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Hostile Takeovers and Anti-Monopoly Regulations in China and Malaysia with Special Reference to US and UK Experiences

Liu Kai and Hasani Mohd Ali*

Faculty of Law, Universiti Kebangsaan Malaysia, 43600 Bangi, Selangor, Malaysia

ABSTRACT

Along with the evolution in business and commerce, types and techniques of mergers and acquisitions (M&A) especially in the form of hostile takeovers are developed and diversified to meet the varying interests of acquiring companies. At the same time, the growing concerns emerge where a number of large conglomerates begin to conduct hostile takeovers with the objective of monopolizing certain industries and obtaining control on the market. This is in adverse to the normal operation of overall market order which emphasis is on fair competition. Consequently, the target companies may be responding by raising monopoly issues if they become subject to a threat of hostile takeover. This Article will review hostile takeovers regulations in China and Malaysia, as the emerging markets where takeovers' regulations are relatively still at their infancy. The main focus of the discussion is to look into the extent of which the target companies in China and Malaysia may rely on anti-monopoly rules as a response in defense instead of relying on conventional techniques. A brief appraisal is made to US and UK anti-monopoly legislations. Both jurisdictions had experienced intense Mergers and Acquisitions since 1950s, because then they had among the most modernized companies.

Keywords: Hostile takeovers, anti-monopoly, China, Malaysia, US, UK

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E-mail addresses:
liukailaw@hotmail.com (Liu Kai),
hmohdali@ukm.my (Hasani Mohd Ali)
* Corresponding author

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INTRODUCTION

Monopolization and elimination of competitors are among the main drives behind a hostile takeover. Theoretically, a hostile takeover occurs when an acquiring company purchases the target company by acquiring the shares of the latter from the shareholders and against the wishes of its management and board of directors. This is

in contrast with a friendly takeover, which requires consents of the management of the target company. Practically, an acquiring company may be successful in a hostile takeover attempt when the target company is publicly held and its ownership is widely dispersed among the shareholders. On the contrary, it is very difficult for an acquiring company to conduct a hostile takeover when the target company is privately held considering its management team usually owns the company and holds the absolute power to refuse any takeover bids (Steven M. Bragg, 2009). With the constant changes in business activities, hostile takeovers are gradually evolving and diversified to meet the interests of acquiring companies. Similarly, various defensive measures are developed to protect the target companies from disadvantageous situations while they are dealing with corporate acquisitions (Jennifer Payne, 2002).

Defensive tactics employed by the target companies should not amount to preventing the shareholders from exercising their freedoms in accepting the offers. The same may apply to the State when introduces certain anti-takeovers measures. However, the emerging issues on fair competition have introduced rooms for anti-monopoly issues to be raised in defense. For a company, getting a monopoly may be a viable option in order to curtail competitions resulting from the restricted development of product, price, quality or innovation (Mark R. Joelson, 2006). It is usually conducted through a strategic mergers and acquisition (M&A), particularly a hostile takeover, via the public securities market to obtain maximum economies of scales and dominant market positions.

This interesting development will be discussed with a brief reference to the development in UK and US, which experiences Malaysia and China, may draw.

THE BACKGROUND OF HOSTILE TAKEOVERS IN CHINA AND MALAYSIA

China's capital market was established relatively recent in comparison to those older markets in the western countries. The first related case occurred in 1993 involving Shenzhen Baoan Group Company Limited (Shanghai Branch) which acquired Shanghai Yanzhong Industrial Company Limited. This case has prompted Chinese companies to adopt anti-takeover measures in the stock markets. There are only a few of hostile takeover cases among the corporate acquisition practices in China, most of which were successful. These successful cases have a common characteristic, namely there is a wide dispersion of target companies' shareholdings. Such a characteristic precisely is a weakness which provides a good opportunity for acquiring companies to conduct their hostile takeover activities by accumulating shareholdings in the target companies through stock markets. Nowadays, Chinese government also strongly encourages State-owned companies to acquire foreign companies through international stock markets to raise their global competitiveness. Among the example of cases include Sinosteel Corporation v.

Midwest Corporation Limited in 2008 and Aluminum Corporation of China v. Rio Tinto Group in 2009, etc.

Malaysia has experienced a vigorous development of capital market with quite a number of hostile takeovers cases came into sight since the late 1980s. There are some examples of such cases. In 1989, the takeover of Muti-Purpose Holdings Berhad (MPHB) by Kamunting Corporation Berhad (KCB) was regarded as the first ever hostile takeover case in the Malaysian corporate scene which involved a consideration in excess of one billion ringgit. It was an important event to the former Kuala Lumpur Stock Exchange (KLSE) as it tested whether the market was able to handle this event effectively and efficiently. In March 2006, after five months of market speculation over the behind closed doors negotiations, another successful takeover took place. It was the takeover of Southern Bank Berhad (SBB) by CIMB Bank, a unit of Bumiputra-Commerce Holdings Berhad (BCHB). This case was a rare experience in Malaysian corporate history where the deal was swinging from a mere merger to a hostile takeover. It was the largest-ever successful hostile takeover in the Malaysian banking sector. Currently, Malaysian companies also keep moving closer to their hostile takeover bids for foreign companies in the international stock markets. Among the recent cases include Malaysian-controlled conglomerate Guoco Group Limited trying to increase shareholdings of Bank of East Asia Limited (BEA) through the Hong Kong Stock Exchange (HKEx). Guoco Group Limited intends to become the largest shareholder of BEA and subsequently control it by a hostile takeover.

ANTI-MONOPOLY IN HOSTILE TAKEOVERS

Monopoly may become a strategy of choice by a particular company in order to thwart competition among companies in terms of product availability, price, quality and innovation. It affects operators, employees, competitors, consumers, regulators, and even market structure, industrial organization and competitive status.

Business operators always have instinctive impulse to undertake industrial concentrations through corporate restructuring activities which may give them monopolistic competitions of the market while at the same time may bring a maximum economy of scale and dominant market positions (Dale A. Oesterle, 2001). Prior to taking any action business operators usually conduct investigations on their industrial concentrations. They delve into information such as whether the concentrations strengthen their existing market positions or promote in achieving absolute dominant market positions, whether the concentrations are in conflict with anti-monopoly legislations or prohibited by anti-monopoly regulatory bodies. These investigations may drive business operators to make strategic arrangements before undertaking their industrial concentrations. For instance, business operators may combine anti-monopoly preliminary studies with concentration feasibility studies before

the concentration negotiations. They may request the appointed lawyers and economists to put forward their suggestions on anti-monopoly in the concentration feasibility reports. Once the concentration agreements are reached after negotiations, business operators may decide whether to declare their anti-monopoly studies to the related regulatory bodies. If the declarations are considered necessary, the regulatory bodies will begin investigations on the industrial concentrations. Whereas, business operators have to take further actions to deal with them.

Business operators may do everything possible to undertake their industrial concentrations. They may adopt various strategies, particularly in the stage of notifications and investigations, to tackle anti-monopoly regulatory bodies. Simultaneously, they may also get opportunities to conduct strategic mergers and acquisitions, particularly hostile takeovers, through the public securities market in favour of their industrial concentrations (Steven Newborn, 2009).

In a hostile tender offer, the target company may assert that it is violated by an unwanted offeror and seek protection from a court in the form of a preliminary and permanent injunction blocking the offeror from continuing with its offer (Simon Peck & Paul Temple, 2002). The putative anti-monopoly violation may arise from a long-standing relationship in the marketplace of the offeror and the target. The target may also attempt to create an anti-monopoly problem where none before existed by quickly acquiring new lines of business or new business locations that would be problematic for the offeror to acquire (Brent W. Huber, 1991). Serious anti-monopoly problems that cannot be cured by divestiture or other means can end a hostile takeover. But the prospect of being successful is not the only reason to commence an anti-monopoly challenge. Even a target company that has little hope of prevailing may have a strong incentive to bring an anti-monopoly action against the offeror since the prosecution of an anti-monopoly action can provide the target company with considerable time to pursue its other takeover defences or to find a white knight. Thus, anti-monopoly can effectively decelerate or stop the deal of takeovers and assist the target company in securing a better tender offer price if it is subscribed into hostile takeovers. Should stopping the deal is paramount, the target company should do everything possible to help the regulatory agency or court to collect evidence that the deal is anti-competitive, including creating potential competition problems. On the other hand, the target company should get the regulatory agencies concerned and make the greatest efforts to increase value for shareholders, if getting a better price is paramount. The target company should prepare anti-monopoly strategies at the early stage of the hostile takeovers. It should consider all possible methods of arguments against monopolistic hostile takeovers.

Most anti-monopoly legislations regulate the industry requiring companies to notify the related regulatory body of

its intention to build up concentration including through an M&A. It may trigger a monopoly if the acquiring company engages in the restricted practices or conducts. The regulatory bodies concerned will be vested with powers to review or conduct investigations and other necessary powers in controlling the practices. It comes within the restriction under anti-monopoly and competition legislations. In addition, the law shall impose a duty on the acquiring companies to employ professionals such as lawyers and accountants to conduct due diligence exercises. The objective is to ensure law compliance and averting any restricted practices.

ANTI-MONOPOLY LEGISLATIONS AND HOSTILE TAKEOVERS IN US AND UK

In the western world, corporate monopolies may occur more often within US and UK. The corporate restructuring exercises are active and vibrant in those countries. As a result, these two countries promulgated a number of specialized anti-monopoly laws to seek fair business competitions in the marketplace. The anti-monopoly laws forbid several types of restraints on trade and monopolization, such as agreements between competitors, contractual arrangements between sellers and buyers, pursuit or maintenance of monopoly power, mergers and acquisitions. These restraints may generally induce positive effects on business practices and industrial organization.

Anti-monopoly Legislations in Relation to Mergers and Takeovers in US

The US has the oldest history of anti-monopoly regulation since the introduction of the Interstate Commerce Act of 1887, followed by the Sherman Anti-trust Act of 1890, the Clayton Anti-trust Act of 1914, the Robinson-Patman Act of 1936, the Celler-Kefauver Act of 1950, etc (Sudi Sudarsanam, 2003).

The Interstate Commerce Act of 1887 was passed as a result of public concern with the growing power and wealth of corporations. It was originally designed to prevent unfair business practices in the railroad industry. Subsequently, it shifts the responsibility for the regulation of economic affairs from the States to the Federal Government. This Act clearly provides the right of Congress to regulate private corporations engaged in interstate commerce. It has remained as one of the most important documents for the US government regulation of private business.

The Sherman Act of 1890 was the first law passed by the US Congress to prohibit corporate monopolies. It was named after Senator John Sherman of Ohio, who was a chairman of the Senate finance committee and the Secretary of the Treasury under President Hayes. This Act addresses single-firm conduct by providing a remedy against any person who shall monopolize or attempt to monopolize any part of the trade or commerce among the several States. It also addresses multi-firm conduct by prohibiting any combination in the form of trust or otherwise, or conspiracy in restraint of

trade or commerce. It authorizes the Federal Government to institute proceedings against trusts in order to dissolve them. The Clayton Anti-trust Act of 1914 was drafted by Henry De Lamar Clayton to further clarify and supplement the Sherman Act of 1890 In its effort to capture anti-competitive practices in their incipiency, it prohibits actions that may substantially lessen competition or tend to create a monopoly in any line of commerce. This Act is the basis for a great many important and much-publicized suits against exclusive sales contract, unfair price cutting, inter-locking directorates and inter-corporate stock holding (Martin, David Dale, 1959).

The Robinson-Patman Act of 1936 was passed by the US Congress to supplement the Clayton Anti-trust Act of 1914. It prohibits anti-competitive practices by producers, specifically unfair price discrimination on the sale of goods to equally-situated distributors when the effect of such sales is to reduce competition. This Act protects the independent retailer from chain-store competition and also prevents the wholesalers from buying directly from the manufacturers at lower prices. The Celler-Kefauver Act of 1950 was passed to amend the Clayton Anti-trust Act of 1914 by plugging a loophole that had allowed companies to avoid anti-trust suits by acquiring the assets of another company. It is aimed to eliminate any merger between the competing firms which take place by the sale of physical assets that in a way leads to a decrease in competition in the market. Thus, this Act is also known as the Anti-merger Act that gives the government the ability to prevent vertical mergers and conglomerate mergers which could limit competitions.

The Interstate Commerce Act of 1887 has created a precedent for the anti-monopoly regulation in US. Followed by other Federal Acts that focus on the anti-trust aspects of mergers and takeovers. It is noteworthy that the Sherman Act of 1890 is not very suitable for the prevention of potential mergers and monopolies, especially in the form of stock acquisition to obtain the controlling power of companies. In order to overcome such a weakness, the US Congress has successively promulgated the Clayton Act 1914, the Robinson-Patman Act of 1936 and the Celler-Kefauver Act of 1950 in support of the Sherman Act of 1890 to deal with mergers and takeovers more effectively (Emest Gellhorn & William E. Kovacic, 1994). In particular, Section 7 of the Clayton Act 1914 states that ‘no person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.’ This Section clearly regulates the stock and asset acquisitions affecting the trade and commerce of the US with foreign

nations. It can be applied even in the case of merger between two foreign corporations based on their potential anti-competitive effects on the US imports resulting from such a merger.

Generally, these Federal Acts jointly provide a contrasting approach to the US anti-trust regulation in terms of investigative procedure, judicial review and institutional arrangement. Usually, the Federal Department of Justice and the Federal Trade Commission enforce theese Federal Acts. Once potential mergers and takeovers are notified to these agencies, they will embark on cautious investigations, and even initiate proceedings in Federal courts, if necessary.

Anti-monopoly Legislations in Relation to Merger Controls in UK

Historically, the UK anti-monopoly regulation can be traced back to the introduction of the Monopolies and Restrictive Practices Act 1948. It is followed by the enforcement of the Monopolies and Mergers Act 1965, the Fair Trading Act 1973, the Competition Act 1998, the Enterprise Act 2002, etc.

As the earliest competition legislation in UK, the Monopolies and Restrictive Practices Act 1948 has created the Monopolies Commission. It is given the power to investigate industries where a single firm or a group of firms acting in collusion could restrict competition. Once the investigation is completed, a report shall be released to the public accordingly. It is the responsibility of the relevant government department to take whatever necessary actions in order to protect the public interest (Helen Mercer, 1995). The Monopolies and Mergers Act 1965 is enacted to enlarge the Monopolies Commission and widen its jurisdiction and powers. It extends the powers available to the Board of Trade in taking action against practices referred to in reports of the Monopolies Commission. The Monopolies and Mergers Act 1965 also provides a procedure in assessing the effects of mergers, and the power to prohibit or dissolve mergers not considered in the public interest (DG Goyder, 1965).

The Fair Trading Act 1973 was passed to make provision in substitution for the Monopolies and Restrictive Practices Act 1948 and the Monopolies and Mergers Act 1965. The new Act further clarifies the powers of the Monopolies and Mergers Commission. It deems that ‘a monopoly exists when one company controls at least twenty five percent of the market; an investigation can be conducted where two companies together control at least twenty five percent of the market; mergers and takeovers resulting from gross assets in control of at least twenty five percent of the market can be investigated; the Director General of Fair Trading has the power to refer investigations to the Monopolies and Mergers Commission.’

The Competition Act 1998 harmonizes the UK law with the European Union legislation on restrictive practices and abuse of a dominant position. It introduces an important change to the administration of the UK competition policy, namely

establishing the Competition Commission. It replaces the long-standing Monopolies and Mergers Commission responsible for the investigation, control and evaluation of restrictive practices, abuse of dominant position, and mergers (David Parker, 2000). The Enterprise Act 2002 has made major changes to the UK competition law with respect to mergers. It reformulates the law relating to mergers and markets, creates the Competition Appeal Tribunal for companies to appeal against decisions by the Competition Commission, penalizes with disqualification to directors of companies engaged in anti-competitive practices, extends the collective protection of consumers, and makes substantial changes to personal and corporate insolvency law.

Mergers and takeovers became the focus of the UK competition policy in 1965 with the introduction of the Monopolies and Mergers Act. It is a further expansion from mere restrictive trade practices by the government supervision since 1948 under the Monopolies and Restrictive Practices Act. Corporate monopolies and mergers were mainly administrated by the Monopolies and Mergers Commission created by the Monopolies and Mergers Act 1965. It was subsequently replaced by the Competition Commission established by the Competition Act 1998. This independent body conducts thorough inquiries with regards to mergers, markets and the regulation of the major regulated industries in examining the cases of anti-competitive practices, or abuses of monopoly power, and accordingly determining whether the mergers as a whole or in parts operate against the public interests. These actions largely guarantees the healthy competition between companies in UK for the benefits of companies, customers and the economy.

In addition, the UK Enterprise Act 2002 is one of the most important legislations that governs anti-monopoly through M&A activities. It makes the Office of Fair Trading independent from the government and gives it additional powers. Under this power the investigations on potentially illegitimate mergers become feasible in practice. Particularly, Part 3 of this Act provides for a new merger regime covering the definition of a qualifying merger and the duty of the Office of Fair Trading to make references to the Competition Commission. It sets out how references are to be determined, prescribes certain public interest case exceptions and other special cases, and confers powers of enforcement including undertakings and orders (Mark Furse, 2008). Under the Enterprise Act 2002, the Competition Commission also launches innovative procedures to improve its transparency and accountability such as publication of guidance on new competition tests, provisional findings during an enquiry and reports explaining core decisions (Sudi Sudarsanam, 2003). These procedures largely decreases the unpredictable results of merger enquiries and the uncertain merger regulation.

As mentioned earlier, the US and UK anti-monopoly legislations have the most comprehensive laws governing M&A activities including that govern hostile

takeovers and anti-monopoly practices. In particular, the US anti-trust and UK competition laws may provide rich and invaluable legislative experiences for China and Malaysia. In consideration of the emerging economies of the two latter countries, they need to implement similar laws within their jurisdictions.

ANTI-MONOPOLY LEGISLATIONS AGAINST HOSTILE TAKEOVERS IN CHINA AND MALAYSIA

Both China and Malaysia have a short history of anti-monopoly regulations following the introduction of Chinese Anti-monopoly Law in 2008 and Malaysian Competition Act in 2010. Those legislations are the principal laws that govern monopoly including through M&A activities in China and Malaysia respectively.

Mergers and Takeovers under Anti-monopoly Regulation in China

In China, following the adoption of a socialist system, quite a number of public listed companies have become State-owned enterprises. Their business operations may naturally result in industrial monopolies since they already control the lifeline of Chinese national economy. These monopolies are viewed strategically different in contrast from any unsolicited monopolies especially by foreign companies. However, the reform and opening-up of China's economy induce the influx of foreign investments. Chinese companies may face a great risk of becoming the monopoly target of foreign conglomerates. Accordingly, Chinese government cautiously considers anti-monopoly as an important issue against any unsolicited monopoly which may amount to a 'market concentration' including through hostile takeovers.

At present, corporate monopolies are principally regulated by Chinese Anti-monopoly Law in China. It was promulgated on 30th August 2007 through the 29th Session of the Tenth National People's Congress. The objectives are to prevent and restrain monopolistic conducts, protect fair competition in the market, enhance economic efficiency, safeguard the interests of consumers and social public interest, and promote the healthy development of the socialist market economy. This Law is applicable to monopolistic conducts in economic activities within China and also applicable to the conducts outside the territory of China if they eliminate or have a restrictive effect on competition within the domestic market of China. With regards to merger and takeover control, Chapter 4 of Chinese Anti-monopoly Law defines a variety of takeovers together with mergers as 'the concentration of undertakings.' In particular, Article 21 of the Chapter 4 provides that if any concentration that falls under the notification criteria issued by the State Council of the People's Republic of China, a report must be notified in advance with the anti-monopoly execution authorities. Without notification the concentration shall not be implemented. This Article sets up a new mandatory regime for the review of mergers and takeovers in China.

In order to implement the merger and takeover related provisions of the Chinese Anti-monopoly Law, the Anti-monopoly Bureau (AMB) of the Chinese Ministry of Commerce (MOFCOM) published a number of draft guidelines and rules in January 2009. They include Guidelines on the Definition of Relevant Markets, Provisional Rules on Investigation and Handling of Concentrations of Undertakings that are not Legally Notified, Provisional Rules on the Collection of Evidence regarding Concentrations of Undertakings under the Notification Thresholds but Suspected of Being Anti-Competitive, Provisional Rules on the Notification of Concentrations of Undertakings, Provisional Rules on the Examination of Concentrations of Undertakings. These draft guidelines and rules clarified MOFCOM's procedures for enforcing a mandatory regime for the review of mergers, takeovers and joint ventures. For instance, MOFCOM shall conduct a two-phase pre-concentration review. The first phase is the preliminary examination which shall be completed within 30 days from the date of MOFCOM's official acceptance of the notification. If MOFCOM determines that further investigation is needed, the review will enter the second phase which lasts 90 days. It can be extended to another 60 days under certain circumstances as specified under the Chinese Anti-monopoly Law. The specific circumstances include (1) the business operators concerned agree to extend the time limit; (2) the documents or materials submitted are inaccurate and need further verification; and (3) the things have significantly changed after declaration. Both phases of the pre-concentration review involve substantive review of the cases. It may entail written objections, defences, and hearings. Furthermore, MOFCOM must determine whether a proposed transaction will eliminate or restrict competitions. Accordingly, MOFCOM should consider a series of factors to make this determination including the business operators' share in and control over the relevant market of the parties; the degree of market concentration in the relevant market; the impact of concentration on market access, technological advancement, consumers and other involved parties, and national economic development; as well as any other factors that MOFCOM considers important or impactful with respect to market competition (Jun Wei, 2009).

The mandatory review under the Chinese Anti-monopoly Law was implemented by MOFCOM when it announced its pre-concentration decisions on the following cases in the Table 1.

These decisions together with the draft guidelines and rules clarifies numerous questions about notification of transactions under the Chinese Anti-monopoly Law. Nevertheless, there are still some uncertainties about MOFCOM's procedures and substantive analysis. For instance, although the merger notifications require a significant amount of information, they must be accompanied by vaguely but broadly defined categories of documents that are rarely relevant to the anti-monopoly analysis of concentrations. This gives

TABLE 1
Decisions of MOFCOM Published in Acquisition Cases

Time	Case	Decision
18 November 2008	InBev N.V. / S.A. v. Anheuser-Busch Companies Inc.	MOFCOM approved the acquisition with conditions. MOFCOM found that the acquisition would not eliminate or restrict competition in the Chinese beer market.
18 March 2009	Coca-Cola v. Huiyuan Juice Group	MOFCOM blocked the acquisition in the first prohibition decision adopted under the Chinese Anti-monopoly Law. This case had been closely watched as an indication of MOFCOM's approach to foreign companies' acquisitions of well-known Chinese companies.
24 April 2009	Mitsubishi Rayon Co., Ltd.v. Lucite International Group Ltd.	MOFCOM approved the acquisition with conditions. MOFCOM determined that the concentration would eliminate or restrict competition and adversely affect competition in the Chinese methyl methacrylate market and its downstream market.

Source: Matthew Bachrack, Cunzhen Huang & Jay Modrall, *Merger Control under China's Anti-monopoly Law: The First Year*, The China Business Review, 2009.

MOFCOM great powers to claim that the notification is incomplete and discontinue the progress of the review. In order to solve these problems, the Legislative Affairs Office of the State Council published second drafts in March 2009 after review of the comments received accordingly. On 27th November 2009, MOFCOM finalized the merger control rules by publishing Rules on the Notification of Concentrations between Undertakings and Rules on the Examination of Concentrations between Undertakings. The former sets out the basic procedures for the notification of transactions under the merger control provisions of the Chinese Anti-monopoly Law, and the latter provides an overview of MOFCOM's procedures for the investigation of notified transactions. Both of the final rules provide transaction parties with the clarity and certainty to certain extent.

In general, the publication of these guidelines and rules largely standardizes the merger review notification process under the Chinese Anti-monopoly Law. Compliance to procedural rules and documentation requirements may block hostile takeovers from the anti-monopoly perspective. Nevertheless, China still lacks a comprehensive and sophisticated pre-concentration review procedure. Business operators still face significant practical difficulties in dealing with notification issues. Thus, Chinese government should move forward to establish better rules on concentration notification and review. Business operators should enhance their communication and coordination with MOFCOM to benefit from its consultation mechanism.

Mergers and Takeovers under Anti-monopoly Regulation in Malaysia

In Malaysia, although the Malaysian Code on Takeovers and Mergers 2010 generally regulates the M&A activities, it does not

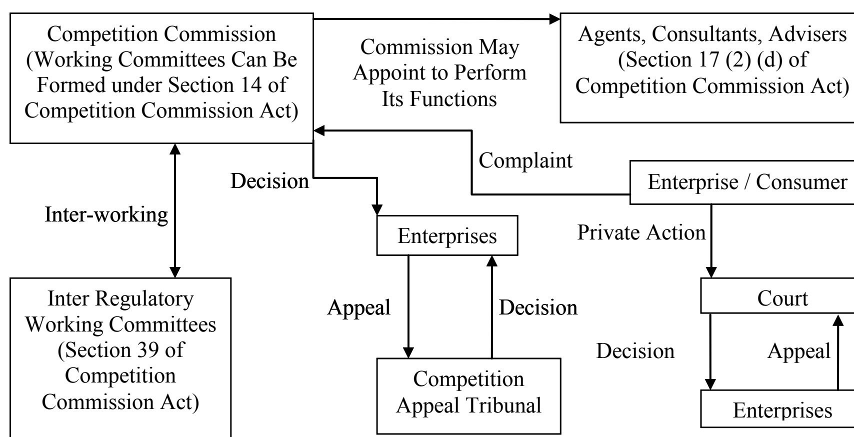
address any controlling measures for merger and takeover abuse with regards to monopolistic competitions (Cassey Lee, 2004).

The Malaysian government has never established a designated institution that can specifically focus on the monopoly-related issues. Nevertheless, monopolistic competitions in Malaysia may be regulated according to the specific sectors. For instance, in the road sector, the Road Transport Department under the Ministry of Transport regulates public roads; and the Malaysian Highway Authority under the Ministry of Works regulates privatized roads. The Road Transport Act 1987 regulates both public and privatized roads. In the port sector, the Ministry of Transport regulates federal ports; while, respective authority of corporatized ports regulate corporatized ones. Both federal and corporatized ports are regulated by the Port Authorities Act 1963, the Ports (Privatization) Act 1990, and other Port Commission Acts for each port (Cassey Lee Hong Kim, 2003). It is noteworthy that the market regulations in these sectors generally take the form of government control over entry conditions such as capital subscriptions, licences and permits. Although these regulations may effectively defend Malaysian companies against hostile takeovers in particular sectors in the market entry stage, they are far enough to regulate various industrial competitions in the nationwide market.

Malaysian Parliament approved the Fair Trade Practices Policy on 26th October 2005. It aims to promote and protect competition in the market; provide fair and competitive market opportunities for businesses; create dynamic and competitive entrepreneurs; encourage socio-economic growth, generate efficiency and equity; promote consumer welfare and rights of Small and Medium Enterprises to participate in the market place; and prohibit unfair trade practices such as abuse of dominant position, hard core cartels in the economy and anti-competitive practices including those originating from outside the Malaysian territory and affecting the domestic territory. Meanwhile, a framework for an enforcement system has also been established to implement the Fair Trade Practices Policy. Similar to the administrative bodies for the Fair Trading Act 1973 in UK, the Fair Trade Practices Commission is established at the Federal level to promote competition and eliminate anti-competitive activities within the economy, and the Fair Trade Practices Appeal Tribunal is established to review decisions taken by the Fair Trade Practices Commission. Although the Fair Trade Practices Policy and its administrative bodies jointly lead the Malaysian monopolistic competitions into the right track, the business operators still claim many anti-monopoly issues, particularly corporate merger and takeover control, for further clarification.

On 22nd April 2010, Dewan Rakyat, Malaysia's House of Representatives, eventually passed Competition Act 2010 and Competition Commission Act 2010 to govern corporate monopolistic competitions. The Competition Act 2010 is designed to

prevent large companies from engaging in monopolistic activities. It is in line with global trends to promote healthy competition among businesses for the ultimate benefit of consumers. Generally, the Competition Act 2010 provides for laws prohibiting anti-competitive agreements and abuse of dominance. It not only applies to commercial activities both within and outside Malaysia, but also applies to commercial activities transacted outside Malaysia which have effects on market competitions in Malaysia. Currently, the Competition Act 2010 does not apply to commercial activities regulated by the Communications and Multimedia Act 1998 or the Energy Commission Act 2001. The energy, communications and multimedia industries, which are subject to market monopolies in Malaysia, are regulated by independent commissions. The Competition Commission Act 2010 is designed to establish the Malaysia Competition Commission (MyCC) and the Competition Appeal Tribunal as competition regulatory bodies. It empowers MyCC to carry out functions such as implement and enforce the provisions of the Competition Act 2010, issue guidelines in relation to the implementation and enforcement of the competition laws, and conduct general studies in relation to issues connected with competition in the Malaysian economy or particular sectors of the Malaysian economy. It empowers Competition Appeal Tribunal to review any decision made by the MyCC on interim measures, finding of non-infringement and finding of an infringement. The Competition Act 2010 and Competition Commission Act 2010 work complementally as the following Fig.1 to regulate various monopolistic activities in Malaysia.



Source: Mohd Aidil Tupari, *Implementation of the Malaysian Competition Law and Policy, and Functions of the Commission*, Seminar on Competition Laws and Policies, Bar Council Auditorium, 24th January 2011.

Fig.1: Malaysian Legal System for Monopolistic Competitions

As shown in Fig.1, the MyCC may appoint agents, consultants and advisers to perform its functions. It may work with the Inter Regulatory Working Committees to make decisions on the enterprises. If the enterprises appeal to the Competition Appeal Tribunal for Committee decisions, the applications will be thoroughly assessed and eventually the Tribunal decisions will be made. If the enterprises take private actions and bring lawsuits, the Court will hear the cases and make judgements. The enterprises can also reject the Court judgements and appeal to the Court for further proceedings.

Business operators in Malaysia should take measures to ensure that their business contracts and dealings comply with the Competition Act 2010 and Competition Commission Act 2010. Their practices and procedures should be in compliance with both Acts while they are restructuring their business ventures, utilizing information acquired from competitors and dealing with upstream and downstream partners. Section 4(2) of the Competition Act 2010 covers practices such as price fixing, market sharing, limiting or controlling market access and bid rigging arrangement.

It is however noteworthy that neither the Competition Act 2010 nor the Competition Commission Act 2010 has an explicit provision for a merger control or fair trade practices which are commonly found in most anti-trust legislations. The only indirect provision related to corporate merger control is Section 4 of the Competition Act 2010. It states that ‘a horizontal or vertical agreement between enterprises is prohibited insofar as the agreement has the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services’. Usually, a horizontal agreement is very likely to occur in a friendly takeover. For example, through shares swap, cartel, collusion or oligopoly arrangements. A dominance, on the other hand, may be found in the aftermath of a hostile takeover which, if abused, gives rise to an anti-competitive practice. As such, the MyCC issued Guidelines on Market Definition, Anti-competitive Agreement, Complaints Procedures and Abuse of Dominant Position in 2012 to act as references to the public to interpret the Competition Act 2010. These guidelines provides for enterprises to conduct self assessment exercises of their businesses in respect of their conducts, procedures, management and control. They should also have competition compliance procedures in place for all their employees at all levels, including Board of Directors.

The introduction of Competition Act 2010 and Competition Commission Act 2010 is commendable as the first step in the right direction to regulate monopolistic competitions. They largely guarantee a free and fair market economy in Malaysia. The MyCC to a large extent relies on complaints from the general public in its enforcement of the law. Any person who has reason to suspect that an enterprise, competitor, supplier, customer, individual or any other business or trader is involved in an anti-competitive agreement or has abused its dominant position may lodge a complaint with the MyCC. Although neither

Act explicitly includes a merger control, business operators are strongly advised to conduct self assessment exercises and ensure that all merger activities are in compliance with the Acts. For the better regulation of corporate monopolistic competitions in the future, Malaysia should also carefully incorporate a systematic merger control regime into both Acts comprising potential hostile mergers and takeovers.

CONCLUSION

Unlike the anti-monopoly laws in US and UK, both China and Malaysia are still at the initial phase of implementing their anti-monopoly legislations. They still lack comprehensive laws and regulations to further clarify certain critical issues on M&A and anti-monopoly. For instance, the Chinese anti-monopoly law lacks certainty for the pre-concentration review procedure; whereas, the Malaysian competition law lacks clarity for the M&A regulation. However, certain parts of the Chinese anti-monopoly legislations and Malaysian competition legislations do draw on certain experiences and lessons from the US anti-trust legal regime and UK competition legal regime respectively. In particular, the Chinese Anti-monopoly Law and Malaysian Competition Commission Act 2010 similarly provides for the notification of concentration of undertakings and investigation of competition regulatory bodies respectively. These laws may to a large extent restrain the occurrence of hostile mergers and takeovers, and prohibit the monopolistic competitions in China and Malaysia.

Therefore, there is a need for both Chinese and Malaysian Legislatures to formulate clear and more detailed regulations for such issues drawing on lessons from other jurisdictions like those of US and UK. At the same time, Business operators should instill self-regulatory skills and quality to closely cooperate with anti-monopoly regulatory bodies in maintaining fair market competitions in China and Malaysia.

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