Competition in Digital Economy: Fate of Consumer Welfare in Malaysia

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Abstract
The digital economy relies on digital computing technologies and online platforms and its consumer market is based on the internet and the World Wide Web. Its rapid technological progress is very innovative and disruptive. Digital market revolutionized and affected the functioning of the established, often regulated business pattern which includes the market competition and consumer welfare both positively and negatively. Digitalization has transformed the manners consumers purchase the goods or services (i.e. the purchasing pattern) and impacted the choice, safety standard, and price determination methods. The platform-based business model involves multisided markets, network effects, and economies of scale, and rather complex and different from the traditional brick and mortar pattern. It has granted beneficial scientific breakthrough for consumers but the way consumers make their choices (consumer market behaviour) on the online platform, related algorithmic pricing, collusion, data gathering manner, and the anti-competitive merger has caused various concerns among the competition regulators concerning the related harm on consumer welfare. Notably, the conventional consumer protection law is unable to address these issues because it is built upon different underlying theories of harm. The objective of the paper is to study the effect of the digital market on consumer welfare generally and specifically within the scope Competition Act 2010. The study examines based on some recent experience and case study involving digital firm, mainly Uber and Grab to discuss how certain characteristics of the digital economy impacts the competition and consequently the consumer welfare in Malaysia.

Keywords: competition law, dominance, digital economy, and consumer welfare.

Introduction
The digital economy is an economy based on digital computing technologies, where the business is predominantly conducted via a digital platform based on the internet and the World Wide Web. (Wikipedia). Digital, refers to electronic technology that generates, stores, and processes data (of signals or data) expressed as series of the digits 0 and 1(Oxford) and use computer technology (Cambridge). The competition in the digital market is different from the competition in the traditional markets because it involves economic activities that use digitized information and knowledge as key factors of production. Such as big data, fintech, digital technologies internet and cloud computing to collect, store, analyze, and share
information via digitally and transform social interactions. These online platforms follow the internet users and the business models are based on the gathering of data which often comes free in exchange for their data.

Digital economy permeates all aspects of society, influencing the way people interact and bringing about broad sociological changes with diverged digitalized marketing platform. It is comprised of the business model of multi-sided markets which creates network effects and economies of scale. The platform includes sharing economy (also known as collaborative consumption or peer-to-peer exchange), which provides the people and organizations to connect online to share goods and services. Some of the best-known examples of the sharing economy include Uber, Grab (transportation) and Airbnb (housing), (Espinel, V. A, 2016). This sharing model operates with least overhead and inventory besides creating benefits and efficiencies as digital technologies drive innovation and increase job opportunities and economic growth. On the reverse side, it has disrupted the traditional business sectors and has major repercussion on competition and established a regulatory system on consumerism and competition law.

Unfortunately, the conventional consumer protection law is unable to address these issues because it is built upon different underlying theories of harm. Malaysia has a comprehensive Competition Law (CL) (except for merger) but confronted with various challenges similar to other jurisdictions in ASEAN on the protection of competition and consumer welfare on digital platform market. The Malaysian Competition Act (CA) 2010 which was enacted under the ASEAN Economic Integration (AEC) although have continued to strengthen over the years on encouraging fair competition (GCR, 2017), it is still in need to improve its enforcement skill and capacity building to address the challenges in the digital economy. The objective of the paper is to study the effect of the digital market on consumer welfare generally and specifically within the scope Competition Act 2010. The study examines based on some recent experience and case study involving digital firm, mainly Uber and Grab concerning digital disruption, anti-competitive pricing, and economy in scale and market concentration. Is Malaysian Competition law digital savvy? Should the Malaysia Competition Commission (MyCC) adopt a more legalistic or economic-based approach in resolving the digital frontier cases? In this respect the paper reviews and discuss how certain pertinent characteristics or attributes of the digital economy (such as algorithmic pricing, collusion, data
gathering manner and anti-competitive merger) impacts the competition and consequently the consumer welfare in Malaysia. The study, in conclusion, demonstrates the importance of CL scope concerning consumer welfare regarding some relevant recommendations.

Impact of Digital Economy on Competition Law and Consumer Welfare

Impact of Digital Economy on Competition and Competition Law Theory

The most influential economist and author of The Wealth of Nations (1776), Adam Smith, once said that more wealth to common people would benefit a nation's economy and society as a whole. Hence, his economic theory emphasized that markets and trade are, in principle, good things if there are competition and a regulatory framework to prevent ruthless selfishness, greed, and rapacity from leading to socially harmful outcomes (Kurz, H.D., 2016). Present digital economy raises questions as to whether the normative scope of competition enforcement, (Ezrachi, 2018) equipped to detect the anti-competitive conducts with its conventional legal tools and framework.

The increasingly digitalized modern economy, or “digital economy” has potential to generate new scientific research and breakthroughs in the cause of improving how people live their lives but its impact has now extended beyond information goods and services to other areas of the economy. However on the flip side, the digital platforms have created a new challenge and economic impact in various aspects of the consumer welfare; as consumers, as the beneficiary and as well as the end-user (for terms, pricing, and market competition) of the digital economy. The expansion of digital business transactions through cross border deals has attracted growing attention in all disciplines of law, which includes Competition Law and Policies (CLP). Which has to lead the Competition Law (CL) authorities to find questions related to the digital economy to be increasingly significant for their work (OECD, 2017). In which the new competitive dynamics in the digital economy (who studying the impact on competition and consumers) is considering whether any further economic tools and frameworks are required to understand digital markets or whether the competition authorities need any changes to their powers, functions or resources. In this respect, the role-play of the respective competition regulators affects its national and regional market competition as a whole. CL perspective in
this context seeks to avoid market barriers and benefit consumers by encouraging competition among a multiplicity of suppliers of goods, services, and technologies (Correa, 2007).

Conventionally CL deals with markets for goods and the markets for technologies exist separately from those for products or services and only sometimes subjected to CL. For example to address situations in which Intellectual Property (IP) is used to charge excessive prices or prevent access to protected technologies. In this respect, competition serves as a strong incentive for developing new technologies in certain fields (Correa, 2017). The digital economy invades a broad range of economic activities that uses digitized information and knowledge as key factors of production. In which, the internet, cloud computing, big data, fintech, and many other new digital technologies are utilized to collect, store, analyze as well as share the information digitally and transform social interactions. The digital platforms connect the buyer and seller who do not know each other through the platform. The platform proprietor collects, generate, accumulate and control an enormous amount of data that constitutes an important input for other actors (Espinell, Victoria A., 2016). Whereby, the digital economy becomes a competition issue when it restraint the excess or abuses its domination on its digital platform by locking in the technology. This leads the potential for scale with digital platforms and the importance of their intangible capital to contribute to them becoming bigger and dominant enterprise (Foda, K. and Patel, N., 2018). Thus, it is disruptive, challenging (because it’s new and still evolving) and beneficial, but lethal if not monitored.

While Asia continues to benefit from this digital transformation, understanding the digital economy remains a challenge because of its complexity. Digitalization is both an enabler and a disruptor of businesses. Also, the absence of a generally agreed definition of the "digital economy" or "digital sector" and the lack of industry and product classification for Internet platforms and its associated services has caused a major obstacle to measure the impact of the digital economy (IMF Policy Report, 2018).

Challenges of Digital Economy on Competition and Consumer Welfare: Competition law and Consumer Law revisited
The digital economy has revolved widely and adopted extensively while its pace of transformation continues to accelerate globally. The silicon chips have permeated all aspects of human activity, as consumers when we purchase goods and services from groceries to all other products on the digital platform. As computing power improves dramatically, more people from the different sector will participate in this digital economy (Muhleisen, M, 2018). Hence, poses novel challenges which needs to be studied to revisit the present competition regulatory structure to benefit both the industry players and the consumers while minimizing its inevitable short-term disruptions for maximizing its long-term benefits. Competition policy also needs to be adopted and adapted.

Digitalization has transformed the economy. Among the key characteristic features that may pose a threat to consumer welfare and needs to be addressed is its data empowerment, as the critical input resource in the production and distribution process. And secondly, the digital platforms as new players in the market. They potentially restraint competition by way of market concentration and abuse of dominance (Schweitzer et.al.2018) which consequently will interfere with consumer welfare. The lesson learned from the rise of Google, Amazon, and Facebook, is either to stop them at an earlier stage or they may build monopolies that are hard to contest. According to Muhleisen (2018), the answer lies not in denial but to wisely devise smart policies that maximize the benefits of the new technology while minimizing the inevitable short-term disruptions by creating a balanced approach.

Although protection of the interest of the consumers is a central aspect of all modern competitions laws as well consumer protection laws, their application covers different issues and employ differing methods (Nathani, S & Akman, P. 2017)) to enforce their goals. In this respect the often relied upon consumer protection laws cannot be utilized to remedy the consequence digital economy. The CL and generic consumer protection law such as the Consumer Protection Act 1999, Malaysia cover distinct areas of law with different underlying theories of harm and protection rules as well as liability. The consumer law is built upon the premise that consumers are a weaker party to business transactions, therefore, should be protected in their dealings with traders through enforcement of certain consumer rights. Unlike CL which indirectly protects consumer’s economic well-being by primarily ensuring goods and services are produced and priced competitively. Meanwhile, competition enforcement observed the world over predicated on two identifiable theories of harm.
The harm to consumers and harm to competition as a pivotal feature of its enforcement regime. Hence, in the task of enforcing the dual function (consumer welfare and competition) regulators are required to reprioritize enforcement measures at times at the interests of consumers and at times in the interests of business (Suhail, N. & Akman, P., 2017). To do that the exploration of the characters of the digital economy on the market and its impact how and when on consumers or business must be studied to face up its challenges.

The most significant challenges of digital economy which affect (or influence over) competition includes among others:

Firstly, its disruptive nature which distorts the existing market and displaces the regulatory pattern. Disruptive technology changes the bases of competition by changing the performance metrics with the competing firms. In which, customer needs drive customers to seek certain benefits in the products they use and form the basis (Danneels, E. 2004) for consumer choices between competing products. The free digital services and user data plethora utilized to customize and cross-sell products to offer greater choice and raise consumer welfare on the argument (by the bigger firms) that consumers are the biggest winners. However, studies are unclear on how big those gains and who captures them. Users, do pay for these services in the form of very valuable information (Foda, K. and Patel, N., 2018) that they provide (as consumers) as a price in the process of digital transaction.

Secondly, the digital sector thrives on its 'data' monopoly over the consumer. In which their success depends on how they use the data to create and improve their services. It causes consumers monopoly of thought by disrupting within when the digital firms transform into a fully-fledged consumer data distillery to drain information digitally. This consumer data is crunched into their vast data centres for the purpose (transforming) of artificial intelligence services. Thus, data is a valuable inexhaustible resource on the digital platform. The more, the better the services develop to attract more users, which in turn generate more data. The undue (increase) use of this personal data is can be equivalent to excessive pricing concerning the data collected by platforms like Facebook, WhatsApp and Google (Surblyte, G., 2016). When the online platforms use their wealth of data to spot potential rivals early and take preemptive action or acquire them. This big data potentially results as a barrier to competitors entering the market (The Economist, 2018, 28 June). Additionally, the firms controlling the ‘big data’ can also extract more consumer surplus through
sophisticated algorithmic pricing and customization (Foda, K. and Patel, N., 2018). Hence the lack of economic tool under CL makes the task to assess who indeed is the biggest beneficiary on the digital platforms very difficult.

Thirdly, algorithmic applications can interfere with consumer’s independent decision making a right of choice. Algorithmic consumers on platforms are assisted by sophisticated ‘digital butler’ to make independent decisions based on their consumer’s preference (provide or collected from previous searches). This digital helper on the long-run could negatively affect the quality of their important decisions because of their technological capacity to code and when the algorithmic coding entangle with the consumer-decision-making by limiting the range of decisions or actions can be done online. Consumers, as humans do change their preferences for non-rationale reasons or reasons that the digital agent cannot (immediately) detect because the algorithm settings coded and may not react benevolently. Therefore, more economic tools are needed in CL to quantify consumer benefits in markets where traditional pricing does not provide the same kind of signals on the market power. Assessments of such nature would help policymakers and regulators to ensure a level playing field and better distinguish between a competitive and anti-competitive behaviour in the digital economy market.

Fourthly, harmful network effects lead towards market concentration with few big firms resulting in a merger and acquisition among them. Firms in the digital economy tend to become interconnected with increasing co-ordination and co-operation. The direct network effect is on one side market for example between users of Facebook. Indirect network effects occur in two sides of the platform for example between the users of the online engine and advertisers on the other side. The more people use the search engine the attention advertisers, increasing the interest in that platform High fixed costs for the infrastructure, technological expertise and necessity to maintain their quality service to spread across many customers had driven powerful network effects and market concentration. Case study on selected markets showed that firms tend to become more dominant because of ‘returns to scale’ and ‘network effects’. For example “search engines,” “wireless carriers,” and “delivery services,” have enjoyed clear cost savings from a large scale. (Hamilton Project, 2018).

Fifthly, harmful algorithmic pricing mechanism plus the impact of tacit collusion on consumer welfare. Algorithm driven computer programs become the key
instruments for digital market success. Tacit collusion is common in concentrated markets involving homogenous products (or horizontal merger cases) in which the algorithms can monitor for sufficient degree the pricing and other key terms of sale. Conscious parallelism facilitates and stabilizes the industries shifting to online pricing, allowing sellers to easily monitor competitors' pricing, key terms of sale and any deviations from current equilibrium. In such an environment, algorithmic pricing does provide a stable, predictable tool, which can execute credible and effective retaliation. Software is used to report and take independent action when faced with price deviation, from the supra-competitive or recommended retail price (Ezrachi & Stucke, 2017).

Algorithm although generates a positive effect on consumer welfare but the flip side it affects consumer choice (threat to pluralism) by fostering tacit-collusion (or 'parallel behaviour'). When it involves coordination through price leadership and less than a full mutual understanding of strategies. Whereby, firms don't explicitly agree on prices and make an independent choice but aware of each other's production function and calculate their economic response accordingly. Presently regulators unable to (competition and consumer protection) challenge on how to address because of lack of algorithm-focused regulation (Picht, P.G. & Fruend, B.,2018, Harrington, J.E. Jr.,2011).

The price-setting algorithm is complex because platforms use Big Data, Analytics, and self-learning algorithms with vast information data to algorithmically adjust prices automatically rather than manually. These algorithms are enabled to collect personal information and market data to match best prices which leads to ‘data advantage’ among companies to harvest greater profits in the market (Singh, N. 2018) (Ezrachi, A. and Stucke, M.E., 2016). This gives rise to algorithmic tacit collusion (conscious parallelism) i.e. collusion agreed between humans and executed with the assistance of technology. Conscious parallelism is accelerated by the development and application of Artificial intelligence (AI) with sophisticated pricing algorithms among consumers.

Impact of Digital Economy on Consumer Policy under Competition Law

According to Professor Ariel Ezrachi, sophisticated computers and related Artificial Intelligence (A.I) are central to the competitiveness of present and futures
markets. Hence, the development of A.I could alter the competitive landscape and the nature of competition restraints, which enforcement agencies need address (Ezrachi, A. & Stucke, M., 2017) and resolve fairly. Although digital economy promises a perfect competition, it could also aid price-collusion and prejudice the consumers’ choice by way of bias information domination. Such as the Google ‘search bias’ case in India, which found Google displays only specialized results design or by way preferential treatment of its site over its competitors (Singh, Nidhi, 2018). Google was claimed to operate its search and advertising services in a discriminatory manner, causing harm to advertisers and indirectly to consumers. (The Economic Times, 2018, 9 Feb)

The computer technology facilitates collusion to fix prices, allocate market or bids and even reduce the share by way of monitoring and enforcing, via algorithm intermediaries. The anti-competitive agreement which could have been caught under the traditional hub-and-spoke model (Singh, Nidhi, 2018) are by-passed when the competitors use the same platform on a single algorithm with the prices automatically aligned towards the upstream suppliers or service provider pricing algorithm. This way the electronic overlords take control of consumer choice subtly (by the weapon of choice) via an algorithm. Simply, because behind every smart web service, there is even a smarter web code which calculates, as to what is the consumer preference (Wakefield, J. BBC, 2011, 23 August), choice of interest and demand.

These invisible computations mechanism controls and dominates the way consumers interact in the digital world. Thus, each firm in the business trail operates its pricing algorithm, under a similar common understanding that is not explicitly negotiated but aware of the pricing algorithm. Hence, tacit collusion or conscious parallelism, inaudibly defeat the spirit of open competition pricing and choice. This conduct is not directly anti-competitive per se (no direct evidence) nor can easily be prosecuted because the very nature of the algorithm is complex and difficult to identify the human perpetrator. The infringement of such conduct or nature can only be prosecuted on the anti-competitive intent of the firm (Singh, Nidhi, 2018) under the present regulatory system. This is the cause of difficulty for competition agencies to nab such activities for anti-competitive pricing but if not controlled will lead to excessive pricing or predatory pricing. In light of the only a handful of dominant platforms (that do not face any competition), practically consumers choice are limited
besides having almost no control over the collection and use of their data. This situation has raised competition and consumer protection concerns worldwide (UNCTAD, 2019 July).

Firms merge for a variety of reasons such as to improve business efficiency, to enter new markets and access new technologies, and to acquire or maintain a monopolistic position in an industry, among others. Study finds that mergers raised markups (i.e., price relative to the marginal cost of production), but did not enhance the productive efficiency of manufacturing plants (Blonigen and Pierce 2016). Ideally, firstly, authorities should detect and eliminate potential competition restraints for mergers at the start, rather than trying to correct anti-competitive outcomes ex-post, as the latter may be difficult once a firm has monopolized the market. Secondly, in the digital economy, data are important and confer power to businesses that control data. However, in most jurisdictions, merger notifications rely on certain thresholds, usually of turnover or assets, digital companies and start-ups may not be captured by the notification criteria as they often do not reach the relevant turnover thresholds, despite having great value). The present review based on turnover or asset threshold does not take into account the value of data and its control by merging parties (UNCTAD, 2019). Hence the younger CL agencies, like Malaysia failed to address the competition concern because;

1. The transaction did not meet notification requirement thresholds in the relevant jurisdictions and was therefore not notified to competition authorities.
2. However, at the point the competition concerns raised in the region, the agencies could only examine and address these concerns ex-post.

This situation reflects the challenges in addressing competition concerns arising from a completed merger, as well as the possibility of investigating the competition-related impacts following a merger case (UNCTAD, 2019).

The digital market has a high rate of investment and innovation which leads to rapid technological progress and increases disruptive innovation (OECD, 2017) in the affected sector. This phenomenon makes regulators and competition authorities significantly concerned on how to look and assess with the existing CL provisions and assessment tools to proof or find infringement in the digital market. The task of balancing beneficial innovation and disruption on consumer welfare has made the job of identifying an appropriate remedy in digital and innovation-driven sectors more
arduous. Hence, it's a challenge for policymakers and regulators when assessing the market share to strike the right balance.

**Impact and Challenge of Digital Economy on Competition Law and Consumer Welfare in Asia: Malaysia**

Scope Competition Law in Malaysia

Malaysian Competition Act (CA) 2010 was enacted under the ASEAN Economic Integration (AEC) agreement and came into force only on Jan 1, 2012. Malaysia as other ASEAN counterparts shares various gaps in its enforcement and investigation stage (except for Singapore). Although the enforcement efforts of the MyCC has strengthened over the years in encouraging fair competition (GCR,2017), still need to improve its enforcement skill and capacity building to address the challenges in the digital era. The CA 2010 had professed in its preamble it aims to promote economic development by promoting and protecting the process of competition, thereby protecting the interests of consumers and to provide for matters connected therewith. The principal of the competition law on consumerism although different from Consumer Protection Act (CPA 1999) in Malaysia, its essence in protecting market competition from any form of restraints trickle down to consumer protection on the pricing and choice.

The CA prohibits firstly, anti-competitive conducts or agreements under Section 4(1) and in there it prohibits horizontal agreements between enterprises which have the objective to fix, directly or indirectly, a purchase or selling price or any other trading conditions such as share market or sources of supply, limit or control the production, market outlets or market access, technical or technological development, investment or perform an act of bid-rigging under Section 4(2).

Secondly, it prohibits the abuse of dominant position under Section 10 (1) by an enterprise, whether independently or collectively, in any conduct which amounts to an abuse of a dominant position in any market for goods or services (CA 2010). “Dominant Position” refers to the situation in which one or more enterprises possess such significant power in a market to adjust prices or outputs or trading terms, without effective constraint from competitors or potential competitors”( Guidelines, MyCC)

However, CA 2010 omitted the anti-competitive mergers control provision as recommended in the ASEAN Regional Guidelines on Competition Policy (RCGP)
A comprehensive competition law encompasses legal provision designed or intended to prohibit, restrict or regulate actions having the purpose or effect of monopolization or restraint of trade or lessening of competition through a merger or acquisition affecting domestic or international trade or economic development. (Law Insider) (UNCTAD, 2007). The merger was opted out in the interest of national policy of encouraging mergers and acquisitions among businesses to strengthen the domestic economy and to advance global corporate competitiveness (Law Reviews, 2016). This has left a huge vacuum concerning anti-competitive merger allocation, scope, and prohibition to control merger. This caused the Malaysian Competition Commission (MyCC) with no power over the merger transaction or their terms of agreement unlike our neighbours like Singapore, Indonesia, and Vietnam. However, there are some sector-specific laws and guidelines to regulate the antitrust aspects of mergers for aviation services, and communication and multimedia sectors, enforced by the Malaysian Aviation Commission (MAVCOM), and the Malaysian Communications and Multimedia Commission (MCMC) respectively. Since mergers are not expressly excluded from the scope of the CA, the competition regulator could only review and enforcement powers in respect of behavioural conduct but not the merger control mandate (Kandiah, S. 2017). MYCC, admitted that they have no jurisdiction or authority over the merger (The Sundaily, 2018 10 April) ride-hailing firms but agreed to (The Edge, 2018) (The Malaysian Insight., 2018, 6 June) to examine Grab's operation for any anti-competitive agreements following the Singapore's findings on violations of competition laws. This has caused a stir among the drivers as well as the riders to inquire the sufficiency of the control mechanism to control future anti-competitive conducts related to pricing or excessive pricing on the drivers which ultimately paid by the consumers.

Generally, price-fixing conducts fall within the scope of Section 4(1) CA and infringement are found in the object or effect significantly prevent, restrict or distort competition in any market for goods or services. Is this control mechanism having sufficient regulatory tools to regulate anti-competitive algorithmic pricing and control the merger phenomena in the digitalized knowledge economy to protect consumer market is questionable? However, Section 4(2) implies a stricter application (the deeming provision) concerning a certain agreement. Whereby, if a horizontal agreement contains a hard-core restriction, it will be automatically regarded by
statute as anti-competitive by the object. In this context, the MyCC is not required to conduct a precise market definition or prove the anti-competitive effect of the horizontal agreement. This means the deeming provision enables agreements between competitors with relatively small or insignificant market shares can be an infringement within Section 4(2) if classified as a hard-core restriction. The deeming provision empowers the MyCC to treat as anti-competitive cartels without having to prove that the agreement to raise prices significantly restricts competition. Hence the Grab-Uber merge transaction bypassed without the need to fulfil any notification requirement thresholds in the relevant and was therefore not notified to competition authorities.

Market Share Assessment on Digital Economy under Competition Act 2010

In case of abuse of dominant position on a digital firm (advocates market concentration or tacit collusion), the market share by itself cannot be regarded as conclusive evidence to prove dominance. “Dominant Position” means a situation in which one or more enterprises possess such significant power in a market to adjust prices or outputs or trading terms, without effective constraint from competitors or potential competitors.” (MyCC, Guidelines Chapter 2). Dominance is assessed on the enterprise's ability to act without concern about the competitor's response or ability to dictate the terms of competition in the market in Malaysia. So far we do not have any significant competitor against Grab besides Uber (Which is not a rival anymore). However substantial considerations given to other factors such as barriers to entry, countervailing buyer power, etc. could also be used in the assessment of dominance. The dominance of an enterprise in itself does not constitute an infringement as only an abuse of a dominant position is caught by the Act. The MyCC guidelines provide only enterprises with a market share above 60% are considered dominant. Dominance is usually determined indirectly by using a range of criteria in the guidelines. The Hypothetical Monopolist Test (“HMT”) is used to define a relevant market by taking a price-range of 5-10% to represent a small but significant increase in price (“SSNIP”). The HMT involves a hypothetical monopolist of the focal product (product under investigation) as to whether the hypothetical monopolist of a market finds it profitable to sustain a price for the focal product of 5-10% above the competitive level. The question of profitability is repeated and if the answer is in the affirmative, the relevant market is the market for the focal products
plus its substitutes. If the answer is still in the negative, the next closest substitutes are added and the question of profitability is repeated until the hypothetical monopolist finds it profitable to sustain a price at 5-10% above the competitive level (MYCC, Guidelines)

The MyCC Guidelines on Chapter 2 to CA stipulated (from economic perspective) abuse of significant market power has two different categories of conducts for competition law purposes:

Firstly, “exploitative conduct” refers to the ability of an enterprise to maintain price above the competitive level for some time without worrying about whether the consumers will switch to other products or worrying that new competitors will enter the market. Secondly, “exclusionary conduct” refers to an ability of an enterprise to dictate the level of competition in a market by preventing efficient new competitors from entering or significantly harming existing equally efficient competitors either by driving them out of the market or preventing them from effectively competing. (MYCC, Guidelines).

In the markets with continual product improvements and innovation, their competition is driven by product features rather than the price would be taken into account. For example, a high current market share may indicate that an enterprise was successful in the past. But this product could be about to be replaced by a new product with a patented technology to which other enterprises do not have access. The enterprise with the new product may have considerable market power now and into the future even though it currently has a low market share.

Empirical Case study on Digital Economy: The Case of Uber –Grab Merger in SEA

In the digital platform, competition becomes more complex because platform business exploits network effects directly (capture consumer growth) and also indirectly (platform attracts more consumers) gives rise to concentrated market or creates market dominance. The dominance of some firms can cause difficulty for future competitors to challenge the position of that online platform. Whereby, the first-mover can take advantage of the competitive game resulting in a winner takes all syndrome (Gorp, N. V. & Batura, O., 2015). This is the most feared common conduct in the digital platform on the competition.

In which the innovative yet disruptive nature of the digital economy overtakes very disruptively the offline counterparts or brick and mortar business colleague in
most aspects to their detriment rather unfairly. This may be so because the digital platform business has low entry barrier, with more opportunity to expand without hurdles (such as regulatory requirement, licensing or taxation) and reduces the previous concentration (Singh, Nidhi, 2018). This may create unfair competition between the online and offline traditional business setting. The very fact of how goods and services are purchased today, reveals an increased reliance on the internet, computers, and technology. Platform-based marketing benefits consumerism by promoting greater transparency, ensures dissemination of symmetric information, ease business and grow by leaps and bounds.

Takeover and merger activities in Malaysia are governed by provisions contained in Division 2 Part VI of the Capital Markets and Services Act 2007 (CMSA 2007), Division 2 Part VI of the CMSA 2007 and the Malaysian Code on Take-Overs and Mergers 2010 (2010 Code) (introduced under the recommendation of the Securities Commission Malaysia (SC) to accommodate the development of the capital market in 2010 to replace the Code on Take-overs and Mergers 1998). Both codes do not provide for a merger control regime in Malaysia. Thus, unlike other jurisdictions and as a latecomer to competition law, Malaysia CA 2010 has no express provisions for merger control. Hence, CA 2010 focuses purely on anticompétitive agreements and abuses of dominant position. (Law Review, 2016), which puts MyCC is rather in an adequate legal position to regulate anti-compétitive merger which a rampant phenomenon in the digital era. So merger deals can bypass in Malaysia without any scrutiny in the context of the anti-compétition regime.

The most prominent digital disruption if such manner in South East Asia (SEA) which has significantly impacted competition and related consumer welfare is the entry of Uber-Grab via online transportation platform or E-hailing service. They are two most prominent E-Hailing firms in SEA which has effected ongoing regulatory system and competitive landscape in the SEA consumer transportation sector and another service-related sector. The transportation regulators and CL authorities in Malaysia faced with various new turn of events which are disruptive as well as innovatively beneficial. Although consumers have benefitted from the presence of the new players and platform-based business models, it prompted other new concerns, mainly linked to the competition with traditional taxi services, safety, merger control regime and algorithmic price-setting mechanism.
Grab, a Singapore based firm (with a Malaysian born co-founder) have attracted millions of users across eight countries (BBC News, 2018, 26 March). Their e-hailing services had caused dissatisfaction among the incumbent taxi drivers for various reasons and created unfair competition in the consumer transportation industry in SEA. Grab had been accused of evading all the standard legal procedural requirements such as permits, passenger insurance, and other safety requirements. On March 26, 2018, Uber, withdrew its services from SEA by merging with the local rival Grab by selling its SEA operations to Grab. In the process, Uber secured a 27.5% stake in Asian based Grab and a seat in the Grab's Board of Directors In their merger contract, (Kollewe, J., 2018 26 March). The merger or sell-off was quizzed by various authorities for causing a twist in the SEA E-Hailing market competition.

The merger was regarded as “asset-light” agreement because it did not entail Grab's acquisition of Uber's vehicles, its employees or its contract with Uber drivers and Uber’s algorithms. However, it was predicted to have negative implications on competition and deserves scrutiny (Ong, Burton, 2018 April 13). The resulting consequence of the agreement was postulated to set the SEA to undergo a massive structural overhaul of its tectonic proportions (Ong, B, 2018 March 30) and accelerate consumer prices and choice. The study revealed a merger in the digital economy is difficult to distinguish anti-competitive motives from normal business strategies because it involves future markets (Gorp, N. V. & Batura, O., 2015) and digital market. The transaction is not a total loss for Uber because its CEO will be in Grab's board and it will take a 27.5 per cent stake in the firm. If Grab was recently valued at US$6 billion, that stake is currently worth US$1.6 billion. (Kollewe, J., 2018 26 March)(Lee, W., 2018).

Singapore raised serious concerns over Uber-Grab transaction for its growing market dominance (by allying with the taxi drivers' companies). Singapore authorities admitted they have overlooked the ride-hailing apps to protect the interests of commuters and drivers. They also expressed dissatisfaction with the basic regulatory regime which has limited coverage and licensed only the drivers of the ride-hailing apps and vehicles. Singapore fears if one operator becomes dominant, commuters may have to bear higher fares and lower service standards become a major concern. And the drivers also have to put up with the conditions set by the merged company. Competition and Consumer Commission of Singapore (CCCS) regards the deal as an “unnotified merger transition” (The Straits Times, Singapore 2018, 14 April) (The
The CCCS ruled that Grab-Uber creates exclusivity arrangements, which may burden new entrant to spend a lot of money to build up driver and rider networks similar in scale and size to the incumbents (Reuters, 2018, 27 July). CCCS’s decisions had affected Malaysia and other SEA nations who also have indicated to do a similar market study on monopoly risks triggered by the merger of Grab and Uber. The CCCS’s decision on 24th September 2018, to find Uber-Grab transaction as anti-competitive under (Section 54) their Competition Act sent waves of warning to all SEA nations. Uber (RM19.97 million) and Grab (RM19.36 million) was fined in total SG $13 million and ordered Grab drivers not be tied to Grab exclusively besides removing all the exclusivity arrangements with all taxi fleets. Grab was instructed to maintain its pre-merger pricing algorithm and driver commission rate to prevent excessive price surge on the consumer. CCCS found Grab’s fare increased 10-15 per cent after the merger and their market share grew to 80 per cent in Singapore.

Professor Walter Theseira, economics explained that the regulators measured average price for consumers after accounting for subsidies and discounts while Grab defined it as posted fare before any discounts (Russell, J. 2018, Star Online, 2018, 24 September).

This case illustrates the resulting phenomena of the so-called perfect competition in the digital economy if unmonitored could lead conscious parallelism which would legitimize and aid anti-competitive price-collusion and prejudice consumer choice. The case also illustrates the need to clarify the definition and mechanism to assess market study in the digital economy. Do we need to have a different approach to do assess market study to assess pricing and dominance in the digital economy?

The controversial Uber-Grab digital transaction has only been so far, despite huge concerns over SEA nations, properly addressed and curtailed in Singapore, which is only one of the eight markets or nation in SEA. Malaysia as other neighbours in SEA also must address the anti-competitive repercussion in their consumer market. Malaysia following CCCS called the Malaysian Competition authority (MYCC) to investigation and monitor Uber-Grab operation more closely. Indonesia feared a similar threat to their consumer transport industry. Indonesian Go-Jek, which is in process of expansion very much welcomed the CCCS decisions.
Role of Competition Law on Consumer welfare in the Digital Era
Pricing and Choice in the Digital Era

The digital economy overall had created various benefits and efficiencies for consumers and the industry. Digital technologies drive innovation and fuel job opportunities and economic growth. The digital economy also permeates all aspects of society, influencing the way people interact and bringing about broad sociological change. Despite its benefit, digital transformation and the understanding of the digital economy remains a challenge for many Asian nations because of its complexity.

Topics like algorithm, disruptive innovation, and anti-competitive merger are the key issues to be dealt with by the MyCC. The Grab-Uber merger had adversely affected the consumer transportation competition and pose new challenges on the present regulatory environment on the local e-hailing market. Provisions in agreements which infringe the Competition Act will be unenforceable as they are considered illegal under the Contracts Act 1950. Therefore CA objective must be revisited concerning its purpose and the intensity of intervention as to whether the competition law's objective is all about the protection of consumer welfare, solely market efficiency or another benchmark. This debate revolves on the issue of whether or not the intervention is measured against a particular goal.

Role, Challenges and Recommendations on Competition Authority: MyCC

MyCC established no just to oversee the effective implementation and enforcement of the CA but also to among others to; (a) advises government and public regulatory authorities on all aspects of competition, (b) advise the government on the impact of laws governing competition, (c) undertakes studies and market reviews, and (d) issue guidelines governing the conduct of competition. So, in essence, MyCC can be expected to promote competitive markets by levelling the playing field for all. Its focus is to safeguard consumer welfare is equally important in the digital economy.

The CA contains presumptions and deeming provisions which attract prohibition either because a restrictive agreement has the “object” or “effect” of
preventing, restricting or distorting competition, similar to competition legislation around the world. According to Prof R. Whish (King’s College, London) this provisions is unclear as to whether the prohibitions will be interpreted in the same way as in the EU and UK, viz. where agreement restrictions "by object" are presumed per se to have anti-competitive effects without a need to go through the process to demonstrate such impact, thereby injecting legal certainty and conserving the use of resources at MyCC. Clarity of this principle and policy much required on other issues such as on standard of proof required; use of effects analysis and how to prove effects; quality of empirical analysis and economic evidence, adoption of time tested “best practices;” and jurisdiction over the impact of mergers and takeovers on competition (The Star Online, 2013, 1 Jun).

The government has not shown any readiness to implement the merger control regime despite its impact on consumer welfare in terms of choice and pricing. Thus, enforcement-only limited to behavioural prohibitions, not structural ones. The CA does not specify the structure of markets and the structure of pricing or on the profit margins derived. So, are we are still far from fair and competitive pricing? When relating to the principal that in markets where the invisible hand (forces) of supply and demand are allowed to free play in Adam Smith or Hayek tradition, it was pointed out that competitive pricing inevitably reflects the maximization of profits, not necessarily the maximization of consumer benefits (The Star Online, 2013, 1 Jun). Hence the approach adopted to assess the market is important legally and economically to address advance markets in the digital platform to ensure correct pricing mechanism applied and also to detect unfair or abusive pricing using an anti-competitive agreement, monopoly, merger or acquisition.

The present definitions and methods used to determine the relevant market seem rather outdated in case of the digital market concerning the access to data during the dominance test (Ritter, E, and Solyom, I, 2018). Algorithms related data are completely paperless uses advanced machine learning technologies and involves artificial intelligence, which is rather challenging to be assessed by way of dawn raids alone. Their infringements are rather virtual based and require digitalized detection methods.

At the regional level, need policies that harness the benefits while mitigating the challenges. We need policymakers to be more pro-active and act fast to keep up to the changes. Many policies, across the whole spectrum of government policy, found
to be the legacy of an analogue era and ill-adapted to today's digital era. This gap between "Technology 4.0" and "Policy 1.0" needs to be closed (OECD, 2017) sooner as the digital is catching up on a much faster pace. The requisite minds set as well as the regulations supported by governments will address the change much required as basic criteria to address the real-time issues in the digital setting in platform markets and artificial intelligence era to uphold consumer’s rights.

Conclusion

CLP in Malaysia needs to include merger control regime and revise its market study mechanism to focus on policies that respond to the organizational changes driven by the digital revolution. To address the various issues related to the digital economy to enhance consumer welfare. Malaysian CA 2010 needs specific provision and policy to regulate company merger to regulate marker concentration and avoid anti-competitive merger. The success of dealing with digital economic issues and challenges requires the empowerment through specific regulation as tools to control and regulate the new challenges, mainly to assess and regulate platform markets and their pricing algorithm. The regulators and government must have the political will to ensure Malaysian consumer welfare concerning the digital market is addressed timely and efficiently as part and parcel national of attaining economic efficiency. Although CL will not solve all the issues related to consumerism, it’s will one of the most effective and useful mechanisms to ensure digital markets fairly and openly available for all. The author believes correct competition regulatory principle and consumer policy needed to balance and accommodate fair play in embracing the digital economy concerning competition, protection for consumer welfare and incentives for innovation in Malaysia.

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References

Adam Smith (1776), the Wealth of Nations. Volume. The University of Chicago Press.


Carlos M. Correa. (2007, October) IP and Competition Law, Exploring Some Issues of Relevance to Developing Countries, University of Buenos Aires, Argentina, Issue Paper No. 21, ICTSD Programme on IPR’s and Sustainable Development

Competition Act 2004, Revise 2006 (Chapter 50D), Singapore


Consumer Protection Act 1999 (Act 599), Malaysia


Law Insider https://www.lawinsider.com/dictionary/competition-law


MyCC Guidelines on Chapter 1 (Anti-competitive Agreements);

MyCC Guidelines on Chapter 2 Prohibition

MyCC Guidelines on Market Definition


