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Exclusion to Prohibition of Anti-Competitive Conduct on the Legislative Ground In Malaysia: A Cross-Sectoral Analysis

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Abstract

In Malaysia, its competition law (Competition Act 2010) excludes commercial activities from prohibitions on the ground that they are in pursuant to an order to comply with a legislative requirement. While this type of exclusion is present in other jurisdictions including the European Union (EU) and Singapore, there is slight difference in legislative wording in the Malaysian law leading to narrower scope of exclusion. Hence this article analyses the application of the exclusion in specific sectors in Malaysia. Using the black letter approach to legal research, the analysis in paper finds that only limited sectors namely professional services fulfil the criteria, while the other sectors, though have legislation that provides for conduct which could be acted upon, such as price fixing, are short of

such an order. This creates false impression that certain activities are shielded merely by being mentioned in a statute whereas a gazetted order from the state to perform them is absent. Meanwhile, the statutes of different sectors have different objectives. Requiring such an order prevents flexibility for matters of security and strategic concerns.

Keywords

Competition Law, Law of Economic Regulation, Malaysian Law

Introduction

The Competition Act 2010 of Malaysia (CA 2010) prohibits the anti-competitive conduct of anti-competitive agreement (Section 4) and abuse of dominant position (Section 10). The CA 2010 for the first time acts as the first economy-wide legislation in Malaysia regulating competition in the market. The impact of such economy-wide legislation is that any entity offering goods or services in a given market, regardless it being privately owned or public in nature, can be caught by the CA if it engages in such activities. Such entities are called enterprises in the language of the CA 2010.

Nevertheless, the CA 2010 specifies certain circumstances in which conduct is excluded from the prohibitions thereunder. The exclusions can take at least 2 different forms. First, exclusion drawing upon the definition of commercial activity, a notion that defines the scope of the application of the CA 2010. This exclusion means that any conduct that it covers, is not commercial in nature, hence the enterprise engaging in such activity does not risk infringing the relevant sections of the CA 2010. Second, exclusion applicable even to a commercial activity or conduct of an enterprise, which is based on the applicability of a sectoral competition rules to such activity or the occurrence of any facts or conditions set out in the Second Schedule of the CA 2010.

According to Paragraph (a) of the Second Schedule, if a conduct or agreement is in pursuant to an order to comply with a statutory requirement, it will not be caught by prohibition of anti-competitive agreement or abuse of dominant position. This is one of exclusions to the CA 2010 which has already been raised before an infringement proceeding before the regulator responsible for implementing and enforcing the CA 2010 namely the Malaysian Competition Commission (MyCC). Hence it is important to study how Paragraph (a) of the Second Schedule is interpreted in respect of different sectors of the economy. By this, we can understand which sectors are exposed to the statutory exclusion the most. Then it is important to identify the forms in which the exclusion takes for the respective sectors.

Statutory exclusions have been linked to social and non-efficiency goals of competition law in Malaysia (Ahamat and Rahman, Delimiting the Social Boundaries of Competition Law in ASEAN: A Common Approach? 2014)

(Rahman and Ahamat 2015). The Malaysian competition law regulator has already addressed the claims by enterprises that their allegedly anti-competitive conduct, particularly anti-competitive agreement should be excluded because of statutory exclusions. In the case of PIAM,[i] which involved alleged infringement of the prohibition of anti-competitive agreement (price fixing) by members of Malaysian General Insurance Association (PIAM). PIAM argued that the conduct of itself and its 22 members in fixing labour and parts rates should be excluded from prohibitions based on Second Schedule of the CA 2010 due to the existence of a directive from Malaysian Central Bank (BNM) to PIAM and the Federation of Workshop Owners' Association of Malaysia to settle their differences or else they might end up at the Financial Mediation Bureau. The MyCC rejected this argument because of want of an order from a regulator or an authority to an enterprise or a group of enterprises to comply with a statutory requirement. Any reliance on statutory provision must state which provision that instructs a particular body to require trade association and/or market players to engage in price fixing. Section 22 of the Insurance Act 1996 does not empower BNM to fix labour and parts rates. Every order from BNM, if there is any has to be related to a statutory requirement. The 3 letters from the BNM were not an order, but were merely advices. They did not contain any order to fix those rates. PIAM must also show that it did not have autonomy in determining its conduct in the market based on the legal requirements imposed on it by the authorities. The facts show that the pricing is done through the Member's Circulars issued by PIAM. The Companies therefore have the autonomy of determining market behaviour.

There is yet to be final judicial pronouncement on whether reliance on statutory compliance as an exception in the PIAM case succeeded. However, as stated below, the Competition Appeal Tribunal in that case has made a gazetted order which market players have to comply a pre-requisite for the exclusion. As in the MAS-AirAsia case, we have to wait until the matter reached the Malaysia's Federal Court indicating a possible time gap until the case goes to the highest court for judicial review. However, the legal principles, particularly in the EU are already settled. This is based on EU case law which was also referred to in the PIAM case. Hence, an analysis of how far compliance with statutory requirement may exist in a specific sector can be worthwhile.

Materials and Methods

This paper employs doctrinal research method or also known as the black-letter approach. Doctrinal research is library-based study where materials are found in libraries, archives and databases. The aim is to discover, explain, examine, analyse and present, in systematic form, facts, principles, provisions, concepts, theories or working of certain laws or legal institutions (Yaqin 2007). The term black-letter approach on the other hand involves cross-referencing of specific rules to more general underlying legal principles as if

together they formed a single, mutually reinforcing and rational system of regulation (Salter 2007). The authors chose the doctrinal or black-letter approach because this paper merely maps the sectors where there is possible application of Paragraph (a) of the Second Schedule to the CA 2010. In doing so, several statutes representing each respective sector have been identified. The corresponding statutory provisions will be analysed in the light of the legal principles underlying the relevant part of the CA 2010, as developed not only by Malaysian competition regulatory bodies but also those of the EU. This is because of the legislative influence the EU competition law has over Malaysian competition law.

The following sectors have been chosen:

1. Conveyancing legal services
2. Medical services
3. Quantity surveying services
4. Architect services
5. Commodity (rubber)
6. Paddy and rice
7. Farmers' associations
8. Trade protection
9. Goods and services subject price control
10. Domestic servants
11. Islamic pilgrimage services (umrah)

Results

Conveyancing Legal Services

Section 113(3) of Legal Profession Act 1976 [Act 166] outlines the rules that set the floor price of remuneration that must be adhered to by solicitors in relation to their non-contentious business/services that include conveyancing legal services.

Section 113(3) LPA 1976 provides as follows:

"The Solicitors Costs Committee or any four of the members of the Committee (the Chief Judge or his nominee being one) may make general orders prescribing and regulating in any manner as they think fair and reasonable the remuneration of advocates and solicitors in respect of non-contentious business and any order made under this section may revoke or alter any previous order so made."

The prescriptive order issued by the Solicitors Costs Committee refers to the Solicitor's Remuneration Order 2005, the most recent one being amended in 2017. The examples of the imposition of a minimum rate under a Solicitor's Remuneration Order 2005 (Amendment 2017)) are as in Table 1 below:

Table 1: Minimum rates/prices for solicitors' remuneration

No	Forms of Price Regulation	Types of Transaction	Examples of Minimum Rates/Prices
1	Scale of fees	Sale and Transfer	For the first RM500,000.00 1.0% (subject to a minimum fee of RM500.00)
		Lease and Tenancy	For the first RM10,000 50% (subject to a minimum fee of RM600)
		Charges, Debenture, and other Security or Financing Documents	For the first RM500,000.00 1.0% (subject to a minimum fee of RM500.00)
2	Fee in specific amount	Discharge of Charge and Deed of Reassignment	First title - RM300
		Preparing, filing or witnessing miscellaneous documents	For witnessing execution of a document - RM50 for first and RM10 for each subsequent copy.

Medical Services

Section 106 of the Private Healthcare Facilities and Services Act 1998 [Act 586] empowers the Minister of Health to make regulations prescribing a fee schedule for any or all private healthcare facilities or services, or healthcare related facilities or services. The healthcare services can be provided in private hospitals or other private healthcare facilities, and private medical and dental clinics.

With regards to private hospitals, the Thirteenth Schedule of the Private Facilities and Services (Private Hospitals and Other Private Healthcare Facilities) Regulations 2006 prescribes as regulated by the Malaysian Ministry of Health, the professional fees which consist of consultation and procedural fees. Regulation 433 speaks about the Fee Schedule, which is as follows:

(1) The fees to be charged for any facility or service provided by the private healthcare facility or service shall be as stipulated in the Thirteenth Schedule.

(2) Subject to subregulation (1), all private healthcare facilities or services shall

have a written policy on the quantum of fees to be charged.

The Thirteenth Schedule on Professional Fee Schedule is excerpted in Table 2 below:

Table 2: Fee Scale for Consultation at Private Hospitals

No	**Consultation Fee:** First visit/initial consultation	**Fee Scale**
1	Consultation only	RM30 – RM125
2	Consultation after clinic hours	Up to 50% above the usual rate

In respect of private medical clinics and private dental clinics, Regulation 108 of the Private Healthcare Facilities and Services (Private Medical Clinics or Private Dental Clinics) Regulations 2006 is a fee schedule-creating provision which reads as follows:

(1) The fees to be charged for any facility or service provided by any private medical clinic or private dental clinic shall be as stipulated in the Seventh Schedule.

(2) Subject to subregulation (1), all private medical clinics or private dental clinics shall have a written policy on the quantum of fees to be charged.

The Seventh Schedule entitled Professional Fees is partly reproduced in Table 3 below:

Table 3: Medical Fees (General Practitioners)

No	**Medical Fees:** General Practitioners (Non-Specialists)	**Fee Scale**
1	Clinic with pharmaceutical services	RM10 - RM35
2	After stipulated clinic hours	Up to 50% above the usual rate

The Pharmaceutical Services Division of the MoH has, with the support of the MyCC, issued a Guideline for Good Pharmaceutical Trade Practice on 18 February 2015 specifying that "A standard price and bonus scheme apply to all channels and healthcare providers; An official wholesale list and formal announcement on price revision or any change of trading terms be provided by suppliers to consumers; There be no market exclusivity for a product to any channel unless administratively advised or directed by the MoH; Promotion of products and services be done responsibly and within existing codes of conduct/practice; and Requiring the establishment of an appropriate system of control and accountability of samples provided to healthcare professionals".

Section 36 Medical Act 1971 speaks of the general power to regulate scale of fees, wherein subject to this Act, the (Malaysian Medical) Council may, with the approval of the Minister, make regulations to prescribe anything which under this

Act is required to be prescribed, and generally to carry out the objects and purposes of this Act. For medical practitioners in the private healthcare facilities and services, the scale of fees are made under the Private Healthcare Facilities and Services Act 1998 [Act 586], specifically the Private Healthcare Facilities and Services (Private Medical Clinics or Private Dental Clinics) Regulations 2006 [P.U.(A) 137/2006] and the Private Healthcare Facilities and Services (Private Hospitals & Other Private Healthcare Facilities) Regulations 2006 [P.U.(A) 138/2006].

Quantity Surveying Services

Section 4(d) of the Quantity Surveyors Act 1967 (specific power to fix scale of fees) provides that the functions of the Board shall be to fix from time to time with the approval of the Minister the scale of fees to be charged by Consulting Quantity Surveying Practice for professional advice or service rendered. Section 26 of the Quantity Surveyors Act 1967 (General power to regulate scale of fees) allows the Board with the approval of the Minister to make rules to prescribe anything which may be prescribed or required to be prescribed under this Act or to enable it to perform any of its functions or to exercise any of its powers set out in this Act.

The scale of fees for Government projects is stipulated in the Scale of Fees For Consulting Quantity Surveyor (Revised 2004) issued by the Ministry of Finance, to be read together with the Notification made under the Registration of Quantity Surveyors Act 1967 [P.U.(B) 510/1986], and for non-Government projects in the Notification made under the Registration of Quantity Surveyors Act 1967 [P.U.(B) 510/1986].

Architects Services

Section 4(1)(d) of the Architects Act 1967 (Specific power to fix scale of fees) provides for the functions of the "Board" which shall include "to fix from time to time with the approval of the Minister the scale of fees to be charged by Professional Architects, architectural consultancy practices and registered Building Draughtsmen for architectural consultancy services rendered." Section 35 of the same Act (General power to regulate scale of fees) provides for the Board the power, with the approval of the Minister, to "make rules generally as may be necessary or expedient for the purpose of carrying out, or giving effect to, the provisions of this Act and in particular, but without prejudice to the generality of the foregoing, for prescribing anything as is required by this Act to be prescribed or as it may deem necessary". The rule-making power includes the power to prescribe the scale of fees.

Rubber Commodity Sector

The Malaysian rubber sector, which is an important commodity to Malaysia, is regulated under the Malaysian Rubber Board (Incorporated) Act 1996 (Act 551). Section 55 of Act 551 states:

"the rubber industry of Malaysia shall be regulated in accordance with the regulations made under this Act". Section 4 (1) of Act 551 also provides for the functions of the Malaysian Rubber Board established by it including: "(d) to regulate the rubber industry, in particular in relation to dealings in rubber, packing, grading, shipping and export of rubber".

Section 3 of the Rubber Price Stabilization Act 1975 (Act 161) provides for the establishment of the National Advisory Council for Rubber Price Stabilization. The Council is empowered to advise the relevant Minister on the purpose of Act 161 namely "the co-ordination, implementation and control of activities necessary for the stabilisation of price of rubber". Act 161 is not mentioned in Section 64 of Act 551 which repeals the Acts before the Malaysian Rubber Board (Incorporated) Act 1996 (Act 551). This shows that Act 161 still applies.

Padi and Rice Sector

Padi (paddy) and rice contribute to the main staple food of Malaysians and many all over the world. Hence it is an important food sector. Rice farming and production are regulated by the Control of Padi and Rice Act 1994. Section 4(1) of the 1994 Act provides "The duties and functions of the Director General for the Control of Padi and Rice shall be as follows:

(a) to conserve and maintain an adequate supply of padi and rice;
(b) to ensure a fair and stable price of padi for farmers;
(c) to ensure a fair and stable price of rice for consumers;
(d) to ensure sufficient supply of rice to meet all emergencies; and
(e) to make recommendations to the Government on policies designed to promote the development of the padi and rice industry, and, where approved by the Government, to coordinate and assist in the implementation of the same."

Section 4(2) provides "Subject to the prior approval of the Minister, the Director General shall have power to do all things expedient or reasonably necessary or incidental to the discharge of his functions, and in particular, but without prejudice to the generality of the foregoing—

(a) to implement a guaranteed minimum price for padi;
(b) to enforce the maintenance of a fair and stable price of rice for consumers;
(c) to fix maximum or minimum prices of padi or rice;
(d) to maintain or to require any person to maintain a stockpile in padi or rice for strategic and price stabilization purposes;
(e) to regulate and control the disbursement of subsidies to padi farmers;
f) to regulate the marketing of padi and rice particularly through the licensing of wholesalers, retailers, rice millers, importers and exporters;
(g) to regulate and control the amount of padi or rice that may be kept, stored or possessed by any person;
(h) to impose rationing in respect of padi or rice and to regulate and control the rationing thereof; to provide for the registration of all or any persons for the purpose of such rationing and for the issue of ration cards or other rationing

documents, and to appoint enumerators to enumerate the public or any class thereof for the purpose of rationing;"

Farmers' Organization

The Farmers' Organization Act 1973 (Act 109) (Disposal of produce to or through a Farmers' Organization through its Section 10(1) that "A Farmers' Organization which has as one of its objects the disposal of any produce of its members or member-units, may provide in its rules or may otherwise contract with its members or member-units—

(a) that every such member or member-unit who or which produces any such article shall dispose of the whole or any specified amount, proportion or description thereof to or through the Farmers' Organization; and

(b) that any member or member-unit who or which is proved or adjudged, in such manner as may be prescribed by the regulations made hereunder, to be guilty of a breach of the rules or contract shall pay to the Farmers' Organization as liquidated damages a sum ascertained or assessed in such manner as may be prescribed by the aforesaid regulations."

Section 10(2) of the same Act provides "No contract entered into under the provisions of this section shall be contested in any court on the ground only that it constitutes a contract in restraint of trade".

Trade Protection Measure (Anti-Dumping)

Anti-dumping is a trade measure imposed on imports for being unfair in terms of pricing (for example, imports are priced below costs). The measure can take the form of a duty imposed on top of ordinary customs duties committed by Malaysia as part of its international obligations. Anti-dumping measures in Malaysia are governed by the Countervailing and Antidumping Duties Act 1993 (Act 504). Section 50(1) of Act 504 (Power to make regulations) provides that "The Minister may make such regulations as may be necessary or expedient for giving full effect to the provisions of this Act, for carrying out the purposes of this Act or any provisions thereof, or for the further, better or more convenient implementation of the provisions of this Act". Section 50(2) provides "Without prejudice to the generality of subsection (1), regulations may be made—

(g) to provide for the forms of undertakings which may be accepted by the Government and the procedures related thereto".

Regulation 18 (Undertakings and suspension of investigation) of the Countervailing and Anti-Dumping Duties Regulations 1994 (P.U.(A) 233/94), paragraph (2) provides "The Government may accept the following forms of undertakings:

(a) in relation to a countervailing duty investigation—

(i) the government of the exporting country agrees to eliminate, offset or limit the subsidy

(ii) [Deleted by P.U.(A) 488/99]
(iii) the exporters agree to revise their prices to eliminate the injurious effect of the subsidy; or
(iv) the government of the exporting country or the exporters agree to take such other action so as to eliminate the injurious effects of the subsidy; and
(b) in relation to an anti-dumping duty investigation—
(i) the exporters agree to revise their prices to eliminate the injurious dumping; or
(ii) the exporters agree to take such other action so as to eliminate the injurious effects of the dumping."

Goods/Services subject to Price Control (maximum pricing)

Price Control and Anti-Profiteering Act 2011 (Act 723) establishes special mechanisms for determining prices of certain goods and services.

Section 4 (Power of the Controller to determine prices of goods) stipulates that the Controller may, with the approval of the Minister, by order published in the Gazette, determine the maximum, minimum or fixed price for the manufacturing, producing, wholesaling or retailing of—
(a) any goods
(b) any particular class or classes of goods; and
(c) any unit or quantity of any goods,
which may include charges for any service in relation to the supply, delivery, repair, maintenance, packing, carriage or storage of such goods.

Section 5 (Power of the Controller to determine charges for services) states that the Controller may, with the approval of the Minister, by order published in the Gazette, determine the maximum, minimum or fixed charges for—
(a) any services
(b) any particular class or classes of services; and
(c) any unit or quantity of any services.

The Price Control and Anti-Profiteering (Fixing of Maximum Price and Price Marking of Price-Controlled Goods) Order 2011 speaks about maximum wholesale and retail prices. On maximum wholesale price, paragraph 2 states that the maximum wholesale price for the price-controlled goods specified in column (1) of Schedules I, II and III are fixed according to the States of Peninsular Malaysia as specified in column (2)(i) of Schedule I, for the State of Sabah and the Federal Territory of Labuan as specified in column (2) of Schedule II and for the State of Sarawak as specified in column (2) of Schedule III. On maximum retail price, paragraph 3 provides that the maximum retail price for the price-controlled goods specified in column (1) of Schedules I, IV and V are fixed according to the States of Peninsular Malaysia as specified in column (2)(ii) of Schedule I, for the State of Sabah and the Federal Territory of Labuan as specified in column (2) of Schedule IV and for the State of Sarawak as specified in column (2) of Schedule V.

Domestic Servants

The recruitment of domestic servants into employment in Malaysia is regulated by the Private Employment Agencies Act 1981 [Act 246]. Section 3 of Act 246 defines "private employment agency" as a body corporate which is incorporated under the Companies Act 2016 [Act 777] and is granted a licence under this Act to carry on recruiting activity, while "recruiting" is defined as "activities which have been carried on by any person, including advertising activities, as intermediaries between an employer and a job seeker to—

(a) offer to look for an employment, offer an employment or obtain an employment, for a job seeker; or

(b) offer to look for an employee, offer an employee or obtain an employee, for an employer".

Section 14(1) of Act 246 (Fees for services) provides "No private employment agency shall charge for any service rendered a fee on the job seeker and non-citizen employee other than or in excess of that as specified in the First Schedule and for every fee received a receipt shall be issued". Section 14A (Registration fee) provides "A private employment agency may impose registration fee as specified in the First Schedule on any job seeker for all categories of employment within or outside Malaysia upon the registration of the job seeker with the private employment agency". Section 14B(1) (Placement fee) provides "A private employment agency may impose placement fee as specified in the First Schedule on any job seeker or non-citizen employee upon the acceptance of an offer of employment by them".

The First Schedule provides as follows:

Table 4: Fee Imposed on Job Seekers or Non-Citizens

(2) Fee imposed on job seeker or non-citizen employee	**Fee Rates**
(a) Registration Fees (i) Fee imposed for registration of all categories of employment within Malaysia to a job seeker, the registration to be valid for all categories of employment for a period of twelve months. (ii) Fee imposed for registration of all categories of employment outside Malaysia to a job seeker, the registration to be valid for all categories of employment for a period of six months.	RM30 and below RM50 and below
(b) Placement Fees (i) Job seeker who is employed within Malaysia (ii) Job seeker who is employed outside Malaysia (iii) Non-citizen employee who is employed within Malaysia	Not more than 25% of the basic wages for the first monthly wages Not more than 25% of the basic wages for the first monthly wages Not more than one month of the basic wages for the first monthly wages

Umrah Services (floor prices)

Umrah is special religious pilgrimage for Muslims, which, though a religious matter, is regulated by the Tourism Industry Act 1992 (Act 482). Section 34 (Power of Minister to make regulations) of Act 482 provides that the Minister may make such regulations as he may consider expedient for the purposes of this Act, and without prejudice to the generality of subsection (1), regulations may be made for any of the following purposes or matters:

(b) the duration and conditions of licence, and the manner and procedure for its renewal

(i) the conduct of or the carrying on of any business or service relating to tourism enterprises or tourist guides and the standards of performance to be maintained by them and the granting of exemptions by the Commissioner to any tourism enterprise or tourist guide from any requirement imposed by regulations made under this paragraph; and

(j) any other matter which is required by this Act to be prescribed.

The Tourism Industry (Tour Operating Business and Travel Agency Business) Regulations 1992 (P.U.(A) 333/92) has regulations stipulating conditions of licence (Regulation 6), which include the imposition of the following conditions upon any licence issued under these Regulations:

(m) in the case of a licensed tour operator for outbound tours other than umrah or ziarah and outbound tours for umrah or ziarah –

(ii) he shall use the Standard Terms and Conditions for Outbound Tour other than Umrah or Ziarah and Outbound Tour for Umrah or Ziarah Packages as specified in the Fourth Schedule for all outbound tours other than umrah or ziarah, or outbound tours for umrah or ziarah organized by him and such standard terms and conditions shall be printed on tour all brochures.

The Fourth Schedule (Standard Terms and Conditions for Outbound Tour Other Than Umrah or Ziarah Packages and Outbound Tour for Umrah or Ziarah Packages) provides for the following:

1. Tour Deposit A maximum deposit of 25% of the tour fare per person must be paid as reservation fee.
2. Amendment Charges – e.g. RM50.00 per person per change
3. Cancellation Charges for Cancellation made by Tour Member – 3.3.1 - If the company receives notice to cancel 30 days or more before the date of departure, a minimum administrative fee of RM50.00 or 10% of the tour deposit (whichever is lower) per person will be levied
4. Tour Information and Prices

Discussion

Professional Services

The survey above shows that many of the sectors subject to price regulation

involve professional services. The laws prescribing the manner in which prices, rates or fees charged by lawyers, quantity surveyors, architects and health service providers are set, have something in common, which there is a statute that becomes an enabler for the setting of those prices, rates or fees. The wordings used indicating such enabling function of the respective legislation are as follows:

Table 5: Exclusion Wordings for Professional Services

No	Sectors	Statute	Exclusion Wording
1	Solicitors	Legal Profession Act 1976 (Section 113(3))	The Committee may make general orders prescribing…the remuneration of solicitors.
2	Medical Doctors	Private Healthcare Facilities and Services Act 1998	The Minister of Health is empowered to make regulations prescribing fee for private healthcare services (which includes consultation and procedural fees).
3	Quantity Surveyors	Quantity Surveyors Act 1967 (Section 4(d))	The functions of the Board is to fix, with the approval of the Minister the scale of fees charged by consulting quantity surveyors for service or professional advice rendered.
4	Architects	Architects Act 1967 (Section 4(1)(d))	The functions of the Board is to fix, with the approval of the Minister the scale of fees to be charged by Professional Architects, architectural consultancy practices rendered.

There are four legislative requirements that must be complied by all market players among the members of the relevant professions. A market review conducted by the MyCC on professional bodies in Malaysia shows that professionals must possess and use expert and specialised knowledge, their entry into the profession is strictly controlled, and there exists a specific professional code of conduct for ethics to be practiced by everyone in the respective profession.[ii] Even among different types of professionals, they will be subject to different legal scenarios depending on two factors which are the existence of statutory empowerment to fix prices and the existence of articulation of prices or fees fixed. Based on the findings of the MyCC, there are professions or sectors with legislation empowering for the regulation of the relevant sector including pricing and there is scale of fees for members. Second, there is such legislation that empowers a specific governing authority to fix scale of fees, but there is no scale of fees yet at

the time the market review was issued. Third, the legislation only gives general power to regulate the sector, and no scale of fees have been fixed. Fourth, there are bodies or associations prescribing fees or prices for their members but they are not empowered by any law.[iii]

There are reasons for excluding professional services from liability for anti-competitive agreements or conduct. Competitive restraints in the professional market are said to be difficult but the common understanding is that the regulation of such a market needs to pay special attention to cutthroat competition. Liberalising the professional market may not necessarily lead to economic efficiency, due to market failures as consumers may be disadvantaged by the problems of information asymmetry (Van den Bergh and Montangie 2006) (Arruñada 2006). Greater impact is felt of professional's human capital, with transactions being more repetitive and atypical and demand being more heterogenous compared to other economic sectors such as manufacturing (Arruñada 2006). There is also the problem of externalities and public goods because of the severe impact of the failure of delivery by the relevant professionals (Arruñada 2006).

Higher fees have been predicted for private hospital specialists' fees in Malaysia if the market is liberalised. However, the proponents of liberalisation argued that there can still be competition from the numerous private hospitals in Malaysia whereby patients can make comparisons and decide (Pillai 2020).

Consequently, the regulatory model for professional services requires noticeable distinctiveness, wherein models such as deregulation, strict regulation of entry into the market, and even devolution of power to private entities including professional associations have been mooted not only in developing economies like Malaysia but also developed systems such as European Union and the United States. Power devolution or also known as co-regulation refers to the State or government delegating powers to govern and regulate a specific sector to market players themselves (R. Van den Bergh 2004). This is because of lack of empirical evidence that market conditions improve after the market is liberalised.

However, there should not be a carte blanche. The EU law allows toleration of anti-competitive practice if such practice "provides a necessary means to support a legitimate national policy", and in the case of professional services, it may refer to the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability for the interest of consumers and public interests related to the respective profession (Bries and Marcelo 2018).

In the PIAM case, the Competition Appeal Tribunal has decided[iv] that because of the phrase "in `an' order to comply with a legislative requirement", the word "an" before "order" rather than "in order to comply…", requires law or statute to empower a governing body to fix prices, fees or rates charged to consumers or customers. The word "order" can be interpreted broadly so as not to be confined to a Rule, a Regulation or an Order being a subsidiary to a parent statute (it identifies as a PU(A) or PU(B) document in Malaysia). Such a liberal interpretation

allows a document issued by a professional body or association containing a scale of fees, prices or rates to fall under the definition of "order" provided that the body or association is empowered by a statute to fix prices or engage in any other conduct that would otherwise be prohibited. However, what if "order" is given a narrow interpretation? The US practice can be useful whereby two factors must be considered namely, the element of command from the State, and the adoption or execution by the State in the execution of a government policy (Bries and Marcelo 2018).

Agriculture and Food

The subsequently analysed statutes concern the agricultural and food sectors. They were rubber, which is a commodity, rice which is food, and farmers' organisations, which is a very important institution in the agricultural sector.

The agriculture sector is too strategic to be left entirely to market forces (Desta 2005). The agricultural market is atomised or dispersed (Chauve, Parera and Renckens 2014). It is unique where there is greater concentration at downstream level compared to the upstream level (Chauve, Parera and Renckens 2014), there is again market concentration at the input levels such as seeds and fertilisers. 10 biggest pesticide companies control 90% of the global pesticide market and 10 animal feed companies control 52% of the global animal market (Lianos, Katalevsky and Ivanov 2016). Farmers are largely made up of small and individually powerless players (Desta 2005). These have led to economic difficulties in the forms of oversupply and imbalances in bargaining power (to the disadvantage of farmers) (Chauve, Parera and Renckens 2014). The concentration of market players at the downstream level (food industry) also can create bottlenecks in the food supply chain affecting consumers and farmers themselves (Lianos, Katalevsky and Ivanov 2016).

Therefore, it is understandable that the agriculture sector is likely to be excluded from comprehensive application of competition law. In the EU, the agriculture sector enjoys exemption from competition rules to some extent. The Common Agricultural Policy (CAP) takes precedence over competition rules in EU (Chauve, Parera and Renckens 2014). Despite exceptions to EU competition law under the CAP, there still have been infringements found among cartels between manufacturers or suppliers particularly at the more downstream level, cartels among buyers and vertical anti-competitive agreements (Chauve, Parera and Renckens 2014).

Unlike the EU which has reference to CAP in its EU treaty, Malaysia lacks a specific legal framework that sets out the principles on which laws, rules and regulations on that sector should be based. Without such legal philosophical guidance, the purpose of each relevant legislative provision in the agriculture sector that has a bearing on competition is unique for the reasons behind the enactment of the respective legislation. They can be summarised in the table below.

Table 6: Legislative Objectives (Agriculture and Food Sectors)

No	Statute	Sector/Product	Objectives
1	Control of Padi and Rice Act 1994	Rice	Food Security
2	Farmers' Organization Act 1973	Farmers' Organization	Oversupply/Imbalance in Bargaining Power
3	Rubber Price Stabilization Act 1975	Commodity	Trade/Industrial Policy or Income Support for Farmers?

The relevant functionality of the Control of Padi and Rice Act 1994 relates among others to maintaining adequate supply of rice, and ensuring fair and stable price of padi for farmers and fair and stable price of rice for consumers.[v] Theoretically, competition law exclusion for these purposes are justified because protecting rice farmers or ensuring that consumers have access to food amidst an atomised and dispersed market may warrant the relaxation of competition law rules. Nevertheless, there are "other" stakeholders of the 1994 Act including State-trading enterprise or monopoly, whose interests are not limited to local production, but also include importation, and who may operate on commercial basis. Since the relevant transactions are covered by the 1994 Act, by virtue of the Second Schedule of the Competition Act 2010, regardless of who the actors are, they (the transactions) should be excluded from prohibition of anti-competition agreement or abuse of dominant position.

The Farmers' Organization Act 1973 envisages the excluded conduct more clearly i.e. in the form of a type of cartel among farmers' organisations. The type of cartel spelt out in the 1973 Act is joint sale (disposal) of produce by farmers which the Act authorises a Farmer Organization in Malaysia to ask the former to dispose of their produce only through such organisation. Weak bargaining power of farmers can be a reason for the requirement of joint sales but if the market is inefficient, the government may need to subsidise or else the costs of inefficiencies will be passed on to end consumers. Surprisingly, joint purchase or procurement is not included in the 1973 Act. Being a powerful tool to represent farmers, the power of farmers' organisation to coordinate purchases of inputs by farmers can help correct the imbalances caused by concentrated upstream markets such as seeds, fertilisers and pesticides.

The Rubber Price Stabilization Act 1975 has a more distinctive objective and scope of application. This is because of rubber being a commodity rather than food crop. The coordination activity which is necessary to stabilize the price of rubber may include price fixing, such that, the ban on anti-competitive agreements can be exempted. However, the setting of certain prices here should be for the purpose of the 1975 Act. A question that may arise is, should stabilising the price of rubber strive to safeguard the welfare of smallholders and be part of the incentives to

develop these marginalized groups? What if the beneficiary of the price stabilisation program is the industry as whole so that big plantations also benefit from it. The purpose of legislation is no longer confined to addressing market asymmetries between small farmers and bigger players on the upstream or downstream levels within the same sector.

Hence the absence of clear legislative purpose steers the discussion away from the substantive context to the format of exclusion for the conduct that is covered by regulations above. As long as there is a clear gazettement through an Order from the relevant ministry, in pursuance of the respective Act of Parliament, the exclusion from Competition Act 2010 can be evidenced. A notable difference from the professional sectors is the lack of fee or price scales.

What about products or sectors which do not experience such gazettements? For example, the palm oil sector. Section 78 of the Malaysian Palm Oil Board Act 1998 specifies the powers of the Minister to make regulations. Nothing in this provision suggests that the Minister may set the price for palm oil.

Malaysia created Malaysian Sustainable Palm Oil (MSPO) in ensuring competitiveness and survivability of smallholders in scaling up their business with sustainable practices (Parveez, et al. 2020). The "regionalisation of the palm oil industry" has been established to enhance cooperation with Indonesia for palm oil expansion, where the Roundtable on Sustainable Palm Oil (RSPO) is seen to be too strict so that an alliance between MSPO and the Indonesian Sustainable Palm Oil (ISPO) have made it possible for "even the smallest farmers" to participate in the "lucrative market of certified sustainable palm oil (CSPO) production" (Parveez, et al. 2020). Palm oil also faces tense competition with other vegetable oils in the international market (Ismail, et al. 2022).

The Malaysian palm oil business should follow a single agenda rather than many, frequently at odds agendas since doing so would reduce our competitiveness in the market relative to our Indonesian competitors, who are frequently more integrated and adaptable in their marketing choices (Ming and Chandramohan 2002). For Malaysia to maintain its competitive edge in the global oils and fats market, there needs to be better integration of producers, refiners, and other industrial sub-sectors (Ming and Chandramohan 2002). Divergent agendas will be lessened as a result of mergers between industry segments, and they will be better able to focus, adapt quickly to changing market conditions, and be more reliable (Ming and Chandramohan 2002).

However, consolidated and coordinated conduct can turn into cartelising behaviour even if such behaviour is a response to another type of cartels. For example, introducing a price ceiling can be steered towards preventing the continuous increase in the price of cooking oil in the market, and the Minister himself spoke about the possibility of using the price control (and anti-profiteering) regime as a medium for the price ceiling (Azaman 2021). There has also been reported about another ministerial statement about the importance of the discussions with the Malaysian Palm Oil Association (MPOA) and some of the

country's leading palm industry players to get concrete recommendations so that the price of non-subsidized cooking oil can be stabilised (Zainuddin 2021).

So long as there is no legislative order for determining price stabilisation, such recommendations might not be enough to be excluded from prohibition under Section 4(2) of the CA 2010. There might also be a difference between palm oil and rubber in the sense that the subject matter of price stabilisation for palm oil is an end consumer product (cooking oil), while for rubber, the product or rather products are the concern of intermediate users. Hence the price control regime, if to be used, should not set price only at the retail level, which is possible given the power of the Price Controller to fix prices (including minimum and maximum prices) throughout the whole supply and production chain (manufacturing, producing, wholesaling or retailing). The price control regime might not be adequate for rubber which requires more specific legislation to cater for not only domestic consumption but also consumption abroad.

Performance of Government Policies

The subsequent statutes concern government policies rather than economic sectors. Both the Countervailing and Antidumping Duties Act 1993 and the Price Control and Anti-Profiteering Act 2011 prescribe certain conduct on market players namely accepting price undertaking (under the 1993 Act) and fixing minimum or maximum prices of certain specific goods or services. Such conduct of market players is eventually assimilated into gazetted government orders. It is not independent conduct of market players complying with a governmental (legislative) order. It could be the order itself.

Domestic Servants

As regards domestic servants, the relevant scope of regulation is their recruitment by private employment agencies. The conduct prescribed by the relevant legislation i.e. the Private Employment Agencies Act 1981 is the charging of a certain amount of fees (registration fees and placement fees) by the private agencies on job-seekers or non-citizen employees. The fixing of such fees can be caught by Section 4(2) prohibition given the broad definition of price under the competition law of various jurisdictions worldwide. Though the fees are not charged on end consumers, the MyCC's decision in the PIAM case concerns fixing rates at the intermediate level (fixing labour and parts rates for vehicle workshop services). However, rates of wages enjoyed by the domestic servants and charged on end consumers are not within the scope of the exclusion. The wages are fixed at RM1840 (without leave) by a memorandum of understanding (MoU) between the Government of Malaysia and the Government of Indonesia on the placement and protection of Indonesian domestic workers (Halid 2022). The legal status of such MoU can be put to question on the ground that States concluded certain forms of agreements not confirming their legality due to secrecy (Donaldson 2017), but

Indonesia is arguing that it is morally and legally binding (Parkaran 2022).

In the context of competition law (which is domestic in nature), such legal treatment of the relevant MoU is within the purview of international law. Nevertheless, what is more important is whether international agreements can have the same legal effect as domestic legislation? In Malaysia, since the country is a dualist nation, international treaties cannot be directly enforced in its domestic system unless there are enabling statutes (Saharuddin 2019) (Romer 2020), and the "order" to fix wages of Indonesian domestic servants has to be made by the relevant Minister (such as the Minister of Human Resources) in pursuant to an Act of Parliament. A possible way out is to treat the whole conduct as something in the exercise of a governmental authority, something that was done in the PIAM case. Under the Competition Act 2010, governmental activities do not fall under the definition of commercial activities, hence they fall outside the scope of the 2010 Act. Governmental activities are not defined in the 2010 Act hence reference to case law (including EU cases) is necessary (Ahamat and Rahman 2015). In SAT Fluggesellschaft mbH v Eurocontrol (an EU case), the conduct of an organisation established by an international agreement could benefit from exclusion from competition law on the basis of governmental authority.[vi]

Muslim Pilgrimage (Umrah) Services

The umrah (a type of pilgrimage for Muslims) services have attracted special interest in competition law. There has been a claim that the Ministry of Tourism and Culture (MOTAC) has set a floor price for umrah at RM6,900 for a period of 12 days and 10 nights (Rodzi 2021). The determination of such a rate was achieved as a result of discussions with the tourism and umrah service association (Rodzi 2021). It was also reported that such determination took into account the cost increases following the implementation of standard operating procedures (SOP) on the part of Saudi Arabia and Malaysia, due to COVID-19 (Rodzi 2021).

However, the claim of floor price determination was denied by the MOTAC, saying that it was indicator pricing that was agreed upon by another body known as *Majlis Kawal Selia Umrah (MKSU)* (Bernama 2021). MKSU is an initiative led by MOTAC which is participated by Department of Wakaf, Zakat and Haji (JAWHAR), Ministry of Domestic Trade, Cooperatives and Consumerism etc. A floor price is evident on MKSU's website (JAWHAR 2022), though the website is maintained by JAWHAR, which is not under MOTAC but under the Prime Minister's Department.[vii] It is also mentioned that the power exercised by MKSU is in pursuant to the Tourism Industry Act 1992 (JAWHAR 2022) (Rodzi 2021) but reference to the MKSU is nowhere found in any of the provisions of the 1992 Act. The reference to pricing under the 1992 Act is only in relation to the Standard Terms and Conditions, which is a must for a service operator to use in order to get a licence.

The Standard Terms and Conditions include fixed amount of tour deposits, amendment charges, cancellation charges and tour information and prices. Minimum price is nowhere stated but para. 6(1) of the Fourth Schedule of the

Tourism Industry (Tour Operating Business and Travel Agency Business) Regulations 1992 mentions the following: "The prices are subject to change due to increase in airfares, other transportation costs, hotel rates, exchange rates, government tax, etc. Therefore, the company reserves the right to increase prices on condition that it informs the customers accordingly before the confirmation of the tour." Consequently, the claim that the minimum or floor prices was part of the government policy that can be excluded from prohibitions under the Competition Act 2010 can hardly be sustained unless there is an order to comply with a requirement stated in the Tourism Industry Act 1992 or other statutes about setting such prices.

Conclusion and Recommendations

The discussion of the results from the statutory provisions that govern the selected sectors show that different sectors have different extent of legal exclusion, i.e. exclusion from the two prohibitions under the Competition Act 2010. The main type of sectors that fulfil the ingredients of statutory exclusion is the professional sectors due to the existence of a clear order from the Executive (Minister) or a body delegated by Parliament referred to in a statute, whom market players have to comply through their prohibited conduct. With regards to the other types of sectors, the discussion shows that they do not fulfil entirely those ingredients because of the lack of such an order. This is where the practice in Malaysia may differ from other jurisdictions such as the EU and Singapore, who are more generous in interpreting the term "order", allowing exclusion by mere statutory requirement without the need for a clear Executive order. Therefore, there is a need for clarity whether or not Malaysia takes a similar approach. If the answer is in the affirmative, the term "order" has to be given a less formal definition, unlike what has been found by the Competition Appeal Tribunal in the PIAM case. Or else there will be false impression that certain activities are shielded merely by being mentioned in a statute whereas an order from the state to perform them is absent.

There is a need to take into account the objective of the exclusion from such prohibitions. The professional sectors, where the concern is mainly with cut-throat competition, the introduction of a minimum or floor price may be needed to prevent small firms from being pushed out of the market as firms take advantage by suppressing prices. Such an exclusion can also prevent substandard services that jeopardise consumers, although other modes of regulation, particularly licensing, can be more suitable than price regulation. Other sectors can have different objectives for price regulation or other regulation for other cartelistic conduct. For example, for the agriculture and food products, the objective of the exclusion to prohibition of cartels among farmers' organisations is to counteract imbalances in the market. Further, the exclusion given to pricing and output limitation of produce can be to stabilise prices which is central to food security.

What remains to be seen is whether there can be a one size fits all approach. The pricing conditions for commodities such as rubber might differ from those

affecting professional services. Due to the strategic nature of certain commodities, prices cannot be made public. Hence requiring publication of prices in an executive order may not be appropriate. Requiring such an order prevents flexibility for matters of security and strategic concerns provided that the executive order only mentions the forbidden act without providing details such prices, rates etc.

There will also be queries from sectors which are not similarly facilitated as professional services, as to why their sectors are not given exclusions. The sectors include those whose major input are natural persons such as domestic servants and security personnel. It will be interesting to see if clearer executive orders with statutory backing can be introduced for these sectors.

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