7. Malaysia and Singapore

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1. INTRODUCTION

Malaysia and Singapore shared a common early history under British rule and were once a single country, albeit for a very short period of about two years before Singapore separated and became a nation state in 1965. As a result of their history, both countries inherited a legal and judicial system which was and still is heavily based on common law subject to, in the case of Malaysia, the growing influence of Islamic law. There are other threads of commonality; the governments of both countries play a significant role in the management of the economy through state-owned enterprises and, more recently, government-linked companies. Due to its significance and impact on competition, this issue will be specifically addressed in this chapter. Both countries also represent small market economies, dependent on foreign investment to different degrees and are active in the ASEAN regional bloc. There are however differences in the physical, socio-political and economic environments of both countries which have influenced and shaped the competition policies and laws of Malaysia and Singapore.

This chapter traces the early common heritage of both countries, followed by a description of their political and economic framework and institutional structures which puts into context the competitiveness of their respective domestic and international economies. Thereafter the competition policies and law of both jurisdictions are set out in relation to their origin and the three main pillars of competition regimes, that is: anti-competitive agreements, dominance and mergers, the last being absent from Malaysian legislation. The chapter concludes with some observations on the commonality and diversity affecting the competition policies and laws of both countries.

2. EARLY BEGINNINGS UNTIL THE SEPARATION OF MALAYSIA AND SINGAPORE[1]

Malaysia is a Southeast Asian country with a total land mass of 329,847 square kilometers. It is separated by the South China Sea into two regions – Peninsular Malaysia and East Malaysia – and is thus the only country to contain land on both the Asian mainland and the Malay Archipelago. It shares land borders with Thailand, Indonesia and Brunei, and maritime borders with Singapore, Vietnam and the Philippines. As of the 2010 census, the population stood at 28.3 million.[2] Singapore is an island city-state located off the southern tip of the Malay Peninsula. It is separated from Malaysia by the Tebrau Strait to its north and from the Riau Islands of Indonesia by the Singapore Strait to its south. Its total land mass is 697 square kilometers. As of the 2010 census, the population stands at 5 million.[3]

As one might expect given their geographical proximity, the fates of these two countries have historically been closely intertwined. British intervention in the region can be traced back to 1786, when Francis Light acquired Penang from the Sultan of Kedah to be used as a base for the East India Company. In 1819, Stamford Raffles established a trading post on the island of Singapore. Subsequently, Malacca, formerly a Dutch possession, was ceded to the British pursuant to the Anglo-Dutch Treaty of 1824. In 1826, these three territories became the Crown Colony of the British Straits Settlements. Between 1874 and 1889, British administration was extended to four other states on the Malay Peninsula – Perak, Selangor, Pahang and Negeri Sembilan – through a system of indirect

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[1] See generally Harding, A. (1996), 'Law, Government and the Constitution in Malaysia', *Kuala Lumpur: Malayan Law Journal*, pp. 13–41; Faruqi, Shad Saleem. (2008), *Document of Destiny: The Constitution of the Federation of Malaysia*, Petaling Jaya: Star Publications, pp. 1–18; US Department of State, 'Background Note: Malaysia'. Retrieved from http://www.state.gov/r/pa/ei/bgn/2777.htm (last accessed 6 September 2011).

[2] Malaysia Department of Statistics (2010), 'Population and Housing Census, Malaysia 2010' (2010 Census). Retrieved from http://www.statistics.gov.my/portal/index.php?option=com_content&view=article&id=1215%3Apopulation-distribution-and-basic-demographic-characteristic-report-population-and-housing-census-malaysia-2010-updated-2972011&catid=130%3Apopulation-distribution-and-basic-demographic-characteristic-report-population-and-housing-census-malaysia-2010&lang=en (last accessed 2 April 2013).

[3] Singapore Department of Statistics. 'Time Series on Population (Mid-Year Estimates)'. Retrieved from http://www.singstat.gov.sg/stats/themes/people/hist/popn.html (last accessed 6 September 2011).

rule by British Residents, who were appointed by treaty as advisors to the rulers of those Malay States. In 1895, these four states were constituted as a single administrative unit known as the Federated Malay States. The other five states on the Malay Peninsula (Kedah, Kelantan, Perlis, Terengganu and Johore) were known as the Unfederated Malay States and, while not directly under British rule, they also accepted British advisors at the turn of the twentieth century.[4]

Developments in the East Malaysian states occurred separately from those on the Malay Peninsula. The state of Sabah was first governed as a British protectorate under the administration of the North Borneo Chartered Company from 1882 to 1946. After World War II, it became a Crown Colony known as British North Borneo. Sarawak, formerly a province of the Sultanate of Brunei, was ceded in 1842 to James Brooke, whose successors ruled as 'White Rajahs' until 1946, when Sarawak also became a Crown Colony.

During World War II, the Japanese army invaded and occupied Malaya, Singapore, Sabah and Sarawak for over three years. When these states were re-occupied by British forces following the Japanese surrender in 1945, it became clear that there was a need to move forward from colonial rule towards self-government, as the colonial government was no longer capable of defending them. In 1946, the British possessions on the Malay Peninsula (with the exception of Singapore) were unified into a single Crown Colony known as the Malayan Union. The Malayan Union met with strong opposition from the Malays, who objected to the surrender of the sovereignty of the Malay States to the Crown, the demotion of the Malay Rulers, the removal of real legislative powers from the states, and generous citizenship provisions which would place immigrant populations on the same footing as the Malays themselves, as well as the high-handed manner in which the British government had implemented the plan. The Malayan Union was unpopular even among the Chinese and Indian communities; the general view was that it would do away with all the rights of the people of Malaya at one stroke. As a result, the Malayan Union was swiftly dissolved and replaced with the Federation of Malaya in 1948, which achieved independence on 31 August 1957.[5]

The independence of the Federation of Malaya raised the question of the ultimate destiny of the other British colonies in the region. In 1961,

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[4] Andaya, B.W. and Andaya, L.Y. (2001), *A History of Malaysia* (2nd edn) Basingstoke, UK: Palgrave, pp. 160–209.

[5] Id, pp. 266–8.

negotiations commenced between the British government, the government of the Federation of Malaya and the representatives of Singapore, North Borneo, Sarawak and Brunei with a view to the creation of an enlarged federation consisting of these territories. General elections were held in Sabah and Sarawak and a referendum was held in Singapore on this issue; the results in all three territories were an endorsement of the plan for an enlarged federation. Brunei ultimately withdrew from the final stages of the negotiations due to unresolved questions regarding the precedence of the Sultan of Brunei and the financial arrangements relating to Brunei's rich oil reserves. The proposed new federation met with strenuous opposition from Indonesia and the Philippines; in spite of this, the Malaysian federation was established on 16 September 1963. Two short years later, Singapore left the federation as a result of disagreements between the Singapore state government and the federal government, stemming primarily from the participation of Singapore's People's Action Party in election campaigns in Peninsular Malaysia. Since 1965, therefore, Singapore has been an independent republic.[6]

3. POLITICAL AND ECONOMIC FRAMEWORK OF MALAYSIA

3.1 Political Structure and Institutions

Malaysia consists of 13 states and three federal territories. These are divided between the two regions which make up the nation, with 11 states and two federal territories located in Peninsular Malaysia and the remaining two states and third federal territory in East Malaysia. Malaysia is a federal constitutional monarchy in which the head of state is the Yang di-Pertuan Agong and the head of government is the Prime Minister. The Yang di-Pertuan Agong is elected for a five-year term by and from the rulers of the nine states in Peninsular Malaysia which have retained their hereditary Malay royal families.[7]

Legislative power is divided between the federal and state legislatures.[8] The federal Parliament is bicameral, consisting of an elected lower house, the House of Representatives, and an unelected upper house, the

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[6] Id, pp. 288–9.

[7] Article 32(3) of the Malaysian Constitution read with the Third Schedule thereto. The nine states concerned are Perlis, Kedah, Kelantan, Terengganu, Perak, Pahang, Selangor, Negeri Sembilan and Johor.

[8] Article 73 of the Malaysian Constitution.

Senate.[9] The 222 members of the House of Representatives are elected for a maximum term of five years from single-member constituencies.[10] The 70 senators, on the other hand, hold office for three-year terms; 26 senators are appointed by the 13 states, while the remainder are appointed by the Yang di-Pertuan Agong on the advice of the Prime Minister.[11] Each State Legislative Assembly comprises a unicameral chamber whose members are elected from single-member constituencies.

Executive power at the federal level is vested in the Cabinet, which is led by the Prime Minister.[12] The Prime Minister must be a member of the House of Representatives who, in the judgment of the Yang di-Pertuan Agong, is likely to command the confidence of the majority of the members of that House.[13] In practice, this has historically translated into the appointment of the leader of the political coalition which commands a majority in the House of Representatives.[14]

In spite of the federal structure of the Malaysian Constitution, commentators have noted that it more closely resembles a unitary state with a number of federal constraints. The balance of power – whether legislative, executive or financial – between the federal and state governments is tilted heavily in favor of the former.[15]

The coalition known as Barisan Nasional and its predecessor, the Alliance, has been Malaysia's federal ruling political party since independence. Barisan Nasional is dominated by three race-based parties, namely the United Malays National Organization, the Malaysian Chinese Association and the Malaysian Indian Congress. It was dealt a severe blow in the 2008 general elections when it lost its two-thirds majority[16] in Parliament to Pakatan Rakyat, an informal coalition of opposition parties.[17] Historically, Barisan Nasional has also been the ruling political party for most states, with the notable exception of Kelantan, which has

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9 Id, Article 44.
10 Id, Article 46.
11 Id, Article 45.
12 Id, Article 43.
13 Id, Article 43(2)(a).
14 See Harding, p. 108 (n 1).
15 See generally Harding, pp. 167–83 (n 1); Faruqi, pp. 157–82 (n 1).
16 This is significant as Article 159 of the Malaysian Constitution provides that, ordinarily, a bill for amending the Constitution requires the support of the votes of not less than two-thirds of the total number of members of each House of Parliament.
17 'Malaysia Decides 2008' (10 March 2008), *The Star* (Kuala Lumpur). Retrieved from http://thestar.com.my/election/results/results.html (last accessed 2 April 2013).

been ruled by the Islamic Party of Malaysia since 1990. However, in the wake of the 2008 general elections, it lost Kedah, Penang and Selangor – and, for a short time, Perak[18] – to Pakatan Rakyat.

Malaysia's judiciary has been described as 'slow and bureaucratic' by the US Department of State; this militates against the timely and efficient resolution of commercial disputes and creates a climate in which corruption and bribery are encouraged.[19] The World Economic Forum Global Competitiveness Report 2010/2011 indicated that the judicial system was considered by business executives surveyed to be influenced by members of government, citizens and companies enough to constitute a competitive disadvantage; the lack of efficiency in the legal system for private companies to settle disputes and challenge government actions was also identified as constituting a competitive disadvantage.[20] In spite of the establishment of the Anti-Corruption Agency (now the Malaysian Anti-Corruption Commission) in 1967, corruption remains a vital concern.[21] The efficiency of the ACA/MACC has been questioned, as its investigations are rarely targeted at high-ranking officials or business representatives with well-connected companies. Freedom House has classified Malaysia as 'partly free' due to restrictions on freedom of expression, religious freedom, academic freedom and freedom of assembly, as well as the prevalence of police brutality and the availability of detention without trial (which has frequently been used against activists, opposition politicians and dissenters).[22]

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[18] In early 2009, three Pakatan Rakyat state assembly persons defected from the coalition and declared themselves independent while supporting Barisan Nasional on confidence matters. The Sultan of Perak refused then-Menteri Besar (head of the executive branch of the state government) Mohammad Nizar Jamaluddin's request to dissolve the State Legislative Assembly and call for fresh elections. Instead, a new state government was formed by Barisan Nasional. The legitimacy of the new government was confirmed by the Federal Court in February 2010.

[19] US Department of State, '2010 Investment Climate Statement – Malaysia'. Retrieved from http://www.state.gov/e/eeb/rls/othr/ics/2010/138774.htm (last accessed 8 September 2011).

[20] Schwab, K. (ed). (2010), *The Global Competitiveness Report 2010–2011*. Geneva: World Economic Forum, pp. 228–9.

[21] US Department of State (n 19).

[22] Freedom House, 'Country Report – Malaysia (2011)'. Retrieved from http://www.freedomhouse.org/template.cfm?page=22&country=8084&year=2011 (last accessed 2 April 2013).

3.2 Influences on Domestic and International Economy

Since independence, Malaysia has been one of the best-performing economies in Asia.[23] Once dependent on primary products such as rubber and tin, Malaysia's economy has since diversified and modernized into a multi-sector economy based on services and manufacturing, although at least one type of primary product – petroleum and associated products – remains an important export.[24] As of 2010, its Gross Domestic Product (GDP) stands at approximately US$237,804 million.[25] The People's Republic of China, Singapore, the United States and Japan are Malaysia's largest trading partners by a substantial margin.[26] Malaysia is one of the world's largest exporters of semiconductor devices, medical devices and disposables, processed food, building materials, healthcare, education, outsourcing services, information and communication technology and engineering services.[27] The World Bank describes Malaysia as an upper-middle income level country.[28] Malaysia attracts a significant amount of foreign direct investment (FDI), which is encouraged by the government through the provision of a number of incentives, particularly in export-oriented high-technology industries and 'back office' services operations.[29]

Malaysia suffered economically during the 1997 Asian financial crisis, but has since recovered and has proven resilient to the global financial crisis of 2008–09. This has been ascribed to reasons such as Malaysia's position as a net exporter of the key commodities of palm oil, natural gas and petroleum[30] and the conservative regulatory environment maintained

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23 US Department of State (n 1).

24 Id.

25 World Bank. 'Malaysia', Retrieved from http://data.worldbank.org/country/malaysia (last accessed 8 September 2011).

26 Malaysia External Trade Development Corporation (2010). 'Malaysia's Top 10 Trade Statistics for the Year 2010 (Country)'. Retrieved from http://www.matrade.gov.my/en/malaysia-exporters-section/33/1134-malaysias-top-10-trade-statistics-for-the-year-2010-country (last accessed 2 April 2013).

27 Malaysia External Trade Development Corporation, 'Products and Services Overview'. Retrieved from http://www.matrade.gov.my/en/foreign-buyers/industry-capabilities/products-a-services-overview (last accessed 8 September 2011).

28 World Bank (n 25).

29 US Department of State (n 19).

30 'Malaysia Resilient against Global Economic Slump' (23 April 2008). *The Edge Daily* (Kuala Lumpur). Retrieved from http://web.archive.org/web/20080429190542/http://www.theedgedaily.com/cms/content.jsp?id=com.tms.cms.article.Article_7a3ef830-cb73c03a-c1186f00-95cc4df1 (last accessed 2 April 2013); 'Malaysia's Capital Market to Remain Resilient despite Uncertainties in

by the Central Bank which has resulted in Malaysian banks being, on the whole, well-capitalized, conservatively managed, and having little significant exposure to the US sub-prime market.[31]

One factor which has been identified as a significant impediment to the economic growth of Malaysia is the complex network of racial preferences which has developed following the implementation of certain measures aimed at promoting the acquisition of economic assets by ethnic Malays and other indigenous peoples (known in Malay as *bumiputera*) and eradicating poverty among *bumiputera*.[32] The best-known of these is the New Economic Policy (NEP), implemented in 1971, which was initially established in order to ensure a more even redistribution of wealth between the minority immigrant populations (chiefly the Chinese) and the majority *bumiputera*, the latter of which comprised nearly 60 percent of the nation's population but held less than 3 percent of its wealth. Due to the race-based (as opposed to deprivation-based) nature of this policy, it provides economic advantages to rich and poor *bumiputera* alike; arguably, it is the wealthy and well-connected *bumiputera* who are best-placed to reap maximum benefits from the policy. Although the NEP was ostensibly replaced in 1991 with the National Development Policy, which was in turn replaced in 2001 by the National Vision Policy, there remains widespread perception that the latter two policies remain dominated by NEP aims.[33]

Previously, there existed several racial preference policies with the potential to affect FDI, such as the requirement that foreign and domestic non-manufacturing firms take on *bumiputera* partners with a minimum of 30 percent of share capital, and that companies seeking listing on the Bursa Malaysia (formerly the Kuala Lumpur Stock Exchange) reserve at least 30 percent of their initial public offering for purchase by *bumiputeras*. However, in recent years, certain aspects of investment regulation have been liberalized in order to encourage FDI. The government has removed equity conditions for 27 service subsectors,[34] repealed Foreign Investment

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Eurozone and US' (1 August 2011). *The Star* (Kuala Lumpur). Retrieved from http://biz.thestar.com.my/news/story.asp?file=/2011/8/1/business/9169194&sec=business (last accessed 2 April 2013).

31 US Department of State (n 1).

32 US Department of State (n 19).

33 Jomo, K.S. (2004), 'The New Economic Policy and Interethnic Relations in Malaysia', Identities, Conflict and Cohesion Programme Paper 7. Retrieved from http://cpps.org.my/resource_centre/jomo_1.pdf (last accessed 2 April 2013).

34 Malaysia Ministry of International Trade and Industry (22 April 2009), 'Liberalisation of the Services Sector'. Retrieved from http://www.miti.gov.my/cms/content.jsp?id=com.tms.cms.article.Article_ea4b01dd-c0a81573-7cd87cd8-e9437020 (last accessed 2 April 2013).

Committee (FIC) guidelines on mergers and acquisitions,[35] reduced *bumiputra* ownership requirements for new listings of foreign-owned corporations from 30 percent to 12.5 percent,[36] and restricted regulatory approval requirements for foreign ownership of properties to those above US$6.39 million (RM 20 million).[37]

In relation to public procurement, Malaysia's official policy is explicitly discriminatory, in particular its expressed preference for *bumiputera* suppliers in order to encourage greater *bumiputera* participation in the economy.[38] Generally, international tenders are invited only where domestic suppliers are not available,[39] and foreign companies may be required to take on a local partner before their procurement bids can be considered. This has resulted in foreign companies having reduced opportunities to compete for public procurement contracts compared with local companies.

3.3 Impact of Government-linked Companies

The government of Malaysia has played an active role in managing and directing the economy, formerly through state-owned enterprises and more recently through government-linked companies (GLCs) – companies with a primary commercial objective and in which the government has a controlling stake. Controlling stake in this context refers to the ability

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[35] New Department to Replace Foreign Investment Committee (1 July 2009). *The Star* (Kuala Lumpur). Retrieved from http://biz.thestar.com.my/news/story.asp?file=/2009/7/1/business/4230194&sec=business (last accessed 2 April 2013).

[36] Goh, T.E. (13 November 2008), 'Govt Relaxes Listing Rule on Bumi Equity'. *New Straits Times* (Kuala Lumpur). Retrieved from http://www.btimes.com.my/Current_News/BTIMES/articles/relax12/Article/index_html (last accessed 2 April 2013).

[37] 'Guideline on the Acquisition of Properties', para. 2.1. Retrieved from http://www.rehda.com/resources/fic/foreign-investment-guidelines-2010.pdf (last accessed 2 April 2013).

[38] Surat Pekeliling Perbendaharaan Bil. 4 Thn. 1995 (Treas. Circ. Let. No. 4/1995) Dasar dan Keutamaan Kepada Syarikat Bumiputera Dalam Perolehan Kerajaan (Policy and Preferences for Bumiputera Firms in the Context of Government Procurement), §§ 5.1–5.5, 6–7 (12 April 1995). See also McCrudden, C. and Gross, S.G. (2006). 'WTO Government Procurement Rules and the Local Dynamics of Procurement Policies: A Malaysian Case Study', 17 *EJIL,* p. 151.

[39] Surat Pekeliling Perbendaharaan Bil. 7 Thn. 2002 (Treas. Circ. Let. No. 7/2002), § 2; Surat Pekeliling Perbendaharaan Bil. 7 Thn. 2002 (Treas. Circ. Let. No. 7/2002), § 2. See also McCrudden and Gross, Id, p. 170, Cheong, M.F. (2011). 'Goals of Public Procurement: A Fine Balancing Act for Malaysia', 38 (Special) *JMCL*, pp. 9–24.

of the government to appoint board members and senior management and its ability to make major decisions for the GLC in question.[40] Based on the NEAC's[41] statistics, there were more than 445 GLCs as of 14 August 2010. Of these, 332 were federal government entities (53 listed and 279 unlisted), while 113 were state government entities (1 listed and 112 unlisted).[42] Listed GLCs account for more than 37 percent of total market capitalization on Bursa Malaysia, and contribute to 17 percent of fixed capital formation and 10 percent of Malaysia's GDP. Eight of the 20 biggest companies listed on Bursa Malaysia are GLCs. In total, there are 53 listed GLCs that account for more than one-third of aggregate market capitalization on Bursa Malaysia.[43]

The origins of GLCs can be traced to the privatization policy outlined in the 1984 Mid-Term Review of the Fourth Malaysia Plan,[44] whose stated objectives were to (i) increase the role of the private sector in economic development; (ii) reduce the burden on the government's fiscal budget; and (iii) improve the productivity and efficiency of state enterprises. It was also an integral part of the government's strategy to increase *bumiputera* interests under the aims of the NEP, as it required at least 30 percent of the privatized entity's equity to be held by *bumiputera* investors.[45]

Some of the enterprises that were privatized during this period included public utilities such as telecommunications and electricity.[46] GLCs

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[40] Khazanah Nasional Berhad. 'Frequently Asked Questions'. Retrieved from http://www.khazanah.com.my/faq.htm (last accessed 2 April 2013).

[41] The National Economic Advisory Council (NEAC) was inaugurated by the Prime Minister in May 2009 with a specific mandate to formulate a New Economic Model (NEM) that would drive Malaysia's transformation into an advanced nation by 2020. The NEAC, comprising top officials from both the public and private sectors, completed its mandate officially on 31 May 2011. The NEAC has published a series of papers and proposed recommendations on core economic issues which have been summarized in the NEM Concluding Part Report. The papers are available at NEAC's website at http://www.neac.gov.my (last accessed 2 April 2013).

[42] NEAC (2010), 'Reengineering the Government's Role in Business'. Retrieved from http://www.neac.gov.my/files/Re-engineering_Government's_Role_in_Business.pdf, pp. 6–7 (last accessed 2 April 2013).

[43] Id, p. 7.

[44] See also 'Privatisation Masterplan for Malaysia' (1991).

[45] See Economic Planning Unit. 'Privatisation Policy'. Retrieved from http://www.epu.gov.my/privatizationpolicy (last accessed 2 April 2013).

[46] See Cheong, M.F. (2011), 'State Relations in the Telecommunications Industry in Malaysia', 8 *MqJBL,* pp. 279–99; Cheong, M.F. (2009), 'Competition and Regulation of the Electricity Industry in Malaysia', 54(1) *The Antitrust Bulletin* pp. 67–86.

continue to be the main service providers in key strategic utilities and services, including postal services, airlines, airports, public transport, water[47] and sewerage, and banking and financial services. The largest GLC, Khazanah Nasional Berhad (Khazanah), has substantial stakes in companies that are involved in a variety of sectors, including agriculture, automotive, financial, healthcare, infrastructure and construction, media and communications, technology and biotechnology, transportation and logistics, and utilities.[48] The Prime Minister is the Chairman of Khazanah's Board of Directors, and two other ministers sit on the Board.[49]

The chief concern relating to GLCs arises from the government's presence in the economy. Due to its interests in and participation through GLCs, the government plays conflicting roles as regulator, policymaker, industry player and buyer, which may restrict competition and also open up room for corruption, rent-seeking and patronage.[50] In certain industries, GLCs may play the roles of both operator and regulator, resulting in a conflict between achieving social objectives and profit maximization. GLCs can also be seen as competing with small and medium enterprises (SMEs) rather than catalyzing SME growth and integrating them into the supply chain.

In addressing these concerns, the main recommendation of the NEAC[51] is that the government must shift from being a direct participant in business in order to focus on its role as regulator and facilitator; additionally, the government should leverage on the role of GLCs to catalyze the development of high value-added economic activities and the growth of the BCIC[52] as the prime mover for *bumiputera* development. Towards this, the NEAC has proposed a comprehensive policy on the role of GLCs based on four main components:

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47 See Cheong, M.F. and Yong, C.M. (2009), 'Competition Law Perspectives on the Water Services Industry in Malaysia'. *LAWASIA Journal,* pp. 112–26.

48 Khazanah Nasional Berhad. 'Portfolio Companies'. Retrieved from http://www.khazanah.com.my/portfolio.htm (last accessed 8 September 2011).

49 Khazanah Nasional Berhad. 'Leadership'. Retrieved from http://www.khazanah.com.my/leadership.htm (last accessed 8 September 2011).

50 NEAC (2010), 'Revising the Regulatory Framework for an Advanced Economy', pp. 2-3. Retrieved from http://www.neac.gov.my/files/Revising_Regulatory_Framework.pdf (last accessed 2 April 2013).

51 For details of these recommendations, see NEAC, pp. 13–34 (n 42).

52 The BCIC (*Bumiputera* Commercial and Industrial Community) was launched to be the key thrust in the restructuring process, since the availability of a sufficient number of capable entrepreneurs and viable enterprises will ultimately determine the success of *bumiputera* in the commercial and industrial sectors.

(i) an oversight mechanism for GLCs;
(ii) re-engineering the role of GLCs in strategic and non-strategic companies, and improving governance;
(iii) financing GLCs' catalytic role to grow new private sector activities; and
(iv) re-engineering the role of GLCs in the economy so that they support but do not compete with the private sector.

In relation to the final recommendation, it was proposed that the (then to be enacted) Competition Act should not exempt GLCs from its purview; this proposal has been taken into consideration and GLCs are within the scope of the Competition Act 2010. Other proposals directed towards encouraging a competitive environment included: refraining from providing automatic government guarantees for GLCs' liabilities; granting credit to GLCs on the same terms and conditions as those for private sector firms; removing barriers in the government's procurement supply chain which afford GLCs special treatment; and providing for clear exit strategies so that GLCs do not linger in mature industries.[53]

4. POLITICAL AND ECONOMIC FRAMEWORK OF SINGAPORE

4.1 Political Structure and Institutions

Singapore is a unitary state in the form of a parliamentary republic, in which the head of state is the President and the head of government is the Prime Minister.[54] Legislative power is vested in the unicameral Parliament, which currently comprises 87 members who represent either single-member constituencies or Group Representation Constituencies.[55] Executive power is vested in the Cabinet, which is led by the Prime Minister.[56] The Prime Minister is appointed by the President and must be a Member of Parliament who, in the President's judgment, is likely to

[53] For a useful summary of the role of GLCs in the context of competition, see NEAC (2010). 'Competition Regulation to Create a Competitive Domestic Economy: Towards Re-Energising the Private Sector to Drive Growth'. Retrieved from http://www.neac.gov.my/files/Competition_Regulation_To_Create_A_Competitive_Domestic_Economy.pdf (last accessed 2 April 2013).
[54] Article 17(1) of the Constitution of Singapore.
[55] Id, Articles 39 and 39A.
[56] Id, Article 24.

command the confidence of the majority of the Members of Parliament.[57] Since independence, the People's Action Party has been the ruling political party in Singapore. However, its popularity has declined in the last decade, and its share of the popular vote in contested seats has decreased from 75 percent in 2001 to 60.1 percent in 2011.[58]

Singapore has been ranked as the least corrupt country in Asia and one of the least corrupt in the world.[59] It actively enforces strong anti-corruption laws; cases of corruption, once uncovered, are dealt with firmly, swiftly and publicly, whether they occur in the public or private sectors.[60] The judiciary also has a reputation for the efficient and equitable disposal of commercial disputes, though the government's overwhelming success in court cases has raised questions about judicial independence, especially since lawsuits against opposition politicians have tended to drive them into bankruptcy and thus disqualify them from contesting a parliamentary seat.[61] It is widely perceived that the safeguarding of civil liberties, political rights and human rights is lacking in certain aspects. Singapore has been classified as only 'partly free' by Freedom House, due to tight constraints on the local media, censorship, the prevalence of corporal and capital punishment, the availability of detention without trial, significant limitations on freedom of assembly, and the use of libel laws to silence political dissent.[62]

4.2 Influences on Domestic and International Economy

Singapore's location at the intersection of major international and regional trade routes gives it an economic importance which is disproportionate to its small size.[63] Upon achieving independence in 1965, Singapore

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[57] Id, Article 25(1).

[58] US Department of State, 'Background Note: Singapore'. Retrieved from http://www.state.gov/r/pa/ei/bgn/2798.htm (last accessed 8 September 2011).

[59] Transparency International, 'Corruption Perceptions Index 2010 Results'. Retrieved from http://www.transparency.org/policy_research/surveys_indices/cpi/2010/results (last accessed 8 September 2011).

[60] US Department of State, '2011 Investment Climate Statement – Singapore'. Retrieved from http://www.state.gov/e/eeb/rls/othr/ics/2011/157355.htm (last accessed 8 September 2011).

[61] Freedom House (2011), 'Country Report – Singapore 2011'. Retrieved from http://www.freedomhouse.org/template.cfm?page=22&year=2011&country=8130 (last accessed 2 April 2013).

[62] Id.

[63] Williams, Mark (2009), 'The Lion City and the Fragrant Harbour: The Political Economy of Competition Policy in Singapore and Hong Kong Compared', 54(3) *The Antitrust Bulletin*, at p. 522.

was confronted with the difficulties of a lack of natural resources and a small domestic market. The Singaporean government responded to this by adopting a pro-foreign investment, export-oriented economic policy, combined with state-directed investments in strategic government-owned corporations.[64] Singapore has been classified as a high income country by the World Bank, with a GDP of US$222,698 million as of 2010.[65] In 2010, services made up 71.7 percent of the economy, while industry accounted for 28.3 percent.[66] Singapore's main exports include machinery and equipment (including electronics), consumer goods, pharmaceuticals and other chemicals, as well as mineral fuels, while its main trading partners are Hong Kong, Malaysia, the People's Republic of China, Indonesia, the United States, Korea, and Japan.[67] As foreign investment is one of the pillars of Singapore's economy, its legal framework and public policy are generally favorable towards foreign investors. To date, it has attracted investments from more than 7,000 multinational corporations from the United States, Japan and Europe, as well as 1,500 companies from China and another 1,500 from India.[68]

Singapore has been affected significantly by the 2008–09 global financial crisis due to its strong external orientation. In the first quarter of 2009, the GDP declined by 10.1 percent year-on-year, after falling by 4.2 percent in the previous quarter.[69] However, it has since made a strong recovery; the economy grew by 14.5 percent in 2010, the fastest annual rate on record.[70]

4.3 Impact of Government-Linked Companies

Although it is strongly committed to maintaining a free market, the government of Singapore also plays an active role in the country's

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64 US Department of State (n 25).

65 World Bank, *Singapore*. Retrieved from http://data.worldbank.org/country/singapore (last accessed 8 September 2011).

66 US Central Intelligence Agency, 'The World Factbook: East and Southeast Asia – Singapore'. Retrieved from https://www.cia.gov/library/publications/the-world-factbook/geos/sn.html (last accessed 9 September 2011).

67 Id.

68 US Department of State (n 25).

69 Monetary Authority of Singapore, 'Annual Report 2008/2009'. Retrieved from http://www.mas.gov.sg/about_us/annual_reports/annual20082009/13_sin.html (last accessed 9 September 2011).

70 Monetary Authority of Singapore, 'Annual Report 2010/2011'. Retrieved from http://www.mas.gov.sg/about_us/annual_reports/annual20102011/work01_06.html (last accessed 9 September 2011).

economic development, primarily through GLCs. These GLCs are wholly or partly government-owned companies held by two principal state holding companies – the Government of Singapore Investment Co. (GIC) and Temasek Holdings Pte. Ltd. (Temasek). Several ministers sit on GIC's Board of Directors, with the Prime Minister as Chairman.[71] The number of GLCs in Singapore today is estimated to be in the hundreds; most of these are controlled by Temasek, the holding company established by the government in 1974 to manage its investments.[72] In addition to GLCs held by Temasek, enterprises which are fully or majority owned by statutory boards may also be classified as GLCs to the extent that their shares are ultimately owned by the government.[73] According to Temasek, its major listed companies account for more than 20 percent of the total market capitalization.[74] In 2002, GLCs were estimated to contribute about 13 percent of Singapore's GDP.[75]

Temasek manages a portfolio valued at US$152 billion (S$193 billion) as at 31 March 2011, focused primarily on Asia, with Singapore accounting for 32 percent of its portfolio and the rest of Asia accounting for 46 percent.[76] In the telecommunications and media sector, Temasek holds 100 percent of Media Corp, the national broadcasting monopoly, across a comprehensive range of platforms comprising television, radio, newspapers, magazines, film and digital media, as well as 55 percent of Singapore Telecommunications and 100 percent of Singapore Technologies Telemedia, two companies which dominate the telecommunications and Internet service provider market in Singapore. In the transportation sector, Temasek holds 100 percent of PSA International, the owner of Singapore's container port; 66 percent of Neptune Orient Lines, a global

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[71] GIC, 'GIC Board of Directors'. Retrieved from http://www.gic.com.sg/about/gic-board-of-directors (last accessed 9 September 2011).

[72] Ramirez, C.D. and Tan, L.H. (2004), 'Singapore Inc. versus the Private Sector: Are Government-Linked Companies Different?' 51(3) *IMF Staff Papers*. Retrieved from http://www.imf.org/external/pubs/ft/staffp/2004/03/pdf/ramirez.pdf (last accessed 2 April 2013).

[73] Id.

[74] Id. The major listed companies are DBS Bank, Keppel Corporation, Neptune Orient Lines, SembCorp Industries, Singapore Airlines, SMRT Corporation and Singapore Telecommunications.

[75] Entrepreneurship and Internationalisation Subcommittee, Economic Review Committee (30 May 2002), 'Recommendations on Government in Business'. Retrieved from http://app.mti.gov.sg/data/pages/507/doc/ERC_EISC_MainReport.pdf (last accessed 9 September 2011).

[76] Temasek Holdings, 'Portfolio by Geography'. Retrieved from http://www.temasek.com.sg/our_portfolio_portfolio_highlights_geography.htm (last accessed 9 September 2011).

shipping company; 54 percent of Singapore Airlines, the national carrier; and 54 percent of SMRT, the national multi-modal transport service provider. In the real estate sector, Temasek owns 100 percent of Mapletree Investments and 40 percent of CapitaLand, both major real estate developers. In the infrastructure, industrial and engineering sectors, Temasek owns 50 percent of Singapore Technologies Engineering, 49 percent of Sembcorp Industries and a substantial share in Keppel Corporation. In the energy sector, it owns 100 percent of PowerSeraya, Senoko Power and Singapore Power, the latter of which is the major domestic energy supplier. In the financial sector, it owns 28 percent of DBS Holdings Group, one of Singapore's major banks.[77]

Nominally, GLCs operate on a commercial basis and have no specific advantage compared with private firms on the basis of government ownership; however, some private firms have reported unfair business practices and opaque bidding processes which appeared to favor GLCs.[78] There remains a perception that GLCs possess unfair advantages in terms of access to funds, tenders and opportunities; GLCs have also been criticized as tending towards lower efficiency than private firms, due to their institutional relationship with the government, the market structure in which they operate, and the management system applied within them, as well as to their being too risk-averse.[79] An International Monetary Fund paper published in 2002 supports the government's position that GLCs are not given special financing privileges or procurement opportunities, though it does reveal that GLCs appear to have a premium of over 20 percent of their stock market value compared to what would be considered fair value for a non-GLC, an outcome which the authors ascribe to the market's perception of the benefits of being linked to the government.[80] An academic study carried out in 2004 concluded that GLCs were as efficient in their use of capital and provided investment returns similar to those of non-GLCs in similar areas of business.[81] The evidence thus appears to suggest that GLCs are not given preferential treatment and are run on a commercial basis.[82] However, the rapid growth of GLCs, in terms

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[77] Temasek Holdings, 'Major Investments'. Retrieved from http://www.temasek.com.sg/our_portfolio_portfolio_highlights_major_investments.htm (last accessed 9 September 2011).

[78] US Department of State (n 60).

[79] Ramirez and Tan (n 72).

[80] Id.

[81] Feng, F., Sun, Q., Tong, W.H.S. (2004). 'Do Government-Linked Companies Underperform?' 28 *J Banking & Fin,* p. 2641.

[82] Id. Note, however, other views; see Williams (n 63), at p. 527.

of both size and number, has led to concerns that they are effectively crowding out the private sector. The issue of GLCs and competition in the Singaporean domestic market was raised by the Entrepreneurship and Internationalization Subcommittee of the government-appointed Economic Review Committee in its report published in 2002, in which it made the following recommendations:[83]

(i) the enactment of a generic competition law to institutionalize a regime where GLCs do not enjoy unfair privileges and must compete on an equal footing in the market;
(ii) establishing and maintaining GLCs only where they can achieve the government's strategic objectives, such as managing critical resources, achieving public policy objectives and developing new growth engines;
(iii) ensuring that GLCs are commercially run, by not according to GLCs subsidies and special privileges or requesting GLCs to perform 'national service', namely any project or activity which they would not have carried out if evaluated purely on a commercial basis;
(iv) constantly reviewing the stable of existing GLCs and divesting those which do not or which have ceased to serve a strategic purpose; and
(v) encouraging a culture of partnership between GLCs and private sector firms.

5. COMPETITION POLICY AND LAW – MALAYSIA AND SINGAPORE COMPARED

5.1 Origins and Structure of Both Legislations

5.1.1 Malaysia

The process of formulating and implementing a Malaysian competition regime has its origins in the 1990s. Prior to 2010, this process generated a ministerial policy as well as various drafts of proposed legislation, the last of these a Fair Trade Practices Act. The Eighth Malaysia Plan (2001–05) made specific reference to the importance of a competition regime, stating that efforts would be made 'to foster fair trade practices that will contribute towards greater efficiency and competitiveness in the economy', for which 'a fair trade policy and law will be formulated to prevent

[83] Entrepreneurship and Internationalisation Subcommittee, Economic Review Committee (n 75).

anti-competitive behaviour such as collusion, cartel price fixing, market allocation and the abuse of market power'.[84]

The Fair Trade Practices Policy which was approved on 26 October 2005 contains the following eight policy objectives:

(i) promote and protect competition in the market;
(ii) create dynamic and competitive entrepreneurs;
(iii) provide fair and competitive market opportunities for businesses;
(iv) prohibit anti-competitive practices, including those originating from the Malaysian territory and affecting the domestic territory;
(v) prohibit unfair trade practices in the economy;
(vi) promote rights of small and medium enterprises (SMEs) to participate in the marketplace;
(vii) promote consumer welfare; and
(viii) encourage socio-economic growth, generate efficiency and equity.[85]

It was envisioned that the proposed Fair Trade Practices Act would prohibit the following categories of anti-competitive conduct:

(i) abuse of dominant position, including conduct such as predatory pricing, exclusive dealings, excessive pricing and tied selling;
(ii) hard-core cartels colluding to fix prices, allocate markets, limit production and engage in bid-rigging;
(iii) anti-competitive agreements which seek to restrain and eliminate competition, such as retail price maintenance, collusive tendering and restraints on production and sale; and
(iv) unfair trade practices which substantially lessen competition, create unfair competition conditions between competitors or harm consumer interests, including misleading advertisements and unfair dealing between small and large economic operators, as well as false promotions, claims, statements and sales tactics.[86]

This long drawn-out process of gestation finally came to legislative fruition on 22 April 2010 with the passing of the Malaysian Competition

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[84] Economic Planning Unit, 'Eighth Malaysia Plan (2001–2005)', para. 16.32.
[85] Ministry of Domestic Trade, Co-operatives and Consumerism, 'Fair Trade Practices Policy'. Retrieved from http://www.kpdnkk.gov.my/web/guest/kpdnkk/dasar-kementerian/amalan-perdagangan-adil (last accessed 2 April 2013).
[86] Id.

Act 2010 (the MCA),[87] which came into force on 1 January 2012, and also the Malaysian Competition Commission Act 2010, which came into force on 1 January 2011. The Malaysian Competition Commission was effectively established with the announcement of the appointment of the Commissioners on 1 April 2011.

The long title of the MCA states that it is:

> An Act to promote economic development by promoting and protecting the process of competition, thereby protecting the interests of consumers . . .

The first paragraph of its preamble explains that:

> . . . The process of competition encourages efficiency, innovation and entrepreneurship, which promotes competitive prices, improvement in the quality of products and services and wider choices for consumers.

The MCA thus has the threefold objective of promoting economic development, protecting the competitive process and increasing consumer protection. While the latter two objectives reflect the basic goals of competition law, it should be noted that they may well conflict with the first stated objective, that of promoting economic development.[88] For developing countries with limited resources, a pertinent debate is whether those resources should be allocated to promote competition and thereby obtain the resulting gains in efficiency, or whether those resources would be better used to support a few advantaged participants in order to allow these few firms to achieve sufficient economies of scale to be able to compete in the world market.[89] A relevant concern for Malaysia is whether the protection of such 'national champions' will reduce the benefits of free competition.

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[87] See the Malaysian Competition Commission website at http://www.mycc.gov.my. See also Cheong, M.F. (2013), 'Competition Law Developments in Malaysia', *CPI Antitrust Chronicle*, pp. 1–5 available at http://www.competitionpolicyinternational.com; Cheong, M.F. (2011), 'A New Catalyst for Malaysia: The Competition Act 2010', *The Law Review,* pp. 107–23. For the position before the new legislation, see Cheong, M.F. (2005), 'Legal Position in Relation to Competition in Malaysia'. *The Law Review,* pp. 434–48; Cheong, M.F. (2006) 'Regulating Competition in Malaysia: The Policy and the Law', in Cassey Lee and M.F. Cheong (eds.), *Competition Policy in Asia: Models and Issues*, Malaysia: Faculty of Economics & Administration and Faculty of Law, University of Malaya, pp. 1–20.

[88] Economic Planning Unit (n 84).

[89] Brooks, D.H. (2007), 'Industrial and Competition Policy: Conflict or Complementarity?', ADBI Research Policy Brief No. 24.

Structurally, the MCA comprises six parts. Part I sets out the short title and date of commencement of the MCA, the interpretation of various terms used and the scope of application of the MCA. Part II sets out prohibitions against two categories of anti-competitive practices (namely anti-competitive agreements and abuse of dominant position), confers upon the Commission the power to conduct a review into any market, and grants the minister in charge power to exclude certain matters from the prohibitions set out in the MCA. The third part confers upon the Commission power to investigate suspected infringement of any of the prohibitions and the commission of any offences under the MCA. The fourth part sets out the procedure by which any decision of the Commission following such an investigation is to be dealt with. The fifth part establishes the Competition Appeal Tribunal, which is given exclusive jurisdiction to review any decision of the Commission made under the preceding part. The sixth and final part contains general provisions dealing with penalties, the compounding of offenses, the right of private action by persons who have suffered loss or damage as a result of the infringement of any prohibition under the MCA, the conferment of the power to make regulations upon the minister in charge, and the conferment of the power to issue guidelines upon the Commission.

5.1.2 Singapore

Even before the passing of a general competition law, Singapore was already relying on policies which regulate market competition, such as those on trade and privatization, to ensure competitiveness. Sector-specific competition codes, such as the Telecom Competition Code and the Media Market Conduct Code, were already being administered before the introduction of the current competition legislation.[90]

The impetus for the introduction of the current broad-based competition legislation had its origins in the government's conscious decision to expose domestic firms to greater levels of competition, thus making them more resilient and better-equipped to compete in a globalized market, while at the same time creating a more attractive legal environment for foreign investors (upon whom Singapore is heavily reliant) to break

[90] See the Singapore Competition Commission website at http://www.ccs.gov.sg. See also Ong, Burton (2006), 'The Competition Act 2004: A Legislative Landmark on Singapore's Legal Landscape', *Sing J Legal Stud,* at p. 176; Ong, Burton (2006), 'The Origins, Objectives and Structure of Competition Law in Singapore', 29(2) *World Competition,* pp. 269–84; Lee, G. (2005), 'New Competition Legislation in Singapore', 3 *Int'l J Franchising L,* pp. 19–25.

into established markets and compete with existing domestic firms.[91] In December 2001, the Economic Review Committee was set up in order to review Singapore's economic policies and to make recommendations to promote its further growth. The terms of reference of one of its sub-committees[92] were to recommend ways to strengthen the spirit of entrepreneurship and innovation in Singapore, and to foster the growth and internationalization of Singapore-based companies, including GLCs.[93] The sub-committee welcomed the government's recent announcement of its intention to enact a generic competition law within the next two or three years, noting that such a law would form part of the enabling infrastructure for entrepreneurship, ensure fair play between all enterprises, and institutionalize a regime where GLCs would not enjoy unfair privileges.[94]

Another significant factor in the passing of Singapore's generic competition legislation was the Free Trade Agreement concluded between Singapore and the United States ('the USSFTA') in 2003. Chapter 12 of the USSFTA, entitled 'Anti-competitive Business Conduct, Designated Monopolies, and Government Enterprises', requires both parties to 'adopt or maintain measures to proscribe anti-competitive business conduct with the objective of promoting economic efficiency and consumer welfare' and, in particular, requires Singapore to 'enact general competition legislation by January 2005'.[95] Singapore was also prohibited from 'exclud[ing] enterprises from that legislation on the basis of their status as government enterprises'. It is clear from the text of the USSFTA that the pervasiveness of GLCs in Singapore was a vital concern for the US Trade Representative, as Article 12.3(2)(d) expressly obliges Singapore to ensure that government enterprises do not engage in anti-competitive conduct or enter into anti-competitive agreements.

These two parallel factors led to the passing, on 19 October 2004, of the Singapore Competition Act ('the SCA'). The Act was implemented in three phases. In Phase 1 (1 January 2005), the provisions establishing the Competition Commission of Singapore ('the CCS') came into force.

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[91] Id, Ong, 'The Competition Act 2004: A Legislative Landmark on Singapore's Legal Landscape', pp. 176–7.

[92] Entrepreneurship and Internationalisation Subcommittee, Economic Review Committee (n 75).

[93] Singapore Ministry of Trade and Industry, 'Report of the Entrepreneurship and Internationalisation Sub-Committee'. Retrieved from http://app.mti.gov.sg/data/pages/507/doc/ERC_EISC_FinalReport2.pdf (last accessed 10 September 2011).

[94] Id, pp. 17–18.

[95] Article 12.2(1), USSFTA.

In Phase 2 (1 January 2006), the provisions dealing with anti-competitive agreements, decisions and practices; abuse of dominance; enforcement; appeal processes; and other miscellaneous provisions came into force. During Phase 3 (1 July 2007), the provisions pertaining to mergers and acquisitions came into force.

Structurally, the SCA is based largely upon the UK Competition Act 1998, which has EU origins, with a tripartite structure dealing with anti-competitive agreements, abuse of dominance and mergers which have or may result in a substantial lessening of competition. This is in contrast with the MCA, which only contains provisions dealing with the former two types of conduct. Part I of the SCA sets out its short title and the interpretation of various terms used therein. Part II establishes the CCS and deals with auxiliary matters related thereto. Part III contains provisions dealing with the three types of anti-competitive conduct mentioned above, sets out the scope of application of those provisions, and also contains provisions related to enforcement. Part IV deals with appeals and establishes a Competition Appeal Board from which decisions of the CCS may be appealed. Part V declares certain acts and omissions to be offenses under the SCA. Part VI contains miscellaneous provisions dealing with matters such as the right of private action and cooperation between the CCS and other governmental bodies.

A noteworthy feature of the SCA is that it has been drafted so as to give it explicit extraterritorial reach. The SCA expressly provides that its scope of application extends to anti-competitive agreements entered into and conduct engaged in, outside the territorial limits of Singapore[96] and the abuse of a dominant position held by an undertaking outside Singapore.[97] As Ong points out, even in the case of a foreign-based undertaking which occupies a position of dominance in its home market, but is a new entrant and small player in Singapore's domestic market, the CCS is nevertheless empowered to challenge any anti-competitive practices which the undertaking is engaged in as an abuse of a dominant position.[98]

5.2 Anti-Competitive Agreements

5.2.1 Malaysia

Section 4(1) of the MCA prohibits anti-competitive agreements, both horizontal and vertical, which have 'the object or effect of significantly

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[96] Section 33, SCA.

[97] Id, Section 47(3).

[98] Ong, 'The Competition Act 2004: A Legislative Landmark on Singapore's Legal Landscape', pp. 182–3 (n 90).

preventing, restricting or distorting competition in any market for goods or services'. The wording of this section is similar to that of Article 101(1) of the Treaty on the Functioning of the European Union ('the TFEU'). The Act defines 'horizontal agreement' as 'an agreement between enterprises each of which operates at the same level in the production or distribution chain', while 'vertical agreement' is defined as 'an agreement between enterprises each of which operates at a different level in the production or distribution chain'. Section 4(2) sets out a non-exhaustive list of horizontal agreements which are deemed to have the object of significantly preventing, restricting or distorting competition in the relevant market, namely agreements which have the object to:

(i) fix a purchase or selling price or any other trading conditions;
(ii) share market or sources of supply;
(iii) limit or control production, market outlets or access, technical or technological development, or investment; or
(iv) perform an act of bid-rigging.

Paragraphs 4(2)(a), (b) and (c) are similar to three of the five instances of anti-competitive agreements given in Article 101(1) of the TFEU.

'Agreement' here is not limited to legally enforceable contracts, but is defined broadly as 'any form of contract, arrangement or understanding, whether or not legally enforceable, between enterprises, and includes a decision by an association and concerted practices'; in this context it should also be noted that Part II, wherein section 4 is contained, is headed 'Anti-competitive *practices*' (emphasis added). The Act takes a generic approach to the prohibition of horizontal and vertical agreements which have the stated effect on competition, without reference to the specific mode of restraint employed. This is in contrast with the approach taken under section 47 of the Australian Competition and Consumer Act 2010 which prohibits two specific types of vertical restraint, namely exclusive dealing, where the supplier agrees to appoint only one dealer for the resale of its products in a particular territory, and resale price maintenance, where a producer dictates the resale price of goods and services to ensure that the retailer cannot sell the goods and services below the minimum price set by the producer.[99]

[99] Other types of vertical agreements include tying agreements, where the desired product can only be purchased with another (usually slow-moving) product; exclusive distribution agreements, where an upstream producer stipulates to a downstream retailer his market or region; and refusal to deal, where certain firms agree not to buy from or sell to certain parties. See generally, Corones, S.G. (2010), *Competition Law in Australia* (5th edn). Sydney: Lawbook Co.

It should be noted that the MCA contains no definition of what 'the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services' means. As section 4(2) provides illustrations only of horizontal agreements which are deemed to have such an object, clarification of how this test applies to vertical agreements is therefore necessary. Bearing in mind that the MCA was only recently enacted, it will be expected that guidelines will be issued by the Commission on key provisions. The test may be framed by reference to a number of factors, such as market share and the type of restraint employed. In the European Union, for example, vertical agreements are exempted from the scope of competition legislation provided that the market share held by the supplier does not exceed 30 percent of the relevant market in which it sells the goods or services. Under the ACCA, resale price maintenance is prohibited per se, while exclusive dealing is only prohibited if it has the purpose or, on balance, has or is likely to have the effect of substantially lessening competition.

5.2.2 Singapore

Section 34 of the SCA prohibits agreements between undertakings, decisions by associations of undertakings, or concerted practices which have, as their object or effect, the prevention, restriction or distortion of competition in Singapore. This includes direct or indirect fixing of purchase or selling prices or other trading conditions; limiting or controlling production, markets, technical development or investment; sharing markets or sources of supply; applying dissimilar conditions to equivalent transactions with other trading parties; and subjecting the conclusion of contracts to unconnected supplementary obligations. Like the corresponding provision in the MCA, the section 34 prohibition of the SCA is not limited to legally enforceable agreements, but also extends to tacit coordination between undertakings. The guidelines issued by the CCS state that the term 'agreement' in this section is to be construed widely, and the only requirement is that the parties involved must reach a consensus as to the actions which they will or will not undertake; thus, the term includes both legally enforceable and non-enforceable agreements, whether written or oral, as well as so-called 'gentlemen's agreements'.[100] The wording of the section also prohibits decisions by associations of undertakings such as trade associations as well as concerted practices, the latter of which extends to

[100] CCS, 'CCS Guidelines on the Section 34 Prohibition', para. 2.10. Retrieved from http://www.ccs.gov.sg/content/dam/ccs/PDFs/CCSGuidelines/S34_Jul07FINAL.pdf (last accessed 2 April 2013).

informal cooperation between the parties concerned, notwithstanding the lack of any formal agreement or decision.[101] Unlike the Malaysian legislation, the section 34 prohibition under the SCA does not extend to vertical agreements, as the CCS takes the view that such agreements in general have pro-competitive effects that more than outweigh anti-competitive effects.[102] In this regard, it also differs from the position taken in the EU, which exempts vertical agreements based on criteria such as market thresholds, total turnover and type of commercial restraints imposed.[103]

Although the SCA, like the MCA, contains no definition of what amounts to an 'object or effect significantly preventing, restricting or distorting competition in any market for goods or services', the CCS has clarified that the correct test to be applied is whether the conduct in question has an appreciable adverse effect on competition.[104] Agreements which restrict rivals' freedom of action but do not result in an appreciable adverse effect on competition will not be prohibited. The CCS has stated that, in Singapore's small and open economy, an agreement will generally have no appreciable adverse effect on competition:

(i) if the aggregate market share of the parties to the agreement does not exceed 20 percent in any of the relevant markets affected by the agreement where the agreement is made between competing undertakings (i.e., undertakings which are actual or potential competitors on any of the markets concerned);
(ii) if the market share of each of the parties to the agreement does not exceed 25 percent in any of the relevant markets affected by the agreement, where the agreement is made between non-competing undertakings (i.e., undertakings which are neither actual nor potential competitors in any of the markets concerned); and
(iii) in the case of an agreement between undertakings where each undertaking is a small or medium sized enterprise (SME). Agreements between SMEs are rarely capable of distorting competition appreciably within the section 34 prohibition.[105]

However, agreements involving price-fixing, bid-rigging, market-sharing or output limitations are deemed always to have an appreciable

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101 Id, para 2.16. The first infringement decision delivered by CCS based on section 34 for price-fixing involved 16 coach operators and their trade association, Express Bus Agencies Association, which were fined a total of $S1.69 million; see also Cheong, M.F. (2012), 'Enforcement of Singapore's Competition Act 2004: Financial Penalties for Infringement of Section 34 Prohibition on Anti-Competitive Agreements', *World Competition*, pp. 301–324.

102 Id, para. 2.12.

103 Articles 2(4), 3(1), 3(2), 4 and 5 of Commission Regulation 2790/1990.

104 CCS (n 100), para. 2.18.

105 Id, para. 2.19.

adverse effect on competition, notwithstanding that the market shares of the parties are below the above threshold levels, even if the parties to such agreements are SMEs.[106]

5.3 Possession of Market Dominance

5.3.1 Malaysia

Section 10 of the MCA prohibits an enterprise from engaging in 'any conduct which amounts to an abuse of a dominant position in any market for goods or services'. It should be noted that this prohibition does not relate to being in a dominant position per se, but relates to the abuse of that dominant position. This is supported by section 10(4), which provides that:

> The fact that the market share of any enterprise is above or below any particular level shall not in itself be regarded as conclusive as to whether that enterprise occupies, or does not occupy, a dominant position in that market.

'Dominant position' is defined as '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'.[107]

Section 10(2) sets out the following non-exhaustive list of situations which may amount to an abuse of a dominant position:

(i) Imposing unfair purchase or selling price or other unfair trading condition;
(ii) Limiting or controlling production, market outlets or access, technical or technological development, or investment to the prejudice of consumers;
(iii) Refusing to supply to a particular enterprise or group or category of enterprise;
(iv) Applying different conditions to equivalent transactions with other trading parties;
(v) Concluding contracts subject to acceptance of supplementary conditions having no connection to the subject matter of the contract;
(vi) Any predatory behavior towards competitors; and

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106 Id, para. 2.20.
107 Section 2, MCA.

(vii) Buying up a scarce supply of intermediate goods or resources required by a competitor, without a reasonable commercial justification for doing so to meet its own needs.

Again, paragraphs 10(2)(a), (b), (d) and (e) are similar to the four instances of abuse of a dominant position provided in Article 102 of the TFEU. As with the provisions dealing with anti-competitive agreements (discussed above), certain aspects of section 10 require clarification, including the meaning of 'unfair' in paragraph 10(2)(a) and 'reasonable commercial justification' in paragraph 10(2)(g). The latter term appears again in section 10(3), which provides that an enterprise in a dominant position is not prohibited from 'taking any step which has reasonable commercial justification or represents a reasonable commercial response to the market entry or market conduct of a competitor'; however, the MCA leaves it unclear what amounts to a 'reasonable commercial justification' and how substantial it must be.

5.3.2 Singapore

Similar to the MCA, the SCA does not prohibit firms from possessing a dominant position per se; rather, section 47 of the SCA prohibits conduct which amounts to an abuse of a dominant position in any market in Singapore.[108] Section 47(3) defines 'dominant position' as a dominant position within Singapore or elsewhere, as the open nature of Singapore's economy renders it more vulnerable to anti-competitive activities of firms operating abroad.[109] Section 47(2) contains an illustrative list setting out the following types of prohibited conduct:

(i) Predatory behavior towards competitors;
(ii) Limiting production, markets or technical development to the prejudice of consumers;
(iii) Applying dissimilar conditions to equivalent transactions with other trading parties; and
(iv) Subjecting the conclusion of contracts to the acceptance of unconnected supplementary obligations.

Compared to the corresponding provision in the MCA, section 47(2) of the SCA appears narrower in scope as it does not contain a reference to

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[108] See Ong, Burton (2006), 'Exporting Article 82 EC to Singapore: Prospects and Challenges'. 2(2) *Comp L. Rev,* pp. 99–117.

[109] Lee, 'New Competition Legislation in Singapore', p. 22 (n 90).

the imposition of unfair purchase or selling prices but rather incorporates a narrower concept of 'predatory behaviour towards competitors'.[110] In this regard, it is also narrower than the corresponding provision of the UK Competition Act 1998. This deliberate departure means that the CCS will not have to undertake the politically unpalatable task of determining whether or not the prices imposed by a dominant undertaking are unfair.[111]

In determining whether certain conduct amounts to an abuse of a dominant position, the CCS employs a two-step test. It first determines whether an undertaking is dominant in a relevant market and, once dominance has been established, goes on to determine whether the undertaking concerned is abusing that dominant position.[112] In assessing the relevant market, the CCS takes into consideration two dimensions, namely the relevant product and the geographic market.[113] An undertaking will not be deemed dominant unless it has substantial market power; market power is determined by considering the extent to which there exist constraints on the undertaking's ability to profitably sustain prices above competitive levels or to restrict output or quality below competitive levels.[114] As a starting point, the CCS considers a market share above 60 percent as likely to indicate dominance, although it is careful to note that market share may not necessarily be a reliable guide to market power and that other relevant factors may have to be taken into consideration.[115] Notwithstanding this, it has been noted that the 60 percent market share threshold is significantly higher than that used in the EU as an indicator of dominance.[116]

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[110] Williams, 'The Lion City and the Fragrant Harbour: The Political Economy of Competition Policy in Singapore and Hong Kong Compared', p. 556 (n 63); Ong, 'The Competition Act 2004: A Legislative Landmark on Singapore's Legal Landscape', p. 182 (n 90).

[111] Ong, 'The Competition Act 2004: A Legislative Landmark on Singapore's Legal Landscape', p. 182 (n 90).

[112] CCS, 'CCS Guidelines on the Section 47 Prohibition', para. 3.1. Retrieved from http://www.ccs.gov.sg/content/dam/ccs/PDFs/CCSGuidelines/s47_Jul07FINAL.pdf (last accessed 2 April 2013).

[113] Id, para. 3.2.

[114] Id, para. 3.3.

[115] Id, paras. 3.7–3.8. Other factors include entry barriers, degree of innovation, product differentiation, and the price responsiveness of buyers and competitors.

[116] Williams, p. 556 (n 63).

5.4 Mergers and Acquisitions

5.4.1 Malaysia

Unlike the competition laws of most jurisdictions, including those of some ASEAN countries, merger control has not been included in the Malaysian competition regime. The Minister for Domestic Trade, Cooperatives and Consumerism, Datuk Seri Ismail Sabri Yaakob, has stated that the reason for this non-inclusion is to ensure a capital market and to encourage mergers and acquisitions to further strengthen the domestic economy and fuel competition for entities to enter the global market.[117] The Minister also stated that any anti-competitive behavior of large merged entities could be dealt with adequately by the provisions on abuse of dominance. Notwithstanding this, it should be noted that there is an important procedural distinction between merger control and control of dominance post-merger. An assessment of merger is undertaken *ex ante* (before the merger is implemented), while an assessment of dominance is carried out *ex post* (after the implementation); thus, the results of the assessment will differ, as the former is based on anticipated results and the latter on actual results.[118]

Mergers and acquisitions are currently regulated under the Companies Act 1965, the Capital Markets and Services Act 2007, the Malaysian Code of Takeovers and Mergers 2010 (with relevant Practice Notes) as well as the Foreign Investment Committee Guidelines, the Bursa Malaysia Listing Requirements and, where industry-specific approval is required for financial institutions and insurance companies, the Central Bank.

5.4.2 Singapore

Unlike its Malaysian counterpart – and unlike the UK Competition Act 1998 upon which it is based – the SCA contains substantive provisions dealing with merger control.[119] Section 54(1) prohibits mergers that have resulted, or may be expected to result, in a substantial lessening of competition within any market in Singapore for goods or services. The SCA

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[117] Ismail Sabri (8 July 2010), 'Competition Act Will Not Regulate Mergers, Acquisitions'. *Malaysian Digest.* Retrieved from http://www.malaysiandigest.com/news/5479-ismail-sabri-competition-act-will-not-regulate-mergers-acquisitions.html (last accessed 10 September 2011).

[118] Furse, M. (2006), *Competition Law of the EC and UK* (5th edn). Oxford: Oxford University Press, p. 337.

[119] See Shiau, D. and Egan, S. (2007), 'Singapore's Merger Control Regime: An Efficiency Focussed Procedure for an Efficiency Focussed Country'. 3 *Competition L Int'l,* pp. 61–7.

gives 'merger' a wide definition; this includes cases where the result of an acquisition by one undertaking of the assets of another undertaking is to place the first undertaking in a position to replace the second undertaking in the business in which it was engaged immediately before the acquisition[120] and where a joint venture is created to perform indefinitely all the functions of an autonomous economic entity.[121]

The CCS recognizes that not all mergers may give rise to competition issues, and that many mergers may actually be pro-competitive (as they positively enhance existing levels of rivalry between firms), competitively neutral, or, while lessening competition, may not do so substantially because of adequate post-merger competition constraints.[122] Thus, its guidelines state that only mergers that substantially lessen competition and have no net economic efficiencies will infringe the SCA.

In determining whether the merger concerned has resulted or may be expected to result in a substantial lessening of competition, the CCS will evaluate future prospects for competition with and without the merger,[123] focusing on the effects which the merger has or may be expected to have upon competition.[124] The CCS takes the general view that competition concerns are unlikely to arise in a merger situation unless the merged entity will have a market share of 40 percent or more, or the merged entity will have a market share of 20 percent to 40 percent and the combined market share of the three largest firms post-merger will be 70 percent or more.[125] Notwithstanding this, the CCS also recognizes that these thresholds are simply indicators of possible competition concerns, and that a substantial lessening of competition in a merger situation could be established at thresholds either above or below those stated.[126]

6. CONCLUSION

The competition laws of Malaysia and Singapore, although both broadly having European antitrust origins, show some differences, particularly in

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120 Section 54(2)(c), SCA.
121 Id, Section 54(5).
122 CCS, 'CCS Guidelines on the Substantive Assessment of Mergers', para. 4.3. Retrieved from http://www.ccs.gov.sg/content/dam/ccs/PDFs/CCSGuidelines/substantiveassess_Jul07FINAL.pdf (last accessed 2 April 2013).
123 Id, para. 4.6.
124 Id, para. 4.8.
125 Id, para. 5.15.
126 Id, para. 5.16.

the tests adopted for their application and the absence of merger provisions in the Malaysian legislation. Singapore had a head start, the CCS having been established more than five years ago. As at November 2011, the CCS had delivered three decisions on section 34 prohibition and one decision on section 47 dominance provision, while the Competition Appeal Board had delivered a single decision on appeal.[127] There have been five decisions pursuant to the notification procedure[128] and clearance of 21 notified merger cases.[129] The CCS has also issued comprehensive Guidelines[130] on key aspects of Singapore competition law, totaling 13 Guidelines. Having established itself, the CCS can now focus on its enforcement role to bring about a competitive business environment that is the primary aim of its competition legislation. This is in tandem with Singapore's focal aim. Given its small size and lack of natural resources, together with its strategic location between international gateways, Singapore is set on maintaining its competitiveness, having positioned itself as a center of international business and finance.[131]

The Malaysian Competition Commission, on the other hand, is newly constituted and has a formidable task ahead. Its immediate challenge will be setting in train the groundwork for the implementation of the substantive provisions of the new competition legislation and the necessary accompanying procedural processes. Issuing guidelines relevant to core competition concepts is a priority. A related implementation challenge is competition law advocacy among stakeholders, particularly the business community, who are the most affected by this new regime. The longer-term challenge will be the effective application of competition policy and law to local businesses, in view of the socio-political and economic framework of the country. As noted, although the NEP has been replaced by the National Development Policy and now the National Vision Policy, there is a widespread perception that the present policy remains dominated by NEP aims.

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[127] CCS, from http://www.ccs.gov.sg/content/ccs/en/Public-Register-and-Consultation/Public-Register/Anti-competitive-Agreements.html (last accessed 2 April 2013).

[128] CCS, from http://www.ccs.gov.sg/content/ccs/en/Public-Register-and-Consultation/Public-Register.html (last accessed 2 April 2013).

[129] CCS, from http://www.ccs.gov.sg/content/ccs/en/Public-Register-and-Consultation/Public-Register/Mergers-and-Acquisitions.html (last accessed 2 April 2013).

[130] CCS, from http://www.ccs.gov.sg/content/ccs/en/Legislation/CCS-Guidlines.html (last accessed 2 April 2013).

[131] See generally Asia Competitiveness Institute, 'Singapore Competitiveness Report 2009'. Retrieved from http://www.spp.nus.edu.sg/aci/docs/Singapore%20Competitiveness%20Report%202009.pdf (last accessed 2 April 2013).

However, despite the seeming diversity in competition policy and law in both countries, there are some commonalities. It is interesting to observe both Malaysia's and Singapore's experience in relation to GLCs, in particular the broadly similar conclusions and recommendations made in the two main reviews of GLCs carried out on both countries. The need to ensure that GLCs compete on a level playing field with other businesses has been recognized in the drafting of competition legislation in both countries. Another common factor, although seemingly trite, is that legislation in each case is seen as the vehicle to bring about competitive trading environments domestically as well as regionally. Malaysia and Singapore, being active members of the ASEAN community, face a common challenge of responding to the aim of ASEAN regional economic integration by 2015.[132] The continued development, implementation and enforcement of the competition policies and law of both countries will certainly play an important role in response to this wider challenge.

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[132] 'ASEAN Economic Community Blueprint'. Retrieved from http://www.asean.org/archive/5187–18.pdf (last accessed 2 April 2013).

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