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MARKET DEFINITION AND MARKET POWER AS TOOLS FOR THE ASSESSMENT OF COMPETITION

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ABSTRACT

Competition is a global phenomenon aimed at creating and ensuring competitiveness in the marketplace. Competition law involves the promotion or maintenance of a competitive market. This paper aims to introduce the concepts of market definition and market power. The paper starts with an analysis of competition law by examining the way competition is interpreted in various jurisdictions. It then discusses how market is defined and the concept of market power and dominant position. This paper will not, however, focus on the abuse of dominant position and other prohibitions found in competition law. In the analysis, a comparison is made between the provisions found in the Malaysian Competition Act of 2010, the Malaysian Communications and Multimedia Act of 1998, the Treaty for the Functioning of the European Union (TFEU) and the Australian Competition and Consumer Act of 2010.

Keywords: Competition law, market definition, market power, dominant position, relevant market

1. INTRODUCTION

Competition law promotes and maintains competition in the market. It regulates the behavioural and structural conduct of players in the market through anti-monopoly prohibitions, concerted conduct laws and merger laws. The global development of competition law has largely been confined within the geographical limits of a particular country. The regulation of competition in the marketplace can be traced back as early as the Roman Empire. Article 59(2) of the Constitution of Emperor Zeno of 483 AD prohibits price fixing and monopolisation in the sale of clothes, fish, sea-urchins and other goods, the punishment for which is perpetual exile. The foundation of modern competition law, however, has been identified as the US Sherman Act of 1890 wherein the word 'anti-trust' is used with respect to competition. It developed from attempts (made in the US) to demolish 'trusts', or anti-competitive cartels, of the main manufacturers of goods. The groups banded together to strengthen their hold on industries to

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ensure that high prices and amenable terms and conditions were retained. The US legislation is aimed at breaking such trusts, hence the use of the term 'anti-trust' (Furse, 1999).

Competition law in various jurisdictions has its own different objectives. The law can be for the maintenance of effective competition (OECD, 2003) as stated in the European Community (EC) competition rules (Roth, P. & Rose,V., 2001) or for the achievement of 'workable competition' (Furse, 1999) or for the inhibition of and breaking up of concentrations of economic power (Encyclopedia of Competition Law, 2000). For example, section 1A of the New Zealand Commerce Act 1984 states that the purpose of the Act is "to promote competition markets for the long-term benefit of consumers within New Zealand" whereas the objective of the United States of America (US) antitrust laws (The Sherman Antitrust Act 1890) is to preserve and promote competition and the free enterprise system. The objective of the Australian Competition and Consumer Act 2010 is to "enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection" (Section 2, Australian Competition and Consumer Act 2010). The aims of the European Union (EU) competition laws are for the establishment of "a common market and an economic and monetary union … a high degree of competitiveness and convergence of economic performance … (Article 2 of the Treaty for the Functioning of the European Union – TFEU), and a system that "ensure competition in the internal market is not distorted" (Article 3 of the TFEU). Although not articulated in the Treaty, the European competition law serves two aims: (i) the promotion of a competitive market economy and (ii) the prevention of barriers to integration of the single market. Competitive activities of business undertakings, driven by self-interest will assist economic development and therefore enhance the welfare of consumers (Roth, P. & Rose, V., 2008). The European Community's competition rules also have a distinct objective of 'a single market integration'. It is designed to abolish all national barriers to create a single Community market, so that there will be a free flowing of goods and services throughout Europe.

The United Nations Conference on Trade And Development (UNCTAD) states in Article 1 of the Model Law on Competition that the objective of competition law is to "control or eliminate restrictive agreements or arrangements among enterprises, or mergers and acquisitions or abuse of dominant positions of market power, which limit access to market or otherwise unduly restrain competition, adversely affecting domestic or international trade or economic development" (UNCTAD, 2000). In the European Union, competition law has two basic purposes: (i) the promotion of a competitive market economy and (ii) the prevention of barriers for the integration of a single market (Roth, P. & Rose, V., 2008). In *Europemballage and Continental Can v. Commission,* this provision *(Article 1)* has been stated to be a requirement so essential that without it numerous provisions of the Treaty would be pointless". In Malaysia, the importance and objective of competition is seen from the need to foster fair trade practices, which will contribute to greater efficiency and competitiveness in the economy. It was stated that the draft "Malaysian Fair Trade Practice Law (FTPL)" (as known at that time) aims to prevent anti-competitive behaviour such as collusion, price fixing and abuse of market power (KPDNKK, 2003). Now the Competition Act 2010 states that, "it is an Act to promote economic development by promoting and protecting the process of competition, thereby protecting the interests of consumers…".

In summary, the objectives or purposes of competition law is generally for the promotion or preservation of competition in the market. This is expressed through the different usage of words and terms applied by various laws in different jurisdictions. The promotion and preservation of competition is done through the elimination of conduct, which would suppress competition, and they include behaviours like collusion, cartel, price fixing, market allocation and abuse of market power.

However, there is an ongoing argument which suggests that in certain jurisdictions the object of competition law might be for the protection of competition and in some jurisdictions it might be for the protection of competitors. This means that there is a difference between protecting competition and protecting competitors. There is also a proposition that competition law should protect competition and consumers, and not protect competitors in the market (Fox, 2003). Although it is true that ultimately the welfare of consumers is the object of competition law or the central importance of competition law, courts' decisions have sometimes been inconsistent with this objective (Whish, 2009). The different objectives and purposes enunciated by various competition law is a good articulation of the different concerns placed by different countries. The concerns placed by a particular country can be on consumer protection, redistribution, protection of the competitors or even a single market imperative (Whish, 2009). Therefore, there is no conclusive objective or 'one box fits all' that concerns the objectives of competition law. The question of objective is subjective and fluid – it keeps developing and changing.

The purposes and objectives of competition law correspond closely to the many benefits of competition law. The success of competition has been associated with lower prices, better products, wider choices and greater efficiency (Whish, 2003). De-monopolisation, liberalisation and privatisation result in lower prices, better products and greater efficiency because players need to compete with each other to remain as a player in the market. Failure to be innovative and produce better products with lower prices will affect the player's position in the market. Therefore, the objects of competition are simple which includes the breaking-up of concentration, the prevention of anti-competitive practices or the prevention of abuse of market power. The benefits of competition are clear. With lower prices and better products, the market works better to the advantage of the consumer.

2. COMPETITION LAW

Competition law protects competition, and in an industry where growth is rapid, competition is vital to ensure the healthy growth of the industry. A system of competition law will likely deal with the following three issues:

1. The prevention of firms from entering into agreements which have the effect of restricting competition, either between themselves or between them and third parties (horizontal and vertical agreements);
2. The control of attempts made by monopolists or firms with market power to abuse their position and prevent new competition from emerging (abusive non-pricing and pricing principles) and the maintenance of workable competition in oligopolistic industries (tacit collusion, oligopoly and parallel behaviour);

3. The prevention or modification of mergers between independent undertakings, which may concentrate the market and diminish the competitive pressures within it (Taylor, 2006).

Competition has been defined according to its literal meaning within the economic theory (Gerla, 1996). Literally the word 'competition' means "the act of competing, struggle or rivalry" or "a contest for some prize, honour or advantage. "To compete" means "to outdo another for supremacy or profit." In the commercial context, "competition" refers to the striving for custom and business of people in the market place. The Oxford Dictionary of Law defines "competition law" as "the branch of law concerned with the regulation of anti-competitive practices, restrictive trade practices, abuses of dominant position or market power." These definitions suggest that competition is all about struggle or rivalry. The law that deals with competition has to address matters associated with the struggles and rivalries of firms or undertakings in business. It deals with anti-competitive practices or restrictive trade practices and abuses of dominant position or market power.

The various statutes that govern competition law do not provide a definition for the term competition (Gerla, 1996). However, though no definition was made, the term 'competition' is explained in terms of the purpose of the law, the processes and benefits involved. For example, the United Nations Conference on Trade And Development (UNCTAD) Model Law on Competition (United Nations, Series on Issues in Competition Law, 2004) does not define competition but rather states what 'competition law' seeks to do. The UNCTAD Model law on Competition states, "Competition law is a law that seeks to prevent distortions of competition resulting from anti-competitive arrangements between enterprises or from the abuse of market power by dominant firms (United Nations, UNCTAD Key Terms and Concepts, 2004)." The Treaty for the Functioning of the European Union (TFEU) Treaty does not define what competition is. On the other hand, it states that competition is a process and market definition as the key to the application of competition rules European Commission Notice, 1997). The United Kingdom (UK) Competition Act 1998 also does not provide a definition for the term competition. Nevertheless, the UK Competition Commission described competition as "a process of rivalry between firms … seeking to win customers' business over time (UK Competition Commission, 2003)." It can therefore be submitted that the term "competition" or "competition law" has been left without a definition in most competition law statutes. It can be inferred here that the definition of the word "competition" is not vital. What is more important is the process involved in assessing competition. In the US, the term 'competition' used to be defined by its dictionary meaning of 'rivalry among firms for business of consumers.' However in the 1970s this method of defining competition changed and a new definition of competition emerged. This new definition emerged from judges and commentators belonging to or influenced by the Chicago School which, defines competition as 'an allocation of resources in which economic welfare … is maximized.' However, it is also suggested that defining competition by its literal dictionary meaning is both sound in law and economics. Harry S. Gerla, (1996) stated,

> "Rivalry as competition is sound law because principles of statutory interpretation imply that competition means rivalry when that term or concept is utilized in the

> antitrust statutes. Rivalry as competition is sound economics because contemporary studies indicate that promoting rivalry will increase the internal efficiency of firms, spur innovation and help develop world-class competitive industries."

This development of defining competition in the economic sense also seems to have an influence in Australia.

In Australia, the Competition and Consumer Act 2010 does not give a definition of competition. However, it was held in *Re Queensland Co-op Milling Association Ltd.; Re Defiance Holdings Ltd*. that under the then Australian Trade Practices Act 1974, the term 'competition' is defined as that meaning similar to the meaning of competition in economic theory (Re Queensland Co-op Milling, 1976). Nevertheless, cases on this point did not further define what competition in economic theory is, rather provided the essential features of competition in the economic sense as:

1. Competition is a dynamic process and not a situation;
2. In a competitive market no individual player or group of players could set the price of its product or services, to choose its level of profits by producing less and charging more, or to exclude the entry of other competitors;
3. Barriers to entry in a competitive market are low or non-existent and the threat of entry of a competitor puts pressure on the firm or firms already in the market to keep ahead by developing new products, new technology, more efficient service or improved cost efficiency;
4. Whether or not a market is a competitive market depends largely on the structure of the market and the determining elements of market structure are:
    a. The number and size distribution of independent sellers, especially the degree of market concentration;
    b. The height of barriers to entry, which is the most important element of market structure in the determination of competition;
    c. The extent to which the products of the industry are characterised by extreme product differentiation and sales promotion;
    d. The character of 'vertical relationships' with customers and with suppliers and the extent of vertical integration; and
    e. The nature of any formal, stable and fundamental arrangements between firms which restricts their ability to function as independent entities.

The Australian Independent Committee of Inquiry for the National Competition Policy, (The Hilmer Committee) stated that,

> "Competition law or policy is not about the pursuit of competition for its own sake. Rather, it seeks to facilitate effective competition in the interest of economic

efficiency (Corones, 1994) while accommodating situations where competition does not achieve economic efficiency or conflicts with other social objectives" (The Hilmer Report, 1993).

There are two theories under the economic theory of competition. They are the price theory, which relates to the demand, supply and prices of goods and services, and the organisational theory, which relates to market structures, behaviour of firms and the effectiveness of the market in relation to consumer interest. Hence, what is the relationship between competition and the economic theory? A simple analogy can be drawn from the literal definition of the term "competition" and the economic theories mentioned above. As seen earlier, literally competition means, "to compete, struggle or rival". This, in relation to the price theory refers to competition of firms for the demand, supply, prices of goods and services. Under the organisational theory, firms fight to "out do" another firm in the market. This determines the market structure and behaviours of firms.

Not-surprisingly, the position in Malaysia is no difference. Neither the Competition Act 2010 nor the Communications and Multimedia Act 1998 defines the term 'competition'. Instead, reference as to what competition is has been made in the Guideline On Substantial Lessening Of Competition, (MCMC Guideline on Substantial Lessening of Competition, 2000) a guideline established under the Communications and Multimedia Act 1998. The Guideline states that competition is "the process of actual or potential rivalry between firms in a market. Section 7.3 (f) states that the level of competition in a market is simply the level of this rivalry". The Guideline lists down the factors in which the Malaysian Communications and Multimedia Commission (MCMC) will take into account as indicators of the level of competition in the industry. These factors are:

1. The number of independent suppliers – the more number of suppliers, the higher the level of competition;

2. The degree of market concentration – the lower the degree of market concentration is an indication of a relatively less market share of competitive rivals which will force the rivals to respond independently to price signals. Hence, higher level of competition;

3. The level of product or service differentiation – the less differentiation in the product or service enables the ease in substitution of these products or service, thus, higher level of competition;

4. The extent of vertical integration with firms in upstream and downstream markets – vertical integration can provide opportunities for an integrated firm to extend market power in one market into the market in question. This might include conduct which impacts on the independence of its rivals, for example by manipulating prices in intermediate markets or by imposing conditions in intermediate markets. This could lead to lower levels of rivalry and competition;

5. The nature and enforceability of any arrangements between firms in the market, which restrict their independence of action – these types of arrangements may reduce the level of rivalry and competition in the market;

6. The height of barriers to entry and exit. Entry or exit of potential rivals into the market should be low to indicate a higher level of competition.

Similarly, the Organisation for Economic Co-operation and Development (OECD) has provided similar indicators to those provided by the MCMC on the evaluation of competition in the telecommunications industry. The OECD divided the indicators into categories of market structure and supplier behaviour. Market structure includes market share and entry barrier. Market share indicators are measured by volume-based (call minutes, or number of subscribers), value-based (revenues) and capacity based (number of lines installed). Entry barrier (ease of entry) is measured by the number of firms in the market, the existence of regulatory restrictions (for example licensing limitation), control of essential facilities, vertical integration (the existence of vertically integrated firm and its price levels). Supplier behaviour indicators are calculated in the rivalry in price, anti-competitive behaviour, collusion, diversification and speed for innovative services (OECD, 2003).

After examining the various statutes that govern competition law, certain observations can be gathered. Firstly, the statutes on competition law do not define the term competition but rather competition law is referred to as a process and the process involves steps like defining market. In other words, they state what competition law seeks to do. These explanations of competition in the statutes mentioned earlier can therefore be broadly divided into the prevention of anti-competitive conduct and abuse of dominant position. Secondly, in defining competition, reference is made to its literal meaning and its meaning in the economic sense. This seems to be accepted in cases decided in the US and Australia. Thirdly, in a jurisdiction where regulating competition is more advanced, the lack of definition of competition does not seem to affect the workings of the law. Cases have developed to explain the definition. In Malaysia, the position is no different. The Competition Act 2010 and the Communications and Multimedia Act 1998 (CMA 1998) do not define the word "competition". Under the Communications and Multimedia Act 1998, the Guideline on Dominant Position states that competition is referred to as a process and the process here refers to the process of actual or potential rivalry between firms in the market and this rivalry is an indication of the level of competition in the market. It is also similar to the literal definition of competition as applied in the US. The application of literal definition would be easier for a country where competition law is still new and lacking of case law. To ensure consistency in the implementation of competition law in Malaysia, the Competition Act 2010 should apply the same approach in defining "competition". It is suggested here that the statutes regulating competition in Malaysia should not define the term "competition". The interpretation proposed above should only be provided for in documents or guidelines issued under the relevant laws and serve as a guide to ensure consistency.

3. MARKET DEFINITION AND MARKET POWER

3.1. Market Definition

Market definition is important in the assessment of anti-competitive conduct. Defining the term 'market' is the key to the application of competition rules. It is considered the "essential first-step" in the assessment of competition related behaviour. In order to assess the effects of an agreement or practice on competition and to assess whether there is a dominant position or

an abuse of that position or a player has market power to affect competition, it is essential to first define the meaning of relevant market.

Within the European Community the concept of relevant market plays a central and often critical role in the application of European competition law. The definition of relevant market is now featured in most decisions made under Articles 101 and 102 of the TFEU Treaty [*ex* Article 81 and 82 of the EC Treaty]. The case of *Europemballage Corp. And Continental Can Co. Inc. v. E.C. Commission* stated that the definition of the relevant market is a necessity. However, while the decisions of the courts illustrate the importance of determining the relevant market it did not however provide any guidance on defining such market. The definition of relevant market is merely an intermediate step, which allows the second stage assessment to include *inter alia* an analysis of market shares and concentration. Relevant market is therefore not defined but is concerned with the identification of product or service substitutes. It contains all possible substitutes of a product or service within a region that provide a significant competitive constraint on the supplier of the product or service (Bishop, S. & Walker, M. 1999).

The US Department of Justice (DoJ) and the US Federal Trade Commission's (FTC) approach towards relevant (DoJ and FTC, 1997) market which also has an influenced on the EC's Notice on the Definition of Relevant Market (European Commission Notice on the Definition of Relevant Market, 1997) is known as the Hypothetical Monopolistic Test or "SSNIP test (MCMC, 2004)" (small but significant non-transitory increase in price) or the "5% test" and it is increasingly being used throughout the world by competition authorities (Bishop, S. & Walker, M. 1999). The European Commission in its Notice on the Definition of Relevant Market for the Purposes of Community Competition Law, December 1997 in Paragraph 17 stated that,

> "market definition is a tool whose purpose is to identify in a systematic way the competitive constraints that the undertakings involved face. The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining their behaviour and of preventing them from behaving independently of any effective competitive pressure. It is from this perspective, that market shares may provide meaningful information for the purposes of assessing dominance or for the purposes of applying Article 85. The question to be answered is whether the parties' customers would switch to readily available substitutes or to suppliers located elsewhere in response to a hypothetical small (in the range of 5% to 10%) but permanent relative price increase in the products and areas being considered. If substitution were enough to make the price increase unprofitable because of the resulting loss of sales, additional substitutes and areas are included in the relevant market. This would be done until the set of products and geographical areas is such that small, permanent increases in relative prices would be profitable."

To illustrate the use of the SSNIP test around the world, Table 1 below shows countries applying the SSNIP test, authorities responsible for the application of the test and documents employing such test. (Bishop, S. & Walker, M. 1999).

Table 1: The use of the SSNIP test around the world

Country	Competition Authority	Related Document
Australia	Australian competition and Consumer Commission (ACCC)	Merger Guidelines: A Guide to the Commission's Administration of the Merger Provisions of the Trade Practices Act (1996)
Canada	Canadian Competition Bureau	Merger Enforcement Guidelines (1997)
Malaysia	Malaysian Communications and Multimedia Commission (MCMC)	Report On A Public Inquiry: Assessment Of Dominance In Communications Markets
Europe	European Commission Market for the Purposes of	Notice on the Definition of Relevant Community Competition Law (1997)
New Zealand	New Zealand Competition Authority	Business Acquisition Guidelines (1996)
United Kingdom	Office of Fair Trading	Guide to the Provisions of the Competition Act: Market Definition (1998)
United Kingdom	Office of Telecommunications (OFTEL)	Effective Competition Review (1998)
United States	Department of Justice & Federal Trade Commission	Horizontal Merger Guidelines (1992 amended 1997)

In Malaysia, section 2 of the Competition Act 2010 defines 'market ' as "a market in Malaysia or in any part of Malaysia, and when used in relation to any goods or services, includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services." It is however also useful to refer to the Communications and Multimedia Act 1998. The Communications and Multimedia Act 1998 has issued a guideline on dominant position in a communications market and this guideline states the application of the economic concept of "substitutability" for the determination of the boundaries of a market.

The economic concept of substitutability is a concept that is relevant in defining a market. The Organisation for Economic Co-operation and Development (OECD) has stated in its working paper on telecommunications and information services policies (OECD, 2003) that without a clear definition of service and geographic area, the regulators may draw an erroneous conclusion in its assessment of competition in the telecommunications market. The OECD has also observed that many national regulatory authority (NRA) has adopted the definition of "market" in line with those developed under competition rules and by competition authorities, which refer to the consumption and supply side substitution (OECD, 2003).

> In Malaysia, section 7.2(g) of the Guideline on Substantial Lessening of Competition (SLC) states that "substitutability" has both a demand-side and a supply-side factors and under these factors the considerations used are the ease with which the purchasers or the suppliers are able to replace particular goods or services currently used or produced by them with other goods or services as substitutes. Purchasers and suppliers who are able to make these substitutions are, for that reason, operating in the same market. The guideline also affirmed that "substitutability" relates to three aspects of market definition:
>
> 1. Product dimension – which referred to the requirement on the identification of the bundle of goods or services supplied by a firm and by actual or potential sources of alternative supply;
> 2. Geographic dimension – which referred to the identification of the area(s) over which a firm and its rivals are able to compete; and
> 3. Time dimension - which referred to the identification of the period over which substitution possibilities should be considered.

In the EU, two of these aspects of market definition relates to the meaning of "relevant market". The European Commission's (EC) approach to defining "relevant market" involves two aspects of market, i.e. the relevant product market and the relevant geographic market. The relevant product market is defined as comprising all products (or services) considered by consumers to be interchangeable or substitutable, having regard to their characteristics, price and intended use (European Commission Notice, 1997). The European Commission further stresses on the reliance on "demand-side substitutability" in assessing the relevant product market (European Commission Notice, 1997). In *Commission Decision of 4 October 1995 on the conditions imposed on the second operator of GSM radiotelephony services in Italy, Omnitel Pronto Italia (Omnitel),* (Commission Decision, 1995) the Commission decided its market definition on the fact that fixed and mobile telephony belonged to different product markets as there was no demand-substitution between them. Evidence showed that customers do not generally cancel a fixed telephone subscription when they buy a mobile telephone. The Commission in its assessment of relevant market stated in paragraph 10 of the report that,

> According to the case-law of the Court of Justice, for a product to be regarded as forming a market which is sufficiently differentiated from other markets, it must be possible for it to be singled out by such special features distinguishing it from other products that it is only to a limited extent interchangeable with them and is only exposed to their competition in a way that is hardly perceptible. Clearly there is very little interchangeability between mobile radiotelephony and telephony using a fixed network: users taking out a subscription for a card phone or portable telephone do not normally cancel their previous subscription for telephone installed at their home or workplace. Therefore, mobile radiotelephony is indeed a new, additional service, not a substitute for traditional telephony.

The relevant geographic market on the other hand, is the area in which the parties to the agreement are involved in the supply of products (or services) in which "the conditions of

competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because conditions of competition are appreciably different in these areas" (Roth, P. & Rose, V. 2001). In other words, a geographic market is an area in which a business enters into competition with each other, and the objective conditions of competition applying to the products or services in question are similar for all traders (EC Competition Guidelines, 1991).

For example in the electronic communications sector, the geographical scope of relevant product market has traditionally been determined by referring to two main criteria, i.e. (i) the area covered by a network, and (ii) the existence of legal or other regulatory instruments that could prevent the cross-border provision of services or networks (European Commission Significant Market Power Guidelines). However, with liberalisation and convergence, the relevant geographic market in respect of the electronic communications market has expanded and is no longer confined to nation or regional market. Nonetheless, broadcasting services are still characterised by unharmonised national or regional restrictions on the cross border provisions of services, for example, ownership restrictions, local content obligations, cultural and language differences continues to segregate the markets.

In Australia, the meaning of market is established by the use of the terms "substitutable" or "competitive" goods or services. Section 4E of the Competition and Consumer Act 2010 defines market as "a market in Australia and, when used in relation to any goods or services, includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services." Market has been described as "an area of potential close competition in particular goods and/or services and their substitutes and the field of actual or potential rivalry between firms Re Queensland Co-op Milling Association Ltd.; Re Defiance Holdings Ltd., 1976). In considering substitutability, four dimensions of market is examined:

1. Product – defining of relevant product (goods or services);
2. Function – defining of relevant functional level (manufacturing, wholesale or retail);
3. Geographic – defining of relevant geographical scope;
4. Time – determining the appropriate time (long-run, short-run) (Re Tooth, 1979).

It can be concluded here that defining a market is essential and should be done before the assessment of any conduct (with regard to anti-competitive conduct) made by the licensee is carried out. In other words, this is the "essential first step" in the process of assessment of anti-competitive conduct.

Based on the above it can be concluded that in defining "market" the concept of substitutability is applied. The relevant market is determined by applying the concept of substitutability to different dimensions of market. In Malaysia three dimensions (product, geographic and time) are observed. In the EU, only two dimensions are essential, i.e. product and geographic. However, Australia stresses on four dimensions i.e. product, function, geographic and time. Malaysia's approach under the Communications and Multimedia Act 1998 stands in between these two jurisdictions.

Malaysia is also influenced by the US in its application of the SSNIP test. The application of the SSNIP test in the Malaysian can be seen in the regulation of competition under the

communications industry as is stated in the Malaysian Communications and Multimedia Commission's report on the assessment of dominance in the communications market (MCMC Public Enquiry Report, 2004). The Malaysian Communications and Multimedia Commission stated that the SSNIP test would be used to identify relevant communications market. In section 2.2.1(a) the report states,

> The SSNIP test is an iterative procedure which starts by looking at the narrowest possible market and asks whether a hypothetical monopolist over that market could increase its profit by implementing a "Small but Significant Non-transitory Increase in Price – SSNIP above the competitive level. The threshold that is often used is a 5% to 10 % price increase. If the hypothetical monopolist is prevented from increasing by a readily available alternative or substitute, this product or service is included in the relevant market. The test is then applied again to the wider market including the substitutes identified. The test is repeated until a set or products or services is reached where such a price increase would indeed be profitable. The smallest set of substitutes thus established is then defined as the relevant market.

Thus, market definition is an important "tool" for the assessment of competitive impact of an agreement, practice, market conduct or concentration. This is established in most jurisdictions including Malaysia. Defining market is the first step to the assessment of any competitive impact of an agreement, conduct or concentration. In defining market the concept of substitutability is applied widely and in reaching all possible substitutes the SSNIP tests is used. This seemed to be the accepted order of application.

In addition to 'market definition' the existence of 'market power' is also a factor to be considered in the assessment of competition.

3.2. Market Power

Market power is important because a player with market power has the ability to affect competition in a relevant market. The economic concept of market power is central to the economic assessment of competition. Market power is defined as the ability of a firm or group of firms to raise price, through the restriction of output, above the level that would prevail under competitive conditions and thereby enjoy increased profits from the action. It contains three important elements:

1. The exercise of market power requires firms to restrict output;
2. The increase in price must lead to an increase in profitability; and
3. Market power is exercised relative to the benchmark of the competitive price level (Bishop, S. & Walker, M.,. 1999).

Indicators of market power include the number of competing suppliers of the same products, their market shares and market concentration, the availability of substitutes and product differentiation, the existence of barriers to entry and potential competition, and the nature of the oligopolistic interaction between firms (Bishop, S. & Walker, M., 1999).

In the assessment of competition, the determination of market power is the second step after market definition. The UK Competition Commission suggested that 'market power' may be described as 'the ability to raise price consistently and profitably above competitive levels (or where a buyer has market power, the ability to obtain prices lower than their competitive levels)'. Companies with market power have the tendency or ability to act in an anti-competitive manner due to their position in the relevant market. Having market power per se is not illegal but what competition law seeks to control is using the market power to control the market, for example, the ability to raise price in the relevant market or the ability to act independently of the other competitors in the same market. Most competition law addresses the issue of misuse of market power. In some countries the concept of dominant position is used, a concept closely related to market power but with a higher threshold. An undertaking with market power does not necessarily have dominant position. The Australian Competition and Consumer Act 2010 for example, addresses misuse of market under section 46 whereby firms are not allowed to misuse its market power. The TFEU Treaty prohibits the abuse of dominant position in Article 102 of the Treaty. Malaysia also applies the concept of dominance in its Competition Act 2010 and the Communications and Multimedia Act 1998.

3.3. Dominant Position

The concept of "dominance" or "dominant position" literally means control. "Dominant" is an adjective that refers to ruling or governing. To dominate is to exercise control over or to govern. "Dominance" as it is widely known is a concept, which frequently occurs when a player (or a licensee) has monopoly in a particular market. The European Court of Justice (ECJ) in *United Brands v. Commission* mentioned "dominant position" in the context of Article 102 of the TFEU Treaty as "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers" (United Brands v. Commission, 1978). This means that an undertaking will have dominant position if the undertaking has the ability to do two things: (i) the ability to prevent effective competition and (ii) the ability to behave independently of its competitors. The ability to prevent effective competition can be seen from the ability of the undertaking to prevent the entry of new competitor into the market and the ability to act independently is seen from the ability of the undertaking to raise prices for goods or services. The long-term effect of these two behaviour is the creation of monopoly, which destroys competition.

Dominant position relates to the possession of sufficient market share that enables an undertaking to act independently without taking account of the likely behaviour of competitors (Lloyd, I. & Mellor, D., 2003). Dominant position has been defined or characterised as:

1. A position where a firm or group of firms would be in a position to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers and such a position would usually arise where the firm or group of firms possess a large share of the supply in a particular market (European Commission Notice, 1997).

2. "… a position of economic strength enjoyed by an undertaking which enables it to hinder the maintenance of effective competition on the relevant market by allowing it to behave to an appreciable extent independently of its competitors and customers and ultimately of consumers (United Brands, 1978)."

3. "… the ability to undertake conduct to a significant extent independently of its competitive rivals and its customers and the pressures they would exert on the firm in a competitive market. This independence generally manifests itself as the ability to independently fix prices, although it extends to the ability to fix levels of output or the quality of output with similar disregard for the responses of rivals and customers in the market (MCMC Guideline on Dominant Position, 2000)."

4. "A licensee is in a dominant position when, in the opinion of the authority, it is able to act without significant competitive restraints from its competitors and customers. In considering whether a licensee is dominant, the authority will take into account the market share of the licensee, its power to make pricing and other decisions, the height of barriers to entry, the degree of product differentiation, and sales promotion, and other such relevant matters which are or may be contained in guidelines to be issued by the Authority (MCMC, 2000)."

5. "The standard test of whether a firm is dominant is whether it has the power to behave to an appreciable extent independently of its competitors and customers in terms of pricing and other decisions (MCMC, 2000)."

The definitions of dominant position from the different authorities above conclude two things on dominant position. First, dominant position is associated with the ability to act independently, and second, large market share is an indication for dominant position.

The word "control" is also relevant to the concept of dominance and always referred to when discussing "dominance". "Control" can be used to indicate actual control of an entity, which refers to formal relationship between entities. A licensee who has control over another could also have dominance of that other but not necessarily vice versa (i.e. one who is dominant does not necessarily have control over the other). A dominant player could not have control over another player unless there is some formal relationship. In *Trade Practices Commission v. Australian Meat Holdings,* (1998) it was stated that, "… dominance, unlike control, is not primarily concerned with the formal relationship between entities, but rather with their conduct towards each other with particular market environment. If the size or strength of a particular entity is such that, in practice, other entities are unable or unwilling actively to compete with it in a particular market, that entity is dominant in that market." Being in a dominant position therefore, does not necessarily involve the formal structure of the market.

What then amounts to a "dominant position?" Section 10 of the Malaysian Competition Act 2010 provides that "an enterprise is prohibited from engaging, whether independently or collectively, in any conduct which amount to an abuse of a *dominant position* in any market for goods or services." Since the Competition Act 2010 is still new, enforceable only in January 2012, the application of the concept of dominance under this Act has yet to be seen. However, under the Communications and Multimedia Act 1998, the application of the dominance can be

seen under sections 137, 138 and 139. Section 137 relates to the determination of a dominant licensee by the Malaysian Communications and Multimedia Commission (MCMC). It is a precondition to the MCMC's power under section 139 of the CMA 1998. In 2004, MCMC issued Commission Determination No. 2 of 2004 on licensee found to be in a dominant position. It is however to be noted that Determination No. 2 of 2004 is only in force for a period of two years and no further Determination has been made to this effect. The other relevant section on dominant position is section 138 which provides that the MCMC may publish guidelines to clarify the meaning of "dominant position". Under section 6 of the Guideline on Dominant Position, the MCMC proposed to adopt a three-step approach in determining whether or not a licensee is in a dominant position in a communications market. This three-step approach involves:

1. Defining the context;
2. Defining the market; and
3. Assessment of dominant position (MCMC, 2000).

The three step-approaches are explained in Table 2 below.

Table 2: Proposed Analytical Framework for Determining Dominant Position

	Define the Context	Define the Market	Assessment of Dominant Position
Objective	Ensure that the Commission has appropriate powers to act.	Define the boundaries of the relevant communications market.	Determine whether the licensee is in a dominant position in the relevant market.
Process	Identify the circumstances, which initiated the assessment.	Identify all demand substitutes for the product or service.	Assess the behavioural features of the market as set out in the guideline for evidence of dominance.
	Identify the licensee most likely to be in a dominant position.	Identify all supply substitutes for the product or service.	Assess structural features of the market as set out in the guideline for evidence of dominance.
	Identify the key stakeholders in the process.	Determine the relevant product market.	Make final assessment of whether the licensee is in a dominant position
	Make initial assessment of the likelihood that the licensee in a dominant position.	Determine the relevant geographical market.	
		Determine the relevant temporal market.	

The first step of the three-step approaches is designed to ensure the MCMC has appropriate powers to act and apply the process in meeting the objective. The second step deals with market definition. Market definition is important to provide a framework within which the abuse of dominant position may be analysed and for that, the MCMC adopts the Hypothetical Monopolistic Test or SSNIP test to define 'market'. The third step involves the assessment of dominance. The use of market shares threshold is important as an indicator of dominance (but not a determining factor of dominance) (MCMC, 2004). It is the MCMC's view that a licensee in the upper market share threshold (of which the percentage has not been finalised) will have a presumption of a dominant position. However, a licensee under the lower market share threshold (of 25%) will unlikely be in a dominant position (MCMC, 2004). Nevertheless, it has been clarified by the MCMC that a licensee with a market share threshold of more than 25% is most likely to be in a dominant position but this figure is not conclusive. The approach that the Commission takes is not to tie itself based on pre-determined thresholds, and the reason behind it is to have flexibility to administer and decide on a case-by-case basis. Other factors that would be taken into account in determining dominance include:

1. Barriers to entry;
2. The ability of the smaller firms to expand;
3. Buyer power on the part of the customers of the dominant firm;
4. Vertical integration; and
5. The closeness of substitutes outside and inside the market (MCMC, 2004).

This approach seems to be in line with Section 10(4) of the Malaysian Competition Act 2010 which states 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.

The process of determining the existence of dominance in a firm under Article 102 of the TFEU Treaty, as applied in the EU also involves three stages:

1. Defining the market: define the relevant product market and the relevant geographical market of which must comprised at least a substantial part of the common market;
2. Analysing the market share: establish the market share of the undertaking in question on the relevant market defined above;
3. Analysis of competitive constraints: assess the significance of the market share and whether actual or potential competitors may affect this position (Roth, 2001).

Market share is important in the assessment of dominant position. The court in *AKZO Chemie BV v. EC Commission* held that with exceptional circumstances very large market share is evidence of the existence of a dominant position. In this case the market share is 50%.

In the EU, Article 102 of the TFEU Treaty [ex 82 of the EC Treaty] prohibits the abuse of dominant position. It provides that, "any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States. Such abuse may, in particular, consist in:

(a) Directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) Limiting production, markets or technical development to the prejudice of consumers;

(c) Applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) Making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

There are three elements needed to establish a breach under Article 102:

1. A dominant position in the common market or substantial part thereof;
2. An abuse of that dominant position;
3. An actual or potential effect on trade between Member States.

In contrast, Australia applies the concept of "misuse of market power". Section 46 of the Australian Competition and Consumer Act 2010 provides that,

> "(1) A corporation that has a substantial degree of power in a market shall not take advantage of that power for the purpose of:
>
> (a) Eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;
> (b) Preventing the entry of a person into that or any other market; or
> (c) Deterring or preventing a person from engaging in competitive conduct in that or any other market."

Though no longer applying the dominance test, dominance is still relevant in analysing market power threshold under section 46. This can be supported by section 46(3) which provides that,

> (3) In determining for the purpose of this section the degree of power that a body corporate or bodies corporate has or have in a market, the Court shall have regard to the extent to which the conduct of the body corporate or of any of those bodies corporate in that market is constrained by the conduct of:
>
> (a) Competitors, or potential competitors, of the body corporate or of any of those bodies corporate in that market; or
> (b) Persons to whom or from whom the body corporate or any of those bodies corporate supplies or acquires goods or services in that market.

Subsection (3) of section 46 bears a close resemblance to the test of market power held in *United Brands v. EC Commission* and *Hoffman-La Roche v. EC Commission*. This has been confirmed in *TPC v. Pioneer (Qld) Pty Ltd*. where the Full Federal Court adopted the approach of the European Court of Justice in assessing market power. A corporation with a substantial degree of market power is prohibited from taking advantage of that power for defined anti-competitive purposes. Market power is the antithesis of competition in that a

firm, which possesses market power, is not constrained by the pressures of competition and can act accordingly in the strategic marketing decisions it makes (Re Queensland Co-op Milling Association Ltd.; Re Defiance Holdings Ltd., 1976) The Australian Competition and Consumer Act 2010 does not define the term “market power”. The term “market power of a corporation” is defined in the Halsbury Laws of Australia as a process, which contains the consideration of a number of factors. These factors are:

1. The existence of barriers to entry;
2. The ability to set the price of the relevant product or service;
3. Whether the corporation is vertically integrated (although this does not necessarily mean that the firm has market power);
4. The conduct of the corporation, for example exclusive dealing, tying arrangements, predatory pricing, refusal to deal; and
5. Market share of the corporation (this is not by itself an indication of market power) (Halsbury Laws of Australia, 1995).

Though Australia uses the market power threshold and not dominance, these two concepts cannot be separated. Market power is used to determine dominance. However, dominance has a higher degree of market power (Explanatory Memorandum of the Trade Practices Revision Bill, 1986).

4. CONCLUSION

Most statutes regulating competition do not have a specific definition of the term competition. In the US, competition is defined by its literal and economic sense. Although the definition could be couched in different manners, the most important is the understanding of the operation of competition law and its significance to the market. Thus, competition law is seen as a process which prevents anti-competitive behaviour and abuse of dominant position, and as a process it involves the assessment of concepts like ‘market definition’ and ‘dominant position’ which is further used as a tool for the evaluation of competition.

‘Market definition’ is a tool for the assessment of competition; ‘market power’ is the ability of a firm in a particular market to engage in an anti-competitive behaviour. ‘Dominant position’ on the other hand covers two things: (i) the market share of an undertaking and (ii) its ability to act independently from other competitors.

It can be concluded that though many competition statutes fall short of defining the term “competition”, the assessment of competition is not affected. The assessment of competition is done by first defining the term ‘market’ which is considered as key and an essential first step towards the assessment of competition. In defining the term ‘market’, the SSNIP test is commonly used in many jurisdictions including Malaysia. ‘Market definition’ is also an important tool to provide a framework within which a ‘dominant position’ is determined. Lastly, ‘market’ and ‘dominant position’ are two situations relevant to competition. Business undertakings compete with each other in a market and there will be situations where undertakings possess market power or dominant position. Having market power or dominant position per se is not prohibited. It is the abuse of such position that competition law prohibits.

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