
Asian Journal of Law and Policy

Vol 3 No 3 (December 2023)

eISSN: 2785-8979

Analysis of Malaysian Competition Law and Policies in the E-Commerce Platforms Market

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ABSTRACT

The current competition law framework in Malaysia is found in the Competition Act 2010 and Competition Commission Act 2010, supplemented by various Malaysia Competition Commission Guidelines. An analysis of the e-commerce platforms market would demonstrate the creation of complex conglomerate ecosystems surrounding a few incumbent platforms that are resistant to conventional monocentric competition laws and policies focusing on price. Consumer complaints suggest the presence of unfair, exclusionary, and exploitative practices that affect various parties in the multi-sided e-commerce platforms that depend on the platform's infrastructure. This research seeks to identify the e-commerce platforms market ecosystem in Malaysia and analyse the regulatory framework governing market competition and safeguarding consumer protection in the e-commerce platforms market in Malaysia with references to notable competition cases and trending consumer complaints. Crucially, it aims to compare the Malaysian competition laws and policies against the Digital Markets Act and the Digital Services Act of the European Union in the context of the digital market, and employs doctrinal research, wherein the primary data is obtained through systematic content analysis of relevant reports and articles. Malaysian competition laws and policies have potential weaknesses that can be strengthened to safeguard consumer protection in the e-commerce platforms market.

Keywords: Competition Law; E-Commerce platforms; European Union; Malaysia



© (2023) 3 Asian Journal of Law and Policy 137–158

<https://doi.org/10.33093/ajlp.2023.10>

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Published by MMU Press. URL: <https://journals.mmupress.com/ajlp>



Received: 30 Jul 2023, **Accepted:** 21 Nov 2023, **Published:** 25 Dec 2023

1. Introduction

The emergence of e-commerce began over four decades ago when the world was introduced to early technology such as electronic data interchange and the World Wide Web.¹ Since then, markets have been considerably reshaped with new strategies and business models, giving rise to titanic e-commerce and online platforms like Amazon.² Powered by the internet and technological innovations to keep up with the new norm during the unprecedented COVID-19 pandemic, the development of e-commerce rises exponentially with the changing trends of consumer preferences and more people carrying out daily tasks utilizing digital devices.³ In Southeast Asia, Malaysia is one of the world's top markets for online shopping⁴ and Southeast Asia is projected to exceed \$240 billion by 2025.⁵ Using China's advancements in e-commerce as a reference point for how Southeast Asia's e-commerce landscape may evolve, e-commerce in Southeast Asia is projected to triple at a compound growth rate of 22% and reach around \$230 billion in gross merchandise volume.⁶ While e-commerce has brought huge gains for businesses and consumers, the strong network externalities and other digital market characteristics of the digital market make the competitive environment significantly different from conventional markets. The unique combination of digital market characteristics in the platforms market tends to cause the market to tip, leading to a market concentration where a few large incumbent firms control intricate ecosystems surrounding platforms. Over time, there has risen a global concern about the deficiency of competition laws and policies safeguarding consumer welfare and regulating healthy competition in the digital market.

In the European Union ('EU'), the European Commission as a pioneer had in November 2022 implemented the Digital Markets Act and the Digital Services Act to regulate how big tech like Amazon affects the competitive dynamic and consumer welfare in e-commerce.⁷

¹ 'The History of Ecommerce: How Did It All Begin?' (*Miva*, 23 Nov 2020) <<https://blog.miva.com/the-history-of-ecommerce-how-did-it-all-begin>>.

² Ben Kazinik, 'The History of eCommerce: How it All Started' (*Mayple*, 11 May 2023) <<https://www.mayple.com/blog/history-of-ecommerce>>.

³ Sal Arora and others, 'E-Commerce Is Entering a New Phase in Southeast Asia. Are Logistics Players Prepared?' (*McKinsey & Company*, 21 December 2022) <<https://www.mckinsey.com/industries/travel-logistics-and-infrastructure/our-insights/e-commerce-is-entering-a-new-phase-in-southeast-asia-are-logistics-players-prepared>>.

⁴ Fukunari Kimura and Lurong Chen, 'E-Commerce as Asia's New Growth Engine' (*Economic Research Institute for ASEAN and East Asia Policy Brief*, October 2017) <<https://www.eria.org/ERIA-PB-2017-02.pdf>>.

⁵ Association of Southeast Asian Nations, 'ASEAN E-Commerce' <<https://asean.org/our-communities/economic-community/asean-e-commerce/>>.

⁶ Arora (n 3).

⁷ Tom Wheeler, 'The UK and EU Establish Positions as Regulatory First Movers While the US Watches' (*The Brookings Institution*, 8 March 2023) <<https://www.brookings.edu/articles/the-uk-and-eu-establish-positions-as-regulatory-first-movers-while-the-us-watches/>>; European Commission, 'The Digital Services Act Package' (9

Both the Digital Markets Act and the Digital Services Act will determine how large online platforms or gatekeepers operate to ensure healthy competition and better consumer choice to address increasing complaints of users' exposure to illegal goods, content, or services on platforms.⁸ The European Commission recently on 6 September 2023 designated 6 gatekeepers in the EU under the Digital Markets Act, namely, Alphabet (eg Google, YouTube, Waze), Amazon, Apple, ByteDance (eg TikTok), Meta (eg Facebook, Instagram, WhatsApp, Threads) and Microsoft.

In Malaysia, the legislation governing the competition law framework is found in the Competition Act 2010 and the Competition Commission Act 2010, supplemented by the Malaysia Competition Commission Guidelines, handbooks, brochures, and FAQs on its official website.⁹ At first glance, the Malaysian competition law and policies read together with other consumer protection legislation seem may be sufficient to address challenges arising in the unique competitive dynamic of the e-commerce platforms market. However, further scrutiny of the e-commerce platforms market and the competition laws and policies show a gap in the context of consumer protection in the e-commerce platforms market. An analysis of the e-commerce platforms market would demonstrate the creation of complex conglomerate ecosystems surrounding a few incumbent platforms that are resistant to conventional monocentric competition laws and policies focusing on price. Simultaneously, rising consumer complaints in the e-commerce sector indicate the presence of unfair, exclusionary, and exploitative practices that affect various parties in the multi-sided e-commerce platforms that depend on the platform's infrastructure.

This research seeks to analyse the Malaysian competition law framework and compare the same against the law reforms in the European Union via the recent enactment of the Digital Markets Act and the Digital Services Act. In section 2, the e-commerce platforms market in Malaysia will be identified. In section 3, the competition law framework regulating the e-commerce platforms market in Malaysia will be analysed. section 4 will analyse the Digital Markets Act and Digital Services Act implemented in the European Union. In section 5, potential weaknesses in the Malaysian competition law and policies will be identified and suggestions will be given to address the potential weakness in the context of the e-commerce platforms market.

2. E-commerce Platforms Market in Malaysia

Carlo Maria Rossotto and others, and Paolo Spagnoletti, Andrea Resca, and Gwanhoo Lee defined a digital platform as technological software that serves as a foundation upon which

February 2023) <<https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package>>.

⁸ European Commission, 'Europe Fit for the Digital Age: New Online Rules for Platforms' <https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment/europe-fit-digital-age-new-online-rules-platforms_en>.

⁹ Malaysia Competition Commission, 'Handbook and Brochure' <<https://www.mycc.gov.my/handbook-and-brochure>>.

complementary participating entities in the e-commerce platforms market can be developed.¹⁰ E-commerce platforms are online channels utilising digital technology for marketplaces where the sale and purchase of goods and services between different users occur in the multi-faceted digital market. Lancieri and Sakowski defined a digital platform non-technically as an intermediary connecting two or more groups of users in the multi-faceted digital market.¹¹ This is consistent with how Marsden and Podszun defined platforms as being intermediaries to several market sides.¹² Unlike conventional businesses, e-commerce platforms utilising the internet to expand and grow their business require significantly low or near-zero marginal costs for the same production volume of products or services.¹³ Besides, e-commerce platforms benefited from high data returns wherein the more users are on the e-commerce platforms, the more valuable data that the platform collects. The collection of data is considered a high return on investment because it can be utilised to provide e-commerce platforms with better insights into consumers' behavioural biases and preferences. It can also be monetised for profits, ie in the ad-supported business model.¹⁴ As Lancieri and Sakowski pointed out, the characteristics of the digital markets individually are not distinguishable from the traditional markets, rather, it is the combination of the characteristics that are usually found in isolation in traditional markets.¹⁵ This is consistent with the findings of the United Kingdom Digital Competition Expert Panel Report 'Unlocking Digital Competition' (Furman Report 2019) and the Stigler Committee on Digital Platform's Sub-committee on Market Structure and Antitrust Report (Stigler Report 2019) finding that digital platforms share a dynamic combination of characteristics which makes its competition dynamic distinguishable from conventional brick-and-mortar businesses.¹⁶

¹⁰ Carlo Maria Rossotto and others, 'Digital Platforms: A Literature Review and Policy Implications for Development' (2018) 19(1-2) *Competition and Regulation in Network Industries* 93 <<https://doi.org/10.1177/1783591718809485>>; Paolo Spagnoletti, Andrea Resca and Gwanhoo Lee, 'A Design Theory for Digital Platforms Supporting Online Communities: A Multiple Case Study' (2015) 30 *Journal of Information Technology* 364 <<https://link.springer.com/article/10.1057/jit.2014.37>>.

¹¹ Filippo Lancieri and Patricia Morita Sakowski, 'Competition in Digital Markets: A Review of Expert Reports' (2021) 26(1) *Stanford Journal of Law, Business & Finance* 65, 106 <<https://www.econstor.eu/bitstream/10419/262705/1/wp303.pdf>>.

¹² Philip Marsden and Rupperecht Podszun, 'Restoring Balance to Digital Competition: Sensible Rules, Effective Enforcement' (*Konrad Adenauer Foundation*, 2020) 12 <<https://www.kas.de/documents/252038/7995358/Restoring+Balance+to+Digital+Competition+%E2%80%93+Sensible+Rules%2C+Effective+Enforcement.pdf/7cb5ab1a-a5c2-54f0-3dcd-db6ef7fd9c78?version=1.0&t=1601365173489>>.

¹³ UK Digital Competition Expert Panel, *Unlocking Digital Competition: Report of the Digital Competition Expert Panel* (13 March 2019) 13 <<https://www.gov.uk/government/publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel>>.

¹⁴ Stigler Center for the Study of the Economy and the State, *Stigler Committee on Digital Platforms: Final Report* (The University of Chicago Booth School of Business, 2019) <<https://publicknowledge.org/policy/stigler-committee-on-digital-platforms-final-report/>>.

¹⁵ Lancieri and Sakowski (n 11) 106.

¹⁶ UK Digital Competition Expert Panel (n 13) 150; *Stigler Committee on Digital Platforms* (n 14) 24–26.

Unlike the US and the EU which are dominated by Amazon and eBay, the largest players in Southeast Asia are online e-commerce platforms selling a diverse range of goods and services like the Amazon business model, ie marketplaces.¹⁷ Mainly, the local alternatives are foreign enterprises such as Shopee, Lazada, Grab, and TikTok Shop. In Malaysia, the top online shopping channels in the second quarter of 2022 are Shopee and Lazada which lead with 26.38 million and 18.39 million engagements by visits respectively, followed by Lelong, Zalora, and GoShop.¹⁸ Both Shopee and Lazada are marketplaces, while Zalora and Lelong belong to a niche market. Lelong is in the niche market of C2C second-hand goods and based on the monthly traffic for online shopping, Zalora is in the niche market of retail clothing, and GoShop is an e-commerce arm of a leading multi-platform media and entertainment company, Astro Malaysia Holdings Berhad that reaches out to end-customers other ways via Astro's other platforms like TV marketing (ie Go Shop 24/7 live shopping channel) and shopping over the phone.¹⁹ Despite these competitors, the ranking of Shopee and Lazada in the top two spots remains consistent with the study of monthly traffic by Marketing Signal Lab in March 2022 showing Lazada with 31.29 million monthly traffic and Shopee with 10.88 million monthly traffic respectively.²⁰ Based on the foregoing, it is noted the different players have different users based on the different markets depending on the geographical location. Regardless of the variables, Shopee remains consistent in the ranking in Malaysia²¹ and Southeast Asia²² thus indicating the rapid progression of e-commerce platforms considering that Shopee was only launched in 2015. Shopee's parent company Sea Limited is also raking in USD 7,463,173 of revenue in e-commerce and other services in 2022 which is almost double that of 2021 thus constituting 60% of Sea Limited's total revenue in 2022.²³ Strangely, albeit the rising threat of social media platforms, TikTok and e-hailing platforms, Grab as intermediaries for commercial transactions in the e-commerce sector similar to Shopee and Lazada, were left out from the list of firms assessed in these surveys. Further, Astro Malaysia Holdings Bhd recently announced on 2 October 2023 that the home shopping platform Astro Go Shop will cease operations from 11 October 2023 due to a 'challenging overall economic landscape and the changing consumer shopping behaviour'.²⁴

¹⁷ 'Online Marketplaces in Southeast Asia: A Unique Region for Ecommerce' (*Webretailer*, 30 January 2023) <<https://www.webretailer.com/marketplaces-worldwide/online-marketplaces-southeast-asia/>>.

¹⁸ Shruti Tiwari, 'Top 10 eCommerce Sites in Malaysia!' (*CedCommerce*, 26 October 2022) <<https://cedcommerce.com/blog/top-e-commerce-sites-malaysia/>>.

¹⁹ Elaine Boey, 'E-Commerce: Astro's Go Shop Meets Soaring Demand' *The Edge Markets* (17 August 2020) <<https://www.theedgemarkets.com/article/ecommerce-astros-go-shop-meets-soaring-demand>>.

²⁰ 'Top 20 E-Commerce Site in Malaysia 2023' (*Marketing Signal Lab*, 7 March 2022) <<https://marketingsignallab.com/top-e-commerce-sites-in-malaysia/>>.

²¹ Tiwari (n 18).

²² Kimura and Chen (n 4).

²³ Sea Limited, 'FY 2022 Annual Report' (2022) 92 <<https://cdn.sea.com/webmain/static/resource/seagroup/pressrelease/2022AR/6XNmuGkDrCpmdEwH15M/2023-04-06%20-%20Form%202020-F.pdf>>.

The digital market characteristics of digital platforms are starkly distinguishable from traditional businesses. Amongst others, the unprecedented strong network effects seem unrivalled by the scale of success which digital platforms have achieved in the past decade. As platforms offer better-personalised products and services, the platform becomes more attractive, and the number of users on the platform increases. Simultaneously, the more users are on the platform, the higher the value of the platform is. In this regard, Zhu and Iansiti pointed out, over time, the rapid rise of incumbent firms weakens entrants and rival firms that do not have a similar installed network base to begin with, or which could be acquired quickly and cost-effectively.²⁵ When large incumbent platforms become incontestable, the markets may become impossible to enter by meritorious rivals and nascent entrants.²⁶ This is a cause for concern considering that the e-commerce ecosystem affects various participating entities including sellers, advertisers, payment gateway services providers, and delivery and logistics partners, all of whom rely on the platform's infrastructure in the e-commerce sector.²⁷ Another key characteristic of digital platforms is their high economies of scale and scope which is further reinforced with a high accumulation of data that is incomparable with rivals and nascent entrants. Platforms' complex ecosystem have multiple sides and various categories of users. With the collection of high-quality user data (large population and high dimensional data) from one side of the market, dominant platforms can enter and expand into new or adjacent markets and offer new and better-personalised products and services. In time, the data collected will lead to better insights into user behavioural biases and preferences which platforms can use to provide a richer experience for users and different categories of users including potential users with low marginal costs,²⁸ platforms can also amongst others, offer their customers complementary services or products at a higher quality in adjacent markets²⁹ which allows dominant e-commerce platforms to enter new or adjacent markets as the new potential dominant rival.³⁰ While the meritorious rise to dominance of incumbent firms is lauded, studies have also shown that dominant firms have often abused their dominant position with unfair and deceptive practices causing various harms to the market and end-user consumers. Some strategies to increase consumer lock-in effects are also employed such as

²⁴ Anis Hazim, 'Home Shopping Astro Go Shop to Cease Operations After Eight Years' *The Edge Malaysia* (2 October 2023) <<https://theedgemaalaysia.com/node/684554>>.

²⁵ Feng Zhu and Marco Iansiti, 'Dynamics of Platform Competition: Exploring the Role of Installed Base, Platform Quality and Consumer Expectations' (November 2007) Harvard Business School Working Paper Series 08-031, 2 <https://www.hbs.edu/ris/Publication%20Files/08-031_18af2edb-02de-45e6-b0ee-e10de3c99ef7.pdf>.

²⁶ Joseph Farrell and Paul Klemperer, 'Coordination and Lock-In: Competition With Switching Costs and Network Effects' In M Armstrong and R Porter (eds), *Handbook of Industrial Organization*, vol 3 (Elsevier 2007) 1967, 89 <[https://doi.org/10.1016/S1573-448X\(06\)03031-7](https://doi.org/10.1016/S1573-448X(06)03031-7)>.

²⁷ Organisation for Economic Co-operation and Development, 'Rethinking Antitrust Tools for Multi-Sided Platforms 2018' (6 April 2018) 57 <<http://www.oecd.org/competition/rethinking-antitrust-tools-for-multi-sided-platforms.htm>>.

²⁸ Farrell and Klemperer (n 26).

²⁹ *Stigler Committee on Digital Platforms* (n 14) 13–14.

³⁰ Lancieri and Sakowski (n 11).

discounts, cashback schemes, reward programmes, free shipping, voucher rebate, and subscription-based benefits.³¹ Further, the massive amount of data harvested by large online platforms including zero-priced e-commerce platforms from users in exchange for goods and services raised concerns that it has implications for consumer protection such as the restriction of consumer choice and right to redress, breach of consumer privacy, cybersecurity issues and the degradation of the quality of the goods and services offered by platforms to consumers. The National Consumer Complaints Centre reported that the most complaints it received were regarding the e-commerce sector.³² This is consistent with the survey by the Malaysian Communications and Multimedia Commission in 2018.³³

3. Competition Law Framework Regulating E-Commerce Platforms in Malaysia

Currently, the legislation governing the competition law framework in Malaysia is found in the Competition Act 2010 and the Competition Commission Act 2010. To ease the understanding and interpretation of the Competition Act 2010 and the Competition Commission Act 2010, Malaysia Competition Commission has supplemented this legislation with handbooks, guidelines, brochures, and FAQs on its official website.³⁴ As the Competition Commission Act 2010 was enacted to provide for the establishment of the statutory body, Malaysia Competition Commission including the scope of Malaysia Competition Commission's functions and powers under Section 16 and Section 17 Competition Commission Act 2010 respectively, the analysis of the competition law framework in Malaysia under this part will mainly focus on the provisions in the Competition Act 2010. The Competition Act 2010 which first came into force in 2012 was enacted to promote economic development, protect competition, and protect consumers' interests. Within the context of the Act, 'consumer' is defined as the 'direct or indirect user of goods or services supplied by businesses in the course of business and includes business users that use the goods or services supplied to it by other businesses such as a wholesaler, a retailer, and a final consumer'. Crucially, in terms of conduct, the Competition Act 2010 does not intend to penalise the position of dominance but rather the abuse of the dominant position to disrupt healthy competition in the relevant markets.³⁵ In summary, the Competition Act 2010 is divided into 6 parts, namely Part 1 (Preliminary), Part II (Anti-

³¹ Competition and Consumer Commission of Singapore, *E-commerce Platforms Market Study: Findings and Recommendations* (10 September 2020) <<https://www.cccs.gov.sg/-/media/custom/cccs/files/media-and-publications/publications/market-studies/cccs-ecommerce-platforms-market-study-report.ashx>>.

³² Suzanna Pillay, 'Online Shoppers in a Web of Scammers' *New Straits Times* (4 June 2017) <<https://www.nst.com.my/news/exclusive/2017/06/245502/online-shoppers-web-scammers>>.

³³ Malaysian Communications and Multimedia Commission, 'Chapter 6: Quality Assurance and Consumer Protection' in 2019 Industry Performance Report (2020) <https://www.mcmc.gov.my/ipr2019/downloads/MCMC_IPR_2019_Full.pdf>.

³⁴ Malaysia Competition Commission, 'Handbook and Brochure' (n 9).

³⁵ Malaysian Parliamentary Debates, House of Representatives, Thirteenth Parliament, Second Session, First Meeting, 26 March 2014, p 137, Dato' Sri Hasan bin Malek <http://lib.perdana.org.my/PLF/Parliament_Hansard/2014/Dewan%20Rakyat/DR-26032014.pdf>.

Competitive Practices), Part III (Investigation and Enforcement), Part IV (Decision by the Commission), Part V (Competition Appeal Tribunal) and Part VI (General). The only provisions in the Competition Act 2010 that are relevant to understanding the laws regulating and prohibiting anti-competitive practices are Part II, Chapter 1 (Anti-competitive agreement) and Chapter 2 (Abuse of dominant position).³⁶

Under Chapter 1, section 4(1) Competition Act 2010 is clear in that it prohibits anti-competitive agreements whether it occurs horizontally or vertically. In the context of this Act, 'horizontal' means an agreement between businesses operating at the same level of the supply and distribution chain while 'vertical' means an agreement between businesses operating at different levels of the supply and distribution chain.³⁷ With specific regards to horizontal agreements, Subject to the instances where businesses may be relieved of liabilities under section 5, section 4(2) Competition Act 2010 provides that these agreements are deemed to have the object of significantly preventing, restricting, or distorting competition if its aim falls under any one of the instances set out in section 4(2)(a)–(d) Competition Act 2010.

Under Chapter 2, section 10 prohibits conduct in abuse of dominant position whether independently or collectively if it was done without reasonable commercial justification or if it was not a reasonable commercial response to the entry or conduct of competitors in the relevant market.³⁸ In the context of Competition Act 2010, a firm has dominant power if it has significant market power to adjust price, output, or trading terms, without much constraints from its competitors.³⁹ Further, section 10(2) Competition Act 2010 provides that an abuse of dominant position is amongst others when a dominant firm does any of the instances, which is non-exhaustive, under section 10(2)(a)–(g) Competition Act 2010, set out below:

- (i) To directly or indirectly impose unfair price or trading conditions on any supplier or customer;
- (ii) To the prejudice of consumers, limit or control production, market outlets/access, technical/technological development, or investment;
- (iii) To refuse supply;
- (iv) To apply different conditions for the same transactions to different parties to the extent which discourages entry, expansion, or investment, forces out or seriously damage existing competitors, or harm market competition;
- (v) To force other contracting parties to accept supplementary conditions although they may not necessarily connect to the subject matter of the contract;

³⁶ Competition Act 2010.

³⁷ Competition Act 2010, s 2.

³⁸ Competition Act 2010, ss 10(1) and (3).

³⁹ Competition Act 2010, s 2.

- (vi) To behave predatorily against competitors; or
- (vii) To buy a scarce supply of goods that competitors require when there is no reasonable commercial justification to do so to meet its own needs.

Based on the foregoing, it is evident that the Competition Act 2010, in its present form contains 2 main provisions relating to laws against anti-competitive agreements or vertical restraints and also laws against abuse of dominant position.

Under Chapter 1, section 4(1) Competition Act 2010 is clear in that it prohibits anti-competitive agreements whether it occurs horizontally or vertically. In the context of this Act, 'horizontal' means an agreement between businesses operating at the same level of the supply and distribution chain while 'vertical' means an agreement between businesses operating at different levels of the supply and distribution chain.⁴⁰ With specific regards to horizontal agreements, Subject to the instances where businesses may be relieved of liabilities under section 5, section 4(2) Competition Act 2010 provides that these agreements are deemed to have the object of significantly preventing, restricting, or distorting competition if its aim falls under any one of the instances set out in section 4(2)(a) – (d) Competition Act 2010.

According to Malaysia Competition Commission's Guidelines on Chapter 2 Prohibition (Abuse of Dominant Position), in assessing whether there has been a breach of Section 10 Competition Act 2010, Malaysia Competition Commission has a two-stage test.⁴¹ Firstly, to determine whether the business complaint is dominant in the relevant market, Malaysia Competition Commission will first define the relevant market following Malaysia Competition Commission's Guidelines on Market Definition⁴² and secondly, to analyse the competition within that market. The definition of the relevant market in the context of Section 10 Competition Act 2010 is necessary as it will facilitate Malaysia Competition Commission in determining the turnover of the business for the relevant product market and geographical market affected by the infringement and the penalty amount.⁴³ In this regard, Section 2 Competition Act 2010 defines 'market' as a 'market for goods or services, including markets for other goods or services that are substitutable for or otherwise competitive with the first-mentioned goods or services in the product market and the geographic market'. Malaysia Competition Commission's Guidelines on Market Definition in this regard explain that defining the relevant market means identifying the close substitutes for the products under investigation, whether on demand or supply side.⁴⁴ For this purpose, Malaysia Competition Commission adopts the Hypothetical Monopolist Test

⁴⁰ Competition Act 2010, s 2.

⁴¹ Malaysia Competition Commission, *Guidelines on Chapter 2 Prohibition: Abuse of Dominant Position* (January 2022) para 1.2 <<https://www.mycc.gov.my/sites/default/files/pdf/newsroom/Chapter%20%20prohibition.pdf>>.

⁴² Malaysia Competition Commission, *Guidelines on Chapter 2 Prohibition* (n 41) para 2.1.

⁴³ *Competition Commission v Dagang Net Technologies Sdn Bhd* [2015] Malaysia Competition Commission Case No 700-2/2/003/2015, para 172 <https://www.mycc.gov.my/sites/default/files/pdf/decision/Decision%20against%20Dagang%20Net%20Technologies%20Sdn%20Bhd%20pursuant%20to%20Section%2040_%20Dated%2028%20February%202021_Public%20Version.pdf>.

(‘HMT’) which is whether a hypothetical monopolist could profitably sustain a price for the smallest group of products that it controls above competitive price (a small but significant increase in price (‘SSNIP’)) at a price range of 5-10%.⁴⁵ In defining the market based on demand-side substitutability in the product market, if the hypothetical monopolist could sustainably maintain an SSNIP for the focal product, then the focal product market is the product itself. If not, this would mean that there are other products that consumers would switch to purchase the next closest substitute product within twelve months if the price of the focal products was increased. In the circumstances, Malaysia Competition Commission will add the next closest substitutes and repeat the test until a point where a hypothetical monopolist could sustainably maintain an SSNIP for the focal products and the next closest substitutes. According to paragraph 2.14 of Malaysia Competition Commission Guidelines on Market Definition, Malaysia Competition Commission will only consider supply-side substitutability if entry is reasonably likely to occur. The same HMT is also adopted by Malaysia Competition Commission when determining the geographic market, albeit with a different variable, ie the extent of the focal area to determine if consumers would switch to purchase products outside the focal area and if suppliers will cease supplying to the focal area. Another distinguishing factor is that when defining the geographic market for products, another consideration is also given to transportation costs which negatively affects the size of the geographic market.

Upon defining the market, Malaysia Competition Commission’s next step involves an analysis of the competition within the relevant market, including determining competitors’ market shares, entry barriers, and how competition is conducted.⁴⁶ Malaysia Competition Commission will determine whether the business being complained of has a dominant position and has abused the dominant position via exploitative conduct (maintaining price above competitive levels for some time without competitive constraints to drive equally efficient competitors out of the market) or exclusionary conduct (dictating the level of competition in the market). Determining whether the business complained of has a dominant position depends on a range of competitive constraints and competitive conditions of the relevant market, including existing competitors, potential competitors, buyer power, and governmental regulation.⁴⁷ While section 10(4) Competition Act 2010 states that market shares will not by itself be regarded as conclusive evidence of dominance, this competitive constraint imposed by existing competitors in the relevant market will be taken into consideration by Malaysia Competition Commission in determining whether there is a dominant position. In this regard, the *Guidelines on Chapter 2 Prohibition: Abuse of Dominant Position* provides that a market share above 60% is indicative of dominance. This is a relevant consideration because businesses with significant market share could have obtained the position by either successfully meeting consumer needs better than their

⁴⁴ Malaysia Competition Commission, *Guidelines on Market Definition* (January 2022) paras 1.3–1.4 <<https://www.mycc.gov.my/sites/default/files/pdf/newsroom/market%20definition.pdf>>.

⁴⁵ Malaysia Competition Commission, *Guidelines on Market Definition* (n 44) paras 2.1–2.9.

⁴⁶ Malaysia Competition Commission, *Guidelines on Market Definition* (n 44) paras 1.7.

⁴⁷ Malaysia Competition Commission, *Guidelines on Chapter 2 Prohibition* (n 41) paras 1.5–2.24.

competitors or by anti-competitive conduct even if dominance was first achieved by efficiency, businesses may still act anti-competitively now or in the future.

Finally, Malaysia Competition Commission will determine whether there was an abuse of dominance via either exploitative abuse or exclusionary abuse (such as predatory pricing, price discrimination, exclusive dealing, loyalty rebates, and discounts, refusal to supply and sharing of essential facilities, buying up scarce intermediate goods or resources, as well as bundling and tying) in the market or separate markets.⁴⁸ With regards to exploitative conduct, dominant firms that believe that there will likely be no new entrants will set excessively high prices to exploit consumers.⁴⁹ Exclusionary conduct, these are conducts that have the effect of preventing efficient competitive processes in the market and thereby decreasing incentives for businesses to compete on merits. In assessing whether the exclusionary conduct complained of is an abuse of the dominant position, Malaysia Competition Commission adopts a two-stage test, firstly, whether the conduct adversely affects consumers and secondly, whether the conduct excludes equally efficient competitors. Notwithstanding this, businesses that are being complained of may still argue that they have not abused their dominant position by proving that the conduct was with reasonable commercial justification or that the conduct was a reasonable commercial response to the entry or conduct of competitors in the relevant market.⁵⁰ For example, a business being complained of exclusionary conduct via loyalty rebates and discounts may argue that the scheme was offered to reduce the costs of supplying to a particular category of customers.⁵¹ The onus to prove in this regard lies on the business complained of or the business which claims so.⁵²

4. Consumer Protection Regulatory Issue in the Competitive Dynamic of E-Commerce Sector

The interconnected link between ensuring healthy market competition and consumer welfare has been widely acknowledged and adopted in many jurisdictions such as the US, Australia, Singapore, and the EU. While the legislative intent of Competition Act 2010 in Malaysia shares the common end goal with consumer protection laws and regulations to protect the interests of consumers, enforcement of competition laws and policies in the context of the digital market still lacks consumer protection considerations as compared to other jurisdictions. To illustrate this, the preamble to Competition Act 2010 is cited below:

An Act to promote economic development by promoting and protecting the process of competition, thereby protecting the interests of consumers and to provide for matters connected therewith. Whereas the process of competition

⁴⁸ Malaysia Competition Commission, *Guidelines on Chapter 2 Prohibition* (n 41) paras 4.1–4.2.

⁴⁹ Malaysia Competition Commission, *Guidelines on Chapter 2 Prohibition* (n 41) paras 3.2–3.4.

⁵⁰ Competition Act 2010, s 10(3).

⁵¹ Malaysia Competition Commission, *Guidelines on Chapter 2 Prohibition* (n 41) paras 5.1–5.2.

⁵² Malaysia Competition Commission, *Guidelines on Chapter 2 Prohibition* (n 41) paras 5.1–5.2.

encourages efficiency, innovation, and entrepreneurship which promotes competitive prices, improvement in the quality of products and services, and wider choices for consumers. And whereas in order to achieve these benefits, it is the purpose of this legislation to prohibit anti-competitive conduct.

There are problems arising from the multisided e-commerce platforms market ecosystem that challenges the conventional monocentric competition law framework focusing on price in Malaysia. The presence of externalities in the digital market requires the need to take into consideration other factors in competition analysis to ensure accountability, fairness, and transparency. The lack of transparency and platform accountability in the collection, processing, and monetisation of data by e-commerce platforms has severe implications for consumer protection. With further scrutiny of the competition law framework read together with other consumer protection legislation in the e-commerce platforms market, there is a gap in the context of consumer protection in the e-commerce platforms market.

With regards to the consumer protection regulatory framework in the e-commerce sector in Malaysia, while it is noted that there are existing laws and policies protecting consumers such as the Consumer Protection Act 1999, and Consumer Protection (Electronic Trade Transactions) Regulations 2012, there are also identified weakness in the regulatory framework. Amongst others, there are no specific laws or policies governing online platforms including social media commerce business model, and hybrid business model. There is also a lack of clarity on platform accountability and obligations towards consumers in the unique competitive dynamic of the e-commerce sector. As a result, consumers relying on platforms' infrastructure have limited choices and redress wherein amongst others, they are not allowed to select a preferred delivery partner as the choice of a delivery partner is either already exclusively limited to preferred delivery partners incumbent platforms or limited to the incumbent platform's owned delivery services.

5. Notable Cases

As of today, Malaysia Competition Commission has published only one proposed decision under section 36 Competition Act 2010 for an abuse of dominant position under section 10 Competition Act 2010 in the case of *Grab* (2019).⁵³ Malaysia Competition Commission however did not proceed to make a finding of infringement under section 40 Competition Act 2010 or non-infringement under section 40 Competition Act 2010 pending the disposal of Grab's judicial review application filed against the proposed decision. Other than that, Malaysia Competition Commission has made two Findings of Infringements under section 40 Competition Act 2010 for an abuse of dominant position under section 10 Competition

⁵³ Malaysia Competition Commission, 'Malaysia Competition Commission Proposes to Fine Grab RM86 Million for Abusive Practices' (3 October 2019), <<https://www.mycc.gov.my/sites/default/files/pdf/decision/Proposed%20Decision%20against%20GRAB%20%28Eng%29.pdf>>.

Act 2010 in the case against *Dagang Net Technologies* (2015)⁵⁴ and *MyEG* (2016).⁵⁵ The case against *Dagang Net* (2015) and *MyEG* (2016) have gone on to be adjudged at the Competition Appeal Tribunal and thereafter the civil courts for judicial review. Recently, on 6 July 2023, the High Court quashed Malaysia Competition Commission's proposed decision and the presiding Judge Datuk Wan Ahmad Farid Wan Salleh held that Malaysia Competition Commission's decision breached natural justice and is tainted with procedural impropriety.⁵⁶ Hereinafter, the case of *Grab* and *Dagang Net* will be briefly analysed.

5.1 Grab (2019)

In the case of *Grab*, Malaysia Competition Commission has identified that Grab Inc., GrabCar Sdn Bhd and MyTeksi Sdn Bhd (Grab) has collectively infringed section 10 Competition Act 2010 for an abuse of its dominant position by imposing restrictive clauses on its drivers to prevent drivers from promoting and providing advertising services for Grabs' competitors in the relevant market of e-hailing and transit media advertising market. This was following the highly publicised Grab-Uber merger in 2018. As a result of Grab's abusive conduct, the competition in the e-hailing market is distorted and existing or new players in the market have larger entry barriers to overcome before they can attain the ability to compete on the same level playing field as Grab. The finding of infringement of section 10 Competition Act 2010 against Grab resulted in Malaysia Competition Commission's issuance of its proposed decision under section 36 Competition Act 2010 to amongst others, impose a financial penalty against Grab in the sum of RM86,772,943.76 and a daily penalty of RM15,000 per day from the date of service of Malaysia Competition Commission's proposed decision⁵⁷. This proposed decision was challenged by Grab in the civil courts for judicial review. Recently, in July 2023, the Malaysian High Court quashed Malaysia Competition Commission's proposed decision for being tainted with procedural impropriety and a breach of natural justice.⁵⁸ In the same decision, the High Court ordered Malaysia Competition Commission to pay legal costs of RM20,000.00 to Grab. Malaysia Competition Commission has since filed an appeal against the High Court decision to the Court of Appeal.

Further scrutiny of Malaysia Competition Commission Proposed Decision dated 23 September 2019 as exhibited in Grab's Affidavit in Reply affirmed on 31 May 2021 in the

⁵⁴ *Dagang Net Technologies* (n 43).

⁵⁵ *Competition Commission v MyEG Services Berhad* [2016] Malaysia Competition Commission Case No 700-1/1/2/2015 <<https://www.myc.com.my/sites/default/files/pdf/decision/Section-40-Notice-of-Finding-of-an-Infringement-by-My-Services-Berhad.pdf>>.

⁵⁶ Rahmat Khairulrijal, 'High Court Overturns RM86 Million Fine Against Grab Over Anti-Competitive Practices' *New Straits Times* (6 July 2023) <<https://www.nst.com.my/news/crime-courts/2023/07/928024/high-court-overturns-rm86-million-fine-against-grab-over-anti>>.

⁵⁷ Malaysia Competition Commission, 'Proposes to Fine Grab' (n 53).

⁵⁸ Ho Kit Yen, 'Court Quashes Competition Commission's RM86.8mil Fine on Grab' *Free Malaysia Today* (6 July 2023) <<https://www.freemalaysiatoday.com/category/nation/2023/07/06/court-quashes-rm86-8mil-fine-on-grab-over-uber-merger/>>.

Judicial Review Application No WA-25-594-12/2019 between Grab and Malaysia Competition Commission suggests the following:

- (i) Malaysia Competition Commission employed amongst others the theory of harm to assess whether Grab's conduct is anti-competitive beyond the measurement of output reduction or price increase to include restriction to the freedom or ability to compete or economic freedom, although it does not reduce consumer welfare in the market.
- (ii) Malaysia Competition Commission found Grab's imposition of restrictive clauses on its drivers has the likely effect of amongst others raising the barriers to entry to its potential competitors and barriers to expand to its current competitors in the e-hailing platform market and related market.
- (iii) Malaysia Competition Commission noted the two-sidedness of the Grab platform in that two different markets rely on Grab as an intermediary to facilitate transactions between them. There also exist indirect externalities across a group of consumers and non-neutrality of the price structure as it affects the level of transactions.
- (iv) In identifying abuse of its dominant position, Malaysia Competition Commission found that it is not legally necessary to establish Grab's dominance in the market of provision of transit media advertising services through commercial and e-hailing vehicles in Malaysia as Grab has leveraged its market power in the former to the latter market.
- (v) In identifying market share, Malaysia Competition Commission found that the market share for Grab had exceeded 60% before the acquisition and post-acquisition, has a market share exceeding 90%.

5.2 Dagang Net Technologies (2015)

In the case of *Dagang Net Technologies*, Malaysia Competition Commission has published a proposed decision finding that Dagang Net Technologies has infringed Section 10 (2)(c) Competition Act 2010 in two ways, namely the imposition of an exclusive clause in the partner agreements entered with software providers between 2015–2016 from providing similar services for the upcoming uCustoms system and the subsequent on-provision of electronic mailboxes to end users of the Customs Information System, Sistem Maklumat Kastam (SMK). Being the sole concession holder in the NSW-SMK⁵⁹ market, Malaysia Competition Commission finds that Dagang Net Technologies has a dominant position since it is undisputed that it holds 100% of market shares as the monopoly of the relevant market where there are no other enterprises that could partake as a service provider in the relevant

⁵⁹ NSW-SMK is an abbreviation for National Single Window-Sistem Maklumat Kastam, it is an electronic-based ecosystem that enables Malaysian Customs related documents and transactions to be done electronically via a single point of entry: *Dagang Net Technologies* (n 43) para 21.

market unless with further appointment by the Royal Malaysian Customs (RMC).⁶⁰ In its assessment of the exclusivity clause imposed by Dagang Net Technologies, Malaysia Competition Commission also reproduced the contended exclusivity clause on page 97 paragraph 238 of its proposed finding as below:

4. Exclusivity

During the Contract Period or extended tenure, the Channel Partner shall not enter into any agreements, contracts, or arrangements with any other party or service provider to be appointed by the Royal Customs of Malaysia under the uCustoms Service Provider Program and providing similar services to the end user.

From an assessment of the above exclusivity clause, Malaysia Competition Commission finds there to be actual and potential adverse effects and consequences to the relevant market because it effectively means that other service providers that may be appointed by the RMC would not be able to compete on merits with Dagang Net Technologies.⁶¹ This would also mean that Dagang Net Technologies' upcoming competitor, Edaran Trade will be at a competitive disadvantage when entering the uCustoms market. Further, Malaysia Competition Commission also finds there to be no reasonable commercial justification for the imposition of an exclusivity clause as there is other evidence showing amongst others that there was an intention on the part of Dagang Net Technologies to suppress competition to prevent losing revenue following the entry of new competitors. As such, Malaysia Competition Commission concluded that the exclusivity clause imposed was an infringement of section 10 Competition Act 2010.

With regards to the allegation that Dagang Net Technologies has refused to supply electronic mailboxes to end users of SMK, Malaysia Competition Commission concluded that the conduct does not constitute an abuse of dominant position due to the insignificant effect on the relevant market.⁶² As Malaysia Competition Commission treats section 10 Competition Act 2010 as an effects-based prohibition, the fact that there is evidence showing that Dagang Net Technologies' competitors such as Rank Alpha and Wynet were still able to transact within the NSW-SMK system and sustain revenue from maintenance fees shows that Dagang Net Technologies' conduct in this regard did not cause significant harm to competition in the market for trade facilitation services. Further in this regard, Malaysia Competition Commission also observed that end users that were unable to choose Rank Alpha and/or Wynet were still able to choose Rank Alpha and Wynet. As a result, Malaysia Competition Commission decided on 16 February 2021 that there was an infringement of section 10 Competition Act 2010 about the imposition of the exclusivity clause. To this end, Malaysia Competition Commission directed several orders to be undertaken by Dagang Net Technologies according to section 40(1) Competition Act 2010 and a financial penalty

⁶⁰ *Dagang Net Technologies* (n 43) para 190.

⁶¹ *Dagang Net Technologies* (n 43) paras 238–261.

⁶² *Dagang Net Technologies* (n 43) paras 280–299.

amounting to RM12,878,094.97 to be paid by Dagang Net Technologies according to section 40(4) Competition Act 2010.⁶³

6. Analysis of the Digital Markets Act and Digital Services Act of the European Union

Competitive issues arising in the online platforms market in the European Union are not new and have been assessed and studied for the past decade. Recently in November 2022, the Digital Markets Act and the Digital Services Act entered into force.⁶⁴ Both the Digital Markets Act and the Digital Services Act will determine how large online platforms or gatekeepers operate to ensure healthy competition and better consumer choice. In essence, in light of increasing complaints about users' exposure to illegal goods, content, or services on platforms,⁶⁵ the Digital Markets Act and Digital Services Act together have two main goals, which are firstly, to create a safer digital space wherein the fundamental rights of users of digital services are protected, and secondly, to establish a level playing field in the European Single Market and globally.⁶⁶ This part of the paper shall provide a brief overview of the Digital Markets Act and Digital Services Act, with emphasis on the obligations imposed on platforms.

The Digital Services Act which aims to create safer digital space for users of digital services by fighting against illegal online content⁶⁷ has just entered into force on 16 November 2022 and will be fully applicable only in the beginning of 2024.⁶⁸ For the avoidance of doubt, 'digital services' in the context of Digital Services Act are the cross-border online services provided by online intermediaries and platforms.⁶⁹ In summary, the Digital Services Act contains 5 Chapters which are Chapter I (general provisions), Chapter II (exemption of liability of providers of intermediary services), Chapter III (due diligence obligations), Chapter IV (implementation and enforcement), and Chapter V (final provisions). The provisions that are relevant to be highlighted about online platforms' obligations under the Digital Services Act are under Chapter III, Section 3, Article 16–24. For very large online platforms (as defined in Article 25 (1) Digital Services Act as platforms that provide services to 10% or more of the EU's population or 45 million or more of the

⁶³ *Dagang Net Technologies* (n 43) para 348–385.

⁶⁴ European Commission, 'The Digital Services Act Package' (n 7).

⁶⁵ European Commission, 'Europe Fit for the Digital Age: New Online Rules for Platforms' <https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment/europe-fit-digital-age-new-online-rules-platforms_en>.

⁶⁶ European Commission, 'The Digital Services Act Package' (n 7).

⁶⁷ 'EU Digital Markets Act: Next Steps and Long-Term Outlook' (*Dentons*, 7 December 2022) <<https://www.dentons.com/en/insights/articles/2022/december/7/eu-digital-markets-act-next-steps-and-long-term-outlook>>.

⁶⁸ European Commission, 'The Digital Services Act Package' (n 7).

⁶⁹ Council Regulation (EC) 2020/0361 (COD) on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC [2000] <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52022AP0014>>.

population in average monthly active recipients), additional obligations are imposed on them as per Section 4, Article 25–33 Digital Services Act.

The landmark piece of legislation known as Digital Markets Act was enacted mainly to ensure a fair and open digital market by fixing gatekeeper problems in the EU digital markets before any harm is done.⁷⁰ The Digital Markets Act entered into force on 1 November 2022 but some of the obligations imposed will take a while before they are legally enforceable, for example, the reporting obligations for gatekeepers which will kick in after a given company is designated as a gatekeeper.⁷¹ It is expected to be fully applicable around February/March 2024, unless given platforms present arguments that it should not be considered as a gatekeeper. For the avoidance of doubt, the term ‘gatekeepers’ is defined under Article 3 Digital Markets Act as a provider of core platform providers with the following characteristics:⁷²

- (i) Strong economic position: significant impact on the internal market;
- (ii) Strong intermediation position: operates one or more important gateways to customers; and
- (iii) Enjoy or are expected to enjoy an entrenched and durable position in their operations.

In summary, the Digital Markets Act contains six chapters which are Chapter I (general provisions), Chapter II (designation of gatekeepers), Chapter III (gatekeepers’ obligations against practices that limit contestability and that are unfair), Chapter IV (rules for carrying out market investigations), Chapter V (implementation and enforcement) and Chapter VI (general provisions). The provisions which are relevant to be noted by online platforms which have not been characterised but may be characterised as gatekeepers are found in Chapter II, Article 3 of the Digital Services Act. The self-executing obligations and obligations that are susceptible to the specification of gatekeeper platforms in the digital markets are found in Chapter III, Articles 5 and 6 of the Digital Services Act. Further, Chapter III, Article 12 sets down the gatekeeper’s obligation to notify of any intended concentration within the meaning of the EU Merger Regulation. To summarise the examples of obligations of gatekeepers under the Digital Markets Act, the European Commission concisely set out the list of examples, reproduced in the Table 1 below:

⁷⁰ European Commission, ‘The Digital Markets Act: Ensuring Fair and Open Digital Markets’ <https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en>.

⁷¹ ‘EU Digital Markets Act’ (n 67).

⁷² European Commission, ‘Proposal for a Regulation of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector (Digital Markets Act) [2020] Regulation (EC) 2020/0374 (COD) art 3 <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0842>>.

Table 1: Obligations of Gatekeeper Platforms under Digital Markets Act⁷³

Obligations of Gatekeeper Platforms under Digital Markets Act	
Do's	Don'ts
To allow third parties to inter-operate with the Gatekeeper's services in specific situations	To not treat services and products offered by the Gatekeeper itself more favourably in ranking than similar services or products offered by third parties on the Gatekeeper's platform
To allow business users to access data that they generate in their use of the Gatekeeper's platform	To not prevent consumers from linking up to businesses outside of the Gatekeeper's platform
To provide companies' advertising on Gatekeeper's platform with the tools and information necessary for advertisers and publishers to carry out the independent verification of their advertisements hosted by the Gatekeeper	To not prevent users from un-installing any pre-installed software or app if they wish so
To allow business users to promote their offers and conclude contracts with customers outside the Gatekeeper's platform	To not track end users outside of the Gatekeeper's core platform service for targeted advertising, without effective consent having been granted.

In the event of non-compliance, the Digital Markets Act provides that consequences will generally be in the form of monetary fines, and periodic penalty payments except for gatekeeper platforms which will be imposed with additional remedies including non-financial remedies such as behavioural and structural remedies, ie divestiture of (parts of) a business).⁷⁴ In effect, the implementation of the Digital Markets Act is hoped to put to rest rampant cases of abuse of dominance by dominant gatekeeper platforms in the digital markets even before harm is done. Further, the Digital Markets Act provides clarification to online platforms on the obligations that they are required to respect beforehand and safeguards consumers and other businesses from fairer behaviours when doing business with gatekeeper platforms.⁷⁵ Cumulatively, both the Digital Markets Act and Digital Services Act in effect have tailored asymmetric obligations that benefit the European Commission's oversight structure against the complexity of online space. Concerning online platforms and very large online platforms, the European Commission concisely set down the following as in Table 2:

⁷³ European Commission, 'The Digital Markets Act' (n 70).

⁷⁴ European Commission, 'The Digital Services Act Package' (n 7).

⁷⁵ European Commission, 'Europe Fit for the Digital Age' (n 8).

Table 2: Cumulative Obligations of Online Platforms and Very Large Online Platforms under the Digital Markets Act and Digital Services Act⁷⁶

	Online Platform	Very Large Online Platform
Transparency reporting	Y	Y
Requirements on terms of service due to the account of fundamental rights	Y	Y
Cooperation with national authorities following orders	Y	Y
Points of contact and, where necessary, legal representative	Y	Y
Notice and action and obligation to provide information to users	Y	Y
Reporting criminal offences	Y	Y
Complaint and redress mechanism and out-of-court dispute settlement	Y	Y
Trusted flaggers	Y	Y
Measures against abusive notices and counter-notices	Y	Y
Special obligations for marketplaces, eg vetting credentials of third-party suppliers ('KYBC'), compliance by design, random checks	Y	Y
Bans on targeted adverts to children and those based on special characteristics of users	Y	Y
Transparency of recommender systems	Y	Y
User-facing transparency of online advertising	Y	Y
Risk management obligations and crisis response		Y
External and independent auditing, internal compliance function, and public accountability		Y
User choice not to have recommendations based on profiling		Y
Data sharing with authorities and researchers		Y
Codes of conduct		Y
Crisis response cooperation		Y

Based on the foregoing, the implementation of the Digital Markets Act and Digital Services Act has a direct impact on the business models of big platforms in the EU. However, further to these expected benefits, the implementation of the Digital Markets Act and Digital Services Act has also resulted in the adoption of laws in other jurisdictions such

⁷⁶ European Commission, 'Europe Fit for the Digital Age' (n 8).

as Germany, South Korea, the UK, and Australia which are all attempting to work on cases of abuse of dominance and gatekeeper-related problems in the digital markets in their respective jurisdictions with similar solutions or their own tailored solutions.⁷⁷ Despite the different ways in which these jurisdictions detail their regulations and/or code of conduct, all of them target large digital platforms and seek to be a cornerstone to tackle illegal content, goods, or services offered on online platforms. The development of these laws is also hoped to inspire future antitrust/competition law cases in other jurisdictions without platform laws.

7. Recommendations to Address Potential Weaknesses in the Malaysian Competition Law and Policies

Having analysed the competition law framework in Malaysia, ie the Competition Act 2010 read together with the Malaysia Competition Commission Guidelines as well as EU’s Digital Markets Act and Digital Services Act respectively with regards to the competition laws governing and regulation platforms, it appears that the Competition Act 2010 has potential weaknesses that could be addressed in future legal research, a summary is provided in Table 3:

Table 3: Recommendations to Address Potential Weaknesses

No.	Potential Weaknesses	Recommendations
1.	Merger control regime	Malaysia Competition Commission has published a consultation paper and salient points to its proposed amendment to the Competition Act 2010 to include the merger control regime. However, this proposed amendment has not seen the light in the parliamentary debates. The Malaysian competition authorities should expedite the inclusion of a merger control regime within the Competition Act 2010. The continuous missing third pillar of competition law is not only a cause for concern in competition law but due to it, the anti-competitive merger of Grab-Uber in 2019 could not be captured under the Competition Act 2010. Considering the recent merger of several incumbent platforms in Indonesia including Tokopedia and Gojek in 2021 ⁷⁸ and the recent talks about Grab’s acquisition of Food Panda’s food delivery business in selected Southeast Asia markets, ⁷⁹ it is timely that the

⁷⁷ ‘EU Digital Markets Act’ (n 67).

⁷⁸ Karen Gilchrist, ‘How These Millennial Tech Founders Pulled Off Indonesia’s Biggest-Ever Business Deal’ *CNBC* (8 June 2021) <<https://www.cnbc.com/2021/06/09/goto-how-gojek-and-tokopedia-teamed-up-in-indonesias-biggest-merger.html>>.

⁷⁹ Sheila Chiang, ‘Foodpanda Confirms Layoffs, Says It’s in Talks to Sell Part of Asia Food Delivery Business’, *CNBC* (22 September 2023) <<https://www.cnbc.com/2023/09/22/foodpanda-confirms-talks-to-sell-part-of-its->

		Competition Act 2010 includes a merger control regime.
2.	Market definition	The Malaysia Competition Commission Guidelines on Market Definition aids Malaysia Competition Commission's investigation into allegations of anti-competitive agreements and/or abuse of dominant position. However, the guideline does not specifically provide for the digital markets. This asymmetrical information may be a cause for concern for platform owners which have emerging business models and changes in practices to maintain dominant position. Therefore, the guideline could be amended to provide better quality information on how Malaysia Competition Commission will define the relevant market of platforms. This could be supplemented by the publishing of a market study on the digital market of e-commerce.
3.	Platform obligations	The Competition Act 2010 read together with other laws and policies in the e-commerce sector does not clearly set out platform duties and obligations to ensure accountability, fairness, and transparency. The Malaysia Competition Commission could address this by publishing guidelines or policies to better inform platform owners of their duties and obligations in the digital market.
4.	Categorisation of 'very large online platforms' or 'gatekeepers'	The Competition Act 2010 could be revised to provide the Malaysia Competition Commission with the power and jurisdiction to collect relevant data to identify and categorise very large online platforms or gatekeepers in the digital markets are defined. This will provide clarity on the obligations and additional obligations (if any) that very large online platforms or gatekeepers would have to respect to ensure a fair and healthy competitive environment and consumer protection in the digital markets of e-commerce. This will ensure transparent reporting by platform owners in the digital market, which could ultimately aid the Malaysia Competition Commission in their investigation.

Based on the foregoing, there are several identified potential weaknesses in the competition law framework that could be addressed, with inspiration from the recent enactment of the Digital Markets Act and Digital Services Act by the European Union. Certainly, further legal research is necessary to ensure the digital market of e-commerce is analysed holistically to ensure suitable recommendations to the competition laws and policies in Malaysia achieve the objective of strengthening the regulatory framework in

[asia-business-layoffs.html](#)>.

Malaysia to ensure a healthy level playing field and a safer digital space for users of digital services in the digital market, aligned with the Malaysia Digital Economy Blueprint towards Wawasan Kemakmuran Bersama 2030, the Twelfth Malaysia Plan, the Regional Comprehensive Economic Partnership (RCEP) and the United Nations Sustainable Development Goals.

Acknowledgement

I would like to thank God, my family, and loved ones, Dr Lee Soon Heng, Madam Susanna Chew, Grace Lee, Michelle Lee, and Daven for being my source of strength, love, and support throughout my PhD journey. I would also like to thank my supervisor, Dr Ong Tze Chin from the University of Malaya who had so kindly guided and supported me throughout my PhD journey with her insights and invaluable knowledge.

I also want to thank the Ministry of Higher Education for the Fundamental Research Grant Scheme (FRGS/1/2022/SS12/UM/02/8) entitled 'A Framework for Competition Law on Digital Market of E-Commerce Platforms in Malaysia' awarded to Dr Ong Tze Chin. The author is extremely thankful to the University of Malaya for the technical assistance and all necessary research facilities for this research.

Funding Information

The author is a graduate research assistant of a Fundamental Research Grant Scheme (FRGS/1/2022/SS12/UM/02/8) entitled 'A Framework for Competition Law on Digital Market of E-Commerce Platforms in Malaysia' awarded to Dr Ong Tze Chin. ◆