



Malaysia Competition Commission





Malaysia Competition Commission

CASE STUDY ON ABUSE OF DOMINANT POSITION

28 OCTOBER 2014

SESSION 2

MyCC'S EXPERIENCE IN EXCLUSIONARY ABUSE CASES

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Types of Abuses

Exploitative Abuse

Mainly setting high/ excessive prices

Exclusionary Abuse

Predatory conduct that stops competitors from competing which leads, indirectly to higher prices, lower quality products, less innovation etc.

EXPLOITATIVE ABUSE

- ❑ Dominant enterprise abuses its market power by charging excessive pricing or raising prices above the competitive level.

United Brands Co. v Commission C-27/76 [1978]

- ❑ The Commission found that the selling prices of United Brands' Chiquita bananas were 80% higher in Belgium compared to Ireland and 138% higher in Denmark than in Ireland.
- ❑ The prices were excessive in relation to costs that were incurred in producing the bananas.

EXCLUSIONARY ABUSES

- i) Predatory Pricing
 - Dominant enterprise set prices below its costs to drive competitors out of the market and then raise price above the original level once the competitors are driven out from the market.
 - AKZO v Commission [1991] ECR I-3359*

- ii) Price Discrimination
 - Same product being sold at different prices without directly corresponding to the differences in the cost of supplying the product.
 - Irish Sugar Plc v Commission T-228/97 [1999] ECR II-2969*

EXCLUSIONARY ABUSES

iii) Exclusive Dealing

- An exclusive dealing agreement between a dominant seller and a buyer that can foreclose the market. It can apply to both exclusive supply and exclusive purchase obligation whereby customers is forbidden to acquire products except from a specific supplier.
- Van den Bergh Foods Ltd v Commission [2003] ECR II-4653*

iv) Loyalty Rebates and Discounts

- Dominant enterprise may be able to use loyalty rebates and discounts to foreclose a market to competitors. It may also apply to pricing practices that have the same effect as exclusive purchasing agreement.
- Michelin v Commission [2003] ECR II-4071*

EXCLUSIONARY ABUSES

v) Refusal to supply

- Dominant enterprise that refuses to supply goods or services to buyer that may amount to an abuse.
- Commercial Solvent v Commission [1974] ECR 223*

vi) Margin Squeeze

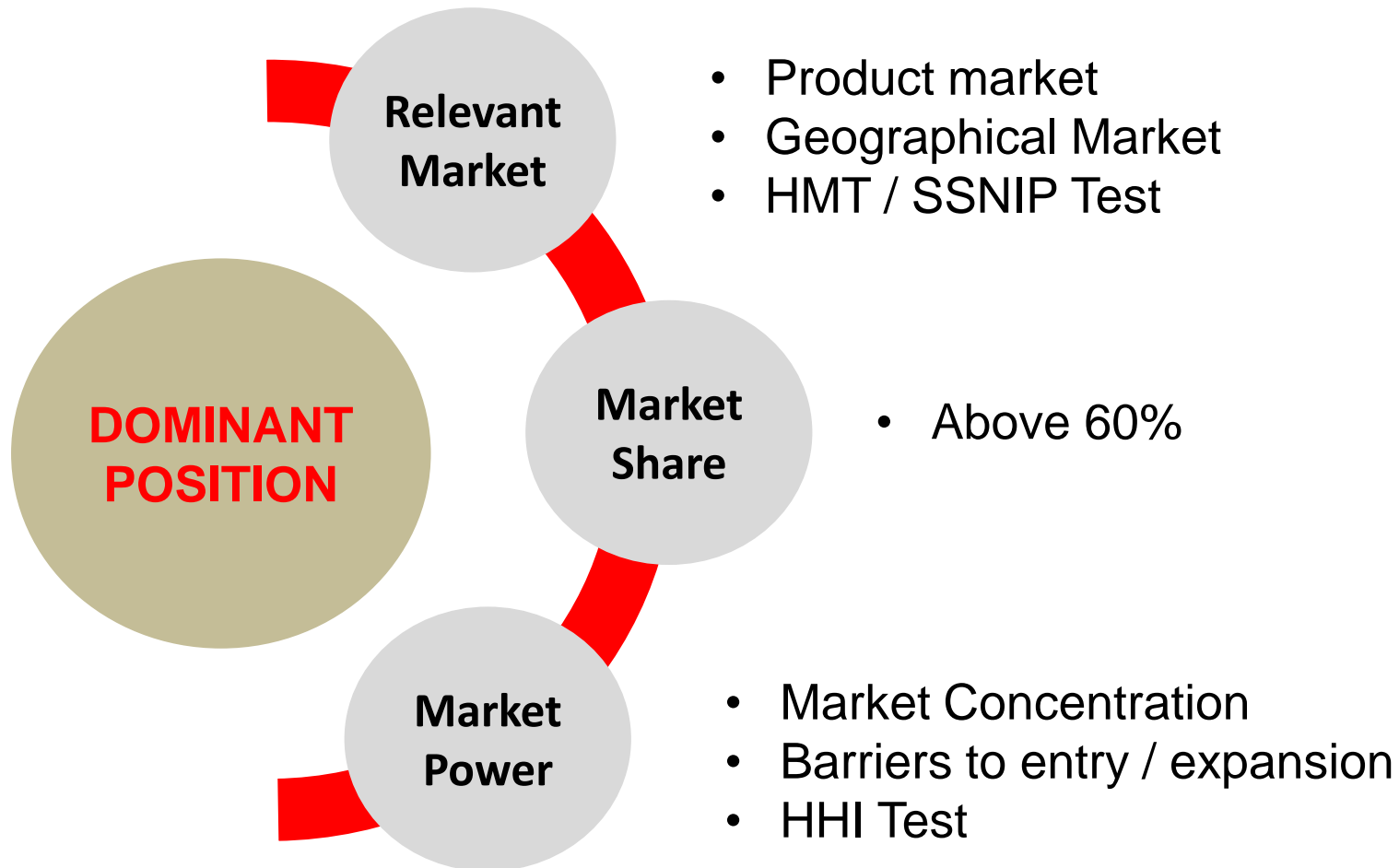
- Dominant enterprise in an upstream market supplies key input to enterprises that compete with it in a downstream market. The low margin between its upstream and downstream prices could drive competitors out from the downstream market.
- Napier Brown-British Sugar OJ [1998] L284/41*

EXCLUSIONARY ABUSES

vii) Tying and Bundling

- Practice of a supplier of one product requiring a buyer to also buy a second product, the tied product. Enterprise that is dominant in one market is trying to leverage its market power in another market.
- Hilti v Commission [1990] ECR II-163*

How To Determine “Dominant Position”?



Case Study 1: Megasteel Margin Squeeze Case

I. FACTS

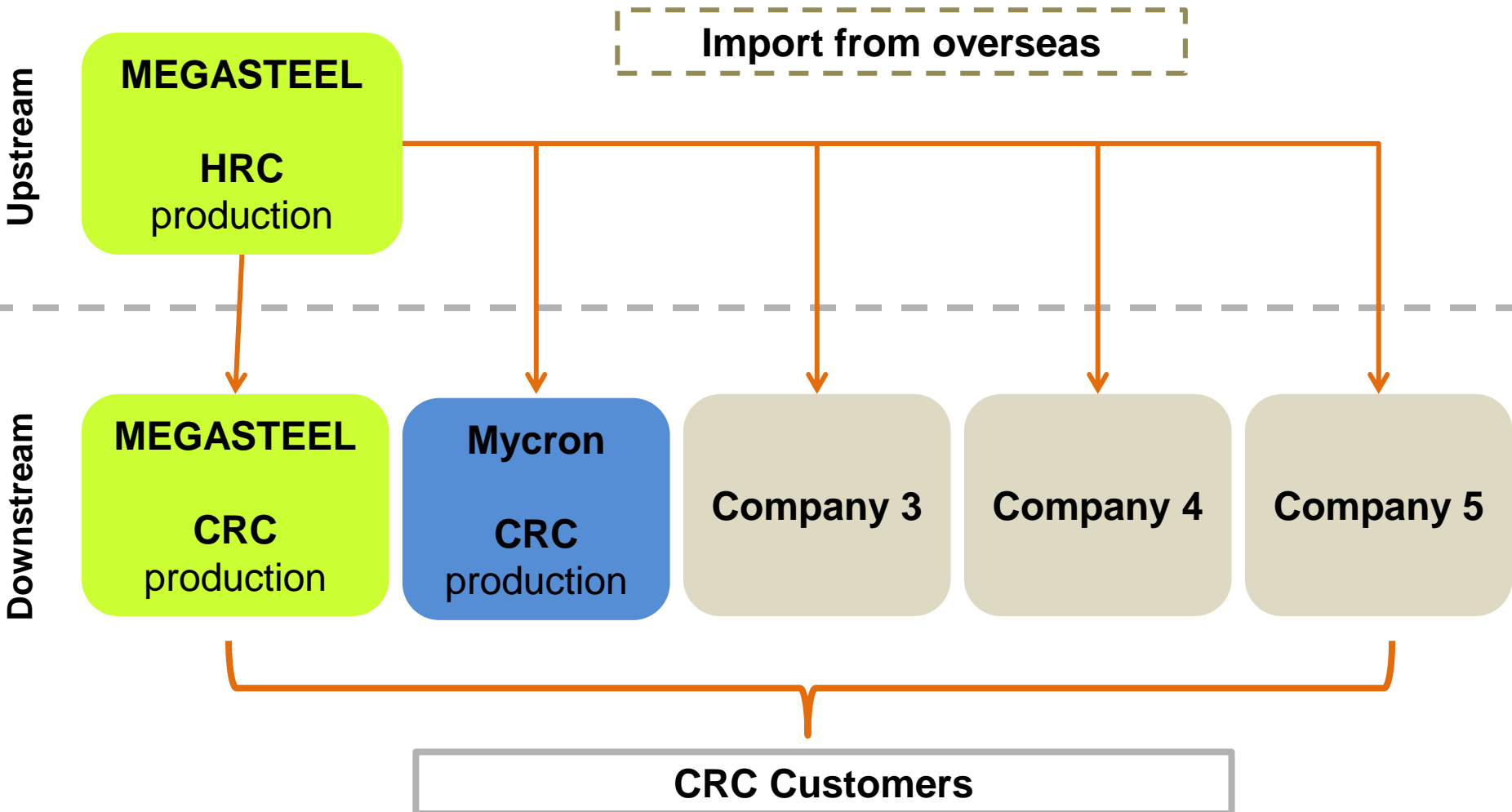
II. DEFINING THE RELEVANT MARKET



III. ANALYSIS

III. PROPOSED FINANCIAL PENALTY

I. FACTS

- Megasteel is the sole producer and seller of Hot Rolled Coil (HRC) in Malaysia since March 1999.
- Since October 2006, Megasteel ventured into the downstream market and became 1 of the 5 domestic Cold Rolled Coil (CRC) producers.
- HRC is an essential input for the production of CRC.



| | Hot Rolled coil | Cold Rolled Coil |
|-----------------------------|---|--|
| Product Appearance |  |  |
| Rolling Temperatures | 900 to 1,100 degrees Celsius | Room temperature |
| Product Thicknesses | 1mm – 21mm | 0.35mm – 3.2mm |
| Application | <ul style="list-style-type: none"> • Construction, industrial machinery, shipbuilding, unexposed automotive and appliance parts. • Products that require thickness, strength and formability. | <ul style="list-style-type: none"> • Refrigerators, stoves, small appliances and exposed automotive parts. • Products that require tight tolerances and a smooth, paintable surface. |

II. DEFINING THE RELEVANT MARKET

Relevant Product Market:

- What other product could be considered as substitutes?

Possible substitute:

- Imported HRC

Relevant Geographical Market:

- What is the relevant geographical market in this case?
 - Malaysia

III. ECONOMIC ANALYSIS OF THE ALLEGED CONDUCT

Equally Efficient Competitor Test

$$P_d - P_u < C_d$$

- P_d : Price of downstream product
- P_u : Price of upstream product
- C_d : Manufacturing Cost of the downstream product

* *Telefonica SA v European Commission [2007] Case T-336/07*

* *Wanadoo Espana v Telefonica Case [2007] COMP/38.784*

- The monthly margins earned by Megasteel appeared to be insufficient for the recovery of its monthly costs of transforming HRC into CRC.

III. ANALYSIS – PRELIMINARY FINDINGS



**MARGIN
SQUEEZE**

- ❑ Margin squeeze is regarded as abusive when a dominant enterprise leverages its market power in the upstream market so as to drive out the its rival(s) in the downstream market.
- ❑ Megasteel has allegedly abused its dominant position at the upstream market by charging HRC price that has the effect of constraining equally efficient competitors at the downstream market to earn sufficient margin to compete.
- ❑ Distort the level of competition at the downstream (CRC) market.

III. PROPOSED FINANCIAL PENALTY



**RM 4.5
million**

This matter is at the stage of a PROPOSED DECISION and will be finalized after the Commission issues the Final Decision.

FURTHER READING

CASE LAWS ON MARGIN SQUEEZE

- *Napier Brown-British Sugar OJ [1998] L 284/41*
- *Deutsche Telekom AG v Commission [2010] ECR I-000*
- *Konkurrensverket v TeliaSonera Sverige AB Case C-52/09*

Case Study 2: Giga and Nexus Exclusive Dealing Case

I. FACTS

II. DEFINING THE RELEVANT MARKET

III. INVESTIGATION AND FINDINGS

IV. UNDERTAKING AND CONCLUSION

I. FACTS

Giga Shipping Services Sdn Bhd

- ❑ Provide shipment service for motor vehicles via Roll On/ Roll Off (Ro-Ro) vessels.

Nexus Mega Carriers Sdn Bhd

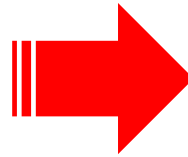
- ❑ Subsidiary of Giga Maritime Group and the “largest car carrier company in Malaysia with a fleet of 82 trucks”.



I. FACTS

- Door to Door Service

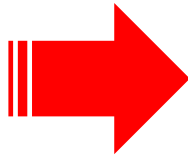
Peninsular Malaysia



East Malaysia



- Port to Port Service



I. FACTS

- ❑ Giga and Nexus are vertically integrated service providers of logistic and shipment services to vehicle manufacturers, distributors and retailers for over 6 years.
- ❑ Majority of Giga's and Nexus's customers request a Door to Door service for shipment of motor vehicle from Peninsular Malaysia to East Malaysia.
- ❑ The Complainant
 - First Shipment : September 2013
 - Last Shipment : April 2014 (decided to temporarily halt its services until further notice)

II. DEFINING THE RELEVANT MARKET

Relevant Product Market:

❑ What other forms of shipments could be considered as substitutes?

Possible substitutes:

- Container vessels
- Barges
- Air freight shipment



II. DEFINING THE RELEVANT MARKET

Relevant Geographical Market:

- What is the relevant geographical market in this case?
 - Ports in Peninsular Malaysia to ports in East Malaysia

III. INVESTIGATION AND FINDINGS

- ❑ MyCC's investigation team during the course of investigation engaged with:
 - >40 manufacturers, distributors and retailers
 - Competitors
 - Port authority
 - Ancillary port services providers

- ❑ Both Giga and Nexus entered into agreements with customers containing exclusive clauses or clauses with the effect of exclusivity which stipulate that they shall be the exclusive provider of the services between 1 - 3 years.

- ❑ In return, they agreed to give customers lower prices arising from the volume of business generated by such agreements.

COMPETITION CONCERNS

- ❑ These agreements may have the effects of:
 - foreclosing customers to competitors of the enterprises; and
 - preventing, restricting or distorting competition in the provision of the services

IV. UNDERTAKINGS AND CONCLUSION

- ❑ Giga and Nexus offered undertakings through their solicitors:
 - Willing to address competition concern by revisiting its agreements with customers and remove the exclusivity clauses or clauses with the same/ similar effect.

- ❑ On 1st October, 2014, the Commission accepted the undertaking with the following conditions amongst others:
 - To remove all exclusivity clauses or clauses with the effect of exclusivity
 - Publish the undertaking in 5 major newspapers
 - Undertake to continue their competition law compliance programme
 - Reimburse the competition commission's administrative costs

[The undertakings in full are published on www.mycc.gov.my]

EFFECTS OF UNDERTAKINGS

- ❑ How do the undertakings address the competition concerns?
 - It ensures competitors in the shipment and logistic services have the access to customers, while customers will gain from having more service providers to choose from.

- ❑ Can any action be taken by MyCC if parties comply with undertakings?
 - The Commission shall refrain from taking proceedings against the enterprises as long as they comply with the terms of the undertakings.
 - The Commission has closed the investigation without making any finding of infringement against the enterprises [Section 43 CA2010].

EFFECTS OF UNDERTAKINGS

- Does this affect the rights of third parties from taking private action?
 - No. Third parties maintain their rights to take private action.

- Does this affect the right of the parties to defend themselves from third party action?
 - No. The parties can defend themselves from any action from any third party.

FURTHER READING

CASE LAWS ON EXCLUSIVE DEALING

- *Van den Bergh Foods Ltd v Commission [2003] ECR II-4653*
- *United States and State of Texas v. United Regional Health Care System, Civil Action No. 7:11-cv-00030-0*
- *Alrosa Company Ltd v Commission of the European Communities [2007] ECR II-2601*

