



Malaysia Competition Commission

“Competition Law in Malaysia”

Mohd Aidil Tupari
Strategic Planning and International Affairs
Division

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BRIEFING OVERVIEW

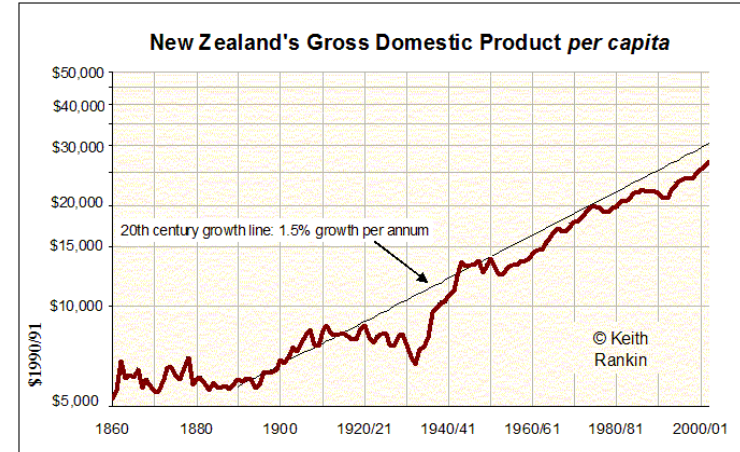


- **Objective of the Law**
- **Scope of Law**
- **Main Prohibitions**
 - **Anti Competitive Agreement**
 - **Abuse of Dominant Position**
- **Commission's Powers**
- **Penalty for Infringement**

WHAT IS THE OBJECTIVE OF THE LAW?



- **PROMOTE ECONOMIC GROWTH by**
- **PROMOTING AND PROTECTING THE PROCESS OF COMPETITION**
- **PROTECTING THE INTERESTS OF CONSUMERS.**



BUSINESS GROW WITH COMPETITION



Targets in the Competition Act 2010



- **WHO? 'Enterprises'**

Any entity carrying on commercial activities relating to goods or services

Note: Single economic entity principle

- **WHAT? 'Commercial activity' (s.3(4))**

Does not include:

- governmental authority/public authorities
- solidarity – social protection
- non economic activity procurement

Main Prohibitions under the Act



Market Behaviour



**Section 4
Prohibition
Anti – competitive
agreements**



**Section 10
Prohibition
Abuse of dominant
position**



**Merger
and
Acquisition**



Anti-Competitive Agreements

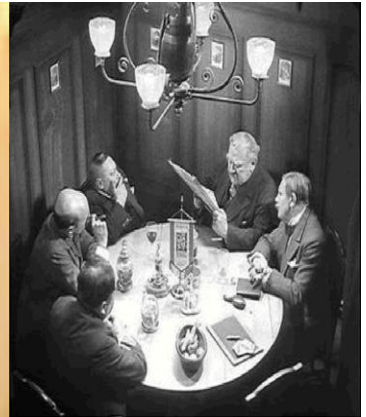
ANTI-COMPETITIVE PRACTICES

Chapter 1

Anti-competitive agreement

Prohibited horizontal and vertical agreement

4. (1) A horizontal or vertical agreement between enterprises is prohibited insofar as the agreement has the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services.

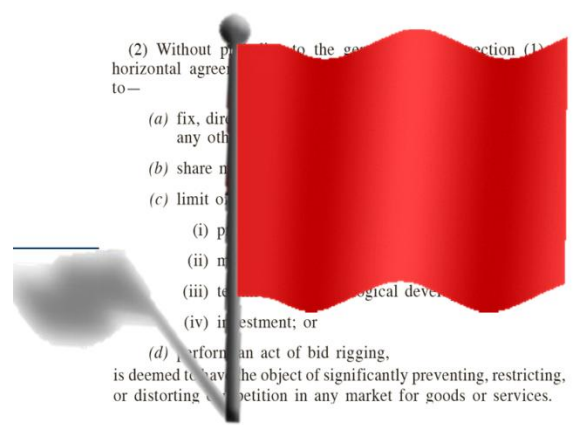


Certain Collusive Agreements Deemed Illegal

In particular, the Act lists certain **horizontal agreements** that are deemed to be anti competitive:

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

Horizontal Agreements Are Deemed Illegal



(2) Without prejudice to the general prohibition in section (1), horizontal agreements to—

- (a) fix, directly or indirectly, any prices;
- (b) share markets;
- (c) limit or control production, sales, technical development, investment; or
- (d) perform an act of bid rigging,

is deemed to have the object of significantly preventing, restricting, or distorting competition in any market for goods or services.

CASES



- In 1992, **Building and Construction Industry in the Netherland** case on the establishment of an organization to facilitate bid rigging. Commission imposed fine of EURO 22.5 m
- In 1974, Glass Containers Association, adopted rules to weaken competition by including obligation not to offer discount, common accounting procedure and an open information scheme
- **In 2008, Six Pest Control Companies** fined total of **S\$262,759.66** by CCS for bid rigging and collusive tendering arrangements – Ignorance is no excuse

ACCC v CC Constructions and others (1999)

The tender for the Commonwealth Office at Haymarket, Sydney, in 1988 led to the exposure of long-term collusive practices by large construction firms.

Before the close of tender the industry association, the Australian Federation of Construction Contractors (AFCC), called a meeting of the four firms bidding for the contract. It was agreed that to enable recovery of overheads associated with preparing tenders the winning firm should pay the three losers \$750 000 each, and the AFCC \$1 million - 'loser's fees'

The arrangement was exposed by a New South Wales Royal Commission into the construction industry.

Difficulty of Prosecuting Cartels – Leniency Helps!

Price Fixing cartel by 11 air cargo carriers

European Commission press release 9 November 2011

11 air cargo carriers were fined €799 million in price fixing cartel for operating a worldwide cartel which affected cargo services within the European Economic area (EEA).

The cartel members coordinated various elements of price for a period of over six years, from December 1999 to 14 February 2006.

- Fuel and security surcharge – flat rate per kilo
- Surcharges were applied in full and no discount rules applied

| No. | Carriers | Fine (€)* | Includes reduction (%) under the Leniency Notice |
|-----|-------------------------------|-------------|--|
| 1. | Air Canada | 21 037 500 | 15 % |
| 2. | Air France | 182 920 000 | 20% |
| | KLM | 127 160 000 | 20% |
| 3. | Martinair | 29 500 000 | 50% |
| 4. | British Airways | 104 040 000 | 10% |
| 5. | Cargolux | 79 900 000 | 15% |
| 6. | Cathay Pacific Airways | 57 120 000 | 20% |
| 7. | Japan Airlines | 35 700 000 | 25% |
| 8. | LAN Chile | 8 220 000 | 20% |
| 9. | Qantas | 8 880 000 | 20% |
| 10. | SAS | 70 167 500 | 15% |
| 11. | Singapore Airlines | 74 800 000 | |
| 12. | Lufthansa | 0 | 100% |
| | Swiss International Air Lines | 0 | 100% |

Points to Ponder!



- Cartel infringement as the prime focus
- Price fixing in any form is caught
- Importance of public distancing from a cartel
- Cartel need not be implemented
- Leniency helps

Significant Effect on Competition



Other types of agreements are prohibited only if they **significantly** prevent , restrict or distort competition in any market for goods or services in Malaysia

“Safe harbors”

- **For competitors** – if the combined market share of the parties to the agreement is less than **20% of the relevant market**
- **For non-competitors** – **all of the parties individually has less than 25%** in any relevant market

Other types of Agreements

Resale price maintenance (RPM)

A producer / manufacturer's contractual requirement that its product be retailed at a fixed or minimum price to consumers

Any other form of RPM including maximum pricing or recommended retail pricing which serves as a focal point for downstream collusion would also be deemed as anti-competitive

Exclusive Supply Agreement

Supplier obliged to sell only to one buyer. Whether it is anti competitive depends on a few factors such as market power of the buyer, duration of the exclusivity and availability of inter brand competition

Requiring Buyer to Buy All from Supplier

May result in foreclosing of the downstream market to other seller if this arrangement results in controlling a significant part of the downstream market

Other types of Agreements



Joint Purchasing Agreement

Generally not regarded as a cartel. Depends on the degree of market power at the upstream and downstream market and its effects on the market (refer to EU Guidelines on Horizontal Cooperation Agreements)

Information Sharing

More likely to raise competition concern if share confidential information
Sharing of future price information may be treated as price fixing agreement that otherwise will not be available

WHAT IS AN AGREEMENT?



- Any form of **contract**, arrangement or **understanding**, whether or not legally enforceable between enterprises and includes a **decision by an association** and **concerted practices**



CONCERTED PRACTICES



- Any **form of coordination** between enterprises which knowingly substitutes practical co-operation between them for the risk of competition and includes any practice which involves direct or indirect contact or communication.

Note: Dyestuffs case – Commission relied on various pieces of circumstantial evidence i.e. similarities of the increase rates, timing of the price increase and instruction given from parent to subsidiary companies and previous informal contact

T Mobile case – mere attendance at a meeting where a competitor discloses its pricing plan to its competitors is deemed as concerted practices even where no formal agreement to raise prices



Abuse of Dominant Position

Chapter 2

Abuse of dominant position

Abuse of dominant position is prohibited

10. (1) An enterprise is prohibited from engaging, whether independently or collectively, in any conduct which amounts to an abuse of a dominant position in any market for goods or services.



WHAT IS DOMINANT POSITION

Where 1 or more enterprises possess such **significant market power** to adjust prices, outputs or trading terms **without effective constraint from competitors**

Note: 60% market share indicative of dominance



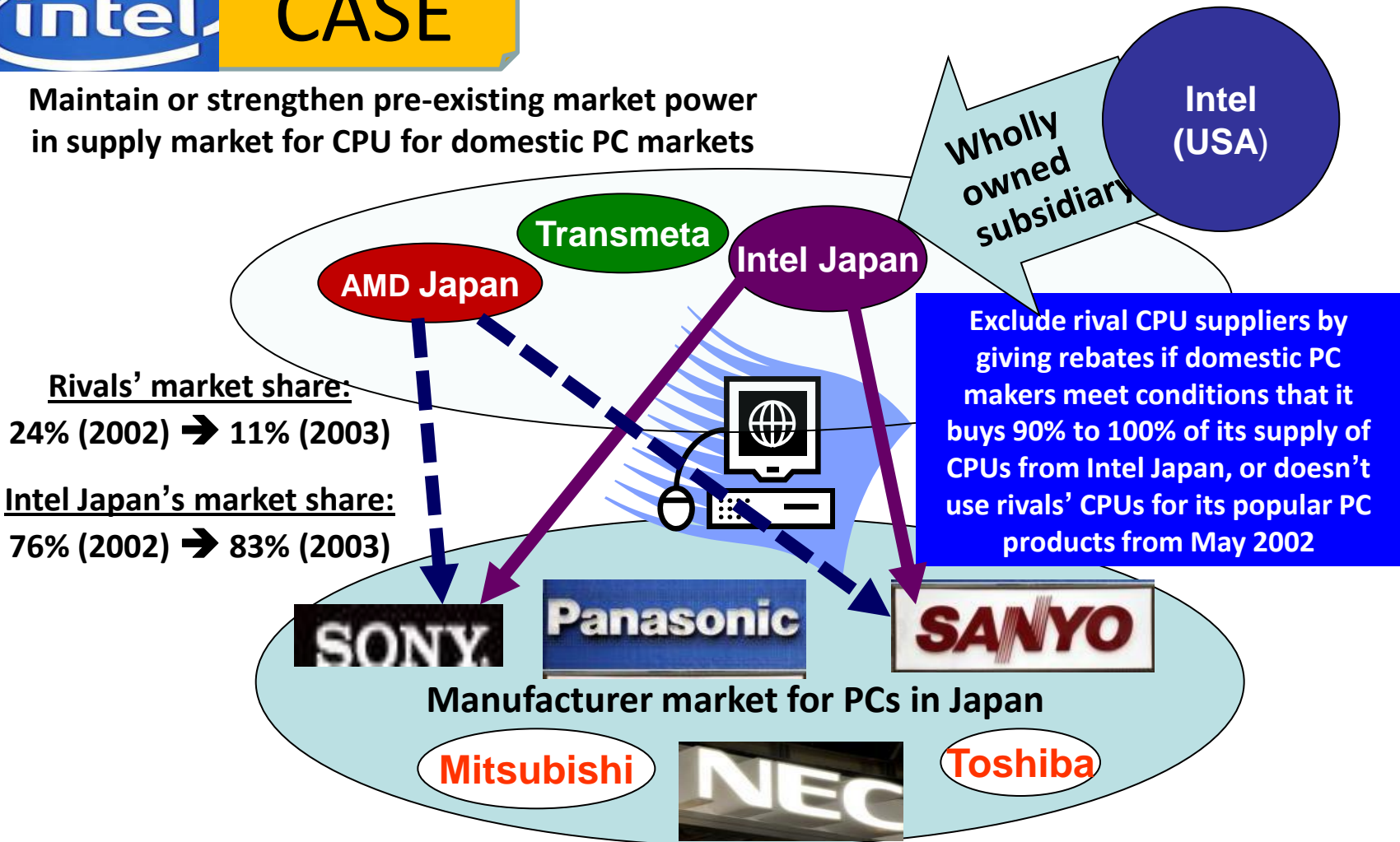
What is Abuse - Exclusionary vs. Exploitative

| Section 10(2) | Examples |
|---|---|
| (a): Directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions on suppliers or customers | Excessive pricing / raising rival's cost |
| (b): Limiting or restricting production, market outlets or access, technical or technological development or investment to the prejudice of consumers | Market foreclosure / exclusion |
| (c): Refusing to supply to a particular enterprise or group or category of enterprises | Refusal to supply, refusal to deal |
| (d): Applying dissimilar conditions to equivalent transactions with other trading parties | Price discrimination, discounts, rebates, and price (or margin) squeeze |
| (e): Making the conclusion of contracts subject to acceptance by other parties of supplementary conditions which by their nature or according to commercial usage have no connection with the subject matter of the contracts | Tying |
| (f): Predatory behaviour towards competitors | Predatory pricing |
| (g): Buying up a scarce supply of intermediate goods or resources required by a competitor | Market foreclosure / exclusion |

Market Foreclosure

intel CASE

Maintain or strengthen pre-existing market power in supply market for CPU for domestic PC markets



Determining Tying

- **Must be Dominant**
- **Two Separate Product**
- **Customer coerced to by both the tying and the tied product**
- **Tying result in foreclosing access to the market**
- **Is there any objective justification for tying**

Note: In 2004, Microsoft case of tying windows media player with its Windows product

Relief for Section 10 Prohibition

Dominant firm may take steps based on:

- Reasonable commercial justification
- Reasonable commercial response to b
conduct of competitor



COMMISSION'S POWERS



- Grant Exemption
- Conduct Investigation
- Issue Directives and Decision
 - Leniency Application
 - Proposed Decision
- Conduct Hearing
- Impose Penalties



INVESTIGATION POWERS



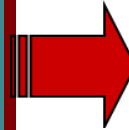
- ⦿ **With or Without Search Warrant**
- ⦿ **Reasonable hour of day or night**
- ⦿ **Enter by force, if necessary**
- ⦿ **Seize record, book, account, document, computerized data etc**
- ⦿ **Not practical to remove - shall seal**
- ⦿ **Body search with strict decency.....seize all things other than the necessary clothing found on the person**

IMPOSE PENALTY



INFRINGEMENTS (MAIN PROHIBITION)

**MAXIMUM 10 % OF THE
WORLDWIDE TURNOVER**

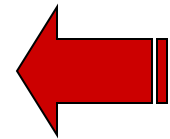


ENTERPRISE

PENALTIES

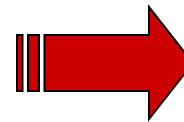
GENERAL OFFENCES

FIRST OFFENCE - RM 5 MILLION,
SUBSEQUENT OFFENCE - RM10 MILLION



**BODY
CORPORATE**

FIRST OFFENCE –
RM 1 MILLION OR 5 YEARS IMPRISONMENT,
SUBSEQUENT OFFENCE -
RM 2 MILLION OR 5 YEARS IMPRISONMENT



INDIVIDUAL

THANK YOU



www.mycc.gov.my