COMPETITION ACT 2010: REVIEW OF MARKET BEHAVIOUR

SESSION 6: FORMS OF ANTICOMPETITIVE CONDUCT

Presented by Dr Cheah Chee-Wah

29 March 2012

Anticompetitive conduct

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

Case law: *Spree Gas*, Bundeskartellamt 1995

- Bundeskartellamt (German Competition Authority) fined Spree Gas for charging prices up to 50% above the prices charged by another gas service provider in an adjacent area
- A rare case: relevant market "easy" to define; network cost of gas supply fully comparable between 2 neighboring areas
- Authority's finding of breach of competition law upheld by Court in 1997
- A "lesson" learnt by the Authority from this (and other similar) cases is the practical difficulty of demonstrating full comparability of supply conditions and costs in different geographic areas
  - §29 of ARC (Act against Restriction of Competition) introduces a "reversal of burden of proof"
  - Companies have to show why and how they are different from others

Case law: *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010)

- In June 2010, CCS found SISTIC.com Pte Ltd (SISTIC) to have abused its dominant position in the ticketing service market via various exclusive agreements
- SISTIC is the largest ticketing service provider with a "persistent market share of 85 – 95%"
- It abused its dominant position through various exclusive agreements that restrict "the choices of venue operators, event promoters and ticket buyers"
  - Application Service and Ticketing Agreement ("ASTA") between SISTIC and The Esplanade Co. Ltd ("TECL") explicitly requires all events held at the Esplanade venues to use SISTIC as the sole ticketing service provider
  - Agreement for Ticketing Services ("ATS") between SISTIC and Singapore Sports Council ("SSC") requires all events held at the Singapore Indoor Stadium ("SIS") to use SISTIC as the sole ticketing service provider; and
  - 17 other agreements that contain explicit restrictions requiring the event promoters concerned to use SISTIC as the sole ticketing service provider for all their events
- SISTIC raised the booking fees paid by ticket buyers by 50% to $3 per ticket in January 2008
- SISTIC fined S$989,000 and directed to modify all exclusive agreements with immediate effect, to remove any clause(s) that require SISTIC's contractual partners to use SISTIC exclusively

Case law: *Cool & Sons Pty Ltd v O'Brien Glass Industries Ltd* (1981) 35 ALR 445

- O'Brien (windscreen manufacturer) gave discounts of 45% or 50% to retailers on condition that "all or the substantial majority" of the windscreens would be purchased from O'Brien
- Cool (a windscreen retailer) only received a discount of 40% because it did not agree to the condition
- Keely J. held that the condition was one which related to a future restraint on Cool's freedom to acquire windscreens from O'Brien's competitors (i.e. it lessens inter-brand competition).
- Finding was upheld on appeal [*O'Brien Glass* case (1983) 77 FLR 441]

Price discrimination

- Second-degree (or indirect market segmentation)
  - Different terms and conditions for the same service
  - Different buyers self-select purchase option; e.g. pay a lower (or higher) air fare to the same destination with (or without) travel restrictions
- Third-degree (or direct market segmentation)
  - Charge a different price in each identifiable market segment, e.g. lower children ticket prices and higher adult ticket prices
  - Prevent customers from switching between market segments by subjecting sale to verifiable buyer information (e.g. driver's licence)
- Rebates and discounts can be (and are) considered as forms of price discrimination
  - Price discount for bulk purchases is essentially a form of second-degree price discrimination

Case law: *Michelin*, Case 322/81 (1983), ECR 3461

- Between 1975-1980, Michelin's share of the relevant market (for new replacement heavy-vehicle tyres in the Netherlands) was 57%-65%; market shares of main competitors were between 4% - 8%
- Michelin's "discount scheme" involved
  - An "off-invoice" discount rate, i.e. the discount rate given for the current year's supply of HV tyres was based on the retailer's turnover of HV tyres in the previous year
  - Conditional rebates, i.e. the retailer will only be rebated at end-of-year if the retailer achieved the specified HV tyre annual sales target
- Retailers not required to sell Michelin's HV tyres exclusively

Case law: *Michelin*, Case 322/81 (1983), ECR 3461

- The EC Commission found Michelin to have breached competition law
  - "… no discount should be granted unless linked to a genuine cost reduction in the manufacturer's costs"
  - "… compensation [i.e. rebates] paid to Michelin dealers must be commensurate with the tasks they perform and the services they actually provide"
  - "… the system of discounts and bonuses agreed must be clearly confirmed to each dealer when the sales contract is presented and concluded"

Case law: *Michelin*, Case 322/81 (1983), ECR 3461

- On appeal to the European Court of Justice
  - the Court upheld the Commission's finding of Michelin's dominance,
  - but dismissed the Commission's finding that Michelin's discount scheme was discriminatory
- Economic reasoning
  - Second-degree price discrimination can be pro-competitive even if it is unrelated to a firm's underlying costs of supply
  - A manufacturer (even a dominant one like Michelin) must be allowed to provide incentives (by way of fidelity discounts or loyalty rebates) to the retailers of its product

Case Law – Michelin v Commission of European Communities (Michelin II), 30 September 2003

- Michelin appealed to the European Court of First Instance against the Commission's finding that its rebate system contravened competition law
  - At the time, Michelin's share of the French market for new replacement tyres was in excess of 50%
  - Its rebate system in the 1990s included quantitative rebates (calculated on basis of total turnover in a year), bonuses for quality of service (to end-customers), and a 'Michelin Friends Club' (MFC) rebate.
- The Court Investigated "whether … the discount tends to remove or restrict the buyers' freedom to choose his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties or to strengthen the dominant position by distorting competition"

Case Law – Michelin v Commission of European Communities (Michelin II), 30 September 2003

- The Court dismissed the appeal
  - Michelin's system of rebates and bonuses induces dealer loyalty and could potentially exclude its competitors from the market
  - The 'service bonus' was an incentive to improve equipment and aftersales services by awarding rebates based on commitments entered into by the dealers. This system was unfair because of the subjectivity of the awarding of rebates
  - The rebate system was a tool for 'rigidifying and improving' Michelin's market position; it is also a tacit tying agreement requiring a retailer's commitment to selling more of Michelin's tyres than others

Case law: Deutsche Telekom ("DT") (OJ 2003 L263/9)

- DT, a dominant vertically integrated firm, was alleged to have charged its competitors a higher wholesale price for "unbundled broadband access" than the retail price which subscribers paid for the same service
- According to the EC Commission, a (margin) squeeze would occur where "the spread between DT's retail and wholesale prices is either negative or at least insufficient to cover DT's own downstream costs…"
- DT would have not been able to offer its own retail services without incurring a loss if it had to pay the same wholesale access price as its competitors. Thus, the profit margins of competitors (even if they are as efficient as DT) would be squeezed.
- The Commission's findings were appealed

Tying

- A customer can buy a product (say, X) if and only if the customer buys another product (say, Y) at the same time
  - Y may be purchased independently of X, but not *vice versa*
  - In the legal (and economic) jargon, Y is the “tying product” and X is the “tied product”
- From the standpoint of competition authorities
  - the firm is leveraging its market power in one market into another market
  - it is an abuse of market power in the tying product (Y) market to raise the price of (and profits earned from) the tied product (X) market

Case law: *Napier Brown/British Sugar* 88/519/EEC, 1988 O.J. (L284)

- British Sugar (largest sugar producer at the time) found to be dominant in the market for "white granulated sugar for both retail and industrial sale in Great Britain"
- British Sugar will only supply at a "delivered price" (comprising the unit price of sugar **and** the costs of delivery to the buyer)
  - Sugar was considered the "tying product"
  - British Sugar's truck service (for delivery to buyer) was considered the "tied product"
- According to the EC
  - British Sugar abused its dominance by "reserving for itself the separate activity of delivering the sugar which could, under normal circumstances be undertaken by an individual contractor acting alone"
  - The business practice of tying deprives customers of the choice between buying sugar at the ex factory price and the delivered price, thereby "eliminating all competition in relation to the delivery of the products"

Case law: *Monroe Topple & Associates v Institute of Chartered Accountants* (2001) ATPR (Digest) 46-212

- MTA sells support materials (such as prescribed reading lists, workshops and workbooks) to candidates of a 'Professional Year' program who want to be a member of the ICA and practise as a CA
- The ICA also sells support materials. Candidates pay ICA an enrolment fee for the 'Professional Year' program <u>but have the option of buying or not buying</u> ICA's support materials
- ICA replaced the 'Professional Year' with a 'CA program'. The higher enrolment fee paid by candidates included ICA's support materials
- MTA claimed that ICA's conduct, i.e. 'bundling' enrolment with supply of support materials, is in breach of competition law

Case law: *Monroe Topple & Associates v Institute of Chartered Accountants* (2001) ATPR (Digest) 46-212

- The market for the supply of course materials and other training support by professional bodies and private providers was taken as the relevant market
- According to Lindgren J, s46 of TPA was not breached
  - "[A manufacturer of a machine] has not taken advantage of substantial market power in the service market for the purpose of preventing competition with it in that market … Inherent in its position as manufacturer is the right to abandon one product and to manufacture a new one in its place and to provide servicing and spare parts for it and to sell them and the new product for a single undifferentiated price, even if this forecloses any possibility of the development of a second service market"

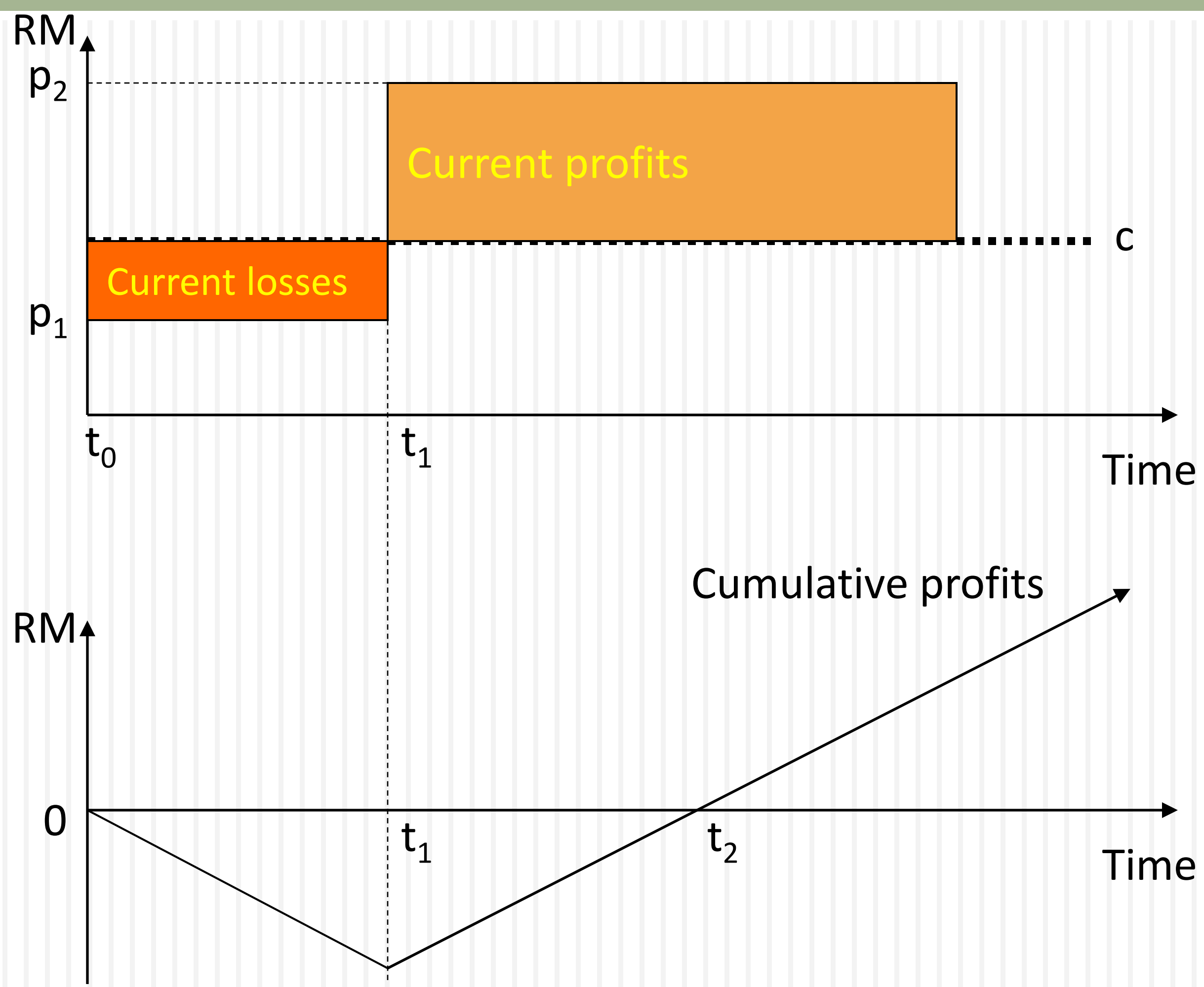
Case law: *Monroe Topple & Associates v Institute of Chartered Accountants* (2001) ATPR (Digest) 46-212

- Would the ICA have been likely to engage in (mixed) bundling if it lacked market power?
  - Lindgren J refers to testing the effect of bundling on consumers
  - So long as a business is acting in what it perceives to be in the best interests of its customers, bundling will not contravene s46 even if it has an exclusionary effect
  - "It is not the object [of Australia's competition law] to protect the private interests of a competitor …"

Predation/predatory pricing

- Two sequential actions (over a period of time)
  - Sacrifice short-run revenues (and profits) by setting a price well below costs, in order to compel the market exit of a competitor
  - Once that's achieved, reset the price to a high level and maintain it over the long-run to recoup the lost profits

Time profile of profit/loss from predatory pricing



Case law: *Lufthansa*, Bundeskartellamt, 2002

- The Authority fined Lufthansa, which was found to be dominant in the market, for “predating” the new entrant Germania on the Frankfurt-Berlin route
  - Lufthansa has to set a price that is at least €35 more than Germania’s price
  - €35 is the estimated net worth of the added benefits of a Lufthansa flight (such as free food and newspaper, more frequent flights, bonus miles)
  - The Court of First Justice, which upheld the Commission’s anticompetitive decision, lowered the net worth to €30.5
- The main reasoning is: If Lufthansa were to continue with charging a low price for its flights despite its “higher costs” and more “frilled” service, the entrant would neither gain market share nor be profitable

Case law: UPS v Commission (Deutsche Post intervening) (2002) ECR II-1915

- UPS alleged that Deutsche Post AG ('DPAG') was using the revenues from its profitable letter-post monopoly to finance a strategy of below-cost pricing of competitive parcel services
- The Commission held that DPAG engaged in predatory pricing because the revenues from its parcel services were less than the service-specific incremental costs
  - Incremental costs measured as the additional costs that are incurred solely as a result of providing the services in question (i.e. parcel services). It does not include common fixed costs that are not incurred solely as a result of those services

Horizontal agreement

- s4(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
- A counter-factual
  - What *would* be the current and future state of competition in the relevant market *absent* of the agreement in question?
  - *De minimis* approach – no need to "worry" if *no* restraining effects can be adduced

Case law: *Ford/Volkswagen,* Case IV/33.814 [1993] 5 C.M.L.R. 617

- JV between Ford and Volkswagen to manufacture a new multi purpose vehicle
- At the time of the agreement
  - neither was in the relevant (multi-purpose vehicle) market
  - neither would have entered the market by themselves because of high production risks
- JV was considered pro-competitive by EC Commission
  - it resulted in production of a new product that gave consumers more choices
  - it created a greater level of competition (by price and product quality) in the market for multi-purpose vehicles

TPC v Email Ltd (1980) 3 ATPR 40-172

- Horizontal agreement
  - Email would stop producing washing machines
  - Simpson would stop producing refrigerators and freezers
  - Each party would specialize in producing one appliance and buy the one it is no longer producing from the other party
  - Each would repackage and rebrand the purchased appliance under their own product label
- Agreement authorised by the (then) Trade Practices Commission on "community and social benefits" grounds
  - specialized mode of production that is more efficient and less costly
  - lower-priced Australian-made appliances priced competitively against imports

Vertical agreement and restraints

- Price-based restraints
  - resale price maintenance (specified minimum price)
  - fixed or recommended price
- Non-price based restraints
  - Selective distribution – branded product distributed to pre-selected retail outlets
  - Exclusive dealership – retailer not allowed to also sell substitutes
  - Exclusive territory – product not supplied to other retailers in specified area
  - Tying / Third-line forcing

The "good" and the "bad"

- Efficiency gains (+) from a restrictive vertical agreement
  - Incentives for a party to curtail the exercise of market power by the other
  - Curtail "double-marginalisation" (double mark-up of price over costs)
  - Minimise horizontal externality and free-riding
- Entry barrier and market foreclosure (-)
  - Upstream market entry curtailed by exclusive dealerships
  - Downstream market entry curtailed by exclusive distribution contract
  - Consolidation of monopoly power in "after-market"

Vertical agreement case law – *JJB Sports plc v The Office of Fair Trading* 2006 EWCA Civ 1318

- JJB Sports plc (UK largest sportswear retailer) had a phone conversation with Umbro Holdings Ltd (manufacturer of England replica sportswear)
  - JJB Sports wanted to maintain its retail price for England replica sportswear in light of the (then) forthcoming Euro 2000 soccer championship
  - It did not want to start a 'price war' with other retailers of the same product
- Umbro conveyed the information to Sports Soccer Ltd, another retailer that sells the sportswear at a price lower than JJB Sports
- Subsequently, Sports Soccer sold at the <u>same</u> price as JJB Sports (i.e. £20 higher than before)
  - Note: no collusion because JJB Sports did not "talk" to Sports Soccer (market rival) about price fixing or market sharing

Vertical agreement case law – *JJB Sports plc v The Office of Fair Trading* 2006 EWCA Civ 1318

- According to UK Court of Appeal, the following sequence of events and discussions amounted to a <u>concerted practice</u> (even in the absence of any formal agreement)
  - A (a retailer) informs B (the manufacturer) of its future retail pricing strategy
  - B then conveys that information to C who is another retailer of B's product
  - C in turn (and in fact) uses that information to set its price for the product that is also retailed by A
- The pricing conduct of both JJB Sports and Sports Soccer was considered to have been <u>coordinated</u> by Umbro in a manner that had the effect (if not the object) of preventing, restricting or distorting market competition

Thank you