

# PROMOTING THE INTEREST OF SMES THROUGH THE LENS OF COMPETITION LAW

**Dr. Nasarudin Abdul Rahman**  
**Assistant Prof**  
**Civil Law Department**  
**Ahmad Ibrahim Kulliyah of Laws**  
**International Islamic University**  
**Malaysia**

# HOW CAN COMPETITION LAW BE RELEVANT?

- Competition law regulates (or rather protects) competition in the market.
- What is competition?
  - Struggle, a process, striving for a better position.
  - Involves the dynamics between supply and demand

# HOW CAN COMPETITION LAW BE RELEVANT?

- **Competition law can promote:**
  - economic efficiency
  - consumer welfare,
  - market participation
  - Protect SMEs? The Neo-Havard and Chicago school rejected non-efficiency objective including preservation of opportunities for SMEs to compete

# The Objective of competition law :

## Experience from other jurisdictions

### **Indonesia**

- to maintain public interest and promote national economic efficiency, create equal business opportunities to big corporations and SMEs.

### **Myanmar**

- The main objective of the Myanmar competition law is to control unfair competition in respect of local or foreign commercial growth

### **Thailand**

- the objective of the law is to promote fair and free trade with competitive environment.

### **South Africa**

- to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy

# INDOMARET (Indonesia)

- On July 4, 2001, the KPPU found Indomarco Primatama, the owner of the Indomaret convenience-store chain of 470 stores creating economically undemocratic that violated Articles 2 and 3 of Law Number 5.
- KPPU had received various complaints from many small store operators that Indomaret conducted unfair business activities of predatory pricing, illegal vertical integration, exclusive dealing, abuse of dominant position, and price discrimination.
- As a result of finding the violation, the KPPU ordered that:
  - 1) Indomarco Primatama be forbidden from expanding its Indomaret stores in areas with open-air food stalls selling all manner of groceries, fruits, and vegetables
  - 2) recommended to Indomarco Primatama should expand its stores through franchises rather than through Indomarco Primatamaowned stores

# Unfair Trade Practices in Large Retail Trade (Thailand)

- In January 2003, the complainants alleged that the business conducts of large foreign retail in Thailand such as mandatory enrolment in price promotion schemes, preferential treatment for house brand products, and various fees and supplier discount were unfair trade practices. These mandatory fees and suppliers discounts allow these large suppliers to undercut prices offered by smaller retailers.
- The commission was requested to solve the unfair trade problem. It then resorted to its advocacy role by adopting "Retail Industry Code of Ethics". The Code, a guideline for retailers rather than a law, describes practices considered "unfair," including sales of products below prices quoted on the invoice, retail price maintenance, refusals to deal and price discrimination, exclusive dealings, and product linkage.
- The code help provide clarification on what types of defenses would be acceptable to the Commission.

# HONDA Case (Thailand)

- In December 2004 Honda Thailand, a motorcycle manufacturer that holds approximately 80% of the market share, allegedly practiced exclusive dealing by prohibiting retail stores from exhibiting and selling competing brands in the same store.
- Retailers also complained that the Honda threatened to stop the supply of its products and to open competing stores next door if they refused to become an exclusive agent, meaning that retailers could not sell other competing brands.
- After investigation, the commission found that the Honda had infringed the competition law through unfair trade practice.

# HOW DOES COMPETITION ACT 2010 (CA 2010) WORK?

- The CA 2010 has provisions that prohibit:
  - Anti-competitive agreement
  - Abuse of dominant position
- However the CA 2010 does not regulate mergers ex ante.
- The CA 2010 however does not have provisions on unfair competition:



# WHAT DOES CA 2010 HAVE TO OFFER?

- Historically, the law was supposed to be known as Fair Trade Practices law – focus was to level the playing field between large firms and smaller enterprises.
  - Unfair burden imposed by large firms and smaller enterprises would be tackled by the law.
  - Exclusion of SMEs from the application of the law
- But with CA 2010 the unfair competition segments were removed
  - the focus is now to create market efficiency.
  - No exclusion of SMEs – the law applies to SMEs

# Prohibition of Anti-Competitive Agreement - Section 4 CA 2010

- **What is anti-competitive agreement?**
  - “Agreement” between “enterprises” horizontal or vertical that has the “object” or “effect” of significantly preventing, restricting or distorting competition in the market.
  - Object test – no need to prove the agreement has anti-competitive effect.
  - Effect test – economic analysis has to be carried out by MyCC

# Horizontal vs Vertical Agreements (Horizontal Agreement)

- **What is horizontal agreement?**
  - Agreement between those at the same level of production/distribution chain:

# Why agreements between competitors can be dangerous?

- **They can be hard core cartel:**
  - **Conspiracy to fix prices, limit output & share markets**
  - **Bid-rigging**
    - **Section 4(2)**
  - **Object test is applied – agreement is prohibited without need to**

# The danger of cartel to businesses

- Cartel can be in intermediary goods/services market (e.g. agriculture & transportation)
- It will increase operational costs
  - Detrimental to parties with weak bargaining power
- May involve refusal to deal with non-cartel members
- UNCTAD research : Cartels also have an impact on the poor by preventing small and medium-sized enterprises (SMEs) from entering cartelized markets and developing their businesses.
- UNCTAD- Cartels may increase the production cost of SMEs by charging higher prices for these inputs

# The danger of cartel to businesses

- **Transport cartel in Kenya - impact on potential market access of poor small-scale entrepreneurs.**
- **Liquefied petroleum gas cartel in Rep of Korea – affects small entrepreneurs such as taxi companies.**
- **Bread and milling cartel in South Africa – increase the cost of essential input, i.e. maize and wheat**
- **Fertilizer Cartel in Zambia – affect SMEs in agricultures**

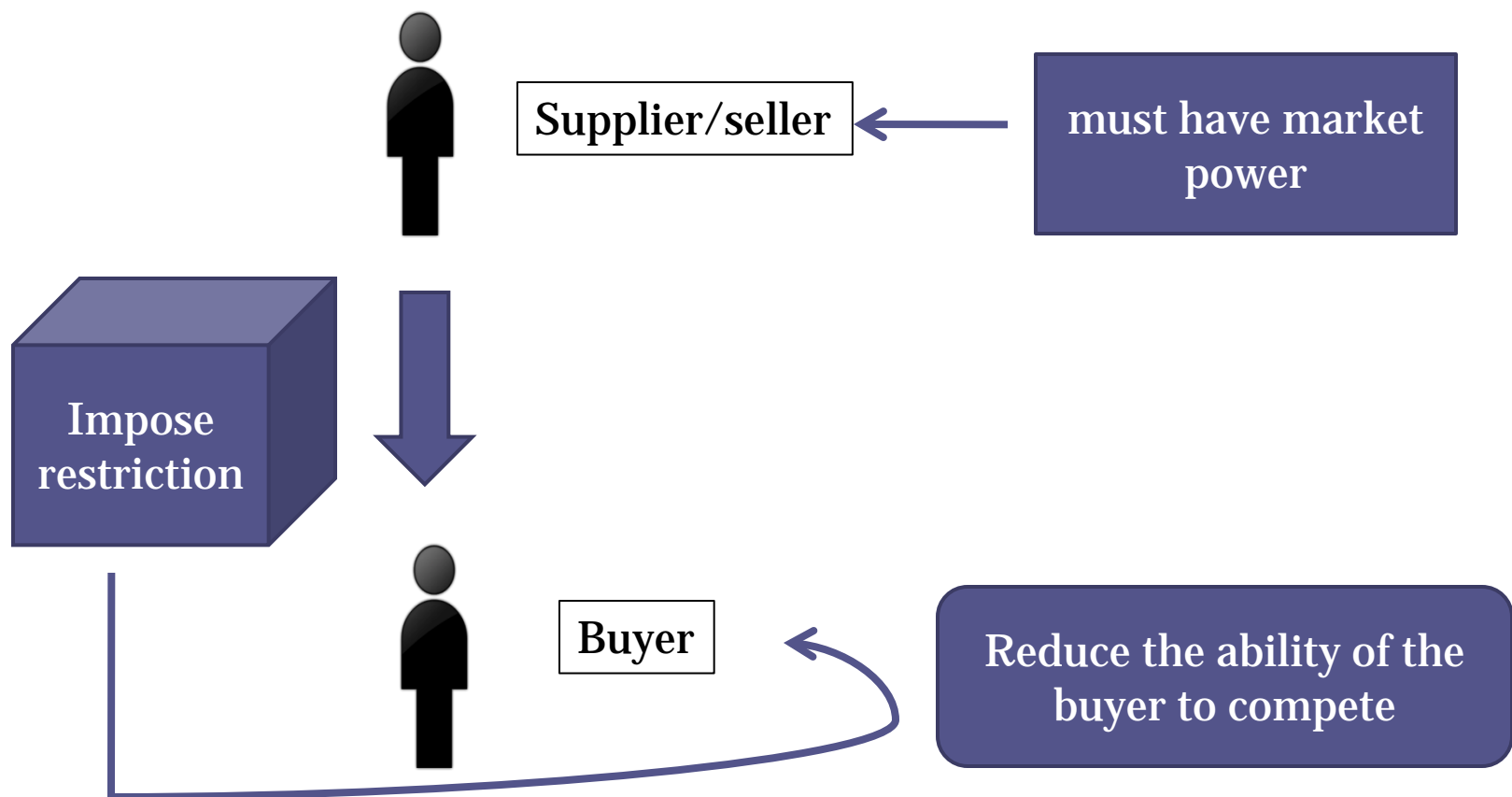
# Horizontal vs Vertical Agreements (Vertical Agreement)

- **What is vertical agreement?**
  - Agreement between suppliers and buyers at different level of production/distribution chain.
- **Vertical agreements can be less harmful:**
  - MyCC may assess whether the agreements have anti-competitive effect

# Horizontal vs Vertical Agreements (Vertical Agreement)

- **What will be the factors to be considered?**
  - Whether the restricting buyer or supplier has enough market power to influence the other party to the contract (supplier / buyer)?
  - Whether restriction is justified?
  - Extent to which the downstream/upstream market is foreclosed.





The restriction can come from an opposite direction i.e. by buyer on seller

# Types of Vertical Agreements

Resale price  
maintenance

Tying and bundling

Agreement that  
requires buyer to  
buy most supplies  
from supplier

Exclusive  
distribution  
agreement covering  
geographic territory

Exclusive customer  
allocation  
agreement

Upfront Access  
Payment

# CONDUCT THAT HAS SIGNIFIGANT EFFECT ON COMPETITION

## 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.

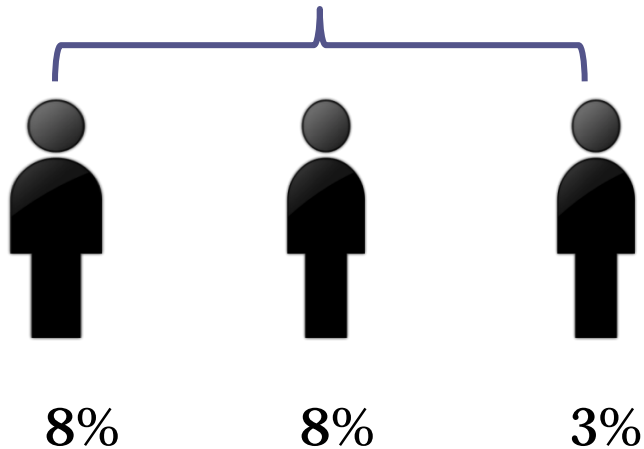
(2) Without prejudice to the generality of subsection (1), a horizontal agreement between enterprises which has the object to—

- (a) fix, directly or indirectly, a purchase or selling price or any other trading conditions;
- (b) share market or sources of supply;
- (c) limit or control—
  - (i) production;
  - (ii) market outlets or market access;
  - (iii) technical or technological development; or
  - (iv) investment; or
- (d) perform an act of bid rigging,

How anti-competitive agreement will not reach the `significant' threshold? (under MyCC Guidelines)

- **Horizontal agreement – 20% market share threshold (combined)**
- **Vertical agreement – 25% market share threshold (individual)**

Compete with each other



## Horizontal agreement

the parties to the agreement are competitors who are in the same market and their combined market share of the relevant market does not exceed 20%.

## Participate in different levels of production chain



Wholesaler  
[20% market share of wholesale market]



Retailer  
[20% market share of the retail market]

### Vertical agreement

the parties to the agreement are not competitors and all of the parties individually has less than 25% in any relevant market.

# Abuse of dominant position

- A dominant enterprise is forbidden from abusing its dominant position.
- Meaning of dominance – ability to adjust prices, output & other trading conditions without constraints from competitors.
- Market share can be an indicator of dominance – but not the only indicator
  - 60% market share – presumption of dominance

# Types of abusive conduct

Excessive  
pricing

Refusal to  
supply

Price  
discrimination

Predatory  
behaviour &  
margin squeeze

Exclusive  
dealing

List is not exhaustive



Regulation of conduct of dominant enterprise will not only benefit consumers, but also small firms

- **Excessive pricing:**
  - not only where a dominant supplier charges excessively high price
  - Prohibition also covers dominant purchaser which demands excessively low price from smaller producers

Regulation of conduct of dominant enterprise will not only benefit consumers, but also small firms

- **Predatory pricing:**
  - **Big companies can price below costs**
  - **Will kill small producers**
  
  - **Big firms can practise transfer pricing:**
    - **Subsidiary company shifts profits to holding company to avoid tax**
    - **Cross-subsidisation**
  
  - **By prohibiting predatory pricing, smaller firms/companies can increase profit margin & demand more from manufacturers.**

Regulation of conduct of dominant enterprise will not only benefit consumers, but also small firms

- **Refusal to supply:**

- E.g. rice is refused if purchaser does not buy sugar (reported in local newspaper).
- Refusal of big companies to grant intellectual property rights (IPRs):
  - According to the law – refusal to grant IPRs is allowed unless it prevents the emergence of a new product not in direct competition with product of IPR owner
  - Other competitive conduct: excessive royalty, holding-up, clawback clause

Regulation of conduct of dominant enterprise will not only benefit consumers, but also small firms

### **Leveraging market powers**

- **A dominant firm may leverage its market power into a new market (e.g. downstream market) preventing new entrants or hampering/distorting competition at the downstream level**

- **e.g. cases :**

**Malaysia –MyEG, imposing dissimilar conditions  
International cases - Google case – favourable treatment and tying arrangement (android)**

# Competition law & SMEs - Threats of Competition Act 2010 to SMEs

- Price-fixing, market allocation, information sharing – are the common anti-competitive agreements made by SMEs.
- Occasionally, collusion to fix/increase prices becomes inevitable to SMEs:
  - Facing global price uncertainties of oil & other essential inputs
  - Collusion acts as a `defence' against big players
  - Trade association coordinates prices among members

- **However enterprises can be relieved from liability via Section 5 of CA 2010.**

# Relief of Liability (Section 5)

- **anti-competitive agreement (including cartel) can be relieved from liability if:**
  - **Has technological, efficiency or social benefits**
  - **Benefits cant be provided without restricting competition**
  - **The detrimental effect is proportionate to the benefits**
  - **No complete elimination of competition in substantial parts of the goods or services.**

# Relief of Liability (Section 5)

- This means Competition Act 2010 applies rule of reason even to cartels.
- The inclusion of social benefits can benefit SMEs.



# Possible benefits of cartel to SMEs

- Information sharing can assist SMEs to measure performances, know the market trends, to plan their operation and plan for the market requirements.
  - By sharing information industry can anticipate any increase in demand or imminent shortages.
- Market allocation can create and develop market products and services in an orderly way.
- Joint purchasing assists the SMEs to centralize their order, and combine warehousing or distribution functions more efficiently.

# However....

- **However all conditions in Section 5 must be satisfied cumulatively.**
- **The term “proportionality” needs to be defined.**

# HOW CAN MYCC HELPS SMEs

- Not imposing financial penalties on certain circumstances but rather taking other softer measures
- For example, Cameron Highland – the first case handled by MyCC
- Sibu Confectionary – one company generated low and insignificant profits
- Reducing the penalties as part of the MITIGATING FACTORS if it involves SMEs

# Undertakings

- Undertakings- SMEs may come forward and offer undertakings- eg case of Barbers Association, PMLOA

# Leniency regime

- To get reduction of financial penalty up to 100% reduction
- Less than 100%
- Depending on conditions stipulated by the Act and the Guidelines on Leniency

# THE FINAL ANALYSIS

The Competition System is not in itself a framework for the protection or promotion of SMEs. It nevertheless should make sure that there are:

- No artificial distortions affecting the competitiveness and efficiency of the SMEs as agents in the markets in which they participate (i.e., providers, distributors, other)
- No entry barriers or regulations that turn out to be arbitrarily discriminatory so as to complicate, retard or block the entrance of SMEs

# THE FINAL ANALYSIS

- SMEs to be aware of their rights under Competition Act 2010 including the right to complain to the Malaysian Competition Commission (MyCC).
- But the law can also target them especially if they form cartels.
- The existence of competition law alone will not guarantee that firms will succeed in their business.
- The interplays between competition law and other economic regulatory policies must also be considered.

**THANK YOU**

**DR. NASARUDIN ABDUL RAHMAN**

**Email: [nasarudin@iium.edu.my](mailto:nasarudin@iium.edu.my)**

**0163282484**