



NEW BUSINESS LANDSCAPE UNDER *COMPETITION ACT 2010*

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A bit of history ...

2

Pre-60s

- **Canada:** *Act for the Prevention and Suppression of Combinations Formed in Restraint of Trade* (1889)
- **US:** *Sherman Antitrust Act* (1890); *Clayton Antitrust Act* (1914)
- **Japan:** *Act Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade*, 1947; amended 2009
- **UK:** *Monopolies and Restrictive Practices (Inquiry and Control) Act* (1948); *Restrictive Practices Act* (1956); *Monopolies and Mergers Act* (1965); *Monopolies and Restrictive Trade Practices Act* (1969); *Competition Act* (1998)
- **W. Germany:** *Act Against Unfair Restraints of Competition* (1957)
- **EC:** *Articles 81 & 82 EC Treaty* (1957); *Articles 101 & 102 of TFEU* (2004)

Post 60s – Asia Pacific region

- **Australia:** *Trade Practices Act* (1974); renamed *Australian Competition and Consumer Protection Act* (2010)
- **South Korea:** *Monopoly Regulation and Fair Trade Act* (1980)
- **NZ:** *Commerce Act* (1986)
- **Chinese Taipei:** *Fair Trade Law* (1991)
- **PRC:** *Antimonopoly Law* (2007)

Closer to home ...

3

□ ASEAN

- **Indonesia:** Prohibition of Monopolistic Practices and Unfair Business Competition Law (1999)
- **Thailand:** *Trade Competition Act* (1999)
- **Singapore:** *Competition Act* (2004)
- **Vietnam:** Law on Competition (2004)
- **Malaysia:** *Competition Act* (2010); fully enforced since 1 Jan 2012

□ Upcoming ...

- **Hong Kong SAR:** Competition Bill – first reading July 2010; targeted enactment date of May 2012

Why the need for competition rules instead of “command and control”?

4

Competition law

- Does not intervene in markets
- Sustains and enhances the competitive process for the direct benefit of consumers (not firms or industries)
- Deals with matters “after the fact” (*ex post*)

“Command and control”

- Necessitated by on-going or impending ‘market failures’
- Involves direct intervention (price or quantity control; or both)
- Usually involves *ex ante* (“before the fact”) rules

Things to do on-site ...

5

- ❑ Continue with your profit-maximising actions/decisions, but don't join a cartel
- ❑ Seek legal and economic advice before drawing-up or signing any purchase or sale contracts with clauses that restrict competition
- ❑ Increase your market share, but don't abuse your market power
- ❑ Keep informed by attending industry association meetings, but don't discuss product costing, pricing or sales strategies

What are the seeds of possible anticompetitive actions?

6

- 2 forms of market power
 - power over price = the ability to raise price consistently and profitably above competitive levels
 - power to exclude = the ability to exclude rivals from the market, or to deter them from entering the market
- Main sources
 - barrier to entry = something that makes its difficult or prevents anyone from entering the (relevant) market
 - barriers to expansion = something that prevents anyone (who is already in the market) from increasing output

Possibility of bad seed germination ...

- Dominant position
 - “[is] a position of economic strength enjoyed by an undertaking [an enterprise] which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers” (my emphasis)
 - ECJ Case 27/76 *United Brands Co. and United Brands Continental BV v Commission* (1978) ECR 207
- “An undertaking is unlikely to be dominant if it does not have substantial market power”
 - UK OFT Guidelines on Competition Act 1998
- “Abuse of market power” equates to “abuse of dominant position”

Relevant market

8

- The one you believe you're operating in is (usually) not the "relevant" market
- Definition of relevant market is:
 - "... a key step in identifying the competitive constraints acting on a supplier of a given product or service ..."
 - "... a framework for competition analysis ..."
 - "... usually the first step in the assessment of market power"
 - *cf UK OFT, Market Definition: Understanding Competition Law, December 2004, p. 4*
- Defined on case-by-case basis
 - "The relevant market is one that is worth monopolising"

Hypothetical Monopolist Test (HMT)

9

- Start with the “focal” product, i.e. the product (or group of products) supplied by the firm (or group of firms) that is under investigation
- Can a (hypothetical) monopolist of this product raise the price permanently by 5 (or 10) per cent without losing sales revenue?
 - If yes, the relevant market is none other than the market for the “focal product”
 - If no, it implies that the “relevant market” is broader – identify and include another product that is an actual or likely substitute
 - Repeat until all substitutes for the focal product are identified

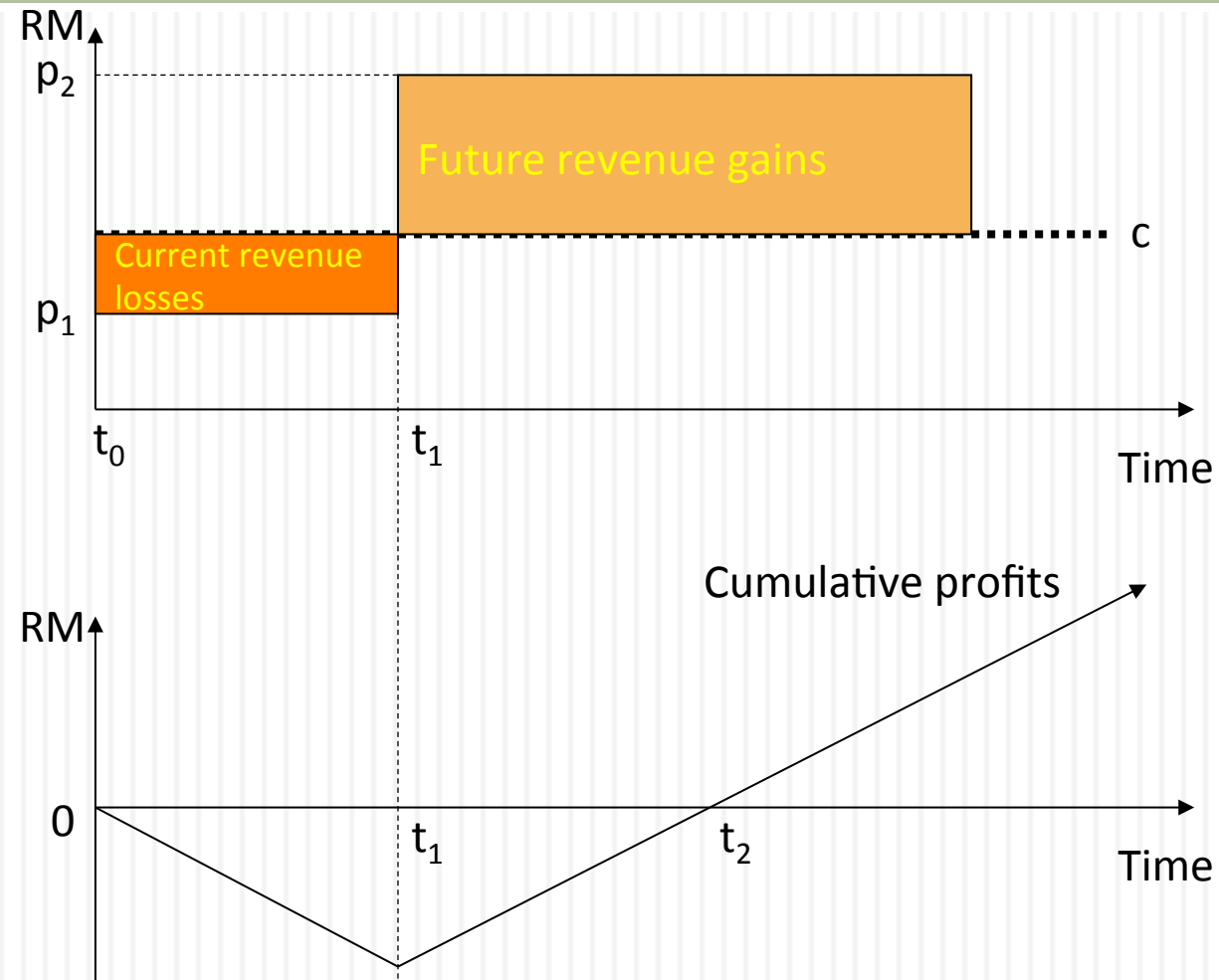
What to watch out for

10

- An enterprise you do business with (or compete against) could be abusing its dominant position when it:
 - ▣ imposes upon you a price or contractual terms that are dissimilar to those required of its other customers – s10(2)(a) & (d)
 - ▣ limits its output, or refuses to supply you, with no objective reason – s10(2)(b) & (c)
 - ▣ refuses to supply you unless you agree to supplementary conditions that are unrelated to your purchase of the product – s10(2)(e)
 - ▣ respond to your market entry by selling its product at a price that may be too low to cover its own costs of production – s10(2)(f)*
 - ▣ buying up the inputs that you need for your business – s10(2)(g)

Predation – “picture worth 1,000 words”

11



Case law: *Lufthansa*, Bundeskartellamt, 2002

12

- Lufthansa found to be dominant in the market for flights on the Frankfurt-Berlin route
- The Commission found Lufthansa to have breached Germany's competition law by "predating" Germania, a new market entrant
 - Lufthansa lowered the price of its flight below that of Germania's price for the same flight-route
 - Germania's flight does not have on-board services. Lufthansa on-board services (such as free food and newspaper, frequent flights, bonus miles) estimated to be €35 per flight passenger
 - Lufthansa's flight ticket should be at least €35 more than Germania's price (Upon appeal, Court of First Instance upheld the Commission's finding, but lowered the estimated on-board costs to €30.5)
- If Lufthansa were to continue with charging a low price for its flights despite its "higher costs" and more "frilled" services, Germania would neither gain market share nor remain profitable

New business landscape

13



- Familiarise yourself (and your staff) with the economic “nuts” and procedural “bolts” of the law
- Be mindful of the actual and potential effects of both your day-to-day transactions and longer-term dealings on the competitive process
- Shield yourself from being a “victim” – be vigilant of:
 - questionable terms and conditions in business contracts and agreements
 - significantly higher than usual prices for the things they buy from others
 - overly excessive reductions in the prices of competing products or services