For information

Bills Committee on
Competition Bill

Overseas Case Law Examples of
Anti-competitive Agreement/ Conduct

Purpose

This paper provides examples of cases in overseas competition jurisdictions to illustrate the concept of substitution in market analysis and the application of the prohibitions against anti-competitive agreements to certain information exchange among competitors and vertical agreements.

A. Market analysis

Market for cooking oils in Indonesia

In 2009, Indonesia's competition authority, the Commission for the Supervision of Business Competition (KPPU), initiated an investigation into cooking oil producers on the suspicion that they had agreed to fix prices in breach of Indonesia's competition law.

KPPU defined the relevant markets as "bulk cooking oil" and "branded cooking oil" rather than the broader market of "cooking oil", because (i) based on the highly visible product characteristics, there are significant differences between bulk cooking oil and branded cooking oil. Branded cooking oil came in smaller plastic bottles whilst "bulk" cooking oil came in large drums; and (ii) the customer base varied between the two products. Customers consuming bulk cooking oil were generally from lower incomes brackets whilst those consuming branded cooking oil were from higher income brackets (this was supported by data from a Nielson study).

On geographic boundary of the market, KPPU was of the view that it would be the whole of Indonesia, noting that the producers were able to sell their product outside the province in which the product was produced owing to the availability of a good transport distribution system in Indonesia.

Based on the identified relevant markets, KPPU was able to assess the impact of the price-fixing on consumers and apply remedies including fines.

Market for insecticide in Singapore

In 2007, the Competition Commission of Singapore (CCS) received information that 6 pest control operators (namely Aardwolf Pestkare (S) Ptd Ltd, Alliance Pest Management Pte Ltd, Elite Pest Management Pte Ltd, Killem Pest Pte Ltd; PestBusters Pte Ltd, and Rentokil Initial (S) Pte Ltd) engaged in price-fixing through collusive tendering in the provision of termite control and treatment services using *Agenda* (a termiticide).

To define the product dimension of the market, it was necessary to decide whether three other termiticides that were approved for use by the colluding firms in Singapore should be considered as potential substitutes for *Agenda*. Based on their various characteristics, the four types of pesticide could be split into two groups: repellent and non-repellent. The CCS considered that each group of pesticides were poor substitute for each other because –

(i) Repellent termiticides kill termites on contact and act as a repellent barrier preventing termites from re-entering a treated area. Due to soil movement, gaps may appear, breaking the barrier, allowing termites to gain entry through the gaps and leading to recurrence of termite infestations;

(ii) Non-repellent termiticides (also known as colony management termiticides), on the other hand, do not kill or repel termites immediately upon contact. These termiticides have a slower reacting effect and work by allowing termites passing through the treated area to come into contact with the termiticide and return to the termite nest/colony to transfer the termiticide to other termites in the nest/colony before dying, leading to colony elimination.

The CCS went on to consider whether the two products within the "non-repellent" group, namely *Agenda* and another product called *Premise*, were close substitute of each other. Taking into account a number of factors including the technique of application, manufacturer's warranty and the existence of exclusive distribution agreements, the CCS considered that *Premise* and *Agenda* were not good substitutes and hence favoured the narrow approach of defining the relevant market as "termite control services using *Agenda*.

B. Exchange of information

Information on future fees by schools in the UK

In 2006, the UK Office of Fair Trading (OFT) found that, during the period from March 2001 to June 2003, 50 fee-paying independent schools (the Participant schools) exchanged on a regular and systematic basis highly confidential information regarding each other's pricing intentions for the coming academic year that was not made available to parents of pupils at Participant schools or published more generally.

The information exchange was organised by the bursar of Sevenoaks School, to whom the Participant schools submitted details of their current fee levels, proposed fee increases (expressed as a percentage) and the resulting intended fee levels. The Sevenoaks bursar subsequently circulated this information amongst the Participant schools in tabular form. This process of information exchange and the resulting tables of information were referred to as the Sevenoaks Survey or Survey.

The OFT considered that the information exchange constituted an obvious restriction of competition whereby the Participant schools knowingly substituted practical co–operation for the risks of competition. Further, this arrangement was implicit in the way that the Sevenoaks Survey operated, and the fact that it was intended that the information exchanged should be reasonably reliable, that there was at least a “gentleman's agreement” amongst the Participant schools that the fee increase figures submitted to the Survey would accurately reflect actual future fee levels. The OFT therefore found that the Participant schools infringed the prohibition (the Chapter I prohibition) imposed by section 2(1) of the Competition Act 1998 by participating in an agreement and/or concerted practice having as its object the prevention, restriction or distortion of competition in the relevant markets for the provision of educational services.

C. Vertical agreement

Exclusive dealing agreements for advertising films in the US

Motion Picture Advertising Service (Motion Picture) was a producer and distributor of advertising motion pictures which depict commercial commodities. It contracted with theatre owners for the display of these advertising films in 27 states in the US. These contracts run for terms up to five years, the majority being for one or two years; a substantial number of them contain a provision that the theatre owner will display only commercial advertising films furnished by Motion Picture.

Motion Picture had exclusive contracts with almost 40 percent of the theatres in the area where it operates. It, together with three other companies in the same business, had exclusive arrangements for advertising films with approximately 75 percent of the total number of theatres in the US which display commercial advertising films.

The Supreme Court of the US held that these exclusive contracts held by Motion Picture and three other major companies had effectively foreclosed 75 percent of all available outlets for this business throughout the US, and had forced some of their competitors out of business because of their inability to obtain outlets for their advertising films. The exclusive contracts had created unfair competition against other advertising film distributors, in violation of the Sherman Act.

Advice sought

2. Members are invited to note the contents of the paper.

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