



Research report

Research project on “Competition Law and SMEs in Retail
Business: Comparative Study on Malaysia, Thailand and
Vietnam”

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Executive Summary

The research aims to study on competition law application and SMEs in retail sector in Malaysia, Vietnam, and Thailand within ASEAN integration contexts. The research also analyses the application of competition law and SMEs retail sector in the three countries and provides proposals for Thai competition law in relation to SMEs in retail sector as to enhance investment and competition. The research utilizes research methods of documentary research, in-dept interview to expert, and research workshop. The research found that there are similar competition legislations as to promote and protect competition in market. However, the approach to use competition law and SMEs in retail sector is different. Malaysia tends to enforce competition law toward SMEs cartels in retail sector. Vietnam, while having one important case, applies competition law to dominant firms as to protect market competition. Thailand tends to have ineffective competition law and lack of protective mechanisms for SMEs in retail sectors.

In addition, the research provides analysis that there are 4 main points of competition law and SMEs. The first point is a competition law with regard to competition between large retail corporate and large retail corporate. At the first point competition law should refrain from interfere market competition and should ensure that market competition works by its own efficiency. The second point a competition law with regard to large retail corporate and SMEs as a supplier. By this the competition law should be applied as to protect SMEs from dominant buyer power of dominant larger retail corporate. The third point is a competition law on large retail corporate and SMEs retail. At the third point, the competition law should not be applied as a protective mechanism to inefficient SMEs. In case that large corporate fairly compete with SMEs in retail sector by providing better services and lower product prices, competition law should not be used as a tool to protect SMEs. The fourth point is a competition law and SMEs anticompetitive conducts. The competition law should be applied to SMEs cartel conducts that affect consumer welfares. However, there is a need to build up awareness on competition law for SMEs. The research provide a proposal for reform on competition law and SMEs in retail by that there should be a reform on competition commission with a consideration on SMEs, enforcement of competition law on retail sectors,

Competition Advocacy to SMEs, Guideline of competition law on retail sector, and
on consideration other law and policy relating to SMEs.

Research Abstract

The research focuses on application of competition law and SMEs in retail sectors in Malaysia, Vietnam and Thailand. The research analyses application of competition law and provides proposals for development on Thai competition law with regard to SMEs in retail sectors. The research found that the three countries have similar framework of competition law in order to promote and protect competition. But the application of competition law in the three countries is different. Malaysia and Vietnam have enforced competition law relating to SMEs in retail sectors. However, Thailand has not enforced competition law due to the lack of effective enforcement and the lack of policy to protect SMEs in retail sectors. The research proposals are the establishment of competition commission with concern on SMEs, the development on competition law enforcement in retail sectors, the promotion of competition advocacy, the issuance of guidelines on competition law in retails, and the reform on laws and policies on SMEs.

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Chapter 1 : Introduction to Research

1.1 Introduction

With its approach to market integration, ASEAN has implemented significant steps toward building up the ASEAN Economic Community. According to the ASEAN Economic Community (“AEC”) Blueprint, all member countries have to cooperate in constructing freer movement of goods, services, investment, skilled labor and freer flow of capital commencing in 2015.¹ The AECblueprint is based on four pillars:; a single market and production base, a highly competitive economic region, a region of equitable economic development, and a region fully integrated into the global economy.²

Building on the 2015 AEC Blueprint, all ASEAN members consented to additional ASEAN market integration steps as set out in the AEC Blueprint 2025.³ The 2025 blueprint focuses on building on interrelated and mutually reinforcing characteristics such as a highly integrated and cohesive economy; a competitive, innovative, and dynamic ASEAN; and enhanced connectivity and cooperation.⁴ In regards to creating a competitive, innovative and dynamic ASEAN, the member states plan to strengthen the region’s competitiveness and productivity by establishing a level playing field for all firms through effective competition law.⁵ This will involve utilization of competition law as vital mechanism to promote competition within ASEAN economies. All of the ASEAN member countries are on a fast track to adopt and to implement competition law.

However, there is a lack of study on the approach of utilizing competition law and SMEs in retail sector. Thus, this research focuses on the approach of competition law and SMEs in Malaysia, Thailand and Vietnam in order to develop a proposal on Thai competition law within the context of ASEAN market integration. This research

¹ ASEAN, *ASEAN Economic Community* <<http://www.asean.org/asean-economic-community/>>, 29 February 2016

² ASEAN, 'A Blueprint for GrowthASEAN Economic Community 2015:Progress and Key AchievementsASEAN' (ASEAN 2015) <<http://www.asean.org/storage/images/2015/November/aec-page/AEC-2015-Progress-and-Key-Achievements.pdf>>

³ ASEAN, 'ASEAN Economic Community Blueprint 2025' (ASEAN, 2015) <<http://www.asean.org/storage/images/2015/November/aec-page/AEC-Blueprint-2025-FINAL.pdf>>

⁴ Ibid

⁵ Ibid p. 12

compares different approaches of utilizing competition law to promote and protect SMEs in retail sectors. In the context of increasing integration and freer movement, SMEs in retail sectors have to face fierce competition from large multinational corporations from within and outside ASEAN. The question at this point is whether there is any difference on approach to utilize competition law as to protect and promote competition for SMEs development under the advent of increasing competition from multinational corporations in retail sector. In addition, if there is a difference, how will the competition law be developed as to ensure free and fair competition for the SMEs in ASEAN integration market in Malaysia, Thailand and Vietnam?

1.2 Objective of the Research

1. To study and collect information about competition law application and SMEs in retail sector in Malaysia, Vietnam, and Thailand within ASEAN integration contexts
2. To compare and analyse the application of competition law and SMEs retail sector in Malaysia, Vietnam, and Thailand within ASEAN integration context
3. To develop a proposal for Thai competition law in relation to SMEs in retail sector as to enhance investment and competition in ASEAN markets

1.3 Research Analytical framework

This research is based on the framework of “*Comparative Law and Economics*” which considers law and its impact on economic development. The study framework emphasizes the interaction between laws and economics which helps provide a clearer view on the application of competition law and transformation of ASEAN economies, especially the promotion of competition and SMEs. According to Ugo A. Mattei, Luisa Antonioli and Andrea Rossato, comparative law and economics is a tool to analyze the interaction of policies and laws that impacts economies and market developments.⁶ Richard Posner, in his view on the comparative law and economics, states that law (antitrust law) and economics is the application of the

⁶ Ugo A. Mattei, Luisa Antonioli and Andrea Rossato, Comparative Law and Economics in Boudewijn Bouckaert & Gerrit De Geest, *Encyclopedia of Law & Economics*, 2015, **Edward Elgar** and the **University of Ghent**, <<http://encyclo.findlaw.com/0560book.pdf>>

theories and empirical methods of economics to the central institutions of legal system.⁷ Thus, this research considers comparative law and economics as its main framework.

In addition, this research is also based on the analytical framework of “*Law and Development*”. The research framework on law and development helps explore the role of law, legal institutions and systems which are under the process of economic and social development, particularly in developing countries with emerging markets. The study of law and development focuses on reform of laws or rules of laws as to build on economic development.⁸ David Kennedy presents that this Law and Development framework is a tool to support analysis on challenging issues on laws⁹ Thus, in this research, the law and development will be an important analytical framework for developing analysis and proposals on competition law and SMEs in retail sectors in Malaysia, Thailand and Vietnam.

1.4 Research Methodology

This research projects will employ research methods of 1) documentary research, 2) comparative research and 3) in-depth interviews.

- The research method of ***Documentary Research*** involves collecting and analyzing primary and secondary documentary sources regarding competition law and SMEs in retail sector in Malaysia, Thailand and Vietnam. The primary sources include legislation, case law and the authoritative pronouncements of law made by parliament and the courts regarding competition law. Secondary sources include materials from books, journal articles, conference papers, policy research papers, working papers and newspaper articles.

⁷ http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2881&context=journal_articles

⁸ Trubek, D. M. (2015). "The Political Economy of the Rule of Law: The Challenge of the New Developmental State." *Hague Journal on the Rule of Law* 1(1): 28-32.

⁹ David Kennedy, *Law and Developments in Joh Hatchard & Amada Perry-Kessaris, Law and Developments Facing Complexity in 21 Century; Essays in Hounour Peter Slinn*, 2003, Cavendish Publishing, USA <http://policydialogue.org/files/events/Kennedy_law_development.pdf >

- The research method of *Comparative Research*¹⁰ focuses on comparative study of the application of competition law with a focus on SMES in retail sector in Malaysia, Thailand and Vietnam. This comparative study will be based on the analysis of the similarity and difference in the application of competition law among Malaysia, Thailand and Vietnam with a consideration on ASEAN market integration.
- The research method of *In-depth Interview* involves conducting interviews with experts involved with competition law and SMEs in retail sectors in Malaysia, Thailand and Vietnam. The interviews involve questions about the application of competition law, the promotion and protection on competition and SMEs in retail sectors and ASEAN market integration with the competition in retail sector between large corporate and SMEs in retail sectors. The interview subjects include at least 2 experts from each of Malaysia, Thailand, and Vietnam, as well as 2 experts in ASEAN contexts. In addition, there will be a use of Snowball sampling¹¹ by asking for referrals to other 2 experts from each country.

1.5 Research scope and process

This research focus on retail sector which relates to various policies and laws. However, the research will concentrate to frameworks of competition law, application of competition laws and SMEs in retails sector in Malaysia, Thailand and Vietnam.

In addition, the research process will be based on the research methods described above. The research steps are:

- 1) Conducting documentary research;
- 2) Comparative research;
- 3) Conducting in-depth interviews;
- 4) Analyzing research results; and
- 5) Holding consultations on research results. within framework of workshop

¹⁰ Linda Hantrais, *Comparative Research Methods*, 1995, Department of Sociology, University of Surrey < <http://sru.soc.surrey.ac.uk/SRU13.html> >

¹¹ Rowland Atkinson & John Flin, Snowball Sampling in Michael S. Lewis-Beck & Alan Bryman & Tim Futing Liao, *The SAGE Encyclopedia of Social Science Research Methods* 2004, SAGE Publications, Inc.



1.6 Research Definition

This research is aimed to study competition law and SMEs in retail sectors in Malaysia, Vietnam and Thailand. The definitions of “competition law” and “SMEs in retails sector” are presented below:

“Competition law” is defined, based on UNCTAD’s model law on competition 2010, as a law to *“control or eliminate restrictive agreements or arrangements among enterprises, or mergers and acquisitions or abuse of dominant positions of market power, which limit access to markets or otherwise unduly restrain competition, adversely affecting domestic or international trade or economic development.”*¹²

¹² UNCTAD, 'MODEL LAW ON COMPETITION' (UNCTAD, 2010). The model can be access from the UNCTAD’s website at< <http://r0.unctad.org/en/subsites/cpolicy/docs/Modelaw04.pdf>>.

“SMEs in retails sector” in this research is defined based on legislation governing SMEs in Malaysia, Thailand and Vietnam, as a “*retail business which has personals less than 250 persons and has annul turn over less than USD 20 Million*”¹³

In addition, other specific definitions of any words or phrases in this research are based on “*OECD- This Glossary of Industrial Organisation Economics and Competition Law 1993*”¹⁴

1.7 Research benefit

The research on competition law and SMEs in Malaysia, Thailand and Vietnam will help create a clear understanding on the application of competition laws and SMEs in ASEAN member countries. The research thus will be an important literature as to make understanding on the competition law and SMEs in retail sector in Malaysia, Thailand and Vietnam under the wake of ASEAN market integration.

In addition, the research will lead to a proposal for developing Thai competition law regarding the promotion and protection of market competition and SMEs in retail sectors. The proposal will be a framework for reform and enforcement of Thai competition law in order to protect market competition and promote the SMEs in retail sectors.

¹³ See Organization for Small & Medium Enterprises and Regional Innovation, JAPAN(2008), Small & Medium Enterprise Development Policies in 6 ASEAN Countries, <<http://www.asean.org/storage/images/archive/documents/SME%20Development%20Policies%20in%206%20ASEAN%20Member%20States%20-%20Part%201.pdf>>

¹⁴ OECD- This Glossary of Industrial Organisation Economics and Competition Law 1993, <<http://www.oecd.org/regreform/sectors/2376087.pdf>>

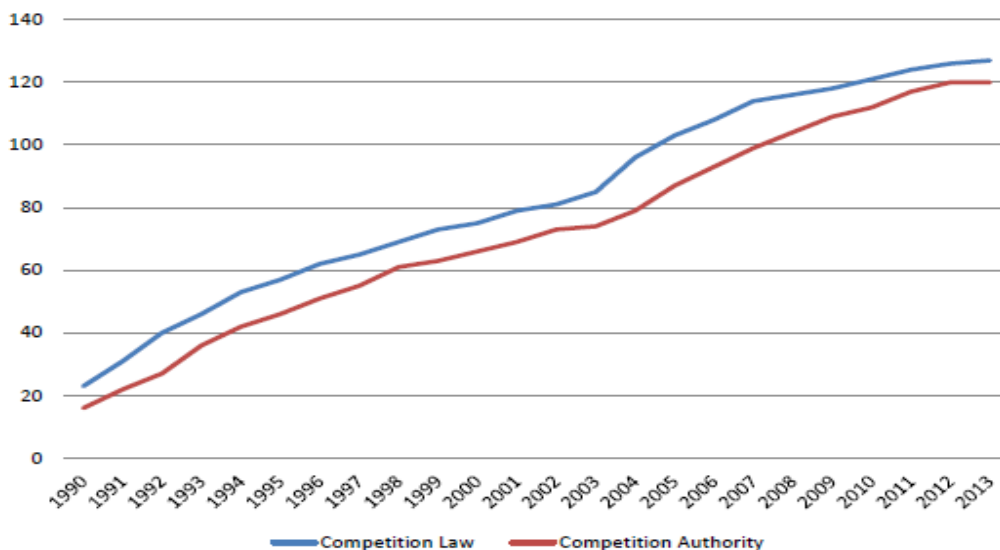
Chapter 2 : Competition Law and SMEs in retail sector

2.1 Competition Law and approach to apply competition law

2.1.1 General ideas about Competition Law

In recent years, there was the rapid proliferation of enacting competition law and establishment of competition authorities.¹ According to the OECD report on Challenge of International Cooperation in Competition Law Enforcement, the numbers of countries which enacted competition legislation increased from about 20 countries to nearly 125 countries from 1990 to 2013.² The main cause of this increase is that competition or antitrust law is a main legal mechanism to cope with anticompetitive conduct arising from abuses of market power and cartels. Competition law remedies are vital tools to help correct competitive markets which have been disrupted by anticompetitive behavior such that market competition no longer works in an effective way.³

Figure 1: Numbers of Jurisdiction with Competition Law and Competition Authorities



Source: <https://www.oecd.org/daf/competition/Challenges-Competition-Internat-Coop-2014.pdf>

¹ Taimoon Stewart, Julian Clarke and Susan Joeke, 'Competition law in Action: Experiences from Developing Countries' (2007) page 4

² OECD, 'Challenges of International Co-operation in Competition Law Enforcement' (OECD, 2014) <<https://www.oecd.org/daf/competition/Challenges-Competition-Internat-Coop-2014.pdf>> p 27, Accessed on 15 March 2016.

³ Mark Furse, *Competition law of EC and UK* (4 ed, 2004).

The first antitrust or competition law can be traced back to an 1889 Canadian competition legislation entitled “An Act for the Prevention and Suppression of Combinations in Restraint of Trade”.⁴ The purpose of enacting this law was to deal with extensive anticompetitive activities designed to escape market competition.⁵ Similarly, the 1890 US antitrust law, entitled Sherman Act was to cope with widespread business cartels and collusive conduct restraining trade in US markets.⁶ The Sherman Act was passed when the US government considered that market distorting activities by businesses would damage the effective system of the wealth redistribution.⁷ At this time, the US was in the process of industrialization with rapid technological advances leading to increases of competition which businesses tried to avoid by utilizing agreements or trust to control market competition.⁸ Scholars view that the Sherman Act was based on common law doctrine dealing with the monopoly conduct and contracts affecting consumers.⁹ Originating in the American Sherman act, US antitrust or competition law has been accepted by various jurisdictions and by international organizations as important legislation to protect market competition, which leads to economic efficiency and development.

For example, UNTAD considers that competition law is a significant element for economic development and provides a model competition law with the stated objectives of competition law as: *“To control or eliminate restrictive agreements or arrangements among enterprises, or mergers and acquisitions or abuse of dominant positions of market power, which limit access to markets or otherwise unduly restrain competition, adversely affecting domestic or international trade or economic development.”*¹⁰

⁴ Canada Competition Commission, 'Competition Policy in Canada Past and Future Backgrounder for Canadian Competition Policy PREPARING FOR THE FUTURE' (Paper presented at 2001) <<http://www.apeccp.org.tw/doc/Canada/Policy/1c.pdf>>

⁵ Cheffins, Brian, 'The Development of Competition Policy, 1890-1940: A Re-Evaluation of a Canadian and American Tradition' (1989) 24(3) *Osgoode Hall Law Journal*.

⁶ Pieter J. Slot and Angus C Johnston, *An Introduction to Competition Law* (2006). p 3

⁷ Ibid

⁸ Ibid

⁹ William L. Letwin, 'The English Common Law concerning Monopolies' (1954) 21(3) *The University of Chicago Law Review* 355; Harvey J. Goldschmid, 'Antitrust's Neglected Stepchild: A Proposal for Dealing with Restrictive Covenants under Federal Law' (1973) 73(6) *Columbia Law Review* 1193; See also in cases of Nat'l Soc'y of Prof'l Eng'rs v. United States 435 U.S. 679, 688 (1978)

¹⁰ UNCTAD, 'MODEL LAW ON COMPETITION' (UNCTAD, 2007).

The competition law thus sets out the rules for governing competition of markets in order to enhance efficient economy. The World Bank and OECD also issued a joint report, derived from international experience, stating that the object of competition law is:

- “Maintenance of competitive process of free competition
- Protecting freedom of trade, choice and access to market
- Prohibiting adverse effects of government intervention in the market place
- Preventing abuse of economic power
- Achieving economic efficiency”¹¹

The joint report provides a variety of objectives of competition legislation from countries such as USA, Canada, German and French. The report also states that, in the previous two decades, the rapid trend on enacting competition law as a tool to achieve economic efficiency has surged. This focus on economic efficiency suggests that competition law enforcement should be based on prudent analysis of competition principles to maintain an unobstructed interaction of competitive forces which will yield the best allocation of economic resources.¹² In addition, a separate OECD report stated that, although most jurisdictions have two main basic objectives of competition law which are 1) promoting and protecting competitiveness process and 2) attaining greater economic efficiency, the expression of the objectives is varied across jurisdictions.¹³

2.1.2 Approach in applying competition law

As noted above, competition laws have been enacted in many countries; however, approaches to their application can be viewed from different perspectives. The fundamental approaches in applying competition law fall within two main schools of thought: the Harvard and Chicago schools. While the Harvard school tends to assert that competition law should be broadly applied against conduct of dominant firms that deter market competition; the Chicago school seems to maintain its position

¹¹ WorldBank and OECD, 'A Framework for the Design and Implementation of Competition Law and Policy' (World Bank and OECD, 1999) page 2-3

¹² Ibid

¹³ OECD, 'The Objectives of Competition Law and Policy and The Optimal Design of a Competition Agency' (2003) 5(1) *OECD Journal of Competition Law & Policy* 7, p 15

that competition law should be applied in a more limited manner in order to refrain from uneconomic decisions that can damage competitive economy.

Early Harvard school analysis on competition policy can be seen in the works of Kaysen and Turner who propose that competition policy must mainly focus on limiting and reducing market power.¹⁴ This implies that the Harvard school support a broader application of competition law to dominant firms to reduce their exercise of market power. Moreover, the Harvard school also supports using government regulations to correct market concentrations by reducing the degree of firm monopoly.¹⁵

In contrast, the Chicago school proposes that the application of competition law should be more limited in its scope and should focus only on the attainment of economic efficiency not other socio-political problems of income distribution and economic power arising from market concentrations.¹⁶ For example the Chicago school views a barrier to entry by the incumbent is the creation of economic efficiency and firms’ conduct of predatory pricing should not be condemned as anticompetitive conduct due to the fact that the conduct may originated from firms intention to fiercely compete with business rival.¹⁷ The Chicago school also adheres with neoclassical economic theory in that it asserts that market intervention by antitrust enforcement and government regulation can be an impediment to effective market function. An important aspect of Chicago school is the belief that a market monopoly or dominant position will be corrected by the market function itself not by government action or antitrust enforcement.

The adoption of the Harvard and Chicago analysis on competition law in US court cases can be seen to yield different results. Piraino provides very insightful comparison between Harvard and Chicago school :

“Harvard School scholars have assumed that poor economic performance is inevitable in monopoly markets. Until the late 1960s, the federal courts and

¹⁴ Kaysen, C., and Turner, D.F., *Antitrust policy: An Economic and legal Analysis*, in Mark Furse, *Competition law of EC and UK* (6 ed, 2008)., p 11

¹⁵ Ibid

¹⁶ Ibid, p 12 and see in Richard Gordon, *Antitrust abuse in the new economy : the Microsoft case* (2002).

¹⁷ Ibid p 11

enforcement agencies followed a Harvard School approach in Sherman Act section 2 cases, and they became willing to find monopolists liable, even if they had not engaged in any exclusionary behaviour. Once a defendant was found to possess monopoly power, the courts and agencies precluded any conduct having the purpose or effect of protecting or increasing that power.

Chicago School scholars believe that monopolists should not be liable simply for engaging in conduct that is a natural consequence of their market power. The Chicago School assumes that firms usually acquire monopoly power because of their ability to provide consumers with superior products at low prices. Punishing monopolists simply”¹⁸

The experience from US courts’ suggests further that courts, when utilizing a Harvard school approach tend to apply *per-se rules*¹⁹ of illegality in relation to anticompetitive conducts and, when utilizing a Chicago school approach, tend to apply *rules of reason*²⁰ that give room for courts to determine whether business conduct is motivated by anticompetitive intention or not.²¹

Both schools have influenced courts in determining competition law cases. Until the 1960s, in the early period of antitrust law decision, courts relied on per se rules of Harvard’s School approach in determining the cases. Scholars and courts observed that the Harvard approach may involve a degree of non-economic considerations as it overemphasizes the illegality of market power and neglects potential efficiencies deriving from impugned conduct.²² This led to the decline of the Harvard school approach and the rise of the Chicago school approach which provided more economic perspective for antitrust law.

The Chicago School has been highly influential in moving Courts reasoning away from applying non-economic considerations established during earlier formalist

¹⁸ Thomas A. Jr. Piraino, 'Reconciling the Harvard and Chicago Schools: A New Antitrust Approach for the 21st Century' (2007) 82 *Indiana Law Journal* 345.

¹⁹ Per se rule deems certain conduct illegal on its face

²⁰ Rule of reason inquires into all conceivable circumstances before determining the legality of a particular restraint

²¹ Ibid above n 18 Thomas A. Jr. Piraino p. 363

²² Ibid

periods.²³ However, when it comes to actual conclusions, Courts have been much more comfortable with the moderate prescriptions of the Harvard School than with the more radical positions advocated by the Chicago School.²⁴ Arguably, this is because the Chicago school approach tends to severely limit the ability of competition law to deter anticompetitive conduct, and reduces certainty in competition law decisions.²⁵

More recently, strict adherence to the Chicago school has faded with the lack of evidentiary support that market concentrations or monopoly are alleviated without rigid antitrust enforcement or government intervention.²⁶ This can be seen by the suggestion of American Antitrust Institute that

“A fundamental paradigm shift in American economic theory is necessary to further the goals of antitrust and consumer law in the U.S. Arguing that the current reliance on neoclassical economic theory as espoused by the Chicago School of economics is incompatible with both the goals of competition law and the basic ideas of democracy, the AAI advocates a shift to a post-Chicago economic framework that recognizes and embraces the value of regulation and more aggressive enforcement in promoting efficient competition”²⁷

We therefore see movement of, scholars and courts towards the post-Chicago approach that can be viewed as a bridge between the Harvard and the Chicago schools. The Post-Chicago approach integrates per se rules, rules of reasons, market share considerations, and competitive effect of the firms conducts.²⁸ This combination of ideas supports a variety of approaches for courts to determine whether business conduct is in breach of competition law or not. When the conduct is obviously illegal (as in horizontal price fixing or horizontal cartelisation) under competition law, the per se rules should be employed, but in other circumstances,

²³ Einer R. Elhauge, 'Harvard, Not Chicago: Which Antitrust School Drives Recent Supreme Court Decisions?' (Discussion Paper No. 594, Harvard Law School 2007). P. 12

²⁴ Ibid p. 12

²⁵ The uncertain outcome is because the economic reason can be varied by economic theories and perspectives and because courts are reluctant to analyse economic approach to determine the line between uncompetitive and competitive conducts when there is economic efficiency and consumer welfare involving in the courts consideration- See in Ibid above n 18 Thomas A. Jr. Piraino p. 363

²⁶ Ibid

²⁷ American Antitrust Institute, The Next Antitrust Agenda: The American Antitrust Institute's Transition Report On Competition Policy to the 44th President in Spencer Weber Waller and Jennifer Woods, 'Antitrust Transitions' (Institute for Consumer Antitrust Studies, Loyola University Chicago, 2009).

²⁸ Ibid above n 15 Thomas A. Jr. Piraino p. 366

when conduct is likely to benefit or harm consumers, empirical economic analysis should be applied.²⁹ The application of Post- Chicago approach to competition law cases will lead courts, competition authorities, businesses and consumers to understand the clear application of competition law and result in increased effectiveness of competition law enforcement.

2.1.3 Function of competition law

As discussed above, competition law thus can be seen as a legal tool for; 1) protecting market competition, 2) protecting consumers welfare, and 3) protecting business competitors.

Competition law function of protecting market competition

It is generally agreed that the main function of competition law should be based on economic theories of competition and seek to protect and develop the competitive process in the pursuit of optimal levels of efficiency.³⁰ Thus competition law should be designed to enhance outcomes on economic efficiency and progress.³¹ With a purpose of increasing market efficiency, competition law should support an effective allocation of resources by increasing the likelihood of efficient relations of prices and costs, capacities and output, demand and supply, and production at efficient scales in efficient locations.³²

Competition law will, by protecting market competition, produce various outcomes of allocative, productive, and dynamic efficiencies. Allocative efficiency occurs where the competition law can guarantee that when there is reduction of output, a producer or a seller who possesses substantial degree of market power cannot influence the market prices.³³ The competition law will contribute to productive efficiency when it can create the reduction of the costs of production to lowest possible point by competitive encouragement³⁴. This can be seen from the case

²⁹ Ibid n 15 p. 370

³⁰ Alec Zuo David K Round, 'The Welfare Goal of Antitrust Laws in Asia: for whom should the law toil?' (2008) 22(2) *Asian-Pacific Economic Literature* 31, p 32 see also in ibid above n 9 p. 15

³¹ Carl Kaysen and Donald F. Turner., *Antitrust policy; an economic and legal analysis* (1959) p. 14

³² Ibid 12

³³ Simon Bishop and David Walker, *The Economics EC Competition Law Concepts, Application and Measurement* (2 ed, 2002). P 20-21

³⁴ Richard Whish, *Competition Law* (4 ed, 2001) p. 3

that the business rivals attempt to use strategy that they can decrease their production cost in order to be prevail the other businesses rivals.³⁵ In addition, Competition law can lead to the dynamic efficiency by assisting and maintaining development of market competitive environment, which will contribute to new innovation from businesses competitors. When the business operators or producers are able to adopt new innovative products or services for market, the dynamic efficiency are enhanced.³⁶ However, it has to be noted that the above three types of efficiency may not always in consistent with each other.³⁷

Furthermore, competition law’s function of maintaining competition and efficiency can be observed in its roles in promoting the competitive process. Competition law enhance s the competitive process by dealing with abuses of market power such may arise from monopoly or oligopoly situations. It also limits market distortions of potentially anticompetitive mergers and cartel behavior .³⁸ Where competition law prevents or limits the effects of anticompetitive conduct, including prevention of competition or entry, it effectively stimulate the competitive market forces.

The notion that competition law should purely focus on economic efficiency is inherited from the Chicago school which precludes consideration of other social benefits.³⁹

Protecting consumer welfare

In many jurisdictions, competition law functions as legal regime for protecting consumers from unfair competitive conduct. Phillips Collins, the chairman of UK Office of Fair Trading, stated:

³⁵ Ibid

³⁶ Ibid p. 4

³⁷ See, Damien Geradin, 'Efficiency Claims in EC Competition Law and Sector-specific Regulation' (Paper presented at the Workshop on Comparative Competition law: The European Evolution of competition law- Whose Regulation, Which regulation?, Florence, 2004) p 4 Geradin examines that when there is case of mergers, it can create economy of scale and scope that can reduce cost for the merging firms thereby establish productive efficiency. But the merger that increases productive efficiency may be in conflict with allocative efficiency because the merged firms can occupy market power with the result of reduction on consumers welfare.

³⁸ Ibid above n 31- Carl Kaysen and Donald F

³⁹ Phillip Clarke and Stephen Corones, Competition law and Policy: Case and Material (2 ed, 2007). p. 97

“Today, all around the world, policy makers recognize that a system of competition law is essential to the successful operation of a market economy and the protection of consumers. And an essential element within the competition tool box is enforcement. It is important that competition authorities intervene to prohibit, punish and deter behaviour that is harmful to consumers.”⁴⁰

In addition, Neelie, a member of the European Commission, noted that, in enforcing competition law, significant consideration has to be given to the affected consumer’s welfare:

“Consumer welfare is now well established as the standard the Commission applies when assessing mergers and infringements of the Treaty rules on cartels and monopolies. Our aim is simple: to protect competition in the market as a means of enhancing consumer welfare and ensuring an efficient allocation of resources. An effects-based approach, grounded in solid economics, ensures that citizens enjoy the benefits of a competitive, dynamic market economy. And of course our anti-cartel work is clearly focused on preventing unfair profits being creamed off markets at additional and direct cost to consumers.”⁴¹

This suggests that enforcement of competition law must consider not only market efficiency and competition, but also consumer welfare as well. For example, the EU Commission’s Guidance on enforcement of Article 82 emphasizes the Commission’s focus on protecting welfare of consumers by targeting exclusionary conduct of dominant undertakings that are most harmful to consumers.⁴² The Guidance also states that the Commission will enforce Article 82 in manner that ensures that market efficiency and competition will increase benefits to consumers.⁴³ Even in the USA, where it is accepted that antitrust enforcement should focus on economic efficiency, significant consideration is given to promoting and protecting

⁴⁰ Philip Collins, 'Opening Keynote Speech to the British Institute of International and Comparative Law’s Conference on Reform of Article 82' (Paper presented at the The British Institute of International and Comparative Law’s Conference on Reform of Article 82, UK, 2006), http://oft.gov.uk/shared_oft/speeches/spe0206.pdf

⁴¹ Neelie Kroes, 'European Competition Policy - Delivering Better Markets and Better Choices' (Paper presented at the European Consumer and Competition Day, London, 2005), http://ec.europa.eu/competition/speeches/text/sp2007_11_en.pdf

⁴² EU Commission, 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings' (EU Commission, 2009) http://ec.europa.eu/competition/antitrust/art82/guidance_en.pdf p. 4-5

⁴³ Ibid p. 5

consumers’ welfare.⁴⁴ In Australia and New Zealand, consumers’ welfare has been identified as the main consideration in the enforcement of competition law.⁴⁵

Furthermore, by protecting consumer interest, the role of competition law can be extended to economic welfare distribution by eliminating monopoly and cartel conduct which derive high profit by taking advantage of consumer interests.⁴⁶ Competition law may then have a role in maintaining rivalry among firms which translates to greater market efficiency and consumers receiving economic benefits from the effective functioning of markets competition.⁴⁷

The wealth redistribution function of competition law is also based on the notion that the law should promote economic equity in society.⁴⁸ This rationale can be seen in the experience on adopting competition law in certain jurisdictions. Many developing countries have employed competition law as a means to enhance public welfare particularly in relation to merger control.⁴⁹ Stephen Hanival, in his study on South Africa, stated that “the competition law mixes considerations of purely economic efficiency with those of equitable wealth distribution and considers the particular needs of firms that are owned or controlled by previously disadvantaged racial groups.”⁵⁰ This aspect of using competition law is also seen in Central American countries that incorporate social welfare provisions into their competition law.⁵¹

⁴⁴ Albert Foer, 'The Goals of Antitrust: Thoughts on Consumer Welfare in the U.S' (American Antitrust Institute, AAI Working Paper 05-09 2005) and Eleanor M. Fox, 'What is harm to competition? Exclusionary practices and anticompetitive effect' (2002) 70(2) *Antitrust Law Journal* 371.,

⁴⁵ See Australia Trade Practice Act 1974 section 4E and section 46 and NZ Commerce Act 1986 Section 1 A. both Australia and new Zealand recognise that the purpose of the act is to maintain consumers welfare by enforcing competition law. See also in Michael Jacobs, 'THE DAWSON REVIEW AND SECTION 46: THE GOOD, THE BAD, AND THE UGLY' (2003) 26(1) *University of NSW Law Journal* 233.

⁴⁶ Harry First, Eleanor M. Fox and Robert Pitofsky, *Revitalizing Antitrust in its Second Century: Essays on Legal, Economic, and Political Policy* (1991).

⁴⁷ K J Cseres, 'The Controversies of the Consumer Welfare Standard' (2007) 3(2), *Competition law Review*, p 124

⁴⁸ Richard Whish, *Competition Law* (LexisNexis, 5th ed ed, 2003), p. 17

⁴⁹ *Ibid*, p. 10

⁵⁰ Stephen Hanival, 'CASE STUDY: South Africa, Equal Opportunity to Compete' (International Development Research Centre, CASE-COMPETITION-6E, 2008).

⁵¹ Taimoon Stewart, Julian Clarke and Susan Joekes, 'Competition law in Action: Experiences from Developing Countries' in (2007).

Protecting Business competitors

Competition law also functions to prevent business competitors from anticompetitive conducts of firms with significant market power. The creation of barriers to competition and limitations on access to essential facilities has become an important aspect of competition law enforcement. This is particularly observed where firms attempt to compete in highly concentrated markets as incumbent firms may engage in anticompetitive behavior to restrict or prevent this competition in order to maintain their market power. Competition law thus has a role to play in enabling competitors to fairly compete against the incumbent firms in such concentrated markets. This is widely seen in liberalised utility markets such as telecommunication, transportation, water and energy where competitors face existing utility incumbents with substantial market power.

Moreover, competition law may also be utilized to protect small and medium enterprises. This may derive from the Harvard School’s approach of correcting market concentrations by reducing the degree and anticompetitive effect of excessive market power held by giant firms.⁵² Barnett opined on the importance of competition law for protecting small business:

“If firms are allowed to collude to prevent competition by fixing prices or allocating customers, or if anticompetitive mergers increase prices, reduce output or stifle innovation – our economy will suffer. And because the success of virtually any small business depends greatly on the general condition and health of the economy, unchecked anticompetitive behaviour that hurts the economy also hurts small business.”⁵³

Large firms may exercise their significant influence to drive out their small competitors. This suggests that competition law may have a role to play in increasing the competitive environment by preservation of small businesses.⁵⁴ However, it has to be noted that protection of small competitors may conflict with the Chicago

⁵² Alison Jones, Brenda Sufrin and Brenda Smith, *EC Competition Law: Text, Cases and Materials* (3 ed, 2007) p 17

⁵³ Thomas O. Barnett, 'Small Business Competition Policy: Are Markets Open For Entrepreneurs ' (Antitrust Division U. S. DOJ, 2008). <http://www.usdoj.gov/atr/public/testimony/239477.htm>

⁵⁴ Stephen Corones, 'Section 46 of the *Trade Practices Act: Boral*, the Dawson Committee and the Protection of Small Business' (2003) 31 *Australian Business Law Review* 210

school’s approach to protecting economic efficiency;⁵⁵ particularly where protecting small competitors effectively supports inefficient competition. Competition law’s protection of small inefficient firms would therefore obstruct efficient competition⁵⁶ from generating better prices and products and interfere with consumers welfare. This potential conflict in the roles of competition law demonstrates the importance of studying how competition law is being utilized to create competitive market efficiency, promote consumers’ welfare and protect small enterprises.⁵⁷

2.2 Competition Law and SMEs in retail businesses

From the above discussion, we conclude that competition law can be a vital tool to promote competition and to protect SMEs despite the potential conflict between these approaches. This study will focus on the issues raised in the retail sectors.

2.2.1 Competition law and SMEs protection in retail business

The significant use of competition law to protect small enterprises can be seen with the US adoption of Clayton Antitrust Act 1914 (“Clayton Act”)⁵⁸ which prescribes certain conduct leading to unfair competition between dominant firms and small firms. The Clayton Act prohibits price discrimination; conditioning sales on exclusive dealing; mergers and acquisitions which may substantially reduce competition; and serving on the board of directors of two competing companies. For example, section 2 states:

“It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States...”

⁵⁵ Chicago school proposes that competition law should be employed for only purpose of protecting competition not the other goals.

⁵⁶ See example case in Australian High Court case of Besser Masonry Ltd v ACCC [2003] HCA 5 at 260

⁵⁷ Economic Advisory Group on Competition Policy (EAGCP), 'An economic approach to Article 82' (EU commission, 2005).<http://ec.europa.eu/competition/publications/studies/eagcp_july_21_05.pdf >

⁵⁸ The Clayton Antitrust Act of 1914, codified at 15 U.S.C. 12-27

Fox and Pitofsky observe that the Clayton Act was passed to create new market freedom and build protection for small businesses against dominant firms’ control over channel competition to prevent small businesses being barred from opportunities to compete with large and powerful competitors.⁵⁹ Hovenkamp also concludes that the Clayton Act increased private antitrust enforcement as Section 4 permits damaged parties to sue and to recover treble damages.⁶⁰ The small and medium enterprises were then incentivized towards legal action toward anticompetitive conduct by dominant firms.

The US antitrust law was also amended by the Robinson-Patman Act of 1936 which prohibits discriminatory prices, services, and allowances in dealings with other businesses. According to US Federal Trade Commission (“FTC”), the Robinson-Patman Act was passed as to prohibit anticompetitive price discrimination in retail store businesses which permitted dominant firms to provide competitive advantages to its allied business.⁶¹ The FTC points out that violation of the Robinson-Patman Act can raise complex legal questions, but businesses should be aware of basic conduct that may constitute violations including:

- “below-cost sales by a firm that charges higher prices in different localities, and that has a plan of recoupment;
- price differences in the sale of identical goods that cannot be justified on the basis of cost savings or meeting a competitor's prices; or
- promotional allowances or services that are not practically available to all customers on proportionately equal terms.”⁶²

Calkins, in his research on the development of US antitrust law, asserts that the Robinson-Patman Act was enacted out of a populist concern for small businesses trying to compete with powerful chain stores.⁶³ However, the Robinson-Patman Act

⁵⁹ Fox, Elenor M. and Robert Pitofsky, 'United States' in David Richardson and Edward M. Graham (eds), *Global Competition Policy* (1997)

⁶⁰ Hovenkamp, Herbert J., 'A Primer on Antitrust Damages' (2011) *University of Iowa Legal Studies Research Paper* p. 3, 20

⁶¹ US FTC, Price Discrimination: Robinson-Patman Violations <<https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/price-discrimination-robinson-patman>>

⁶² Ibid

⁶³ Calkins, Stephen, 'Competition Law in the United States' (2007) Wayne State University Law School Research Paper No. 07-14

has critics which consider it to be poorly drafted legislation and note that responsible agencies have not vigorously enforced it.⁶⁴

According to Sawyer, criticism of the Robinson-Patman Act is mainly based on the Chicago School’s economic approach to US antitrust law.⁶⁵ The economic ideas emerging from the University of Chicago’s Free Market Study Group attacked and discredited the progressive populism of the Robinson-Patman Act by arguing that it is anti-consumer, anti-big business, and anti-free market.⁶⁶ Nevertheless, the Robinson-Patman Act was an important legal mechanism to deal with issues between large retail chain stores and small retailers as exemplified in the cases of *FTC v. Fred Meyer, Inc.*⁶⁷ and *Southgate Brokerage Co. v. FTC.*⁶⁸

In *FTC v. Fred Meyer*, the FTC decided that Fred Meyer, the corporate owner of a chain of supermarkets, had conducted promotion activities that it considered as discriminatory pricing behaviors prohibited by §§ 2(a) and 2(d) of the Robinson-Patman Act.⁶⁹ Since 1936, Fred Meyer has used an annual four-week promotional campaign in its stores based on distributing coupon books to customers. The coupons could be used for discounts at Fred Meyer stores. This program was very successful business and 138,700 books were sold in 1957 and 121,270 in 1958.⁷⁰ The main concern was that there were two wholesalers offering lower prices to Fred Meyer by providing promotional allowances in respect of some of the goods sold during the campaign. Fred Meyer's retail competitors were not able to benefit from these promotional allowances.⁷¹ The U.S. Supreme Court determined that Fred Meyer had infringed Section 2(d) by inducing suppliers to engage in discriminatory pricing.⁷²

⁶⁴ Ibid

⁶⁵ Sawyer, Laura Phillips, 'The U.S. Experiment with Fair Trade Laws: State Police Powers, Federal Antitrust, and the Politics of 'Fairness,' 1890-1938.' (2015) *Harvard Business School Working Paper*

⁶⁶ Ibid

⁶⁷ Inc., 390 U.S. 341 (1968)

⁶⁸ 150 F.2d 607, 611 (4th Cir.)

⁶⁹ *FTC v. Fred Meyer, Inc.* 390 U.S. 341 (1968), <
<https://supreme.justia.com/cases/federal/us/390/341/>>

⁷⁰ Federal Trade Commission, Petitioner, v Fred Meyer, INC., et al.,
<<https://www.law.cornell.edu/supremecourt/text/390/341>>

⁷¹ Aalberts, Robert J. and Lynn Judd, 'Slotting in the Retail Grocery Business: Does It Violate the Public Policy Goal of Protecting Businesses Against Price Discrimination?' (1991) 40(2) *DePaul Law Review* 21

⁷² Ibid

In *Southgate Brokerage Co. v. FTC*, Southgate was a brokerage agent and food distributor which received fees for providing warehousing services and reselling products on sellers' behalf. Southgate also bought and resold products in its own name. The key concern was that Southgate was receiving brokerage commissions from the sellers for products it was purchasing on its own behalf. The FTC issued a cease and desist order as this conduct was determined to be a violation of Section 2(c) of the Robinson-Patman Act. A petition to set aside the order was denied by the Fourth Circuit Court of Appeals.

In addition, US competition law can be used for protecting SMEs when they have to be under dominance retailers or supermarkets which require the SMEs supplier to pay slotting allowance. The dominant retailers or supermarket may be subjected to an infringement of competition law. It is because the retail chain or large supermarket chain can use discriminatory slotting fees to their suppliers. Skitol in his testimony to US senate committee points out that “Retail chains may demand different amounts from different suppliers in the same product category indeed in some cases the leading supplier may pay nothing while its smaller rivals are expected to write large checks.”⁷³ In addition, competition law concerns with slotting allowances arise in various countries as noted in Kobel et al's book on antitrust in the groceries sector.⁷⁴ This book discusses how competition law deals with slotting allowances in countries such as Australia, Austria, Finland, and Belgium.

In addition, the EU commission stated in its recent report on choices in grocery retail that there is a clear trend towards increased market concentration in edible grocery retail.⁷⁵ Concentration of brand suppliers tended to increase at national level from 2004 to 2012 across most EU member states⁷⁶ The report also notes that the market share of private label products has increased across most product

⁷³ Robert A. Skitol, Slotting Fees in the Grocery Industry, Before the Senate Committee on Small Business, (September 14, 1999) (testimony of Robert A. Skitol, the American Antitrust Institute) in Sakia Kim Kim, Saskia, 'Shelf-Access Payments: Slotting Fees, Pay-to Stay Fees and Exclusivity Deals' (Senate Office of Research Donald Moulds, 2005)

<<http://sor.senate.ca.gov/sites/sor.senate.ca.gov/files/Shelf-Access%20Payments.pdf>>

⁷⁴ Kobel, P., Kellezi, P. and Kilpatrick B., Antitrust in the Groceries Sector & Liability Issues in Relation to Corporate Social Responsibility, 2015, Springer-Verlag GmbH Berlin Heidelberg, Berlin.

⁷⁵ European Commission, 'The economic impact of modern retail on choice and innovation in the EU food sector' (European Commission, 2014)

<http://ec.europa.eu/competition/publications/KD0214955ENN.pdf>, p. 31

⁷⁶ Ibid, p. 32

categories in the EU based mainly on the increased perception among consumers that these products offer good value for money.⁷⁷ The market changes may lead to competition law being involved where large retailers exercise market power over SMEs in EU. Also, EU competition law has thus far dealt with issue of late payments to suppliers, unilateral price amendments, returned goods abuses, threats of delisting for supplier ‘transgression’ and excessive squeeze on overseas growers.⁷⁸ Ezrachi points out that the proliferation of private labels in large retailers has transformed the landscape of EU retail competition which has led to the emergence of ‘vertical competition’ between big retailers and suppliers. Ezrachi asserts that there is a gap in competition law because the competition law fails to properly address the increased market power of retailers and the competitive implications of private labels.⁷⁹ Similarly, Lianos and Lombardi, in their research on bargaining power between large retailers and SME suppliers, argue that there is issue with the traditional approach of competition law to dealing with this bargaining power.⁸⁰ Lianos and Lombardi point out that, based on their studies on investigations in Germany, France and Italy, there are anticompetitive concerns when small suppliers are subject to large retailers’ superior bargaining power.⁸¹ For example, these large retailers force amendments to supply contracts by threatening to delist product or impose other forms of retaliation.⁸²

In South Korea the KFTC issue a subordinate regulation on “the Fair Trade in Large-Scaled Distribution Businesses,” in 2012 (amended in July 2013) which focuses on protecting the interests of small suppliers and store lessees by prohibiting certain behaviors of large distributors such as supermarkets or department

⁷⁷ Ibid, p. 25

⁷⁸ Oxford Institute of European and Comparative Law, 'Trends in Retail Competition: Private labels, brands and competition policy' (Oxford Institute of European and Comparative Law, 2013) <http://www3.law.ox.ac.uk/denning-archive/news/events_files/Report_of_the_Symposium_on_Trends_in_Retail_Competition,_2013.pdf> p. 23-25

⁷⁹ Ezrachi, Ariel, 'Unchallenged Market Power? The Tale of Supermarkets, Private Labels, and Competition Law' (2010) 33(2) *World Competition* 17

⁸⁰ Lianos, Ioannis and Claudio Lombardi, 'Superior Bargaining Power and the Global Food Value Chain. The Wuthering Heights of Holistic Competition Law?' (2016) Centre for Law, Economics and Society Research Paper Series, p 14

⁸¹ Ibid, p. 14-19

⁸² Ibid, p. 23

stores.⁸³ The regulation prohibits anticompetitive conduct by large retailers affecting small enterprises such as delaying payment of sales prices, refusing or delaying receiving goods, and passing on sales promotion costs.⁸⁴

In Japan, the Fair Trade Commission (“JFTC”) issued its “Guidelines Concerning Designation of Specific Unfair Trade Practices by Large Scale Retailers Relating to Trade with Suppliers” in 2005.⁸⁵ The Guidelines were issued in response to abuses of dominant bargaining position by large-scale retailers over suppliers such as compelling small suppliers into offering monetary contributions or accepting unjust return of goods, irrespective of existing contracts, or making a new contract under different business terms.⁸⁶ The Guidelines prohibits various abusive conducts such as unjust return of goods, unjust price reduction, unjust consignment sales contract, beating suppliers down on prices for bargain sales, refusal to receive specifically ordered goods, coercion to purchase, unjust assignment of work to employees of suppliers, unjust receipt of economic benefits, unfavorable treatment in response to refusal of request⁸⁷

Based on the review above, it appears that competition law can be a vital mechanism to protect retail sector SMEs from abusive conducts by large retailers . However, the potential conflict between using competition law to protect SMEs in contrast to its purpose of protecting competitive markets must be reconciled.⁸⁸

2.2.2 Competition law and SMEs’ anticompetitive conducts

While the report has already discussed competition law’s role in protecting SMEs from unfair practices, it also may anticompetitive conduct by retail sector

⁸³ Lee, Hwang, 'Overview of Current Antitrust Enforcement in Korea' (2014) *Competition Policy International*

⁸⁴ South Korea Government, 'Annual Report on Competition Policy Development in Korea' (OECD, 2012) <<http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/AR%282012%2938&docLanguage=En>>, p 14

⁸⁵ JFTC, 'Guidelines Concerning Designation of Specific Unfair Trade Practices by Large- Scale Retailers Relating to Trade with Suppliers' (2005) <http://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines.files/guidelines_large_scale_retailers.pdf>

⁸⁶ Ibid

⁸⁷ Ibid, Part II section 1-10.

⁸⁸ Cheng, Thomas K. and Michal S. Gal, 'Superior Bargaining power: Dealing with Aggregate Concentration Concerns' (Paper presented at the 10th ASCOLA Conference, Tokyo, 2015) <<http://ascola-tokyo-conference-2015.meiji.jp/pdf/Ascola%20-%20Tokyo%20-%20provisional%20programme.pdf>>

SMEs. The main competition issue arising with retail sector SMEs is cartels or anticompetitive agreements. The OECD competition committee’s study on “Potential Pro-Competitive and Anticompetitive Aspects of Trade/Business Associations” notes that trade associations may promote cartel behavior which would infringe relevant competition law and the trade associations are mainly consists of SMEs.⁸⁹ Based on countries’ contribution, the study’s principle findings are;

- *“Trade associations play valuable, fundamental roles as forums for the discussion and exchange of views on important issues of common interest for the industry sector which they represent. Many trade associations activities should be supported and encouraged, because they promote the efficient functioning of the market.*
- *Many trade association activities benefit from statutory and non-statutory exemptions or immunities from the application of competition rules, to permit them to perform these beneficial roles.*
- *Trade associations may offer opportunities for direct competitors to meet repeatedly. This could easily spill over into illegal and anticompetitive activities and favour collusion and coordinated exclusionary conduct.*
- *Associations may be liable for antitrust infringements, but the application of competition rules to associations may raise specific issues when it comes to determining and assessing monetary sanctions”.*⁹⁰

The study also reports examples in South Korea, Netherlands and USA, where trade associations appear to have made cartels via meeting of numerous competitors that would otherwise have difficulty coordinating among SMEs.⁹¹ However, the study also notes that many countries provide an exemption in their respective competition laws for anticompetitive agreements under the auspices of a trade association as such agreement among SMEs may effectively create bargaining or lobbying power for SMEs.⁹²

⁸⁹ OECD, 'Policy Roundtable on Trade Association' (OECD, 2007),
<<http://www.oecd.org/regreform/sectors/41646059.pdf>>

⁹⁰ Ibid, p 7-9

⁹¹ Ibid, p. 141, 155, and 211

⁹² Ibid

An important study on competition law enforcement in relation to SMEs is Qaqaya’s ongoing research on the application of competition law to SMEs in selected APEC countries. This research initially found that competition laws in many developing countries incorporate a variety of economic policies such as the promotion of SMEs which typically account for between 80 and 99% of the total number of companies in developing countries.⁹³ Qaqaya’s research studies an enforcement of competition laws in relation SMEs’ cartel and dominant enterprises.⁹⁴ The research also addresses whether competition laws are applicable to SMEs’ behaviour or not. The research aims to produce an understanding of appropriate competition law enforcement to SMEs.

Albert A. Foer’s “*Small Business and Antitrust*” , observes that SMEs are subject to application of competition law when they are involved in behavior, such as price fixing and group boycotts, which deter market competition.⁹⁵ The research notes that the larger firms tend to dominate over SMEs in trade association meetings particularly where such firms pay the main costs of the trade association.⁹⁶ Foer concludes that antitrust law must deals with SMEs’ collusive coalition as to protect consumer benefits.⁹⁷

Furthermore, Schaper’s “Competition law, Enforcement and the Australian Small Business Sector” notes challenging competition law issues in relation to SMEs in Australian markets.⁹⁸ The issues include the SMEs’ lack of awareness of the competition law and the regulator’s need to consider proportionality of fines and penalties imposed on SMEs. Schaper asserts that there is a need for further empirically-based research aimed at the development of effective regulatory and enforcement approaches of competition law toward SMEs.⁹⁹ Examples of such research include: 1) SMEs in co-operation, collusion and cartel conduct, 2) the influence of

⁹³ Qaqaya, Hassan, 'Application of competition law to small-and-medium enterprises: lessons from selected APEC countries' (UNCTAD, 2015)
<<http://unctad.org/en/Pages/DITC/CompetitionLaw/ResearchPartnership/Commpetition-Law-and-SMEs.aspx>>

⁹⁴ Ibid

⁹⁵ Foer, Albert A., 'Small Business and Antitrust' (2001) 16(1) *Small Business Economics* 17.

⁹⁶ Ibid

⁹⁷ Ibid, p. 16

⁹⁸ Schaper, Michael T., 'Competition law, enforcement and the Australian small business sector' (2010) 17(1) *Small Enterprise Research*, 7

⁹⁹ Ibid, p. 12-13

third parties facilitating SMEs response to competition matters, 3) the impact of competition policy changes on SMEs.¹⁰⁰

The UK Competition and Markets Authority (“CMA”) examined competition law awareness among UK businesses and found that, while SMEs consider it important to comply with competition law, they lack understanding of what conduct violates competition law.¹⁰¹ The CMA’s research shows that SMEs are prone to infringe competition law due to their poor understanding of what constitutes anticompetitive conduct (for example, market competitors agreeing prices in order to avoid losing money and meetings among competitors to discuss prices) and lack of awareness on the sanctions and penalties or even how to report anticompetitive conduct.¹⁰²

The OECD report on General Cartel Bans: Criteria for Exemption for Small and Medium-sized Enterprises, provides an interesting discussion on how the competition law should be applied to SMEs.¹⁰³ The report shows that, when faced with competitive disadvantages, SMEs normally attempt to co-operate to compensate and offset structural disadvantages.¹⁰⁴ Such cooperation among SMEs may contribute to an improvement in competitive structure by that it enables SMEs to effectively compete with large retail firms.¹⁰⁵ An example of such pro-competitive cooperation among SMEs is horizontal relationships among franchisees. The report notes an example from Norway where the competition authority considered agreements among franchisees are not subjects to infringement of competition law because the agreements allowed them to compete with major retail chains and thus facilitate fair competition on the retail market.¹⁰⁶

Rahim and Brady’s research on “The Collective Bargaining Authorisation Provision for SMEs in the Australian Competition Law - Serving or Distorting a Public Benefit?” points out that Australian competition law is concerned with an

¹⁰⁰ Ibid, p. 14-15

¹⁰¹ BDRC Continental, 'SMEs & Competition Law Qualitative Research Report' (CMA, 2015) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/477543/BDRC_Competition_Law_Research.pdf>

¹⁰² Ibid

¹⁰³ OECD, 'Policy Roundtable on General Cartel Bans: Criteria for Exemption for Small and Medium-sized Enterprises' (OECD, 1996) <<http://www.oecd.org/competition/cartels/1920345.pdf>>

¹⁰⁴ Ibid, p. 8

¹⁰⁵ Ibid, p. 9

¹⁰⁶ Ibid

exemption for SMEs’ joint conduct¹⁰⁷ which is designed to help SMEs have more bargaining power in dealing with large firms over matters such as access to supply, contracts and other commercial matters, and the provision of legal protection from any potential sanction.¹⁰⁸ Based on this exemption, the Australian Competition and Consumer Commission (“ACCC”) usually permits collective bargaining among SMEs where it to lead to public benefits.¹⁰⁹ However, the exemption raises questions whether SMEs may use the permits to create arrangements that distort market competition.¹¹⁰

In summary, this chapter has explored issues in relation to SMEs and competition law given different perspectives and approaches to legal analysis. Based on the examples provided and research reviewed, we observe that competition law may have a role in protecting SME from significant market power of larger firms, but also must be concerned with potentially anticompetitive behavior by SMEs. The main concern is in retail sectors where SMEs tend to face with direct effects from large corporates or chain stores. Are SMEs in retail able to resort to competition law remedy to protect them from an abuse of market power when the SMEs have to bargain with large corporates? Should the retail SMEs’ collective bargaining or cooperation be subject to competition law infringement? Thus, the research in the next chapter studies on deeper details of competition law and SMEs in retail sector in Malaysia, Thailand and Vietnam.

¹⁰⁷ Rahim, Mia Mahmudur and Iolani M Brady, 'The Collective Bargaining Authorisation Provision for SMEs in the Australian Competition Law - Serving or Distorting a Public Benefit?' (2015) 2015(3) *Competition and Regulation in Networked Industries*

¹⁰⁸ Ibid

¹⁰⁹ Ibid

¹¹⁰ Ibid

Chapter 3 : Competition law and SMEs in retail businesses in Malaysia, Vietnam, Thailand

In this chapter 3, the study will explore competition law frameworks with a focus on SMEs in retail sectors in each of Malaysia, Vietnam and Thailand.

3.1 Competition Law in Malaysia

3.1.1 Background of Malaysia Competition Law

After independence from the UK in 1957, Malaysia was classified as a middle income country by the World Bank.¹ Malaysia then focused its economic development based on commodity exports such as rubber, tin, palm oil and petroleum.² The economy grew significantly by 6–7 percent each year from 1970 until 2000. The Malaysian government has generated this economic development through step plans focused on import substitution, industrial policies for export-led growth, and market access and liberalization.³

In relation to import substitution, the government aimed to induce industrialization through state intervention and to stimulate growth through fiscal policy and incentives.⁴ The Malaysian government later changed its industrial policies to support export-led growth with economic diversification fostering the growth of the services sector, particularly in high value-added manufacturing industries such as electronics and automotive.⁵ With an export-led economic policy, Malaysia also made efforts to develop a pro-business environment by adopting more business friendly

¹ Yusof, Zainal Aznam and Deepak Bhattasali, 'Economic Growth and Development in Malaysia: Policy Making and Leadership' (The International Bank for Reconstruction and Development / The World Bank, 2008) <http://siteresources.worldbank.org/EXTPREMNET/Resources/489960-1338997241035/Growth_Commission_Working_Paper_27_Economic_Growth_Development_Malaysia_a_Policy_Making_Leadership.pdf>

² Ibid

³ Yusof, Zainal Aznam, 'Economic Diversification: The Case of Malaysia' (Revenue Watch Institute, 2012) <http://www.resourcegovernance.org/sites/default/files/RWI_Econ_Diversification_Malaysia.pdf>

⁴ Ibid

⁵ Ibid

policies and facilitating private sector acting as a main driver of economic growth.⁶ Malaysia also adopted market-oriented policies to encourage private investment and business activities, both domestic and foreign.⁷ During this period, , the government issued the *Eight Malaysia Plan 2001-2005* (8MP) which explicitly accepts the need to encourage competition and recognizes the usefulness of competition law and policy and its contribution towards the whole economy.⁸ Despite facing the 1997 Asian economic crisis and the global financial crisis of 2008-2009,⁹ the Malaysian economy was able to under progress of development. The government set out the Malaysia New Economic Model 2010 which encourages more private sector initiatives to drive and develop market economy.¹⁰ The Model enacted rolling back the government controls in some economic areas, promoting market competition and regulating all commercial activities under the same economic rules.¹¹

Moreover, the Model sets out its plan to develop the economy by focusing on creation of market environment for economic growth through:

- Modernising business regulations by removing unnecessary rules and compliance costs.¹²
- Liberalising the service sector by reviewing policies and regulations that deter effective liberalization of the services sector, including foreign equity restrictions and limits on employment of foreigners.¹³
- Removing market distortions by rationalising subsidies to reduce market distortions and the lack of market based pricing which contribute to overconsumption, waste and misallocation of resources.¹⁴

⁶ Director General Economic Planning Unit Prime Minister's Department, 'Development Planning in Malaysia' (Economic Planning Unit-Prime Minister's Department, Malaysia, 2004)
<http://www.epu.gov.my/c/document_library/get_file?uuid=87293fd8-ba57-4fe0-a65a-52f8f925c397&groupId=283545>

⁷ Ibid

⁸ Nambiar, Shankaran, 'Enhancing Institutions and Improving Regulation: The Malaysian Case ' (2006) *EABER Working Paper Series NO. 4*

⁹ Fong, Cheong May, 'Malaysia Country Report' (Graduate School of International Development, Nagoya University, Japan- Project funded by the Japan Fair Trade Commission, 2001)
<http://www.jftc.go.jp/eacpf/02/malaysia_r.pdf>

¹⁰ Schellekens, Philip, What is new in Malaysia's New Economic Model? World Bank
<<http://blogs.worldbank.org/eastasiapacific/what-is-new-in-malaysia-s-new-economic-model>>

¹¹ Ibid

¹² The Economic Planning Unit Prime Minister's Department, 'Tenth Malaysia Economic Plan 2011-2015' (The Economic Planning Unit Prime Minister's Department, 2010)
<https://www.pmo.gov.my/dokumenattached/RMK/RMK10_Eds.pdf>, p73

¹³ Ibid, p. 76

- Introducing competition legislation which to address anticompetitive practices in all economic sectors.¹⁵
- Improving the interface between government and business to induce private sector investment in public partnerships.¹⁶

The competition law of Malaysia was thus adopted to promote and protect market competition to support economic development. The Competition Act was then passed by Parliament in 2010; however, it was not enforced until 2012. The Competition Commission (“MyCC”) was established as the main institution to enforce the act. The Competition Act and the MyCC will be further discussed below.

3.1.2 The Malaysia Competition Law

3.1.2.1 The Malaysia Competition Commission

The MyCC was established on 1 April 2011 by the Law of Malaysia Act 173 Competition Commission Act 2010 (Commission Act 2010). The MyCC’s duty is to *“safeguards the process of free and fair competition in commercial markets for the benefit of consumer welfare, efficiency of enterprises and the development of the economy as a whole”*.¹⁷ The MyCC have authority to investigate complaints of anti-competition behaviors, carry out market reviews and impose penalties on companies found to infringe the competition law.

According to section 5 of the Commission Act, the MyCC will consist of the following members:

- “A Chairman
- Four members representing the Government sector from Ministry responsible for matters concerning domestic trade and consumer affairs; and

¹⁴ Ibid, p. 76

¹⁵ Ibid, p. 77

¹⁶ Ibid, p. 77

¹⁷ Malaysia Competition Commission, *Malaysia Competition Commission (MyCC)*
<<http://www.mccc.gov.my/>>

- Not less than three but not more than five other members, who have experience and knowledge in matters relating to business, industry, commerce, law, economics, public administration, competition, consumer protection or any other suitable qualification as the Minister may determine.”¹⁸

Members of the MyCC are appointed by the Prime Minister based on recommendations from the Minister of Domestic Trade, Cooperatives and Consumerism (“MDTCC”) after consultation with the Ministry of Finance.¹⁹ The MyCC is responsible to the MDTCC.²⁰ The Minister of MDTCC can direct the MyCC in writing to work on any aspects consistent with the provisions of the competition laws, relating to the performance of the functions and powers of the Commission.²¹ The MyCC budget is also determined by the Minister.²²

In addition, the MyCC’s power is established under the Commission Act 2010 and the Competition Act 2010. According to Commission Act 2010, the MyCC has the following powers and functions:²³

- to impose penalties for infringements of the competition law;
- to impose fees or charges for services rendered by the MyCC;
- to appoint such agents, experts or consultants as it deems fit to assist the MyCC in the performance of its functions;
- to formulate and implement programmes for the proper and effective performance of the MyCC’s functions, including for human resource development, funding and co-operation;
- to co-operate with any body corporate or government agency for the purpose of performing the MyCC’s functions; and
- to require enterprises to supply information as required to assist the MyCC’s in the performance of its functions.

¹⁸ Competition Act 2010, section 5

¹⁹ Competition Act 2010, section 10

²⁰ Competition Act 2010, section 18

²¹ Competition Act 2010, section 14(2)

²² Competition Commission Act 2010, section 30

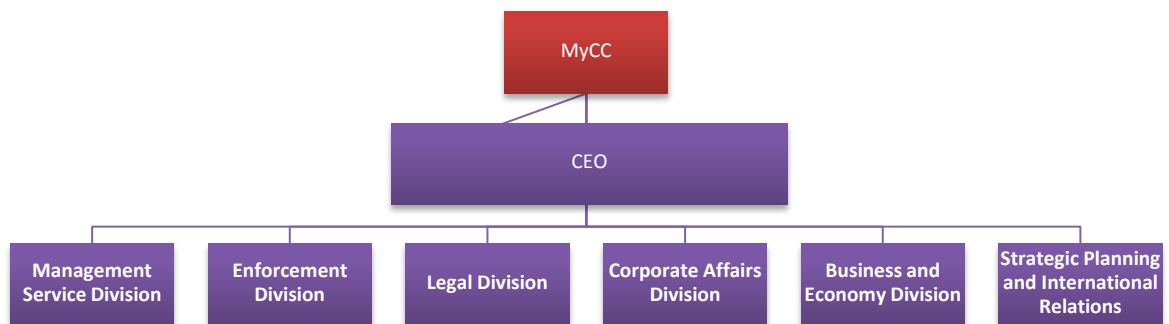
²³ Competition Act 2010, section 17

According to Competition Act 2010, the main functions of the MyCC are : ²⁴

- to advise the Minister or any other public or regulatory authority on all matters concerning competition;
- to alert the Minister to the actual or likely anticompetitive effects of current or proposed legislation and to make recommendations to the Minister, if appropriate, for the avoidance of these effects;
- to advise the Minister on international agreements relevant to competition matters and to the competition law;
- to implement and enforce the provisions of the competition law;
- to issue guidelines in relation to the implementation and enforcement of the competition law;
- to act as an advocate for competition matters; and
- to inform and educate the public regarding the ways in which competition may benefit consumers in, and the economy of, Malaysia.

In addition, the MDTCC also is responsible for the office of MyCC to support the MyCC. The Chief Executive Officer who manages the MyCC’s function and affairs is appointed by the Minister.²⁵

Structure of the MyCC



Source: MyCC, (2016) *Organisaiton Chart*, <<http://www.mycc.gov.my/organizational-chart>>

²⁴ Competition Act 2010, section 16

²⁵ Competition Act 2010, section 20 (2)

3.1.2.2 The Competition Act 2010

The Malaysian Competition Act was passed on 2 June 2010. It gave all stakeholders and business until 1 January 2012 to adjust their potentially infringing conduct. The substantive provisions were based on the U.K. and European competition law.²⁶ The Competition Act applies to all business activities in Malaysia and to conduct occurring outside Malaysia where such activities affect competition in Malaysian markets.²⁷ The Competition Act exempts government’s activities and any purchase of goods or services which has no commercial purpose.²⁸ In addition, the Act exempts commercial activity within regulated communication and energy sectors²⁹ such as those regulated under Communications and Multimedia Act 1998 [Act 588], Energy Commission Act 2001 [Act 610], and Petroleum Development Act 1974 [Act 114].³⁰ Finally, the Competition Act also does not apply to any agreement or conduct based on compliance with legislative requirements, collective bargaining of labour activities or enterprises entrusted with the operation of services of general economic interest.³¹ Thus, while the Competition Act stipulates its broad application to all commercial activities, it includes numerous exemptions .

Nevertheless, the Competition Act still contains important prohibitions on anticompetitive agreements in section 4 and abuses of market power in section 10 as discussed below.

Anticompetitive Agreement

Section 4 (1) of the Competition Act prohibits horizontal and vertical agreements that affect and distort competition in Malaysian markets for goods or services. The Act defines a horizontal agreement as an agreement between enterprises which operate at the same level in the production or distribution chain.³² The Act

²⁶ Malaysia Competition Commission, Competition Act 2010 <<http://www.mycc.gov.my/faq-competition-act-2010>>; Rahman, Nasarudin Abdul and Hanif Ahamat, Competition Law in Malaysia (Sweet & Maxwell Asia, Malaysia 2016)

²⁷ Competition Act 2010, section 3 (1) (2)

²⁸ Competition Act 2010, section 3 (4)

²⁹ Competition Act 2010, section 3 (3)

³⁰ Competition Act 2010, section 3, First Schedule

³¹ Competition Act 2010, section 13 Second Schedule

³² Competition Act 2010, section 2

defines vertical agreement” as an agreement between enterprises which operate at different levels in the production or distribution chain.³³

Section 4 prohibits horizontal agreements whose purpose is to:

- 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 access, technological development, or investment;
- bid rig,

Nevertheless, some anticompetitive agreements that would be prohibited are exempted where they have minimal effect on market competition. According to the MyCC’s Guidelines on anticompetitive agreements, an agreement is deemed not to have significant effect on competition where:

“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%”;

“the parties to the agreement are not competitors and all of the parties individually has less than 25% in any relevant market. For example, an exclusive distribution agreement between a wholesaler and a retailer neither of whom has more than 25% of the wholesale market or retail market.”³⁴

Section 5 of the Act provides exemptions for otherwise prohibited anticompetitive agreements, if they significant identifiable technological, efficiency, social benefits arise directly from the agreement and the competition is not completely eliminated.³⁵ To receive an individual exemption, businesses must apply to the MyCC and demonstrate the relevant agreement satisfy the requirements of Section 5.³⁶ The MyCC may also issue block exemptions when it determines that otherwise prohibited

³³ Competition Act 2010, section 2

³⁴ MyCC, 'Guidelines on Chapter 1 Prohibition' (MyCC, 2012)

<http://www.mccc.gov.my/sites/default/files/handbook/MYCC-4-Guidelines-Booklet-BOOK1-10-FA-copy_chapter-1-prohibition.pdf>, p 6-7

³⁵ Competition Act 2010, section 5 (a)-(d)

³⁶ Competition Act 2010, section 6

agreements fall satisfy the requirements of Section 5.³⁷ In granting an exemption, the MyCC may impose any condition or obligation it considers appropriate

Abuse of Dominant Position

The Act section 10 addresses abuse of dominant market power and prohibits dominant businesses from engaging in anticompetitive conduct.³⁸ To be clear, mere possession or attainment of dominant market power is not prohibited.³⁹ The Competition Act defines dominance as:

“a situation in which one or more enterprises possess such significant power in a market to adjust prices or outputs or trading terms, without effective constraint from competitors or potential competitors.”⁴⁰

To determine whether a business is dominant, the MyCC will consider relevant product and geographical markets.⁴¹ The MyCC will also investigate market shares, entry barriers and any countervailing bargaining power. The MyCC will generally not consider a business to be dominant if it has a market share of less than 60%.⁴² However, Section 10(4) of the Act states that market share is “not conclusive as to whether that enterprise occupies, or does not occupy, a dominant position.” Therefore, a business with very high market share may not be considered dominant if it is not able raise selling price above the current level due to potential new entrants or import products.⁴³ The MyCC has to consider many economic factors in order to determine dominance.

If a business is considered to have a dominant market position, it will be prohibited from engaging in any anticompetitive behaviors as described in Section 10 (2) according to the MyCC are exploitative conduct, exclusionary conduct, predatory pricing, price discrimination, exclusive dealing, loyalty rebates and discounts, refusal

³⁷ Competition Act 2010, section 8

³⁸ Competition Act 2010, section 10 (1)

³⁹ Competition Act 2010, section 10 (3)

⁴⁰ Competition Act 2010, s2

⁴¹ MyCC, 'Guidelines on Chapter 2 Prohibition' (MyCC, 2012),

<http://www.mycc.gov.my/sites/default/files/handbook/MYCC%204%20Guidelines%20Booklet%20BOOK2-6%20FA%20copy.pdf>, p. 4

⁴² Ibid, para 2.2, p. 2.

⁴³ Ibid, p. 7

to supply and sharing of essential facilities, buying up scarce intermediate goods or resources, and bundling and tying.⁴⁴

3.1.3 Cases on Malaysia Competition Act 2010

1. *Cameron Highlands Floriculturist Association*⁴⁵

In the Cameron Highlands Floriculturist Association (“CHFA”) case, MyCC investigated then took legal action against CHFA for a pricing fixing agreement. The investigation was initiated when the President of the CHFA made a statement in the 16 March 2012 edition of the Star newspaper that the prices will be increased by ten per cent (10%) based on an agreement among all 150 CHFA members.⁴⁶ The MyCC communicated to CHFA on 14 June 2012, but received no response from the CHFA. The MyCC then decided that the CHFA agreement infringed Section 4 (2) of the Competition Act and impose the following penalties:

1. *“the CHFA is instructed to cease and desist the infringing act of fixing prices of flowers;*
2. *the CHFA shall provide an undertaking that its members shall refrain from any anticompetitive practices in the relevant market*
3. *the CHFA shall issue a statement on the above mentioned remedial actions in the mainstream newspapers; and in the event that the CHFA fails to comply with the above mentioned remedial actions, a financial penalty amounting to RM20,000.00 shall be imposed on the CHFA. An additional RM1,000 will be imposed for each or part of each following day that the CHFA fails to comply.”*⁴⁷

⁴⁴ Ibid

⁴⁵ 6 December 2012-Case Number: MyCC/0003/2012(ACA),
<<http://www.mccc.gov.my/sites/default/files/Cameron%20Highlands%20Floriculturist%20Association.pdf>>

⁴⁶ Ibid

⁴⁷ Ibid, p. 15

2. *MAS-AirAsia*⁴⁸

The MAS – AirAsia case relates to an allegedly anticompetitive agreement among Malaysian Airline System Berhad, AirAsia Berhad and AirAsia X Sdn. Bhd. These airlines entered into a Comprehensive Collaboration Framework (‘the Collaboration Agreement’) which stated that each airline would focus on their respective markets and not enter into competitor’s markets.⁴⁹ In addition, the Collaboration Agreement stated that a Joint Collaboration Committee would be established to administer and manage all issues and matters pertaining to the Collaboration Agreement.⁵⁰

Pursuant to the Collaboration Agreement, the MyCC found Firefly Airline, a wholly owned subsidiary of MAS, withdrew from certain air routes and left AirAsia to control low cost airline routes.⁵¹ On 31st March 2014, the MyCC concluded that there has been an infringement of Section 4(2)(b) of the Competition Act and imposed a penalty of RM10,000,000 on each companies.

3. *Sibu Confectionery and Bakery Association*⁵²

The Sibu Confectionery and Bakery Association (“SCBA”) case involves an anticompetitive agreement which infringed section 4(2)(a) of the Competition Act. The MyCC, in November 2013, investigated the agreement to fix prices of confectionery and bakery products in the Sibu, Sarawak area among the 15 members of the SCBA. The MyCC found evidence that SCBA members present at the relevant meeting agreed to increase the prices of confectionery and bakery products by 10% to 15% in Sibu, Sarawak.⁵³ While some of the members argued that they did not agree with the other members to fix prices, their presence at the meeting was sufficient evidence that they were part of the agreement.⁵⁴ Thus the MyCC, on 12 February

⁴⁸ MyCC, Infringement of Section 4(2)(b) of the Competition Act 2010 by Malaysian Airline System Berhad, AirAsia Berhad and AirAsia X Sdn. Bhd, 31st March 2014 (No. MyCC.0001.2012). <<http://www.mycc.gov.my/sites/default/files/MAS%20AIRASIA.pdf>>

⁴⁹ Ibid, p. 5

⁵⁰ Ibid, p. 15

⁵¹ Ibid, p. 5

⁵² MyCC, Infringement of section 4(2)(a) of the Competition Act 2010 by Fifteen (15) Members of the Sibu Confectionery and Bakery Association, 12 February 2015 (No. MyCC.0045.2013).

⁵³ Ibid, p. 10

⁵⁴ Ibid, p. 20

2015 imposed the following penalties (one enterprise was not penalized as the MyCC determined it had received little benefit from the agreement)

No	Enterprise	Financial Penalties
1	Wonderful Bakery	RM 9,700
2	Kung Fung Food Industries	RM 27,000
3	ABC Cake House	RM 12,000
4	Farley Bakery	RM 102,600
5	Wong Keng Sieng	RM 480
6	New Chuo An Bakery	RM 1,700
7	Chung’s Bakery	RM 16,050
8	Sweetie Bakery	RM 1,200
9	Huoug Hiong (Sibu) Confectionery	RM 3,000
10	Seng Kee Bakery	RM 9,550
11	To Eat Bakery Sdn. Bhd.	RM 56,550
12	Nam Mee Bakery	RM 900
13	Lian Yu Bakery Cake Store	RM 5,650
14	Yong Lin Yin	RM 1,350
Total		RM 247,730

Source: MyCC, Infringement of section 4(2)(a) of the Competition Act 2010 by Fifteen (15) Members of the Sibu Confectionery and Bakery Association, 12 February 2015 (No. MyCC.0045.2013).

4. *Ice Manufacturers*⁵⁵

The Ice Manufacturer case involves an anticompetitive agreement among ice manufacturers which infringed section 4(2)(a) of the Competition Act. The MyCC initiated its investigation in response to a newspaper announcement made by 26 ice manufacturers, operating mainly in Kuala Lumpur, Selangor, and Putrajaya, to collectively raise the prices of edible tube ice and block ice commencing 1 January 2014.⁵⁶ The MyCC investigated and imposed the below penalties on 24 of the parties:

⁵⁵ MyCC, Infringement of Section 4(2)(a) of the Competition Act 2010 by Twenty-Four (24) Ice Manufacturers of Kuala Lumpur, Selangor, and Putrajaya, 30 January 2015, No. MyCC.700.2.0001.2014, <
<http://www.mycc.gov.my/sites/default/files/1%20Ice%20Manufacturer.pdf>>

⁵⁶ Ibid, p 3

No	Enterprise	Financial Penalties	
1	Atlas Edible Ice Sdn. Bhd. (198860-X)	RM	106,000.00
2	I-Bing Tube Ice Sdn. Bhd. (674381-W)	RM	1,600.00
3	BNI Sdn. Bhd. (487305-K)	RM	1,900.00
4	Chuan Heng Trading (Kajang) Sdn. Bhd. (603491-U) Kajang Crystal Ice Sdn. Bhd. (453614-A)*	RM	8,010.00
5	SP Edible Ice Sdn. Bhd. (1015439-V)	RM	1,800.00
6	Everest Aisvaram Sdn. Bhd. (613655-M)	RM	7,100.00
7	Fui Wah Enterprise Sdn. Bhd. (713495-M)	RM	17,600.00
8	KFI Coldstorage Sdn. Bhd. (493872-P)	RM	2,250.00
9	Pacific Tube Ice Sdn. Bhd. (719718-H)	RM	7,700.00
10	Shukor Sakam Ais Rintik – Rintik Sdn. Bhd. (578613-D)	RM	3,650.00
11	Perfect Tube Ice Sdn. Bhd. (351726-U)	RM	15,360.00
12	SJ Ice Sdn. Bhd. (640597-T)	RM	7,200.00
13	Sunflower Heritage Sdn. Bhd. (533866-A) Sunflower Tube Ice Sdn. Bhd. **	RM	23,200.00
14	Twilight Tube Ice Sdn. Bhd. (308272-T)	RM	1,500.00
15	Wai Mah Trading (000895329-T)	RM	14,800.00
16	Jade Tube Ice Manufacturing Sdn. Bhd. (401831-W)	RM	6,500.00
17	Thien Nam Sdn. Bhd. (389367-H)	RM	2,200.00
18	Ocean Land Sdn. Bhd. (17361-D)	RM	6,600.00
19	Ais Ceria Trading (001403049-A)	RM	1,200.00
20	Ais Everest Sdn. Bhd. (574195-T)	RM	6,800.00
21	Citi Ais Marketing (000898336-D) ¹¹	RM	2,200.00
22	AE Ice Sdn. Bhd. (928323-D)	RM	4,400.00
23	KS Trading (SA0084404-A)	RM	1,600.00
24	Dynamic Tube Ice (Nisar & Sons Sdn. Bhd.) (889385-X)	RM	1,080.00

Source: MyCC, Infringement of Section 4(2)(a) of the Competition Act 2010 by Twenty-Four (24) Ice Manufacturers of Kuala Lumpur, Selangor, and Putrajaya, 30 January 2015, No. MyCC.700.2.0001.2014.

3.1.4 Malaysia competition act and SMEs in retail sectors

From the above discussion on the competition act and competition commission in Malaysia and on the example cases on competition act, it can be seen that Malaysia has established its sound competition law framework in order to deal with anticompetitive conducts both in terms of institution, rules and enforcement. However, with regards to SMEs in retail, there is also some interesting issue from the institution, rules and enforcement of competition law. The details and issues are furthered below.

Competition law institution

In institutional perspective, the competition commission and its support office are established as to serve works for dealing with anticompetitive conducts in Malaysia. MyCC after its establishment in 2010 become is the vital agency dealing with anticompetitive conducts. MyCC has power to investigate complaints on anti-competition behaviors, carry out market reviews and impose penalties on companies found to infringe the competition law. The office of MyCC is also can help supports investigation and works of MyCC. The Chief Executive Officer (CEO) who is appointed by the Minister has a major role to build effective enforcement of MyCC. According to Lee, MyCC’s work on the enforcement can be described as “gradualist” but, MyCC has also investigated a number of cases for possible infringement of the competition act 2010.⁵⁷ However, there is some institutional concern where MyCC is under influence of the Minister extending by the appointment of Commission members.⁵⁸ According to The section 18 of the Competition Commission Act 2010 states that the Commission is report to the Minister and that the Minister may give directions of a general character to the Commission.⁵⁹ The work of the commission may be affected by the influence of Minister.

With regards to SMEs in retail sector, MyCC states in its annual reports that it aims to employ competition act as to create levels the playing field for all businesses and the small and medium enterprises (SMEs) are protected from unfair practices by

⁵⁷ Lee, Casey, 'Competition Law Enforcement in Malaysia: Some Recent Developments' (2014) *ERIA Discussion Paper Series*, p 6

⁵⁸ Ibid , p. 4

⁵⁹ Ibid

dominant players in any given market.⁶⁰ The MyCC also focuses on the SMEs is because of the fact that most businesses in Malaysia are made up of SMEs and with the SMEs’ collective bargaining will deal with imbalance of the business landscape with large corporates.⁶¹ There is also MyCC advocacy work for SMEs by the publication of “Competition FAQs for SMEs”.⁶² The FAQs provide information to all SMEs as to be under compliance with competition act 2010.⁶³ The FAQs also provide information to SMEs about their right before competition act where the SMEs have been forced by large suppliers in doing their business.⁶⁴ Thus MyCC seems to have approach on promote and protect SMEs from an unfair competitive conducts from large company in Malaysia market economy.

Competition rules

In a perspective of competition rules, the competition act 2010 has vital elements of competition law which cover prohibitions on anticompetitive conducts and on abuse of market powers. The section 4 of the competition act prohibits anticompetitive agreements and section 10 prohibits abuse of dominant power. With regard to SMEs in retail sectors, where there is anticompetitive conducts of large firm’s abuse of market power in retail sector, the rules can be mechanism to protect SMEs from such an abuse. Where there is concern over abuse of dominance from multinational retailers in Malaysia such as Carrefour, Makro, Giant, and Tesco at least competition law can be used to cope with the abuse and to protect SMEs in retail market competition.⁶⁵ Moreover, where there is any anticompetitive agreement among SMEs which deter competition in market, the rules in competition act will be important legal remedy as to correct and to remove such an anticompetitive agreement from SMEs.

⁶⁰ Ibid, p. 16

⁶¹ MLTIC, *MyCC focusing on strengthening SME Competitive Landscape*
<<http://mltic.my/competition/news/mycc-focusing-on-strengthening-sme-competitive-landscape-MY11827.html>>

⁶² FAQs for SMEs , <http://www.mycc.gov.my/sites/default/files/handbook/FAQ-for-SMEs.pdf>

⁶³ Ibid

⁶⁴ Ibid

⁶⁵ Mohd Roslin, Rosmimah and T. C. Melewar, 'Hypermarkets and the Small Retailers in Malaysia: Exploring Retailers' Competitive Abilities' (2008) 9(4) Journal of Asia-Pacific Business 329

Competition law enforcement

The Malaysia competition act has been enforced for dealing with anticompetitive conducts both on abuses of dominance and on the anticompetitive agreement among businesses. This can be seen from the cases that at least MyCC has worked and decided on various cases on infringement of competition act. However, the interesting point from the cases is that the Competition act is mainly enforce to anticompetitive agreements which are under SMEs retail association. It can be considered that the enforcement on abuse of dominance of market power tends to be difficult when comparing to the enforcement of anticompetitive agreement. The cases on *Cameron Highlands Floriculturist Association*, *Sibu Confectionery and Bakery Association*, and Ice manufactures cartels can be considered as an aim to enforce competition act for dealing with anticompetitive agreement among SMEs. MyCC inclines to focus on SMEs anticomptitive agreement rather than dealing with dominance of market power. Thus, the competition act according to cases tends to be enforced with the focus on SMEs anticompetitive agreements in Malaysian markets. In considering to SMEs in retail sectors, the competition law tends to be used as a legal prohibition on anticompetitive agreements of SMEs in retail sectors. The approach to enforce competition act mainly to SMEs agreement rather than large corporate's abuse of dominance may subjected to concern of balance between supporting SMEs to compete with dominant corporate in Malaysian market economy.

3.2 Competition Law in Vietnam

3.2.1 Background of Vietnam Competition Law

Vietnam before 1980s is under the State comprehensively managed and directed all economic activities by administrative commands planned in detail from the centre.⁶⁶ The Vietnam government later recognised and encouraged the development of only two main economic sectors: the State owned economic sector

⁶⁶ Dang Cong San Viet Nam [The Communist Party of Vietnam], 'Bao Cao Chinh Tri Cua Ban Chap Hanh Trung Uong Dang Cong San Viet Nam Tai Dai Hoi Dai Bieu Toan Quoc Lan Thu VI Cua Dang [The Political Report of the Central Committee of the Communist Party of Vietnam at the Sixth Party Congress]' (15 December 1986).

and the collective owned economic sector.⁶⁷ During the period, the private economic activities were not recognised.⁶⁸ The vital change to Vietnam economic policy was at the introduction of the *Doi Moi* reforms which changed Vietnam from a centrally planned economy to a more market-oriented economy, as well as recognised and encouraged private economic sector. The principle of building an economy in accordance with “market mechanisms” was recognised and was again confirmed in the 1992 Vietnamese *Constitution*.⁶⁹ From the change of economic policy, the market mechanisms tend to improve economic condition and lead to the further liberalisation of Vietnam economy.

Basing on reform to all state planning or controls over market system toward market economy approach, the Vietnam made an important effort to introduce its competition law in 1998. The economic reform was directed to deal with issues of anticompetitive conducts from state monopolies during a policy to create market liberalization and competition. This is partly due to the aim of the Vietnam government as to join the World Trade Organization (WTO).⁷⁰ Nevertheless before the drafting and the passing of the competition law, Vietnam has various laws which help combat anticompetitive conduct. The example is The Commercial Law 1997 which state some consumer protection on misleading and deceiving conducts and unfair promotion. Also in the Ordinance on Price Standing Committee of the National Assembly in 2002 prohibited price fixing agreement that can deter market.⁷¹ By having on the various provisions in laws relating to competition, Vietnam then turned to issuing the competition law promote free and fair business behaviors.

The Law on Competition No. 27-2004-QH11 was passed in 2004 and was effective on 1 July 2005.⁷² The law establish the “Right to compete in business” by stating that State shall protect the right to compete lawfully in market competition

⁶⁷ Article 18 of the 1980 Vietnamese *Constitution*.

⁶⁸ Chu Van Lam and Nguyen Van Huan, 'So Huu Tap The Trong Nen Kinh Te Thi Truong Dinh Huong Xa Hoi Chu Nghia [Collective Ownership in a Socialist Oriented Market Economy]' (2005) (12) *Tap Chi Nghien Cuu Kinh Te [Journal of Economic Studies]* 9;.

⁶⁹ Article 15, the 1992 Vietnamese *Constitution*.

⁷⁰ Alice Pham, Development of Competition Law in Vietnam in the Face of Economic Reforms and Global Integration, the Symposium on Competition Law and Policy in Developing Countries, Northwestern Journal of International Law & Business (2006) 26 (3) pp549, 551

⁷¹ See Freshfields Bruckhaus Deringer, Vietnam- new competition law (January, 2005) 1

⁷² Vietnam Government, 'Development of Viet Nam Competition Law and Policy' (Paper presented at the Competition Policy and Law Group Meeting, Hiroshima, Japan, 28 February-1 March 2010 2010) <http://www.apeccp.org.tw/doc/Workshop/w2010/10_cplg1_010.pdf>

under principles of honesty and non-infringement of the interests of the State and the public interest.⁷³ The law aims to prevent conducts in restraint of competition, unfair competition with an aim to make a resolution of competition cases, and to provide measures for dealing with breaches of the laws on competition.⁷⁴

3.2.2 Vietnam Law on Competition No. 27-2004-QH11

The Vietnam Law on Competition No. 27-2004-QH11 has main element of institutional establishment and the substantive rules. The institution established by the Law on Competition No. 27-2004-QH11 and prohibition rules in the substantive provisions will be discussed below.

3.2.2.1 Institution established by Law on Competition No. 27-2004-QH11

The **Law on Competition No. 27-2004-QH11** set out two main organizations of Competition Administrative Agency and Competition Council. .

Competition Administrative Agency

The Chapter IV article 49 of the Law on Competition established the Competition Administrative Agency as an authoritative organization under the Ministry of Trade (MOT). The agency has authoritative power and duties to enforce competition law and to deal with anticompetitive conducts affecting market economy in Vietnam.⁷⁵ The head of Competition Administrative Agency is appointed by the Prime Minister basing on a recommendation of Minister of Trade.⁷⁶ In addition, the investigators of the agency are appointed by Minister of trade basing on a recommendation from head of the Agency.⁷⁷ The head of Administrative Body has duty to organize and ensure that the agency functions according to the set objective of the Law.⁷⁸ The Investigators are also has to perform its work according to orders from the head of the Competition Administrative Agency.⁷⁹ The agency may investigate

⁷³ Law of Competition 2004 (Vietnam) Art 4

⁷⁴ Law of Competition 2004 (Vietnam) Art 1

⁷⁵ Law of Competition 2004 (Vietnam) Article 49

⁷⁶ Law of Competition 2004 (Vietnam) Article 50

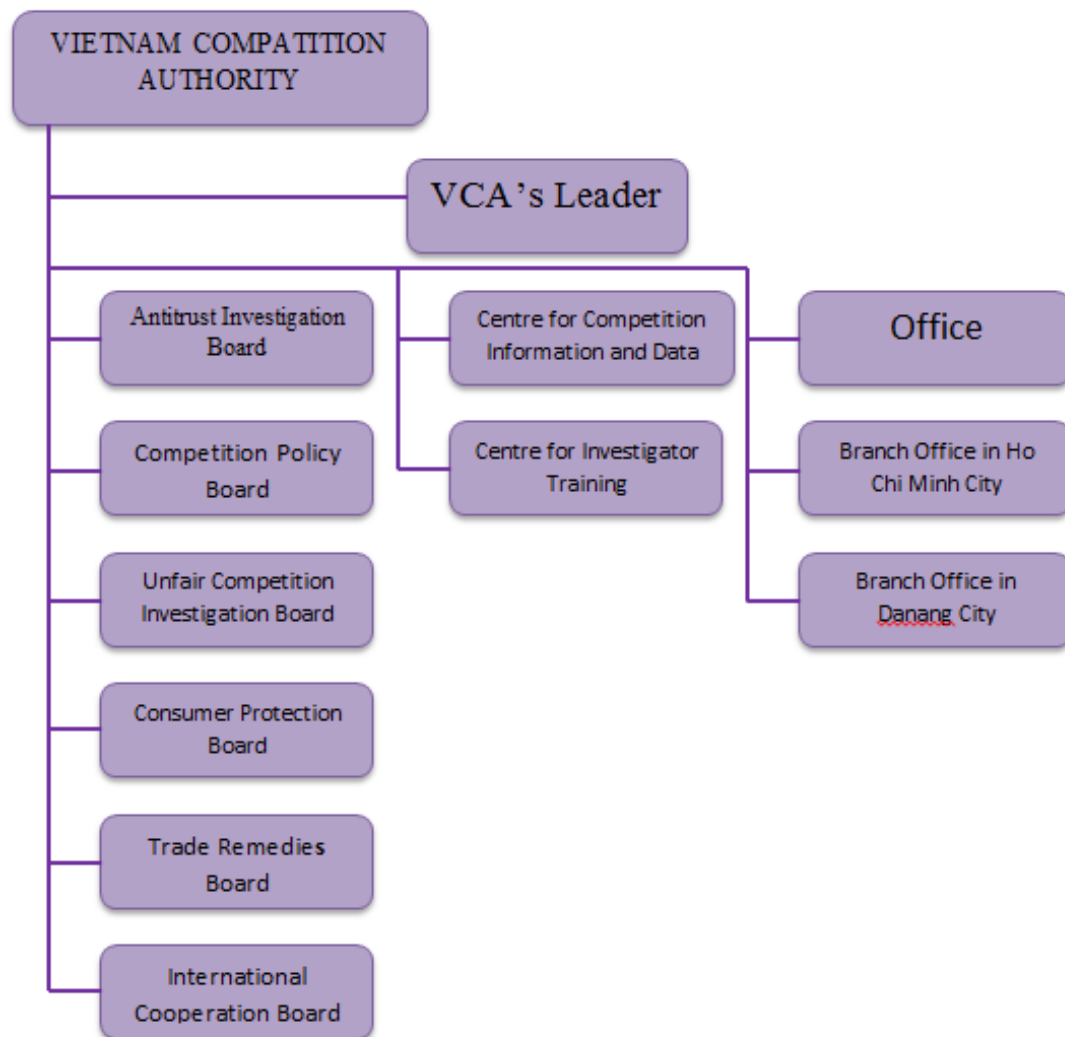
⁷⁷ Law of Competition 2004 (Vietnam) Article 51

⁷⁸ Law of Competition 2004 (Vietnam) Article 50 (2)

⁷⁹ Law of Competition 2004 (Vietnam) Article 51 (2)

any cases based on complaints received or the agency initiative.⁸⁰ The agency may make a decision and impose fines if an unfair competitive practice is proved.⁸¹ The below chart explains organizational arrangement of Vietnam Competition Authority.

VCA’S ORGANISATION CHART



Source: Vietnam Competition Authority, 'APEC Training Course on Advocacy of Competition Law and Policy' (2010) 20(9) Bulletin Competition and Consumers

The Competition Council

According to Article 53 of the Law on competition, the Competition Council must be established as an independent organization and the Council will be consisted of 11 to 15 members. The members of the council are appointed or dismissed by Prime

⁸⁰ Law of Competition 2004 (Vietnam) Article 119 (2)

⁸¹ Law of Competition 2004 (Vietnam) Article 119 (2)

Minister basing on recommendation from Minister of Trade.⁸² The Competition Council has the duty to deal with competition cases concerning practices in restraint of competition and to resolve any complaints on competition law issues.⁸³ The term of Council members are five years, and the term may be renewed.⁸⁴ When there is a case from the competition agency, the council will establish a panel consisted of five council members to make a hearing and resolve the cases.⁸⁵ The council has the authoritative power to impose various penalties.⁸⁶ In cases, any businesses are subjected to an infringement of the competition law, the council can issue penalties.”⁸⁷

3.2.2.2 Substantive rules of competition law

The Vietnam Law on Competition No. 27-2004-QH11 applies to all entities which conduct businesses including public enterprises, state monopoly enterprises, business association and state administrative bodies.⁸⁸ In applying the law to all enterprises, the law set out prohibition rules which deal with 1) the practices of state administrative body, 2) the practices in restraint of competition and 3) unfair competitive practices.

Practices of State Administrative Bodies

The Law on competition gives specific prohibition to the state administrative body in order to prevent any anticompetitive conducts raised from state or government. The Law on competition thus applies to the state administrative bodies and set out that state government may not engage in any anticompetitive practices which affect competition in markets.⁸⁹ The law on competition as having specific prohibition on state enterprise seems to be established as a mechanism to control and remove state’s anticompetitive conducts in market competition.

⁸² Law of Competition 2004 (Vietnam) Article 53 (1)

⁸³ Law of Competition 2004 (Vietnam) Article 53 (1)

⁸⁴ Law of Competition 2004 (Vietnam) Article 55 (2)

⁸⁵ Law of Competition 2004 (Vietnam) Article 54 (3)

⁸⁶ Law of Competition 2004 (Vietnam) Article 119 (1) & Article 119 (2)

⁸⁷ Law of Competition 2004 (Vietnam) Article 117 (1), (2) and (3)

⁸⁸ Law of Competition 2004 (Vietnam) Article 2

⁸⁹ Law of Competition 2004 (Vietnam) Article 6

Practices in restraint of competition and unfair competitive practices

The provisions to Control of Practices in Restraint of Competition are in Chapter II of the Vietnam Law on Competition No. 27-2004-QH1. The prohibited practices in Chapter II are 1) Agreements in Restraint of Competition, 2) Abuse of Dominant Market Position and Monopoly Position, and 3) Economic Concentration, 4) Unfair competitive practice.

Agreements in Restraint of Competition

Article 8 of the Vietnam Law on Competition prohibits any business horizontal agreements which create a restraint on competition.⁹⁰ The prohibitions cover all cartel or anticompetitive agreement among business in Vietnam. The agreements of any business both large or SMEs which lead to restraint of trade in market will be subjected to violation of the Law on Competition. However, the Law on Competition provided legal exemptions to some types of agreement which can be considered as efficient to market competition. The article 9 of the Law on Competition states that it is possible to business to obtain exemption of the prohibitions for a period of time. The business with an aim to make agreements classified as in clauses 1, 2, 3, 4 and 5 of article 8 of the Law of Competition can be exempted by the approval from The Minister of Trade.⁹¹ The Minister of Trade would have to decide its approval of the exemption basing on that the agreements can increase the competitiveness of medium and small sized enterprises and increases the competitiveness of Vietnamese enterprises in the international market,⁹² with consideration to fair and free business competition.⁹³

Abuse of Dominant and Monopoly Position

The Vietnam Law on Competition does not prohibit a firm from having a dominant or monopoly position but the law prohibits business with dominant or monopoly position not to abuse their market power. Business entity is deemed as dominant, if the entity has a market share of thirty (30) per cent or more in the

⁹⁰ Law of Competition 2004 (Vietnam) Article 8

⁹¹ Law of Competition 2004 (Vietnam) Article 25

⁹² Law of Competition 2004 (Vietnam) Article 10

⁹³ Law of Competition 2004 (Vietnam) Article 10 (2) and Art 4

relevant market or if the entity is able to substantially restrain competition.⁹⁴ A group of business entities can be also be considered as collectively dominant if:

- (a) Two enterprises have a market share of fifty (50) per cent or more in the relevant market
- (b) Three enterprises have a market share of sixty five (65) per cent or more in the relevant market
- (c) Four enterprises have a market share of seventy five (75) per cent or more in the relevant market.⁹⁵

The Law on competition prevents two major exploitative conducts and exclusive conducts. The exploitative conducts, in the law, mean conducts that relate to harm to consumer interest while the exclusive conduct relates to the difficulty to market competitors. The prohibition on article 18(2), (3) are classified as exploitative conducts contributing to consumer harm, while the prohibition on (1) (4), (5) and (6) may be deemed as exclusive conduct as it deter abilities of competitors to compete in markets. Furthermore business enterprises will be classified as a monopoly in case there is no any competitor in relevant market.⁹⁶ The monopoly enterprise is under a prohibition of imposing disadvantageous conditions on customers and changing or cancelling unilaterally a signed contract without legitimate reason.⁹⁷

Economic Concentration

The Law on competition also set out prohibition rules for on economic concentration which can be considered as a merger and acquisition rules of competition law.⁹⁸ The businesses are prohibited to be to create the economic concentration if the concentration amount to an occupying of market shares in the relevant market more than fifty per cent.⁹⁹ Nevertheless, the prohibition of economic concentration can be exempted by the approval of the Minister of trade or The Prime Minister. The Minster of trade will consider an approval of the economic

⁹⁴ Law of Competition 2004 (Vietnam) Article 11 (1)

⁹⁵ Law of Competition 2004 (Vietnam) Article 11 (2) (a) (b) (c)

⁹⁶ Law of Competition 2004 (Vietnam) Article 12

⁹⁷ Law of Competition 2004 Article 14

⁹⁸ Law of Competition 2004 (Vietnam) Article 17

⁹⁹ Law of Competition 2004 (Vietnam) Article 18

concentration when one or more of the business involving in the economic concentration is at risk of being bankrupt.¹⁰⁰ The Prime Minister will consider the approval of the economic concentration when the economic concentration has the effect to export market or to socio-economic development.¹⁰¹

Unfair Competitive Practices

In addition to the prohibitions of anticompetitive conducts, the Law on competition also deals with unfair competitive practices. The unfair competitive practices are defined as practices by an enterprise during the business processes which are contrary to general standards of business ethics and which cause or may cause damage to the interests of the State, other enterprises or, consumers.¹⁰² The definition of the unfair competitive practices tends to be a broad definition but the law also specifies prohibited unfair practices which are considered as *Misleading instruction*¹⁰³, *Infringement of business secrets*¹⁰⁴, *Coercion in business*,¹⁰⁵ *Defamation of another enterprise*,¹⁰⁶ *Causing disruption to the business activities of another enterprise*,¹⁰⁷ *Advertisement aimed at unfair competition*,¹⁰⁸ *Promotion aimed at unfair competition*,¹⁰⁹ *Discrimination by an association*.¹¹⁰

¹⁰⁰ Law of Competition 2004 (Vietnam) Article 25 (1)

¹⁰¹ Law of Competition 2004 (Vietnam) Article 25 (2)

¹⁰² Law of Competition 2004 (Vietnam) Article 3(4)

¹⁰³ Law of Competition 2004 (Vietnam) Article 40

¹⁰⁴ Law of Competition 2004 (Vietnam) Article 41

¹⁰⁵ Law of Competition 2004 (Vietnam) Article 42

¹⁰⁶ Law of Competition 2004 (Vietnam) Article 43

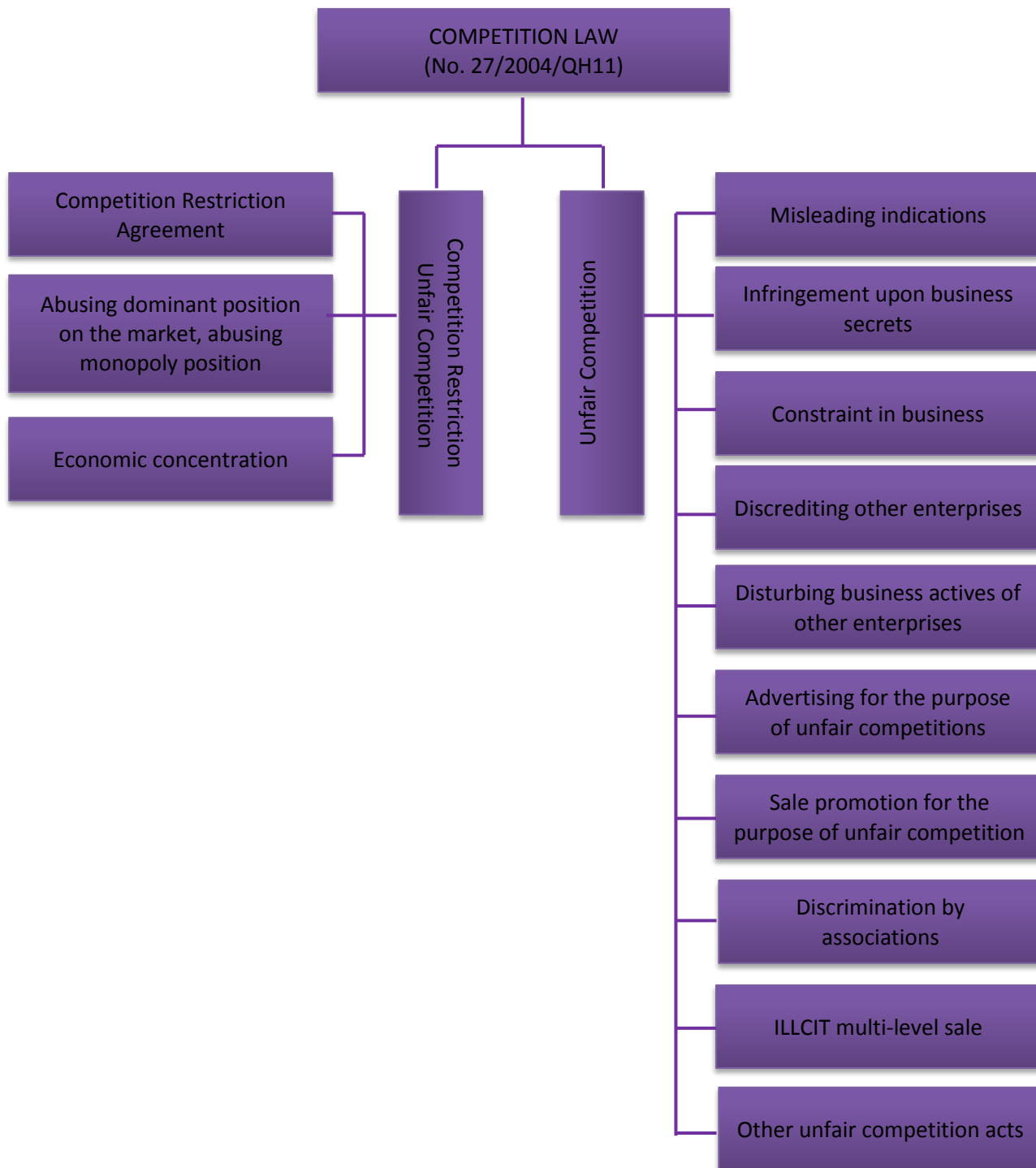
¹⁰⁷ Law of Competition 2004 (Vietnam) Article 44

¹⁰⁸ Law of Competition 2004 (Vietnam) Article 45

¹⁰⁹ Law of Competition 2004 (Vietnam) Article 46

¹¹⁰ Law of Competition 2004 (Vietnam) Article 47

presents an overview of the Vietnam Law on competition.



Source; Loan, Dinh Thi My, 'Development of Competition Law in Vietnam' (Paper presented at the East Asia Competition Forum, 2010) <http://www.jftc.go.jp/eacpf/06/6_03_13.pdf>

3.2.3 Cases on Vietnam Law on Competition

The above discussion on competition commission and competition rules, the competition law is enforced to deal with cases on anticompetitive conducts in Vietnam economy. The next part thus discusses on cases involving with the competition law enforcement in Vietnam.

1. Vinapco Case

The Vinapco case involves abuse of market power by Vietnam Petrol Corporation (“Vinapco”) is the only company licensed by the government to supply fuel for commercial flights in Vietnam.¹¹¹ In 2007 Vinapco made fuel service agreements to Pacific Airlines. Later on 12 March 2008, Vinapco proposed to Pacific Airlines to revise the agreement with the increase of fuel service charges.¹¹² Pacific Airline disagreed with the proposal to increase the charges which will allowed its competitor, Vietnam Airlines to enjoy lower fuel charges. On 1 April 2008, Vinapco unilateral terminated its fuel supply to Pacific Airline. On the same day Ministry of Transportation ordered Vinapco to resume its fuel supply as to allow Pacific Airlines’s flights to all passengers.¹¹³

The Vietnam Competition Authority on 22 April 2008 initiated investigation on the possible Vinapco abuse of dominant market power.¹¹⁴ The competition authority considered whether Vinapco unilateral termination and non-supplying of fuel is subjected to infringement of law on competition. The competition authority decided the case that Vinapco is under infringement of Article 14.2, 14.3 of Vietnam Law on Competition by the conduct of imposing disadvantageous conditions to customer and by the unilateral termination of contract without appropriate reason.¹¹⁵

¹¹¹ Tran Viet Dung & Nguyen Ngoc Son, Laws And Culture Of Competition In Vietnam: A Critical Analysis From Landmark Competition Cases Suggestions For Future Development (Asian Competition Forum at <<http://www.asiancompetitionforum.org/docman/7th-annual-asian-competition-law-conference-2011/powerpoint-slide/55-21-tran-viet-dung-presentation/file.html>> retrieved on 5 May 2016.

¹¹² Ibid

¹¹³ Ibid

¹¹⁴ Fruitman, David, 'Vietnam' in Mark William (ed), Political Economy of Competition Law in Asia (2013)

¹¹⁵ Ibid

The competition authority also imposed financial penalty to Vinapco at the rate 0.05% of revenue of preceding fiscal year 2007 in which violation taken place.¹¹⁶

2. Price Agreement by Insurance Companies

The case of price agreement relates to an agreement among 15 insurance companies in meeting of Vietnam Insurance Association on 15 September 2008. The agreement were signed by those insurance companies with the purposes to (i) fix the rate of vehicle insurance and (ii) insurance premium rate for physical damage to cars. After the signing of the agreement, Vietnam Insurance Association announced to the public about the agreement and sent letter to all other insurance companies to join the agreement.¹¹⁷ On 18 Sept. 2008, 4 other insurance companies had joined the agreement. The price cartel of 19 insurance companies comprised 97.79% market share of insurance against physical damages of cars in Vietnam On 18 Nov. 2008, Vietnam Competition Authority has decided to initiate investigation and concluded its investigation that the 19 companies under the agreement infringed the Law on competition.¹¹⁸ The Vietnam Competition Authority thus issue financial penalty to the cartel at 0.025% of total turnover of the preceding fiscal year (approx. USD 80,000) and total dispute settlement charge: VND 100 million (USD 60,000) equally divided by the insurance companies.¹¹⁹

3.2.4 Vietnam competition law and SMEs in retail

From the above, the frameworks of competition law in Vietnam are under three main pillars of competition institution, competition rules and competition enforcements. Those pillars interact to each other as to promote market competition and to prevent anticompetitive conducts distorting market competition. The three pillars would relate to the competition law and SMEs in retail sectors. The institution will be a main organization which has vital roles to guarantee free and fair competition in retail sector where SMEs still lack of bargaining power comparing to

¹¹⁶ Ibid

¹¹⁷ Mayer Brown JSM, 'Vietnam Price-fixing Decision Includes a Warning for All Businesses in the Country' (Mayer Brown JSM, 2010)

<<https://www.mayerbrown.com/pt/publications/detailprint.aspx?publication=986>>

¹¹⁸ Nguyen, Anh Tuan, 'The Asia-Pacific Antitrust Review 2016-Vietnam: Overview' (2016) Global Competition Review

¹¹⁹ Ibid

large corporates. The further details about the institution, competition rules, and enforcement will be discussed below.

Competition Institution

In perspective on institution, the Competition council and competition authority are two main agencies for the Law on Competition 2005. The competition council is, by the Law on competition, established as independent agency enforcing competition rules as to promote competition in market. Also the competition authority is a department which supports the council’s works and deal with complaints and investigation of the competition law. The institutional development seems to be efficient for application of the law on competition. However, there is also a challenging issue where the council and the authority seems to have dependency to government. The Council and competition authority are agencies under the Ministry of Trade (MOT) and the roles between the two agencies seems to be on similar tasks. The institutional challenges over Vietnam competition law are that there may be overlapping conflicts between Competition Council and the Vietnam Competition Authority.¹²⁰ In addition The Ministry of trade currently has to perform three important functions at the same time by planning policies, regulating the market and exercising ownership of entities in market. The functions may be at conflicting interest to promote competition in market. The institutional arrangement of Vietnam competition law seems to be less affect to the retail and SMEs in retail markets. However, there may be an issue where there is a potential abuses of market by the state enterprises in retail sectors or when the large corporate has a permission to do retail business and compete with SMEs. The institution of the law competition which has to be under Ministry of Trade may have to be subjected to the ministerial order which may be against the core purpose of Law on competition.

Competition Rules

With regards to the rules, Vietnam seems to have comprehensive competition rules which deal with anticompetitive conducts relating to anticompetitive business agreement, abuse of dominant power, merger and acquisition, and unfair practices.

¹²⁰ See, Micheal Wood in Phuong, Anh, Vietnam Lagging behind in Fair Competitiveness Environment <http://vccinews.com/news_detail.asp?news_id=33460>

The rules are vital legal mechanisms to prohibit any business activities which affect market competition. With regard to competition in retails and SMEs, the rules prevent any creation of unfair competition in the open retail markets in Vietnam. The large firms would not be able to use its markets power to deter SMEs in retail sector by the prohibition on abuse of dominant market position and monopoly position from section 11-15 of the Law on competition. In addition, in case there is anticompetitive conducts under SMEs cartel agreement in retails sectors. The applicable rules from Law on competition will be an important prohibition as to correct the cartel agreement. The section 8-9 prohibits various types of cartel agreement among business. However, the Law on competition section 10 also provides possible exemption to if the agreements create efficacy or competitiveness in Vietnam economy.¹²¹

Competition Law Enforcement

The enforcement of the Law on competition was initiated to deal with abuse of market power especially state enterprise's abuse. According to Tran Thi Minh Phuong, the competition law enforcement on VINAPCO case creates an important move to create business awareness on competition law.¹²² The case directly deals with state enterprise which holds significant market power. Though there is no valid trend of case enforcement, it can be consider that application of the Law on competition seems to be on abuse of market powers. This can be seen from the rules of competition law which provided some exemption to SMEs agreement and to the first case of VINAPCO abuse of market power.¹²³ The Vietnam's approach to use competition law may different from Malaysia which pays attention to SMEs agreement rather than dealing with large corporates. In Vietnam, the enforcement of the Law on competition is thus considered to be a protective legal mechanism to

¹²¹ Ly, Luu Houng, 'Vietnam's Competition Law -Retrospective and Prospective' (Paper presented at the ACF December 2014, Hong Kong, 2014) <<http://www.asiancompetitionforum.org/docman/10th-annual-asian-competition-law-conference-2014/panel-b/191-1-vietnam-luu-huong-ly/file.html>>

¹²² Phuong, Tran Thi Minh, 'Ways and means to strengthen Competition Law Enforcement and Advocacy - Vietnam's practice' (Paper presented at the Seventh United Nations Conference to review the UN Set on Competition Policy, Geneva, 6-10 July 2015, 2015) <http://unctad.org/meetings/en/Presentation/CCPB_7RC2015_PRES_RTWaysMeans_Vietnam_en.pdf>

¹²³ Ly, Luu Houng, 'Vietnam's Competition Law -Retrospective and Prospective' (Paper presented at the ACF December 2014, Hong Kong, 2014) <<http://www.asiancompetitionforum.org/docman/10th-annual-asian-competition-law-conference-2014/panel-b/191-1-vietnam-luu-huong-ly/file.html>>

SMEs in markets. In Phuong’s research, SMEs in Vietnam are under various competition constraints with state-run business and private business.¹²⁴ In retail sector, SMEs may have to face with rigid competition with larger firms from state business and large private business. The enforcement on competition law which focuses on abuse of dominant would then be a supportive mechanism for SMEs development in retail sector.

3.3 Competition Law in Thailand

3.3.1 Background of Thai Competition Act 2017

The development of Thai competition law can be traced back to the government aim to make market liberalization and to create a deregulation on market economy during 1980-1990.¹²⁵ Minister of Commerce in 1991 thus submit legal review to the government with the purpose to urge a reform on competition legislation in order to establish legal mechanism to protect market competition in liberalized and deregulated Thai markets. The review proposed that there should be a reform on Price Fixing and Anti-Monopoly Act 1979 and to issue competition legislation.¹²⁶ The review pointed out that the Price Fixing and Anti-Monopoly Act 1979 pertain legal drawbacks of that the *Price Fixing Act* was to passed as to control prices of goods and services in markets for the benefit of consumers and the control of price can distort market competition.¹²⁷ In addition, the *Price Fixing Act* present at unclear prohibition in order to deal with anticompetitive conducts and abuse of market power.¹²⁸ The drawbacks led to legal and political hindrance in dealing with anticompetitive conduct in markets. Thus there was an establishing on the drafting committee for reform the competition law in Thailand. The committee consider on the competition law frameworks from South Korea, Taiwan Japan, and

¹²⁴ Hai, Tran Thi Thanh, 'Challenges of Small and Medium-Sized Enterprises (SMEs) In Vietnam during the Process of Integration into the ASEAN Economic Community (AEC)' (2015) 5(2) *International Journal of Accounting and Financial Reporting*

¹²⁵ Sutham, Apisith John, 'The Asian Financial Crisis and The Deregulation and Liberalisation of Thailand's Financial Service Sector: Babarians at the Gate' (1997) 21(5) *Fordham International law journal* 1890.

¹²⁶ Paopongsakorn, Nipon, 'The New Competition Law in Thailand: Lessons for Institution Building' (2002) 21(2) *Review of Industrial Organization* 19

¹²⁷ Thanitkul, Sakda, 'Competition Law in Thailand: A Preliminary Analysis' (2001) 1(1) *Washington University Global Study Law Review*

¹²⁸ Ibid

German.¹²⁹ The reason to look at the frameworks from South Korea and Taiwan is because drafting committee thought that Thailand has similar economic conditions to, as there were fewer dominant firms, and most firms in economy are SMEs.¹³⁰ In addition, the committee also consider that competition law model from main civil law countries of the Japanese Anti-Monopoly Law 1947 and the German Act against Restraints of Competition for drafting competition law.¹³¹

After an eight years debate in parliament, the competition the Thai Competition Act B.E.2542 (1999) was passed. The using of eight years debate in passing the law is due to the uncertainty of political economy of Thailand. Nevertheless, the important factor which led the parliament to pass the Thai competition act is because there was an influence of International Monetary Fund in setting up economic reform plan for Thailand basing on great financial crisis in Thailand in 1997.¹³² Moreover, the adoption of the Thai Competition Act B.E.2542 (1999) was also based on the establishment of the 1997 Constitution of Thailand. The 1997 Constitution, as landmark democratic constitution set out in sections 50 and 87 to promote the free-market economy and to protect market competition for consumers' benefits.¹³³ The influence of the constitutional thus led to the passage of the Thai Competition Act in 1999.¹³⁴

After its passage, the Thai Trade Competition Act 1999 had been ineffective for 17 years and had led to major futile enforcement without any legal case. By the ineffective issue, the cabinet approved the draft reform on the act in October 2016. The draft aimed to establish a new independent competition commission and office of trade competition which are free from of political intervention.¹³⁵ By the draft act the

¹²⁹ Ibid

¹³⁰ Ibid

¹³¹ Ibid

¹³² Mark William, "The Competition Law in Thailand: Seed of Success or Fated to Fail?" (2004) 27(3) *World Competition* 459; Mark Williams, *Competition policy and law in China, Hong Kong and Taiwan* (Cambridge University Press, 2005), 60-61; Mark Williams, "The Thai Competition Act 2017: What's Gone Wrong" (2006) <<http://www.asialaw.com/Article/1971894/Search/Results/The-Thai-Competition-Act-1999-Whats-Gone-Wrong.html?Keywords=Competition+Act>>.

¹³³ See Thai constitution 1997 section 50, 87 from <http://www.admincourt.go.th/amc_eng/02-LAW/laws/ConstitutionBE2540-1997.pdf>.

¹³⁴ Thanitkul, Sakda, *Explanation and Case Studies: Thai Competition Act 2017(BE2542)* (Wiyuchon Publication House, 2011)

¹³⁵ Petchanet Pratuangkrai, Tougher Trade Competition Act due 2017, The Nation Newspaper, October 13, 2016 01:00,

competition commission will effectively deal with abuse of market dominance, mergers and acquisitions, cartels and other unfair trade practices.¹³⁶ Later, on 24 March 2017, the draft act was passed by the parliament- National Legislative Assembly after the recommendations by the special committee concerning on the draft Act. The draft act will be effective after 90 days from the date of publication in the Government Gazette.

3.3.2 Thai Competition Act BE2560 (2017)

The Thai Competition Act 2007 contains important chapters on establishing the trade competition commission and setting up the office of trade commission. The Act also set out a prohibition rules dealing with Anticompetitive conducts, and penalty by fines and imprisonment.

3.3.2.1 Trade Competition Commission and the Office of Trade Competition

Trade Competition Commission

In the first chapter of the Thai competition act, the Thai Trade Competition Commission is established as an authoritative commissions having enforcement power of the Act.¹³⁷

The important power and duties of commissions are set out in section 17 which stipulates that the commission shall deal with various function of competition law enforcement. The Thai Trade Competition Commission has a broad ranges of power as to enforce competition act. When considering to SMEs in retail sector, the competition commission by the power from the trade competition act, would be a significant institution promoting competition and protecting SMEs in retail sectors. However, the commissions also have to deal with SMEs’ anticompetitive behaviors which affect market competition and consumers welfares.

<http://www.nationmultimedia.com/news/business/EconomyAndTourism/30297543> retrieve on 14 December 2016.

¹³⁶ Ibid

¹³⁷ Thai Competition Act 2017 section 7, 17, 20, 21

The Thai Competition Act 2016 section 11 state that there must be the selection committees, consisting of;

- Permanent secretary of Ministry of Finance
- Permanent secretary of Ministry of Agriculture and Cooperatives
- Permanent secretary of Ministry of Commerce
- Permanent secretary of Ministry of Justice
- Permanent secretary of Ministry of Industry
- Secretary of National Economic and Development Board
- Secretary of Consumer protection board
- Chairman of Chamber of Commerce
- Chairman of Industrial Association ¹³⁸

The selection committees would have a duty to carefully choose 7 competition commissions, consisting of 1) the chairman of the competition commission, 2) the vice chairman of the competition commission, and other 5 commissions. The selection committees have to send the list of 7 competition commissions to the cabinet approval. After the cabinet approval, the prime minister have power to establish the approved competition commissions.¹³⁹ By having the selection committee, there will be an effective selection of competition commission. However, in another view, the selection committee are based on bureaucratic reliance with a mix of private associations.

The selection of the competition commissions may create conflict of interests when there is a competition concern relating to the Thai chamber of commerce and Thai Industrial association. Also under this legal framework of the selection, SMEs may not be able to involve with the selection and may not be able to giving some opinions on the selection of the competition commission.

The Office of Trade Competition

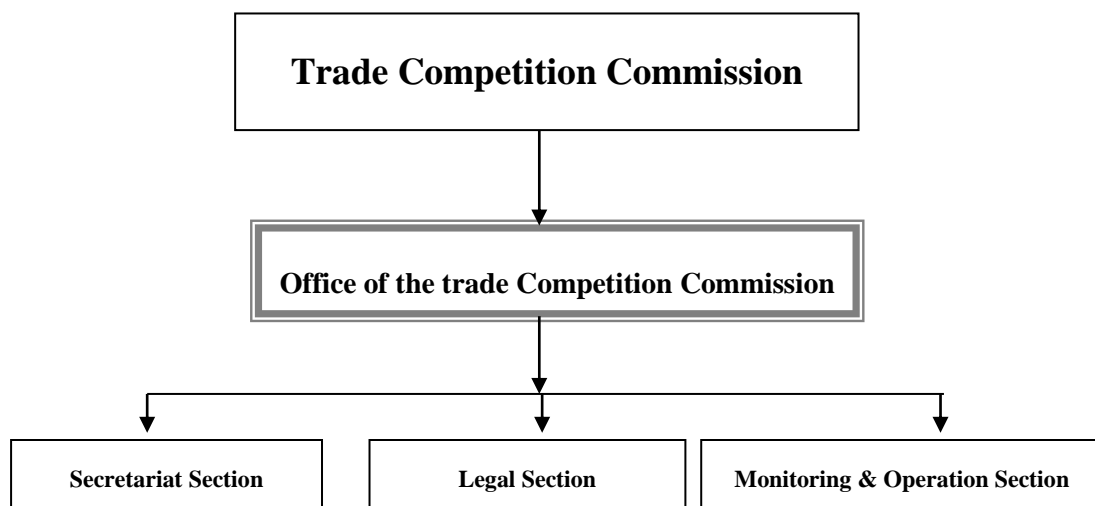
In using authoritative power of competition commission, the commission has its supporting office established by the section 27 of the Trade Competition Act 2017.

¹³⁸ Thai Competition Act 2017 section 11

¹³⁹ พระราชบัญญัติการแข่งขันทางการค้า 2560 มาตรา 7-10

The Office of the Competition Commission is an independent agency.¹⁴⁰ The office has various duty and power as to facilitate the competition work on competition law.¹⁴¹ The officers in the office will be able to make investigation and make any order to suspect business in order to support the enforcement of Thai Competition Act.¹⁴² The office’s duties are supportive task for the Commission, monitoring and researching into products and conducts operating business in order to assist the works of competition commission. The office is also the first point on receiving the complaints alleging business conduct in breach of the competition law.¹⁴³

Structure 1 Thai competition law Organization Structure



Source: Office of Trade Competition Commission (2016), Organizational Chart, <http://otcc.dit.go.th>

3.3.2.2 Substantive rules of the competition law

Competition law exemption

While the Thai competition law has its broad scope to prevent anticompetitive business conducts, it contains exemption in its section 4, and spelling out that it will not apply to the sectors of;¹⁴⁴

¹⁴⁰ Thai Competition Act 2017 Section 27

¹⁴¹ Thai Competition Act 2017 Section 29

¹⁴² Thai Competition Act 2017 Section 29-30

¹⁴³ Thai Competition Act 2017 Section 27 (5)

¹⁴⁴ Thai Competition Act 2017 section 4

- Government entities
- State owned enterprises
- Farmers' groups, co-operatives or co-operative societies recognized by law and having objective to benefit farmers
- Businesses, in whole or in part, permitted by the Ministerial Regulation

The sectors above are excluded from the competition law enforcement and able to perform activities or making contract to restrict market competition. This exemption and exception privileges are mainly employed by the state owned enterprise (SOEs) that provide the essential facilities to consumers. The Thai competition act 2017 has core sections of 50-59 prohibiting unfair and anticompetitive business conducts. The *act section 50* deals with abuse of dominant market power by prohibiting businesses occupying dominant market position engage with any anticompetitive behaviors which affect market competition.¹⁴⁵

The 2007 criteria for classifying whether business is a dominant market are that;

- “Business operator, in any goods or services, with market share in the previous year over 50% and at least 1,000 million baht turnover; or
- The top three business operators, in any goods or services, with combined market share in the previous year over 75% and at least 1,000 million baht turnover

The exception is for a business operator with the market share less than 10% or Turnover less than 1,000 million baht in the previous year.”¹⁴⁶

The act section 51 requires businesses merger and acquisition must notify the Commission within 7 days after the merger and acquisition.¹⁴⁷ The mergers of business according to section 51 are defined as horizontal combination between producers,

¹⁴⁵ Thai Competition Act 2017 section 50 subsection 1,2,3, and 4

¹⁴⁶ Notifications of Trade Competition Commission On Criteria for Business Operator with Market Domination, 2007, Office of trade competition commission, <http://www.dit.go.th/otcc/upload/Criteria%20for%20Market%20Domination.doc>, <http://www.dit.go.th/otcc/upload/%E0%B8%9B%E0%B8%A3%E0%B8%B0%E0%B8%81%E0%B8%B2%E0%B8%A8%E0%B9%80%E0%B8%81%E0%B8%93%E0%B8%91%E0%B9%8C-25.pdf>

¹⁴⁷ Thai Competition Act 2017 section 51

distributors and services suppliers¹⁴⁸, purchase of asset of another business with a view to controlling the business,¹⁴⁹ and purchase of the whole or part of shares of another business with a view to controlling business.¹⁵⁰

The act section 54 forbids the collusive and cartel agreements that have an effect on market competition. The section 54 details the prohibited agreements such as price fixing, market sharing, bid rigging, and restricting production.¹⁵¹

The section 57 set out that business operator must not conduct unfair competition of destroying, impairing, and obstructing, impeding or restricting business operation of other business operators. The section 57 thus tends to create free and fair manner without intention to restrict or exclude market competitors. This section is broad rule dealing with business conducts where there is an inequality of market power.

The act section 58 proscribes business entities not to create any international agreement which deter competition by limiting opportunities to purchase goods or services from business operators outside the Thailand.

3.3.3 Cases on Thai Competition Law

It is noted that all the currently no legal action on case relating to Thai competition act. All the cases presented below is based on the complaints on anticompetitive conduct but there is not any enforcement of competition act.

1. The Cable Television Monopoly¹⁵²

In 2000, the Competition Commission received complaints from consumer groups that UBC, a large cable television firm (merged from the two cable television companies) had unfairly increased its subscription charges to consumers. The two companies that had been merged and become UBC were under the licensed and

¹⁴⁸ Thai Competition Act 2017 section 51 section 1

¹⁴⁹ Thai Competition Act 2017 section 51 section 2

¹⁵⁰ Thai Competition Act 2017 section 51 section 3

¹⁵¹ Thai Competition Act 2017 section 54 (1)-(4)

¹⁵² Nikomborirak , Deunden, 'The Political Economy Of Competition Law: The Case Of Thailand' (2006) 26(3) *Northwestern Journal of International Law & Business* 597; UNCTAD, 'Review of Recent Experiences in the Formulation and Implementation of Competition Law and Policy in Selected Developing Countries: Thailand, Lao, Kenya, Zambia, Zimbabwe' (UNCTAD, 2005).
<http://www.unctad.org/en/docs/ditccplp20052_en.pdf >

regulated by the Mass Communication Organization of Thailand (MCOT) and had previously competed vigorously for subscribers using a number of bundled program packages of differing content and price.

After the investigation, the Commission agreed with the investigating subcommittee that the cable operator was a monopoly and may subjected to the breach of competition law section 25(3), prohibiting businesses occupying dominant market position not to operate in the manner of fixing prices of goods and services. However, due to the lack of definition of market dominance at that time, the commission decided that there was no breach of competition law from UBC. The commission then reports the case to the Mass Communication Organization of Thailand ("MCOT"), which regulates the cable television industry, on the premise that complaints about the rates and packages offered should be handled by a sector-specific regulatory body rather than the general competition authority. The MCOT analyzed the case that the UBC's tariff was not excessive because the company was facing an operating loss. The company, however, began to offer the less expensive option in order to comply with the conditions stipulated in the concession

2. Whiskey and Beer Tied-Sales¹⁵³

In early 2000, Singha, the largest Thai beer producers complained to the commission that the Surathip Group, manufacturer of Chang Beer (Elephant Brand) Beer, had created the tying of its beers to the sale of a highly demanded whiskey/liquor in order to take market share the beer market.

After investigation, the commission found that the practice of tying beer to whiskey sales constituted an obvious breach of Section 25 of the Trade Competition Act, by that the Surathip were unreasonably fixing compulsory tying of its beer sale and its whisky sale. However, the commission refrained from taking legal action to the alleged company by the reason that the section 25 of the law was unenforceable in the absence of a dominance threshold.

¹⁵³ Ibid

3. Unfair Trade Practices in Large Retail Trade¹⁵⁴

In January 2003, the complainants alleged that the business conducts of large foreign retail created mandatory enrollment 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

4. Exclusive Dealings in the Motorcycle Market¹⁵⁵

It is the first case where the TCC found an infringement of the competition law and decided to take legal actions against the defendant. 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. The Honda's alleged conducts, when pursued by a supplier with significant market power, can create an abuse of dominant market power subject to the infringement of section 25 of the competition law. 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.

¹⁵⁴ Thanitkul, Sakda 'SMEs and Competition Law: A Case Study on Suppliers of Goods to Large Retail Stores' (2005) 15(48) *Journal of International Cooperation Studies*.; Chantida Kalampakorn, 'Unfair Trade Practices Under Thai Trade Competition Act' (Paper presented at the 3rd APEC Training Program on Competition Policy, Indonesia, 2004)

<http://www.jftc.go.jp/eacpf/05/APECTrainingProgramDecember2004/Kalampakorn_Thai.pdf>

¹⁵⁵ William , Mark, 'The Competition Law in Thailand: Seed of Success or Fated to Fail?' (2004) 27(3) *World Competition* 459; Phusadee Arunmas, 'Trade Competition Act to be revised', *Bangkok Post* 8/02/2010. Thai post 1 April 2010 <<http://www.thaipost.net/news/010410/20181>>

After investigation, the commission found that the Honda is infringement of competition law concerning on the unfair trade practice. The commission found that the Honda conducted unfair pricing by using its higher market power to take advantage of rivals, persuading dealers to pursue unjustified practices, adopting unfair trade practices without justification and relying on trade secrets to boost self-commercial interest. The commission, instead of enforcing its authority to decide the case, chosen to refer the cases to the public persecutor.

It is expected that the Honda Company would face with the court action brought by public prosecutor. However, the case against Honda collapsed because prosecutors decided not to press any charges.

3.3.4 Thai Competition law and SMEs in retail sector

From the above, the framework of competition law in Thailand can be seen in three main aspects of competition institution, competition rules and competition enforcements. Each aspect interacts together as to free and fair competition in market economy including retail sectors. However, there is still an issue over those three aspects which will be discussed below.

Competition institution

The competition law institution in Thailand is similar to Malaysia and Vietnam because there are the competition commission and the office of the trade competition commission. The commission has broad power to investigate and to take action against anticompetitive conducts in all economic sectors. The office also has authoritative power to deal with complaints relating to any anticompetitive conducts. With regards to SMEs in retail sector, the competition institution is vital to safeguard and promote fair and free competition in the retail sector. Thus, it can be seen that Thailand have establish competition intuition which is similar to Malaysia and Vietnam by having competition commission and support office for the commission. However, the details on the commission and the office may be different in terms of degree of independency and effective works. The Thai competition institution tends to have issues over independency and the effective work on competition law enforcement.

The competition commissions were influenced from private-connected political pressure. The commissioners tend to be captured by both political and business influence, contributing to a conflict of interests when commissioners from business sectors have to consider case investigating on business conducts.¹⁵⁶ In the example case of illegal tying of the whisky and beer companies, one of the commissions who had to decide the case had business relationship with a company affiliated with the powerful whisky conglomerate.¹⁵⁷ The case shows that there is a conflict of interest in the commission investigation. Furthermore, the competition commissioners are not a full-time agency but operated as on voluntary and occasional commission. This raises the difficulty for competition commission to investigate and decide cases

Thus, with regards to the SMEs in retail sector, the competition institution tends to be unreliable and the SMEs may have to face with large firms' anticompetitive behaviors. Nevertheless, SMEs in retails can also conducts their anticompetitive agreement which affects consumer welfares because of weak competition institution.

Competition rules

The competition act 2017 has been established with various sections dealing with anticompetitive conducts in term of abuse of dominance, cartel agreement and merger control. The section 50 which dealing with abuse of dominance is an important substantive rule prohibiting large businesses which use their market power unfairly. When considering to retail sector, large modern trades or corporate convenience stores are subjected to prohibition under section 50. The example is an abuse of market power modern trade or large corporates in convenience stores which use unfair behaviors to their SMEs suppliers. The example is an abuse of market power modern trade or large corporates is by setting up conditions or conducting any behaviors as to force the SMEs suppliers to conform to their conditions. Another example is that the corporates may also use predatory pricing below cost as to drive SMEs off a retail market. Apart from prohibition on abuse of market power, the Thai

¹⁵⁶ Nikomborirak , Deunden, 'The Political Economy Of Competition Law: The Case Of Thailand' (2006) 26(3) *Northwestern Journal of International Law & Business* 597 p 600-601

¹⁵⁷ Ibid

competition act also prohibits anticompetitive cartel agreement in section 54. The prohibition on the anticompetitive agreement thus may relate to SMEs mutual understanding or agreements to control price or market competition in retail sector. The example is the SMEs’ price fixing conducts on selling or purchasing price in retails which affect to competition and consumer welfares.

In addition, section 57 also set up a broad scope as to deal with any unfair conducts from large scale retailers. Thus, the competition rules of the Thai competition act seems to be comprehensives for dealing with unfair conducts involving with SMEs in retails sectors.

However, the comprehensive rules are also unclear and in practices do not lead to a legal protection to SMEs. In the Srimoon and Seyanon’s research on “Survey the Opinions of Suppliers on Business Practices between Large-scale Retailers and Suppliers from”, it is found that majority of opinions of suppliers towards large modern trade practices are somewhat unfair business practices.¹⁵⁸ The research also points out that the competition rules especially section 29 Thai competition Act 1999 (Thai competition Act 2017 section 58) , is unclear to protect suppliers from the larges-scale retail unfair behaviors on raising yearly additional and on manipulating buying and selling prices.¹⁵⁹ Suppliers in retail sectors have to conform to any offer or conditions from large-scale retail trades.

Competition Law Enforcement

With regard to the enforcement of Thai competition act, the enforcement is futile to deal with anticompetitive conducts because of the issues on the competition commission and on the applicable rules. There are institutional problems over competition commission and the office of the competition commission on the lack of independency and ineffective works. The intuitional problems thus contribute to the significant lack of enforcement. Since the passage of the Trade Competition act in 1999, there has not been any legal action or decision from competition commission. With the ineffective enforcement from the intuitional problems, the retail sectors and

¹⁵⁸ Srimoon, Jakarin and Arisara Seyanon, 'A Survey the Opinions of Suppliers on Business Practices between Large-scale Retailers and Suppliers ' (University of the Thai Chamber of Commerce, 2009) <http://utcc2.utcc.ac.th/academicweek_proceeding/2552/business/jakarin.pdf>

¹⁵⁹ Ibid

the SMEs in retail sectors are prone to face with anticompetitive conducts from large-modern trade. Also the SMEs’ cartel in retails would affect the consumer welfare as there is not competition law enforcement against them.

In addition, as there is still an issue over unclear rules of competition act, the enforcement is also unclear. Large business and SMEs are unable to have a clear understanding to the applicable rules of the trade competition act. Thus, there is need to reform on both the institution and the rules on competition act. The reform has been passed through parliament in March 2017. However, the political economy of private-connected politics will be tremendous issues for the enforcement, especially for SMEs in retails sectors, where large retail corporates have their political influence to government.

Chapter 4 : Expert Opinions : Competition law on SMEs in retail sectors

The Chapter 2 reviews studies on competition law and SMEs and Chapter 3 explores current competition law frameworks in Malaysia, Thailand, and Vietnam. The review and exploration show documentary research which provides different perspectives of competition law and SMEs in retail sectors in those three countries. In this chapter, the research goes beyond documentary research toward field study basing on in-depth interview to experts from Malaysia, Thailand and Vietnam. The in-depth interview is to see the deeper and practical perspectives on the competition law and SMEs in retail in the three countries. The expert in this research is chosen based on the publication and professional profiles relating to competition law, trade and business regulation, and SMEs with social developments. This chapter will be divided by interviews to in the three countries.

4.1 Malaysia Competition law and SMEs in retail sector

Asst. Professor Dr. Nasarudin bin Abdul Rahman, Faculty of Law, International Islamic University, Kular Lumpur and Malaysia Competition Agency, Personal Interview 17 July 2016

Development of SMEs sector is strong and SMEs are accounted as majority of businesses in Malaysia economy. Most of businesses in Malaysia are from SMEs businesses. However, there are also the big retailers in the markets which are Tesco Company, Giant Company, Carrefour Company, 7-11 company and News Daily. The situation is that the big corporate retail tends to compete among them.

There are so many areas of businesses where SMEs work on, the example is insurance, industries, and trades. By the existence of the SMEs in all economic sectors, there are many trade associations in Malaysia. The three main trade associations are the manufacturing, the services, and the agriculture. Those three main have contain many SMEs members.

At this stage of economic development, there is no concern on the issue of SMEs facing competition from the large retail corporates. SMEs can still stay in their retail markets and still be able to compete with other company in the markets. It is because Malaysian government makes an important policy to promote SMEs which have to compete with large corporates in retail sector. The Ministry of Domestic Trade, Co-operatives, and Consumerism issues a Guideline on Foreign Participation in the Distributive Trade Services in Malaysia in 2014. The Guideline aims to build fair development and efficiency of the retail industry, and ensure growth of local businesses. The guideline also supports Bumiputera participation in the economic sector according to National Development Policy.

In addition, the government policy on securing economic right to Bumiputera also help protect SMEs which are Bumiputera businesses in Malaysia to sustain the market competition and to face with a new market entrants from international businesses. In case business or international business would like to invest in retail sector, there is need to obtain Approved Permit (AP) which is an import and export licence issued based on the Customs Act 1967 by various Ministries in Malaysia. The AP would help protect SMEs from competition from large modern retails. Malaysian government also establishes SME corp which is an government agency having duty to support development of SMEs in Malaysian Economy. The SMEs corp provides information and incentive to micro and SMEs business in their business improvement.

In aspect to competition law, the section 10 of the Malaysia competition law deals with abuse of market power and dominant firms in retail would not be able to use their market power deterring SMEs in retail markets. Also the section 4 of the Malaysia competition law deals with cartel agreements. However, the cartel agreement is under diminishing threshold. If the cartel agreement among SMEs does not pass the threshold, the cartel agreement is not under infringement of Malaysia competition law.

The interesting issue in competition law in Malaysia is on loss leader pricing where the large retails sell a small number of products either at or below cost. The large retails are at their assumption that consumers will buy other products in the retail stores resulting to combined profitable sale figures. There is a complaint from SMEs in retail but MyCC is still under an investigation process according to the complaint.

In addition, there is also complaint about the unfair shelving of SMEs products in retailing. There is an optional and condition on products in order to put the new or selected products up to the front shelf in order to draw consumers attention. The large retail may set up unfair condition to SMEs in case the SMEs would like to put their products on the front shelf. Moreover, the example case in retail is on the Nestle Malaysia applied for MyCC’s permission to make a retail price standard which may consider as the resale price maintenance or price fixing among Nestle and its distributors. Later the Nestle decided to withdraw the application to MyCC as the Nestle may does not like to disclose more information regarding to retail price determination of its retail products.

Competition law in Malaysia tends to be under Harvard approach by dealing with abuse of dominant power. Nevertheless, It can be seen that MyCC focuses on trade association’s anticompetitive agreements. This is because the cartel agreement among SMEs significantly deters market competition and deter consumers interest. While it seems to be small effect from SMEs anticompetitive agreement, the agreement create economic problems due to the fact that the combined market shares from the agreement can be consider as a whole sectors. The example is from the Cameron Highland case where all SMEs under trade association made a price fixing. The trade association controls all members in the florist markets that the setting up price by trade association may lead to vital affect to consumers.

With regards to SMEs in franchising sectors, Malaysia has passed specific act on franchising business. Thus all issue about franchising will be under governance of franchising act. There may be a abuse of dominant in franchising business when the franchisor is a dominant corporate and the franchisee is SMEs or individual. Nevertheless, there is not any complaint about the unfair issue in franchising business in Malaysia. The franchising business not only is under franchising act but also under the Contract law and Intellectual Property law. This is an issue of intersection between competition law and other laws in doing business of SMEs.

H. Herin Jeffery Bin Daud Hong, Senior Assistant Director Strategic Planning International Affair Division, Malaysia Competition Agency, Personal Interview 17 July 2016

The competition law in Malaysia focus on anticompetitive conducts. However, there is not any case about retail sector. The example case of abuse dominance is on the Mega Steel case where there is potential abuse of dominance but the case was revert to Ministry of Trade. The decision of MyCC is to withhold its action from the case because MyCC would like to give the Ministry of Trade to supervise the steel industries and MyCC dos not have sufficient information for making any decision or action to the Mega Steel Company.

The other interesting case is on the MyEG case. The MyEG case is Malaysian government customer service agency for immigration. MyEG set up condition for all applicant of immigration permit to have insurance cover during period of immigrants stay in Malaysia. However, the MyEG also announce that if immigrants buy insurance services from specified insurance companies, the process will be shorter for approving immigration application. This leads to an unfair market competition to other insurance companies are not in specified lists of MyEG. MyCC is currently look at the information of the MyEG case.

According to the experience, enforcement of MyCC is under Harvard approach on antitrust law. MyCC mainly focus on supports SMEs and protect SMEs from unfair conducts of large corporate. However, MyCC did enforce law on cartels conducts among SMEs because the cartel agreement affects consumers most and this create problems to economic development. The business norm in Malaysia is that SMEs should follow business community. When there is an association meeting, there will be normally a discussion on price fixing. The meeting will normally be concluded by the president of association announcement on price setting. The setting of the price by the meeting as the norms of SMEs in doing business is based on the SMEs’ lack of knowledge and awareness on competition law. MyCC is currently working hard on making advocacy to SMEs as to make them understand and aware on competition law in Malaysia.

Associate Prof. Dr. Salawati Mat Basir, Faculty of Law Deputy Legal Advisor, National University of Malaysia (Universiti Kebangsaan Malaysia), Personal Interview 19 July 2016

The SMEs businesses are economic backbones of Malaysia economy. Government makes much effort and support to SMEs development in all sectors, including retail sector. While there is a Bumiputera business policy but in reality Chinese business can gain more regulatory favors from government. It is because Chinese trade associations have closely involve with government in the process of setting up policies on business. The SMEs in Malaysia thus have more support for their development and have more protection from government policy when there is a concern over increasing competition from large corporates in retails.

The example of successful support of government to SMEs is the Munchee Biscuit product under Cylon Biscuit Limited Company. The Cylon Company was originated from very small business. Later the Cylon Company received support from government policy relating to SMEs. The supports are about business strategy, product design, and finance for business development. By the supports from the government the Cylon company is now the major international exporter of biscuit products of Malaysia. There are so many exports products from Cylon. From the example, Malaysia government made its effort to growth SMEs and to support expansion of SMEs in Malaysia economy.

Government also provide significant amount of fund for support SMEs. The SMEs corp provide 6 billion Ringit to SMEs as to boost up the development of SMEs in all sectors. For instance the Gullien Biscuit Company which is set up as a very small business but after received government funding so the company can develop its products and capacity as to be under WTO export standard. Thus the government support from SMEs can create significant development on Malaysian SMEs as to do business internationally. In addition, government in all ministries has set up unity policy to support micro and small enterprises in order to enhance development to the enterprises. Ministries implement various business training to enterprises which need to trade or to make business in markets.

SMEs in both retail and franchise sector can received much supports from government in all any business needs. The example is that the Malaysian government linked its support policy to the University Putra Malaysia in servicing all food science labs to all SMEs with less cost. The University service lab will provides testing on the food as to ensure the quality for the SMEs products in order to keep the SMEs food products in line with WTO and international standard.

Moreover, SMEs increasingly expand their business by franchising sectors. The Chinese SMEs tend to bring more franchise brands into Malaysia markets. It is because the Chinese business are keen to take risk of business where there is potential markets. This is different from Bumiputera business which prefer to refrain from taking risks of businesses. At the current stage, franchise sectors are very expanded by both local franchise and international franchise in Malaysia. It is due to the support from government to SMEs in all business activities.

Government also sets up policy to facilitate SMEs to do more business on agriculture as Malaysia dose not develop agriculture production and markets. The government aims to have more agricultural products from the increase involvement of SMEs in the sectors. The example is that the government has a good support to SMEs business in exporting mango and guava to international markets. Government will provide help and finance to the SMEs in doing agricultural export business. Government also make a reform scheme to all SMEs by providing support to around 32000 SMEs in changing their business brand and plans. The government scheme is to help SMEs compete with large modern trade.

Around 15000 out of 32000 SMEs are able to transform and enhance their business and able to compte with the rapid change of markets in Malaysia. Thus the SMEs in Malaysia have a large support from government. Some SMEs even have a chance to create their business growth. The example is that some SMEs become manufacturer of automobiles. This is the result of government policy and implementation to support SMEs.

In addition, the chamber of commerce play a supportive role to all catching up with market changes. The Chinese chamber of commerce supports all SMEs to operate

and develop their businesses. The rich or tycoon Chinese business are normally a main support to the SMEs and to business community.

Associate Dr. Haniff Ahamat, Faculty of Law, National University of Malaysia (Universiti Kebangsaan Malaysia) Personal Interview 19 July 2016

The SMEs can be considered as a majority of business in Malaysia economy. While there is government support to SMEs to compete in the market, the competition law do not has sufficient mechanism to protect SMEs from the large retail corporate. Government does have policy but in some aspect lack of implementation to deal with issue over unfair competition between large corporate and SMEs.

The competition act section 4 prohibits SMEs to create any cartel conduct. However, a specific exclusion of the competition law application to SMEs is provided in section 5. The section 5 (a) gives a safe harbor to SMEs to make any anticompetitive agreement in case there are significant identifiable technological, efficiency or social benefits directly arising from the agreement. Also the section 5(b) give a safe harbor to SMEs in case that the agreement among SMEs contributes to the benefits could not reasonably have been provided by the parties to the agreement without the agreement having the effect of preventing, restricting or distorting competition. Thus the available of safe harbor can give SMEs to combine their market power as to compete against the large corporate, especially in retail sectors.

However, it is noted that the safe harbour provides in the text of section 5 (a), and 5(b) still broadly vague. When the SMEs are under anticompetitive agreement as to compete with large corporate, there is no solid definition of how the agreement can create economic benefits. In most of the cases, SMEs agreements are then subjected to infringement of competition act. With regards to abuse of dominant, the section 10 of the competition act prohibit large cooperate to conducts unfair practices. The section 10 is the significant legal mechanisms to protect SMEs in retail from unfair competition.

The nature of the SMEs in Malaysia is different from Indonesia in the aspect that the SMEs in Malaysia prefer to confront with direct market competition. During the past ten years, there have been many tradition Malaysian SMEs gone off retail markets.

Nevertheless, there is still a strong business communities in various states of Malaysia. The business community then can help supports the existence of SMEs in markets. The economy in Malaysia is unique in that there is no economic concentration in capital state like Bangkok Thailand. Many states have built up their own business activities and can create their business growth. The example are Kelantan, Melaka, Penang states which have wel developed economies and SMEs growth. Thus the SMEs in business are not concentrated but rather spread throughout the states in Malaysia. Moreover, in states, the SMEs business community are strong and give great supports to all SMEs. However, there is still an overcoming competition from modern trade. The example is the increasing of 7-11 branches in Malaysia. There is some trend of Malaysian SMEs to sell their business to Indonesian investors. Malaysian SMEs tend to sell their retail shops to Indonesian business. Thus, Indonesian business can grow and stay in Malaysia markets. By this point, it shows that there is still a concern over the takeover of business from foreigners. The market in Malaysia is distict from other countries on that government provides business rights to Bumiputera business. However, the Bumiputera businesses would normally let the right to do business to other especially, Chinese and Indonesian. Thus it can be seen that although there is a great support to Bumiputera business which may create unfair condition to other businesses, in realty the Bumiputera policy does not make any privilege to Bumiputera business. This is because Bumiputera businesses tend not to operates business by themselves but rather let the other to do businesses.

*Racheal Burge, Lecturer University of Southern Queensland, Australia,
Skypes Interview 21 July 2016*

It is important to help SMEs to understand the competition law and to have compliance awareness to the SMEs. In many cases, large and medium enterprises are more capable to deal with competition law compliance. Small businesses with their aim to survive and to stay in market competition do not have awareness to competition law. Thus, there is a need to create competition law awareness to small enterprises. The awareness will make them understand their right from competition law and to comply with the competition law.

In term of enforcement of competition law, the infringement of competition law by the abuse of dominance is very complex and is not so easy to enforce. It requires

significant proof as to show how any conducts subjected to abuse of dominance. The MyCC thus have to initially work on the per se cases on SMEs’ anticompetitive conducts. The young agency should normally start with the SMEs anticompetitive agreements. In Malaysia, SMEs are account for 95% of market economy.

In UK, there are many dominant or large companies. They may create unfair competition to SMEs and the UK competition agency has to work on the abuse cases. Also the UK Competition and Markets Authority has made many inquiries to supermarket sectors as to ensure the fair competition in retail sectors. The authority also works largely on investigation into consumer retail products. The example is that the Tesco Lotus opens small convenience stores and taking markets from community stores. Thus authority has to issues any measure to make sure that the Tesco will not remove all the stores from the markets.

The example to make sure that the competition law is effective protect SMEs is from the Australia perspective by ACCC’s awareness campaign the ACCC has focus to help SMEs by establishment of various advocacy regime. Currently, MyCC also has aim to work on a lot of SMEs awareness as to make SMEs compliance and awareness to competition law. However, there is still a lack of research on how the awareness campaign can stimulate the impact to SMEs’ conducts under competition law.

4.2 Thailand Competition law and SMEs in retail sector

Dr. Charles Cheung, Former Chairman of Trade Competition Committee, the Board of Chamber of Commerce Thailand, Personal Interview 1 September 2016

In commenting about the SMEs development in retail sectors, there are many concerns and issues to market competition. The important concern is that the retail market has been developed toward a market concentration where there are few major large- scale retailers. 20 years ago when the modern trade has not enter Thai retail markets, there is less concern over market concentration. However, at the current pace of retail market, only large retails trade can dominate markets and affect to SMEs. The SMEs in retail (ไม่ว่าจะ) could not survive in the markets as the modern traders have

various impacts to the SMEs in retail market competition. SMEs are not easy to compete with the large retailers.

Although it is good to consumers when the large modern traders can offer more variety of products, cheaper prices and better promotion schemes to consumers, the modern traders create a remove of the SMEs in retail markets. SMEs cannot compete with the large retails which have more efficient in business plan, trade terms and supply logistic systems. Thus, it is very difficult for SMEs to fight with the large retails. Many SMEs have to fade out of the markets and this creates a markets concentration where only few large retailers are in the markets for selling consumers products.

The large retailers have also expanded their markets to all types of retail markets. The example is that large retailers are working toward pharmacist store or include the pharmacist into their stores. Thus, it is important to make an intervention to the market by government as the market mechanism cannot create a fair market competition. The example is that in San Francisco USA, there is regulation as to control the large scale retailers to open their branches. The regulation requires that there must be no more than 10-12 branches in limited areas. By the regulation the SMEs can sustain in retail markets. Therefore, in respect to retail markets, the government intervention is necessary as to guarantee free and fair market competition. The example is that South Korea, Japan, and Taiwan have made their regulatory mechanisms available to controls and to adjust a fair competition in retails market. The mechanisms are for protection of SMEs while making sure that the competition effectively.

In addition, the important concern over the competition between the large retails and SMEs is on the “Product Portfolio Power” where the larger modern trades have more power over variety of products to offers to consumers. By the power, SMEs would have to face with significant difficulty to compete with the larger retails which have more products variety. While it is accepted that SMEs may have to change their market strategy to compete with in retail markets, the SMEs cannot easily changes. SMEs have to incur finance, business plan, and other factors in order to changes their business. This leads to SMEs’ inability to changes and compete with large retails. The SMEs in retail in Thailand thus have not much room to survive in market competition.

There was a proposal to adopt regulation to retail competition but many critics about the regulatory intervention to the retail market. Nevertheless, as experience has been proved that Thai retail markets are under market concentration and SMEs have to move out markets. It is very necessary to issue a regulation for protecting fair market competition for SMEs in retail markets.

*Mrs. Aramsri Rupan, Director Investigation, Department of Internal Trade, Thai Ministry of Commerce and Mr. Wuttitthep Timtong, Director on daily products, Department of Internal Trade, Thai Ministry of Commerce
Personal Interview 2nd September 2016*

During the period of many years on retail development in Thailand, it has been an expansion of convenience store which is a chain of modern trade stores. The increase and expansion of the modern convenience store lead to a significant impact to traditional retail stores in Thailand. The modern convenience stores have focuses on both consumer products and food fast food retail products. The rising concern is that the convenient stores which implement market strategy on fast food products will cause more removal of small food shop in Thailand. The example is in case of noodle and food stalls or very small food shops will be greatly affected by the fast food product from the modern chain retailers. In the reality, foods from the large retailers do not have good quality and quantity but there is a fast service for consumers. The modern convenience stores then are able to increasingly dominate the fast food market.

The Ministry of commerce aims to stimulate market competition where all market players can compete. However, in the retail sector, there should be regulatory managements which can help promote fair competition to small retails. It has been aim to introduce the draft Retail Act to the government and to parliament. The draft Retail Act will help create a zoning for large retailers. The zoning then helps alleviate the impact to the small traditional retail in Thailand. The Act will help provide a regulatory mechanism for protect SMEs in retails and help promote fair competition in the market.

In addition, the government has attempted to protect tradition SMEs from the impact of fierce competition from large retail. The example is the policy where the Department of business development invited all SMEs to learn on the business strategy from large retails. Nevertheless, the policy does not work well as the SMEs are far less

efficient than large retailers and the SMEs do not have good business and management system like to the large corporates.

The other important issue is that the Thai government neglect to support SMEs as to compete with the large corporate. The OTOP scheme does work well in South Korea and Japan but the OTOP does not contribute to the development of Thai SMEs. There is lack of various business strategy support to SMEs and it leads to the point that SMEs cannot well compete with the large retailers. Another concern about competition between large modern retailers and SMEs is that the large retailers have more strategic consumer focuses. It is because the large retails have business synergy that can direct to consumers’ interests. The consumers would prefer to by products from the large retailers as the SMEs cannot understand the changes of consumers interests. In another word, the large retailers have more business research development that can enable them to win the SMEs in retail markets. It is noted that there is also a competition between large retail and large retails. The example is the Big C, Tesco Lotus, and 7-11. They are all modern retailers and competing to each other while the traditional SMEs have to walk out the retail market. The competition between the modern retailers can lead to better market efficiency and better consumer welfares.

Large retailers have significant amount of investments and they have various business strategies that politically connected. The large retailers work closely with government in various business projects. The example is that the large retail offer training course to traditional SMEs but the course directly sells the business franchising model of the large retailers to SMEs. In some cases, the international modern retailers are able to make a lobby to diplomatic authorities in making pressure to Thai government. This has been happens when the Thai government aimed to regulate and govern the retail sectors where the international modern retailers are in the markets. The international retailers would then ask their embassy to make a pressure to Thai government not to make any regulation governing retail markets.

There is also some complaint regarding to slotting allowance by that there is a requirement of fees, if the SMEs would like to sell products on the large retailers’ shelves. The fees are, for instance, initial fees, advertisement fees, and branch expansion fees. The SMEs with a hope to sell the products to mass consumers have to pay the fees to the large retailers. In some cases, the SMEs do not know whether the fees are really

utilized according to the large retailers’ business plan or not. The example is that the large retailers ask for the advertisement fess from SMEs suppliers and notify that there will be 10 advertisements for the SMEs products. In reality, the large retailers do not make 10 advertisements.

The large modern retailers are also making a business strategy of “Loss Leaders” where a product in modern retailers is sold at a price below its market cost to stimulate other sales of more profitable goods or services. There are complaints from small retailers of electrical appliances which cannot compete on the prices with the modern retailers. The lowering of the sale price of 30 percent of electrical appliances at the modern retailers can create significant problems to the small retailers.

The issues of unfair conduct would normally be disputed by the authoritative mediation. The mediation is that the office of competition commission offer to mediate the issues between the large retailers and the SMEs who are suppliers of the large retailers. The larger retailers would normally conform to the request of the SMEs in making payments. However, SMEs may be distracted from what they requested by the fact that they have to keep supply product to the large retailers in order to survive in the businesses. It is thus an issue of surviving in the market by relying on large retailers in the business cycles.

Mr. Suwit Kingkaew Senior Vice President, CP All, Public Limited Company, 2nd September 2016

CP All with 7-11 stores aims to help consumers and agriculture suppliers and work in a sustainable way. The example is that the 7-11 buy coffee bean from the northern part of Thailand and to sale coffee in 7-11 stores. The 7-11 stores’ high volume of buying the coffee beans lead to the rise of the coffee bean prices. The sales of coffee in 7-11 stores are under cheap and reasonable price. This is why 7-11 can serve good coffee to customers.

There is a concern in ASEAN market that the CP All and 7-11 will occupy all market. However, CP ALL is under fierce competition from other modern traders. For instance, the CP ALL has not entered the Vietnamese markets. The Thai Charoen Corporation Group (TCC) which took over Vietnamese Big C Company also own Big C

Thailand company. By this the CP All with 7-11 retail business has to face with competition from other big retail traders.

CP All plans to have 9,500 7-11 branches throughout Thai market. The question is that the CP ALL competes with SMEs retail or not. The answer is that CP ALL does not compete with the SMEs retailers which are approximately 800, 000 SMEs retail stores in Thai market. 7-11 stores have changes its retail plan to focus more on food and beverage where consumers would consume many times per day. This is difference from traditional or SMEs retails which mainly sell various household products but less on food and beverages. This is why the 7-11 is not a competitor with SMEs retailers. The 7-11 also have adaptive business plan as to catch up with consumers’ preference. For instance, during Vegetarian festival in Thailand, 7-11 will put more frozen vegetarian food in the stores in order to satisfy consumers’ demand.

In initial setting up period, 7-11 has about 300-400 stores which face with business loss. The problem of the loss is that 7-11 at that time work as the traditional retail stores which sales only dispensable products such as soap, detergent, toothbrushes, and ect. The 7-11 as retailers thus have to change business plan toward more convenient food products where 1 customer would buy products in the 7-11 stores five times a day. The 7-11 also provide fast and better food products to customers who are in a rush time during a day. From the change of the business strategy, currently it is estimated that each 7-11 store would has daily income at around Baht 70,000.

7-11 would focuses more on individual customers while the Tesco and Big C supermarkets focus on family customers. The SMEs retailers thus would still be able to stay in the market as they can buy cheaper products from wholesaler and resell the products to customers. In addition, not all the 7-11 stores are owned by CP ALL, there is a franchising system where other entrepreneur can joint with CP ALL to establish 7-11 stores. Apart from 9000 7-11 stores, the 5000 7-11 stores are established under franchising chain with local business. 7-11 company is not able to control suppliers’ prices but 7-11 tends to talk with suppliers about how to make promotional prices. 7-11 company has shelf management system which helps build a good business efficiency of purchasing system. 7-11 company has business forecasting system which helps create better purchasing system. 7-11 company has to compete with other modern trades. This is why 7-11 cannot control prices from suppliers as suppliers can sell products to other

modern trade. There are various rumors from news and some personal opinions which aim to create public misunderstanding to 7-11 company in competing in free market. While 7-11 company aimed to build business for agricultural products from farmers, there is no news or public awareness about what 7-11 aim to help farmers. 7-11 open new markets for Thai banana to China and Japan. Before 7-11 worked on the agricultural trade for selling fruits to international markets, SMEs or other modern trades do not consider helping farmers to sell their products to international markets. The 7-11 business, instead, helps SMEs in agricultures rather than competing with the SMEs.

It should be noted that if Thailand would like to adopt Retail law, the important consideration is that the law must use for create free market. The law must help develop both large and SMEs in retail sectors. If the law contributes to obstruction to development of the retail sector, the obstruction will then lead to economic problems.

Mr. Adul Chotinisakorn Deputy Director, Department of Foreign Trade, Ministry of Commerce Thailand at the Conference on Trade and Investment in Mekhong Sub region (CLMV) 24-25 September 2016

With an experience of working as a consulate in commerce in Malaysia for 5 years, Mr. Adul Chotinisakorn notices that Malaysia has a good regulations and policy to control and govern Hypermarket. The regulations and policy also cover the urban planning of the main areas and cities in Malaysia. The regulation and policy thus create an efficient use of area plans. The important example from Malaysia is the policy on building the main cities of Putrajaya and Cyberjaya. The policy makes sure that there is better area plan to control of housing, government, business areas. The control of the retail stores by large retails thus can be controlled under the area plans.

The Malaysian regulation and policy on SMEs retail sector is different from Thailand in the sense that the Thai regulations and policy tend to be less efficient in term of controlling large retail and in term of area planning for the retail stores. The example is that in Thailand, the retail stores by many large retails have been opened in various areas. The open of the stores may not suitable with city planning which aim to create convenient living.

In addition, the good example of the competition regulation to control international large corporates in retail is from India. India government tends to create a regulations and policy which help protect traditional SMEs in retail sectors against large retail corporates aiming to open branches in India markets. By the regulation on competition, large retail corporates have market share just around 8 percent of entire retails sectors in Indian economy.

Opinions from Thai academic experts

- Prof Dr. Sakda Thanitcul,
- A/Prof Somporn Isvilanonda,
- Prof Dr. Aree Wiboonpongse,
- Dr. Nilsuwan Leelarasamee,
- A/Prof Dr. Lawan Thanadsillapakul,
- Police Colonel. Tawee Sodsong

From the research meeting at Thai Research Fund, Level 14, SM Towers 6 September 2016 and 22 August 2017

Issues of competition law regarding to SMEs and retails are based on two main problems which are 1) the large retailer’s abuse of market power toward SMEs as a suppliers to the large retailers and 2) the large retailer’s abuse of market power to SMEs competitors. It is important to consider on the two main problems as to develop competition law application in retail sectors. The consideration should be based on how to solve the problems on order to practically develop the competition law.

In addition, within various aspects of retail sectors, the application of competition law is not clear. For example, the “Loss Leader” by large retailer is the reduction of price for market competition. The reduction of the prices contribute to consumer benefits in the competitive market where large retailers have economy of scales over SMEs. The cheap or high prices in retail competition are difficult to define whether the prices are subjected to infringement of competition law or not. However, there should be a research as to understand the competition law on retail and SMEs. The research is important to Thai economy. Another important issue is on the large retailer’s private brands which compete directly to SMEs. The private brands are considered as

unethical business behaviors. Government policy and laws in Thailand are not able to control the fair competition of retail business behaviors.

Another case is about a legal and policy control over franchise business of large retail. The large retail as franchisor usually exploited franchisee. If the business of franchisee has great return and profits, the large retailer as a franchisor will soon open its retail shop next to the franchisee shop. The shop will directly compete with the franchisee's shop and it is sure that the franchisee's shop will face with business problems and has to end the retail business.

The application of competition law in Thailand is not problematic, although it has an attempt to apply the competition law to business conducts. The rudimental problem of the competition law is that competition commission lacks of works on enforcement. The example on the lack of work is that since the passage of the Thai competition act in 1999, there are 93 complaints with 81 complaints accepted to consideration of competition commission. From the 81 complaints, there are evidence that 3 complaints proven to be valid infringement of competition law. From the 3 complaints, the public prosecutor decided not to press charge 1 case and the competition commission decided not to bring the case to the court 2 cases. There are still 5 cases waiting in meeting of competition commission. Thus, there is not successful case of competition law enforcement in Thailand. It is due to the lack of work from competition commission. In addition, the complaint system is difficult for businesses affected from unfair behaviors. It is because the affected businesses have to prove the exact financial damages caused by the unfair behaviors. SMEs would face difficulty to make a complaint to the competition commission. In many cases, SMEs are not able to give business information relating to large retail trade.

Competition laws in Thailand, Malaysia, and Vietnam have similar legal frameworks but the problem is about lack of enforcement. The rudimental issue is from the fact that Thai government does not aim to create market competition. The government rather aim to control and monopolized markets. For instance, the rice trade is controlled by government regulation. Currently, there are few companies that are allowed to in structure of rice business in Thailand. By government control, the rice trade and business are not transparent. In addition, while Thai government aim to support “Start Up business”, the government does not consider on uncompetitive market

structure. The government does not concern that Start up SMEs are able to survive and compete with large business under changes toward digital economy. Thus, it is necessary to analyze the connection between retail digital economy and how support to Start up SMEs in the new digital economy.

4.3 Vietnam Competition law and SMEs in retail sector

Assistant Prof Dr. Nguyen Bah Binh, Vice Dean, Department of International law, Hanoi Law University, Personal interview. 18 May 2016

In Vietnam, 95 percent of retail businesses are SMEs. Within the process of liberalization and integration of Vietnam to international market, SMEs are at the increasing step to compete with many large international firms. In term of franchise sector and retail sectors, the franchise system and franchise regulation may run in conflict with competition law as competition law in Vietnam prohibits anticompetitive agreement in franchise sectors. However, the franchise sector is to be developed by the franchising contract in which SMEs are making an agreement as to expand franchise brands and branches. The exemption to the franchises regulation thus is important to facilitate the development of SMEs in retail franchise sectors.

According to the initial drafting purpose, the Vietnam competition law is to protect SMEs from monopoly which mainly a monopoly State Owned Enterprises (SOEs). The competition law was drafted and passed as to deal with various SOEs that occupy monopoly and dominant market power in Vietnam economy. However, during 2003-2004 many foreign companies entered Vietnam market and compete with SMEs in retail sector. The example is Coca Cola and other drink companies. Thus by issuing the competition law in 2005, the competition law will be a main legal remedy for dealing with abuse of dominant power of SOEs and international companies which compete with SMEs in retail sector of Vietnam.

It can be seen that between the approach to use competition law to protect competition in Vietnam according to Harvard school. Vietnam tends to use Harvard approach by protecting smaller competitors against large entities of SOEs and private

enterprises. The main objective to employ Harvard approach is to reduce large businesses’ unfair behaviors which affects SMEs and market competition.

Up until now, there is no complaint about unfair competition from SMEs in retail sectors. In the same way, there is no complaint about unfair conducts from large modern retail. There is no any complaint or any issue about slotting allowance in retail sectors. The competition law in the retail sector is mainly used on the misleading advertisement. There is not any case on retail SMEs cartels or abuse of dominance affecting SMEs in retails. Nevertheless, there is a case about insurance association cartel agreements. The scope of Vietnam competition law covers also misleading and unfair advertisement. There is need to separate approach of the competition law to only protecting competition rather than consumers. There is a proposal to reform on the competition law and consumer protection law in order to separate the consumer approach from competition law.

Currently in Vietnam, the franchising retail stores or modern convenience stores are from both international and local businesses. The example is Circle K retail convenience store shop is from Singapore. The VIN stores are from Royal City company which is a large local property corporates. The Lotte supermarket is from South Korea. The Big C supermarket is from Thai corporate which plans to enter into Vietnam retail markets. However, there are still a lot of traditional retails stores in Vietnam which consumers still prefer to purchase products from the traditional stores.

In Hanoi and Ho Chi Minh City, there are many modern retail stores and supermarkets but in other provinces there are many traditional stores. Thus at this current stage SMEs in retail under traditional styles are able to maintain their market shares from customers’ demand. The modern retails thus have to face with competition with traditional SMEs retails. It is because the prices of products at the traditional stores are much cheaper than the modern trades. The SMEs traditional stores do not have their brand name but they trade under their family name that people in their areas tends to buy products from the family name. Thus the family SMEs retails business still work in Vietnam. Regarding to franchising in retails, the franchises have to compete with traditional stores. Only in future when market developed, consumers may changes to franchise shops.

Dr. LUU Huong Ly, Deputy Head of General Affairs Bureau, Department of Civil and Economic Law, Ministry of Justice, Hanoi, Vietnam Personal interview. 18 May 2016

Vietnam’s first ever generic competition legislation, the Law on Competition (No 27-2004-QH11) (VCL), was passed by Legislature XI of the National Assembly at its 6th session on 3 December 2004 and was brought into full force and effect on 1 July 2005. The scope of the VCL is quite broad and it regulates not only the three standard types of practices (agreements in restraint of competition, the abuse of a dominant or monopoly position and anticompetitive economic concentrations), but also covers unfair competitive practices that harm competitors and/or deceives consumers. Initially, in drafting process the legislation was named as Antimonopoly act but it was changed to Competition Act as to smooth the public acceptance.

After the promulgation of the VCL by the National Assembly, the Government has issued several guidelines to implement the VCL in the form of Decrees. As of June 2016, there have been six Decrees issued by the Government to provide detailed regulations for the implementation of the VCL.

With regards to retail sectors, there are many modern trade retails. The Big C company and Metro company has been acquired by Thai company. The modern trade creates an issue of dominance of market and it leads to public concerns on the retail sectors where the local business may loss in competition with the oversea large retail business. In addition, after the law passed, the enforcement is very poor. Thus it leads to the criticism that the law does not help protect SMEs from large firms. The approach of competition law also is also confused. The Harvard and Chicago approach are mixed in enforcement of competition law. The example case is Vinapo which the competition authority deals with abuse of dominance.

However, there is still not any case about anticompetitive conducts in retail in Vietnam. There is only a criticism about potential unfair competition of Big C Company from Thailand as an oversea company in Vietnam. There is some private research shows that there is some issue about unfair and exclusive dealing affecting SMEs in retail sectors. Nevertheless, SMEs under family business in retail still all right with the

markets competition as consumers prefer the traditional retails. This is because the modern trade and supermarket are quite new in Vietnam markets.

The retail in Vietnam is gradually developed to accept more modern retail as consumers behaviours are changing toward more standard of service and products in large retails. There is a regulatory requirement to the modern retails store in not to make any effect to SMEs. The requirement is an Economic Need Test on which the modern trade have to show. If the modern trade would like to establish its supermarket or large retails the modern trade have to show that there is a real economic need for the supermarket or stores. Nevertheless, under political economy of Vietnam, the requirement of Economic Need Test is not an effective legal mechanism to protect SMEs as government both central and provinces tend to permit any modern retails in an unclear procedure and not too transparent.

Associate Prof Dr. Tran Viet Dung Dean of the Faculty of International Law, Ho Chi Minh Law University Personal interview. 19 May 2016

Current issue of the retail sector is on the foreign company entering retail sector in Vietnam. Business and consumers are afraid of that the foreign company will dominate the retail market in Vietnam. The example is the entering of Thai Big C company to Vietnam retail. The main concern on competition law is that the competition law in Vietnam focuses mainly to market share but disregard the behaviour of foreign company which have market power outside Vietnam with the attention to dominate market in Vietnam. The example is that Big C Company can sometime allow or refuse some products of Vietnamese SMEs to be on the Big C retail shelves.

In Vietnam, the competition law applies to cartel conducts, abuse of dominance, unfair competition, and misleading conducts. If there is anticompetitive behaviour which may affect SMEs in retail sectors, the competition law on unfair competition can be a broad rules dealing with the behaviours.

SMEs in Vietnam are a backbone of the economy. Majority of business in Vietnam is SMEs. Although, there is need to create market competition in some sectors, the SMEs are still in competition in various sectors. The example of the sectors which

need a competition creation is the telecommunication where the foreigner wants to invest in the telecommunication. However, there is still a control on the sectors as to govern the sectors. Also the government would like to protect SMEs by make a control on markets. The controls thus may create unfavourable condition to competition creation in the markets.

With regards to retail sector, especially in big modern retail trade, the foreign companies are competing with local large retail company. The Big C Company and the Metro company are facing with competition from the Vina Group, Co.op mart, and Citi Mart which are local big modern retails. However, the SMEs in retail are still all right with the current retail markets as consumers prefer to rely on tradition or family SMEs retails for their daily purchase of dispensable and food products. In future, if the behaviour of consumers in Vietnam changes toward modern convenience store or to the super markets, the SMEs in retail sectors may be affected from the large modern retails.

Pham Hoai Huan, Lecturer in Competition Law , Ho Chi Minh City Law University Personal interview. 19 May 2016

Modern retail market in Vietnam is concentrated to by large retailers and there is potential problems to Vietnam SMEs as a suppliers to the large retailers. The example is the the SMEs in Vietnam may not be able to sale their product to Big C company as the Big C has their own products and the company is a foreign company from Thailand. The modern retail market is control by only four companies which may create potential anticompetitive behaviors to SMEs. Nevertheless, there is no obvious problem on abuse of dominant market power toward SMEs in the retail sectors. This is the SMEs in retail is still under two side of retail markets. The retail market is under the modern retail trade and the traditional retail trade. The modern retail trades is under a competition among big retail companies. The traditional retail trade in retail is under a lot of SMEs retail. Thus people still prefer to buy grocery products from SMEs in traditional retails. The SMEs in tradition retails thus can still gain customers. It is expected that 60 percent of consumers in Vietnam still buy products from the traditional grocery stores.

With the consideration to competition law on the SMEs in retails sector, the approach of competition law in Vietnam does not purely focus on Harvard or Chicago

approach. The competition law in Vietnam was mainly passed as to satisfy the requirement for Vietnam to enter WTO members. Nevertheless, competition law in Vietnam tends to be under EU approach which protects both competition and consumers. Vietnam government now tends to focus on developing national champion rather than support SMEs in the markets. The Vietnam retail sector is under development process but the government does not apply any legal mechanism to protect SMEs in market competition.

In addition, with concern over the Trans-Pacific Partnership Agreement (TPP), the SMEs in retail sector may have to face with a stronger competition. When market open under TPP, Vietnam business have to deal with more oversea competition. The issue is that how the competition law is used to protect SMEs in markets while support market competition in retail after the TPP. While the competition law may have to protect SMEs in retail from the large corporate, the competition law also has to support the open of market as to ensure more market competition.

Assistant Prof Dr. Tran Thang Long Deputy Head of Division of Legal English , Ho Chi Minh City Law University, Personal Interview. 19 May 2016

Competition law in Vietnam still has not much roles in retail markets. Consumers still prefers to buy grocery products from traditional SMEs retails. However, there is a possible change on consumers' preference to switch to buy products from modern retail stores or to the large retail supermarkets. The majority of consumers in Vietnam can be classified under low income level. The consumers thus prefer cheaper products from traditional SMEs retails.

The competition law is based on objectives to antimonopoly in order to deal with monopoly and unfair competition. The concern over retail sector is that there are large corporates which to some extent controls markets. The example is the Mega Star Corporate- on movie sector and CBG cinema control licensing of movie broadcast. The competition law thus has to deal with monopoly problem and unfair competition in movie industry. In addition, the problems of competition in retail in Vietnam occur when the local retails have to compete with foreign retails company. The Big C Company which is under control from Thai Company may create unfair circumstance to

local SMEs retail in Vietnam. Another example is the Masan Group Corporation that has taken over many companies and control companies in livestock feeds. The Masan has many subsidiaries which controls companies in various sectors in Vietnam economy. This Masan conglomerates then create problem to competition law and the competition law may not be able to deal with the conglomerate company as it has cross market power.

The competition law in Vietnam does provide support to SMEs by giving exemption to SMEs. The exemption is to help support SMEs in export market. The exemption also provides to SMEs where there is a possibility of SMEs to go bankrupt. The merger or the cartel among SMEs under export orient or under bankruptcy situation is thus exempted from infringement of competition law.

4.4 Summary of expert opinions on Competition law and SMEs in Retail sectors

4.4.1 Malaysia

In Malaysia, the retail sector is under tight controls by the government policy. As the government policy and regulation place an important support to *bumibutra*, government foster SMEs in retail sector by providing preference to *bumibutra*. Although there are some large retailers entering retail markets in Malaysia, the government makes sure that the retail stores under the large retailers do not expand and affect the retail SMEs in Malaysia. The government has SMEs policy and regulation for promoting SMEs base on community basis and the policy aims to prevent unfair bargaining power between the large retail corporate and SMEs.

There is not case on Malaysian competition law abuse of market power or unfair competition in retail sector. It is partly due to the government policy and regulation to administering retail markets. It is noted that the policy and regulation may run at conflict with market-orientation basing on the purpose of competition law. Basing on documentary study, the trend of competition law enforcement tends to be on anticompetitive agreement or cartels conducts of SMEs. The competition law by the documentary study thus seems to be utilized to SMEs anticompetitive conducts rather than to the large retail corporate's abuse of market. However, by in-dept interview study,

the approach to implement competition law to SMEs’ anticompetitive conducts is due to the fact that the conducts has widely affect consumers. The SMEs’ anticompetitive conducts in cases are account to nearly control of business.

Basing on the interview with experts on Malaysian competition law, the SMEs anticompetitive conducts are accounts to nearly 90 percent of market control which can widely deters consumer interests. Furthermore, the reason that the competition law enforcement tends to be on SMEs’ anticompetitive conducts is due to the fact that the SMEs lack of awareness on competition law. By the expert opinion, the understanding rates on competition law that will help create awareness and compliance to competition law is low. The SMEs are thus prone to conducts business which infringes competition law prohibition. Nevertheless, the competition commission aim to implement effective advocacy to SMEs in order to stimulate awareness to SMEs and to make sure that SMEs are aware to their protected right when they face with unfair competition from large retail corporates.

4.4.2 Vietnam

The experts opine that the Law on competition in Vietnam aim to deal firstly with monopoly or abuse of market dominance behavior. To some extent, the law does not effectively protect SMEs markets. There is not case about the competition issue in retail sectors. There is also no complaint about the unfair competition in retail sector. The market competition in retail sector is under two main types of competition; 1) the competition between large retails and large retails and 2) the competition between large retail and SMEs. The competition between large retails can be seen in supermarket and shopping mall businesses.

Implementation of competition law on a case between the large and are rarely seen at this development stage of retail market in Vietnam. This is because the retails market in Vietnam still under the developing steps. Consumers still have preference to buy products from traditional SMEs retail sectors. The fierce competition between large corporate and SMEs has not happened in the current development of Vietnam retail market.

By the expert opinions, the concern is that there will be an increase of international investments entering retail markets. The new investment may create an unfair competition to SMEs in retailers. In case the retail sector has been developed, SMEs may not be able to deal with anticompetitive conducts from the large retails. The foreign investment may dominate retail market and deter market competition of retail competition in Vietnam. Although, there is a government policy to control the expansion of the modern retail trade by the Economic Need Test, the modern trades both local and foreign would be able to expand their retail branches. This is due to the fact that the policy to control the retail market is affected by issues over political economy.

4.4.3 Thailand

When considering to unfair conducts and SMEs in retail, Thai competition law lacks behind Malaysia and Vietnam. It is because the Thai competition law is ineffective and has not been able to deal with any anticompetitive behaviours since its enactment in 1999. There is no case enforcement and the competition commission is affected by politic-linked businesses. While there are complaints about unfair competition in retails sectors, there is no enforcement of competition law as to correct the unfair competition. The large retailers are able to use their market power to exploited SMEs in case that SMEs has to rely on the large retailers for selling their products to consumers. With the lack of competition law enforcement large retailers are able to controls and refuse to deal with SMEs suppliers.

In addition, when considering to competition between the large retailers and SMEs in retail markets, the large retails are able to outpace the SMEs. It is accepted that SMEs are not able to adapt themselves with the rapid changes in retail markets. The large modern retails claim that they can satisfy consumers need on retail products while SMEs dos not change their selling and services according to consumer’s needs. The consumers can obtain benefit from the competition between modern large retail and SMEs retailers. This Thai situation on the retail competition is different from the Malaysian by the point that the Malaysian government has implemented tighter policy to for SMEs protection.

Experts from Thailand note that Thai government aimed to introduce a draft Retail Act for governance on zoning to large modern retailers and to protect traditional

SMEs. The draft Act was purported to introduce a regulatory mechanism for protect SMEs in retails and help promote fair competition in the market. However, the draft Act did not passed through the parliament. The failure to pass the draft contributes to a lack of policy and regulation to govern retail market and promote SMEs. It is noted that regulatory intervention may inhibit competitive process of the markets but by letting market works by itself, the SMEs’ adjustment to the market change will be slower than the large modern corporates. By a lack of a regulatory intervention, the large modern corporates would later control the markets rather than compete fairly with SMEs. The obvious example is from Thailand where competition law does not effectively enforce and where there is no regulatory mechanism helping SMEs. The large modern corporates are thus able to control Thai retail market while letting SMEs out of the markets.

Chapter 5 : Research analysis and conclusion with proposal to development

From the chapter 4 on the in-depth interview from experts from Malaysia, Thailand and Vietnam, this chapter 5 presents research analysis and conclusion with a proposal to develop competition law and SMEs in retail sectors. The chapter will be divided in to three part of 1) information from documentary and in-depth interview, 2) analysis of the information on competition law and SMEs in retail sectors, 3) research conclusion with recommendation to development on competition law and SMEs in retail sectors.

5.1 Information documentary research and in-depth interview

The research explores main ideas about competition law and SMEs in retail sector and displays approaches of applying competition law basing on Harvard and Chicago Schools. The approaches create a functions competition law. The important understanding from the exploration on the approaches and functions are that competition law can be mechanism to promote market competition and prevent anticompetitive conducts in retail sector. Competition law is applied to anticompetitive conducts from dominance businesses in retail sector and applied to SMEs’ anticompetitive agreement.

The research also studies on the legal frameworks of competition law in Malaysia, Thailand, and Vietnam. In Malaysia, basing on documentary study, Competition Act 2010 was issued as a main legislation to protect market competition. Competition Commission of Malaysia has also been established as to be main agency dealing with enforcement of competition law. The Malaysia competition law is enforced for dealing with anticompetitive conducts but it seems that the law mainly enforce to anticompetitive agreements which are under SMEs’ retail anticompetitive agreements. Nevertheless, by the in-depth interview from experts, the enforcement of competition law to the SMEs is because SMEs anticompetitive agreements are consider as a vital control to market competition and widely affect consumers.

In Vietnam, basing on documentary research, the comprehensive competition rules are based on the Law on Competition 2005. The Law on competition is placed as

an important legal mechanism to promote and protect competition in markets. The law is purported to deal with monopoly abuse and deal with issue of dominant market power. The dominant firms are mainly State Enterprises. In case of VINAPCO, the competition law dealt with VINAPCO that is state enterprises controlling airline fuels. The case shows how competition law is primarily enforced to abuse of dominant. It is similar to information gathered from to expert opinions that Vietnam competition law is mainly concern with dominant firms rather than on the SMEs cartels. The concerns from expert is on how Vietnam competition law be utilised with large retail enterprises which have significant investment from overseas. In a next stage of retail development, SMEs in retail sector may not be able to compete with large retailers. In addition, when there is an issue of anticompetitive conducts under SMEs cartel agreement in retails sectors, the law on competition will be an important prohibition as to correct the cartel agreement.

In Thailand, competition law is based on Thai Competition Act 2017. The act contains various sections dealing with abuse of dominance and cartel agreements. The act section 25 deals with abuse of dominance and section 27 deals with cartel agreement. However, basing on documentary research Thai competition act is ineffective by a lack of enforcement. Since its enactment, there is no court case presenting that the act has been enforce against abuse of dominance or cartel agreement. The ineffective enforcement of the act is also due to the institutional problems and the reform in 2017 would be a promising step to develop the competition law enforcement. In addition, basing on information from experts, competition law in Thailand is not able to protect SMEs and promote fair competition in retail markets. It is due to the fact that government lack of any protective policy for SMEs in retails and the competition act has not been enforce against any anticompetitive conducts in retail. There were complaints on unfair competition in retail sectors between large retails and SMEs but competition law has not been implemented to solve the complaints. Nevertheless the expert also opines that the large retail compete fairly with SMEs retails. The large retailers have better business plan and strategy to serve consumers and the consumers prefer to by a products from convenient stores rather than the SMEs traditional store. Thus, the SMEs fading out of retail market is not a consequence of large retailers’ unfair conducts but rather large retailers’ better business and services.

5.2 Analysis of the research on competition law and SMEs

Basing on the documentary and inept-interview research, it is found that there is difference on the points of a situation of retails market and SMEs and a contexts of competition law.

In Malaysia, retail markets are under regulatory and policy controls in order to govern large modern retail and to protect SMEs. The large retailers may not be able to compete directly with SMEs. Government tends implement Bhumibutra policy and other SMEs support policies as to ensure the existence of SMEs in retail sectors. While, there are large retailers in markets, government maintain regulation which allow SMEs to confront directly with competition from large retailers. Nevertheless in the context of competition law, while there is an acceptance that Malaysian competition act deals with abuse of dominance, the competition law was initial enforce to cartel agreements among SMEs in retails. The Malaysia competition commission currently focuses more on advocacy in order to build competition law awareness and compliance among SMEs.

In Thailand, the SMEs are dying off the market and large modern retailers are able to gain market shares in retailer sectors. The context of competition law in retail sector is ineffective and lack of competition law remedy in case of any complains in retail sectors.

In Vietnam the traditional SMEs is able to maintain their market shares in retails sectors with the increase investment from large corporate in retail. The competition law has been enforced to dominant entities with an aim to protect less-bargaining power entities. There is still no issue of unfair competition between large and SMEs in retail sector but there is concern on foreign investment that enters retail market in Vietnam. The table below summarized situation of SMEs and competition law in Malaysia, Thailand and Vietnam.

Table: SMEs and Competition law in Malaysia, Thailand and Vietnam

	Situation of Retail market and SMEs	Competition law contexts
Malaysia	Markets are under regulatory and policy controls in order to govern large modern retail and to protect SMEs	Initially enforce to SMEs anticompetitive conducts. No case on large retail abuse to SMEs Building awareness of competition law to SMEs Possible investigation on SMEs' complains
Thailand	SMEs in retail sectors are dying out off the market Modern large retail both in supermarket and convenience store are able to controls retail sectors.	Ineffective competition law No case on competition law enforcement
Vietnam	SMEs still maintains in control of retail markets	No case or complaints about competition law on abuse of market power in retail sectors Competition law has been enforced to deal with dominance firm Challenging issues over overseas corporates in retail sector

What can be consider from the above table and from information in Chapter 3 and 4 is that there are correlation between competition law and retail sector in aspects of 1) Competition law on large business and large business in retail sector, 2) Competition law on large business and SMEs supplier in retail, 3) Competition Law on large business and SMEs in retail, 4) Competition Law on SMEs anticompetitive cartel.

1) Competition law on Large business and Large business in retail sector

The competition law with regards to case of competition between large corporates is of significant to ensure that corporates retailers fairly compete with each other. The competition law would deal with abuse of dominant of market power. Competition law should be enforced to anticompetitive conducts from large retail corporates. The example is on a case of *US Federal Trade Commission (FTC) v “Toy R Us.”*¹ In the case, FTC made decision to fine Toys R Us Company due to fact that the company abuse of dominance market power by setting up agreements from toy manufacturers to stop selling to warehouse clubs the same toys that they sold to Toys "R" Us to other large retailers.² The case went to the court and the court hold in favor of FTC decision that that Toys "R Us had conducted horizontal and vertical agreements with and among toy manufacturers to restrict the availability of popular toys to other large retail companies.

Nevertheless, it is cautioned that the enforcement of competition law does not obstruct a fierce and fair competition between large retail corporates. The example is the substantial reduction of product prices in a large corporate should not be subjected to infringement of competition law in case that an aim of the price reduction is to compete directly to the other large retailers. The competition, by the reduction of price is a process of competitive market and consumers can reap benefit from the competition. In case that there is a competition between large retails, the competition law should be under Chicago school that points out that the competition law should not intervene market when competition law may create an obstruction to efficient competition between larges corporates in retail market. Thus, in this research, competition law enforcement should refrain from interfering a fierce competition between large retail corporates because the competition creates an efficiency of market with an overall benefit to consumers.

¹ *US Federal Trade Commission v “Toy R Us, 2011, Case: 1: 11-cv-0063*

² US FTC, Toys R Us, Inc., 2014 , < <https://www.ftc.gov/enforcement/cases-proceedings/091-0082/toys-r-us-inc> > retrieved on 20 June 2016

2) *Competition Law on Large business and SMEs supplier in retail sector*

The competition law should be enforced against large corporate's unfair business conduct toward SMEs suppliers. The SMEs which supply their products to sell on shelves of large retails have to face with unfair conducts such as late repayment of the products price and requirement of advertisements fee without consent from SMEs suppliers. The late repayment of the product price from large retailers can affects financial status of SMEs that need a payment to run their businesses. The behavior for late repayment should be subject to enforcement of competition law on abuse of dominant. Basing on the interview from Thai expert, large retailers are able to make late payment to retailers. The late payment leads to financial effects to SMEs when they are in need of the payments to serve their business finance.³ According to Dobson, a large retailer, as a dominant buyer may exercise its market power by a conduct of a late payment to suppliers.⁴ This generally happens when retail grocery market is under market concentration with few large retailers in markets.⁵

In addition, the large retailers or supermarket may request the SMEs supplier to pay a shared advertisement and slotting allowance fees. The requirement on the fees constitutes to unfair conducts infringing competition law. Scheelings and Wright presents that competition authorities in many countries have to enforce competition law on the anticompetitive problems associated with buyer power in the supermarket industry.⁶ Thus, the research with reference to competition law and SMEs in Malaysia, Thailand and Vietnam maintain that the competition law must be applied to cases when large retailers, having dominant market power conduct unfairly to SMEs suppliers. The competition law should be used to protect SMEs suppliers that has less bargaining power with large retail corporates.

³ Paul, Y S., Boden R, 2011, "Size matters: the late payment problem", *Journal of Small Business and Enterprise Development*, Vol. 18 Issue: 4, pp.732-747

⁴ Dobson, W, P, 2005, Exploiting Buyer Power: Lessons from the British Grocery Trade, *Antitrust Law Journal* Vol. 72, No. 2 (2005), pp. 529-562 <<http://www.antitrustinstitute.org/files/384.pdf>>

⁵ Ibid

⁶ Scheelings, R and Wright, J. D. 2006, "Sui Generis?": An Antitrust Analysis of Buyer Power in the United States and European Union," *Akron Law Review*: Vol. 39 : Iss. 1 , Article 6 <<http://ideaexchange.uakron.edu/cgi/viewcontent.cgi?article=1291&context=akronlawreview>>

3) Competition Law on Large business and SMEs in retail

Application of competition law should be concern with unfair behaviors of large retailers toward SMEs. The example is a behavior of “Loss Leader” where large retail corporate significantly reduce price of one product as to endure customers to buy other products in the supermarkets. The Loss leader conducts would base on market power of products variety. The large retail corporate would have superior variety of products comparing to SMEs retail. The large retail would then be able to use strategy of Loss Leader to unfairly compete with SMEs.

However, it is important to note that competition law should not be wrongly applied to a situation when large retail can fairly compete with SMEs. When the large corporate provides better services and cheaper product prices to consumers, SMEs would have to fade off from retail market. It is due to the fact that large corporate provides more efficient business to consumers. The competition law should not be applied to protect SMEs losing their market share from more efficient large retail cooperate. If the competition law is applied to protect inefficient SMEs in retail, it means that competition law is a legal tool for uncompetitive and inefficient market.⁷ The example is that the large retail corporate can provide superior shops and other promotional schemes to consumers. The large corporate correctly work on it business as to win consumers’ satisfaction. The SMEs that do not transform themselves to keep up with the competition from the large retail should be left off the market. It is due to the fact that the SMEs in retail are ineffective market players.

It is accepted that there should be assistance to SMEs for competing with large retail cooperates. Nevertheless, the competition law is not an appropriate legal mechanism where there is a fair and efficient market competition between large retail and SMEs. It is the SMEs law and policy that should be used to assist SMEs in retail not competition law.

⁷ Prof. May Fong Cheong opinion at Workshop on “ Competition Law and SMEs in Retail Business: Comparative Study on Thailand Vietnam and Malaysia” , Faculty of Law, Chiang Mai University Thailand, 18th January 2017

4) *Competition Law on SMEs anticompetitive cartel*

The competition law in Malaysia, Thailand and Vietnam provide exemption to SMEs in case that the agreement among SMEs create better bargaining position in market competition with large corporates or in case that the agreement may lead to efficient and innovative results. However, some SMEs agreement may not classified for competition law exemption and competition law should be applied to the agreements. It is because the agreement may economic effect to consumers. The example is when SMEs under trade associations made cartels by consulting to numerous competitors about price or market fixing. The cartel conducts among SMEs involve behaviors of price fixing and group boycotts, which deter market competition.⁸ The competition law has to be is a legal mechanism dealing with SMEs’ collusive behaviors as to ensure that consumers welfare are protected.⁹

Nevertheless, there should be a consideration on that the SMEs cartel conducts are based on a lack of awareness on competition law. The SMEs, especially in Malaysia, Thailand and Vietnam generally lack of knowledge on competition law. While SMEs agree to make a cartel for their own business benefits, SMEs do not recognize that the cartel is prohibited by competition law. A competition advocacy is needed to create awareness to SMEs in order to ensure that the SMEs would not involve with anticompetitive cartel.

5.3 Conclusion and proposal for Competition law and SMEs in retail

By the analysis above, the research consider that the competition law should be developed as to promote competition and protect SMEs in retail basing on;

1. *Competition commission with a consideration on SMEs*

The competition commission as a vital institution for competition law should include expert on SMEs or should include a representative from SMEs association. It is due to the fact that the SMEs’ bargaining or political power is lower than the large business. The representatives from or expert in SMEs would help consonant SMEs needs on competition law enforcement and to create an awareness of SMEs on competition law. For instance, in an appointment of Australian Competition

⁸ Foer, Albert A., 'Small Business and Antitrust' (2001) 16(1) *Small Business Economics* 17.

⁹ Ibid

Commission, there must be a commission member who has significant knowledge on small business matters.¹⁰ The representative or expert in SMEs in the members of commissioners is to ensure SMEs is of concern in the commission.¹¹ With regard to Thailand, it is important the competition commission must have knowledge and aware on issues SMEs. By having the commission who concern over SMEs, competition law would be enforce with a consideration to SMEs protection.

2. Enforcement of competition law on retail sectors

The competition law with regard to retail sector is a specific one. There must be an understanding on retail business as well as business conducts in retail sector. There are various types of anticompetitive conducts in retail sector. The example conducts are abuse of dominant buyer power, unfair slotting allowance, and late payments. The anticompetitive conducts can contribute to effect of market competition and economic loss to SMEs. Therefore, the competition law enforcement on the retail sector is needed, especially Thailand. Thailand lacks of effective enforcement when compare to Malaysia and Vietnam. The enforcement of Thai competition law is a first priority in order to ensure healthy market competition in retail sector.

3. Competition Advocacy to SMEs

As SMEs are prone to be subjected to infringement competition law, it is necessary to implement advocacy to SMEs. By the advocacy, SMEs would be able to refrain from any prohibited anticompetitive conducts. The SMEs can understand their right to be protected by competition law. According to the report from International Competition Network, competition advocacy is

“those activities conducted by the competition authority related to the promotion of a competitive environment for economic activities by means of non-enforcement mechanisms, mainly through its relationships with other governmental entities and by increasing public awareness of the benefits of competition.”¹²

¹⁰ Competition and Consumer Act 2010 section 7

¹¹ Prof. Michael opinion at Workshop on “Competition Law and SMEs in Retail Business: Comparative Study on Thailand Vietnam and Malaysia”, Faculty of Law, Chiang Mai University Thailand, 18th January 2017

¹² ICN Advocacy Working Group, Advocacy and Competition Policy, 2002, <<http://www.internationalcompetitionnetwork.org/uploads/library/doc358.pdf>>

The competition advocacy to retail sector is important to make sure that SMEs would be able to resort to remedy from competition law when facing with anticompetitive conducts in retails. Storey presents his interesting study that SMEs most likely to be unaware of competition law while large firms are more likely to prepare for compliance to competition law.¹³ In addition, SMEs prefer to ignore threats from anticompetitive conducts, rather than report to competition authority.¹⁴ Therefore, this research proposes that it should be a specific advocacy to SMEs in retail sector. The specific advocacy will lead to increase of competition law awareness and to ascertain that SMEs knows available remedy protecting them from anticompetitive conducts in retail sector.

4. SMEs as a stakeholder of competition law enforcement

To enable SMEs to use competition law as a tools for competition protection against unfair practice from large modern trade, there should be an easy complain system. The system should be efficient and checkable. In many cases, SMEs decide not to make any complain because the SMEs face with legal and policy difficulty from complain system. SMEs may also have to wait for a long period to receive result of their complaints. In order to make an effective competition law application for SMEs, it should be effective complain channels. The complaint result should also be checkable. The complaint system must be a supportive mechanism for SMEs in fighting with unfair behaviors. The complaint system is to consider that SMEs in retail are lack of knowledge about competition law and economic information needed for case processing. In addition, there should be a system that involve SMEs with investigation procedures basing on complaints received. Alternatively, there should be method to permit SMEs to help on works of competition commission or office of commission. If there is SMEs' participation to the competition law cases, there will be a development on competition law application in retail sector.

5. Guideline of competition law on retail sector

Apart from the main competition legislation, there should be an adoption of guideline to make clearer understanding on protecting competition and SMEs in retail

¹³ Storey, D.J. (2010) “The Competitive Experience of UK SMEs: Fair and Unfair” Small Enterprise Research Vol.17 No.1, pp.19-29.

¹⁴ Ibid

sector. The example of guideline is from Japan Fair Trade Commission’s Guidelines *Concerning Designation of Specific Unfair Trade Practices by Large-Scale Retailers Relating to Trade with Suppliers*.¹⁵ The guideline is a rule specifically dealing with Large-Scale Retailers’ conducts on abuse of dominant to unfairly coerce SMEs suppliers.¹⁶ Thus, this research proposes that there should be an adoption of guideline that directly deal with anticompetitive conducts between large retail corporate and SMEs. The Thai competition commission should adopt guideline as to prescribing unfair conducts in retail sectors.

6. Competition law and retail in digital economy

Competition law should be developed as to keep up for economic structure changes toward digital retail and digital economy. The digital retail leads to the transformation of trade and payment under e-commerce system or smart phone application. The digital economy create changes on retail trade methods resulting to changes of market structure which affects large retailers and SMEs. Assawanan point out that;

“Within the transformation to digital period, the SMEs advantage will disappear. It is because the E-commerce service does not require trade areas such as in community, provinces, or countries. The E-commerce normally will result to only one business that can conquer country and global markets. For instance, Amazon which can gain shares of markets globally. The Thai digital economy will be under cross national digital business. It is due to the fact that digital economy is borderless and it will be difficult to make any market barrier to large business which dominate global digital economy.”¹⁷

By the digital economy, the application of competition law will face with challenges from dominant business power which can control retail trades. SMEs would not be able to compete with the large digital retailers. By the recognition on digital economy, modern trades use their significant investment and knowledge for moving their business to digital retail. The modern trades can foresee that the retail sector will

¹⁵ JFTC, Guidelines Concerning Designation of Specific Unfair Trade Practices by Large-Scale Retailers Relating to Trade with Suppliers, (2005),

<http://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines.files/guidelines_large_scale_retailers.pdf

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¹⁶ Ibid

¹⁷ Assawanan, A., 2015, Digital Economy โอกาสหรือวิกฤตของ SME ไทย (2), Bangkok Business, <http://www.bangkokbiznews.com/blog/detail/624684>

soon be under e-commerce and mobile application. The modern trades which move toward the digital economy will be a challenging issue for competition law. The competition law has to be a legal tool for protection of new competition method in digitalization and for protection on SMEs which face with unfair competition. The application of competition law should be clearly reconsider from various aspects such as definition of relevant normal and digital markets, and definition of abuse of dominant in online retail which can be consider as competition law infringement.

7. *Law and Policy relating to SMEs*

Apart from a reform on competition law, the research proposes that there should be a development on law and policy relating to SMEs.¹⁸ It is because the scope of competition law may not cover all issues relating to SMEs in retail businesses.¹⁹ The example is that the franchise law and policy that help stimulate the development on SMEs as to compete with large corporate.²⁰ The better structure of competition in retail market is from the franchising business of SMEs. It is because the SMEs in doing their business, are in lack of access to finance and lack of know how to do business well. This is why SMEs are not able to compete with the large business that has financial support and business know how.²¹ Franchise business would help support the SMEs on finance management and business know how. Thus there should be a reform on franchise law and policy that can be a helpful mechanism for SMEs to compete with large corporates.

Moreover, there should be in broader views as to deal with issue of competition and SMEs in retail sector. The views are according to the unconscionable conduct, collective bargaining, consumer protection, industry code and unfair contract terms.

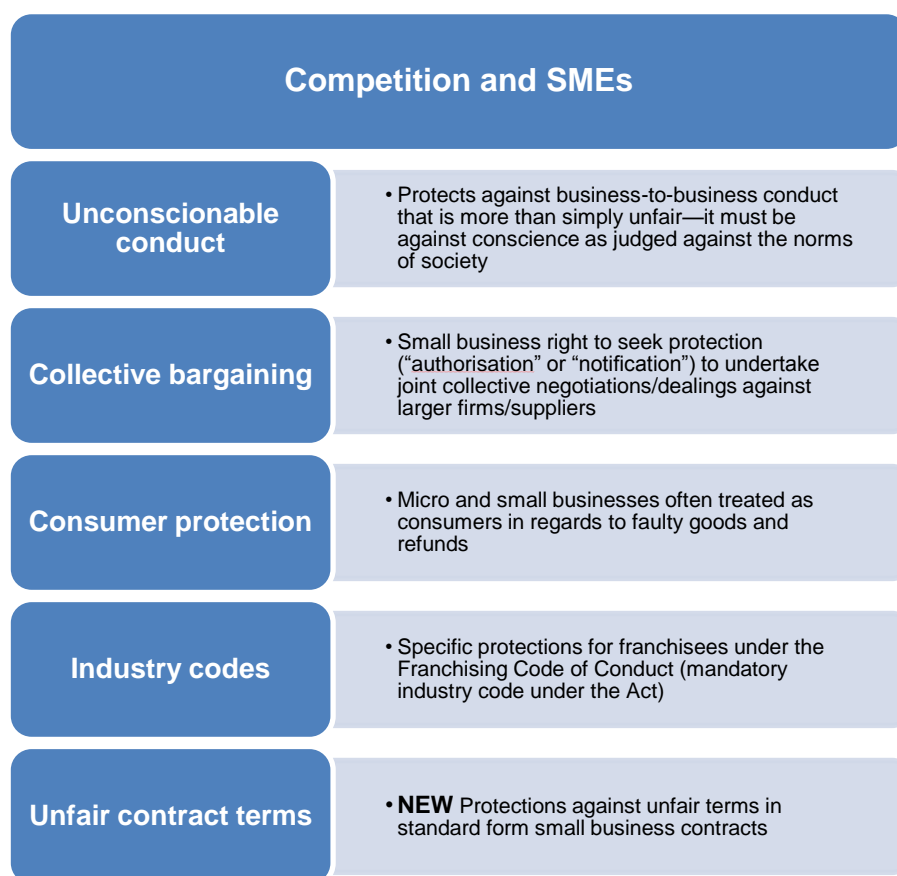
¹⁸ David Fruitman’s opinion at Workshop on “Competition Law and SMEs in Retail Business: Comparative Study on Thailand Vietnam and Malaysia”, Faculty of Law, Chiang Mai University Thailand, 18th January 2017

¹⁹ Ibid

²⁰ Prof. Andrew Terry’s opinion at Workshop on “Competition Law and SMEs in Retail Business: Comparative Study on Thailand Vietnam and Malaysia”, Faculty of Law, Chiang Mai University Thailand, 18th January 2017

²¹ Ibid

Consideration on SMEs in market competition



Source: Schaper, M, SMEs & Competition Law: Observations From Asia & Australia, Conference Presentation at Faculty of Law, Chiang Mai University, Thailand 18 January 2017

Thus, the research proposes that there should be a reform on other policy that relates to SMEs in retail sectors. The example that the government may adopt policy on collective bargaining which is essential to empowering SMEs in dealing with an unfair behaviours from large businesses. However, the policy to support a collective bargaining must not amount to anticompetitive market. For instance, a policy on protecting SMEs in Malaysia is based on Bhumibutra economic policy. The policy help protect SMEs from market competition but the policy itself lead to an uncompetitive conditions which conflicting with aim of competition law and policy.²²

²² The opinions from Anne Katrin Bannach, A/Prof Mia Rahim and Mr. Pett Jarupaiboon at Workshop on “Competition Law and SMEs in Retail Business: Comparative Study on Thailand Vietnam and Malaysia”, Faculty of Law, Chiang Mai University Thailand, 18th January 2017

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Appendix I

Question to Experts

1. Questions to Experts in Vietnam

1. How are the SMEs on retail in Vietnam Economy?
2. What is the framework of substantive rules of the competition law in Vietnam?
3. How the law is enforced to protect market competition and protect SMEs in retail sectors?
4. In your ideas the enforcement of competition law in Vietnam is based on Harvard or Chicago approaches? The Harvard approach focus on dealing with abuse dominant of market power. The Chicago focuses on the application of competition law to promote efficient competition.
5. Is there any complaint from SMEs regarding to unfair practices under competition law?
6. Are there any issue regarding to slotting allowance in retail sectors?
7. Does the Vietnam competition law apply to SMEs’ anticompetitive conducts?
8. How the franchising sectors are under compliance with competition law in Vietnam?

Pictures from the interview of expert from Vietnam

Assistant Prof Dr. Nguyen Bah Binh, Vice Dean, Department of International law, Hanoi Law
University, Personal interview. 18 May 2016



Dr. LUU Huong Ly, Deputy Head of General Affairs Bureau, Department of Civil and Economic Law, Ministry of Justice, Hanoi, Vietnam Personal interview. 18 May 2016



Prof Dr. Tran Viet Dung, Dean of the Faculty of International Law, Ho Chi Minh Law University Personal interview. 19 May 2016 and Assistant Prof Dr. Tran Thang Long Deputy Head of Division of Legal English , Ho Chi Minh City Law University, Personal Interview. 19 May 2016 Associate



2. Questions to Experts in Malaysia

1. How are the SMEs on retail in Malaysian Economy?
2. What is the framework of substantive rules of the competition law in Malaysia?
3. How the law is enforced to protect market competition and protect SMEs in retail sectors?
4. In your ideas the enforcement of competition law in Malaysia is based on Harvard or Chicago approaches? The Harvard approach focus on dealing with abuse dominant of market power. The Chicago focuses on the application of competition law to promote efficient competition.
5. Is there any complaint from SMEs regarding to unfair practices under competition law?
6. Are there any issue regarding to slotting allowance in retail sectors?
7. Does the Malaysian competition law apply to SMEs’ anticompetitive conducts?
8. How the franchising sectors are under compliance with competition law in Malaysian?

Pictures from the interview of expert from Malaysia

Asst. Professor Dr. Nasarudin bin Abdul Rahman, Faculty of Law, International Islamic University, Kular Lumpur and Malaysia Competition Agency, Personal Interview 17 July 2016



H. Herin Jeffery Bin Daud Hong, Senior Assistant Director Strategic Planning International
Affair Division, Malaysia Competition Agency, Personal Interview 17 July 2016



Associate Prof. Dr. Salawati Mat Basir, Faculty of Law Deputy Legal Advisor, National
University of Malaysia (Universiti Kebangsaan Malaysia), Personal Interview 19 July 2016



Associate Dr. Haniff Ahamat, Faculty of Law, National University of Malaysia (Universiti Kebaangsan Malaysia) Personal Interview 19 July 2016



3. Questions to Experts in Thailand

1. How are the SMEs on retail in Thai Economy?
2. What is the framework of substantive rules of the competition law in Thailand?
3. How the law is enforced to protect market competition and protect SMEs in retail sectors?
4. In your ideas the enforcement of competition law in Malaysia is based on Harvard or Chicago approaches? The Harvard approach focus on dealing with abuse dominant of market power. The Chicago focuses on the application of competition law to promote efficient competition.
5. Is there any complaint from SMEs regarding to unfair practices under competition law?
6. Are there any issue regarding to slotting allowance in retail sectors?
7. Does the Malaysian competition law apply to SMEs’ anticompetitive conducts?
8. How the franchising sectors are under compliance with competition law in Thailand?

Pictures from the interview of expert from Thailand





Appendix II

Details of Workshop for the research

Work shop title : “ *Competition Law and SMEs in Retail Business: Comparative Study on Thailand Vietnam and Malaysia*”

Venue: *Faculty of Law, Chiang Mai University Thailand.*

Date: *18th January 2017*

List of participants:

No	Name	Position	Institute
1	Prof. Andrew Terry	Professor of Business Regulation / Discipline of Business Law	The University of Sydney Business School, The University of Sydney
2	Prof. Michael Schaper	Deputy Chairperson	Australian Competition & Consumer Commission
3	Prof. Dr. May Fong Cheong	Visiting Professorial Fellow	UNSW Faculty of Law, AUS
4	Dr. Mia Rahim	Director, Higher Degrees by Research	School of Law, University of South Australia
5	Dr. Le Dang Doanh	Senior Fellow of the Economic College	Hanoi National University (HNU)
6	Mr. David Fruitman	Regional Competition Counsel and Senior Adviser	DFDL (Cambodia)
7	Miss Sita Zimpel	GIZ Advisor, “Competition Policy and Law in ASEAN” (CPL II)	GIZ Indonesia
8	Ms. Anne Katrin Bannach	Head, Myanmar and Thailand Programmes	Friedrich Naumann Foundation for Freedom Regional Office for Southeast and East Asia
9	Mr. Pett Jarupaiboon	Regional Program Manager	Friedrich Naumann Foundation for Freedom (regional office for Southeast and East Asia), Bangkok, Thailand
10	Min Maung Maung Myo	Program Manager	FNF Myanmar

No	Name	Position	Institute
11	Dr.Sapae Kyi Maung	Assistant Director	Ministry of Commerce from Myanmar
12	Daw Wai Yee Kyaw	Staff Officer	Ministry of Commerce from Myanmar
13	Mr.Phomma Inthanam	Director of Competition Division	Department of Internal Trade, Ministry of Industry and Commerce, Lao PDR
14	Mr. Pithleudeth Vongvath	Deputy of Devision	Ministry of Industry and Commerce, Lao PDR
15	Mr. Akhavong Viengheuangphay	Officer	Ministry of Industry and Commerce, Lao PDR
16	Ms. Phet Anousone Thanadabouth	Officer	Ministry of Industry and Commerce, Lao PDR
17	Assist. Prof. Chatree Rueangdetnarong	Dean	Faculty of Law, Chiang Mai University, Thailand
18	Aramsri Rupan	Senior Expert on Develop and Promote Business Competition	Bureau of Business Competition, Ministry of Commerce
19	Associate Prof Dr. Nisit Phanthamit	Director	Center for ASEAN Studies, Chiang Mai University, Thailand
20	Kanya Hirunwattanapong	Assistant Dean for International Affairs	Faculty of Law, Chiang Mai University, Thailand
21	Chainarong Luengvilai	Associate Dean for Student Affairs	Faculty of Law, Chiang Mai University, Thailand
22	Sutasinee Supa	Head of Legal Academic Services Center	Faculty of Law, Chiang Mai University, Thailand
23	Dr. Pornchai Wisuttisak	Head of development and training center	Faculty of Law, Chiang Mai University, Thailand
24	Dr. Ploykeaw Porananond	Lecturer	Faculty of Law, Chiang Mai University, Thailand
25	Dr. Pedithep Youyuenyong	Lecturer	Faculty of Law, Chiang Mai University, Thailand
26	Susan Billstrom	Lecturer	Faculty of Law, Chiang Mai University, Thailand
27	Dr.Usanee Aimsiranun	Lecturer	Faculty of Law, Chiang Mai University, Thailand
28	Apiradee Springall	Lecturer	School of Law, Assumption University

Picture from the workshop:











Appendix III

Publication of Research



PROGRAMME

7th ASEAN Competition Conference 2017 - ASEAN@50 – Managing Change in a Competitive ASEAN” 8-9 March 2017 Sunway Hotel Resort Selangor, Malaysia

The 7th ASEAN Competition Conference (ACC) serves as an initiative to advocate the development of Competition Policy and Law (CPL) within the ASEAN Member States by encouraging the building of strong institutional and enforcement mechanisms to foster a more competition aware region.

Since its inception in 2011, the ACC has been a forum to address the challenges faced in CPL implementation. The ASEAN Member States have benefited from the exchange of experiences and strategic discussions, drawing lessons from one another and from competition bodies and experts from outside of the region in areas of CPL enforcement and advocacy, among others. With a specific theme chosen each year, the ACC is instrumental in fostering the promotion of competition policy for regional development and in shaping the direction of CPL implementation within the ASEAN region.

In order to achieve a more competitive ASEAN region with well-functioning and highly cohesive markets, there is a need to better address the issue of having operational and effective competition rules. The ASEAN single market will need to look towards enforceable competition rules that protect against anti-competitive practices and promote consumer welfare, as well as to allow for the pursuit of a regional competition policy.

Although implementing effective regional competition policy is a big challenge due to the wide differences in socioeconomic developments, legal institutions as well as the lack of competition culture and weak regulatory frameworks, a more region-centered approach through both formal and informal cooperation initiatives may assist in forging a stronger competition environment in the ASEAN region.

The 7th ACC is hosted by the Malaysia Competition Commission (MyCC) and co-organised together with the AEGC, the ASEAN Secretariat, and the ASEAN-Australia-New Zealand Free Trade Area (AANZFTA) Economic Cooperation Support Programme (AECSF) and the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, upon commission of the German Federal Ministry for Economic Cooperation and Development (BMZ).

Day 1 Programme (Wed, 8 March 2017)	
8.30 am	Registration
9.00-9.15 am	Welcoming Remarks The Hon. Tan Sri Dato’ Seri Siti Norma Yaakob Chair, Malaysia Competition Commission
9.15-9.25 am	Opening Address <i>High-level representative from Malaysia (tbc)</i>
9.25-9.35 am	The 10th Anniversary of ASEAN Experts Group on Competition (AEGC) <i>The AEGC@10 Anniversary Video</i>
9.35- 10.00 am	Coffee Break & Photo Session
10.00-10.10 am	Overview of the Conference <i>Dr. Nasarudin Abdul Rahman, Assistant Professor, International Islamic University Malaysia (IIUM), Conference Convenor</i>
PLENARY SESSION	
10.10-10.25 am	The ASEAN Competition Landscape Post-2015 – Vision for a Competitive ASEAN <ul style="list-style-type: none"> • Overview of ASEAN competition developments and progress in ASEAN in the last decade • Understanding the new competition imperatives under the ASEAN Community and its attendant new AEC Blueprint 2025 • An overview of initiatives under ASEAN Competition Action Plan (ACAP) 2016-2025. <i>Speaker:</i> Mr Khouanchay Iemsouthi <i>Chair of the ASEAN Expert Group on Competition (AEGC)</i>
PANEL DISCUSSION 1	
10.25am - 12.00 pm	ASEAN’s Young Competition Agencies - the Tough Get Going <ul style="list-style-type: none"> • What are the successful elements of an effective competition agency? Are there any short-cuts to training and retaining talent? • How to build political support and strengthen stakeholder commitment on the benefits of competition law? • Does priority setting and resource allocation work in an environment of competing priorities? • What are the limits of independence, transparency and accountability of young competition agencies?

	Moderator: Mr Toh Han Li <i>Chief Executive</i> <i>Competition Commission of Singapore</i>	
	Panellists: <ul style="list-style-type: none">• Atty Gwen De Vera, <i>Executive Director, Philipppine Competition Commission (PCC)</i>• Dato' Ahmad Hisham bin Kamaruddin <i>Commission Member of the MyCC</i>	Commentators: <ul style="list-style-type: none">• Mr. Aung Min Thyke, <i>Myanmar</i>• <i>Representative from New Zealand</i>
12.00 – 12.40 pm	Competition in the Malaysian Pharmaceutical Industry Speaker: <ul style="list-style-type: none">• Professor Abbott <i>United Nations Development Programme</i>	
12.40 - 2.00 pm	Networking Lunch (All)	
PANEL DISCUSSION 2		
2.00-3.30 pm	Competition Laws are relevant for MSMEs - Myth or Reality <ul style="list-style-type: none">• Why are competition laws also relevant for smaller companies?• Are MSMEs too small to affect the market, thus be excluded from competition law enforcement?• How can small companies promote the competition culture?• How can small companies benefit from competition enforcement?	
	Moderator: Ms. Shila Dorai Raj <i>Competition Law and Economics Consulting (CLEC)</i>	
	Panellists: <ul style="list-style-type: none">• Professor Tresna Priyana Soemardi <i>Commissioner, Komisi Pengawas Persaingan Usaha (KPPU) Indonesia</i>• Dr Pornchai Wisuttisak, <i>Head of Legal Training Centre, Faculty of Law, Chiangmai University, Thailand</i>	Commentators: <ul style="list-style-type: none">• <i>Representative of KFTC (tbc)</i>• Ms. Karunajothi Kandasamy, <i>Deputy Chief Executive II, SME Corporation, Malaysia</i>

3.30-3.45 pm	Coffee Break
BREAK OUT SESSION 1 (BOS #1)	
3.45-4.45 pm	<p>Balancing Public Policy Considerations</p> <ul style="list-style-type: none"> • What is understood by public delivery of goods and services, and should competition law apply to public entities supplying goods and services also provided by private firms? • What are the public interest considerations when enforcing competition law? • What constitute appropriate exclusion and exemptions from competition laws? • What are the different roles that a competition authority and sector regulator play in promoting market competition? • What potential models and approaches are available for better institutional cooperation arrangements with other sector regulators? • How does competition policy interacts with other policies such as industrial policy, trade policy? Are they complementing or in conflict with each other? <p>Moderator: <i>Atty Gwen De Vera, Executive Director, Philippine Competition Commission (PCC)</i></p> <p>Speakers:</p> <ul style="list-style-type: none"> • Ms Teresa Moreira <i>Head of the Competition and Consumer Policies Branch, UNCTAD</i> • Mr Antonio Gomes <i>Head of the Competition Division, OECD</i>
BREAK OUT SESSION 2 (BOS #2)	
3.45-4.45 pm	<p>Merger Controls and the Impact on Competition</p> <ul style="list-style-type: none"> • Why is there a need for merger controls under competition laws? • Will merger notifications and examination affect business confidentiality and affect business operations? • How to achieve quick turnaround in merger clearance? • What are the public interest considerations in mergers assessment under competition law? • How to find appropriate remedies under merger controls? <p>Moderator: <i>Mr Frank Fine</i> <i>Head of International Antitrust at DeHeng Law Offices, Brussels, Belgium</i></p> <p>Speakers:</p> <ul style="list-style-type: none"> • Mr Nishimura Motohiro, <i>Deputy Director of International Affairs Division, Japan Fair Trade Commission (JFTC)</i> • Mr Mark Basile, <i>Director, Merger Investigations, Australian Competition and Consumer Protection Commission (ACCC)</i>

4.45 - 5.15 pm	Wrap up Session & Preparation for Day 2 Conference Convenor	
6.00 pm	End of Day 1	
7.00 - 9.00 pm	Dinner hosted by MyCC (tbc) By Invitation Only	
Day 2 Programme (Thursday, 9 March 2017)		
8.30-9.00 am	REGISTRATION	
PANEL DISCUSSION 3		
9.00-10.30 am	Competition and Innovation – Too Soon, Too Fast <ul style="list-style-type: none">Promoting understanding of the nexus between competition and innovation - competition law and emerging technologies and its implications on ASEANWhat impact does e-commerce and disruptive innovations have on competition?What are competition issues in two-sided platform?Do we need to factor in big data into the competition framework?	
	Moderator: Mr. Chandra Setiawan <i>Commissioner, Komisi Pengawas Persaingan Usaha (KPPU) Indonesia</i>	
	Panellists: Mr Toh Han Li <i>Chief Executive Competition Commission of Singapore</i> Mr Antonio Gomes <i>Head of the Competition Division, OECD</i>	Commentators: Dato’ Indrani Thuraisingham, <i>Consumer International</i> Private Sector Representative
10.30-10.45 am	Coffee Break	
PANEL DISCUSSION 4		
10.45 - 12.15 pm	Regional Cooperation: Building Blocks <ul style="list-style-type: none">What are characteristics of ASEAN competition law legislation and enforcement?Is there a case for enhanced regional cooperation?How can ASEAN work together to strengthen competition law enforcement in the region?What are the steps to promote the regional cooperation - mechanisms to promote sharing of information, as well as making investigations faster and less costly?	

	Moderator: <i>Ms Teresa Moreira, Head of the Competition and Consumer Policies Branch, UNCTAD</i>	
	Panellists: <ul style="list-style-type: none"> • Mr. Phung Van Thanh, Deputy Director, Antitrust Division, Vietnam Competition Authority • Mr Marcus Bezzi, Executive General Manager, Australian Competition and Consumer Commission (ACCC) 	Commentators: <ul style="list-style-type: none"> • Ms Heidi Heidi Farah Sia binti Abd Rahman, Head of Consumer Affairs Division Department of Economic Planning and Development, Prime Minister’s Office • Ms Sarah Firdaus, Senior Officer, ASEAN Secretariat
CLOSING		
12.15- 12.45 pm	Wrap-up By Convenor Closing Remarks by MyCC: Dato’ Abu Samah Shabudin <i>Chief Executive Officer</i> <i>Malaysia Competition Commission (MyCC)</i> (Completion of Feedback Forms)	
12.45 pm	End of Conference	
2:15 – 2:45 pm	Post-Conference Briefing (Closed Door Session for AEGC, Co-Organizers and Convener)	
2:45 – 3:30 pm	Joint Consultation with Dialogue Partners	
3:30 - 4.00 pm	Closed Door Session between AEGC and UNDP	

HO CHI MINH CITY UNIVERSITY OF LAW



INTERNATIONAL CONFERENCE LEGAL FRAMEWORK OF ASEAN ECONOMIC COMMUNITY: IMPACTS ON THE TRADE AND INVESTMENT LAWS OF VIETNAM

Time: Friday 9th December, 2016

Venue: Palace Hotel

(56-58-60-62-64-66 Nguyen Hue Street, Ben Nghe Ward, District 1, Ho Chi Minh City)

PROGRAMME

7:30 – 8:00	Registration
8:00 – 8:10	Welcoming Speakers and Delegates
8:10 – 8:15	Opening Speech <i>Assoc. Prof. Dr. Bui Xuan Hai</i> <i>Vice-Rector of Ho Chi Minh City University of Law</i>
Session 1	<i>Overview of the AEC legal framework and experience for regional integration</i>
8:15 - 8:30	Co-chairs: Assoc. Prof. Bui Xuan Hai, Assoc. Prof. Tran Viet Dung, Dr. Usanee Aimsiran
	Dr. Tran Thang Long Lecturer of International Law Faculty, Ho Chi Minh City University of Law ASEAN Economic Community: Theoretical Groundworks and Institutional Challenges for its Work
8:30 - 8:45	Prof. Novrizal Mohamad Faculty of Law, Universitas Indonesia Indonesia's readiness to implement the AEC
8:45 - 9:00	Dr. Stefano Pellegrino <i>Frasers Law Company, EUROCHAM Executive Committee</i> ASEAN Economic Community: Differences/similarities with the EU approach, and lessons taught by the recent Brexit
9:00 - 9:15	Dr. Nguyen Thanh Tu <i>Economic – Civil Law Department, Ministry of Justice</i> Legal harmonization in ASEAN and its affect to Vietnam trade and investment laws
9:15 – 9:45	Discussion
9:45 - 10:15	Tea-break & Photo session

Session 2	<i>Analyses on trade and investment laws of Vietnam in the light of AEC</i>
<i>Co-chairs: Prof. Bui Xuan Hai, Dr. Stefano Pelligrino, Dr. Ngo Huu Phuoc</i>	
10:15-10:30	Ms. Nguyen Thi Thuy <i>Faculty of Commercial Law, Ho Chi Minh City University of Law</i> One-door regime in ASEAN – ASEAN rules of origin – Harmonization of product standards in ASEAN: Significant innovation to promote trade in AEC
10:30 - 10:45	Mr. Le Tan Phat <i>Faculty of International Law, Ho Chi Minh City University of Law</i> Mutual recognition agreements – A solution for service trade liberalization in ASEAN
10:45 - 11:00	Dr. Pornchai Wisuttisak <i>Law Faculty, Chiang Mai University (Thailand)</i> Law for SMEs promotion and protection under ASEAN market integration: Comparative study in Thailand and Vietnam
11:00 - 11:30	<i>Discussion</i>
11:30 - 13:30	<i>Lunch</i>
Session 3	<i>Issues relating to investment and competition in AEC</i>
<i>Co-chairs:</i> <i>Prof. Mai Hong Quy, Prof. Dr. Nguyen Thanh Tu, Assoc. Prof. Nguyen Van Van</i>	
13:30 – 13:45	Mr. Raphael Tay <i>Chooi & Company, Malaysia</i> The development of the investment law and policy in ASEAN: Opportunities to reform for Vietnam
13:45 – 14:00	Assoc. Prof. Tran Viet Dung <i>International Law Faculty, Ho Chi Minh City University of Law</i> Implementation of ACIA: Problems regarding the overlap of Vietnam’s commitments for foreign investment protection
14:00 – 14:15	Dr. Phan Thi Thanh Duong <i>Commercial Law Faculty, Ho Chi Minh City University of Law</i> ASEAN regulations on the liberalization of capital transactions – Impacts on investment activities under the law of Vietnam
14:15 – 14:30	Dr. Ha Thi Thanh Binh <i>Commercial Law Faculty, Ho Chi Minh City University of Law</i> Creating single market in AEC and issues regarding the definition of relevant market under Vietnam competition law.
14:30 – 14:45	Dr. Nasarudin Abdul Rahman <i>Faculty of Law, International Islamic University Malaysia</i> Should competition laws in ASEAN promote non-efficiency goals?
14:45 - 15:30	<i>Discussion</i>
15:30 – 16:00	<i>Concluding and Closing Speech</i>