SMEs and Competition Law: A Case Study on Suppliers of Goods to Large Retail Stores*

Sakda THANITCUL**

Introduction

The paper explores one of the complex issues in competition law that is how SMEs (Small and Medium-sized Enterprises) should be handled under competition law - protection, promotion or exemption. A case study on suppliers who produce and supply their goods to large retail stores clearly illustrates this complex issue faced by both advanced economics e.g. the United States, Japan, Australia and emerging economics e.g. Indonesia and Thailand. The paper examines how the courts and competition commissions in the United States, Japan, Australia, Indonesia and Thailand deal with the problems relating to business relationship between large retail stores with far much more bargaining power and suppliers which are normal SMEs with little bargaining power. The complaints lodged to the Competition Commissions in most jurisdictions are relating to the abuse of market power by large retail stores e.g. to purchase products from suppliers at unjust low price, to force suppliers to pay extra fees to them etc. The paper also examines how these jurisdictions especially Thailand struggle to resolve this complex problem with minimum harm to consumer welfare.

In most major advanced economies, the Competition Laws are considered to be the economic charter or economic constitution of the market oriented economy. The

---

* This paper was presented at International Expert Seminar on "Mapping Policy Experience for SMEs", organized by Thai APEC Study Center, Thammasart University, 19-20 May 2005, Sheraton Grande Laguna Hotel, Phuket, Thailand.

** Visiting Professor, Graduate School of International Cooperation Studies, Kobe University.
The author is currently an Associate Professor of Law at Faculty of Law, Chulalongkorn University, Bangkok, Thailand. The author is also a member of the Specialized Sub-Committee on Retail Business established in 2003 by the Competition Commission to deliberate whether the conduct of the large retailers violates the Competition Act at 1999 or not. The opinions expressed in this paper are the author's individual opinion.

Canadian Government enacted the competition law as early as 1890, followed by the Sherman Act (the Antitrust Law) of the United State in 1891. The United State imposed the competition law on Germany and Japan after the World War II as part of the " economic democratization " program. Even South Korea, the champion of practicing industrial policy (picking the winners or targeted industries), enacted competition law in 1981 and Taiwan in 1992. Thailand and Indonesia enacted their comprehensive competition laws in the same year 1997. At present, it is said that more than 80 nations around the world, both developed and developing economies already adopted competitions laws. Generally speaking, the objective of competition law is universal, " to maintain and promote free and fair competition " in the markets. As a result of this free and fair competition among business enterprise, it will leads to consumer welfare — cheaper price and more choice of goods and services for consumers. However on the other hand, many governments including those governments in advanced economies like the United States, Japan recognize the important role of SMEs in their economies. They also enacted SMEs-related laws to promote SMEs by helping them in the important areas of business operation e.g., financial, marketing, technology support. Also, those governments enacted law to provide SMEs exemption from the application of competition laws — without exemption a number of concerted activities collectively undertaken by SMEs would be deemed per se illegal e.g., export cartel or price fixing cartel. The example of those law shielding SMEs from application of competition laws are the Webb-Pomerene Act enacted by the United State Government in 1981 and the Small and Medium Business Organization Law of 1957 by the Japanese Government Respectively.

The sharp conflict between the objective of the competition law and the objective of SMEs promotion law clearly illustrated by the disputes in retail business — between small retailers and between small manufacturers of goods (suppliers) and large retailers. The serious conflict between small retailers and large retailers in United States after the Great Depression led the United States Congress to enacte the Robinson-Patman Act of 1936[1] which prohibits suppliers of goods from supplying goods at discriminatory price to retailers. In other words, in order to help Mom & Pop stores, a supplier is required by law to sell his good to Mom & Pop stores at the same price

that he sells to large retailers. This requirement is clearly against economic reasons since transaction cost involving transaction with a large retailer is lower than that involving a small retailer e.g. delivery cost. In late 1940, the French Government, in order to rescue small retailers, it enacted a number of laws penalizing large retailers for their efficiency[2]. The Japanese Free Trade Commission (JFTC) tried to rescue Mom & Pop stores around Tokyo by condemning the efficiency of large supermarkets by its decision requiring the two large supermarket to cease the price war in 1982[3]. Also, the JFTC tried to help small suppliers of goods by condemning the business conduct of large department store in 1982[4]. And in the same year, the Japanese government enacted the large Scale Retail Stores Law[5] to protect small retailers from competition pressure coming from both Japanese large retailer (at that time — Daiei and others) and perceived foreign threat (at that time Wal-Mart). The Objective of the Large Scale Retail Store Law is to make it harder for large retailers to expand their business into new market because their need their competitors ' (small retailers) consent and government approval. The KPPU, the Competition Commission of Indonesia, experience this complex conflict in the Indomaret decision of July 4, 2001.[6] In order to protect tradition markets, the KPPU issued the order to Indomaret (the large retailer) to cease expansion into those traditional markets on the ground that such conduct violated the Indonesia's Competition Act.

Advanced economy like Australia also experienced the conflict between SMEs policy and competition law. Small retailers lodged complaints against two large retailers alleging them of violating the Australian Competition Law. The ACCC, the Australian Competition Commission, took different approach from other competition enforcement agencies. Namely, it decided in its 10-page decision that the two large retailers did not violate the competition law. The ACCC could not condemn their efficiency because it enhances consumer welfare and consumers are still have ultimate choice to buy what goods (national brand or house-brand), at what price and where to them (at small retailer or at large retailer). Although, the ACCC recognizes the need of SMEs to get together and bargain collectively with large retailers.[7]

At present, Thailand experiences similar problem. The Specialized Sub-committee

has been established in order to deliberate whether or not some particular conducts of large retailers violate the Thai Competition Act of 1999.

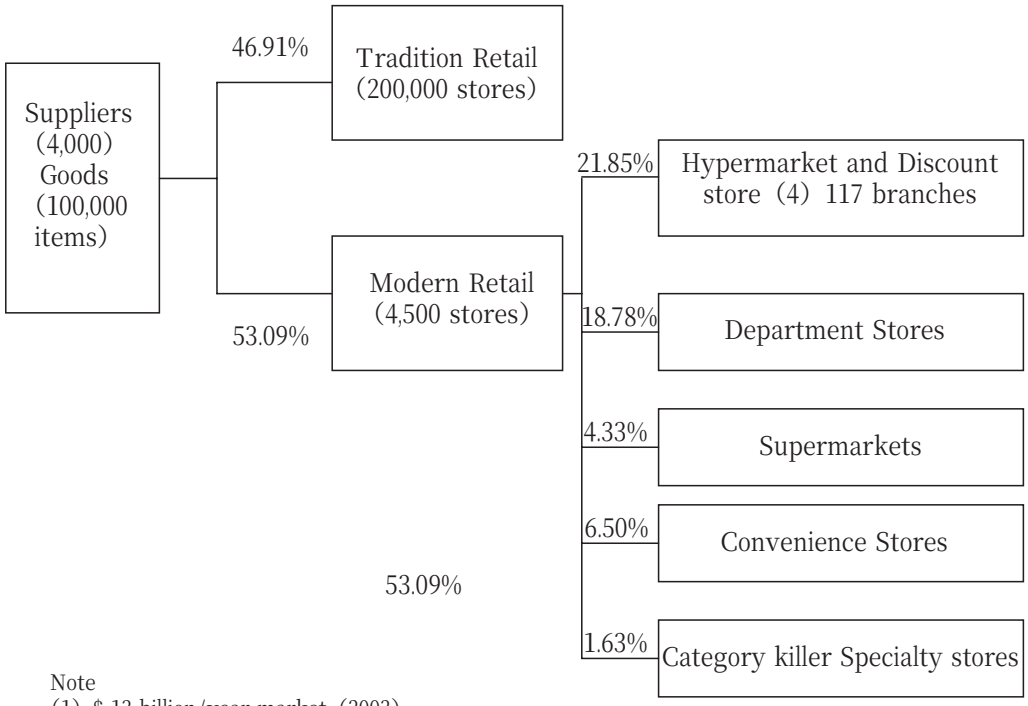
1. The Factual and Legal Issues Concerning Retail Business in Thailand

As a result of the financial crisis in 1997, the newly elected Democratic Party adopted a number of economic reform measures, one of which is the Alien Business Act of 1999, which inter alia opened the wholesale and retail sectors in Thailand to foreign participation. Consequently, the retail sector in Thailand has undergone substantial change in recent years[8]. Traditionally, manufactures of goods, especially large firms and wholesalers had much more bargaining power in dealing business with retailers. The overall picture of retail sector in Thailand dramatically changed after the opening of new hypermarket-type stores by giant foreign retailers such as Makro and Ahold (Netherlands), Casino Group and Carrefour (France) and the British Tesco supermarket chain. Another retail development has been the growth of the francise 7-Eleven convenience stores and Tops supermarket chain which have made rapid inroads into particular market niche, again offering a modern environment but with higher prices than local Mom & Pop stores and traditional markets respectively.

By 2002, the market share of the modern trade sector has expanded to about 53.09% while the traditional trade sector has deceased to about 46.91%. More importantly, the trend is that the modern trade sector is going to gain more of the market share in the Thai retail sector in the future.

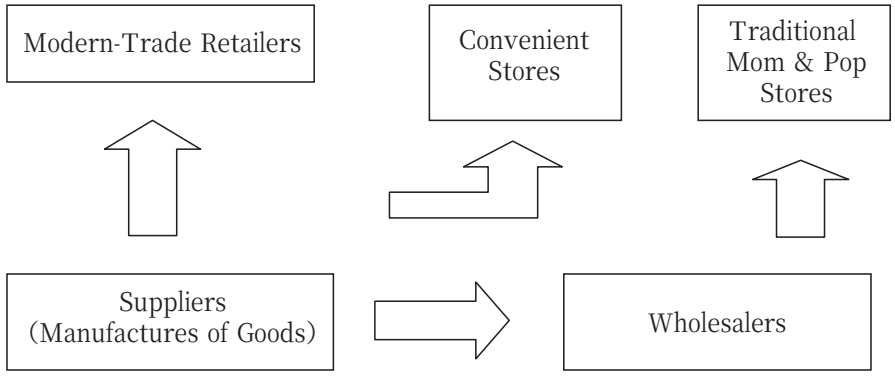
As a result of this market opening, there have been dramatic and sudden changes in this commercial sector. Traditionally, local small grocery stores and fresh produce markets were the main sources of fresh and processed food in Thailand, and the supplementary source were Thai-owned and Japanese-owned supermarkets. The new hypermarkets offer modern environment, car parking and other products such as clothing and home accessories, in addition to grocery, so as well as increasing consumer choice and convenience, they also offer lower prices due to their economies of scale. Consumer groups have concluded that the growth of foreign owned retailers has benefited consumers by reducing retail price and that traditional retailers had to

Retail Sector in Thailand



Note
(1) $ 13 billion/year market (2003)
(2) Source: the Office of Competition Commission.

Why there is a problem?



winner = 1. large retailers 2. consumers

losers = 1. suppliers 2. wholesalers 3. tradition Mom & Pop stores

adapt and compete more efficiency[9].

This rapid structural change and clear foreign presence in this previously very local business sector has had not only economic but also political ramifications. As part of its populist policy in January 2001, the Thai Rak Thai Party had denounced foreign incursion into retail sector and promised measures to protect local small-scale retailers[10]. By August 2001, the new government has besieged by angry local retailers demanding action include the repeal of the Foreign Business Act of 1999 and the prohibition of any new hypermarket developments. The local retailers claimed that 300,000 small retailers has close of the result of strong competition from the new foreign retailers[11]. Pressure continue in 2002, with deputations demanding action from government to freeze further large-scale retail development, repeal the Foreign Business Act of 1999 and impose new zoning and opening-hours restrictions by the introduction of a new retail business law[12]. In September 2002, The Deputy Minister of Commerce, Newin Chidchob who chaired the Competition Commission announced that a Sub-committee under the Commission Competition had found that four foreign-owned large retailers had breached section 29 of the Competition Act[13]. The large retailers were alleged to have treated goods suppliers (most of them are SMEs manufactures) unfairly by *inter alia* favouring their own subsidiaries, demanding up-front fees for the placement of goods, requiring discounts to promote the supplier products, demanding discounts to hold promotional events for the suppliers products and forcing suppliers to produce the large retailers " own-brand " goods[14].

From legal perspective, the abovementioned allegations can be classified as below:

(1) Large Retailers vs. Traditional Mom & Pop stores.

The legal allegation against the large retailers was that they engaged in " unjust low price (predatory pricing) " with the intention to drive traditional Mom & Pop stores out of the retail market. It was claimed that about 300,000 Mom & Pop stores all over Thailand were already left the retail sector by closing their stores. This conduct of the large retailers has been alleged of violating section 29 of the Competition Act of 1999.

(2) Large Retailers vs. Suppliers (SMEs Manufacturers)

The legal allegation against the large retailers was that they engaged in " abuse of bargaining position by using their powerful bargaining position (economy of scale) to take unfair advantage of weak suppliers by demanding them to pay up-front fees for the placement of goods (entrance fee), requiring discounts to promote supplier products (loss-leader practice), demanding discounts to hold promotional events (e.g., new year sale) and forcing suppliers to produce large retailer's own-brand goods (house-brand goods).

2. The Experience of Advanced Economies: The United States, France, Japan, and Australia.

In the United State, the first action of American government in responding to the outcry of small retailers (Mom & Pop stores) against large retailers in 1936 was the enactment of the of the Robinson-Patman Act. The objective of the Act was to weaken bargaining position of large retailers by preventing them from exercising their economy of scale. Namely, the Act requires manufactures to sell the same goods at the same price to both large retailers and small retailers[15]. This Act runs against economic reasons because manufacturer could sell at lower price to large retailers — lower delivery cost, lower packaging cost, lower transaction cost etc. This Act is considered to be a bad law because of two reasons. Firstly, it is a complicated law (three types of injured parties) and difficult for the United State Fair Trade Commission (FTC), the enforcement agency of this Act, to monitor compliance. Secondly, it is rather easy for a business operator to circumvent around the provisions of this Act. For example in the landmark case of *Federal Trade Commission V Borden*[16], a large milk producer just added a nickle of vitamin into their fresh milk product in order to differentiate this product from the rest. Then they do not have to sell this different milk product at the same price to all purchasers, any longer. Because of this serious defect, the FTC rarely enforces this Act.

How about the legal issue of whether or not those small retailers can get together in order to obtain economy of scale and then jointly purchase good from suppliers? In the *United States v. Topco Associates* 405 U.S. 596 (1972),[17] the US Supreme Court held

that the concerted action of small retailers on dividing the market horizontally among themselves, jointly purchasing goods from manufactures and jointly using the " Topco " brand on goods was against the Sherman Act.[18] Chief Justice Burger did not agreed with the majority opinion and wrote dissenting opinion that such concerted action should be held valid[19] because it helps small retailers to " compete better " with large retailers.

In France, since 1947, there has been a number of attempts by the French government to help small retailers. By 1951, there were at least three French legislations imposing various types of taxes on large retailers. From a noted French economist's perspective, what the French did was purely to penalize the efficiency of large retailers.[20] At present, one of the noted measures adopted by the French government in order to help small retailers is the use of zoning regulations.[21] Large retailers are barred from establishing their business in downtown areas. Consumers who wish to buy goods at lower price must drive to suburb where large retailers located.

In Japan, The most cited JFCT decision concerning the conflict between SMEs promotion policy and competition policy is the *Maruetsu-Haromato case*[22]. In that case, two competing large supermarkets cut the retail price of milk (loss leading practice-the author). The cost of purchasing a carton of milk wholesale was 160 yen, but the two supermarkets continued to sell milk at 100 yen. This was held to be unfair pricing and run against the provision of Article 2(9) which authorizes the JFTC to designate specific conduct in this area, and sale below cost is one of the items designated as unfair business practices by JFTC.[23] A sale below cost of production or purchase, as the case may be, is an unfair business practice in principle if the price charged is substantially below such cost level and is carried out by an enterprise on a continual basis. " Cost " in this context is understood to be the sum of the cost of production or purchase plus general overhead expenses. In practice, the JFTC will look at the purchasing price of particular good and compare that to the selling price of that particular item. If the selling price of that particular item (as indicated in the advertisement) is lower than the purchasing price (as indicated in the invoice slip),

the JFTC will issue " caution (chui) order " to that large retailer. This means that JFTC looks at retail business as " middleman business (to buy at low price and to sell at high price) " and well-recognized " loss-leader (to sell one item below cost in order to lure customers to the store and they will buy other items) " practice in retail sector is not acceptable to JFTC.[24] In the *Nippon Shokuhin Co.* Case, the Japanese Supreme Court held that supplying a commodity or service continuously at a low price which is excessively below cost incurred in the said supply is prohibited in principle under Item 6 of the General Designations. This is because such conduct does not reflect business efforts or normal competitive process and tends to cause harmful effects on fair competitive order by making it difficult for competitors to engage in business activities. Then, the General Designations put the requirement " without justifiable reasons " in order to exclude such cases which cannot be deemed undue as to concrete cases.[25]

The other measure that the Japanese government adopted in order to help small retailers is the enactment of the Large Scale Retail Store Law in 1972. The rationale behind the law is that in the Japanese economy, a dual structure is said to exist. A few large and numerous small enterprises co-exist side by side, and there is considerable tension whenever a competitive relationship arises between the two groups. Thus, the law was enacted to restrict new entry of large-scale stores into local markets.[26] Under this law, when a large retailer intends to open a new store in a local market, it must file a report with the local government or the Ministry of International Trade and Industry (MITI), as the case may be. Such authorities can advise the new entrant to reduce the planned floor space or delay the opening of the store if it is determined that the new entry would adversely affect the business of small retailers in the local market. If such advice is not followed, then the local government or MITI can issue a legal order to enforce such restriction on the new entry.[27] In practice, a potential new entrant and existing small shop owners hold discussion among themselves, to reach a compromise, and after an agreement is reached, the new entrant files a report with the local government or MITI.[28]

The JFTC landmark decision concerning the conflict between SMEs suppliers and a

large retailer was the *Mitsukoshi* decision in 1982. At that time Mitsukoshi was the largest retailer in Japan and enjoy tremendous prestige. Suppliers of products clamored for the opportunity to sell products Mitsukoshi since this would give them credibility and prestige as suppliers. In this sense, Mitsukoshi was in a dominant position vis-à-vis its suppliers. Using its economic advantage, Mitsukoshi demanded that suppliers purchase certain luxury items such as paintings and jewels, contribute money for festivals sponsored by Mitsukoshi to promote Mitsukoshi's business, and forced suppliers to bear the cost of repairing and renovating Mitsukoshi retail stores without guaranteeing that products supplied by the suppliers contributing such funds would be exhibited there. The JFTC decided that if a powerful purchaser such as Mitsukoshi made a request, suppliers had no choice but to comply with that request. Therefore, the mere fact that Mitsukoshi made such proposals constituted an abuse of bargaining position.[29]

The recent landmark JFTC decision was the *Lawson* case[30] decided in July, 1998. Lawson is one of the largest convenient store chairs in Japan. It requested suppliers to sell products to them at the price of one yen per unit. The JFTC views this practice as the disguised coercive collection of contributions.

In July 1991, the JFTC issued "Guideline Concerning Distribution System and Business Practices". In Chapter 5 on "Abuse of Dominant Bargaining Position by Retailer" the JFTC gives definition of a retailer who has dominant position over its suppliers and designates the below conducts as "abuse of dominant bargaining position" by such retailer :

1. coercion to purchase
2. unjustly return of unsold goods
3. unjustly request for dispatch of salespersons to shops
4. coercive collection of contributions
5. request for frequent delivery in small lots

In Indonesia, the KPPU found the expansion of a large supermarket chain, Indomaret, into traditional market a violation of Article 2 and Article 3 of the Indonesian Competition Act. The KPPU issued an order to Indomaret to cease

expansion into traditional markets on July 4, 2001. It was argued that the reason why the KPPU held the conduct of Indomaret illegal was because of a provision in the Indonesian Constitution which dictates the state to promote and protect SMEs. The Indomaret becomes the landmark decision in the KPPU jurisprudence and other KPPU decisions follow the Indomaret, protection of SMEs is more important than maintaining free competition.

In Australia, the Australian Competition & Consumer Commission (ACCC) took totally different approach from the KKPU, maintain free and fair competition is more important than protecting SMEs. There are about 1.2 millions SMEs, most of them employ about 3-4 employees. Total workforce in the SMEs is around 4 million people. The SMEs business covers local newspaper, small farm, small professional office like dentist, accountant, lawyer, and small grocery store. The SMEs group in Australia are well-organized and process powerful lobbying power. The dispute in this case is between small grocery stores and two Australian giant retailers. The allegation lodged by small retailers against the two giant retailers was the conduct of unjust low price and selling their own house-brand products at unjust low price. The ACCC found that the said conduct did not violate the Trade Practices Act of 1974 (Australia's Competition Act) by issuing a 10-page decision explaining in great detail the reasonings of their decision to the public and poses the decision on the ACCC website. In rendering this decision, the ACCC deliberated the issues based on four principles — independently, objectively, rigorously and transparently. Because of those four principles, the ACCC claims that its decision does not yield to political pressure by taking side with the SMEs. One of the important reasonings is that if the two giant retailers carrying too many of their house-brand goods, let say 50% of all items in the stores, many consumers will stop visiting their stores, or to visit their stores and then move to other small retailers for national-brand goods. The point is that consumers are the ones who make the ultimate choice where they are going to buy.[31]

3. Measures Adopted by Other Economies to Strike the Balance between SMEs Protection vs. Maintaining of Free Competition

The United State Supreme Court decision in the *United States v. Topco Associates*

(405 U.S. 596, 1972) illustrates clearly that an agreement, even among small retailers, to restraint competition among themselves is not permissible under the competition law. The ultimate goal of the Sherman Act of 1891 is to maintain and to promote free and fair competition.

The Australian ACCC Decision concerning the conduct of the two giant retailers also indicates that the ACCC's mission is to promote competition among business entrepreneurs for the ultimate benefit of consumers.

For other economies, measures adopted to strike the balance between SMEs protection and maintaining of free and fair competition can be categorized as below.

(1) To impose heavier tax burden on large retailers. These were measures adopted by the French government in 1947.

(2) To keep large retailers from further expansion by the use of zoning regulations. These are measures adopted and still in force in a number of European nations.

(3) To keep large retailers from expanding into traditional markets by the use of the large scale retail store law. This measure has been adopted by Japanese government since 1972. Without consent of small retailers in particular traditional market where a large retailer wants to expand its retail business into, that large retailer cannot get a permit from MITI.

(4) To keep large retailers from expanding into traditional markets by the use of the competition law. The Indonesia KPPU ruled the conduct of Indomaret was the abuse of dominant position and ordered it to stop.

(5) To regulate the conduct on unjust low price (predatory pricing) of large retailers by using competition law. This measure is adopted by the JFTC decision in the *Maruetsu-Haromato* case of 1957. In order to give clearer picture of unjust low price, the JFTC adopted the Guidelines defining what does it mean by the phase "unjust low price". This might be helpful in mitigating the price war between small retailers and large retailers. In other words, it is meant to help small retailers who have horizontal competitive relationship with large retailers to compete better with large retailers.

（6）To regulate the conduct on abusing of bargaining position of large retailers by the use of competition law. This measure is adopted by the JFTC decision in the *Mitsukoshi* case of 1982. In the same year, the JFTC adopted the Guidelines defining what does it mean by the phase " abuse of bargaining position ". Later in the *Lawson* case, The JFTC based their opinion on the definition in the Guidelines, hold that the conduct of Lawson was against Article 2 (a) of the Japanese Antimonopoly Act. This might be helpful in mitigating the adverse affect on SMEs suppliers. In other words, it is meant to help weak SMEs suppliers who have vertical relationship with powerful large retailers from taking advantage out of their business relation.

4. Thailand's Experience in Retail Section: What Is the Right Choice?

When the Thai Rak Thai took the administration in early 2001, it promised to small retailers that the government would take care of this serious problem. Newin Chidchob, the Deputy Minister of Commerce, was the one who was in charge. He took three measures to resolve the problem.

Firstly, he ordered the Department of Internal to draft a bill on retail sector. The bill looks similar to the Japanese Large Scale Retail Store Act. Any new entrant must receive permission from the Retail Business Committee before one can enter into retail markets both in Bangkok and in the provinces. Retail business is virtually a " controlled business " by this draft bill. The opposition to this came from all directions — small retailers, provincial chambers of commerces, large retailers, academic, practicing lawyers. Consequently, the draft bill was dropped out from the picture in early 2002.

Secondly, the Thai Rak Thai government adopted a zoning regulation to control the expansion of the four large retailers in the similar manner to France and others. Based its semi-legislative power upon the provisions in the City Planning Act of 1992, the Ministry of Interior enacted the zoning regulation with the aim at controlling the expansion of large four retailers in September 2003. However, by the time the said zoning regulation becomes effective (September 2003), the four large retailers already

have more than 117 branches all over the country. In other words, it is already too late to control the four expansion of the large retailers.

Thirdly, the Competition Commission chaired by Newin established a Sub-Committee to deliberate whether the conduct of large retailers violate the Thai Competition Act of 1999. The Sub-Committee found that the conduct of the large retailers violated Section 29 (unfair trade practice) of the Act. Specifically speaking, the conduct of demanding various extra fees, i.e., entrance fee, advertisement fee from SMEs suppliers was illegal. Also, the conduct of selling goods at unjust low price and caused adverse effect to traditional Mom & Pop stores was illegal.

When Newin was transferred to the new post of Deputy Minister of Agriculture, Adisai Potharamik, the Minister of Commerce himself took charge. The new Specialized Sub-Committee was established to, again, deliberate on whether the said conducts of large retailers were illegal. The Sub-Committee consisted of a former banker as the Chairman, one practicing lawyer, a businessman who is the President of a SMEs company and one law professor. The Specialized Sub-Committee held about 20 meetings to deliberate the issues. Finally, the Committee decided to take the middleground solution. Namely, they did not decide that the conducts of large retailers were in compliance with the Competition Act like the Australian ACCC decision. On the other hand, they did not decide that the conducts of large retailers were violation of the Competition Act. They adopted the approach similar to the Japanese JFTC. Namely, the Specialized Sub-Committee issued the draft guidelines on Retail Sector,[32] which look very similar to the JFTC Guidelines on Retail Sector. This Guidelines has been criticized by one commentator that the aim of the Guidelines is to protect the Thai SMEs suppliers against large foreign retailers. Relevant part of the article written by the said commentator reads:

" clearly, most of the enumerated transgressions seek to protect suppliers, many of them local Thai businesses, against the perceived unfair advantages thought to be enjoyed by the new foreign entrants to the Thai retail sector, in terms of superior financial resources, marketing and operational skill, volume discounts... "[33]

However, this author argues that this approach to resolve the problem is probably the most appropriate public policy for Thailand. The aim of this approach is to prevent the four large retailers from engaging in abusive conducts which result in adverse effect on weak SMEs suppliers. This approach does not mean to condemn their efficiency in doing business by taking legal action against them but to give the clear signal to large retailers that they have to be careful about their conduct because of their huge bargaining power that they can demand a lot from weak SMEs suppliers. If there is a complaint lodged by weak SMEs suppliers alleging that a large retailer grossly violating these Guidelines, the staff at the office of the Competition Commission will step in by informing them that there are complaints against their business behavior. As business operators, management of large retailers do not want to spend their time on defending themselves by showing evidences like vendor agreements that they entered into with weak SMEs suppliers. It is argued that the top management of large retailers would rather refrain from such alleged conduct by instructing their purchasing departments to watch out about their particular conduct.

The Guidelines on " unjust low price " is also important to resolve the issues. By adopting the Maruetsu-Haromato test, a large retailer may not sell its goods at the price lower than the price it purchases on the continuous basis, it may be helpful in preventing them from driving out Mom & Pop stores with so-so efficiency. The most important point is that, without the Maruetsu-Haromato test, the large retailers may use financial resources they received from weak SMEs suppliers to subsidy their practices of unjust low price. Two problems concerning this practice were raised. Firstly, consumers may be happy with unjust low price practice but how much the financial resources that large retailer received from 4,000 SMEs suppliers are transferred to consumers, and how much they put that in their pockets. Secondly, although consumer are satisfied with unjust low price practice of large retailer but the question is whether this practice is being fair to 4,000 SMEs suppliers? It is probably all right if the four large retailers compete with each other on price, quality and service. However, it may not be fair if the price of competition on price are born by weak SMEs suppliers who are not direct parties involved in the horizontal competition.

Finally, taking this middle-ground approach is far much better than to proceed to take criminal legal proceeding (all violations of the Competition Act are criminal offences) against large retailers or not to take any action at all.

Conclusion The author argues that the recommendation of the Specialized Sub-Committee to the Competition Commission to adopt the Guidelines concerning Retail Sector is an appropriate approach for Thailand. This approach is far much better than to proceed to take criminal proceeding against large retailers or not to do anything about this conflict of SMEs policy and competition policy at all. This approach strikes the right balance between SMEs policy and competition policy.

Notes

1 Philip Areeda, " ANTITRUST ANAYLYSIS: PROBLEM, TEXT, CASES ", 5th ed. 1997 at 901
2 Jane Aubert-Krier, " Monopolistic and Imperfect in Retail Trade ", in Edward H. Chamberlin (ed.), MONOPOLY AND COMPETITION AND THEIR REGULATION, 1954, at 298-9
3 JFTC Decision, 6 May 1957, Shinketsushu, Vol. 29 p. 13 (1959)
4 JFTC Decision, 17 June 1982, Shinketsushu, Vol. 29 p.32 (1982)
5 Daikibo Kouri Tenpoho, Law 10, 1972
6 John R Davis, " The KPPU As a new kind of Player in Indonesia's Legal System ", a paper presented at Asian Law Institution Inaugural Conference, National University of Singapore, May 27-29, at 9
7 Graeme Samuel, Chairman, Australian Competition and Consumer Commission at the Workshop held at the JFCT Building on April 22, 2005 as part of the program on Competition Law Enforcement for Asian Countries, organized and sponsor by International Bar Association, Japanese Bar Association, Japanese Fair Trade Commission , April 18-22, 2005 at Japanese Bar Association Building and the JFTC Building.
8 Mark Williams, Competition Law in Thailand: Seeds of Success or Fate to Fail?, World competition 27 (3): 459-494, 2004 at 482
9 Report by the Thailand Development Research Institute, August 2002, as reported in Hypermarket Dominance: Retailers demand action, The Nation, Bangkok, August 6, 2002 cited in William, id.
10 Williams, id., at 482-3
11 " Sterilise " foreign retailer, The nation, Bangkok, August 30, 2001, cited in William, id., at 483
12 " Call for freeze on superstores, the Nation, Bangkok, 4 April 2002, cited in William, id.
13 Section 29 of Competition Act at 1999 reads: " Section 29 A business operator shall not carry out any act which is not free and fair competition and has the effect of destroying, impairing, obstructing, impeding or restricting business operation of other business operators or preventing other persons from carry out business or causing their cessation of business. "
14 Trade Practices: Big Chains may face legal action, The Nation, Bangkok, 24 September 2002, cited in Williams, supra note 8, at 483
15 Article of the Robinson Patman of 1936 needs:
" 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 or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods

or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however*, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: And provided further, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned. "

16 Federal Trade Commission v. Borden Co., 383 U.S. 637, 644, 646, 659-660 & n.17 (1996). Borden sold evaporated milk under its own nationally advertised brand. It also sold chemical identical milk bear the private brand labels of the buyers; the private label product is sold for a lower price by Borden, wholesalers, and retailers. The court held this product to be " of like grade and quality " within the meaning of section 2 (a). First neither the statutory words nor their legislative history clearly requires like brand. Second to hold otherwise would permit the sellers to deny some buyers the lower price brand and thus seriously injured them. Third, the contrary would permit the seller to escape the Act whenever it succeeds " in selling some unspecified amount of each product to some unspecified portion of his consumers, however large or small the price differential might be. " Fourth as to the object that it ignore economic reality, the Court emphasized that its decision means only that brand difference do not oust the statue and that transactions like those involved the case may be examined by the Commission under section 2 (a). the Commission will determine, subject to judicial review, whether the differential under attack is discriminatory within the meaning of the Act, whether competition may be injured, and whether the differential is cost justified or defensible as a good faith effort to meet the price competitor.

17 *United States v. Topco Associates* 405 U.S. 596 (1972)
In that case, The United States sued to enjoin Topco Associated, Inc. (Topco) from violating section 1 of Sherman Act. Topco is a cooperative association of approximately 25 small to medium sized regional supermarket chains that operate in 33 states. It was founded in the 1940s by a group of small, local chains, which desired to cooperate to obtain high quality merchandise under private labels in order to compete more effectively with larger national and regional chains. By 1967, sales of Topco members exceeded $2.3 billion; only A & P, Safeway, and Kroger boasted larger figures. In their respective areas, member chains had market shares ranging from 1.5 to 16 percent, with 6 percent being average. Although relevant figures for the national chains were unavailable, Topco members were frequently in as strong a competitive position. This strength was due, in some measure, to the success of Topco brand products. The agreement among member chains limited each to selling Topco products in a designated territory. Most licenses were exclusive, and even those allowing some overlap generally resulted in de facto exclusivity. The district court concluded that, even though this agreement prevented competition in Topco brand products, the increased ability of Topco members to complete with others outweighed any anticompetitive effect.

18 Section 1 of the Sherman Act reads: " Every contract, combination in the form of trust or otherwise or conspiracy, in restraint of trade or commerce among the several States, or with foreign nation, is declare to be illegal shall be deemed guilty of a felony, and on conviction thereof shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court. "

19 Areeda, *supra* note 1, at 205-206.

20 Aubert-Krier, *supra* note 2 at 298-9

21 Although the author is unable to identify the said regulation but during the period of time in which the author serve as a member of the Specialized Sub-committee on Retail Business, other members insist that such regulation exists. That is the reason why the Thai government adopt the similar zoning measure to help small retailer in 2002.

22 See Mitsuo Matsushita, INTRODUCTION TO JAPANESE ANTIMONOPOLY LAW, Yuhikaku, 1990, at 57

23 Item No 6 (Unfair Low Price Sale) which is one of the business practices designated by JFTC as unfair

trade practice reads: " 6. Without proper justification, supplying a commodity or service continuously at a price which is excessively below cost incurred in the said supply, or otherwise unjustly supplying a commodity or service at low price, thereby tendering to cause difficulties to the business activities of other entrepreneurs. " See Fair Trade Commission, International Affair Division, ANTIMONOPOLY LEGISLATION OF JAPAN, June 1998, at 83

24 Philip Kotler, MAKETING MANAGEMENT, translates into Thai by Tanawan Saengsuwan et.al., at 702.

25 *Nippon Shokuhin* Co. Case, Dec. 14, 1989 36 KTIS 570

26 Mitsuo Matsushita, Keizaiho Gaisetsu (An Introduction to Japanese Economic Law, Tokyo University Press, 2002, at 339 (in Japanese)

27 Matsushita, id.

28 Matsushita, supra note 22, at 95

29 Item No 14 (Abuse of Dominant Bargaining Position) which is one of the business practices designated by JFTC as unfair trade practice reads : " 14. Taking any act specified in one of the following items, unjustly in light of the normal business practices, Use of one's dominant bargaining position over the other party:

(i) Causing the other party in continuous transaction to purchase a commodity or service other than the one involve in the said transaction;

(ii) Causing the other party in continuous transaction to provide for oneself money service or other economic benefits

(iii) Setting or changing transaction terms in a way disadvantageous to the said party;

(iv) Other than any act coming under the preceding three Items, imposing a disadvantage on the said party regarding terms or execution of transaction; or

(v) Causing a company which is one's other transacting party to follow one's direction in advance, or to get one's approval, regarding the appointment of officers of the said company (meaning those as defined by Section 2(3) of the Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade).

See Fair Trade Commission, International Affairs Division, *supra* note 23, at 84

30 FTC Recommendation decision July 16, 1998.

31 Samuel, *supra* note 7

32 The essence of the Guidelines is as below:

" - Unfairly low prices, offering goods for sale at less than invoiced cost unless there are special reasons such as the perishable nature of the product.

- Unequal treatment of suppliers without justification or an unreasonable refusal to purchase from producers.

- Obtaining confidential information or technology concerning a suppliers ' products and making use of it so as to unfairly compete against the suppliers products with own-brand goods.

- Use of superior economic strength to take unfair advantage of other business operators which damages, destroys or limits competitors ability to compete in that market examples of which would include:

○ requiring producers to pay the retailers ' advertising costs that do not relate to the product supplied;

○ requiring producers to pay salary costs of retailers or wholesalers;

○ unfairly requiring producers to share their profits with retailers or wholesalers;

○ imposing harsh terms of trade on producers such as unreasonable mandatory discounts or exclusivity;

○ imposing resale price maintenance.

33 Williams, *supra* note 8, at 484