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INTRODUCTION
Making the Invisible SME More Visible in Competition Policy and Law

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Introduction

Small and medium-sized enterprises (SMEs) are the biggest single group of businesses to be found globally, and represent the overwhelming majority of trading enterprises in almost every regulatory jurisdiction around the world.[1] The importance of SMEs is reflected in the presence of industrial policies supporting SME development in many countries. Curiously, however, SMEs are almost invisible when competition policy and law issues are discussed or analysed. This is all the more surprising given the lack of consensus amongst countries with competition law on whether SMEs merit a differential treatment in competition law implementation and enforcement.

This book seeks to rectify the relative neglect in research and policy discussions on the role of the SME sector in competition policy and law. A number of issues are addressed in this book. What are the unique features of small firms? In what ways can competition

regulators effectively engage with the SME sector? Finally, should we construct our competition laws to take into account the differences between large and small firms? These are some of the issues which this book examines.

Competition Law in the Asia-Pacific

The Asia-Pacific region contains one of the richest and most diverse mixtures of competition law regimes to be found globally. On the one hand, these include some of the oldest, best known, and deeply embedded legal frameworks, some of them more than a century old. There is also a separate cohort of jurisdictions whose systems are now several decades old; and yet there are also many which are either relatively new, or are still coming to fruition.

Canada, for example, introduced one of the earliest modern competition laws to be adopted by a nation state, having enacted its Act for the Prevention and Suppression of Combinations Formed in Restraint of Trade in 1889. Its neighbour, the United States, enacted the Sherman Anti-Trust Act federally just a year later and, in doing so, also gave rise to an alternative descriptor for this entire body of law.

Several decades later, a number of other countries in the Asia-Pacific region also adopted their own laws. Japan was one of the earliest leaders, legislating an Act on Prohibition of Private Monopolization and Maintenance of Fair Trade in 1947. Australia passed the Trade Practices Act in 1974 (which was subsequently renamed the Competition & Consumer Act 2010), whilst South Korea enacted its Monopoly Regulation and Fair Trade Act in 1980, New Zealand its Commerce Act in 1986, and Taiwan the Fair Trade Act in 1991.

The start of the twenty-first century then saw a fresh wave of laws introduced into jurisdictions which did not previously have a regulatory framework for competition, including Papua New Guinea (the Independent Consumer and Competition Act 2002), India (the Competition Act 2003), Singapore (the Competition Act 2004), China (Anti-Monopoly Law 2007), Hong Kong (Competition Ordinance 2010), and Malaysia (the Competition Act 2010).

Ostensibly, such laws have usually been framed to cover all businesses operating within a particular jurisdiction. The elements of what is to be found within these statutes and implementation

guidelines can vary enormously. Some regulatory frameworks are quite limited in scope, covering only a limited number of activities, such as mergers and cartels. Others can be far more extensive, branching out into many other different realms of business behaviour, such as resale price maintenance, unconscionable conduct, and unfair trading terms. In some nations, both consumer and competition law regulation are to be found in the one Act and enforced by the same agency; in other regions, this has never been the case.

In general, though, most legal frameworks are intended to cover all businesses trading in the relevant jurisdiction. Yet there are also times when special rules are made for one or another type of business. Sometimes this may be an exemption for a particular industry sector.

Some countries, however, have gone so far as to specifically set the development of SMEs as one of the guiding objectives in their competition laws. Section 1.1 of the current Canadian Competition Act (1985), for example, explicitly states that one of its objectives is to "… ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy". Another more extreme example is Indonesia's competition law which excludes all small businesses (Article 50h). What is it about the SME sector that warrants such special consideration?

Small and Medium-sized Enterprises

Businesses, like people, are not all the same. Enterprises can differ in many varied ways: the industry (or industries) they operate in, the legal structure they adopt, the number of employees they have, and so on. Perhaps the most obvious one to the outside observer is that of size.

Almost every country in the world uses a somewhat different definition of what constitutes micro, small, medium, and large scale firms. For some, it is based solely on the headcount (number of workers) they have; for others it may be a combination of assets, turnover, and/or employees. Definitions of an SME may vary from one place to another, but in general it is recognized that these are all independent enterprises who are not part of a larger corporation; instead they are usually owned and managed by its owners, who usually

also contribute most, if not all, of its capital (Australian Bureau of Statistics 2007).

Regardless of how firm size is defined, one striking feature emerges time and time again: SMEs are the largest single group of businesses in almost every country around the world. This figure averages out at around 95 per cent of all actively trading firms in most economies, including those in the Asia-Pacific region.

In fact, the biggest single group of business ventures to be found around the world — the unincorporated, sole person microbusiness operating from the owner's home —- often does not show up in many official statistics, since they are so small that it is often hard to register or count such enterprises.

Size, of course, is not in itself the only determinant of how every business will react in every possible situation. SMEs are incredibly diverse. They are to be found in every sector of the economy, and range from the very smallest and simplest (such as the sole trader working on a venture part-time) to very complex organizations (perhaps listed on a national stock exchange, with a diverse spread of products, and/or with hundreds of employees). And yet all of them, for the purposes of competition regulation, are generally expected to comply with the law as well as any billion-dollar multinational corporation.

Once an overlooked area of academic research, in the last forty years studies into the SME sector have burgeoned. Qualitative and quantitative examinations of almost all aspects of business operations, the environment in which firms trade, and of the policy context in which they are regulated, have helped identify a number of distinctive features about most SMEs.

Despite this growing body of research, competition law and its impact on the small business sector has rarely been examined in any detail, either by competition agencies, policy development bodies or academia. It is a curious anomaly, for whilst there is a large body of work (in disciplines such as economics and political economy) which argues that open, free competition can facilitate the growth of new products, markets, and business opportunities — which in turn should foster enterprising new business ventures — there has been little effort to examine the application of these laws to the SME community.

TABLE 1.1
Competitive Dynamics: Some Typical Differences Between Small and Large Firms

	SMEs	Large Firms
Number of business establishments	Single	Multiple
Geographical distribution	Limited	Limited or wide
Product/service range	Limited	Limited or wide
Market share	Limited	Significant
Customer base	Small	Numerous
Likelihood of business failure/exit	High	Low
Compliance cost burden	Proportionately high	Proportionately low
Knowledge of, and access to, regulatory information	Limited; ad-hoc	Sophisticated; extensive
Knowledge of, and access to, marketplace information	Limited; ad-hoc	Sophisticated; extensive
Ability to access established supply sources	Difficult	Easy
Level of financial resources	Typically small and limited	Substantial
Use of external legal and economic advisers	Limited; ad-hoc	Systematic; structured

Source: Adapted from Schaper (2010).

What is broadly recognized, however, is that small firms face different competitive dynamics and challenges than their larger counterparts (see Table 1.1). When compared to the biggest commercial organizations (Schaper 2010), they:

- *Have only a limited service or product offering* — most SMEs only sell a small range of goods, which may in fact be as few as just one or two different products;

- *Face a greater range of competitors* — most commonly the majority of these will, in fact, be other SMEs;
- *Possess only a small market share* — apart from successful niche specialists, most businesses have only a minor part of any market that they operate in;
- *May be heavily dependent on just one or two key customers* — especially in the manufacturing or wholesale trade sector, these clients can often account for most of the business's entire earnings;
- *Geographically restricted* — small-scale enterprises usually only have one (or, perhaps occasionally, two) premises. Even in an online age, many of them find that the majority of their customers and sales still come from a relatively limited geographic region;
- *Are usually operated by the owner/founder* — the manager of the business is also the original entrepreneur. Their personal goals and ambitions, skill sets, knowledge, and world view often spell out the way the firm will operate, which is in marked contrast to the more strategic, rational, and pre-planned approach adopted by most large corporations;
- *Have a much higher failure rate* — the newer or smaller a firm is, the greater the likelihood that it will cease trading, close, or be taken over by another enterprise. Less than half of all enterprises survive for more than five years;
- *Experience a proportionately greater regulatory compliance cost* — the relative expenditure of resources (time, effort, staff, and money) required to be fully compliant with the law is far greater for micro-ventures and small-scale firms than it is for a large corporation;
- *Suffer from regulatory information asymmetry* — because there are so many of them, individual small enterprises are less likely to be approached or assisted by government agencies, or to receive information about legal compliance issues;
- *Rarely have access to all available market information* — because there is a resource, time, and effort cost in collecting such data, many micro- and small-sized business operators have only limited knowledge of competitor and supplier prices, consumer wants, and changing market conditions;

- *Find it harder to access existing suppliers and wholesalers* — new ventures, especially in the retail sector, are often a risky proposition for established firms to deal with, as their likelihood of failure is so much higher;
- *Have far fewer resources* — most SMEs operate on limited financial capacity. They have low turnover, small profit margins, tight cash flow, and possess limited financial reserves. Similarly, they have fewer human resources and — because the operator is required to do so many different tasks — are less able to devote time and effort to any one particular task;
- *Are less likely to be a member of the relevant industry association* — membership of formal business groups is often quite low; and
- *Use professional advice sparingly* — because of the cost and time involved, firms tend to ignore or bypass legal counsel, unless there is a pressing issue which cannot be avoided.

Each of these factors will, of course, be different for each individual enterprise. But when examined collectively, it is very clear that SMEs are quite different to large firms and usually operate at a comparative disadvantage to bigger enterprises.

The challenge for competition lawmakers and agencies, then, is a simple one: if small businesses are different from large ones, should this difference be taken into account? And if so, exactly how?

Contributions in this Book

This book comprises twenty-one essays that assess a number of different issues in this new field of academic and practical enquiry. They provide a wide array of perspectives by authors with diverse backgrounds such as lawyers practising in the region, academics, competition law agency staff, representatives of multilateral agencies and independent think-tanks, consultants and advisers to the SME sector, and even the former CEO of one competition agency and the deputy chair of another.

The contributions are organized into three major sections. Section 1 — Theories and Basic Concepts — examines some of the big picture and practical issues involved in this topic. In Chapter 2, Lee and Zhang explore the link between competition policy and growth,

whilst Tan and Poh (Chapter 3) suggest that there is sometimes a major disconnect and tension between policies designed to support the SME sector, and the level playing field approach required when competition law is applied. Storey (Chapter 4) outlines one of the earliest quantitative examinations of small business operators, the competitive issues they face on a daily basis, and their attitudes to competition regulators. A more recent assessment of competition law regulators and their dealings with Australian SMEs is provided by Mundy and Davidson in Chapter 5. The section concludes with a contemporary issue — the use of electronic resources by competition agencies to reach out to the small firm sector, written by Schaper and Cejnar (Chapter 6).

In Section 2 — SMEs and Competition Law — the issue of how SMEs are treated in competition laws is examined in detail. Merrett, Smith, and Trindade (Chapter 7) suggest that the use of *per se* provisions can be a two-edged sword — sometimes helping small businesses comply more easily, yet at other times creating a degree of inflexibility that works against them. See and Fukunaga (Chapter 8) assess the arguments as to why SMEs should occasionally be excluded from the application (in whole or part) of competition law, whilst Buchan (Chapter 9) examines the impact of competition law on franchising, a particular segment of the small business sector that is already regulated in many Asia-Pacific jurisdictions. The implications of the nature of the Chinese family business structure and practices for competition law enforcement is examined by McEwin (Chapter 10). Burgess (Chapter 11) discusses the anti-competition behaviour of trade associations in new competition jurisdictions and the potentially positive role such organizations can play in assisting compliance to competition law.

The final Section 3 — Country Studies — provides a detailed look at these issues within particular nations and self-governing territories. It provides a fascinating series of snapshots as to how particular legal frameworks and competition agencies deal with the SME issue. Bali, McKiernan, Vas, and Waring (Chapter 12) explore the nexus between competition and productivity in the context of SMEs in Singapore's manufacturing sector. Hayashi and Wu (Chapter 13) examine Japan, whilst Kim and Kim (Chapter 14) deal with neighbouring South Korea. Both are countries with long-standing competition laws. The experience of countries with more recent legal frameworks are

examined by Tan and Poh (Chapter 15), who look at the case of Singapore; Tambunan (Chapter 16), who assesses contemporary issues in Indonesia; and Raj and Burgess (Chapter 17), who assess the work of the Malaysian Competition Commission. Le and Harvie (Chapter 18) discuss developments in Vietnam since the opening up of its economy, whilst Williams (Chapter 19) looks at the largest Asian economy, China. Fournier (Chapter 20) critiques the work of the Hong Kong competition regulator. Takahashi (Chapter 21) discusses the manner in which Japan's Subcontract Act complements its competition law in regulating the relationship between TV stations and their SME sub-contractors in the country's broadcasting industry. Finally, the emergent patchwork of competition laws in Pacific Island states are discussed by Simpson and Fisse (Chapter 22).

Key Themes

So, what are the key findings and observations from these various chapters? Each of the authors makes his/her own unique insights and arguments, but there are some common themes.

Small businesses are an integral part of the competition law framework in every country. Although their numbers and economic impact differs from one country to the next, SMEs are the biggest constituency in every jurisdiction — and that produces significant issues for the construction and administration of competition law.

SME-specific provisions in competition law can help address other legal shortcomings. Numerous jurisdictions have attempted to make particular provisions to help small firms. These have included *per se* provisions, arbitrary thresholds above or below which the law will apply, the capacity to seek exemptions from a law, or mechanisms to continue working collectively in certain circumstances. However, such laws need to be carefully constructed and administered — after all, sometimes the tools designed to help small firms (such as *per se* provisions) have occasionally also hurt small firms.

Competition law is often opposed by SMEs. Competition law is often viewed as a two-edged sword for most small enterprises. Whilst there is a recognition that small firms are sometimes the

potential victims of anti-competitive practices by other (usually larger) enterprises, there is also some scepticism about the ability of regulators to protect them from such breaches. At other times, SMEs are also common contraveners of the law, especially when there is a long prior history of group price-setting and collective market behaviour. Their business practices are often closely scrutinized by newly established competition agencies.

SME policy and competition policy can often conflict. Government and public policy often simultaneously have differing (and somewhat opposing) approaches to SMEs. Competition law regimes may require all firms to be treated dispassionately and equally, and to assume that all parties are equal before the law. However, most nations are also keen to implement industrial policies that are aimed at fostering greater levels of entrepreneurship and enterprise development via various programmes including selective assistance, encouraging clusters to foster innovation, leveraging cross-firm learning, and benchmarking to various SMEs.

Competition agencies need to recognize and actively engage with the small business sector. Regulators and enforcers of competition law should be aware of the unique characteristics of the SME sector. It is not sufficient to simply presume that SMEs will automatically make an effort to learn and comply with the competition laws; there has to be an active and ongoing effort to engage with and educate the sector.

Industry bodies have a significant role to play. Small firms do not act individually; often their collective voice is even more important. Professional bodies, chambers of commerce and industry, and industry associations can sometimes act as a supporter of competition law enforcement and education. At other times, though, they have been some of the fiercest opponents of the introduction of such laws. Occasionally, they help facilitate breaches of the law through cartel-like joint actions.

Cultural, historical, and social differences matter. The nations of the Asia-Pacific region vary enormously not only in their economic and political systems, but also in many other dimensions. In many Asian nations, there are significant linguistic, ethnic, and cultural differences between different communities, which means that regulators need to

reach out and promote in many languages, not just English. Collective business activities by small businesses (sometimes historically carried out on the basis of family, kin, ethnicity, or language) are often deeply-embedded, long-standing ways of doing business, but may work at cross-purposes to the objectives of competition law.

Much more remains to be learnt about small businesses. There is still a lack of specific information about SMEs in the region, in many different ways. Their knowledge, attitude, and behaviours towards competition laws have only been briefly sketched to date. Likewise, the actual measurable impact of competition policy and law on them is not known. There is also a lack of empirical data on the causal link between competition law and productivity within the small firm sector.

A Possible Future Research Agenda

The contributions in the book are more than just a set of observations and commentaries about the current state of affairs. A number of the chapters also identify areas where more research and greater practical knowledge is needed. In doing so, they help lay out a prospective research agenda, covering (but not necessarily limited to) issues such as:

The nature of competition faced by SMEs. What anti-competitive practices do small firms face in practice? To what extent are cartels, price fixing, the misuse of market power, and other illegal forms of market behaviour actually experienced by SMEs in the marketplace? Does this vary from one jurisdiction to another?

Knowing, believing, and learning. How much do managers/owners actually know about competition laws? What do business owners think about competition law? How can education and information outreach programmes be designed to best reach SMEs? What factors encourage or inhibit compliance with competition law within the SME sector?

Participation in anti-competitive business practices. How frequently do micro-, small-, and medium-sized businesses engage in illicit business behaviour, and what form does it take? How successful are such illegal practices, who facilitates them, and what are the chances of being detected and punished?

What are the macro-level impacts of competition law on SMEs? Does competition law lead to changes in entry and exit rates in the industry? In countries with newly introduced competition frameworks, there is scope to determine both the pre- and post-regulatory changes of such measures.

The impact of non-legal variables. Competition law is not just driven by the structuring and enforcement of regulations; it is also very much impacted by other factors, such as community attitudes, culture, family and kin associations, history, and third parties (such as industry association). How do these issues affect the operation of competition law in the Asia-Pacific?

These fields of enquiry can be addressed in a number of different ways. Legal scholarship has always been used in examining competition law, but other disciplines (such as management and sociology) can also have much to contribute. Likewise, different tools and research methodologies can also be employed, both qualitative and quantitative.

No doubt there are many more questions that could also be examined, and which could add considerably to the body of knowledge. Now is the time to begin such work. This is a brand new field for competition law, and one in which the results have great potential to affect its future evolution. Few individual agencies have examined such issues; nor have the various international competition forums, such as the International Competition Network. There are significant opportunities for proactive researchers and commentators to make a lasting contribution to this new and emerging topic.

Conclusion

The small business sector is many things — diverse, large, enterprising, difficult to pin down, entrepreneurial, and sometimes just plain confusing to those unfamiliar with its foibles. None of these, however, justify ignoring or overlooking the importance of such firms in the development and enforcement of competition law regimes. Indeed, the fact that they are so different and challenging is a particular reason why we need to know more, not less, about such businesses.

We hope that this book begins that process, by providing some ideas and perspectives which will assist lawmakers, competition agencies, the legal profession, and the small business sector itself. And we look

forward to seeing debate and discussion on this topic grow in the years to come, as it surely must.

We appreciate the thought and effort put in by our many authors, and thank them for their time and dedication in working alongside us to produce this volume. Finally, our thanks also go to the ISEAS – Yusof Ishak Institute, especially the Director, Mr Tan Chin Tiong, and to our ever-capable research assistant, Ms Reema Bhagwan Jagtiani. The former has generously supported this project since its inception, with the Institute funding a symposium on the topic in May 2015, and, finally, publishing the volume now in front of you. And Reema has played an invaluable role in helping prepare both the symposium and in managing the production of this book.

NOTE

1. The term "small firm" is used interchangeably with "small and medium-sized enterprise" (SME) in this book.

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