

Hardcore Cartels: What You Don't Know CAN Hurt You

by Eunice Chan Wei Lynn and Samuel Ong Ying Yie

Cooperation between businesses and businessmen has always been the general practice of profitable corporations. Such cooperation was perfected into an art form by the *keiretsu*, who were essentially the industrial and financial conglomerates of Japan. Many would agree that such cooperation may ensure stability and certainty in the market, allowing businesses to thrive and stay profitable regardless of outside influences. It would be a severe understatement to say that the *keiretsu* made the most of such conditions. Through their coordination, they not only generated significant profits for themselves, but also for their executives. It would indeed seem to the everyday man on the street that it is reasonable for a civilised business to extend whatever cooperation that is requested of them by their fellow members of the business community.

An agreement or arrangement between competitors to:

- (a) fix prices to provide them with certainty as to profit margins;
- (b) allocate control of specific markets to each party for the purpose of eliminating competitive worries;

- (c) standardise bids for projects to ensure that all parties obtain profits; or
- (d) control the supply of goods or services into the market to stabilise prices and maintain profit margins;

would seem very desirable to businesses of all sectors and markets. However, it would be a serious mistake if one were to engage in any of the practices listed above. A business caught engaging in such conduct will be vigorously punished by the Malaysia Competition Commission (**MyCC**), the country's regulator on competition law.

The four examples above are commonly known as "hardcore cartel conduct" in view that they are the most heinous of all anti-competitive conduct and thus are punished most harshly. According to the *Concise Oxford English Dictionary*, cartels are defined as "an association of manufacturers or suppliers formed to maintain high prices and restrict competition".¹

MyCC actively investigates and prosecutes cartels and is empowered to impose a maximum of 10% of an enterprise's worldwide turnover during the infringement period.² While Malaysia only imposes civil fines for infringements, countries such as the US impose very harsh criminal sanctions for these illegalities.

¹ *Concise Oxford English Dictionary* (12th Ed, Oxford University Press) at p 217

² Competition Act 2010 ("CA"), s 40(4)

(A) What is hardcore cartel conduct?

The two elements of establishing the offence of hardcore cartel conduct in Malaysia are as follows:

(a) An agreement³

“Agreements” are any form of contract, arrangement or understanding, whether or not legally enforceable, between enterprises, that includes a decision by an association and concerted practices.⁴ The main idea behind this definition is to prohibit the concurrence of wills between enterprises⁵ and other types of coordination to carry out anti-competitive conduct.

(b) Which has the object of fixing prices, sharing markets, limiting supplies or bid rigging.⁶

These instances of unlawful conduct are widely considered the worst of the many competition law-based offences and are heavily sanctioned throughout the world. Such acts are often referred to in many regimes as hardcore restrictions. The proving of intention is not a prerequisite for the establishment of such a breach.⁷ In determining the object of such agreements, MyCC will look at the actual common intentions of the parties as well as the aims pursued by the agreement.⁸

The Malaysian competition regime has a zero tolerance approach towards cartel conduct⁹ and hunts cartels down in an almost fanatical fashion. In breaking the Aswara bid-rigging cartel, Iskandar Ismail, CEO of MyCC, stated that the bust was to send “a clear message that MyCC will take stern action against those who engage in anti-competitive tactics such as creating a cartel to control prices”.¹⁰

There is no clearer example of this than in MyCC’s decision to fine AirAsia and MAS for entering into a market sharing agreement. Such an agreement was considered a hardcore cartel agreement by MyCC.¹¹ Among other things, AirAsia and MAS argued that the agreement was never actually implemented and thus, they should not be fined.¹² Nevertheless, MyCC — and subsequently, the High Court — concluded that AirAsia and MAS had participated in hardcore cartel conduct and thus should be fined accordingly.¹³

In this respect, the Malaysian regime is no different from any other established competition law jurisdictions, including both the EU and the US systems.

(B) Why are cartels treated so severely?

The harm that is brought by hardcore cartels is in essence quite straightforward. Hardcore cartel activity such as price fixing essentially forces consumers to pay more for a product or service than they would have if price fixing was not carried out. It has been considered by some academics to be a form of covert theft.¹⁴

3 Section 2, read with s 4(1) of the CA

4 CA, s 2

5 Case T-41/96 *Bayer AG v Commission of the European Communities*, ECR [2000] II-3383, [2001] 4 CMLR 126; p 69

6 CA, s 4(2)

7 MyCC’s Guidelines for Chapter 1 Prohibitions, para 3.25

8 *Ibid*, para 2.13

9 Danial Dzulkifly, “MyCC busts eight companies for bid rigging, proposes RM1.9m in penalties”, *Malay Mail Online* (5 March 2019) <<https://www.malaymail.com/news/malaysia/2019/03/05/mycc-busts-eight-companies-for-bid-rigging-proposes-rm1.9m-in-penalties/1729291>>

10 *Ibid*

11 *Competition Commission v Competition Appeal Tribunal, Malaysian Airline System Berhad and AirAsia Berhad* [2018]

12 *Ibid*, at para 22(ii)

13 *Supra* n 11, at para 115-116

14 Donald Baker, “Punishment for Cartel Participants in the US: A Special Model?” in Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing, 2011)

One can more clearly see the damage done by cartels through the quantification of overcharges borne by consumers. According to Levenstein and Suslow, from 1995 to 2005, overcharges by international cartels amounted to as much as US\$500 billion.¹⁵ That represents a possible US\$500 billion that was stolen from the pockets of consumers through the illegal conduct of price fixing. To give one a frame of reference, this amount far exceeds the total GDP of Malaysia in 2018, which amounted to only around US\$352 billion.¹⁶ The above observation serves as the main motivator behind the fierce persecution and prosecution of cartel activity by competition authorities throughout the globe.

(C) Cartel punishment

US

The US has long been famous for its strong stance against cartels, with hardcore cartels ruthlessly prosecuted and price fixing cartels being considered the “supreme evil” of American antitrust law.¹⁷ Such infringements are punished very severely indeed. This can be seen from the fact that the median prison sentence that is imposed on individuals for cartel activity is 14 months. Another significant statistic is that the US courts are responsible for the majority of the 7,876 months in prison sentences have been imposed internationally, as of 12 August 2016, for hardcore cartel activity.¹⁸

European Union

In the EU, all four types of cartels are punished very severely with price fixing cartels being the most severely

punished. In July 2016, DAF, Daimler (Mercedes-Benz), Iveco, MAN and Volvo/Renault all admitted to having participated in a 14-year illegal price-fixing cartel, between 1997 and 2011.¹⁹ As a result, the EU imposed a record fine of EUR3.8 billion upon the cartel participants with only MAN obtaining immunity from fines as a result of being a successful leniency applicant.²⁰ In addition, the EU also instituted heavy fines against the participants of the now-famous Lysine Cartel €110 million in 2000.²¹ Well-known brands such as Ajinomoto were among those that were punished in this decision.

Singapore

The Competition and Consumer Commission of Singapore has not been shy about cartel conduct enforcement and is equally intolerant of hardcore cartels. In a recent decision released on 12 September 2018, the watchdog fined participants in a price fixing and market sharing cartel in relation to the sale and distribution of fresh chicken products in Singapore.²² The fines amounted to a total of approximately SGD27 million.²³

Malaysia

With regard to the Malaysian regime, the High Court recently ruled to uphold MyCC’s decision to impose a fine of RM10 million each on MAS Bhd and AirAsia Bhd for establishing a market sharing cartel.²⁴ This indicates that the Malaysian competition authority, as well as the judiciary, understand the harm of hardcore cartels and are willing to impose debilitating financial sanctions to ensure deterrence of hardcore cartel activity.

15 Margaret Levenstein and Valerie Y Suslow, “Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy”, 71 Antitrust LJ 801 (2004), pp 801-852

16 Department of Statistics, Malaysia <https://www.dosm.gov.my/v1/index.php?r=column/cthemByCat&cat=266&bul_id=UIQ2ZFZlcDRRSVJnL2dPT09ESXFOQT09&menu_id=TE5CRUZCbLh4ZTZMODZlBmk2aWRRRQT09>

17 *Verizon Communications v Law Offices of Curtis v Trinko, LLP* 540 US 398, 408 (2004)

18 John Connor, “International Cartel Stats: A Look at the Last 26 Years”, SSRN Electronic Journal (August 2016) <<https://www.researchgate.net/publication/309995039>>

19 European Commission press release, “Antitrust: Commission fines truck producers €2.93 billion for participating in a cartel” (19 July 2016) <https://ec.europa.eu/commission/presscorner/detail/en/IP_16_2582>

20 *Ibid*

21 European Commission press release, “Commission fines ADM, Ajinomoto, others in lysine cartel” (7 June 2000) <https://ec.europa.eu/commission/presscorner/detail/en/IP_00_589>

22 CCCS public register, “CCCS Penalises Fresh Chicken Distributors for Price-fixing and Non-compete Agreements” (12 September 2018) <https://www.cccs.gov.sg/public-register-and-consultation/public-consultation-items/cccs-penalises-fresh-chicken-distributors-for-price-fixing-and-non-compete-agreements?type=public_register>

23 CCCS media release, “CCCS Penalises Fresh Chicken Distributors for Price-fixing and Non-compete Agreements” (12 September 2018) <<https://www.cccs.gov.sg/media-and-consultation/newsroom/media-releases/fresh-chicken-distributors-penalised-by-cccs-12-sept-18>>

24 *Competition Commission v Competition Appeal Tribunal, Malaysian Airline System Berhad, Airasia Berhad* [2018] Judicial Review Application No WA-25-82-05/2016

What are the other consequences of cartel activity?

Reputational damage

In addition, a body corporate which has had a decision made against it by MyCC will have the serious stigma of having participated in anti-competitive conduct which ultimately harmed consumers attached to it and, thus, might cause it to have a bad reputation among the public which will lead to a loss of customers. This is especially true when a body is found to have participated in hardcore anti-competitive activity such as price fixing. The reputation of having colluded to “steal” from consumers may even do it great commercial damage. Such damage is more serious for companies that are heavily reliant on their brand image to secure business.

Follow-on damages

Lastly, and perhaps most importantly, s 64(1) of the CA allows private actions to be initiated against corporate bodies for breaches of the CA in the event plaintiffs have suffered damage or loss as a result of the unlawful activity. As seen in some jurisdictions, the most debilitating actions tend to be follow-on damages claimed from price fixing cartels. A finding of a hardcore price fixing cartel infringement by MyCC will make claiming damages easier than standard actions as the breach/unlawful act has already been definitely established. To date, there have not been any follow-on civil damages claims for cartel conduct.

An example of such claims for follow-on damages would be the claims now being brought against Samsung Electronics after a finding of cartel conduct against it as well as other corporate bodies.

(D) How are cartels discovered?

Method 1: Leniency programmes

The Leniency Programme is essentially an arrangement which gives cartelists the chance to get a reduction of up to 100% on the fines that MyCC would impose.²⁵ Such a discount would be offered on condition that they admit to their anti-competitive activities and provide information or other forms of cooperation which significantly assist or are likely to significantly assist MyCC in its investigations.²⁶ The prime motivator that leniency regimes capitalise on is the feeling of fear:²⁷

- (a) The fear of an employer of a disgruntled employee whistleblowing on its cartel activities.
- (b) The fear of other cartel members of one of their number getting cold feet and revealing said illegal activities to the authorities in exchange for a discount on the fine.
- (c) The fear of a husband that a scorned wife would reveal his illegal cartel activities to the competition regulator.

Such fear has been touted by academics as one of the core motivators for leniency applications.²⁸

Of the hardcore cartel decisions in the EU that resulted in fines between 1986 and 2015, 60.53% were discovered through leniency applications.²⁹ Given the effectiveness of leniency programmes in uncovering hardcore cartels, it should come as no surprise that such programmes are the main method of cartel discovery in the EU and many other jurisdictions.

²⁵ MyCC Guidelines on Leniency Regime, para 3.4

²⁶ CA, s 41

²⁷ *Supra* n 14

²⁸ *Ibid*

²⁹ Wouter PJ Wils, “The Use of Leniency in EU Cartel Enforcement: An Assessment after Twenty Years”, *World Competition*, Volume 39, Issue 3 (September 2016), pp 327-388

For enterprises that have already started participating in illegal cartel conduct, they may wish to consider applying for the leniency programme. A 100% reduction in the fines in this respect will generally only be afforded to the successful leniency applicant who is first in line.³⁰ Subsequent successful leniency applicants would receive a less significant reduction, depending on the discretion exercised by MyCC, which will take into account multiple factors in making its decision.³¹

While one notes that a successful leniency applicant would not be exempt from follow-on damages claims from their anti-competitive conduct,³² any potential leniency applicant should bear in mind the arduous task of establishing causation of said damages.

Method 2: Whistleblowing

Whistleblowers have long been crucial sources of information for competition authorities³³ across the world. Arguably, the most famous whistleblower with respect to hardcore cartels is Mark Whitacre, who brought down the previously mentioned Lysine Cartel. It was his actions that were instrumental in helping the authorities take down that cartel. It is beyond argument that whistleblowers are one of the ways in which such cartels are discovered.³⁴

MyCC takes advantage of this fact by instituting a hotline that members of the public can call to report instances of hardcore cartel activity.³⁵

Method 3: Individual Investigation by MyCC

MyCC is given broad powers in relation to its enforcement of competition laws through investigations. Its investigative powers, more specifically in relation to demands for information, have been repeatedly upheld by the High Court.³⁶ It is thus important to note what MyCC can do under such powers which include, but are not limited to, the following:

- (a) Conducting dawn raids
- (b) Requiring enterprises and persons alike to provide information or records to assist MyCC in the performance of its functions. It is an offence to refuse to comply with said demands of MyCC.³⁷
- (c) Possessing the powers of a police officer in relation to a police investigation in seizable cases as provided for under the Criminal Procedure Code.³⁸
- (d) Conducting search and seizures with a warrant³⁹ and also without a warrant,⁴⁰ provided that he has reasonable cause to believe that the investigation would be adversely affected or evidence is likely to be tampered with or damaged, etc.
- (e) Enforcing the obligation for the provision of access to computerised data whether stored in a computer or otherwise to the officer conducting the search.

30 MyCC Guidelines on Leniency Regime, paras 3.4-3.8

31 *Ibid*, paras 3.9-4.0

32 *Id*, para 4.1

33 *Supra* n 14

34 *Ibid*

35 <<https://www.mccc.gov.my/contact-us?>>

36 *Wealthy Care Consortium Sdn Bhd v Malaysia Competition Commission* (Judicial Review Application No PA-25-94-10/2018) <https://www.mccc.gov.my/sites/default/files/pdf/decision/Grounds%20of%20Judgment%20Case%2095_3.pdf>; *Lee Ting San Lorry Transport Sdn Bhd v Malaysia Competition Commission* (Judicial Review Application No PA-25-95-10/2018) <https://www.mccc.gov.my/sites/default/files/pdf/decision/Grounds%20of%20Judgment%20Case%2094_2.pdf>

37 CA, s 20

38 CA, s 17

39 CA, s 25

40 CA, s 26

MyCC has indicated that it will not hesitate to use any of the powers at its disposal in its hunt for hardcore cartels.

Method 4: Market Review by MyCC

MyCC has the power to conduct market reviews on its own initiative or upon the request of the Minister. It has done so on five occasions, for:

- (a) the professional industry;⁴¹
- (b) the domestic broiler market;⁴²
- (c) the building industry;⁴³
- (d) the pharmaceutical industry;⁴⁴ and
- (e) most recently, the food sector.⁴⁵

Such market reviews are quite comprehensive and could reveal the presence of hardcore cartels within a particular market.

(E) Practical considerations

Shareholders of the companies or the companies themselves that have heavy fines imposed on them might bring private actions against the directors. These actions would be based on their breach of their duty to exercise reasonable care, skill and diligence in allowing

such illegal anti-competitive conduct to be carried out. As such, with regard to compliance programmes, a top-down approach is recommended, with management as well as the managed being informed of the protocols that should be adopted and strictly adhered to.

Practical steps to address anti-competitive concerns:

- i. Set up a comprehensive compliance programme, which would entail the following:
 - (a) Educating the workforce with regard to the elements of cartel behaviour and the types of prohibited cartel conduct.
 - (b) Educating them on ancillary anti-competitive arrangements which indicate the existence of cartel conduct.
 - (c) Carrying out detailed analysis of agreements to identify any possible anti-competitive concerns within them.
 - (d) Establishing a competition compliance team which monitors for signs of anti-competitive conduct.
 - (e) Maintaining accountability and transparency in corporate decisions.

41 "Research on the Fixing of Prices/Fees by Professional Bodies under the Competition Act 2010" (1 August 2013) <<https://www.mycc.gov.my/market-review/research-on-the-fixing-of-prices-fees-by-professional-bodies-under-the-competition>>

42 "Final Report: Review of Domestic Broiler Market" (1 March 2014) <<https://www.mycc.gov.my/market-review/final-report-review-of-domestic-broiler-market>>

43 "Final Report: Market Review of Building Materials in the Construction Industry" (8 January 2018) <<https://www.mycc.gov.my/market-review/final-report-market-review-of-building-materials-in-the-construction-industry>>

44 "Final Report: Market Review on Pharmaceutical Sector under Competition Act 2010" (8 January 2018) <<https://www.mycc.gov.my/market-review/final-report-market-review-on-pharmaceutical-sector-under-competition-act-2010>>

45 "Final Report: Market Review on Food Sector under Competition Act 2010" (6 August 2019) <<https://www.mycc.gov.my/market-review/final-report-market-review-on-food-sector-under-competition-act-2010>>

- ii. Steps to address cartel conduct:
 - (a) Have a protocol for the reporting of anti-competitive behaviour.
 - (b) Establish protocol to mitigate/eliminate anti-competitive involvement.
 - (c) Amend agreements with anti-competitive objects.
- iii. Managing dawn raids:
 - (a) Have a systematic filing protocol.
 - (b) Mark confidential and legally privileged documents clearly.
 - (c) Have external counsel on retainer and present during the dawn raid.
 - (d) Be informed of what can and cannot be taken by MyCC and have trained personnel on standby to monitor the situation.
 - (e) Train all members of the corporation on the protocols to be followed during a dawn raid.
 - (f) Carry out mock dawn raids from time to time.

(F) Conclusion

It is clear that MyCC is fully committed to its role of prosecuting and eliminating cartel activity, among other things. As can be seen from some of its recent decisions, MyCC does not shy away from imposing debilitating sanctions upon cartelists and entities that infringe the CA, regardless of size or position in society.

Businesses and companies would thus be wise to take serious notice of the provisions and prohibitions of the CA and ensure due compliance.

LH-AG

About the authors



Eunice Chan Wei Lynn (cwl@lh-ag.com), a partner with the IP & TMT Practice, assists clients in formulating competition law compliance programmes and advises them on competition law issues arising since the implementation of the Competition Act 2010.



Samuel Ong Ying Yie was a pupil with LHAG.