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INSIGHTS

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Can Industry Players Cooperate by Sharing Commercially Sensitive Information?

Cooperation between industry players can benefit their collective interests by establishing a more predictable environment.

However, it is vital for industry players in Malaysia, regardless of the industry, to be mindful that such cooperation does not infringe the Competition Act 2010 **(Act)**.

On 11 December 2023, the Malaysian Competition Commission **(the Commission)** imposed a whopping financial penalty amounting to RM415 million on the following poultry feed millers **(Decision)**:

(a) Dindings Poultry Development Centre Sdn. Bhd. **(Dindings)**;
(b) FFM Berhad **(FFM)**;
(c) Gold Coin Feedmills (Malaysia) Sdn. Bhd. **(Gold Coin)**;
(d) Leong Hup Feedmill Malaysia Sdn. Bhd. **(Leong Hup)**; and
(e) PK Agro-Industrial Products (M) Sdn. Bhd. **(PK-Agro)**.

(Collectively referred to as the **Parties**.)

The Commission found that the Parties had engaged in agreements and/or concerted practices that infringed the prohibition under Section 4 of the Act over three periods of infringement spanning from 31 January 2020 till 30 June 2022.

We set out below the key takeaways from the Commission's decision.

Background

Poultry feed represents a significant portion of the cost structure in chicken farming. As a result, any increase in the price of poultry feed has the potential to impact poultry production, which would lead to higher cost of chicken and eggs.

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Agreement and/or Concerted Practice

Section 4(1) of the Act provides that a horizontal or vertical agreement between enterprises is prohibited insofar as the agreement has the object or effect of significantly preventing, restricting, or distorting competition in any market for goods or services. By virtue of the definition of 'agreement' under Section 2 of the Act, the Section 4 prohibition applies to agreements that are both legally enforceable and non-enforceable, whether written or oral.

Under section 4(2) of the Act, without prejudice to the generality of subsection (1), a horizontal agreement between enterprises which has the object to fix, directly or indirectly, a purchase or selling price or any other trading conditions is deemed to have the object of significantly preventing, restricting, or distorting competition in any market for goods or services.

It is important to note that concerted practice may fall within the ambit of Section 4 of the Act. The concept of informal contact may cover concerted practice through parallel behaviour.

The Parties are members of the Malaysian Feedmillers Association **(MFA)**. The Commission found that the Parties had engaged in anti-competitive practice prohibited under Section 4 of the Act by engaging in concerted practice by raising their price of poultry feed at a similar rate, quantum, and time.

Information Sharing and Parallel Conduct

Through the Commission's investigations, it found that formally there were no agreements or recorded minutes during the meetings of the MFA in relation to the poultry feed prices.

The Commission, however, relied on evidence of informal exchanges of information between the Parties through various means such as *WhatsApp* conversations, audio recordings, communications via email and text, personal notes during informal meetings prior to and after the MFA meetings by the Parties' representatives, CCTV footages, and call logs implying information sharing through communications between the Parties. When the totality of the evidence was examined in conjunction with the proximity to the dates of price announcements and invoices, the Commission observed that there were perfectly parallel increases in the quantum of poultry feed prices in Malaysia.

The Commission cited the case of ***Brazilian Newspaper Cartel***[1] where four of the largest newspapers in Rio de Janeiro simultaneously increased their prices by the same percentage. In addition to the price parallelism, the newspapers also published editorial notes informing readers of the price increase on the same date. The executives of the newspaper failed to provide any explanation for this. As a result, the

[1] Decision by the Administrative Council for Economic Defence (CADE), Administrative Procedure n°08012.002097/99-81. See also, Prosecuting Cartels without Direct Evidence 2006 by The Organization for Economic Cooperation and Development (OECD), page 86.

Brazilian Competition Authority found the firms guilty of cartel behaviour: the association of price parallelism with the publication of the editorial note along with the absence of a plausible explanation for the simultaneous and identical price.

The Parties cited the case of ***Wood Pulp***[2] to support their agreement that the Commission should have considered alternative explanations for the parallel behaviour, as well as the principles in ***Suiker Uni***[3] and ***Polpropylene***[4] to argue that the identical behaviour was mere 'parallel behaviour with no element of concertation' and that parties are free to independently determine the prices of its goods, taking into account the increasing costs of raw materials.

The Commission, however, distinguished ***Wood Pulp***. In the present case, the Commission did not solely rely on parallel behaviour but also the evidence of communications between the Parties, which supplements the evidence of parallel conduct.

The Commission was unable to agree that the parallel behaviour occurred naturally in the market and was free from concertation as Parties failed to provide its independent calculations, resulting in a lack of evidence regarding independent price determination. The Commission also noted that the quantum of poultry feed price continued to rise exceeding the cost of raw materials.

Rebates and Discount

The Parties argued that although the base price of the poultry feeds was the same, it did not affect the competition as parties were free to offer rebates and discounts from the base price.

The Commission took the view that **exchanging sensitive information allowed the Parties to coordinate their pricing strategies**. This coordination between the Parties led to a situation where the apparent diversity in discounts did not prevent them from collectively setting a fixed quantum of price increase for poultry feed.

The recent decision of ***Langkawi Ro-Ro Ferry Services Sdn Bhd & Ors v Competition Commission***[5] held that it is an established principle that, as long as an enterprise was a party to collusion, the enterprise is liable.

When considering the use of discounts by the Parties, the Commission found that it is also evident that the discounts were not uniformly extended across all customer segments. Rather, they were selectively offered to well-established clients, with special discounts and enhanced rebates primarily tailored to bulk purchases.

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[2] Joined cases C-89/85, C-104/85, C-116/85, C-117/85 and C-125/85 to C-129/85 A. Ahlstrom Okakeyhktio and others v Commission of European Communities

[3] Joined Cases 40-48, 50, 54-56, 111, 113-114/73 *Suiker Unie and Others v Commission*, at paragraphs 173-174.

[4] Case No L 230/1 *Polypropylene* (1986) 86/398/EEC.

[5] *Langkawi Ro-Ro Ferry Services Sdn Bhd & Ors v Competition Commissio*n [2022] MLJU 2900

The Commission does not need to prove anti-competitive effect once the deeming provision is invoked

The Parties argued regarding the need to prove anti-competitive effect. However, the Competition Appeal Tribunal, in upholding the Commission's findings in ***Ro-Ro,*** stressed that where it is deemed by law that an agreement has the object of significantly preventing, restricting, or distorting competition, it is unnecessary for the Commission to prove the anti-competitive effect nor to conduct any effect analysis.

The ability to deem the anti-competitive effect demonstrates the existence of a sufficient degree of harm, dispensing with the need for any effect analysis.

The Commission also established that it is a common understanding among other feed millers and downstream customers that the Parties are among the biggest producers in the relevant market.[6]

The identical and parallel quantum of price increases contradicted the Parties' allegation of independent behaviour in the market. Increases in the quantum of prices exceeding the costs of production inflate the final prices of poultry feed, and as a result, inflate the costs of chickens and eggs. This demonstrated evident harm to the end consumers. As such, the conduct of the Parties was deemed to have the object of significantly preventing, restricting, or distorting competition.

Financial Penalty

Section 40(1)(c) of the Act provides that the Commission may impose a financial penalty when it determines that any party has infringed Section 4 of the Act. Section 40(4) of the Act provides that the financial penalty shall not exceed 10% of the worldwide turnover of each of the Parties throughout the infringement period.

In this present case, the Commission did not find any mitigating factors. Ultimately, the Commission imposed the following financial penalty to the Parties:

Party	Financial Penalty (RM)
FFM	42,689,583.64
Gold Coin	97,511,670.48
Leong Hup	157,470,027.02
PK Agro	47,800,793.00
Dindings	70,023,622.35

Conclusion

The Commission is equipped with powers to impose hefty penalties for any infringement of the Act. As such, it may be wise for industry players to ensure thorough compliance with the Act, whether in their cooperation

[6] Decision para. 394

with other industry players or as part of their sales and marketing strategy.

The full decision by the Commission can be accessed here.

We understand that four of the Parties have indicated their intention to appeal against the decision to the Competition Appeal Tribunal and may have already done so. We are keeping tabs on the progress of the matter and will update from time to time.

If you have any queries, please contact Associate, **Aida Faralyana Binti Azlan** (afa@lh-ag.com), or her team Partner, **Hoi Jack S'ng** (hjs@lh-ag.com).

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