



Competition Act 2010 [Act 712]

Decision of the Competition Commission

Infringement of section 4(2)(a) of the Competition Act 2010 by Fifteen
(15) Members of the Sibu Confectionery and Bakery Association

12 February 2015

(No. MyCC.0045.2013)

TABLE OF CONTENTS

1.	INTRODUCTION	3
2.	THE ENTERPRISES	4
3.	PROCEDURE	7
	3.1 The Investigation	7
	3.2 Proposed Decision	7
	3.3 Written Representation	7
	3.4 Oral Representation	8
4.	FACTS OF THE CASE CONCERNING THE	8
	TARGET ENTERPRISES	
5.	REPRESENTATIONS BY THE TWENTY-FOUR	12
	(24) ENTERPRISES	
6.	LEGAL ASSESSMENT	13
	6.1 Application of section 4(2)(a) of the Act	13
	6.2 Conclusion of the Legal Assessment	19
7.	REMEDIES	21

1. INTRODUCTION

1. In November 2013, the Competition Commission ('the Commission') initiated an investigation under section 14(1) of the Competition Act 2010 ('the Act') into a suspected infringement of section 4(2)(a) of the Act by forty (40) enterprises who are members of the Sibü Confectionery Bakery Association ('the SCBA'). Subsequently, twenty-four (24) enterprises were initially found by the Commission to have been involved in the suspected infringement.

2. Pursuant to section 40 of the Act, the Commission has made a finding that fifteen (15) enterprises (referred to hereafter as the "Target Enterprises") have infringed section 4(2)(a) of the Act by entering into a horizontal agreement that has as its object to fix, directly or indirectly, the selling price of confectionery and bakery products in the Sibü, Sarawak area.

3. The Commission also found that pursuant to section 39 of the Act, the remaining nine (9) enterprises have not infringed section 4(2)(a) of the Act (referred to hereafter as the "Non-Infringing Enterprises").

4. Financial penalties are imposed on fourteen (14) of the Target Enterprises. One (1) Target Enterprise namely Yong Kong Chuo who generated an insignificant amount of revenue during the infringement period is not being imposed any financial penalty.

2. THE ENTERPRISES

5. Table 1 presents the list of the Target Enterprises found to have infringed section 4(2)(a) of the Act.

6. Each of the Target Enterprise is involved in the sale of confectionery and bakery products in the Sibul, Sarawak.

Table 1: Target Enterprises Found to have Infringed section 4(2)(a) of the Act

No.	Enterprise(s)	Representative of Enterprise(s)	Address
1	Huong Hiong (Sibu) Confectionery	Wong Lee Jing	No. 82, Market Road, 96000 Sibul
2	Chung's Bakery	Katherine Ngu Tien Yieng	Chung's Bakery No. 2A Lrg 1, Jalan Pahlawan, 96000 Sibul
3	ABC Cake House	Ngu Tiong Kiew	No. 1 Jalan Mahsuri, 96000 Sibul
4	Farley Bakery	Tiong Yoing Hua	Farley Bakery Sublot 45, Seduan Land District Jalan Salim, 96000 Sibul
5	Wonderful Bakery	Lee Kung Hoo	No. 3, Jalan Lada 8-A, 96000 Sibul
6	New Chuo An Bakery	Lin Yan Yan	37, Lrg 16, Taman Rajang, 96000 Sibul
7	Kung Fung Food Industries	Chuo Sin Chee	No. 5, Lane 6, Rejang Park, 96000 Sibul

No.	Enterprise(s)	Representative of Enterprise(s)	Address
8	Seng Kee Bakery	Ting Leong Yew	48, Jalan Market, 96000 Sibu
		Ting Leong Hua	
9	Sibu Central Market	Yong Lin Yin	9B, Lorong 16B, Jalan Tekam
10	Sweetie Bakery	Ting Chung King	Sweetie Bakery No. 61 (GF), Lrg 14, Ulu Sg. Merah, 96000 Sibu
11	To Eat Bakery Sdn Bhd	Chuong Soui Chang	To Eat Bakery Sdn Bhd No. 19A, Lanang Road, 96000 Sibu
12	Wong Kieng Seng	Wong Kieng Seng	No. 34, Market Road, 96000 Sibu
13	Yong Kong Chuo	Yong Kong Chuo	No. 18, Sg. Merah, 96000 Sibu
14	Nam Mee Bakery	Chieng Hock Ming	20, Sg. Merah Bazaar, 96000 Sibu
15	Lian Yu Bakery Cake Store	Su Ngio Kee	Lian Yu Bakery Cake Store 35A- Jalan Berjaya 96000 Sibu

7. Table 2 presents the list of the Non-Infringing Enterprises.

Table 2: The Non-Infringing Enterprises

No.	Enterprise(s)	Representative of Enterprise(s)	Address
1	Ling Kui Ping	Ling Kui Ping	Sibu Central Market No. 41A, Lane 2, Kapor Road, 96000 Sibu

No.	Enterprise(s)	Representative of Enterprise(s)	Address
2	Chieng Muk Hin	Chieng Muk Hin	1A, Jalan Mantis Selatan 3B, 96000 Sibü
3	Wong Ting Tiong	Wong Ting Tiong	Sibu Central Market No. 3-B, Lane 21, Wong King Huo Road 96000 Sibü
4	Pau Kiu Mee	Pau Kiu Mee	Sibu Central Market No. 12A, Lorong 19, Jln Wong King Huo
5	Daily Bread	Law Puong Heng	Sibu Central Market No Daily Bread No. 80, Pusat Pedada, Jalan Pedada, 96000 Sibü
6	Carnation Cake House	Wong Kiong Luk	Jalan Oya 80C, 96000 Sibü
7	Happiness Bakery	Tie Sheng Jie	20, Bukit Lima Timur, 96000 Sibü
8	Famous Bakery	Lee Kiet Ming	Famous Bakery No. 8, Lrg Upper Lanang 29A, 96000 Sibü
9	Yat Bakery	Yat Nai Hung	Yat Bakery No. 14, GF, Lrg Chew Siik Hiong 1A, 96000 Sibü

8. The Non-Infringing Enterprises are members of the SCBA who are also involved in the sale of confectionery and bakery products in the Sibü, Sarawak.

3. PROCEDURE

3.1 The Investigation

9. In November 2013, the Commission initiated an investigation under section 14(1) of the Act based on the article entitled “*Announcement of price hike draws attention of MyCC*” published by Borneo Post Online on the 20 November 2013.

10. During the course of investigation, the Commission issued a number of section 18 notices to obtain documents and information and to obtain statements from some of the members of the SCBA. The Commission interviewed the Chairman and Secretary of the SCBA. The Commission also conducted field investigations in Sibuluan, Sarawak.

3.2 Proposed Decision

11. On 30 September 2014, the Commission then served its Proposed Decision on the twenty-four (24) enterprises.

3.3 Written Representation

12. In response to the Proposed Decision, all twenty-four (24) enterprises submitted their written representations to the Commission.

3.4 Oral representation

13. Only eleven (11) enterprises indicated that they wished to make oral representations before the Commission.

14. On 14 January 2015, the Commission convened an oral representation session for these enterprises, being:- Farley Bakery, Huong Hing (Sibu) Confectionery, ABC Cake House, Kung Fung Food Industries, Carnation Cake House, Yat Bakery, Sibu Central Market, Happiness Bakery, To Eat Bakery, Seng Kee Bakery and Famous Bakery.

15. During the oral representation session, the enterprises appealed for a reduction and/or waiver of the financial penalties proposed to be imposed.

4. FACTS OF THE CASE CONCERNING THE TARGET ENTERPRISES

The SCBA

16. The SCBA originated from the Sibu Confectionery Association ('the SCA') which was founded in 1946. In or around 2010, the SCA expanded by including bakery owners and it then changed its name to the Sibu Confectionery and Bakery Association¹.

¹ A search via the Registry of Societies has confirmed that the SCBA is a registered association.

17. According to its constitution, the registered place of business of the SCBA is at 2nd Floor, No.20, Lorong Salim 17, 96000, Sibul, Sarawak.

18. The Target Enterprises are all members of the SCBA.

19. Investigations found that as of 12 September 2014, the SCBA had forty (40) registered members² of which thirty-nine (39) were enterprises. One member who did not represent any enterprise was a retired teacher who was appointed as a Secretary for the SCBA³.

20. Twenty-seven (27) enterprises carried out confectionery and bakery business⁴ and twelve (12) enterprises are not involved in any confectionery and bakery business and/or in any related business.

The Annual General Meeting

21. On 17 November 2013, the SCBA held its second Annual General Meeting ('the AGM') at the Golden Happiness Restaurant in Sibul, Sarawak. The Minutes of Meeting confirmed that the Target Enterprises attended the AGM.

² Source: Updated list of the members of the SCBA for the year 2014. All of them have been confirmed to be registered members of SCBA at the point when the statement was issued by its Chairman on 17 November 2013.

³ Source: Statement of Wong Sing Mee the secretary of the SCBA

⁴ Two members of the SCBA (i.e., Ting Leong Hua and Ting Leong Yew) operate a single bakery (Seng Kee Bakery) and act as a single economic entity.

22. The minutes of the AGM submitted by the Chairman of the SCBA, Mr. Hounng Sieun Meu ('the Chairman') indicated that the attendees including the Target Enterprises had engaged in price fixing by agreeing to increase the prices of confectionery and bakery products by 10% to 15% in Sibul, Sarawak. Excerpts from the minutes of the AGM (English version) show the following, and in paragraph 1 the Chairman states;

“this AGM we have to think and discuss carefully to fix a reasonable and acceptable selling price for our products which will be fair to bakers, consumers and society. We all know that the wages of workers, the prices of ingredient, the transportation and the sale tax, etc will raise up in the coming year. Therefore we have to discuss our selling price and make some decision first.”
[sic]

At paragraph 5 the Chairman continues;

“after careful and detail discussion, we found that most of our packed the products in different shape of pockets, different qualities and different quantities then we come to a condition that the new price of all the products will raise 10-15% of the old prices. Mr.Chieng Hock Ming proposed, Mr. Ko Ting Ing seconded. All the members present at the meeting put up hands to support. It was passed and adopted.” *[sic]*

23. The agreement by the Target Enterprises during the AGM to increase the prices of confectionery and bakery products is also demonstrated by one of the newspaper articles submitted to the Commission by the SCBA. Picture 1, as published by the Sin Chew Jit Poh newspaper⁵, shows the attendees raising their hands in agreement to the proposal to increase the prices of confectionery and bakery products by 10% to 15%.



Picture 1: “Price of Bakery Products to Increase by 10% to 15% Next Month”- Sin Chew Jit Poh, 18 November 2013

24. Based on the statement given by the Chairman to the Commission on 7 April 2014, it was confirmed that Picture 1 shows the members of the SCBA being present and raising their hands to agree to the passing of the proposal to increase the prices of confectionery and bakery products by 10% to 15% in Sibul, Sarawak.

⁵ “Price of Bakery Products to Increase by 10% to 15% Next Month” reported by Sin Chew Jit Poh

25. The Chairman and one enterprise have admitted that the enterprises agreed to increase the prices of confectionery and bakery products due to the increase in the prices of flour, sugar, red beans, green beans, diesel, electricity, rental rate of the shop and the implementation of the minimum wage policy⁶

26. The Chairman had confirmed that after the AGM, he issued a press statement to the media. The press statement was published in several major newspapers, namely, Sin Chew Jit Poh (18 November 2013), New Sarawak Tribune (19 November 2013), The Star (19 November 2013) and Utusan Sarawak (21 November 2013).

27. The Chairman further confirmed that what had been reported by the media between 18 November 2013 and 21 November 2013 concerning the agreement to increase the prices was accurate. He has also admitted that all the information and documents (including Picture 1) submitted to the Commission represented what transpired at the AGM.

5. REPRESENTATIONS BY THE TWENTY-FOUR (24) ENTERPRISES

28. As discussed above, all twenty-four (24) enterprises served with the Proposed Decision have been given the opportunity to make written and/or oral representations before the Commission.

⁶ Source: Statement of Lee Yung Kwong in paragraph 25: "The reason for SCBA made a decision to increase the price of confectionery and bakery because the increase of sugar, flour, oil and wages."

29. Four (4) of the Target Enterprises admitted liability. The remaining eleven (11) Target Enterprises contested the Commission's finding. Six (6) of the Target Enterprises argued that they did not agree with the decision made in the AGM. However their names were captured as attendees in the minutes of the AGM. Five (5) enterprises argued that they have increased their prices independently despite their attendance to the AGM.

30. All nine (9) Non-Infringing Enterprises stated that they did not attend the AGM. Their names were not listed as attendees in the minutes of the AGM.

6. LEGAL ASSESSMENT

6.1 Application of Section 4(2)(a) of the Act

Agreement between Enterprises

31. Section 4 of the Act states that:

“(1) 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.

(2) Without prejudice to the generality of subsection (1), a horizontal agreement between enterprises which has the object to-

(a) fix, directly or indirectly, a purchase or selling price or any other trading conditions;

(b) share market or sources of supply;

(c) limit or control-

(i) production;

(ii) market outlets or market access;

(iii) technical or technological development; or

(iv) investment; or

(d) perform an act of bid rigging,

is deemed to have the object of significantly preventing, restricting, or distorting competition in any market for goods or services.

(3) Any enterprise which is a party to an agreement which is prohibited under this Section shall be liable for infringement of the prohibition.”

(emphasis added)

32. To establish whether the enterprises have infringed or are infringing section 4(2)(a) of the Act, the Commission has to prove that :-

- (i) The Target Enterprises are ‘enterprises’ as defined under Section 2 of the Act;
- (ii) There is a horizontal agreement between the Target Enterprises; and
- (iii) The agreement has the object of significantly preventing, restricting, or distorting competition in any market for goods and services.

Enterprises

33. Section 2 defines “enterprise” as:

“any entity carrying on commercial activities relating to goods or services, and for the purposes of this Act, a parent and subsidiary company shall be regarded as a single enterprise if, despite their separate legal entity, they form a single economic unit within which the subsidiaries do not enjoy real autonomy in determining their actions on the market.”

34. Pursuant to section 3(4) of the Act;

“commercial activity” means any activity of a commercial nature but does not include,

- (a) any activity, directly or indirectly in the exercise of governmental authority;*

- (b) any activity conducted based on the principle of solidarity; and*
- (c) any purchase of goods or services not for the purposes of offering goods and services as part of an economic activity.*

35. The Target Enterprises are sellers of various types of confectionery and bakery products. The fact that the Target Enterprises are enterprises is further supported by the official list of the members of the SCBA dated 22 April 2014 submitted by the Chairman to the Commission which shows the business details of each member⁷. The Commission has also established that each Target Enterprise is carrying out commercial activities as evidenced in the turnover generated from the business of selling of various types of confectionery and bakery products in Sibu, Sarawak.

36. The Target Enterprises are engaged in commercial activities through selling confectionery and bakery products in Sibu, Sarawak and are therefore enterprises as defined under section 2 of the Act.

⁷ Source: The latest list of the SCBA members dated 22 April 2014 submitted by the Chairman

Horizontal Agreement

37. Section 2 of the Act defines “*agreement*” as:

“any form of contract, arrangement or understanding, whether or not legally enforceable, between enterprises and includes a decision by an association and concerted practices.”

38. Section 2 of the Act further defines “*horizontal agreement*” as:

“an agreement between enterprises of which each operates at the same level in the production or distribution chain.”

39. An agreement arose between the Target Enterprises when they collectively decided to increase prices during the AGM. The Target Enterprises agreed unanimously by a show of hands to the proposal to increase the prices of confectionery and bakery products by 10% to 15% in Sibü, Sarawak.

40. Each of the Target Enterprises is involved in the selling of confectionery and bakery products in Sibü, Sarawak and each operate at the same level in the production and/or distribution chain.

41. In this case, the decision made by the Target Enterprises to increase the price of confectionery and bakery products by 10% to 15% during the AGM is a horizontal agreement.

Anti-Competitive Object

42. Section 4(2) of the Act provides that an agreement between enterprises to fix a selling price is a horizontal agreement which is “deemed to have the object of significantly preventing, restricting, or distorting competition”.

43. The Commission’s Guidelines on Chapter 1 Prohibition (Anti-Competitive Agreements) relating to prohibition under section 4 provides further explanation by stating that:

*“It is important to note that Section 4(2) of the Act treats certain kinds of horizontal agreements between enterprises as anti-competitive. In these situations, the agreements are **deemed to “have the object of significantly, preventing, restricting or distorting competition in any market for goods or services.”** This means for these horizontal agreements, the MyCC will not need to examine any anti-competitive effect of such agreements. The agreements which are deemed to be anti-competitive include:*

- (a) fix, directly or indirectly, a purchase or selling price or any other trading conditions“.*

44. The same Guidelines also state that there is no necessity for the Commission to prove effects of the agreement once an object agreement is established. Paragraphs 2.13 and 2.14 of the said Guidelines state the following:

“2.13 If the “object” of an agreement is highly likely to have a significant anti-competitive effect, then the MyCC may find the agreement to have an anti-competitive “object”.

2.14 Once anti-competitive “object” is shown, then the MyCC does not need to examine the anti-competitive effect of the agreement.”

45. Therefore, for infringements under section 4(2)(a) of the Act, there is no need to take into account the actual effects of an agreement which has as its object the prevention, restriction or distortion of competition within the market.

6.2 Conclusion of the Legal Assessment

Target Enterprises

46. The Target Enterprises were each recorded as having attended the AGM where the decision was made to increase prices. Further, none of the Target Enterprises disputed that they attended the AGM.

47. Participation by the Target Enterprises in the motion passed at the AGM to increase price establishes their collective intention i.e. the object of the intended anti-competitive result.

48. The fact that an enterprise may have played only a limited part in the setting up of the agreement, or may not be fully committed to its implementation, or participated only under

pressure from other parties does not mean that it is not a party to the agreement.

49. Further, as the Commission's Guidelines on Chapter 1 Prohibitions (Anti-Competitive Agreement) indicate:

*“An agreement could also be found where competitors attending a business lunch listen to a proposal for a price increase without objection. On the same note, competitors should avoid meetings or other forms of communication with competitors particularly where price is likely to be discussed. **Mere presence with competitors at an industry association meeting where an anti-competitive decision was made may be sufficient to be later implicated as a party to that agreement.**”[sic] [Emphasis added]*

50. As the Guidelines show, mere presence of an enterprise at a meeting which decides on an anti-competitive agreement may implicate the enterprise as a party to that agreement.

51. Price fixing is a major concern of the Commission as the restriction of competition is obvious in any price fixing cases. The agreement to fix price leaves no room for individual enterprises to assess their own operating costs and determine for themselves the cost-pass-through effects and how much should the price increase be and also whether the price increase should be borne by themselves or by the consumers.

52. Accordingly, the Commission has decided the Target Enterprises have infringed section 4(2)(a) of the Act by entering into an agreement that has as its object to fix, directly or indirectly, the selling price of confectionery and bakery products in Sibu, Sarawak.

Non-Infringing Enterprises

53. The evidence gathered by the Commission does not support a finding that the Non-Infringing Enterprises attended the AGM and participated in the motion passed to increase prices.

54. Accordingly, the Commission has decided that the Non-Infringing Enterprises have not infringed section 4(2)(a) of the Act.

7. REMEDIES

55. Section 40(1) of the Act provides that,

“If the Commission determines there is an infringement of a prohibition under Part II, it –

(a) shall require the infringement to be ceased immediately;

(b) may specify steps which are required to be taken by the infringing enterprises, which appear to the Commission to be appropriate for bringing the infringement to an end;

(c) *may impose a financial penalty; or*

(d) *may give any other direction as it deems appropriate.*

Directions

56. The Commission directs the Target Enterprises to cease and desist the fixing of prices of confectionery and bakery products in Sibu, Sarawak.

57. The Commission also directs the members of the SCBA as at the date of this Decision to provide the Commission with a signed Undertaking, in a form and by a date to be agreed with the Commission not to be involved in any future conduct contrary to the Act.

Financial Penalties

58. Any financial penalty imposed by the Commission shall not exceed the statutory maximum established by section 40(4) which provides:

“A financial penalty shall not exceed ten percent of the worldwide turnover of an enterprise over the period during which an infringement occurred.”

59. Pursuant to section 40(1) of the Act, the Commission decides to impose financial penalties on fourteen (14) of the Target

Enterprises that have infringed and are infringing section 4(2)(a) of the Act.

Determination of the Financial Penalties

60. In determining the amount of the financial penalties, the Commission has taken the following steps:

- Step 1: Seriousness (gravity) of the infringement
- Step 2: Duration of the infringement
- Step 3: Relevant turnover of the Target Enterprises for the period of infringement
- Step 4: Aggravating and mitigating factors
- Step 5: Verification that the financial penalty is no more than 10% of the Target Enterprises' worldwide turnover.

Step 1: Seriousness (gravity) of the infringement

61. The Commission has decided to impose financial penalties on the fourteen (14) of the Target Enterprises that have infringed section 4(2)(a) of the Act by agreeing to increase the prices of confectionery and bakery products in Sibul. The agreement reached by these enterprises has the object of significantly preventing, restricting or distorting competition in selling of confectionery and bakery products in Sibul.

62. The Commission is of the view that it is important for the financial penalties to act as a deterrent to other enterprises, and especially Small Medium Enterprises, which may be considering activities of the kind covered by this case. The penalties should send a strong signal to the business community of the seriousness of infringements of this kind.

Step 2: Duration of the infringement

63. The Commission has determined that the infringement started when the Target Enterprises participated in the AGM on 17 November 2013 at which they agreed to increase prices.

64. Up to 18 September 2014, the Target Enterprises have not taken any steps to cease and desist from the decision made during the AGM to increase prices. Therefore, for the purpose of computing the financial penalties, the Commission has set the duration of infringement from 17 November 2013 to 18 September 2014.

Step 3: Relevant turnover of the Target Enterprises for the period of infringement

65. The Commission has taken into account each Target Enterprise's turnover generated from the monthly sales of bakery and confectionery products in Sibul throughout the infringement period.

Step 4: Aggravating and mitigating factors

66. The Commission has decided not to impose any financial penalty on Yong Kong Chuo as he has become bankrupt and only generated a very insignificant amount of total turnover during the infringement period.

67. As indicated above, four (4) of the Target Enterprises attended the AGM and admitted to increasing prices. These are Mei Hao Bakery @ Wonderful Bakery, Qun Fang Meat Bun Food Industries @ Kung Fung Food Industries, Daily Fresh and Sweet Bakery @ ABC Bakery and Farley Bakery. For these Target Enterprises who implemented the decision made at the AGM and did not take any step to cease the conduct prior to the Commission's Proposed Decision, the Commission has decided no mitigating factor applies.

68. For the remaining ten (10) enterprises, they attended the AGM but did not implement the agreement to increase prices. These are Wong Kieng Seng, New Chuo An Bakery, Chung's Bakery, Sweetie Bakery, Aroma Bakery @ Huong Hiong (Sibu) Confectionery, Seng Kee Bakery, To Eat Bakery Sdn. Bhd., Nam Mee Bakery, Lian Yu Bakery and Cake House as well as Yong Lin Yin. The Commission has decided to reduce the financial penalties accordingly.

69. Based on the considerations discussed above, the following financial penalties are imposed on the Target Enterprises:

Table 3: Financial Penalties Imposed on the Target Enterprises

No.	Enterprises	Financial Penalties
1	Wonderful Bakery	RM 9,700
2	Kung Fung Food Industries	RM 27,000
3	ABC Cake House	RM 12,000
4	Farley Bakery	RM 102,600
5	Wong Keng Sieng	RM 480
6	New Chuo An Bakery	RM 1,700
7	Chung's Bakery	RM16,050
8	Sweetie Bakery	RM 1,200
9	Huong Hiong (Sibu) Confectionery	RM 3,000
10	Seng Kee Bakery	RM 9,550
11	To Eat Bakery Sdn. Bhd.	RM 56,550
12	Nam Mee Bakery	RM 900
13	Lian Yu Bakery Cake Store	RM 5,650
14	Yong Lin Yin	RM 1,350
Total		RM 247,730

Step 5: Verification of financial penalties

70. The financial penalties are not more than 10% of the Target Enterprises' turnover. The Target Enterprises do not generate worldwide turnover.