



**SURUHANJAYA PERSAINGAN MALAYSIA**  
**MALAYSIA COMPETITION COMMISSION**

**The 2nd Moot Court Competition on Competition Law (MCCL2017),  
by Malaysia Competition Commission (MyCC)**

**PROPOSITION**

**28-29 October 2017 (Sat-Sun)**

**AIKOL, IIUM, Kuala Lumpur**

The Malaysia Competition Commission “the **Commission**” was established on 1 April 2011 with the purpose of enforcing the Competition Act 2010 “**the Act**”.

2. The Commission safeguards the process of free and fair competition in commercial markets for the benefit of consumer welfare, efficiency of enterprises and the development of the economy as a whole.
3. There was a newspaper report published on 20 November 2013 that the price of cement bags have been raised by 10% to 15% across country. The decision was made by Cement Manufacturers Association of Malaysia (CMAM) on 17 November 2013 during its Annual General Meeting (AGM) at the XYZ Hotel in Kuala Lumpur.
4. On 30 November 2013, the Commission commenced an investigation under section 14(1) of the Act into a suspected infringement of section 4(2)(a) of the Act by 14 enterprises who are members of the CMAM. Subsequently, 14 enterprises were initially found by the Commission to have been involved in the suspected infringement.
5. The Minutes of Meeting confirmed that the 14 enterprises attended the AGM. The minutes of the AGM indicated that the 14 enterprises had engaged in price fixing by agreeing to increase the prices of cement bags by 10% to 15% across country. It was mentioned during the AGM that the rise was necessitated by the rising price of coal and other raw materials.
6. The construction industry in Malaysia is under heavy pressure of shortage of raw materials, especially cement and steel. However, there are plenty of bricks due to huge availability of clay which is the main raw material for making bricks. There are many Small to Medium Enterprises (SMEs) producing bricks even at the district and village level. There are three different associations for each of these industries, Cement Manufacturers Association of Malaysia (CMAM), Steel Manufacturers Association of Malaysia (SMAM) and Bricks Manufacturers Association of Malaysia (BMAM). There is also an Association for Builders of

Malaysia (ABM) which protects the interest of builders and helps in negotiating rates cumulatively for the builders and sets standards for the builders.

7. The main roles of these trade associations are to provide a platform for the industry to discuss common issues, setting standards and also to get different policies in their favour. In view of the fact that the Act is new and many associations have been carrying out activities that raise competition concerns, the Commission carried out several competition compliance advocacy programmes for the trade associations including publishing competition compliance guidelines for businesses in Malaysia.
8. Given the fact that cement industry has been such a booming business in Malaysia, two Indian manufacturers have recently started exporting cement bags into Malaysia. Production of cement involves complex technology and requires innovation to improve the cement's features.
9. At the AGM dated 17 November 2013, the 14 enterprises also agreed that they needed to counter the problem of industrial espionage. Consequently, they agreed that they would no longer "poach" each other's skilled staff that were given access to confidential information relating to technology essential to the manufacture of the cement, and in furtherance of the agreement, they would not hire them for a period of 18 months after termination of their original employment contracts.
10. The agreement by the 14 members of the CMAM was reached with the objective to ensure 'fair competition' in selling of cement bags in Malaysia.
11. On 23 November 2013, a disgruntled employee from AAA Sdn. Bhd. (a member of CMAM) submitted a complaint to the Commission in relation to the "no-poach" agreement which initiated by AAA Sdn. Bhd.
12. In the course of its investigation, the Commission requested documents and information from the members of the CMAM and the other parties concerned. The Commission also conducted field investigations with all 14 enterprises

including interviews with Mr. Ali, the Chairman of CMAM and Mr. Zack, the Secretary of the CMAM. Mr. Zack is also AAA Sdn. Bhd.'s employee.

13. The Commission found that Mr. Zack actively participated in the agreement and at the same time, he represented AAA Sdn. Bhd. in the meeting. At the completion of the investigation, the Commission concluded that CMAM has provided a platform to the cement manufacturers and facilitated an anti-competitive agreement.
14. None of the 14 members of the CMAM including AAA Sdn. Bhd. disputed that they attended the AGM and had agreed to the price increase.
15. Clear participation by AAA Sdn. Bhd. together with the other 13 members of the CMAM in the decision made at the AGM to increase price established their collective intention i.e. the object of the intended anti-competitive result.
16. In this regard, the liability of AAA Sdn. Bhd. was not absolved although AAA Sdn. Bhd. did not fully implement the decision made at the AGM.
17. On 1 Mac 2014, the Commission in accordance to Section 36 of the Act, served its Proposed Decision on the 14 enterprises. The Commission imposed the provisionally penalty of RM60,000.00 to the AAA Sdn. Bhd.
18. In response to the Proposed Decision, all the 14 enterprises including AAA Sdn. Bhd. submitted their written representations to the Commission and requested for an oral representation session. During the oral representation session, the enterprises requested for a reduction and/or waiver of the financial penalties proposed to be imposed.
19. The Oral Representation was held on 30 April 2014 and was conducted in accordance with Section 37 of the Act. AAA Sdn. Bhd. attended the session and presented its representations. The Chairman of the Commission was not named as a panellist during the oral representation session. As of today, no

guidelines issued by the Commission on the appointment and requirements of panellists for an oral representation session.

20. The Commission took into account the written representation as well the oral representations made by AAA Sdn. Bhd. Upon considering all evidences together with the representations, the Commission then made a finding of infringement under Section 40 and, in compliance with Section 40(3), published reasons for its decision in the form of the Final Decision.
21. The Final Decision dated 1 Jun 2014 sets out the position that the Commission took against 14 members of the CMAM including AAA Sdn. Bhd. for having infringed Section 4(2) of the Act by entering into a horizontal agreement that has its object to fix, directly or indirectly, the selling price of cement bags in Malaysia.
22. The Commission determined the financial penalty by taking into account the AAA Sdn. Bhd.'s monthly sales of cement bags in Malaysia throughout the infringement period. The AAA Sdn. Bhd. submitted to the Commission that its total revenue over this period was RM3,400,000.00.
23. Despite the evidence clearly showed that the AAA Sdn. Bhd. attended and participated in the AGM which had agreed to increase prices, the Commission considered the fact that the AAA Sdn. Bhd. did not implement the agreement to increase the prices. Consequently, a substantial discount was given to the AAA Sdn. Bhd. to this effect and their fine was reduced to RM60,000.00.
24. The Commission reiterates that the financial penalty computation only took into account the monthly sales of the cement bags during the infringement period and not the total sales generated by AAA Sdn. Bhd. Based on the revenue data given by the AAA Sdn. Bhd., the total turnover generated over the infringement period was RM3,400,000.00. Therefore the financial penalty imposed on AAA Sdn. Bhd. i.e. RM60,000.00 did not exceed the statutory maximum provided for under Section 40(4) of the Act.

25. The 13 enterprises had paid the penalty imposed by the Commission except for AAA Sdn. Bhd. who decided to appeal for the Final Decision dated 1 Jun 2014 in accordance with Section 40 of the Act.
  
26. AAA Sdn. Bhd. raised the following as the grounds of its appeal:
  - 26.1 AAA Sdn. Bhd. has not infringed Section 4(2)(a) of the Act. They also claimed that a “no-poach” agreement is inapplicable under Section 4(2) of the Act;
  
  - 26.2 The Commission has failed to consider the gravity of the infringement and duration of the infringement i.e. AAA Sdn. Bhd. has never implemented the agreement by increasing prices of cement bags by 10% to 15% despite the AAA Sdn. Bhd.’s attendance in the annual general meeting that was held on 17 November 2013;
  
  - 26.3 The Commission did not follow the principles of natural justice and the procedure adopted by the Commission was vitiated due to bias and lack of fairness. The Chairman of the Commission involved with the final decision although he was not present during the oral representation and violated the procedure that “only one who hears can decide”;
  
  - 26.4 The Commission has failed to consider the very short duration of the infringement;
  
  - 26.5 The Commission has failed to provide an opportunity to AAA Sdn. Bhd. to cross examine the witness and thus their right to be heard was violated;
  
  - 26.6 The imposed financial penalty of RM60,000.00 has exceeded the statutory maximum established under Section 40(4) of the Act. AAA

Sdn. Bhd. challenged the imposition of penalty on the “gross turnover” and applied the concept of “relevant turnover”; and

- 26.7 The imposed financial penalty of RM60,000.00 has exceeded ten per cent of the worldwide turnover of the AAA Sdn. Bhd. during the infringement period.
27. Section 4(2) is a deeming provision. The Parliament has enacted that in the case of a horizontal agreement to fix prices, the existence of an agreement to fix prices is sufficient to satisfy the requirement that it has the *object of significantly preventing, restricting, or distorting competition in any market for goods or services*.
28. The Commission had taken the position that for infringements under Section 4(2) of the Act that 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.

**Notes:**

**Lawyers representing both sides are required to address the arguments that are specifically mentioned in the Proposition. They are, however, free to make any other arguments that they deem fit. Lawyers for both sides are encouraged to explore additional arguments related to jurisdiction as well as merits.**

**One team shall represent AAA Sdn. Bhd. in the appeal against the Commission’s decision. Another team shall represent the Commission.**