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## Warehouse Operators Fined By MyCC for Infringement Of Anti-Competition Laws

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The Malaysia Competition Commission (MyCC) had announced in early August 2021 that seven warehouse operators based in Port Klang had infringed Section 4 of the Competition Act 2010 (CA 2010) for participating in a price fixing cartel<sup>1</sup>.

The warehouse operators were found to have infringed the prohibition under Section 4 of CA 2010 by participating in an agreement which has, as its object, the prevention, restriction, or distortion of competition in relation to the market for the provision of handling services of long length and heavy lift of import and export cargo in Port Klang, Malaysia from 22.5.2017 until 9.1.2020. The total fine imposed amounted to RM1,043,012.52.

### Facts

MyCC had first received a tip-off regarding anti-competitive conduct carried out by several warehouse operators from an informant.

At the time of MyCC's dawn raids against the operators, it was uncovered that the operators had created a WhatsApp Group and began their discussion on fixing the surcharges despite acknowledging that they are all competitors in the warehouse services market. The operators were also found to have entered into an operators' cartel agreement entitled 'Surcharge Memorandum' dated 22 May 2017 (Infringing Agreement), wherein the operators agreed that all of them would charge the agreed rates for the handling service of long length and heavy lift cargoes effective from 1 June 2017.

The services were provided in Port Klang which were regulated and managed by the Port Klang Authority (PKA). However, the surcharges for the services in this matter were

<sup>1</sup> <https://www.mycc.gov.my/announcement/warehouse-cartel-in-port-klang-busted-and-fined>

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not regulated at the time the warehouse operators entered into the 'Surcharge Memorandum'.

Following its investigation, MyCC found that 7 operators had breached the prohibition under Section 4 of the CA 2010 by entering into an agreement to fix the surcharges for the handling service of long length and heavy lift cargoes.

### Action By MyCC

The proposed and final decision (Decision) delivered by MyCC in January 2020 and August 2021, respectively, found that the seven warehouse operators had entered into agreements in breach of Section 4(1) read with Section 4 (2) and Section 4(3) of CA 2010.

### Key Points To Note from MyCC's Decision

There are several key issues which should be noted from MyCC's Decision as follows:

#### (1) Involvement of the Port Klang Authority

It was argued by the warehouse operators that since PKA did not gazette the charges relating to the handling services of long length and heavy lift import and export charges, PKA should also be found liable under the CA 2010, and hence the liability of all the parties involved should be reduced. However, MyCC had noted that as PKA is a statutory body established under the Port Authorities Act 1963 (PAA 1963), it should not be deemed as an "enterprise" under the CA 2010, and as such the anti-competitive prohibition under Section 4 of the CA 2010 did not apply to PKA.

Further, the MyCC had stated in its Decision that it is important to note that the PKA did not encourage the Parties to enter into any agreement that infringes the CA 2010. Therefore, PKA cannot be held liable or responsible for the price-fixing agreement that was entered by the warehouse operators.

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## (2) Application of the CA 2010

MyCC rejected the argument by the warehouse operators that the CA 2010 should not apply as activities of the warehouse operators were regulated and governed by the PKA pursuant to the PAA 1963 and that the PAA 1963 did not include provisions to promote and safeguard competition in the port sector.

MyCC stated in its Decision that if Parliament had intended to exclude the application of the CA 2010 in favour of the PAA 1963, Parliament would have excluded the PAA 1963 from the application of the Act by expressly providing for PAA 1963 in the First Schedule of the Competition Act 2010.

It was also submitted in the Decision that the CA 2010 is therefore a statute of general application that applies to all economic sectors in Malaysia, as opposed to PAA 1963 that only applies to port-related matters. Consequently, the CA 2010 applies to enterprises that are licensed or regulated by the PKA under PAA 1963.

## (3) Public distancing in relation to CA 2010

Under common law, the concept of public distancing in cartel cases allows an enterprise that has attended anti-competitive meetings to evade liability by showing that it had “publicly distanced itself” from any such anti-competitive discussions<sup>2</sup>.

The counsels for several of the warehouse operators argued that the operators had refunded excess payments upon the “reversal of PKA’s approval” (as alleged by counsel), and therefore, the operators were no longer a party to the Infringing Agreement.

In its Decision, MyCC found that the practice of refunding excess payments made by the customers by warehouse operators did not amount to ‘public distancing’.

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<sup>2</sup> Paragraph 133 of MyCC’s Decision

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MyCC opined that a company must express firmly and unequivocally to the other cartel members of its intention to distance itself from the anti-competitive conduct for it to be publicly distanced from an anti-competitive agreement.

#### **(4) Conduct of employees**

In response to the argument made by one of the operators which made representation that the owner of the company was not in the WhatsApp group chat in which all the cartels had communicated, MyCC expressed the following:

*“145. The conduct of an employee could be decisive and attributed to the enterprise that employs him. The conduct of a person who is generally authorised to act on behalf of the enterprise is sufficient to bring about liability to the enterprise, even if the owner or the managing director of the enterprise himself did not do or participate in the act, or was not even informed of the commission of an infringement of competition law.”*

#### **Conclusion**

MyCC had reported in its press release dated 9 August 2021 that:-

*“This case should send a clear message to all industry players that, MyCC will leave no stones left unturned, in fighting the economy sabotage by the cartels against our open market economy. They should steer clear of such practices. As for those who are already involved in a cartel, [they] should approach the MyCC via leniency regime application or any other appropriate scheme as provided under Competition Act 2010. MyCC’s door is always opened for parties who may want to seek for redemption”<sup>3</sup>.*

Following these recent developments, all businesses are reminded to comply with competition laws as there will be

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<sup>3</sup> <https://www.mycc.gov.my/announcement/warehouse-cartel-in-port-klang-busted-and-fined> (Iskandar Ismail, the Chief Executive Officer of MyCC)



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severe consequences for business enterprises and individuals, including directors, in the event of non-compliance and contravention of such law.

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