



Malaysia Competition Commission

Monitoring Mechanisms: An Overview of Current Approaches



Executive Summary

- ☑ Competition Act 2010, enacted in June 2010, came into force in **JANUARY 2012**
- ☑ The importance of an effective monitoring mechanism –public and private sector perspective

Liquid Crystal Display (LCD) Price Fixing Cartel

European Commission press release 8 December 2010

6 producers of LCD panels were fined a total of €648 925 000 for operating a cartel between October 2001 and February 2006.

“Crystal meetings” were held:

- agreed on prices, including price ranges and minimum prices
- exchanged information on future production planning, capacity utilisation, pricing and other commercial conditions

No.	Manufacturer	Fine (€)*	Includes reduction (%) under the Leniency Notice
1.	Samsung	0	100 %
2.	LG Display	215 000 000	50% and "partial immunity" for 2006
3.	AU Optronics	116 800 000	20%
4.	Chimei InnoLux Corporation	300 000 000	0%
5.	Chunghwa Picture Tubes	9 025 000	5%
6.	HannStar Display Corporation	8 100 000	0%

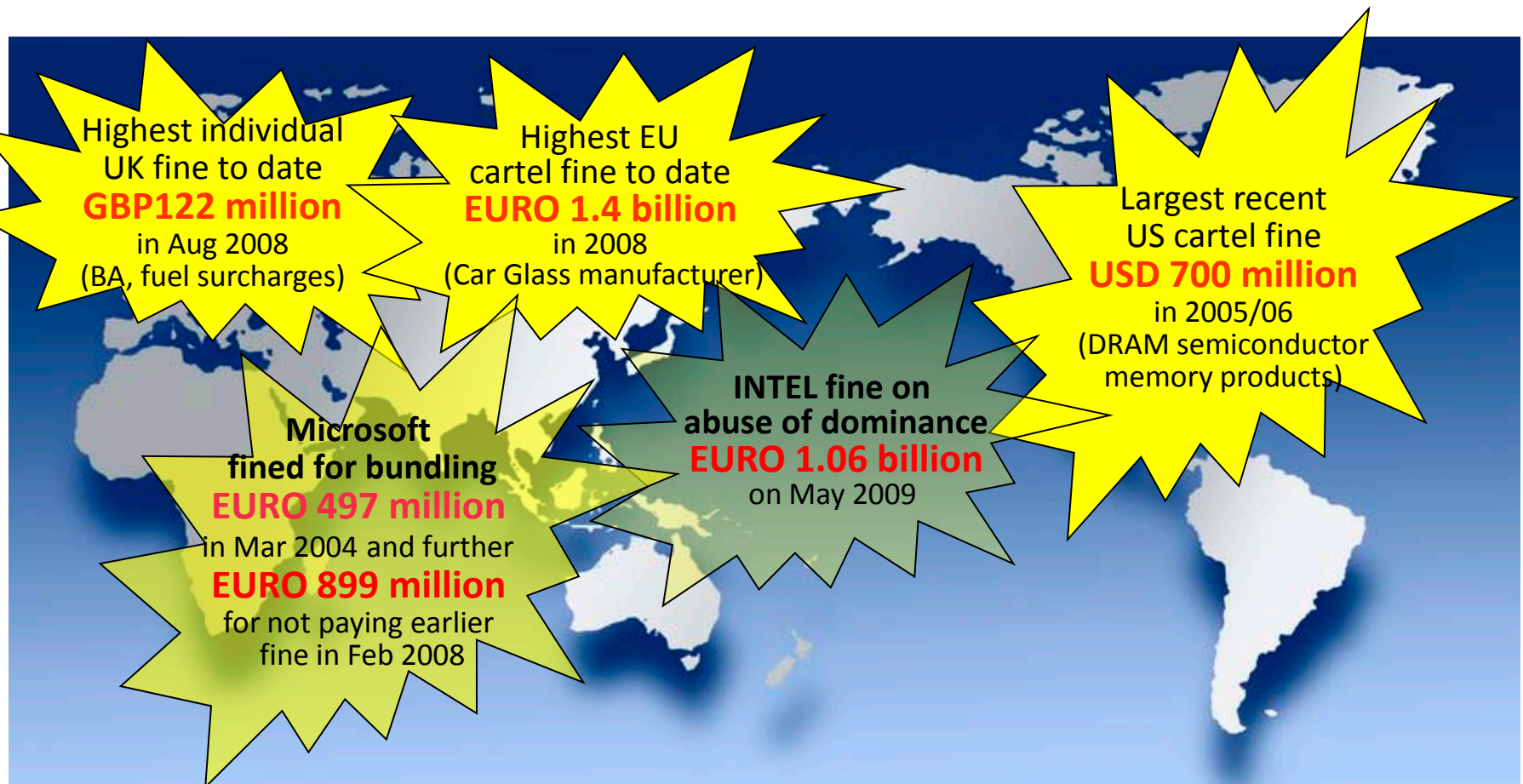
ACCC v CC Constructions and others (1999)

The tender for the Commonwealth Office at Haymarket, Sydney, in 1988 led to the exposure of long-term collusive practices by large construction firms.

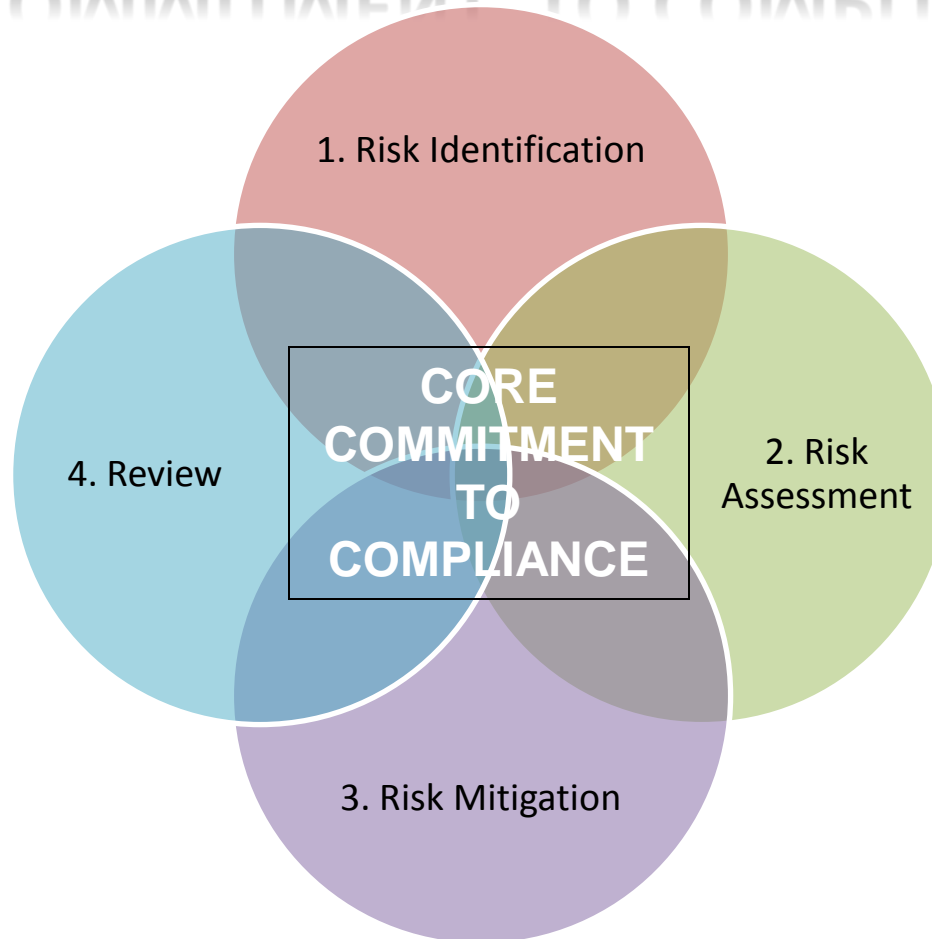
Before the close of tender the industry association, the Australian Federation of Construction Contractors (AFCC), called a meeting of the four firms bidding for the contract. It was agreed that to enable recovery of overheads associated with preparing tenders the winning firm should pay the three losers \$750 000 each, and the AFCC \$1 million - 'loser's fees'

The arrangement was exposed by a New South Wales Royal Commission into the construction industry.

World-wide enforcement – More than 130 countries already have competition laws



CORE : COMMITMENT TO COMPLIANCE



At the core of this process is a commitment to the compliance throughout your organisation. Your board and senior management must take overall responsibility for instilling this commitment to compliance.

Step 1: Risk Identification

Look carefully at your business and identify areas where you might risk breaking competition law. For example:

- Do your employees have contact with your competitors at industry events or otherwise?
- In your market, do employees move frequently between competing businesses and do you have people who have recently joined from competing businesses?
- Do your employees seem to have information about your competitors' prices or business plans?
- Are your customers also your competitors?
- Do you ever work in partnership with your competitors?

- Are you entering into exclusive contracts for long periods (five years or more)?
- Do your agreements contain joint selling and purchasing provisions with your competitors?
- Do your agreements contain requirements to share commercially sensitive confidential information, or to collaborate, with your competitors?
- Does your business impose resale restrictions on retailers that sell your products?
- Are you a business with a large share of any of the markets in which you operate?

Do's

- ✓ ensure all relevant staff have compliance training
- ✓ circulate an agreed agenda
- ✓ keep detailed records of the discussions
- ✓ immediately terminate any discussion with competitors if you are concerned that it may violate competition law. If necessary, leave the meeting, and ensure the note of the meeting includes your objection and reason for departure

Do's

- ✓ contact your legal department and/or external legal adviser immediately if:
 - you are concerned that you or someone else in the company may have violated competition law; or
 - a commercially sensitive subject (e.g. current or future prices, costs marketing or sales plans) has been raised by or discussed with competitors
- ✓ understand that participation in trade association or consortium meetings does not provide protection from the application of competition law and mere presence at an anti-competitive discussion is sufficient to be implicated in an infringement
- ✓ retain any documents, records or data which are received or exchanged in meetings and which may be relevant to any investigation or lawsuit

Dont's

- X** discuss or exchange commercially sensitive information such as current or future prices, business plans, capacity, costs, revenue or marketing activities
- X** agree to set prices at a certain level or within a general range, agree to minimum prices or the timing of price movements, discuss dividing up markets by geography or customer type, or agree to boycott or impose stricter conditions on suppliers, customers or other competitors
- X** assume that a certain practice or conduct is lawful because others have done it in the past or because it is industry standard
- X** use language in meetings which exaggerates your company's market strength (e.g. "dominate" or "monopolise") or which could imply competitor collusion or wrongdoing (e.g. "destroy after reading")
- X** continue with or attempt to cover up conduct which you are concerned may violate competition law

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KBB, the bihun king

BY MARYANN TAN

A monopoly is emerging in the wholesale market for vermicelli or better known locally as bihun. Penang-based KBB Resources Bhd is winning favour from investment analysts for its growing dominance as a bihun producer.

Earning itself the title "King of Bihun" since buying its closest competitor, Rasayang Food Industries, it appears KBB won't stop at gobbling up other bihun makers to kill the competition.

"Since buying Rasayang we've increased our market share to over 50%. We want to corner the market. I think we'll stop at 70%," executive director Kenny Ang says in a telephone interview with *The Edge*. Sounding more like the "Kingpin of bihun", Ang says KBB will target those that "disturb" us with pricing.

He must be lucky there isn't such a thing as antitrust laws in the country. Of course it is any firm's aim to dominate. Dominance gives market control and that means certainty at a time where producer costs are rising from inflationary pressures.

The RM11.6 million purchase of Rasayang was crucial because Rasayang, it seemed, was the biggest price threat to KBB's fortunes. After completing the buyout in the first quarter, bihun prices have gradually moved up.

A report by AmResearch estimates that average industry prices of bihun and laksa (ranging between RM1,500 and RM2,200 per

tonne) improved by close to 50% between the first half of this year and last year.

For this reason, revenue will grow by 66.5% to RM131.2 million in the current financial year to December. Net earnings will jump by 39.5% to RM15.1 million. AmMerchant is also adviser to KBB's proposed private placement.

OSK offers another estimate: RM125.9 million in turnover and RM14.2 million in net profit for FY2006. That still compares very well against FY2005's revenue of RM78.8 million and net profit of RM10.8 million.

Without Rasayang as a challenger Ang admits that KBB will be free to raise prices although it does get the Domestic Trade and Consumer Affairs Ministry on its case each time someone lodges a complaint.

Ang says about 10 other bihun producers other than KBB remain in the market. He didn't identify who KBB was eyeing nor how it would execute the takeover. According to AmResearch, KBB's competitors are yielding and are keen to sell out. One in Kedah and another in Penang reportedly generate RM5 million to RM8 million annually from selling bihun and laksa. Others reportedly sell less than RM5 million of those noodles annually.

KBB doesn't seem to be threatened by imports. Higher cost of production and transport are pricing the imported brands out of the



Average industry prices of bihun and laksa improved by close to 50% between the first half of this year and last year

market, KBB says. On the other hand, Ang says the high freight charges prevent KBB from exporting its bihun to other markets as well.

But KBB has made investments in Indonesia, venturing upstream into rice flour milling. It formed PT Bersatu International Food Industries in 2004, which commenced milling late last year. Analysts report that it hasn't yet achieved full capacity utilisation. As a new en-

trant, BIFI has to contend with price competition as the market leader, PT Budi Makmur, seeks to restrain BIFI, AmResearch says.

Besides rice flour, sago is the other key ingredient in making bihun. A few months back, KBB acquired a sago supplier in Sibu, which will help to lower the cost of manufacturing bihun in Sabah and Sarawak. This gives it a price advantage over higher quality Chinese imports. Ang says KBB may consider venturing into sago production in Indonesia if the market there matures.

With very low gearing and comfortable cash flow from operations, some wonder if KBB really needs to execute its proposed private placement. The exercise is expected to raise some RM20 million for the company, which it says will help with working capital and debt repayment.

It hasn't had much luck with the proposal to place out 24 million new shares (it has a base of 120 million shares), which recently gained approval from the Securities Commission to extend the time frame to February next year.

Perhaps it will give KBB the financial muscle to achieve its bigger goals as spelt out by Ang.

"We understand that bihun is the fast food of Malaysia and Southeast Asia. It is our vision to become a brand name like Nestlé."

KENNY YAP/THE EDGE

Step 2: Risk assessment

Once you have identified all the areas where there is a risk your business might break competition law, you can then work out how serious these risks are:

Low risk
Medium risk
High risk

Businesses should consider assessing which employees are in high risk areas.

Step 3: Risk mitigation

- Set up policies, procedures and training to reduce the likelihood of the risks you have identified occurring
- For example, if you have identified employees meeting competitors at conferences as being high risk, you could run training to make sure your teams know what they are, and are not, allowed to communicate to competitors about. This training could also be supported by an employee code of conduct
- What you do will depend on the risks identified and the likelihood of the risk occurring. By way of example, some businesses have found the following measures to be helpful:
 - ☐ training employees in competition law
 - ☐ implementing an employee code of conduct policy

Step 3: Risk mitigation

- ☐ implementing a system where all contact with competitors is logged
- ☐ establishing a system so that employees can get advice before action (for example, legal advice on a contract)
- ☐ establishing a system for employees to report, on a confidential basis, any competition law concerns that they might have
- ☐ making sure employees tell you if they are joining a trade association or attending events where they might be meeting with competitors

Step 4: Review

Review steps 1 to 3 and your commitment to compliance regularly, to ensure that your business has an effective compliance culture. Some businesses review their compliance efforts on an annual basis, others review less frequently. There may be occasions when you should consider a review outside the regular cycle, such as when taking over another business or if you are subject to a competition law investigation.

Akzo Nobel Experiences: Competition Law Compliance Manual

- 2004 - The European Commission imposed fines totalling €66.34 million on Akzo Nobel, BASF and UCB for operating a cartel in the market for choline chloride,. Choline chloride, also known as vitamin B4, is used mainly as a feed additive for poultry and pigs, to increase growth, reduce mortality and improve meat quality.
- 2009 - The European Commission imposed a total of € 61 120 000 fines on nine companies – Almamet, Donau Chemie, Ecka Granulate, Holding Slovenske elektrarne (for its former subsidiary TDR Metalurgija), Novácke chemické závody and its former parent 1.garantovaná, SKW Stahl-Metallurgie and its former parent companies Evonik Degussa and Arques industries – for violating the EC Treaty's ban on cartels and restrictive business practices (Article 81). Akzo Nobel also participated but was not fined because it revealed the existence of the cartel to the Commission.

Top to Down Approach: Strong and Clear Message

Letter from the CEO

AkzoNobel has a policy of absolute compliance with competition law. AkzoNobel companies and their employees worldwide must strictly observe and adhere to this policy.

The Board of Management considers compliance with competition law to be more than a legal requirement; it is core to AkzoNobel's value of integrity and responsibility. Our reputation and long-term success are based not only on how effectively we serve our customers and how successful we are at increasing shareholder value, but also on the way we conduct our business and our competitive practices in the market place. We want it to be unmistakably clear to the outside world and to our employees alike, that we compete fairly and lawfully; and with integrity.

AkzoNobel operates in a global economy where competition laws play an ever more important role. As an international group of companies, we find ourselves under constant close scrutiny, from both national and supranational authorities. Breaches of competition law, even unintentional ones, can have severe consequences for the financial condition, reputation and continued viability of our company. For employees failure to comply with competition law can potentially result in loss of employment, ruined careers, fines and imprisonment.

AkzoNobel's company values put compliance ahead of business results. Every AkzoNobel employee should be aware that his or her career will not suffer should compliance with the code of conduct, which of course includes compliance with competition law, have an adverse impact on business results. On the other hand, disciplinary action will be taken against any employee who violates competition law. Such disciplinary action may include dismissal. In this area we are "a zero tolerance company".

Although competition laws are complex, there are fundamental rules that AkzoNobel employees are required to know and follow. It is essential that you are able to identify situations where competition law issues may arise and where you must seek legal advice.

Please read this manual carefully and ensure you comply fully with the competition rules at all times. If you suspect you or any other employee of AkzoNobel has infringed or may become involved in any infringement of competition law, or whenever you are considering an arrangement that gives you any doubt as to whether you would achieve your business objective in a legitimate way, you must seek timely advice from AkzoNobel Legal & IP.

Hans Wijers
CEO AkzoNobel

Akzo Nobel Competition Policy

All AkzoNobel personnel are expected to conduct company business in a legal and ethical manner. Compliance with competition law falls within the framework of our code of conduct, which applies equally to all our business transactions throughout the world and to the individual behaviour of employees in conducting AkzoNobel's business. AkzoNobel has a policy of strict compliance with competition law wherever it operates. All AkzoNobel employees are required to adhere to this policy and breaches of competition law will not be tolerated.

Employee who has contact with **customers, suppliers or competitors** or who attends **trade association meetings** or **trade fairs** or who has management responsibilities in respect of such employees must ensure:

- ✓ Is familiar with the fundamental principles of competition law
- ✓ Can identify situations where competition law issue may arise
- ✓ Is personally committed to achieving full compliance with Akzo Nobel competition law compliance policy
- ☐ Conduct competition law training at least once every two years

Basics of Competition Law

- Objectives of Competition Law
- Basic Principles - Main Prohibitions
- Specific Conduct – “Horizontal” and “Vertical” Relations (Relations with Competitors/Relations with Suppliers, Distributors and Customers/Abuse of Dominance/ Application of IPR Rights
- Document Creation and Retention – Special Focus on emails
- Trade Associations (strict mechanism)
 - ✓ Membership - need to seek consent from Legal division
 - ✓ Do's and Don't's – Strict Guidelines

When communicating, the following rules should be observed in order to avoid a perfectly legal activity looking suspect due to a poor choice of words:

- Do not use vocabulary which could be misconstrued as suggesting guilty purpose, such as “*please destroy/delete after reading*” or “*no copies*”
- Avoid power or domination vocabulary

Cont...

- Because the term “market” has legal significance (in both determining if a company has a dominant position and in merger analysis), it is better to avoid references to “market” where possible.
- Avoid loose or “macho” language with regard to intentions

- Exercise caution when talking about competition and prices, especially among competitors
- Do not speculate as to the legal nature or consequences of conduct
- State clearly the source of any price information (so it does not give a false impression that it came from discussions with competitors)
- Avoid any suggestion that an industry view has been reached on a particular issue (such as price levels).

Matters which should never be discussed with competitors, at any official meeting or social gathering

Do not have formal or informal discussions relating to:

- territorial restrictions, allocation of customers, restrictions on types of products, or any other kind of market division;
- individual company prices, price changes, conditions of sale (including payment terms and periods of guarantee), price differentials, discounts;
- general market conditions and general industry problems, including industry pricing policies or patterns, price levels, or industry production, capacity, or inventories (including planned or anticipated)

Cont...

- individual production or distribution costs, cost accounting formulas, methods of computing costs;
- individual company figures on market shares, sources of supply, production;
- information as to future plans of individual companies concerning technology, production, marketing and sales; and
- matters relating to individual suppliers, distributors or customers.

Trade industry statistics

To be certain that it is legal to exchange industry statistics through the medium of a trade association, Legal Division should be contacted to ensure that:

- an independent company, or at the very least a team of trade association staff unconnected with any of its members, collects and disseminates the information without identification of the company who submitted it;
- the participants submitting their data do not disclose that information to other participants, in order to maintain complete confidentiality of the individual data submitted;

Trade industry statistics

- the data collated and disseminated is aggregated data which does not allow the identification of an individual participant; and
- the information relates to historic data only and does not include future data.

Trade association meetings

The following rules apply in connection with trade association meetings:

- an agenda must be circulated for review in advance of the meeting and Legal Division should be contacted if any doubts exist
- the meeting must be attended only by the appropriate AkzoNobel employees
- a commercial employee should not attend a technical meeting
- informal commercial discussions of any kind before or after meetings must be avoided as much as possible

Cont...

- accurate, detailed notes of the meeting must be taken and, in case of doubt, a copy of the draft notes has to be provided to Legal Division
- objections should be made against any deviation from the agenda during the meeting which strays into prohibited areas. Every employee must be vigilant as to what is discussed
- if a competitor seeks to initiate a discussion on an improper subject, objections should be made

Powers of Competition Authorities

- Searches
- Compel submission of documents
- SOPs during dawn raids
- Sanctions

Conclusion

- Effective Compliance Programme – Internal Monitoring (Preventive) Mechanism
- Reduction of Fines
- Compliance Programme as a “Sword” or as a “Shield”

THANK YOU



www.mycc.gov.my

Mohd Aidil Tupari
aidil@mycc.gov.my

*Strategic Planning and International Affairs Division
Malaysia Competition Commission (MyCC)*