

DECISION TO CLOSE AN INVESTIGATION IN RELATION TO THE SUSPECTED INFRINGEMENT OF COMPETITION ACT 2010 IN THE HAULIERS INDUSTRY IN PENANG

EXECUTIVE SUMMARY

INTRODUCTION

1. In 2017, the Malaysia Competition Commission (“the Commission”) initiated an ex-officio investigation against several haulier companies in Penang under section 14 (1) of the Competition Act 2010 (“the Act”) in relation to the alleged price-fixing and fixing of a trading condition by 14 haulier enterprises.

2. The list of haulier enterprises that were alleged to be involved in anti-competitive agreements in relation to price fixing is as follows:
 - (i) LTS Logistics (PG) Sdn. Bhd. (“LTS”);
 - (ii) Wealthy Care Consortium Sdn. Bhd. (“Wealthy Care”);
 - (iii) SH Haulage Sdn. Bhd. (“SH”);
 - (iv) Swift Haulage Sdn. Bhd. (“Swift Haulage”);
 - (v) Swift Integrated Logistics Sdn. Bhd. (“Swift Integrated”);
 - (vi) Tanjong Express Logistics (M) Sdn. Bhd. (“Tanjong”);
 - (vii) FM Global Logistics (M) Sdn. Bhd. (“FM”);
 - (viii) TS Transport Sdn. Bhd. (“TS”);
 - (ix) Benua Haulage Sdn. Bhd. (“Benua”);
 - (x) Komunajaya Sdn. Bhd. (“Komunajaya”);
 - (xi) Pos Logistics Berhad. (“Pos”);
 - (xii) Containers Link Logistics Sdn. Bhd. (“Container Link”);
 - (xiii) Interway Transport Sdn. Bhd. (“Interway”); and
 - (xiv) Megah Transport Sdn. Bhd. (“Megah”).

3. As a focus of the investigation, the Commission identified and investigated whether the circular issued by the Association of Malaysian Hauliers (“AMH”) dated 7.11.2016 (“AMH Circular”) to its members amounts to an anti-competitive agreement resulting in price-fixing and/or fixing of a trading condition among the AMH members.
4. The contents of the AMH Circular stated that “*members may wish to raise the charges for the additional service to customers... This additional service surcharge may apply with effective from 1st December 2016*”. In addition, in the same AMH Circular, it also provided “*Note: The present charges of **Scan & Periksa** by Penang Port is RM98.00.*”
5. The Commission notes that the *Scan & Periksa* charges are in relation to the scanning surcharges through the Royal Malaysian Customs (“RMC”).
6. Pursuant to further assessment by the Commission, it was found that the AMH Circular was issued in response to the announcement dated 8.9.2016 regarding the imposition of a mandatory scanning system (100% scanning) by the RMC on import containers at the Penang Port dated 8.9.2016. The Commission also noted that the implementation of the system resulted in increases in the cost of time for the hauliers to move out from the port.
7. Subsequent to the issuance of the AMH Circular, there were several enterprises, namely, Tanjong Express Logistic (M) Sdn. Bhd., LTS Logistics (PG) Sdn. Bhd., Wealthy Care Consortium Sdn. Bhd., Lee Ting San Enterprise Sdn. Bhd. and Swift Haulage Sdn. Bhd. who issued their circular imposing the same scanning surcharge rate of RM75.00. The dates of issuance of the circular by the respective enterprises were ranging from 14.11.2016 to 28.11.2016 with an effective date of 1.12.2016.

THE INVESTIGATION

8. The investigation of the alleged anti-competitive agreement via price-fixing and fixing of a trading condition among haulier enterprises requires the Commission to conduct an assessment based on the evidence gathered.
9. In this context, the Commission found that the AMH Circular dated 7.11.2016 raised potential competition concerns due to its ability to:
 - (a) facilitate price-fixing arrangements via the *Scan & Periksa* charges in the AMH Circular which was stated at RM98.00; and
 - (b) fix a trading condition by AMH's announcement to its members in relation to the term "*additional service sur-charge*."
10. Based on these concerns, from 2017 to 2018, the Commission issued several notices under section 18 and directions under section 20 of the Act to the respective enterprises requesting the relevant information including circulars and/or memorandums, revenue information, email and invoices, as well as taking statements to ascertain the allegation of price fixing and fixing of trading condition on scanning surcharge. The Commission had also actively engaged with key stakeholders including government agencies, port authorities and the customers of the haulage services in assessing the said allegation.
11. Based on the assessment of the evidence, the Commission found the following:
 - (a) the Penang Port Commission did not actually impose any charges in relation to *Scan & Periksa*. However, the stated amount of RM98.00 in the AMH Circular is referring to the charges for extra-movement of lifting on or lifting off operations for containers over 20 feet in length, which is imposed by the Penang Port Commission. Therefore, the Commission

finds that the statement made in the AMH Circular may be misleading and inaccurate;

- (b) based on the gathered documentary evidence, the Commission found there were enterprises that imposed scanning surcharges from 1.12.2016 onwards on their customers but at different rates, based on the sample of invoices from 2017 and 2018;
 - (c) the implementation of the scanning surcharges was temporary as it had only lasted throughout the negotiation period between the haulier enterprises, customers of the haulage services, port authorities, and government agencies; and
 - (d) the Commission found that the haulier enterprises were just reacting to the increased cost due to the implementation of mandatory scanning system. Although there were increase in price, there was no uniform conduct among them as each enterprise implemented the charges at different rates and not following the recommended rate in the AMH Circular.
12. Therefore, the Commission finds that there is insufficient evidence to indicate the existence of an agreement and/or concerted practice between the haulier enterprises.
13. Besides that, there were a series of engagements held between AMH, the relevant government authorities, and the Federation of Malaysian Manufacturers (“FMM”) to address the concern in relation to the congestion issues stemming from the introduction of the mandatory scanning for import containers by RMC. Consequently, the imposition of mandatory scanning has led to an increase in the operational cost of hauliers. In light of these engagements, the Commission noted active steps were taken by AMH to engage with relevant authorities,

namely the Ministry of International Trade and Industry and the Ministry of Finance, to reduce port congestion at the Penang Port.

INITIATIVE BY THE COMMISSION TO LAUNCH A MARKET REVIEW COVERING THE HAULIER SECTOR

14. From the year 2020 to 2021, the Commission took the initiative to conduct a Market Review for the Selected Transportation Sector in Malaysia (“the Market Review”) which includes haulier services to further understand the dynamics of the market.
15. Based on the Market Review, the Commission found that the haulier sector is time-cost sensitive. Therefore, any delay or port congestion inevitably increases the cost of doing business by the industry players. Consequently, this cost will be transferred to the customers. The full report of the Market Review can be accessed on the Commission’s website.

LEGAL PROCEEDINGS: APPLICATION FOR JUDICIAL REVIEW BY TWO HAULIER ENTERPRISES

16. Two haulier enterprises, namely LTS and Wealthy Care, filed a judicial review at the Penang High Court in relation to the Section 18 notice issued by the Commission dated 4.10.2018.
17. On 18.6.2019, the Penang High Court dismissed both judicial review applications with costs. The court proceedings officially ended in the year of 2021. The details of the court orders issued against the Target Enterprises are provided in the table below:

Table 1: List of Court Orders issued by the Penang High Court in relation to the Judicial Review Applications

No.	Name of Haulier Enterprise (Applicant)	Court Order No.	Date of Issuance
1.	Wealthy Care Consortium Sdn. Bhd.	PA-25-94-10/2018	18.6.2019
2.	Lee Ting San Lorry Transport Sdn. Bhd.	PA-25-95-10/2018	18.6.2019

CONCLUSION

18. Having reviewed the facts and circumstances of the case as well as the findings from the Market Review, the Commission is of the view that pursuant to section 16(3) of the Competition Act 2010, the continuation of the investigation to determine whether an infringement had occurred would not constitute of making the best use of the Commission's resources.
19. There is a lack of evidence to indicate any form of anti-competitive agreement among the haulier enterprises. Furthermore, the Commission found that the increase of price by the enterprises was a market reaction due to the implementation of the mandatory scanning system. In addition, it is observed that there were various rates imposed by the enterprises in relation to the scanning surcharges in 2017 and 2018.
20. In addition to the series of engagements held between RMC, the Penang Port Commission, the enterprises and FMM to address the concerns in relation to the congestion issues at the Penang Port, FMM in a meeting dated 8.4.2022 revealed that the issue on scanning surcharged has already been resolved.

Therefore, further investigation on this matter by the Commission will unlikely give any significant impact to the market.

21. Notwithstanding the above, this decision should not be taken to imply that the Commission would cease to monitor market practices in the haulier industry.

DATE: 31 JANUARY 2023