COMPETITION APPEAL TRIBUNAL

IN THE COMPETITION APPEAL TRIBUNAL AT PUTRAJAYA

IN FEDERAL TERRITORY OF PUTRAJAYA, MALAYSIA

APPEAL NO. 1 OF 2021

BETWEEN

DAGANG NET TECHNOLOGIES SDN BHD

(Company No. 177974-T)

(APPELLANT)

AND

COMPETITION COMMISSION

(RESPONDENT)

BEFORE

DATO' A AZIZ BIN A RAHIM

DATUK DR. MOHD GAZALI BIN ABAS

DATUK MOHD RAFEE BIN MOHAMED

INTRODUCTION

The complaint against the appellant is that it has used its dominant position to require existing and new entries of software suppliers in the relevant market to sign a new agreement – the MyChannel Partner Agreement (MCPA) – which contains an exclusivity clause ('the Clause'). On this complaint, and after investigation, the respondent

found the appellant had committed an infringement of subsection 10 (1) of the Act for conduct that is prohibited. The respondent ordered the appellant to pay a penalty of RM10,302,475.98. The appellant is aggrieved and not satisfied with the finding of the infringement and the imposition of the penalty. Hence, this appeal.

BACKGROUND FACTS

[1] The appellant is a private limited company established on 18.1.1989 and is engaged in the development, management, and provision of business to government (B2G) E-commerce services and computerized transaction facilitation services. The appellant was previously known as Electronic Data Interchange (M) Sdn Bhd before changing to its current name on 13.7.2000.

[2] The appellant is a wholly owned subsidiary of Dagang Nextchange Bhd [10039-P] (formerly known as Time Engineering Bhd) a public listed investment holding company engaged in the business of information communication technology and energy.

[3] The government decided that customs declarations are to be submitted electronically to enhance the tax collection system and to facilitate trading in Malaysia. Accordingly, in 1992 the Royal Malaysian Custom (RMC) issued an invitation to tender for the development and maintenance of the Sistem Maklumat Kastam (SMK). Edaran IT Services Sdn Bhd [155273-A] (Edaran IT Services) was awarded the tender and had since developed the SMK for the RMC. At the same time Edaran IT Services has been maintaining the provision of the back-end services of the said system.

[4] By agreement dated 1.3.2005 the government granted to the National Chambers of Commerce and Industries of Malaysia (NCCIM) the sole and exclusive right to undertake the organization, development, and implementation of a trade documentation system. NCCIM then appointed the appellant to undertake the development and production of all aspects of the trade documentation system (which later become to be known as National Single Window (NSW)) and the provision of services that facilitates the trading and finance communities in the exchange of data, submission of documents and transmission of messages electronically, using the UN/EDIFACT standards between themselves and the RMC.

[5] By an agreement the appellant was granted the right to operate a trade documentation system connected to the SMK to facilitate the exchange and submission of trade documentations (such as Customs Declarations, Cargo Manifests, and several related documents) and transmission of messages electronically using UN/EDIFACT standards.

[6] By an agreement dated 19.11.2009 the appellant was appointed by the government to be the service provider to design, develop, operate, and maintain the NSW system for the purposes of providing the NSW services. The appointment was for 5 (five) years from 2009 to 2014. No other company or enterprise was appointed by the government for that purpose during that period. Therefore, the appellant became the sole service provider for NSW. This arrangement was renewed for another 4 years by the Ministry of Finance (MOF) via supplemental agreement dated 24.10.2014 and a letter dated 19.9.2016. Subsequently it was further extended to 31.8.2019 via a letter from MOF dated 20.12.2017. At the time of the respondent's decision on this case, the appellant's appointment as the sole service provider for NSW has been extended to 31.8.2021. During

the hearing of this appeal, we were informed by the appellant's counsel that the appellant's contract was further extended until 31.8.2024 by the Government.

[7] The NSW is an electronic based ecosystem that enable Customs related documents and transactions to be transferred electronically between the trading communities and regulatory authorities in Malaysia via a single point of entry i.e. the NSW. The trading communities consist of manufacturers, importers, exporters, freight forwarders and shipping agents (collectively referred to 'the end users") whereas the regulatory authorities consist of the RMC terminal and port operators, port authorities, bankers, and permit issuing agencies such as the Ministry of International trade and Industry, Ministry of Agriculture and SIRIM Berhad.

[8] The appellant provides the following essential end-users services in carrying out import and export trading activities:

a. Customs declarations – allows the end-users to submit customs declaration forms to RMC for approval.
b. Customs duty payment – allows the end-users to pay their duties and tax to the RMC, permit fees to permit issuing agencies and any bill payment to the appellant.
c. Preparation of permits for approval – allows end-users to obtain the permits from the permit issuing agencies electronically.
d. Preparation of permits under the Strategic Trade Act 2010 - allows the end-users to obtain the permits from the permit issuing agencies electronically.
e. Preferential certificate of Origin – allows end-users to obtain the permits from the permit issuing agencies electronically; and

f. Electronic Manifest System – allow the end-users to submit their cargo manifest and vessel information to the relevant port authority for approval.

To utilise the above services, the end-users will have to transmit the required information to the regulatory authorities via the NSW and the process flow is then reversed from the regulatory authorities to the end-users via NSW. The connectivity between the end-users and the regulatory authorities via NSW is only possible using the Sistem Maklumat Kastam (SMK). To utilize the services provided by the appellant, the end-users may use (i) eDeclare, which is the appellant own online web portal, or (ii) Enterprise Application Interface (EAI) which is the end-users' own back-end software, and (iii) software obtained from the listed software providers. The software used however must be connected to an electronic mailbox to transmit the trade facilitation data; and the appellant is the sole generator of the electronic mailbox. End-users will not be able to use the software without the electronic mailbox. Each software is hardcoded with the electronic mailbox's unique identification number as well as the end-user's username and password. Therefore, one electronic mailbox can only be used for one software. One of the listed software suppliers is Rank Alpha.

[9] The process flow for the submission of customs declaration forms by end-users are as follows:

(i) the end-users entered the required data -customs related data – into the software and the said data will be transmitted using the electronic mailbox to appellant's gateway platform under the NSW.

(ii) once received, the appellant converts the data into the UN/EDIFACT standard and transmits them via the same electronic mailbox to the RMC under SMK.

(iii) RMC will then review the data and will acknowledge the same or will inform the end-users of any errors in their customs declaration data via a reversed process flow.

[10] For the services rendered, the appellant imposed on the end-users a one-time registration fee, a monthly charge as well as transaction charges according to the amount of data transmitted monthly by the end-users to NSW/SMK for the use of the electronic mailbox.

[11] In 2013 the government mooted the idea of the Ubiquitous Customs System ('the uCustoms') with a projected launching date in 2016. The uCustoms will be operated by the RMC and it will merge the NSW and SMK into a new NSW system to provide a one stop centre for trade facilitation services providing end-users with end-to-end services in terms of obtaining or submitting the relevant trade facilitation documentations from and to the relevant government agencies including the RMC.

[12] Subsequently RMC issued a request for proposal ("RFP") – *Tawaran Merekabentuk, Membangun, Memasang, Mengkonfigurasi, Menguji, Mentauliah Dan Menyelenggara System Service Provider untuk National Single Window.* This was announced on 24.1.2015. This date is significant for this appeal. After this announcement the appellant took certain business decisions to protect its business interests and its market which led to the complaint against the appellant using its dominant position.

[13] On 23.11.2015 the RMC announced the appointment of both the appellant and Edaran Trade as National Single Window ('NSW') service

providers to all relevant stakeholders by means of a circular letter. The appointment of Edaran Trade Network Sdn Bhd (Edaran Trade) (1156875-T) as the service provider was conditional on the formation of joint venture between Edaran IT Services (15527-A) and Rank Alpha (269716-T) for the duration of Edaran Trade's appointment as a service provider for the uCustoms project. Edaran Trade is a private limited company established on 25.8.2015 and principally engaged in providing information technology services activities, NEC computer training, and wholesaling of computer hardware, software, and peripherals.

[14] The reason for the appointment of more than one service provider is to provide more value-added services to the end-users. Under the proposed uCustoms system, the end-users would have two options in submitting or preparing their trade facilitation documents. Firstly, the end-users may directly submit or prepare trade facilitation documents via uCustom online web-based portal without a fee. This option does not involve any service or software provider in completing their trade facilitation documents. The second option is that the end-users may use or acquire the services of service providers in the uCustom system for additional value-added services for a fee.

[15] However due to technical issues on the development of the uCustoms system and the complex nature of the project, the launching of the uCustoms system was delayed; and at the date the respondent delivered its final decision on 16.02.2021 the uCustoms system is yet to be commissioned and its operating environment has yet to be finalized by the RMC. Nevertheless, the respondent noted in its decision at paragraph 48 that *'the uCustoms system is evidently shown to be progressing on a yearly basis. The scheduled date for the*

pilot and simulation of the UCustoms with selected companies based in West Port and Port Klang was held on 17.12.2018'.

[16] Earlier we mentioned that the date of the announcement has a significance in this appeal. From the records before us, particularly the narratives by the respondent as to the facts of this case, we noted that prior to the date of the announcement of the uCustoms system project, the appellant was the sole service provider for the NSW in tangent with SMK and RMC; and the appellant had entered into several service agreements with various parties who were software providers – in particular on 15.4.2008 it entered into an agreement named as 'the Master Solution Partner Agreement' (MSPA) with Mobile Force for a term of 5 years. On 17.2.2009 the appellant entered into the same agreement with Rank Alpha, also for a 5-year term. On 17.4.2009 the appellant again entered into an agreement – the MSPA – with Wynet for a term of 5 years. All the above agreements between the appellant and the software providers did not contain the Clause. It is noted that all the agreements were to expire before 2015, the year the RMC announced the proposed uCustoms system project. It is also worth noting that the respondent, at paragraph 52(iv) of its decision, observed that the appellant was aware of the additional service provider to be appointed by the government for the upcoming uCustoms project as early as 8.4.2013.

[17] On 25.3.2015 the appellant issued an invitation letter to Rank Alpha to participate in a new partner program which is the 'MyChannel Partner Agreement' (MCPA) which is to replace the earlier MSPA. Prior to this, on 14.3.2014 and 24.9.2014, the appellant had issued letters to Rank Alpha for the extension of the MSPA which is to last until 31.3.2015. The appellant also informed Rank Alpha of a new agreement being finalized to replace the MSPA.

[18] Two months after the announcement on 24.1.2015 by RMC on the issuance of the RFP for the appointment of the uCustom Service Provider, the appellant issued an invitation letter to Rank Alpha to participate in a new partner programme known as 'MyChannel Partner Agreement' (MCPA) which contains the new terms and conditions notably the Clause and the fee clause. The Clause stipulates that during the tenure of the MCPA, the vendor shall not engage with other service provider, to be appointed by the RMC under the uCustoms service provider program, to provide similar services to end users. But Rank Alpha did not response to the invitation. However, between 10.4.2015 and 15.4.2015 there was communication between Rank Alpha and the appellant; but Rank Alpha did not sign the MCPA that contains the Clause.

[19] Meanwhile, on 14.8.2015 the appellant and Edaran Trade were appointed as the service providers for uCustoms. On 24.10.2015 appellant informed the 9th Steering Committee meeting that uCustoms would be implemented on 1.12.2015 and registration with uCustoms would start on 1.1.2016. On 29.10.2015 the appellant made an announcement to the end-users on its appointment as the service provider for uCustoms and that DNeXPORT and Mobile – Force were its current business partners for the NSW and end-users were encouraged to migrate to its business partners. DNeXPORT signed the MCPA which contained the Clause with the appellant on 30.10.2015. Between 4.12.2015 and 22.1.2016 two other software providers – Buttonwood and Crimsonlogic – signed the MCPA that contained the Clause with the appellant.

[20] Against the above background, there were two complaints filed against the appellant. The first complaint was filed by Rank Alpha

regarding the Clause in the MCPA. The complaint was filed on 2.12.2015 pursuant to section 15 of the Act. The second complaint was filed by Titimas Logistics, another software provider on 5.1.2017. The complaint by Titimas Logistics was on the refusal by the appellant to supply electronic mailboxes to end users. Thereafter the respondent commenced investigation on the appellant regarding the two complaints in accordance with the provisions of the Act. However, the complaint by Titimas Logistics was dismissed. The respondent finds no merit in the complaint.

[21] The above background facts are culled from the information recorded by the respondent in its final decision, and they are not in dispute. The above scenario also remained largely unchanged since 2013 until 2015.

SUBMISSIONS AND ARGUMENTS BY COUNSELS AND OUR FINDINGS

[22] At the close of its investigation the respondent found and concluded that the appellant:

(i) holds a dominant position within the meaning of section 2 of the Act (paragraphs 190 and 195 and 206 of the respondent's final decision).

(ii) has no reasonable commercial justification in the imposition of the Clause in the MCPA on the software providers during NSW-SMK period and that the Clause imposed by the appellant can have anti-competitive effect in the provision of trade facilitation services in Malaysia (paragraphs 253 and 260 of the respondent decision).

(iii) refusal to supply the electronic mailboxes does not constitute an abuse of its dominant position due the insignificant effect to the relevant market (paragraphs 280 and 299).

(iv) has failed to satisfy the requirement of reasonable commercial justification under subsection 10(3) of the Act (paragraph 311)

(v) removal of the Clause does not warrant the exoneration of the appellant from liability.

(vi) had committed an infringement of the Act (paragraph 348).

[23] Thereafter the respondent proceeded to issue an order and directions pursuant to section 40 of the Act which included an order to cease and desist; and imposed a financial penalty of RM10,302,475.98 on the appellant.

[24] In its notice of appeal dated 12.3.2021, at pages 42 to 57, the appellant raised several grounds of appeal. The first ground of appeal is the issue regarding the relevant market allegedly to be affected by the appellant conduct. The appellant submitted that the respondent erred in its finding that the relevant market is the trade facilitation service in Malaysia and had failed to identify the NSW system as the only relevant market. The appellant further submitted that the respondent had failed to apply 'Hypothetical Monopolist Test' (HMT) or the 'Small but Significant in Non-Transitionary Increase in Price (SSNIP) Test' in determining the relevant market, which appellant submitted are necessary to determine if the appellant is dominant in the said relevant market.

[25] Subsection 10(1) of the Act provides that *'An enterprise is prohibited from engaging, whether independently or collectively, in any conduct which amounts to an abuse of a dominant position in market for goods or services.'*. We therefore agree with both the appellant and the respondent that the determination of the relevant market is crucial because we need to assess the effect of the infringement on the market behaviour. In other words, section 10 of the Act is effect based. In this regard the identification of the relevant market is to determine if there was in fact competition within the said relevant market and to what extent there were any anti-competitive acts.

[26] The appellant submissions are two pronged. Firstly, the appellant said the respondent had widened the definition of the relevant market in its final decision of 16.2.2021 as compared to its proposed decision earlier. In its proposed decision dated 6.4.2018 (served on the appellant on 10.7.2018) the respondent had identified the NSW system as the relevant market. But in its final decision the respondent defined the relevant market to *'provision of trade facilitation services'* as opposed to just *provision of trade facilitation in the NSW.'*. The appellant argued that to define NSW as the only relevant market was the right thing to do because in that market the appellant has a monopoly, and this is not being disputed or challenged. Learned counsel for the appellant submitted that the respondent cannot approbate and reprobate.

[27] The term 'market' in section 2 of the Act means *'a market in Malaysia or in any part of Malaysia, and when used in relation to any goods or services, includes a market for those goods and services and other goods or services that are substitutable for, or otherwise competitive with, the first mentioned goods or services.'*.

[28] The respondent in its final decision had determined the relevant market in the following terms:

> *'176. The commission is of the view that the relevant market in this instant case is the provision of trade facilitation services in Malaysia ("the relevant market")'.*
>
> *'177. Dagang Net is the sole service provider in the provision of trade facilitation services under the NSW. Dagang Net, as the sole trade facilitation service provider, operates at the upstream level whilst Rank Alpha and Wynet, as software providers for submission of trade facilitation data to SMK via the NSW operate at the downstream level of the relevant market. The upcoming uCustoms system is the related market that will replace the NSW at the later date.*
>
> *178. The Commission is of the view that the NSW-SMK system and the uCustoms system are interrelated. Notwithstanding the fact that the uCustoms system is yet to be in operation, both the NSW-SMK system and the uCustoms system serve as platform for end users to submit trade declarations to RMC. Therefore, the NSW-SMK system and uCustoms system can be said of the same market, that is, provision of trade facilitation services. It is evident from the available evidence obtained in the course of the investigation that NSW-SMK system will be replaced by the uCustoms system'.*
>
> *179. The commission is of the opinion that the uCustoms system will inevitably come into operation sometime soon as evident from various documentation capturing its development and progress. Therefore, it is not a hypothetical market'.*

[29] In response to the appellant's submissions and in support of the respondent's finding as quoted above, learned counsel for the respondent submitted that there is no shifting of goalpost. The respondent did not widen the determination of the relevant market in its final decision as compared to its proposed decision. Learned counsel for the respondent further submitted that the appellant was aware that the relevant market is always identified to consist of the NSW and uCustoms systems. This fact, he argued, is obvious from the written representations by the appellant against the respondent's proposed decision. To support his submission, learned counsel for the respondent referred to paragraph 218 of the respondent's proposed decision which he said explicitly identified uCustoms system as a relevant market. Therefore, learned counsel submitted the respondent did not approbate and reprobate on this issue.

[30] Secondly, and regarding the determination of the relevant market the appellant also submitted that the respondent had failed to apply the legal and economic tests. We agree with the submissions by learned counsel for the appellant that the respondent had not applied the HMT and the SSNIP test in its determination of the relevant market. But in our opinion the failure to apply those tests are not fatal, and not necessarily renders the determination of the relevant market by the respondent wrong in fact and in law. In our view the two tests as laid down by the cases from the European Union jurisdiction in particular the case of *Europeanballage Corpn and Continental Can Co Inc v Commission (Case No. 6/72)* cited by the appellant counsel in his written submissions are just tools that can be used in situation where the actual relevant market is in doubt or overlapped geographically. The case cited by the appellant is a good example. In that case the Commission in the first instance held that the *Continental Can* and its subsidiary had a dominant position in three different product markets

– cans for meat, can for fish and metal tops -without giving a satisfactory explanation. On that ground, the Court of Justice, on appeal by the Company, annulled the decision of the Commission (see paragraph 138 at page 69 of the appellant's written submissions dated 02 September 2022). But regarding the 'market' which factual situation is clear and can be easily identified, it may not be necessary to apply the tests to determine the market. The ordinary dictionary meaning of 'market' is a concept of space or gathering place where products and services are offered for trade. This concept of space or gathering place may be limited or defined geographically or it may be borderless; its definition is governed only by the type of goods and services that are offered for trade. This is obvious from the wording of the term 'market' in section 2 of the Act which we have quoted above when it says that in relation to goods or services it includes market for the substitutes for the said goods or services but confines to market in Malaysia or any part thereof. In this instance appeal, the goods or services that are offered for trade are the services for the facilitation of trade (or more accurately in our views Customs services) for the purpose of Customs tax collections using IT technology available at the material time. It is only one kind or one category of service; and it is being offered by a sole service provider that is the appellant through agreement with the Government of Malaysia. So, the market is easily identifiable. In the case referred to and cited by the appellant the underlying principle is substitutability of the products, goods or services which may require the application of either or both tests to determine the market. In this instance, there is no substitutability issue because the services that are offered remain the same whether using NSW, or uCustoms, in the event the latter becomes operational and replaces the NSW system.

[31] Regarding the issue of approbation and reprobation by the respondent we do not think there is any merit at all. At paragraph 208

of the respondent's proposed decision, the respondent already identified uCustoms system as the related market. And the appellant is aware of this fact because the proposed decision was given to the appellant to comment upon and in fact the appellant was given opportunity by the respondent to make representations on the proposed decision. Furthermore, since 2009 the appellant had been the sole service provider for trade facilitation services for the RMC. This was, and still is, the systems that is operational for the purpose of trade facilitation services with the RMC using the SMK and the NSW until the Government (i.e. RMC) announced the proposed uCustoms system that will eventually merge with and replace the ongoing NSW. But the nature and kind of services offered for trade facilitation under the proposed uCustoms is still the same – the trade facilitations services. Thus, in our view it is still the same market; it is only a migration from one existing system to an enhanced and probably more efficient system. Therefore, we find no merit in this ground of appeal by the appellant.

[32] The next ground of appeal raised by the appellant is the issue of the appellant's dominant position as stated at paragraph B of Part 3 of Notice of Appeal dated 17.3.2021. We will consider this ground of appeal together with another ground of appeal at paragraph C of the same Notice of Appeal which is about abuse of dominant position and its reasonable commercial justification because the two grounds are interrelated.

[33] The respondent in its final decision found, as we mentioned earlier, the appellant 'is in a dominant position'. Section 2 of the Act defines *'dominant position'* as *'a situation in which one or more enterprises possess such significant power in a market to adjust prices or outputs or trading terms, without effective constraint from*

competitors or potential competitors.'. We agree with the statement by the respondent at paragraph 182 of its final decision that an enterprise can be in a dominant position because of several factors but these factors are not necessarily determinative. The MyCC's Guidelines on Chapter 2 Prohibition listed several factors that can be considered whether an enterprise is in a dominant position in each relevant market. One important factor is the existence of large market shares. The respondent, in its Guidelines on Prohibition, considers a market share above 60% is an indication of the existence of a dominant position in the relevant market. Other factors that can be considered under the MyCC Guidelines on Prohibition to indicate a dominant position are the existence of barriers to entry or expansion and the existence of countervailing buyer power, preventing either potential competitors from having access to the market or actual ones from expanding their activities on the market.

[34] We noted that since 2009 the appellant is the sole service provider for trade facilitation services using the platform of NSW and SMK. As the sole concession holder in the NSW-SMK market the appellant holds 100% market share. The respondent, at paragraph 196 of its final decision, holds the view that there is indeed a high barrier for another service provider to compete with the appellant and enter the NSW-SMK market for trade facilitation services. The respondent found that any service provider that wishes to enter the market must have the applicable expertise and capabilities and, must submit their proposal which is subjected to the procurement process of the RMC and be approved as a service provider. The respondent also noted at paragraph 198 of its final decision that the end users do not possess the ability to switch to other service providers in the NSW-SMK system as the appellant is the sole service provider. Thus, the appellant has monopoly of the NSW-SMK market for trade facilitation services. Therefore, on the facts we agree that the appellant is in a dominant

position. But the real question is, for the purpose of section 10 of the Act, whether the appellant is dominant within the meaning of section 2 of the Act? The respondent answered that question in affirmative at paragraph 206 of its final decision.

[35] But the appellant says otherwise. The appellant submitted that as a monopolist of the NSW-SMK market it cannot be said to have a dominant position within the meaning of section 2 of the Act. The appellant also says that it cannot be said it is in a dominant position under subsection 10(1) of the Act because the appellant does not have any competitors in the NSW-SMK market. The appellant relied on the Court of Appeal case of *Labuan Ferry Corp Sdn Bhd v Chin Mui Kien* [2018] 3 MLJ 256. The appellant in *Labuan Ferry*, held a monopoly as the sole operator of the ferry services between Menumbuk and Labuan by virtue of an agreement with the government of the State of Sabah. The ferry service operated by the appellant in that case was essential to trade, commerce and transportation of goods, products, and people between the two territories i.e. Sabah and Labuan. There was no other ferry operator or company that provides ferry services between the two territories. At one point, the appellant raised the ferry charges from RM1500.00 to RM1800.00 depending on the types of vehicles using the services. The respondent in that case complained.

[36] Learned counsel for the appellant in this appeal, submitted and argued before us that *Labuan Ferry* case is applicable because in that case Justice Abdul Rahman Sebli JCA said, at paragraph 60 of the judgment, that an enterprise that is in a *'dominant position within the meaning of s 10(1) of the Act is not to be equated with a monopoly which involves no competition.'*. The learned judge further said that the monopoly of essential products or services falls outside the purview of the Act. The learned judge also said, at paragraph 60 of the

judgment in that case, that the Act has nothing to do with the common law doctrine of prime necessity which is concerned with the obligation by monopoly suppliers of essential products and services to supply the products and services in consideration for fair and reasonable payments, and not with the process of competition. Thus, to put in simple words, learned counsel for the appellant argued that although the appellant is a monopoly regarding the provision of trade facilitation services by virtue that the appellant is the sole concession holder or service provider, the appellant is not dominant within the meaning of section 2 of the Act.

[37] Responding to the above arguments by the appellant, learned counsel for the respondent submitted that the appellant reliance on *Labuan Ferry* case is unmaintainable. This is because *Labuan Ferry*, learned counsel submitted, is not a case under subsection 10(1) of the Act. It is a case in which a private individual sued the monopolistic company for raising the charges; and the issue in that case is whether the doctrine of prime necessity applies in such situation. Learned counsel for the respondent argued that the Court of Appeal in *Labuan Ferry* did not consider the applicable guidelines and cases on monopolies vis-à-vis an offence of abuse of dominant position or its elements. Learned counsel for the respondent referred to us, paragraph 45 of the judgement in *Labuan Ferry* case where the Court said that –

> *'to directly or indirectly impose unfair selling price or other unfair trading condition on any supplier or customer is an abuse of dominant position within the meaning of s10(1) of the Competition Act and is prohibited. We do not think it can be disputed that by having monopoly of the ferry service between Menumbok and Labuan, Labuan Ferry was in dominant position within the meaning of s 2 of the Competition Act.'.*

[38] The appellant also cited and relied on the case of *Real Big Ventures Sdn Bhd v Pentadbir Tanah Daerah/Tanah Petaling (PTD Petaling) & Others* [2022] MLJU 1198. This is a judicial review case. The first respondent in that case (i.e. PTD Petaling) had issued a circular stating that application for permit to stockpile and extraction of sand must be made through the 5th respondent, a private company. The applicant in that case applied for a permit to the first respondent but was rejected after the first respondent consulted the 5th respondent. The applicant filed for judicial review against the rejection and one of the grounds raised in the application was that the 5th respondent had a monopoly, and this was against the Act. This case was decided at the High Court; and the High court referred to the Second Schedule of the Act and ruled that the Act is not applicable. Thus, learned counsel for the appellant submitted and argued that in a situation where an enterprise is a monopoly like the appellant the issue of dominance does not arise; more so when there is no competitor.

[39] In reply, learned counsel for the respondent argued that *Real Big Ventures* case also is not a case under subsection 10 (1) of the Act and the Court in that case never addressed infringement of section 10 of the Act. Therefore, learned counsel said, the appellant reliance on *Real Big Ventures* case is misplaced.

[40] Instead, learned counsel for the respondent submitted there are other cases – local and foreign cases - that are more relevant and applicable to the present appeal. One of the cases cited by learned counsel is *MY E.G. Services Berhad & Anor (MyEG) v Competition Commission & Anor* (Application for Judicial Review No. WA-25-81-03/2018). *MyEG* originated from the decision of this Tribunal (of different Coram) which found that *MyEG* as a concession holder is in

a dominant position within the ambit of section 2 of the Act. Though *MyEG* is also a judicial review case, it originated from the decision of this Tribunal. Also, important to note is that the decision of the High Court in *MyEG* was affirmed by the Court of Appeal. The High Court also found that *MyEG* holds the dominant position in both upstream and downstream market. Learned counsel for the respondent also referred to us cases from the European Union to support the proposition that an enterprise which enjoys legal monopoly either by provisions of the law or by agreement with the authorities is, and can be, in a dominant position within the Act. These cases are: *General Motors Continental NV v Commission -Case 26/75; Telemarketing (CBEM) SA -Case 311/84 and Klaus Hofner and Fritz Elser v Macrotron GmbH -Case C-41/90.* All these cases ruled that an undertaking which operates in a monopolistic environment and in absence of competition is in a dominant position within the meaning of Article 86 of the Treaty. Article 86 of the EU Treaty is like our section 10 of the Act. Thus, learned counsel for the respondent submitted that both Malaysian and EU case law recognizes that a monopoly can still be regarded as an enterprise in a dominant position; therefore, the respondent's findings in the final decision on this issue are consistent with established legal principles in Malaysia and the EU.

[41] Learned counsel for the appellant insisted in his submissions that *Labuan Ferry* is the more relevant and applicable case to the facts of this appeal and should be followed as compared to *MyEG* case and the EU cases cited by the respondent's counsel. Learned counsel for the appellant argued that the respondent had wrongly disregarded paragraph 60 of the *Labuan Ferry's* judgement where the Court held that dominant position within the meaning of subsection 10(1) of the Act cannot be equated with a monopoly. Learned counsel for the appellant urged upon us not to follow *MyEG* case because the facts in that case are different – in *MyEG*, the enterprise concerned had

monopoly in upstream and downstream markets through its subsidiaries. Further, learned counsel submitted the Court made the finding that *MyEG* had monopolistic control of the markets by looking at the enterprise as a group. Unlike *MyEG*, learned counsel argued, the appellant in this appeal only has monopoly in the upstream market and has no control in the downstream market. Learned counsel submitted that the only provision in the Act that relate to monopolies is found in Second Schedule to the Act. Prior to this, the appellant had already raised this argument on the Second Schedule of the Act when it made it oral and written representation before the respondent regarding the respondent's proposed decision on 29.7.2019. The Second Schedule of the Act sets out the exceptions to Chapter 1 (the anti-competitive agreements) and Chapter 2 (on prohibitions) of the Act. By virtue of this Second Schedule, activities listed in paragraphs (a) to (c) of the Schedule is not subjected to Chapters 1 and 2 of Part III of the Act. For our purpose the relevant paragraph of the Second Schedule exemption is paragraph (c) which says:

> *'an enterprise entrusted with the operation of services of general economic interest or having the character of a revenue producing monopoly in so far as the prohibition under Chapter 1 and Chapter 2 of Part III would obstruct the performance, in law and in fact, of the particular tasks assigned to that enterprise.'*

Learned counsel for the appellant submitted and argued that the appellant is an enterprise or undertaking that is engaged in commercial activities providing services for facilitation of trade documentations and data between the end-users and RMC is entrusted with the operation of services of general economic interest. Therefore, learned counsel submitted that the appellant comes within the ambit of paragraph (c) of the Second Schedule of the Act. Learned counsel supported his argument by referring to Guidelines on Services

of General Economic Interest Exclusion by Office of Fair-Trading UK issued in December in relation to the interpretation of paragraph 4 of Schedule 3 of UK Competition Act 1998, which is in *pari materia* with paragraph (c) of the Second Schedule of the Competition Act 2010. According to the UK Office of Fair Trading referred to above, the criteria that must be fulfilled to qualify for exemption exclusion under paragraph 4 of Schedule 3 of the UK Competition Act 1998 are as follows:

(i) It must be an undertaking/enterprise,
(ii) An undertaking/enterprise must have as its principal objective the raising of revenue for the state through provision of a particular service,
(iii) An undertaking/enterprise must have been granted an exclusive right to provide the service, hence be the monopoly provider of that service, and
(iv) An undertaking/enterprise must show that the application of the prohibitions under the UK Competition Act 1998 would obstruct the performance in law or in fact, of the task assigned to it.

Learned counsel for the appellant submitted that, in relation to paragraph (c) of the Second Schedule of the Act, the appellant meets all the above criteria; and regarding criteria (iv) learned counsel submitted that the appellant's performance of the NSW Agreement will be obstructed if the appellant is found to have infringed subsection 10(1) of the Act.

[42] We have given our utmost considerations to the submissions by both parties. Regarding the issue whether the appellant is in dominant position, the answer in our view is obvious. The appellant never deny that it has sole concession to provide the trade facilitation and data

services since 2009. And this concession has been extended from time to time, the last extension being in 2019 where the appellant position as the sole concession holder was extended till 2021. During this period, there was no other company being appointed to provide the trade facilitation services and operate the NSW. Therefore, we agree with the finding by the respondent that appellant is a monopoly regarding the provision of services of trade facilitation in terms of documentations and data transmission between the end-users (i.e. the exporters, importers, port authorities and etc) and the RMC linked with SMK using the NSW. However, the more pertinent question is whether appellant is 'dominant' within the meaning of the term as defined in section 2 of the Act. We mentioned earlier in this decision, the respondent found the appellant to be so. But the appellant challenged this finding because it said it has no competitor in the relevant market. The answer to this question is important because subsection 10(1) of the Act prohibits any enterprise which is dominant (within the meaning under section 2) in the market from engaging in any conduct, either independently or collectively, which amount to an abuse of that dominant position in any market for goods or services. Some of the conducts (and these are not exhaustive) which are considered as abuse of a dominant position are listed in subsection 10(2) paragraphs (a) to (g) of the Act.

[43] At this juncture we want to digress from the above discussion to focus our attention on the provisions of subsections 10(3) and (4) of the Act. Subsection (3) of section 10 of the Act allows an enterprise in a dominant position to take any step which has reasonable commercial justification or represents a reasonable commercial response to the market entry or market conduct of a competitor. We shall see later the appellant has used this subsection to excuse itself from being penalised for a conduct by the appellant which is alleged to amount to an abuse of the appellant dominant position. Subsection

(4) of section 10 of the Act provides that an enterprise's market shares above or below any particular level in any market is in itself shall not be regarded as conclusive as to whether the enterprise is dominant or not in that market. In other words, besides the level of market share, there are other factors to consider before we can conclude whether an enterprise is in dominant position or not in that market. Anyhow, it is worth to remember that the appellant has 100% share of the relevant market that provides trade facilitation services.

[44] Returning to the issue whether the appellant is dominant within the meaning of section 2 of the Act, we have noted above that the respondent found it to be so. The respondent made this finding on the facts about appellant being the sole concessioner on the services provided. The respondent also supported its finding on the legal principles decided by case law like MyEG case and a few other cases from the EU jurisdiction. We have referred to these EU cases above. All the cases relied on by the respondent, and cited before us by the learned respondent counsel, agreed on one legal principle – that is an enterprise in a monopolistic position can be dominant under the Act (in the case of Malaysia) or the EU Treaty (in the case of European Union) despite certain exemption or exclusion provisions under the respective law.

[45] The appellant, as we noted earlier, relied mainly on *Labuan Ferry* case which held that an enterprise which has monopoly as service provider for ferry services cannot be equated with being dominant under the Act. The appellant also relied on *Real Big Ventures* case (supra) which was decided along the same line as *Labuan Ferry.* The appellant argued that *MyEG* case is not good precedent to follow because *MyEG* and all its subsidiaries which have monopolies in upstream and downstream activities have been group together as one

entity. The appellant further argued that the EU cases should not be accepted because it contrary to section 3 of the Civil Law Act 1956 – which has a cut-off date for reliance on cases from UK and EU.

[46] In our opinion, the finding and conclusion by the respondent that the appellant is dominant within the meaning of section 2 of the Act and rejecting the appellant contention that being monopolistic cannot be equated as being dominant is correct. As the sole provider of the services, appellant has a monopoly of the market. In that position the appellant has significant power in the market to prices, outputs, or trading terms subject only to any restrictions agreed between the Government and the appellant without effective constraints from competitors or potential competitors. As a monopolist the appellant has all these characteristics. Regarding the preference of *MyEG* case over *Labuan Ferry* and *Real Big Venture* cases by the respondent, we are of the view that it is the discretion of the respondent as the adjudicator of facts and law to decide and choose which case law or decision to follow as precedents, which decision and choice in our view has been exercised judiciously with the respondent giving reasons for its choice of preference. Preference of course is for decisions emanating from our Court of law; however, decisions from other jurisdictions on the same subject matter, if they are relevant, may be referred to for guidance and treated as persuasive authority to follow. On our part, we consider *MyEG* and the EU cases relied on by the respondent are the better authorities or precedents to follow. These cases arose from the challenge under the respective competition or anti-competition law in Malaysia and EU compared to *Labuan Ferry* and *Real Big Ventures* case which are civil cases and never investigated and decided by the respondent under the Act. Thus, the civil courts would not view the cases as the respondent would have had the respondent investigated and decided on those cases.

[47] Nevertheless, we need to take notice that the Tribunal (i.e. The Competition Appeal Tribunal) is an administrative Tribunal, and its decision is an administrative decision. We do not think that the Tribunal is bound by the doctrine of precedents as strictly as the Court of Justices. We are not saying that the Tribunal should disregard the law and the legal principles that govern the issues at hand completely. We are saying that the Tribunal should be less preoccupied with the legal arguments by counsels appearing before it. The Tribunal should focus on the economics and commercial arguments and the finding of facts by the Commission/respondent supporting those arguments. We believe if this is taken care of, the law will fall into place. We are advocating this approach because we are dealing with issues of competition and anti-competition in a relevant market. In other words, we are concerned with the conducts of the market players in the relevant market and the market behaviour itself. Trade and commerce consist of vibrant activities and the market is continually evolving in character and behaviour because of legal intervention by the authorities regulating such behaviour and because of the ingenuity of the market players themselves in adapting to changing circumstances and environment to ensure business survival. The Tribunal should be more concerned on the conduct or behaviour of the enterprise that was the subject of the complaint and investigation by the respondent that has allegedly significantly affected free and fair competition in the relevant market. We should give more appreciation to the spirit of the Competition Act which is, as we understand it, to ensure healthy competition amongst enterprises in a relevant market. The legal restrictions and prohibitions on certain conducts and behaviour by any enterprise active in the relevant market are not to stifle its ingenuity and creativity to innovate market practices; but rather to ensure that whatever actions or innovations the enterprise undertake for that purpose do not strangle competitiveness in the

relevant market to the detriment of other enterprises or market players, and to compete on a level playing field, and not to the disadvantage of consumers.

[48] Taking the approach which we have described above, we are of the view that the appellant's argument regarding section 3 of the Civil Law Act 1956 should not dissuade the Tribunal to ignore or reject the relevant cases and decisions from other jurisdictions just because the cases and decisions do not meet the requirement of that section. As we have said above the Tribunal is at liberty to look at all relevant case law and decisions as persuasive authorities no matter from which jurisdiction they originated. The guiding principle for this judicial discretion is fairness and relevancy.

[49] Regarding the appellant's argument that a monopoly cannot be equated with being dominant because it has no competitor, we refer to section 2 of the Act which defines the term 'dominant', in relation to an enterprise, as one that has significant power to control and manipulate the relevant market by price fixing, control of production and restricts entry of new players (who could be potential competitors) into the relevant market, and many other means possible to preserve its monopolistic position. The word 'dominant' is an adjective and it is a relative word. It is used to describe a person, a situation, or a position in relation to another. Therefore, one can say that if there is no competitor than there is no dominance – just a monopoly. But in our view the definition of the term 'dominant' in section 2 of the Act must be seen, in the context of monopolistic enterprise, in relation to potential competitors or entries into the relevant market. From this viewpoint, it does not matter whether the enterprise which has a monopoly has a competitor or not. The co-existence of a monopoly and competitors in a single relevant market

in our opinion is a contradiction in terms. When an enterprise with a monopoly of a market has competitors, it no longer enjoys the benefits of the monopoly. The most sensible thing for it to do in such situation to preserve its monopoly is to scuttle the competition and the competitor before it becomes a threat to its monopolistic existence. It can easily do that because being a monopoly it is dominant. Its dominance is not because of no competitors but because of the very nature of being a monopoly. Therefore, we cannot accept this argument and we reject it.

[50] Having concluded that legally a monopoly can be equated with dominance, and that the appellant is a monopolistic enterprise, the next question to ask is whether the appellant has abused its monopolistic position? First, we need to remind ourselves that subsection 10(3) of the Act does not prohibit a dominant enterprise from engaging in conduct which may seem to be anti-competitive as a reasonable response to the market entry or market conduct of a competitor; or if the dominant enterprise can show reasonable commercial justification for such conduct. However, the burden to prove the requirements under subsection 10(3) is on the enterprise concerned. Secondly, we need to remember that the act or the behaviour of the appellant that is being questioned is the imposition of Clause in the new agreements with its partners and software providers.

[51] The respondent takes the view that section 10 of the Act should not be interpreted narrowly because subsection 10(1) is non-exhaustive; and the specific cases or examples of conduct that amount to abuse of dominant position listed in subsection 10(2) is also non-exhaustive. Accordingly, the respondent takes the position that the imposition of the Clause is a conduct within the ambit of the

prohibition under subsection 10(1) of the Act. We agree with the respondent's interpretation of section 10 of the Act that it should not be narrowly interpreted and that the examples and cases of abusive conduct listed in subsection 10(2) are non-exhaustive. The respondent also considered the abusive conduct of the appellant by insisting its business partners and software suppliers to sign an agreement with the Clause in it as having an adverse effect and consequences in the relevant market. At paragraph 239 of its final decision, the respondent is of the view that the Clause prevents the software providers from engaging with any other service providers in uCustoms system market and prevents the software providers from providing similar services to the end users in uCustoms system market. In this regard the respondent, at paragraph 240 of its final decision, said:

> *"Now, on the hypothesis that all the software providers were to sign the MCPA with Dagang Net during the tenure of the NSW-SMK system, this would effectively mean that other service providers would be prevented from competing with Dagang Net. This is because service providers would not have access to software providers in the uCustoms system. The exclusivity arrangement by Dagang Net, therefore, has disincentivised competition, whilst in counterfactual, Edaran Trade or any other service provider would have the ability to compete in the market for the provision of trade facilitation services. "*

Relying on authorities from the EU jurisdiction the respondent held that the concept of abuse is an objective one. The respondent is also of the view the abusive conduct of the dominant enterprise resulted in the weakening of competition which hinders the maintenance of the existing degree of competition or the growth of that competitor in the market. Thus, the respondent said a dominant enterprise has a special responsibility not to impair, by conduct falling outside the scope of competition on merits, genuine undistorted competition in

the market. [For EU cases referred to by the respondent for the foregoing views – see footnote 163 and 164 at page 89 of the Final Decision].

[52] Regarding effect of exclusivity on the market generally, the respondent referred to cases from EU and concluded that it is harmful to the market. The first case is *Hoffman La Roch* where the European Commission found that the customers were bound by an exclusive or preferential purchasing commitment in favour of La Roch for all or for a very large proportion of their requirement and this constitutes conduct of an enterprise occupying a dominant position, as this hampers the freedom of choice and equality of treatment of purchasers and restricts competition between manufactures in the common market. The second case is *Van Der Bergh Foods v Commission.* The Commission in that case found that when an economic operator who holds a dominant position in the market concludes an exclusive supply agreement it constitutes an unacceptable barrier to entry into the market and impairs effective competitive structure of the market. Thus, the respondent concluded in its final decision that the imposition of the Clause by the appellant on its software providers is an abuse of its dominant position in the relevant market.

[53] The exact wording of the Clause in the MCPA in question reads as follows:

> *'During the contract period or extended tenure, the channel partner shall not enter into any agreements, contracts or arrangements with any other party or service provider to be appointed by the royal customs of Malaysia under the uCustoms service provider program and providing similar services to the end users.'.*

The harmful effects of the Clause are also observed by the respondent in the witness statement of En Samsuri bin Ishak, who was then the Head of Legal and Contract Administration Department Dagang NeXchange Bhd. He also drafted the MCPA which contains the above Clause. At paragraph 21 of his statement to the Commission recorded on 25.9.2017 En Samsuri said:

> *'Based on my reading of the exclusivity clause of the MyChannel Partner Agreement, during the MyChannel Partner Agreement contractual period, the effect of the exclusivity clause is that any Business Partner would be bound to Dagang Net in the uCustoms operating environment when it is implemented and that they may not enter into any agreement with any other party appointed by the RMCD as service provider under the uCustoms operating environment. I also agree with the Commission's assessment that there is no mention of specific term 'technical and security' in the said Clause.'.*

[54] The appellant challenged the respondent's finding that the Clause is harmful to the market and is anti-competitive. The appellant argued before the Commission i.e. the respondent, that there is no evidence that the Clause is anti-competitive. The appellant also argued that, in the context of uCustoms system, the finding is flawed because uCustoms system has yet to commence operation as such it is a hypothetical scenario. Further, the appellant argued that the respondent had relied and made inferences based on circumstantial evidence namely the appellant's financial projections, the investment house research projections and internal meeting minutes for its finding. The appellant alleged that the respondent had referred to statements recorded from unreliable individual to justify its finding. The appellant submitted and argued that the *'existing technical*

protocol and specifications are exclusive to Dagang Net.'. Therefore, *'if a similar electronic mailbox system is used in the uCustoms system there may be security and technical risks as well as integrity issues in relation to software providers, when connected to more than one service provider; as well as in relation to end users, when connected to more than one software provider at the same time.'.* The appellant also justified its introduction of the Clause by arguing that it is a matter within its discretion based on duties and obligation to ensure security, stability, and integrity of NSW-SMK system under the Concession Agreement. Moreover, the appellant argued that there is no barrier to entry into the market for Edaran Trade to compete in the uCustoms system because software providers are permitted to engage with other service providers, including Edaran Trade, if the software providers develop another version of software to use with other service providers. Further, the appellant argued that at all material times, software provider Rank Alpha's end-users were still allowed to submit their respective Customs Declarations through the NSW-SMK system, and that the cessation of Rank Alpha as the appellant authorised software provider was on Rank Alpha's own volition and not due to the inclusion of the Clause in the new MCPA.

[55] The respondent rejected all the above arguments and justifications by the appellant. The respondent held that though the uCustoms system is yet to be in full operation, the Clause has borne its effect on the software providers upon signing the MCPA and throughout its tenure. The respondent also held that the conduct of the appellant in introducing the Clause can have significant effects of preventing, restricting or distorting competition in the upcoming uCustoms system market. In other words, by introducing and insisting on the Clause the appellant is creating barriers to entry into the market for its competitor and potential competitors. At paragraph 246 of its final decision the respondent by inference, peeked at the

appellant real intention in introducing the Clause. The respondent said *'in view of the upcoming uCustoms market, Dagang net (i.e the appellant) via the imposition of the exclusivity clause, had intention of retaining its current market share where in the NSW-SMK market, as such a clause would have had the potential effect of ensuring that all software providers would be exclusive solely to Dagang Net, leaving Edaran Trade at a competitive disadvantage when entering the uCustoms market.'.* At paragraph 253 of its final decision the respondent concluded that there is no reasonable commercial justification in the imposition of the Clause in the MCPA on the software providers during the NSW-SMK period. The respondent went further to hold that the purpose in introducing the Clause was merely to foreclose the market for the provision of the trade facilitation services and the appellant to retain its current market share in view of the upcoming uCustoms system.

[56] The appellant argued that the respondent has no evidence to conclude that the Clause is an abuse of dominant position. The appellant further argued that there is insufficient effect analysis done by the respondent to show that the Clause had an anti-competitive effect on the fact that the appellant could never exclude or potentially exclude competitors in a non-existent system, which we think the appellant is referring to the uCustoms system. Thus, it was argued that the conclusion made by the respondent is merely theoretical. The appellant also argued that the appellant cannot be found to have abused its dominant position as the services provided by the appellant are not substitutable within the definition of the 'market' in section 2 of the Act.

[57] In this appeal before us, learned counsel repeated the arguments raised before the Commission/respondent and submitted

that the purpose of the Clause was in line with its responsibilities as set out in the NSW Agreement/Supplemental NSW Agreement. Learned counsel also submitted that the Clause could not constitute as barriers to entry for its competitors in the uCustoms market because there is nothing barring the software providers from subscribing to other service providers. Further he submitted and argued that the Clause was introduced to overcome technical and security issues relating to NSW-SMK System. Learned counsel for the appellant informed us that the appellant had at the request of the respondent, provided the respondent with samples of cases of system errors caused by unauthorised software. At paragraph 159.5 of its written submissions learned counsel for the appellant said, *'it can be seen in most of cases, there were issues related to input into the software by the SP and non-compliant messages.'*. Learned counsel submitted that after the respondent had reviewed the case summary provided by the appellant, the respondent had questioned the appellant's CTO on the cases provided who explained that these issues were caused by data insertion error and message syntax errors – possibly resulting from non-compliance of Rank Alpha's software. Rank Alpha was one of the appellant's software providers under the NSW-SMK System. Learned counsel also submitted that at the time the MCPA was conceived, the appellant was working under the assumption that the uCustoms would be completed in 2015 and would replace the NSW. Therefore, with such short period of time to transition between the systems (NSW to uCustoms) the problem anticipated by the appellant could be real if all front-end software providers are to connect to more than one service provider at the same time; this may cause security and integrity issues. It was submitted that the appellant's technical protocols and specifications of the NSW should not be shared with any third party to ensure that there would not be any breach in security of their transaction data. Learned counsel submitted it is the appellant's contractual obligation under the NSW Agreement to ensure the system is secure. It was

argued that it should be expected that in an uncertain environment, the appellant would have pre-emptively taken necessary steps to avoid technical and security issues from arising during the transitionary period between SMK-NSW and uCustoms. Regarding the respondent reliance on industry experts to debunk the appellant's arguments on the security and technical issues, learned counsel suggested that they are not independent and disputes their reliability. Regarding the argument on the barrier to entry into the new uCustoms market learned counsel submitted that there could be only two options – the appellant and Edaran Trade. He further submits that the software providers have the option to sign up with Edaran Trade on condition that the software providers created another version of the front-end software specifically for the other service provider, and not allow to use the technical protocols and specifications of the appellant. On this point learned counsel for the appellant submitted that it was wrong for the respondent to rely on the evidence of one Mohd Nor Fauzi bin Abdul Khayyum, one of the industry experts from whom the respondent had recorded a witness statement on the issue relating to security and technical risks. Mohd Nor Fauzi was a former employee of the appellant but was asked to leave allegedly for under-performing and, at the time his statement was recorded he was with Edaran IT, a software provider related to Edaran Trade. To support his argument that the refusal of the service must be likely to eliminate all effective competitors in the market learned counsel for the appellant cited the case of *Clear Stream Banking Ag v Commission of The European Communities* [2009] ECR 11-3155. Learned counsel submitted the respondent had failed to explain how the Clause can has this effect on the relevant market. Learned counsel also submitted that the respondent had not discharged its burden of proof to show that the Clause has anti-competitive effect on the market. The respondent he said had failed to conduct or had conducted insufficient assessment as to the negative effect of the Clause. Learned counsel cited the case of *European Night Services and Others*

v Commission [1998] ECR 11-3141 to support his submission that the burden is on the respondent to conduct such assessment and the respondent has not discharge this burden. Also, he argued, the respondent was relying on the evidence of mostly untested witnesses because the appellant's request to cross examine the witnesses on the statements they gave to the respondent during the investigation was refused by the respondent. Lest we forget, learned counsel also submitted that the appellant is a monopoly within the meaning of the Second Schedule of the Act. Therefore, the appellant said it should not be governed by the Act as set out in the Second Schedule to Act, and as decided in the *Labuan ferry* case and the *Real Big Ventures* case.

[58] Responding to the above submissions and arguments by the appellant, learned counsel for respondent submitted that on the available evidence before it and on the balance of probabilities of those evidence the respondent has proven that the appellant had committed an infringement of section 10 of the Act. Regarding the issue of the relevant market learned counsel for the respondent submitted that in its proposed decision the respondent made it unequivocally clear that the relevant markets consist of trade facilitation services under the NSW and trade facilitation services in the uCustoms system. Therefore, learned counsel submitted there is no shifting of the goalpost or the widening of the definition of the relevant market. To support this argument learned counsel cited two cases from EU. The first case is *Dole Food company & Anor v European Commission (*Case T-588/08) which held, among others, that the Commission is not bound to the contents of its Statement of Objections and that due considerations can be given to assessment of facts put forward to the Commission. The second EU case is *Irish Sugar Plc v European Commission* [2000] All ER 198 which held that where consideration of an additional argument in the final decision does not

alter the nature of the complaints against the undertaking, it cannot constitute an infringement of defence rights.

[59] Regarding the issue that the respondent has failed to apply the HMT/SSNIP test in determination of the relevant market learned counsel submitted that the respondent is not bound to apply the test. He argued, on the authority of EU decision in *Topps Europe Ltd* v *Commission EU*: T: 2017:2, that the respondent has a certain discretion concerning the definition of the relevant market in so far as that definition involves complex economic assessments. On the relevance and suitability of applying the HMT/SSNIP test to determine the relevant market learned counsel quoted paragraph 82 of *Topps's* case which reads:

> *"in the present case, as regards, first of all, the applicant's argument that the Commission ought to have carried out an SSNIP test, it must be found that although that type of economic test is indeed a recognized method for defining the market at issue, it is not the only method available to the Commission. It may also take into account other tools for the purpose of defining the relevant market, such as market studies or an assessment of consumers' and other competitors' points of view. The SSNIP test may also prove unsuitable in certain cases, for example in the presence of 'cellophane fallacy', that is a situation where the undertaking concerned already holds a virtual monopoly and the market prices are already at a supra-competitive level or where there are free goods or goods the cost of which is not borne by those determining the demand. It is also apparent from point 25 of the Commission notice on the definition of relevant market for the purposes of Community competition law (OJ1997 C 372 p.5) that the definition of the relevant market does not require the Commission to follow a rigid hierarchy of different sources of information or types of evidence. The Commission did not,*

therefore, commit a manifest error of assessment in basing its conclusions on the relevant market on its assessment of the evidence gathered without having recourse to an SSNIP test.".

Learned counsel also pointed out to us that MyCC Guidelines on Market Definition, at paragraph 2.6, also states that the respondent retains the discretion to consider other evidence in assessing the relevant market.

[60] Regarding the issue whether uCustoms system can be considered as part of the relevant market, learned counsel for the respondent submitted that from the contemporaneous documents and statements collected by the respondent it shows that the NSW-SMK system currently implemented was to be eventually replaced entirely by uCustoms system which is aimed to provide end-to-end solutions to end-users particularly for trade importers and exporters. Learned counsel argued the two systems are similar and they are inter-related, which upon uCustoms becoming operable sometimes in 2018, they will merge and becomes one system for trade facilitation services.

[61] Regarding the argument on the issues relating to security and technical risk as well as the reasonable commercial justification, learned counsel for the respondent submitted that the appellant has not provided any evidence of any potential technical security or downtime issue other than to rely on the evidence of its Chief Technology Officer and Chief Executive Officer. Learned counsel argued that the statements by these two officers were self-serving and contained no elaboration or analysis as to the nature and likelihood of such issues. Learned counsel for the respondent cited the

EU case of *Generics v Competition and Markets Authority* – Case C-307/18 in which the EU Court held that a dominant undertaking seeking to rely on such defences had to do more than putting forward *'vague general and theoretical arguments'* or rely exclusively on its commercial interest. In comparison, learned counsel argued, witnesses from Edaran IT in particular En Mohd Nor Fauzi bin Abdul Kayyum and Mr Kelvin Tiong Chin Hock from Rank Alpha, in their witness statements given to the respondent on 6.10.2017 and 26.10.2017 respectively had given clear explanation as to how the system works [see paragraph 90 at page 41 to 43 of the respondent written submissions dated 2.9.2022]. Learned counsel also referred the witness's statement by Alwyn Ho Chee Keong of Wynet, another software provider, given on 13.10.2017 who pointed out that under the current system i.e. NSW the appellant is using the mailbox connectivity system while Edaran IT would likely not using the same connectivity system as such he said it would be difficult to ascertain if the technical and securities issues that worries the appellant would arise. Based on the evidence of these three witnesses learned counsel submitted that it clearly *'shows that as things stand there should be no issues in relation to having two software providers connected to one service provider and that any supposed issue could be overcome either by (a) usage and determination of different and unique identifiers or (b) potentially different versions of the same software to be connected to two service providers.'*. In this regard, learned counsel submitted that *'any potential technical risk ought to be highlighted to the RMC as the relevant authority and not for the appellant to use its dominance to assume such potential risk and take actions to remedy the speculative problems to the detriment of its future competitors.'*.

[62] Regarding the removal of the Clause from the MCPA, by way of supplementary agreement or new agreement, learned counsel for the respondent submitted that the very act of the appellant removing the

Clause *'clearly downplays their argument of any potential technical and security risks'.* Learned counsel submitted it is essentially an admission that the Clause is unnecessary to begin with. With regard to the appellant's argument that the removal of the Clause was to avoid an overlap between the operations of NSW and uCustoms as explained by the appellant at para 37 of the appellant statement of reply dated 5.5.2021, that – *'Concurrent with the removal of the exclusivity clause, the business partners were then required to sign a supplemental agreement whereby the period of business partners' participation in the MCPP were pegged to the appellant's concession period with the government. This was done to avoid overlap between the operation of the NSW and uCustoms. Thus, avoiding instances where security and technical issue could arise.'.* We do not think that this is the real reason. Learned counsel for the respondent argued in paragraphs 37, 38 and 39 of the respondent's 'Further Statements in Reply', dated 26.5.2021 as produced below:

> *'37. ..What must be noted is that between the period from the removal of the exclusivity clause to the date of the Final Decision, no such technical and/or technical integrity of the NSW.'.*
>
> *'38. In fact, the action of Dagang Net in relation to the execution of the supplemental agreement with its business partners clearly shows that no such exclusivity clauses are necessary to maintain the security and/or technical integrity of NSW.'.*
>
> *'39.....Whilst it claims that the exclusivity clause is necessary for technical and security purposes, it has failed to justify why the only reasonable response to a technical and security is an action which is inherently anti-competition.'.*

Thus, we concur with the respondent's view that the removal of the Clause proved that it was unnecessary to have that Clause in the first place.

[63] Beside the issues in preceding few paragraphs, there are other minor issues raised by the appellant in this appeal such as denial of rights to cross examine witnesses and procedural impropriety and fairness. We will address this minor and miscellaneous issues in the later part of this decision. For now, we will focus on the major issues first.

[64] We have addressed some of the major issues like the determination of the relevant market and position of dominance vis-à-vis monopoly raised by the appellant in several earlier paragraphs of this decision. At the risk of being repetitive, we will re-visit and examine some of the major issues. The first one is the imposition of the Clause by the appellant and whether the appellant had abused its dominant position, a conduct which is found to have infringed subsection 10(1) of the Act. In our view this is the crux of this appeal. The respondent had rejected the appellant's justification and arguments for the introduction and imposition of the Clause in the MCPA for reasons which we have stated in the earlier paragraphs. Is the respondent right in doing so? The appellant had justified the introduction of the Clause on the ground of technical risks and security of data when software providers are connected to two service providers – the appellant and Edaran Trade in the upcoming uCustoms system. To assess whether this justification has merits we will first look at the chronology of events leading to the introduction of the Clause. We can see this chronology summarised by learned counsel for the respondent at pp. 8 – 10 of his written submissions dated 02.9.2022. From this summary it is noted that since 19.11. 2009 the appellant had

been the sole service provider for the NSW system when it was appointed to design, develop, operate, and maintain the NSW system for the purposes of providing trade facilitation services using the NSW and SMK platforms. The appointment was for 5 years from 2009 to 2014. This arrangement was renewed several times, by a supplemental agreement dated 24.10.2014 and letters from MOF dated 19.9.2016 and 20.12.2017, until 31.8.2019. Thereafter the appellant got another extension until 31.8.2021. This latter extension was announced by the appellant through its Newsletter dated 24.7.2019. With all the extensions the appellant had been enjoying the dominance as monopolist in providing the trade facilitation services on the NSW-SMK platform using electronic mailbox connectivity exclusive to the appellant for nearly 11 years to the date of the respondent made its final decision on this case.

[65] However, in 2013 the government envisioned the uCustoms system and the RMC issued a Request for Proposal to design, develop, configure, test and commission the uCustoms. This was on 24.01.2015. The projected launching date for uCustoms was sometime in 2016. The diagrammatic presentation of the uCustoms process flow can be seen at paragraph 46 of the respondent's final decision. Soon after the announcement of the uCustoms project, the appellant began to take steps to prepare for the future. The first step taken by the appellant was to issue a letter to Rank Alpha, one of its software providers, on 14.3.2014 on term extension of the MSPA until March 2015. This extended agreement contains no exclusivity clause; at the same time the appellant also informed Rank Alpha that a new agreement is being drafted and finalised to replace the MSPA. On 25.3.2015 the appellant issued an invitation to Rank Alpha to participate in a new partnership program under a new agreement – the MCPA. The invitation letter (and the new agreement) contains the terms and conditions of the Clause that stipulates that Rank Alpha

shall not engage with other service providers appointed by the RMC under the uCustoms Service Provider Program to provide similar services to the end-users. Between 5.10.2015 and 30.10.2015 the appellant managed to sign on two other software providers – Mobile Force and DNexPORT Sdn Bhd - on the new agreement MCPA that contains the Clause. Earlier, on 14.8.2015 the government announced the appointment of Edaran Trade and the appellant as service providers for uCustoms. We pause here to observe that after the second extension of its original agreement with the government for the NSW, the appellant contract was extended to 2019. Then comes the announcement on the uCustoms project in 2015, which was followed by the government's appointment of Edaran Trade as one of the two service providers for uCustom, the other one being the appellant itself. We also want to make this observation that the appellant, having been the sole service provider for the NSW-SMK for the last five years since its appointment in 2009 must have access to information, either officially or unofficially, about the RMC plan for uCustoms. This is a reasonable inference to make in the circumstances. We have in an earlier paragraph referred to evidence where the appellant had informed the Steering Committee that uCustoms would be expected to be operational in 2016 and had issued invitations/notices to all software providers to sign-up with its business partners. When the government announced the appointment of Edaran Trade as one of the service providers for uCustom, we can reasonably infer that the appellant is looking hard at its future as the monopolist that control the relevant market to provide trade facilitation services now that there is a potential competitor in the form of Edaran Trade at its doorstep. It must be remembered that the NSW-SMK system is soon to be replaced and merged with uCustoms to function as one system. Therefore, it is not far-fetched to contemplate that the steps taken by the appellant that we have described above are about the appellant's survival at maintaining its dominance in the upcoming new environment of

uCustoms. In this regard we are of the view that the respondent is justified to look at the market projections by market analysts on the would-be performance of the appellant once the uCustoms is operable and commissioned. We also observe the timing the appellant decided to replace the MSPA with the new agreement MCPA that contains the Clause and insist that the software providers and its business partners to sign the agreement which contains the Clause. This was done soon after the announcement of uCustoms followed by the appointment of Edaran Trade as the other service provider for uCustoms. If the appellant's argument on the issue of technical risks and security is to be valid why was the Clause not introduced much earlier as a step to overcome the technical and security problems that had beleaguered the NSW. The Clause also does not have any reference to any security or technical risk as one of the reasons (or the only reason for its introduction). We also noted that the appellant started to withdraw the Clause in 2017. Why was that? On the evidence and facts of this case we can reasonably suggest three reasons; first, appellant was hoping to get leniency in judgement from MyCC during the course of investigation which commenced on 21.6.2016 or as a mitigating factor if it is found breaching the law; second, the argument about security/technicality issue is merely an afterthought argument to hide the true intention and prime reason i.e. the anti-competition intent; third, the uCustoms did not materialised in 2016 as envisaged because of technicalities in the configuration of the system.

[66] Taking the totality of evidence and the environment surrounding the introduction of the Clause by the appellant, we are of the opinion that the introduction of the Clause and the announcement of uCustoms and the appointment of Edaran Trade as the other service provider is not mere co-incidence in the circumstances. In our opinion it is a deliberate and planned act by the appellant to ensure that all

software service providers are tied up contractually with the appellant leaving them with no option to join or use other service providers appointed for the uCustoms for the duration of their contracts with the appellant. This is the ultimate effect of the appellant's Exclusivity Clause – it kills competition.

[67] Next, we want to assess the technical and security issues which the appellant said the main reasons for the introduction of the Clause in the new MCPA. In the few preceding paragraphs, we have seen evidence in the form of statements recorded from the appellant's CTO and CEO that shows the technical problems encountered by the appellant under the NSW-SMK system is caused mainly by error in data inputs or insertions by end-users and software providers resulting in the system cannot process the data inputs. The statements also said that at times the appellant had to send technical team to the end-users and software service providers to help rectify the problem. In our view this is not the real problem that could cause the system not to function satisfactorily. Technology is a tool that can be harnessed to simplify working process by making it more efficient and better. This is operational technical problem that is expected to occur from time to time in any system especially where it involves connectivity of one phase of the system to another and interfacing. But this problem is not unsolvable. It can easily be solved with good back up from a good technical team as well as constant monitoring of the working of the system. Also, to be noted that the examples of the technical problem given by the witnesses from the appellant seemed to be confined to the NSW-SMK system that has been in operation for quite sometimes and under complete control of the appellant.

[68] The other aspect of technical risk and security which was highlighted by the appellant is encapsulated at paragraph 83.4 of the

appellant written submissions dated 2.9.2022 which is produced below:

> *'the connectivity of one front end software to two service providers could lead to technical and security risks and these concerns are related to the connectivity for end users as well as the security of their transaction data as a result of the inability of Customs to differentiate which service provider the message came from as the mailbox used are from the same.'.*

The appellant's support for this is the statement of Ms Jasberndarji Kaur, the appellant CTO recorded on 14.7.2017 [see paragraph 83.5 of appellant written submission]. But a closer examination of the statement shows even Ms Jasberndarji Kaur was not certain that could be the case. In her statement she said she could not comment on the possibility one software provider can be connected or will be connected to two or more service providers in the uCustoms environment because at that time the specifications for uCustoms have yet to be decided. However, she also said that in her opinion where the environment is utilizing the mailbox concept one software provider cannot connect to two or more service providers due to security and integrity concerned because then the Customs would not be able to differentiate the message from one software provider to another since the messages from several software providers will be via the same mailbox.

[69] There are three observations we can make on the statement by Ms Kaur. First observation is security and technical issues, if any, could only be assessed if the uCustoms is already in operation and software providers are allowed to connect to two or more service providers. The second observation is that this problem is likely to become a thorny issue regarding the uCustoms if the mailbox concept is

continued to be used. The third observation is if this problem persistently there since the beginning of the appellant's appointment the sole service provider for NSW using the mailbox connectivity why was the Clause not introduced much earlier to resolve the problem? Why was it introduced after the Government had announced the uCustoms system and the appointment of Edaran Trade as one of the two service providers? Taking all these into consideration, we are of the view that the appellant's worries on the technical risks and security issues at this point of time is only speculative and not real. In this regard, we agree with the respondent submissions that the appellant had not produced any evidence of actual technical risk and security or the probability of it in the current environment i.e the NSW environment because as Ms Kaur said in her statement *'the configuration (specifications) for the uCustoms have yet to be decided.'*.

[70] We recall that soon after the RMC called for proposal to design and configure and commission the uCustoms, the government also appointed the appellant and Edaran Trade as the service providers for uCustoms. In this regard it is reasonable to infer that both the appellant and Edaran Trade, either jointly or separately, has the responsibility to design and develop the uCustoms according to the specifications required by the RMC as one system that can be used by two or more service providers appointed by the RMC. The design and configuration of the uCustoms should and ought to, in our view, take care and address the issue of technical risk and security issues that worries the appellant. We are also asking ourselves why did the government appointed two service providers for uCustoms? Why not just stay with the appellant as the only service provider for uCustoms? After much thought we can offer only one probable answer – that is the government wants to open the relevant market to healthy competition giving the software providers to team up with any one of

the two service providers appointed. In our view this is the real concern of the appellant because it is likely to lose its monopolistic position in the new uCustoms environment. Thus, to protect its business and dominance in the related market, the appellant wanted all software providers to sign up the MCPA which contains the Clause making them bound to the appellant even when the uCustoms successfully comes into operation.

[71] The appellant also justified the introduction of the Clause by relying on subsection 10(3) read together with Second Schedule of the Act. Subsection 10(3) of the Act provides that an enterprise in a dominant position is not prohibited from taking any step which has reasonable commercial justification or represents a reasonable commercial response to the market entry or market conduct of a competitor. The Second Schedule to the Act is an exemption from the Act by virtue of section 13 which reads that the prohibitions under Part II of the Act shall not apply to the matters specified in the Second Schedule. This means that any act or conduct undertaken by an enterprise which is prohibited under Part II of the Act is excusable and the enterprise concerned cannot be faulted for such conduct or act if it comes within any of the three categories of exemption listed at paragraphs (a) to (c) of the Second Schedule.

[72] For our purpose the relevant paragraph of exemption is paragraph (c) which exempted, in relation to an enterprise entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly in so far as the prohibition under Chapter 1 and Chapter 2 of Part II would obstruct the performance in law or in fact of the particular tasks assigned to that enterprise, all prohibited activities under Chapter 1 and Chapter 2 of Part II of the Act from being sanctioned under the Act. In other

words, such activities cannot be considered as infringements of the Act. We are of the opinion the appellant has not discharged the burden to justify the introduction of the Clause was reasonable in the circumstances. We have said before this that the uCustoms was introduced to replace the NSW system and function as a single system for all and the appointment of Edaran Trade as the second service provider next to the appellant is to encourage competition. The imposition of the Clause on the software providers by the appellant runs contrary to this intention of the RMC because it takes away the freedom of choice from the software providers to choose which service providers they want to work with. Thus, we see no reasonable commercial justification at all on the steps taken by appellant to introduce the Clause. Regarding the appellant argument in relation to paragraph (c) of the Second Schedule that it has monopoly of the relevant market and is entrusted with the operation of services of general economic interest and its monopolistic activities are revenue-producing monopoly and, if the appellant is not allowed to impose the Clause it would obstruct the performance, in law and fact, the task assigned to it which is the provision of trade facilitation services to front end-users, we find no merit in this argument. In our opinion the services provided by the appellant is not of general economic interest. The trade facilitation services provided by the appellant served only very narrow interest which is specifically to take advantage of available and the state of current technology to facilitate transactions between the front end-users and the RMC making it faster and more efficient. Compare this to the ferry service provided by Labuan ferry in the *Labuan Ferry's* case which connected two territories separated by a body of water to transport people and goods. This transportation service in our opinion is a category of services of general economic interest because it facilitates the mobility of people and goods between the two territories and this in turn helps to promote trade and thereby contribute to the economic growth of the two territories. We are also of the view that the appellant is not a revenue-producing

monopoly, and that the appellant would not be obstructed in law and in fact from performing the task entrusted to it which is to provide trade facilitation service to front end-users to do transactions with the RMC. We say that the appellant is not revenue-producing monopoly like TNB or Indah Water which provides electricity supply and sewage services respectively, that was once the responsibility of the State. The appellant on the other hand is engaged contractually for a limited period to provide trade facilitation services and is allowed to impose charges for these services. The revenue is collected by the RMC in the form of excise tax and other taxes. This revenue is not directly related to the service provided by the appellant but depends on the declarations of dutiable goods by the front end-users.

[73] The appellant also complained about procedural unfairness and breach of natural justice. The appellant said it was denied the right to cross-examine the witnesses to test the statements they gave to the respondent. On this complaint we agree with learned counsel for the respondent that the Act does not specifically provide for right to cross-examination. The granting of the right is the absolute discretion of the respondent. Nevertheless, the respondent must be fair and act judiciously in considering the request for such rights. In this case we noted the respondent had refused the appellant the right to cross-examine; and in its decision, at paragraphs 75 to 156, the respondent had set out its reasons for the refusal. We have considered the respondent's reasoning and we agree with the respondent that cross-examination is unnecessary. Moreover, we noted that the appellant had exercised its rights to comment and criticise the statements given by the witnesses when it made representations to the respondent on the respondent's proposed decision. In our view given this chance, the respondent had complied with rule on the right to be heard. Therefore, there is no issue of procedural unfairness.

[74] The final issue in this appeal is the imposition of financial penalty on the appellant. It is well within the discretion of the respondent to determine the financial penalty to be imposed on the appellant in accordance with the principles prescribed by the Act and the guidelines published by MyCC. In exercising that discretion, the respondent may take into consideration all relevant factors. In this instance case, the respondent had considered the cooperation given by the appellant in the investigation of the complaint against it and the termination of the infringing act as mitigating factor in the calculation of financial penalties. The respondent also must consider the seriousness of the infringement and public interest. At paragraph 358 of its final decision the respondent had summarised the factors that it has to consider in determining the amount of penalty imposed. Taking account of all those factors listed in that paragraph and, after some adjustments, the respondent had imposed the sum of RM10,302,475.98 on the appellant as penalty for the infringement.

[75] In arriving at the above figure the respondent had utilized the financial data submitted by the appellant under section 18 Notice dated 13.4.2017. The respondent, at paragraph 370 of its final decision, had determined the infringement period from 29.10.2015 until 09.11.2017. Considering the nature of the infringement and the physical geographical location of the market, which is throughout Malaysia, the respondent viewed the infringement as serious. The respondent also found that the appellant had not co-operated in the investigation over and beyond the extent to which it was legally required. However, the respondent did not find any aggravating factors against the appellant. At the same time, the respondent considers the removal of the Clause by the appellant as a mitigating factor.

[76] In its final decision, the respondent had explained in detail the calculations as to how it arrived at the above figure. We noted that the respondent in its calculation had adhered to the guidelines on financial penalties issued by MyCC. The respondent had taken the period of infringement to be between 29.10.2015 to 9.11.2017. The revenue of the relevant market from 29.10.2015 to 31.10.2017 was RM169,415,932.16. But there is no data submitted by the appellant for the period from 1.11.2017 to 9.11.2017. Then the respondent took the following steps:

Step 1

First the respondent determined the appellant's revenue from the relevant market for the period of infringement from 1.11.2017 to 9.11.2017. Using the financial data submitted by the appellant under section 18 Notice, the respondent found the appellant's relevant turnover for the period between 1.1.2017 to 31.10.2017 is RM169,415,932.16. Since the appellant had not submitted any financial return for the remaining period of infringement between 1.11.2017 and 9.11.2017, respondent had used a proxy figure to determine the value of the relevant turnover for that period. The respondent determines the proxy value for the period from 1.11.2017 to 9.11.2017 by adding up the relevant turnover value from 1.1.2017 to 31.10.2017 which comes to RM77,418,693.93. The respondent then divides this sum by 304 days (i.e the total number of days from 1.1.2017 to 31.10.2017). Using this formula, the respondent obtains the proxy value of RM254,666.7563. The respondent then uses the proxy value to determine the total value of the appellant's relevant turnover for the period from 1.11.2017 to 9.11.2017 by multiplying the proxy value with number of days in that period which were 9 days. This gives the respondent the figure of RM2,292,000.81. Respondent then adds this amount to the amount of the appellant's relevant turnover for the period from 29.10.2015 to 31.10.2017 which is

RM169,415,932.16. Thus, the total sum of the appellant's relevant turnover for the whole period of the infringement from 29.10.2015 to 9.11.2017 is RM171,707,932.97. From this total sum the respondent must determine the base figure for the purpose of imposing the financial penalty on the appellant for the infringement. The base figure is the percentage of the total sum of the relevant turnover for the whole period of the infringement, and it is fixed at the discretion of the respondent. In this case the respondent has taken 10% from the amount of RM171,707,932.97 as the base figure; and this gives the respondent the amount of RM17,170,793.30.

Step 2

The respondent then did the adjustments to the base amount RM17,170,793.30 by taking into consideration aggravating and mitigating factors as well as the level of co-operation given by the appellant during investigation. Taking all these factors into consideration the respondent reduced the base figure by 25% (i.e RM4,292,698.33). After this discount, the respondent obtained a sum RM12,878,094.97 as the figure for financial penalty to be imposed on the appellant.

Step 3

The respondent then must ensure that the amount of the penalty imposed does not exceed 10% of the appellant's worldwide turnover as prescribed by section 40 of the Act. To determine the appellant's worldwide turnover for the period between 29.10.2015 and 31.10.2017 the appellant must first determine the worldwide turnover for the period between 1.1.2017 and 9.11.2017 because the appellant had not submitted any data for this period. We have explained above as to how the respondent has used a proxy figure to

obtain the worldwide turnover figure for the period from 1.11.2017 to 9.11.2017 which is RM2,292,000.81. The respondent then adds up this amount to the amount of the respondent worldwide turnover for the period 1.1.2017 to 31.10.2017 (which is RM177,248,946.51); and this gives the respondent the figure of RM179,540,947.32 which constitutes the appellant worldwide turnover for the whole period of infringement from 29.10.2015 to 9.11.2017; and 10% of this total worldwide turnover for the whole period of infringement from 29.10.2015 to 9.11.2017 is RM17,954,094.73. Thus, the financial penalty of RM12,878,094.97 does not exceed the limit prescribed by subsection 40(4) of the Act.

Step 4

In a rare occasion in this case the respondent had done a further adjustment to the amount RM12,878,094.97 by taking into consideration an external factor which is the COVID-19 pandemic which the respondent viewed as unprecedented challenge with very severe socio-economic consequences that impairs the sustainability of businesses. The adjustment for this factor is another 20%. Thus, the final figure of financial penalty imposed on the appellant after all the adjustments is RM10,302,475.98. [*Note: the respondent uses a similar figure of RM77,418,693.93 for the extra 9 days for both the relevant market and worldwide turnover*]. In the circumstances we do not wish to disturb the respondent decision on the financial penalty imposed on the appellant.

Conclusion

[77] Therefore, it is our unanimous decision that this appeal be dismissed on both counts – the appeal on the infringement as well as the appeal on the imposition, and the amount, of the financial penalty.

Dato' A Aziz bin A Rahim

(Chairman)

Datuk Dr. Mohd Gazali bin Abas

(member)

Datuk Mohd Rafee bin Mohamed

(member)