IN THE COMPETITION APPEAL TRIBUNAL, MALAYSIA
IN THE STATE OF FEDERAL TERRITORY OF PUTRAJAYA, MALAYSIA

IN THE MATTER OF
APPEAL NO: TRP 2-2021

BETWEEN

1. SAL AGENCIES SDN. BHD.
2. WCS WAREHOUSING SDN. BHD.
3. REGIONAL SYNERGY (M) SDN. BHD.
4. INTREXIM SDN. BHD.
5. PIONEERPAC SDN. BHD. **APPELLANTS**

AND

COMPETITION COMMISSION **RESPONDENT**

.....

PRESIDING MEMBERS OF THE COMPETITION APPEAL TRIBUNAL

1. YA DATO' DR. CHOO KAH SING
2. YBHG. DATO' HAJI CHE PEE BIN SAMSUDIN
3. YBHG. DATO' DR. SUHAZIMAH BINTI DZAZALI

.....

GROUNDS OF DECISION

Introduction

[1] Pursuant to s. 40(1) of the Competition Act 2010 (hereafter 'the CA'), the respondent (hereafter 'MyCC' or 'the Commission' or 'the respondent') made a positive finding in its Final Decision dated 26.7.2021 (hereafter 'the Final Decision') that the appellants had infringed s. 4(1) read together with s. 4(2) of the CA – an infringement of a prohibition under PART II. Dissatisfied with the Final Decision of the respondent, the appellants filed an appeal to the Competition Appeal Tribunal (hereafter 'the CAT' or 'the Tribunal') pursuant to s. 51(1) of the CA.

[2] On 24.2.2023, this Tribunal, after having heard the oral submissions and having read the written submissions from the respective parties' counsels, unanimously confirmed the respondent's Final Decision. The reasons for the Tribunal's decision are set out below.

Salient Background Facts

[3] In early June 2017, the Commission received information that an anti-competition conduct could have been committed by the appellants (and two other parties, namely, Prima Warehousing Sdn. Bhd. and

Interocean Warehousing Services Sdn. Bhd.). The anti-competition conduct involved price fixing in relation to the provision of the services of long length handling and heavy lift handling for import and export cargoes (hereafter 'the Services') at the Northport and Westport of Port Klang, Malaysia.

[4] The Northport is operated by Northport (M) Bhd., and the Westport is operated by Westport Malaysia Sdn. Bhd. It is said "both the Northport and Westport are known as port terminal operators and are in charge of the day-to-day operations of the respective ports." The regulatory body of these ports is the Port Klang Authority (hereafter 'the PKA') established under the **Port Authorities Act 1963 (Revised 1992)** (hereafter 'Act 488').

[5] The appellants are private limited companies that carry on and/or engage in the business of providing haulage services, transportation, warehousing, cargo handling and related businesses. The appellants' core business is providing warehousing storage services for import and export cargoes. The Services is part of the cargo handling which involves loading and unloading cargoes from containers in and out of their warehouses. A surcharge is imposed on the customers for the loading and unloading of their cargoes.

[6] The appellants' warehouses at which the Services were offered are situated within the port free zone which is within the administration and control of PKA.

[7] PKA is empowered by the Act 488 to allow levy charges from time to time on all or any of the matters prescribe under s. 16 of the said Act (subject to the approval of the Minister from the Ministry of Transport). Any charges or scales of charges prescribed by the PKA (upon the approval from the Minister) shall be published in the *Gazette*.

[8] On October 2018, the Commission had reason to suspect that the appellants could have infringed or were infringing a prohibition under the CA, and thereby launched a formal investigation pursuant to s. 14(1) of the CA.

[9] In the course of investigation, the Commission found a Surcharge Memorandum dated 22.5.2017 (hereafter "the Infringing Agreement"). The Infringing Agreement was issued to the warehouse operators located at the Northport and Westport. The Infringing Agreement was entitled "*IMPLEMENTATION OF LONG LENGTH HANDLING SURCHARGE FOR ALL IMPORT & EXPORT CARGOES EFFECTIVE FROM 1ST JUNE*

2017". The contents of the Infringing Agreement are reproduced as below:

> "Pleased to inform that warehouse operators in Northport / Westport have suggested to implement warehouse handling charges for Export cargoes.
>
> **Any individual Cargo with length of 12 feet and above and weighing below 2500kgs will be considered as long length cargo and there will be additional surcharge as per below**:
>
> **Long length handling in and out charges @ RM350.00 / handling**
> **Heavy lift handling surcharge for any individual cargo weight;**
> **3000kgs – 5000kgs – RM750.00 / shift**
> **5000kgs – 10000kgs – RM1200.00 / shift**
> **10000kgs – 15000kgs – RM2000.00 / shift**
> **15000 – 18000kgs – RM2800.00 / shift**
> **18000 – 24000kgs – RM3800.00 / shift**
>
> **Note: Will be based on per handling shipment on the same day.**
>
> In view of this, we hope all warehouse operators to acknowledge by signing below as a confirmation of implementation.
>
> Your cooperation is highly appreciated.
>
> Thank you."

[10] The signatories to the Infringing Agreement are the representatives of the appellants and two other parties, namely Prima Warehousing Sdn.

Bhd. and Interocean Warehousing Services Sdn. Bhd. It is noted that the 4th appellant Intrexim Sdn. Bhd. was previously known as "Western Warehousing Sdn. Bhd." when its representative signed the Infringing Agreement on 26.5.2017.

[11] The Commission also found the appellants' representatives had used a mobile platform WhatsApp Group-Chat as one of the modes of communication. In the chat group (known as 'NP' and subsequently changed to 'Ling'), the Commission found a series of communications among the appellants' representatives pertaining to the progress, status and implementation of the handling surcharge post the Infringing Agreement.

[12] The Commission held numerous interviews with the key representatives of the appellants, including representatives from the stakeholder PKA. The Commission also interviewed one main service provider who was involved in the similar business (the Services) in the market for more than 30 years known as Maltaco M.S. Sdn. Bhd. (hereafter 'Maltaco').

[13] After the completion of the investigation, on 9.1.2020, the Commission made a decision to the effect that s. 4(1) of the CA under

Part II had been infringed or was being infringed, and thereby gave a written notice of its proposed decision (dated 9.1.2020) (hereafter 'the Proposed Decision') to the appellants.

[14] The appellants submitted their respective written representations to the Commission. Only Interocean Warehousing Services Sdn. Bhd. sought for an oral representation. On 1.12.2020, Interocean Warehousing Services Sdn. Bhd. presented its oral representation to the Commission, and the appellants' representatives were granted permission to attend and observe the proceeding.

[15] After having considered the respective appellants' written submissions, on 26.7.2021, the Commission issued its Final Decision and found that the appellants (as well as Prima Warehousing Sdn. Bhd. and Interocean Warehousing Services Sdn. Bhd.) were in breach of s. 4(1) read together with s. 4(2) and 4(3) of the CA.

[16] In the Final Decision, at paragraph 243, the Commission directed the appellants (as well as Prima Warehousing Sdn. Bhd. and Interocean Warehousing Services Sdn. Bhd.) as follows:

"(a) to cease and desist from implementing the agreed charges for the provision of handling services of long length and heavy lift of import and export cargo in Port Klang, Malaysia; and

(b) the future charges for the provision of handling services of long length and heavy lift of import and export cargo are to be determined independently by each of the 7 enterprises."

(hereafter 'the cease-and-desist Order')

[17] The Commission also imposed financial penalties against the appellants (as well as Prima Warehousing Sdn. Bhd. and Interocean Warehousing Services Sdn. Bhd.). The amount of the financial penalty was calculated based on 10% out of 10% of the worldwide turnover of each of the appellants over the period from 22.5.2017 (the date of the Infringing Agreement) to 13.12.2019. In footnote 184, at p. 110 of the Final Decision, the Commission stated as follows:

"The Commission states that the duration of the Infringement is from 22.5.2017 till the date of the issuance of Proposed Decision dated 9.1.2020 in the Proposed Decision (paragraph 184) as there is no evidence shows that the infringement had ended prior to the said date. However, for the purpose of calculating the financial penalty, the date is fixed from 22.5.2017 to 13.12.2019."

[18] Prima Warehousing Sdn. Bhd. and Interocean Warehousing Services Sdn. Bhd. did not file an appeal to the CAT. On 25.8.2021, the appellants jointly filed an appeal to the CAT through the firm of solicitors Messrs David Gurupatham & Koay. The Commission, as the respondent in the appeal, was represented by the firm of solicitors Messrs Lim Chee Wee Partnership.

The Findings of this Tribunal

The Finding of Infringement of s. 4(1) of the CA by the Commission

[19] For ease of reference, s. 4 of the CA is reproduced below and reads as follows:

> "(1) A horizontal or vertical agreement between enterprises is prohibited insofar as the agreement has the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services.
>
> (2) Without prejudice to the generality of subsection (1), a horizontal agreement between enterprises which has the object to-

(a) fix, directly or indirectly, a purchase or selling price or any other trading conditions;

(b) share market or sources of supply;

(c) limit or control-

(i) production;

(ii) market outlets or market access;

(iii) technical or technological development; or

(iv) investment; or

(d) perform an act of bid rigging,

is deemed to have the object of significantly preventing, restricting, or distorting competition in any market for goods or services.

(3) Any enterprise which is a party to an agreement which is prohibited under this section shall be liable for infringement of the prohibition."

[20] The Commission, in coming to its decision in finding the appellants had infringed the prohibition section, i.e., s. 4(1) of the CA, has invoked and applied the "deemed" provision of s. 4(2) of the CA. In **Malaysian Airline System Bhd v Competition Commission & Anor** [2022] 1 CLJ 856, p. 881, the Court of Appeal held as follows:

"[111] The word "deemed" is, of course, a very powerful word. It brings into being a factual situation which may not in reality be there. It has the effect of creating an event or situation which ordinarily and in reality, is not even there. Lewison in *The Interpretation of Contracts* (5th Edn) at para 14.12 stated that where a deeming clause is used, it would be conclusive as to the deemed meaning or consequence.

....

[116] However, for a "deemed" clause to be triggered the conditions set for it to operate must be strictly complied with because of its inherent bias in producing a certain set of result."

[21] Due to the nature of an inherent bias in a "deeming" provision, it is necessary for the conditions to be strictly complied with before it could be applied. In this instant case, the conditions are (i) there must be a horizontal agreement; (ii) the horizontal agreement is made between enterprises; (iii) the agreement has the object to fix, directly or indirectly, a purchase or selling price or any other trading conditions.

[22] "Horizontal agreement" is defined as an agreement between enterprises each of which operates at the same level in the production or distribution chain; and "enterprises" is defined as any entity carrying on

commercial activities relating to goods and services (see s. 2 of the CA). The appellants were and still are entities carrying commercial activities relating to provision of services, including the Services; they were and still are operating at the same level in the production chain. For that, the first and second conditions have been fulfilled. From a plain reading of the contents of the Infringing Agreement, it would appear that the parties intended to implement a standard surcharge of the Services mentioned therein. An intention to implement a standard surcharge of the Services would fall squarely within the third condition which is having the object to fix directly a purchase or selling price of the Services offered by the appellants to their respective customers.

[23] Further, in the course of investigation, the Commission found various communications via WhatsApp group chat among the appellants' representatives pertaining to the price fixing of the surcharge for the Services. The Commission also made a finding of fact that one of the appellants' representatives was the prime-mover of the Infringing Agreement. At para 86 of the Final Decision, the Commission stated as follows:

> "[86] From the preceding paragraphs, the Commission is satisfied that Loo Suo Li of Regional Synergy was proactively

involved in the initiation of the Surcharge Memorandum. The Commission views Loo Suo Li of Regional Synergy as the instigator and ring leader of the cartel. Apart from formulating the contents of the Surcharge Memorandum, she is also responsible for taking proactive steps to convince and ensure that the Parties agreed, signed and adhered to the rates proposed by Regional Synergy."

[24] All the above findings of the Commission converge to the fact that the appellants were in concerted practice pertaining to the price fixing of the Services in the market.

[25] Based on the above, the conditions of the "deemed" provision have been satisfied. It follows that the Infringing Agreement is deemed to have the object of significantly preventing, restricting, or distorting competition in the market for the Services. The appellants entered into an anti-competition agreement which is prohibited under s.4(1) of the CA, and therefore, the appellants were found liable for infringement of the prohibition pursuant to s. 4(3) of the CA.

[26] Beside invoking the "deemed" provision in finding that the appellants had infringed the prohibition of anti-competition, it was essential for the Commission to identify what the market entails in the given situation, in

order to avoid fixation over what is '*de minimis*', before it could come to the conclusion that anti-competition has been committed. The Commission at para 239 of its Final Decision defines the market in this instant case as follows:

> "The relevant service market, in this case, is the market for the provision of handling services of long length and heavy lift of import and export cargo in Part Klang, Malaysia."

[27] The Tribunal is in agreement with the Commission that the market in the given situation was confined to a specific location, i.e., Port Klang, Malaysia, and the services concerned was limited to the long length and heavy lift handling services specifically for the import and export cargoes at the respective appellants' warehouses which are located within the vicinity of Port Klang.

[28] In relation to the burden and standard of proof, this Tribunal finds no error has been committed by the Commission in identifying the burden of proof and in relying on the civil standard of balance of probabilities.

[29] In conclusion, this Tribunal is of the view that the reasons relied by the Commission to find that the appellants were liable for the infringement

of the prohibition of anti-competition provision within the meaning as envisaged in s. 4(1) of the CA appear to be in accord with the relevant provisions of the CA.

[30] This Tribunal will now consider the appellants' grounds of appeal and to decide whether there is any meritorious reason to disturb the findings of the Commission in coming to its decision.

The Appellants' Grounds of Appeal

[31] The appellants raise seven grounds of appeal. They are paraphrased as below:

(i) The Final Decision was in breach of natural justice and ultra vires;

(ii) There was no infringement of s. 4 of the CA;

(iii) The appellants were entitled to relief of liability under s. 5 of the CA;

(iv) The Commission had erred in its finding of facts which led to a wrong conclusion in its coming to the Final Decision;

(v) Section 3(4)(a) of the CA was applicable;

(vi) Following from the above ground of appeal, therefore, MyCC did not have jurisdiction and/or authority over the appellants and activities at the Port Free Zone; and

(vii) MyCC's finding on the absence of a Gazette (on long length handling [LLC] and heavy lift handling [HLC]) was misconceived.

[32] The Tribunal will address each and every ground raised by the appellants *in seriatim* below.

The First Ground: Breach of Natural Justice and Ultra Vires

[33] The appellants' counsel contends that the appellants were not given the opportunity to present their cases before the imposition of financial penalty in the Proposed Decision on 9.1.2020, particularly the opportunity to mitigate before the financial penalty was proposed in the Proposed Decision. Likewise, the appellants were denied of the opportunity to mitigate "after and/or prior to the Final Decision", the appellants' counsel contended.

[34] The appellants' counsel poses a question to the Tribunal: "Whether the CA is being unfair, arbitrary or oppressive where the provisions therein

did not afford any right to be heard by mitigation or confrontation before or after the Final Decision?"

[35] As a result of the appellants not being given the full opportunity to present their cases before the Proposed Decision as well as the Final Decision, the appellants' counsel therefore submits that the Commission had acted ultra vires in coming to its Final Decision. In the Appellants' Written Submissions, at paragraph 30(b), the appellants' counsel submitted as follows:

> "Therefore, we submit that the Appellants were denied a reasonable opportunity to defend themselves including the right to mitigate which is a violation of the Appellants constitutional right to be heard as enshrined in Article 135(2) of the Federal Constitution. We further submit that there is a serious procedural impropriety in the decision-making process by the Competition Commission. The order of dismissal by the Competition Commission was bad in law and is procedurally flawed. Accordingly, we submit that the decision is void inoperative and of no effect - **Nemo Judex In Causa Sua**."

[36] The appellants' counsel complains that the Commission had "usurped into the role as an Investigator, Prosecutor, Judge and Jury in this case and had further FAILED to give the Appellants a chance to

defend themselves nor did they provide the Appellants a right to mitigate". The appellants' counsel says this is "an outright abuse of power."

[37] Another complaint is that the Commission elected to impose financial penalties in its Proposed Decision against the appellants, instead of a remedial action which the Commission could have considered or proposed to apply as provided in s.36(2)(b) of the CA. The appellants' counsel submitted at paragraph 36 of the Appellants' Written Submissions as follows:

> "... However, the Respondent chose the former (penalty) instead of the later. This action by the Respondent is clearly mala fide or bad faith as the Proposed Decision must be remedial in nature because a Written Representation was not done yet at that point of time. The Respondent's action to impose sanction has placed the Appellants' as **guilty** even before the they were given an opportunity to be heard."

[38] At paragraph 38 of the Appellants' Written Submissions, the appellants' counsel submitted as follows:

> "The Appellants further submits and reiterates paragraph 7 of the Appellants' NOA, whereby it is the Respondent's duty and obligation to assess the market power of the parties to an

agreement to see whether they come within the definition stated thereof. Whether such conduct substantially affects the competition and whether the de minimis rule applies if the parties lack market power. This significant point was never considered by the Respondent. (Refer Chapter 1 Prohibition (Anti-competitive Agreements) page 6 and page 7 [Tab 4 of ABOA 2])"

[39] At paragraph 39(d) of the Appellants' Written Submissions, the appellants' counsel submitted as follows:

"The Appellants reiterate the contents of paragraph 16 of the Appellant's SIR that states that, the lack of conducting a proper object analysis of the Surcharge Memorandum, the FAILURE to take into account the intention and merits of the said Surcharge Memorandum, had further caused the Appellants to file this Appeal. The Respondent has breached their obligation where the Respondent must not flagrantly reject or disregard fundamental reason common sense in reaching its decision. (Refer to Tab 7 CBOD 1, pg 222-259 - Written Representation)"

[40] The above are the crux of the appellants' contentions and complaints in their first ground of appeal.

[41] This Tribunal is of the considered view that the contentions and complaints are mainly directed at the frame work of the CA. The regime

set out in the CA by our Parliament or the legislature is intended to curb anti-competition in Malaysia. PART IV of the CA deals with the manner in which the Commission comes to its final decision. It begins with s. 35 which allows the Commission to give such direction (as it considers to be appropriate and proportionate) as an interim measure pending completion of an investigation. It follows with a proposed decision upon its completion of an investigation. Section 36 of the CA reads as follows:

> "(1) If, after the completion of the investigation, the Commission proposes to make a decision to the effect that one of the prohibitions under Part II has been or is being infringed, the Commission shall give written notice of its proposed decision to each enterprise that may be directly affected by the decision.
>
> (2) The notice shall –
>
> *(a)* set out the reasons for the Commission's proposed decision in sufficient detail to enable the enterprise to whom the notice is given to have a genuine and sufficient prospect of being able to comment on the proposed decision on an informed basis;
>
> *(b)* set out any penalties or remedial action that the Commission proposes to apply; and

(c) inform each enterprise to whom the notice is given that the enterprise may, within such reasonable period as may be specified in the notice-

(i) submit written representations to the Commission; and

(ii) indicate whether it wishes to make an oral representation before the Commission."

[42] In **MyTeksi Sdn Bhd & Ors v Suruhanjaya Persaingan** [2020] 8 CLJ 94, p. 103-4, the High Court, in dealing with s. 36 of the CA, stated as follows:

"[24] The provisions [referring to ss.37, 38, 40, 51, 58 of the CA] alluded to above show that the proposed decision under s. 36(1) will be subject to further process before the respondent decides whether there is a non-infringement or an infringement under ss. 39 or 40 respectively.

[25] Having examined the features of the CA, I find the proposed decision does not dispose of the rights of parties or alter such rights. It is not a final decision as the final decision is when the Commission decides on whether there is an infringement or otherwise.

[26] The fact that there is no provision for appeal against the proposed decision only supports the contention that the proposed decision is not a final decision."

[43] The above excerpts clearly explain the position after the proposed decision has been made by the Commission. The appellants were not deprived of their right to make representation to the Commission whether oral or in writing, which includes the opportunity to "mitigate" within the framework of the CA after a proposed decision is made by the Commission that one of the prohibitions under Part II has been or is being infringed.

[44] This Tribunal could not agree with the appellants' counsel that the appellants were deprived of the right to be heard before the Proposed Decision was made on 9.1.2020. Insofar as a proposed decision of the Commission is concerned, it is neither conclusive nor does it have any effect, it is merely a proposed decision.

[45] The appellants' counsel's submission that because no right to make representations was accorded to the appellants before the Proposed Decision was made, there was a breach of natural justice, in that a right to be heard was not accorded, is misconceived in law and in fact.

[46] In law, the Proposed Decision is not final or conclusive. Although financial penalties were proposed in the Proposed Decision, they have yet to have effect. The Commission had through the Proposed Decision communicated to the appellants as to why the Commission was of the view that one of the prohibitions under Part II has been or is being infringed. It sets down the facts and the law which have led to a proposed finding of an infringement of prohibition in the anti-competition law. It gives the party concerned an opportunity to examine the basis for the proposed decision. After receiving a proposed decision under s. 36(1) of the CA, the party concerned is then accorded the right to make oral and/or written representation to the Commission.

[47] The appellants' counsel's submission is because no representation was accorded before the Proposed Decision was made that amounted to a breach of natural justice. This proposition is putting the cart before the horse by requiring a representation to be made or opportunity to mitigate before the Commission even makes any preliminary finding of infringement of the prohibition of anti-competition.

[48] The opportunity to make representation (whether orally or in writing) is in fact and in law provided in the CA after a proposed decision is made

by the Commission. This opportunity resonates with the right enshrined in the Federal Constitution. Sections 36(2)(c) and 37 of the CA provide the party concerned the right to be heard. This opportunity is only relevant if and only if there is a proposed decision made under s.36(1) of the CA, vis-à-vis a proposed decision to the effect that one of the prohibitions under Part II has been or is being infringed. Therefore, before a proposed decision is made under s. 36(1) of the CA, in other words during the investigation stage, there is no necessity for any right to make representation or to mitigate to be accorded to the party under investigation.

[49] This Tribunal is of the considered view that it is incorrect to say that the CA is being unfair, arbitrary or oppressive. This Tribunal is also of the considered view that the CA has provided the right to be heard (including mitigation) before a final decision is made under s. 40(1) of the CA.

[50] On 11.3.2020, before the Final Decision was delivered on 26.7.2021, the appellants through their previous firm of solicitors Messrs Edwin Ong Chambers had submitted a written representation to the Commission. The said solicitors also indicated that they did not wish to make an oral representation. The appellants were in fact and in law accorded the right to be heard, and the appellants opted for a written

representation, instead of an oral one. Hence, it is incorrect to say that the Commission had committed "an outright abuse of power".

[51] With regard to the complaint that the Commission had "usurped into the role as an investigator, prosecutor, judge and jury", this Tribunal is of the considered view that the CA sets down the frame work for the Commission. The CA allows the Commission to exercise those roles in order to enforce the anti-competition law. This Tribunal is not in the position to judge or comment on the wisdom of the legislature in laying down such frame work. This Tribunal is of the considered view that this proceeding is not the right forum to question the legitimacy of the provisions in the CA.

[52] This Tribunal is also of the considered view that it is incorrect to say that the Commission had found the appellants "guilty" by imposing a financial penalty in the Proposed Decision. As explained earlier, the Proposed Decision did not have any effect, but was merely statement of the proposed findings of the Commission.

[53] This Tribunal opines that the Commission has the discretion to select to propose a financial penalty or a remedial action as it thinks fit as the law permits the Commission to do so. Section s. 36(2)(b) of the CA

states: "*set out any penalties or remedial action that the Commission proposes to apply.*" It is clear the Commission is not bound to choose remedial action as its first choice. The Commission is given the discretion to exercise its options.

[54] This Tribunal could not find anything that could suggest the Commission's election of a financial penalty at the proposed decision stage was an act of mala fide or bad faith. The appellants' counsel submitted that because the appellants had not yet made a written representation at that point of time, therefore, the Commission must first propose a remedial action in its Proposed Decision. The appellants' counsel's submission and proposition here is wrong in law because in the first place a written representation is premature at that stage, as explained earlier. Secondly, the law does not require the Commission to first propose a remedial action in its Proposed Decision. Lastly, if in the proposed decision a remedial action is proposed, but later in the final decision a financial penalty is imposed, the party concerned would surely in such circumstances be deprived of any opportunity to make any representation to the Commission in relation to the imposition of a financial penalty in the final decision.

[55] Based on the above reasoning, this Tribunal finds the first ground of appeal to be unfounded and unmeritorious. There was no breach of natural justice nor did the Commission act in an ultra vires manner in coming to the Final Decision.

[56] With regard to the appellants' complaints in paragraphs 38 and 39(d) of the Appellants' Written Submissions, this Tribunal is of the considered view that it is more appropriate to consider and examine such submissions under the second ground of appeal, instead of the first ground of appeal, because the complaints are directed at the question whether the Commission had carried out its analysis and investigation properly before coming to its decision. Hence, this leads to the second ground of appeal.

Second Ground: There was no infringement of s. 4 of the CA

[57] The nub of this second ground of appeal is that the Commission failed to properly consider whether the Infringing Agreement was an agreement that had prevented, restricted or distorted competition in the given market because the Commission merely relied on the deeming provision. The appellants' counsel submits that the Infringing Agreement did not satisfy any of the ingredients of the prohibition s. 4(1) of the CA.

When the "deemed" provision was invoked by the Commission, it remains a fact the ingredients of the prohibition section were not established and proved by the Commission, the appellants' counsel submits. At paragraph 48 of the Appellant's Written Submission, it stated as follows:

> "The Appellants submits that the Surcharge Agreement does not satisfy any ingredient of the offence which has the object or effect of significantly preventing, restricting, or distorting competition in any market for goods or service. Thus, we submit that the Respondent has failed to discharge the legal burden on a balance of probability."

[58] Paragraph 51 of the Appellants' Written Submissions states as follows:

> "We further submit that the intention of the parties was deliberately left out and object of the Surcharge Memorandum was not shown, and without any further mitigating factors or rights, the Appellants were given an unreasonable sanction. As such, it is the Appellants assertion that the Respondent has failed to act in compliance with the Act and Guidelines."

[59] The appellants' counsel complains that the Commission failed to assess the market in which Maltaco was the main "player" who provides

the Services in the market. At paragraph 57 of the Appellants' Written Submissions, the appellants' counsel states as follows:

> "It is evident from the Final Decision and specifically paragraphs 36 to 41, that the Respondent did not assess the position of Maltaco and other competitors which are significant to the alleged market monopoly. By assessing the market, the Respondent ought to have known that the Appellants does not have a dominant position. This is a serious omission by the Respondent in reaching to its Final Decision."

[60] The appellants' counsel further submits at paragraphs 61, 62, 63 and 64 of the Appellant's Written Submissions:

> "61. The Appellants submits and further states that Maltaco M.S Sdn Bhd is not only a supplier who falls under horizontal line of nature of business, but Maltaco's dominance in market has placed them into vertical line of business as well.
>
> 62. Maltaco's presence is not only dominated in the same zone of trade but also outside the capacity of the Appellants' zone of trade. Thus, it gives the consignees / customers a liberty of choice on services they wanted depending on the price offered by the service providers i.e Appellants, Maltaco and other competitors therein.

63. From the above, the Appellants submits and state that Maltaco's dominance and presence in the same market with the Appellants', enables Maltaco to give cheaper price and have advantage in the market and any customer can choose their service provides. This solidifies the Appellants assertion that this was certainly not a cartel because this was an additional service of long length and heavy lift of import and export cargo in Port Klang, Malaysia that was provided by the Appellants whose main service was for general cargo.

64. Following from the above and upon perusal of the Final Decision, this Honourable Tribunal will note that the Respondent failed, refused and neglected in surveying the market in order to determine whether any feature or combination of features of the market prevents, restricts or distorts competition. It is pertinent to note that these services are not mandatory for the Appellants and further was not regulated under the Port Klang Authority yet. This was just an add on service for the customers convenience."

[61] At paragraph 69 of the Appellants' Written Submissions, the appellants' counsel states as follows:

"The Appellants humbly submit that there is no monopoly, as the customers can get cheaper price, no prohibition of service in the same zone, further, there is cheaper alternative. All this was not considered in the Respondent's Final Decision. Maltaco's position in the market in the same zone reflects the position of

Appellants' and without investigating Maltaco in detail and concluding Appellants as cartel, this clearly shows the outcome is flawed."

[62] In support of the appellants' second ground of appeal, the appellants' counsel submits that "the statutory wordings of the Chapter 1 Prohibition employ the word 'significantly'. The appellants' counsel further submits that "as such, the provision contains an in-built *de minimis test* whereby agreements which are of minor importance fall outside the ambit of the Competition Act 2010." The appellants' counsel also submits that "'significant' means that the agreements must have more than a trivial impact, and it should be noted that impact would be assessed in relation to the identified relevant market."

[63] The appellants' counsel cited paragraph 3.4 of the *Guidelines On Chapter I Prohibition- Anti-Competitive Agreements*, p. 10 which reads as follows:

"3.4. In general, "significant" means the agreements must have more than a trivial impact. It should be noted that impact would be assessed in relation to the identified relevant market. A good guide to the trivial impact of an anti-competitive agreement might be the combined market share of those participating in such an agreement. As a starting point and to provide greater certainty,

the MyCC may use the following basis in assessing whether an anti-competitive effect is "significant." This approach sets "safe harbours" for otherwise anti-competitive agreements or association decisions. In general, anti-competitive agreements will not be considered "significant" if:

- the parties to the agreement are competitors who are in the same market and their combined market share of the relevant market does not exceed 20%;

- the parties to the agreement are not competitors and all of the parties individually has less than 25% in any relevant market. For example, an exclusive distribution agreement between a wholesaler and a retailer neither of whom has more than 25% of the wholesale market or retail market."

[64] The appellants' counsel submits at paragraphs 73 and 74 of the Appellants' Written Submission as follows:

"73. Based on the above, due to the role, geographic market and Maltaco's dominant presence in the market was not taken into account. The Appellants submits that the Surcharge Agreement may fall outside the prohibition Section 4 as it only has an insignificant effect on the market, taking into account the weak position (in comparison to Maltaco's dominance) which the Appellants concerned have on the product or service market in question.

74. In conclusion to the above, assessment is not made thoroughly by the Respondent, one cannot arrive at a conclusion that the Appellants are monopolizing the market until you have assessed Maltaco's shares and position in the market. In fact, it goes beyond the market and Maltaco are specialist in the area and are offering lower price. Evidence shows, no advantage in the market. Thus, the benefit given outweighs the detriment effect to the customers."

[65] The appellants' counsel's submissions could be condensed to mean that because of the deeming provision that was employed by the Commission, the fact remains that the ingredients of the prohibition section (s. 4(1) of the CA) were not established and proved by the Commission on the civil standard of balance of probabilities. This is especially so when Maltaco is considered the dominant party in the relevant market; whereas, the appellants' involvement only had a trivial impact on the relevant market. Therefore, the appellants' infringement of the prohibition of anti-competition, even if there was any, did not qualify to be considered as "significantly" preventing, restricting or distorting competition in the relevant market for the Services. The appellants' counsel also took objection to the Commission labelling the appellants as a "cartel" when the appellants have no association to any illegal association or secret society.

[66] This Tribunal takes cognizance of the legal proposition in the Court of Appeal decision in **Malaysian Airline System Bhd** (supra) (see paragraph 20 above). When the conditions in s.4(2)(a) of the CA have been satisfied, then the "deemed" provision would become operative by law. It follows that the object of significantly preventing, restricting, or distorting competition in the relevant market for the Services would be regarded as if it is a factual reality. In other words, the *object of significantly* preventing, restricting, or distorting competition in the relevant market for the Services, which is supposed to be a factual reality, may not in reality exist, but it is to be accepted as a factual reality in law.

[67] It is necessarily true, therefore, the ingredients, so to speak, of the prohibition provision (s. 4(1) of the CA) would be regarded as established, proved and discharged when the deeming provision is successfully invoked and applied. Section 4(2) of the CA if it is successfully invoked and applied would lead indeed to an inherently biased result. As such, the conditions set for the "deemed" provision to be operative have to be strictly complied with (see paragraph 20 above).

[68] This Tribunal notes that s.4(2)(a) of the CA does not merely deem the Infringing Agreement to have the *object* of preventing, restricting or

distorting competition in the market for the Service, it deems the Infringing Agreement to have the *object of* ***significantly*** preventing, restricting or distorting competition in the market for the Services.

[69] According to MyCC's guidelines, "anti-competition agreements will not be considered significant if the parties to the agreement are competitors who are in the same market and their combined market share of the relevant market does not exceed 20%" (see *Guidelines On Chapter I Prohibition- Anti-Competitive Agreements*, p. 10; see also paragraph 63 above). In other words, an anti-competition agreement could have the *object* of preventing, restricting or distorting competition in the market for a given goods or services, but if the parties to the agreement are competitors who are in the same market and their combined market share of the relevant market is less than 20%, then the parties to the agreement could avoid liability for infringement of the prohibition. The rationale behind such guideline is that any anti-competition agreement that has less than 20% in the relevant market share would not have any significant impact in the relevant market. Even if there is an impact, it is only a trivial one which is considered as insignificant in the relevant market.

[70] The Infringing Agreement had been deemed to have the *object of significantly* preventing, restricting or distorting competition in the relevant

market for the Services. Based on MyCC's guidelines, this may be taken to mean the Services provided by the appellants exceeded 20% of the market share for the Services.

[71] The appellants' counsel submits that if a proper survey or analysis had been carried out by MyCC, it would reveal that the appellants' involvement in the relevant market share could be less than 20%. This is because the major player in the relevant market was Maltaco, and the Services offered by the appellants were not their core business.

[72] The Commission acknowledged that the Services were not the core business of the appellants and the Services generated a small percentage of the respective appellants' total worldwide turnover. The Commission in its Final Decision, particularly in paragraphs 261-2, stated as follows:

> "261. In the present case, the Commission takes into consideration the nature of the conduct which is price fixing and the fact that the relevant services are not central to the Parties' business models.
>
> 262. Due to this consideration, the Commission finds that the penalty figure arrived at for the period of infringement was insufficient to act as a deterrent as each of the Parties' relevant turnover was less than 3% of its total worldwide turnover.

Therefore, the Commission uplifts the value of the base figure to the MDT [minimum deterrence threshold] figure which is 10% out of 10% of the worldwide turnover of each of the Parties for the purpose of calculating the financial penalty."

[73] Following from the above observation of the "deemed" provision, this Tribunal is confronted with a question. Is the deeming fact, i.e., *object of significantly*, a rebuttable fact?

[74] This Tribunal refers to the relevant paragraphs of the judgment of the Court of Appeal in **Malaysian Airline System Bhd** (supra). The relevant paragraphs are reproduced as below:

"[112] We are familiar in cases of substituted service of summonses where the act of advertisement and posting at the last known premises of the person to be served with a legal process would be deemed served irrespective of whether the person to be served had actually seen the notice of the document served in the posting at his last known address or the advertisement in a newspaper.

[113] The person may even bring evidence to show that he could not have seen the posting as he was overseas or that he does not read or could not read the national newspaper in the language in which the notice of service was published.

Whatever evidence is to the contrary would not be effective in rebutting the "deemed" facts [emphasis added].

[114] Thus in *Amanah Merchant Bank Bhd v. Lim Tow Choon (Through Official Assignee)* [1994] 2 CLJ 1; [1994] 1 MLJ 413 (SC) the Supreme Court considered a clause in a guarantee providing for the service of notices which contained a "shall be deemed to be served" provision. The clause assumes critical importance because a notice of demand, necessary to find a cause of action against the guarantor, must be properly served on the guarantor.

[115] Mohamed Dzaiddin SCJ (later CJ) held that the words "shall be deemed" in the clause meant "shall be regarded as". His Lordship considered the cases of *Canadian Imperial Bank of Commerce v. Haley* (1979) 100 DLR (3d) 470 and *R v. Westminster Unions Assessment Committee; ex parte Woodward & Sons* [1917] 1 KB 832 where in the circumstances of the cases, **the deeming provision was not meant to be a presumption and was therefore not something that was rebuttable. The deeming provision was conclusive as to the deemed meaning or consequence and the defendant was precluded from showing otherwise** [emphasis added]."

[75] The Court of Appeal referred to the then Supreme Court decision in **Amanah Merchant Bank Bhd v. Lim Tow Choon (Through Official Assignee)** [1994] 2 CLJ 1; [1994] 1 MLJ 413, and acknowledged that

when there is a deeming provision it is not meant to be a presumption, and therefore, it is not something that is rebuttable.

[76] However, the Court of Appeal also referred to another apex court decision in **Lucy Wong Nyuk King & Anor v Hwang Mee Hiong** [2016] 4 CLJ 813; [2016] 3 MLJ 689. The Court of Appeal also acknowledged the danger of "interpreting a 'deemed' provision in a manner that may lead to injustice or absurdity." In **Lucy Wong**, at p. 704 [MLJ], the apex court held as follows:

> "[52] In our judgment, if something is 'deemed' in a situation where it is clearly wrong or inappropriate, which would lead to injustice or absurdity the application of the deeming provision should be limited to the extent needed to avoid such injustice or absurdity. We have emphasised earlier the importance of having regard to the written agreement as a whole in order to discover the true meaning of its several clauses...."

The apex court in later part of the judgment stated as follows:

> "[55] We wish to put emphasis that *Amanah Merchant Bank Bhd v Lim Tow Choon* and the cases cited therein did not involve an agreement, which contained similar clauses as in the present case. This distinction is crucial to note for the reason that, as we

have said earlier, in the context of our case the effect of a reading of cl 16 as a whole renders the deeming provision in cl 5 to be a presumption that was rebuttable. Therefore, the case of *Amanah Merchant Bank Bhd v Lim Tow Choon* is distinguishable on its facts."

[77] It is clear from the above excerpt, that the legal proposition in **Amanah Merchant Bank Bhd** is still good law.

[78] This Tribunal is of the considered view that the legal proposition in **Lucy Wong** is confined to its peculiar facts. In that case, in order to discover the true meaning of an agreement, a "deeming" clause must be read in the context of the whole agreement. If the "deemed" effect leads to injustice and absurdity, then the deeming provision must be construed to the extent that is rebuttable. Whereas, this instant case concerns a statutory "deeming" provision relating to the prohibition provision of the CA. Although the appellants' counsel has raised a pertinent point in the appeal, this Tribunal is of the considered view that the "deemed" provision in the CA is one that is not rebuttable based on the legal proposition in **Amanah Merchant Bank Bhd**.

[79] The deeming fact before this Tribunal is that the Infringing Agreement had the *object of significantly* preventing, restricting or

distorting competition in the market for the Services. When considered with the MyCC's guidelines, it also means the Services provided by the appellants exceeded 20% of the relevant market share. Based on the legal proposition in **Amanah Merchant Bank Bhd**, this deeming fact is not a presumption capable of being rebutted. This is a statutory deeming provision and it is not open for the appellants to adduce evidence to contradict the deemed conclusive fact.

[80] The Commission had fulfilled the conditions set out in s. 4(2)(a) of the CA (see paragraphs 22 to 25 above). Therefore, the Commission had rightly applied and relied on the "deeming" provision to establish the appellants were liable for infringing the prohibition provision s.4(1) of the CA.

[81] Based on the above analysis, this Tribunal could not find any merit in the second ground of appeal of the appellants.

Third Ground: Relief of Liability under s. 5 of the CA;

[82] Section 5 of the CA is a relief of liability section. It is only relevant when liability under s. 4(1) of the CA has been established against the

appellants. The four reasons set forth in s. 5 of the CA must be cumulatively met. Section 5 of the CA states as follows:

> "Notwithstanding section 4, an enterprise which is a party to an agreement may relieve its liability for the infringement of the prohibition under section 4 based on the following reasons:
>
> *(a)* there are significant identifiable technological, efficiency or social benefits directly arising from the agreement;
>
> *(b)* the benefits could not reasonably have been provided by the parties to the agreement without the agreement having the effect of preventing, restricting or distorting competition;
>
> *(c)* the detrimental effect of the agreement on competition is proportionate to the benefits provided; and
>
> *(d)* the agreement does not allow the enterprise concerned to eliminate competition completely in respect of a substantial part of the goods or services."

[83] It is important for this Tribunal first to identify what benefit arises from the Infringing Agreement. Obviously, there is no identifiable technological benefit. The appellants' counsel submits there was a significant identifiable social benefit directly arising from the Infringing Agreement.

[84] "The social benefits arising from the agreement are amongst others to standardize process for the customer, less complaints to the Port Klang Authority, less hassle for the customer as a one stop shop because this was not a significant contributor to the warehouse income but instead is more to an additional service", the appellants' counsel submits.

[85] This Tribunal is of the considered view that something is said to have social benefits when it possesses the quality or value which is beneficial to society's general well-being beyond mere economic benefit. By way of examples, the maintaining or promoting of societal well-being is part of social benefits; the preserving or promoting of education, culture or environment is part of social benefits; the maintaining or promoting of the standard of living of the people is part of social benefits; and last but not least, the maintaining of social order or security could also be part of social benefits.

[86] What the appellants' counsel has submitted on are merely events that allow the appellants' customers to have the benefit to access to and to enjoy a more convenient service which was offered by the appellants. This benefit could not have any positive impact on the society at large nor does it possess the quality or value which is beneficial to the society's

general well-being. For this reason alone, the appellants' reliance on s. 5 of the CA to seek relief of liability under s. 4 of the CA is entirely unsustainable. What have been submitted in the Appellants' Written Submissions in relation to this third ground of appeal could not support the application of s. 5 of the CA because, as mentioned earlier, the reasons set forth in s. 5 of the CA must be cumulatively met.

[87] This Tribunal notes that in paragraph 103 of the Appellants' Written Submission, the appellants' counsel suddenly sprung the argument that there were efficiency benefits arising from the Infringing Agreement. This argument is submitted under the fourth ground of appeal, instead of the third ground of appeal. Nevertheless, this Tribunal will consider the appellants' counsel's submission under this ground of appeal. This Tribunal finds there is insufficient evidence and facts submitted by the appellants' counsel to demonstrate that there were any significant identifiable efficiency benefits arising from the Infringing Agreement.

Fourth Ground: The Commission had erred in its finding of facts, and thereby led to a wrong conclusion in its coming to the Final Decision;

[88] The complaints in this part are essentially repetition of the above complaints which this Tribunal has found there is no merit. However, one of the complaints is worth considering. The appellants' counsel submits

that PKA was fully aware and had full knowledge of the Infringing Agreement.

[89] The appellants' counsel submits that the appellants had the blessing and approval of PKA to enter into the Infringing Agreement, therefore, the finding of the Commission in its Final Decision ought to be defeated (see paragraph 106 of the Appellants' Written Submissions).

[90] The Infringing Agreement was entered into and approved by the appellants between 25.5.2017 and 30.5.2017, and it was dated 22.5.2017. Thereafter, there were three meetings held between the appellants' representatives and PKA's representatives, namely on 29.9.2017, 6.11.2017 and 10.1.2018. All three meetings occurred after the Infringing Agreement was entered into.

[91] The Commission in its Final Decision has detailed its finding of facts in relation to those three meetings. In paragraph 212 of the Final Decision, the Commission stated as follows:

> "212. The Commission finds that PKA had changed its stand from initially allowing warehouse operators to impose a surcharge for the long length handling services of the import and

export cargoes158 to disallowing the same due to complaints received from customers. Moreover, PKA regarded the rate of RM350.00 to be exorbitant. An extract of the meeting minutes is set out below:

> *"2. PERBINCANGAN 2.1 Lifting Charges – Long Length Cargo 2.1.1 Tuan Pengerusi memaklumkan lifting charges bagi long length cargo perlu diselaraskan kerana pihak LPK telah menerima beberapa aduan daripada pihak Pengimport. 2.1.2 Beliau juga memaklumkan caj yang dicadangkan oleh Operator Gudang sebanyak RM350.00/shipment adalah sangat tinggi dan ianya perlu mempunyai berat minima dan syarat-syarat lain tertentu.159..."*

[92] At paragraph 223 of the Final Decision, the Commission stated as follows:

> "223. The Commission reiterates its position that PKA neither encouraged nor authorized the Parties to enter into the Infringing Agreement. In any event, the Commission would like to refer to *Greek Ferries* [COMP/34466 Greek Ferries, at paragraph 163] and *Spanish Raw Tobacco* [COMP/38238 Spanish Raw Tobacco, at paragraph 427] where the European Commission made a finding that encouragement or authorisation to the anti-competitive agreement by a public authority does not absolve the enterprises from infringing the law."

[93] This Tribunal is in agreement with the Commission's finding in that there is no clear evidence that PKA had approved the price fixing of the

Services *vis-à-vis* the entering of the Infringing Agreement by the appellants. If PKA did indeed give its blessing and approval, its blessing and approval could not prevail over the statutory prohibition in the anti-competition law.

[94] This Tribunal finds there is no merit in this fourth ground of appeal.

Fifth and Sixth Ground: Section 3(4)(a) of the CA applies, therefore, MyCC has no jurisdiction and/or authority over the appellants and activities at the Port Free Zone

[95] Section 3(4)(a) of the CA states as follows:

> "(4) For the purposes of this Act, "commercial activity" means any activity of a commercial nature but does not include-
>
> *(a)* any activity, directly or indirectly in the exercise of governmental authority;
>
> *(b)* any activity conducted based on the principle of solidarity; and
>
> *(c)* any purchase of goods or services not for the purposes of offering goods and services as part of an economic activity."

[96] In gist, the appellants' counsel submits that the exercise of the commercial activities by the appellants is under the purview and control of the PKA, a government body created by statute, therefore, s.3(4)(a) of the CA expressly excluded the application of the CA. The appellants were carrying out activities directly or indirectly in the exercise of a governmental authority.

[97] This Tribunal could not agree with the submission of the appellants' counsel. The Commission in its Final Decision at paragraph 187 stated as follows:

> "It is the Commission's view that for an entity to carry out any activity directly or indirectly in the exercise of government authority for the purposes of section 3(4)(a) of the Act, the entity must be an entity that has been exclusively delegated by the Government of Malaysia to carry out certain activities based on public interest or social objectives."

[98] This Tribunal is of the considered view that the word "activity" referred to in s.3(4)(a) of the CA must be understood to be the activity of the Services concern, as opposed to the act (or activity) of standardizing the surcharge of the Services. The "activity" that is referred to in the section is one which is excluded from the term "commercial activity" for

purposes of the definition of "enterprise" in s. 2 of the CA. Therefore, the appellants can only rely on s. 3(4)(a) of the CA if the Services provided by the appellants amount to activities directly or indirectly in the exercise of governmental authority.

[99] The mere fact that the Services carried out by the appellants were within the control of PKA does not mean the Services was activities in the exercise of governmental authority. The Services were not activities directly or indirectly in the exercise of governmental authority.

[100] The CA only recognises four activities be excluded from the Act, namely activities that are within the Communications and Multimedia Act 1998; activities that are within the Energy Commission Act 2001; activities that are within the Petroleum Development Act 1974 and the Petroleum Regulations 1974; and activities that are within the Malaysian Aviation Commission Act 2015.

[101] The Services were commercial activities carried out by the appellants at their own free will. They were not activities in the exercise of governmental authority. The Services were purely activities of a commercial nature in pursuit of profit. It is misconceived to say that the Services or even the act of entering into the Infringing Agreement was an

"activity" directly or indirectly in the exercise of governmental authority. Hence, the appellants' counsel's submission that the activities that were carried out by the appellants were within the control of PKA, and therefore, the appellants were carrying out activities within the meaning of s.3(4)(a) of the CA is misconceived.

[102] Following from the above, it is equally misconceived to say that MyCC did not have jurisdiction over the appellants over the activities carried out within the PKA's control.

[103] This Tribunal could not agree with the appellants' counsel's submission that there is ambiguity in the definition of "governmental authority" in s. 3(4)(a) of the CA. Governmental authority has to be understood to be authority or power given under law to the Federal Government or a State Government or other governmental entities. This Tribunal accepts that PKA is a governmental entity, the activities or the Services that were carried out by the appellants were not in the exercise of governmental authority by PKA. It is not PKA's responsibility or duty to provide the Services at the Northport and Southport in Port Klang. Therefore, the Services were not carried out either directly or indirectly in the exercise of a government authority.

[104] Based on the above, this Tribunal finds the fifth and sixth grounds of appeal untenable.

Seventh Ground: MyCC's finding on the absence of a Gazette (on long length handling [LLC] and heavy lift handling [HLC]) was misconceived.

[105] The appellants' counsel submits that the Commission was wrong to conclude that the surcharge for the Services is not regulated by PKA and under the legislative purview of PKA (see paragraphs 152-3 of the Appellants' Written Submissions).

[106] Even if it is true PKA had agreed to the surcharge imposed by the appellants, that could not negate the fact that the infringement of the prohibition in the anti-competition law was committed prior to such agreement by PKA. The General Manager Circular was never issued to affirm the Infringing Agreement. The appellants could not rely on any agreement by PKA as a defence nor as an excuse to escape liability under the law. The appellants had entered into the Infringing Agreement before obtaining any approval from PKA. Therefore, there is no excuse for the appellants to place the blame on PKA's representative for the failure to issue the circular approving the illegal act.

[107] What is important is that it is a requirement under the law for charges imposed within the port(s) to be gazetted, however the surcharge rate in the Infringing Agreement was never gazetted. The appellants by entering into the Infringing Agreement at that material time without the sanction of law had infringed the prohibition provision of the anti-competition law.

Conclusion

[108] For the reasons stated above, this Tribunal is satisfied that the Commission was correct in coming to its findings. The Tribunal thereby unanimously confirms the Final Decision of the Commission. This Tribunal notes the appellants did not raise any ground of appeal on the financial penalties imposed on the appellants. As such, this Tribunal did not review the imposition of financial penalties and the methodology employed by the Commission for the calculation of the amounts imposed against the appellants.

[109] In closing, this Tribunal states that some issues raised by the appellants' counsel in the Appellants' Written Submissions and Appellants' Reply to the Respondent's Written Submission are not discussed or mentioned in the grounds of decision here, and that does not

mean they were not considered. The Tribunal is of the view that those issues are too trivial and do not affect the final decision of the Tribunal.

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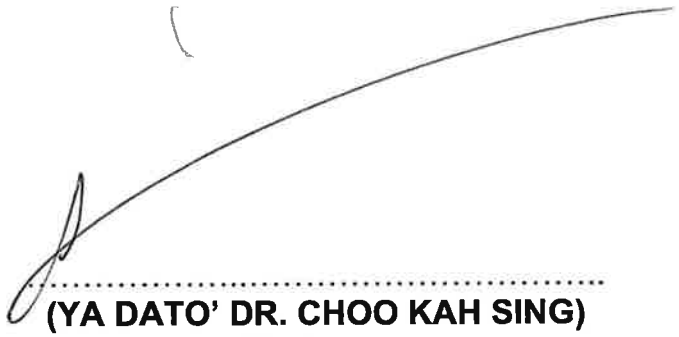
The presiding members of the Competition Appeal Tribunal



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(YA DATO' DR. CHOO KAH SING)
Chairman

.....

(YBHG. DATO' HAJI CHE PEE BIN SAMSUDIN

.....

(YBHG. DATO' DR. SUHAZIMAH BINTI DZAZALI)

Date: 24.2.2023

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