ENCLOSURE 1

Malaysia Competition Commission

Case No. 700.1.1.43.2017

Seven Tuition and Day Care Centres

Pusat Tuisyen Wawasan Cemerlang

Pusat Perkembangan Minda Literasi

Pusat Jagaan Harian Genius

Pusat Tuisyen Inspirasi

Pusat Tuisyen Literasi

Pusat Progresif EG

Kids@Home Educare /

(Pusat Jagaan Kanak-Kanak Suria) ...The Enterprises

Redacted confidential information in this Decision is denoted by square parenthesis [✂]

DECISION

Introduction

1. Seven Tuition and Day Care Centres (individually referred to as "the Enterprise" and collectively referred to as "the Enterprises") have been alleged to have infringed s. 4 of the Competition Act (Act 712) (hereinafter referred to as "the Act"). The Malaysia Competition Commission (hereinafter referred to as "the Commission") had issued a Proposed Decision ("PD") on 8.2.2018 and served the PD on the Enterprises in accordance with s. 36 of the Act. Subsequently, the Enterprises have submitted written representations and this was followed by oral representations by three of the Enterprises, namely Pusat Jagaan Harian Genius, Pusat Perkembangan Minda Literasi and Pusat Progresif EG.

Facts

2. The facts of the case are as follows:

3. Upon receipt of information by a complainant in August 2017, the Commission initiated an investigation under s. 15(1) of the Act in relation to a suspected infringement by tuition and daycare centres operating in the SS19 area in Subang Jaya, Selangor.

4. The Commission has found that the Enterprises in ***Table 1*** below have infringed s. 4(2)(a) read together with s. 4(3) of the Act by agreeing to fix and increase the fees of tuition and daycare services in the SS19 Subang Jaya, Selangor area. This Decision is therefore addressed to the Enterprises listed in ***Table 1*** below.

No.	The Enterprise(s)	Proprietor(s)
1.	Pusat Tuisyen Wawasan Cemerlang	1) Ng Mooi Yong (NRIC No.: [✂]) 2) Fong Chee Weng (NRIC No.: [✂])
2.	Pusat Perkembangan Minda Literasi	1) Ng Wai Leng (NRIC No.:[✂]) 2) Eg Yik Man (NRIC No.: [✂])

No.	The Enterprise(s)	Proprietor(s)
3.	Pusat Tuisyen Inspirasi	1) Low Ying Ling (NRIC No.: [✂])
4.	Pusat Tuisyen Literasi	1) Yip Choy Har (NRIC 2) No.:[✂])
5.	Pusat Progresif EG	1) Eg Yik Lam (NRIC No.:[✂]) 2) Eg Yik Man (NRIC No.: [✂])
6.	Pusat Jagaan Harian Genius	1) Cheah Li Choo (NRIC No.: [✂])
7.	Pusat Jagaan Kanak-Kanak Suria	1) Lim Lin Looi (NRIC No.: [✂])

Table 1: The Enterprises subjected to the Decision

5. The Commission first received a complaint from the Complainant on 4.8.2017 by Mr [✂] (hereinafter referred to as "the Complainant") via MyCC's e-complaint platform alleging the above infringement. In order to support his allegation, the Complainant provided the Commission with the following information and documents:

(i) A mobile phone "screenshot" in JPG format that showed a notice in the English language issued by the Enterprises to

inform parents on the adjustment and standardisation of fees with effect from July 2017;

(ii) A mobile phone "screenshot" in JPG format that showed a notice in the Mandarin language issued by the Enterprises to inform parents on the adjustment and standardisation of fees with effect from July 2017;

(iii) Three copies of official receipts issued by Pusat Tuisyen Literasi for the month of April 2017 dated 4.4.2017, May 2017 dated 2.5.2017, and July 2017 dated 4.7.2017; and

(iv) Three copies of official receipts issued by Pusat Jagaan Kanak Kanak Literasi for the month of April 2017 dated 4.42017, May 2017 dated 2.5.2017, and July 2017 dated 4.7.2017.

6. On 1.11.2017, the Complainant informed the Commission via email that he no longer wished to pursue or proceed with the complaint as he had withdrawn his child from the tuition and daycare centre of one of the Enterprises as a result of the alleged fee hike.

7. Despite the withdrawal of his complaint and the Complainant's refusal to offer further cooperation, the Commission proceeded to exercise its discretion to proceed with investigations into this case on an ex-officio basis under s. 14(1) of the Act. There is no legal basis to accept the request of the withdrawal of the complaint as the Commission is only empowered to close a complaint in accordance only to s. 16 of the Act.

8. Upon the completion of the investigation, it was found that the Enterprises had in fact agreed to fix and increase the fees of tuition and daycare services on 12.5.2017.

The Enterprises Subject to the Proceedings

9. A brief description of the Enterprises is as below:

(a) Pusat Tuisyen Wawasan Cemerlang ("PTWC")

10. PTWC [Business Registration No.: 001863857-V] is a partnership business run by Miss Ng Mooi Yong (NRIC No:[✂]) and Mr Fong Chee Weng (NRIC No.:[✂]). The business operates a tuition centre and its

principle place of business is at No. 91-1, Jalan SS19/6, 47500 Subang Jaya, Selangor.

(b) Pusat Perkembangan Minda Literasi ("PPML")

11. PPML [Business Registration No. SA0124580-P] is a sole proprietorship business owned by Mr Eg Yik Man (NRIC No.:[✂]), which operates an after-school daycare centre for primary school students. Prior to 20 December 2017, PPML was owned by Miss Ng Wai Leng (NRIC.:[✂]). The principle business address of PPML is at No. 97-A, Jalan SS19/6, 47500 Subang Jaya, Selangor.

12. For the purpose of this Decision, any reference to the name "MRC" in the witness statements and documentary evidence also refers to "PPML" as over the course of the investigation, it was discovered that PPML was once a Mind Research Consultant ("MRC") Franchise but the proprietor had since opted out of the MRC franchise. Witnesses interviewed were also inclined to use the term "MRC" instead of "PPML" as they were not made aware of the name change by the proprietor of PPML.

(c) Pusat Tuisyen Inspirasi ("Inspirasi")

13. Inspirasi [Business Registration No.: 1661888-U] is a partnership business owned by Miss Low Ying Ling (NRIC No.: [✂]), operating as a tuition and after-school daycare centre for primary school students. Inspirasi's principle place of business is located at No. 77A, Jalan SS19/6, 47500 Subang Jaya, Selangor.

(d) Pusat Tuisyen Literasi ("Literasi")

14. Literasi [Business Registration No.: 001506898-W] is a sole proprietorship business owned by Madam Yip Choy Har (NRIC No.: [✂]) which operates a tuition centre for primary school students having its principle business address at No. 83-1, Jalan SS19/6, 47500 Subang Jaya, Selangor.

15. Madam Yip Choy Har is also the sole proprietor of a daycare centre, known as Pusat Jagaan Kanak-Kanak Literasi ("Jagaan Literasi") [Business Registration No.: SA0329879-P] located at No. 85-1, Jalan SS19/6, 47500 Subang Jaya, Selangor.

(e) Pusat Progresif EG ("Progresif EG")

16. Progresif EG [Business Registration No.: 002134401-K] is a partnership business run by Mr Eg Yik Lam (NRIC No.: [✂]) and Mr Eg Yik Man (NRIC No.: [✂]) which operates an after-school tuition and daycare centre for primary school students. All of the students who attended this centre are primary school students coming from the same school which is Sekolah Rendah Jenis Kebangsaan Cina ("SRJKC") Lick Hung. The principle place of business of Progresif EG is located at No. 55, Jalan SS19/6, 47500 Subang Jaya, Selangor.

(f) Pusat Jagaan Harian Genius ("Genius")

17. Genius [Business Registration No.: SA0042511-A] is a sole proprietorship business owned by Miss Cheah Li Choo (NRIC No.: [✂]) which operates an after-school daycare centre for primary school students. All the students who attended this centre were from Sekolah Rendah Jenis Kebangsaan Cina ("SRJKC") Lick Hung. The principle place of business of Pusat Jagaan Harian Genius is located at No. 64 dan 66, Jalan SS19/6E, 47500 Subang Jaya, Selangor.

18. For the purpose of this Decision, any reference to the name "Pusat Jagaan Harian Little Genius" in the witness statements and documentary evidence also refers to "Pusat Jagaan Harian Genius" as the witnesses commonly referred to the name "Pusat Jagaan Harian Little Genius" and "Pusat Jagaan Harian Genius" interchangeably.

(g) Pusat Jagaan Kanak-Kanak Suria ("Suria")

19. Suria [Business Registration No.: SA0000980-W] is a sole proprietorship business owned by Miss Lim Lin Looi (NRIC No.: [✂]). The enterprise was registered by Miss Lim Lin Looi on 29.9.2004, and began operating the Kids At Home Educare daycare centre under the name Pusat Jagaan Kanak-Kanak Suria ever since. Suria offered tuition classes, daycare service and art classes to primary school students at No. 63 Jalan SS19/6E, 47500 Subang Jaya, Selangor. Most of the students attending Suria were from Sekolah Rendah Jenis Kebangsaan Cina ("SRJKC") Lick Hung.

20. Kids At Home Educare ("Kids@Home") [Business Registration No.: 001273161-A] a sole proprietorship business owned by Miss Lim Lin Looi (NRIC No.: [✂]), once operated as a daycare centre at No. 63 Jalan SS19/6E, 47500 Subang Jaya, Selangor using the name

Kids@Home from December 2000 to September 2004, Kids@Home business registration with Suruhanjaya Syarikat Malaysia ("SSM") had expired on 30.01.2008.

21. Miss Lim Lin Looi revealed that the reason why the operations of Kids@Home had to be transferred to Suria in December 2004 was due to the fact that the *Jabatan Kebajikan Masyarakat* ("JKM") had advised her to do so since daycare centres were no longer allowed to deploy names in the English language.

22. Incidentally on 9.9.2010, Miss Lim Lin Looi registered a third business under the name Kids At Home Educare ("Kids@Home 2") [Business Registration No.: SA0152812-U] at No. 63, Jalan SS19/6E, 47500, Subang Jaya, Selangor.

23. Miss Lim Lin Looi stated that Kids@Home 2 is currently run by her husband, Mr Siow Yuen Peng (NRIC No.: [✂]) although SSM records reveal that Miss Lim Lin Looi remains the sole proprietor of Kids@Home 2.

24. According to Miss Lim Lin Looi, Kids@Home 2 acts as a consultant representing Suria in discussions and meetings so that Suria

can gave their full attention in taking care of their students. Additionally, Miss Lim Lin Looi is not well versed in Malay and English, hence the reason why Mr Siow Yuen Peng would attend discussions and meetings on behalf of Suria as a consultant under the Kids@Home name.

25. It is important to emphasise that Kids@Home is no longer an active company as its business registration with SSM had expired on 30.1.2008, while Suria and Kids@Home 2 are still listed as active companies in the SSM register.

26. Miss Lim Lin Looi further admitted that she had signed the "Notice to Adjust and Standardise" the tuition and daycare fee under the name of Kids@Home notwithstanding the fact that her daycare centre is called Suria since Kids@Home is Suria's consultant. The results of the SSM Search also showed that Kids@Home, Kids@Home 2 and Suria all shared the same business address and are owned by the same person, Miss Lim Lin Looi.

27. The legal position in relation to Suria remains clear and unambiguous. Miss Lim Lin Looi as the sole proprietor of Suria, an active registered business remains personally liable for all activities of

Suria which had effectively taken over the operations of the now de-registered Kids@Home since December 2004. As such Suria is therefore identified and named as one of the Enterprises as it was the entity effectively operating the tuition and daycare services at the premises duly registered with SSM.

28. Kids@Home 2 and Suria can be regarded as a single enterprise despite their separate legal entity, since Miss Lim Lin Looi herself states that Mr Siow Yoen Peng from Kids@Home would attend discussions and meetings as a consultant for Suria.

29. Therefore, for the purpose of this Decision, any reference to the name "Kids@Home" and "Kids@Home 2" also refers to "Pusat Jagaan Kanak-Kanak Suria" as both are owned by the same person, operating at the same business address.

Procedure

30. Pursuant to the complaint received, investigations were carried out under s. 15(1) of the Act, and thereafter under s. 14(1) after the Complainant withdrew his complaint.

31. During the course of the investigation, a total of eighteen notices made pursuant to s. 18 of the Act requiring the provision of information and/or documents and to make a statement based on the information and documents requested or in relation to any queries made by the Commission's officers were issued to the parties who attended the meetings on 12.5.2017 and 25.5.2017. From there, relevant documents were collected and statements acquired from eight parties, who had received the s. 18 notice.

32. Apart from the s. 18 notices, several inspections were conducted at the business premises of the Enterprises between the months of September to October 2017 pursuant to s. 20 of the Act. Throughout this investigation, a total of three Notices pursuant to s. 20 were issued to PTWC, Progresif EG and Genius.

33. During the course of the investigation, the following eight witnesses were interviewed and statements taken pursuant to s. 18 of the Act:

(a) Miss Ng Mooi Yong (NRIC No.: [✂]) of PTWC on 3.10.2017.

(b) Miss Ng Wai Leng (NRIC No.: [✂]) of PPML on 5.10.2017.

(c) Miss Low Ying Ling (NRIC No.: [✂]) of Inspirasi on 9.10.2017.

(d) Madam Yip Choy Har (NRIC No.: [✂]) of Literasi on 10.10.2017.

(e) Mr Eg Yik Man (NRIC No.: [✂]) of Progresif EG on 10.10.2017.

(f) Miss Cheah Li Choo (NRIC No.: [✂]) of Genius on 11.10.2017.

(g) Miss Lim Lin Looi (NRIC No.: [✂]) of Suria on 11.10.2017.

(h) Madam Loke Phaik Suan (NRIC No.: [✂]) from Tadika Didik Sayang on 2.11.2017.

The Enterprises were Participants in a WhatsApp Group Named "Tuition Daycare Centre"

34. On 9.5.2017, Madam Yip Choy Har created a WhatsApp group named *"Tuition Daycare Centre"* (translated from its original name in Mandarin). Subsequently, Madam Yip Choy Har invited the following persons into the *"Tuition Daycare Centre"* WhatsApp group ("the WhatsApp group"):

(i) Miss Ng Mooi Yong the owner of PTWC;

(ii) Miss Ng Wai Leng the owner of PPML;

(iii) Miss Low Ying Ling the owner of Inspirasi;

(iv) Mr Eg Yik Man the owner of Progresif EG;

(v) Miss Cheah Li Choo the owner of Genius;

(vi) Miss Lim Lin Looi the owner of Suria; and

(vii) Madam Loke Phaik Suan from Tadika Didik Sayang.

35. The participants of the WhatsApp group were also the participants of another WhatsApp group known as "LH Childcare 2017". The LH Childcare 2017 WhatsApp group is a group created by a school teacher by the name of Teacher Hii from SRJKC Lick Hung, for the purpose of updating the Enterprises about SRJKC Lick Hung students' activities.

Madam Yip Choy Har obtained the phone numbers of the participants of the Tuition and Daycare Centre WhatsApp group from the LH Childcare 2017 WhatsApp group.

36. Madam Yip Choy Har admitted creating the WhatsApp group after talking with the representatives from other tuition and daycare centres in the SS19 area. Around April or May 2017, Madam Yip Choy Har met Miss Ng Mooi Yong of PTWC and discussed how their businesses were suffering from losses and that the necessity for increasing their fees.

37. According to Miss Ng Mooi Yong, Madam Yip Choy Har had also verbally invited Miss Ng Mooi Yong to fix and increase PTWC's fee, but Miss Ng Mooi Yong had disagreed with that suggestion.

38. Madam Yip Choy Har also spoke with Miss Low Ying Ning from Inspirasi to inquire whether Miss Low Ying Ning had plans to increase their fees soon. Miss Low Ying Ning's reply was that she was planning to do so the following year.

39. Madam Yip Choy Har also spoke with Miss Cheah Li Choo from Genius to discuss her desire or intention to increase fees.

40. Additionally, Madam Yip Choy Har claimed that the parents of students who attended her centre had requested her to increase the fees as the current fees charged by Literasi was lower than fees charged by the tuition and daycare centres operating in other areas such as Petaling Jaya and Putra Heights. Madam Yip further claimed that a friend, Madam Loke Phaik Suan, also informed her that the fees charged by the centres operating in the SS19 area are lower than fees charged by tuition and daycare centres in other areas.

41. Madam Loke Phaik Suan (NRIC No.: [✂]) is not the owner or proprietor of any tuition and daycare centre in the SS19 area but has indirect involvement with the running of Tadika Didik Sayang, a kindergarten owned by her husband, Mr Yong Sey Keau@Yong Wee Fook (NRIC No.: [✂]) located at No. 23, Jalan SS 18/5A, Subang Jaya, Selangor.

42. In the WhatsApp group, Madam Yip Choy Har suggested that a meeting be held with all the participants of the WhatsApp group to discuss the issue of standardisation of fees charged to students. After all parties had agreed on a date for the meeting, Miss Cheah Li Choo from Genius offered to hold the meeting at the premises of her daycare centre.

The First Meeting of the Enterprises on 12.5.2017

43. The first meeting held on 12.5.2017 ("the First Meeting") at the Pusat Jagaan Harian Genius was attended by:

(i) Madam Yip Choy Har from Literasi;

(ii) Miss Ng Mooi Yong from PTWC;

(iii) Miss Ng Wai Leng from PPML;

(iv) Miss Low Ying Ling from Inspirasi;

(v) Mr Eg Yik Man from Progresif EG;

(vi) Miss Cheah Li Choo from Genius;

(vii) Miss Lim Lin Looi of Suria and her husband, Mr Siow Yuen Peng from Kids@Home; and

(viii) Madam Loke Phaik Suan from Tadika Didik Sayang.

44. This meeting commenced at about 11.00 a.m. and lasted for about an hour. The atmosphere during the meeting was calm and amicable. Incidentally, this was the first time the proprietors of tuition and daycare centres in the SS 19 area had held a meeting together.

45. It was alleged that the meeting was dominated by Madam Loke Phaik Suan and Madam Yip Choy Har as they were the persons who

had pushed for the Enterprises to increase and fix their respective fees, but this allegation was denied by both Madam Loke Phaik Suan and Madam Yip Choy Har.

46. The First Meeting mainly discussed the low fee rate that is being charged by the Enterprises. The general consensus of the meeting was that there was a need for the centres to increase the existing fees charged due to the rising operational costs, rental, inflation and increasing cost of living. During the meeting, the Enterprises shared and disclosed to each other their respective fees charged at the time.

47. At the end of the meeting, the Enterprises agreed to collectively increase the fee to RM450.00 per student on the basis that this was a fair amount for both the parents and the centres. The "Notice to Adjust and Standardise" the tuition and daycare fee ("the Notice") was then prepared by Madam Yip Choy Har in both English and Mandarin.

48. The draft "Notice" was then uploaded to the WhatsApp group for the Enterprises' viewing.

The Second Meeting of the Enterprises on 25.5.2017

49. The second meeting was held on 25.5.2017 ("the Second Meeting") at Genius and was attended by the following persons:

(i) Madam Yip Choy Har of Literasi;

(ii) Miss Ng Mooi Yong of PTWC;

(iii) Miss Ng Wai Leng of PPML;

(iv) Miss Low Ying Ling of Inspirasi;

(v) Mr Eg Yik Man of Progresif EG;

(vi) Miss Cheah Li Choo of Genius; and

(vii) Miss Lim Lin Looi of Suria.

50. The purpose of the Second Meeting was for the representatives of each of the Enterprises to sign the "Notice". Madam Loke Phaik Suan did not attend the Second Meeting.

51. The Enterprises were not threatened, forced or coerced into signing the Notice, nor were there any negative consequences or sanctions imposed upon any of the Enterprises if they did not sign the Notice. The reason most of the Enterprises proceeded to sign the Notice was due to the fact that they felt that the current fees imposed (of

between RM390.00 to RM400.00 per student) was quite low and necessitated increasing.

52. There were centres that had signed the Notice because other centres had signed it and centres with a larger number of students had also signed the Notice. At the end of the Second Meeting, the Enterprises that attended the meeting had collectively signed the Notice.

53. The Notice contained the scale of fees that was to be charged by the centres for the month of July, August, September, October and November 2017.

Miscalculation of the Fee for November 2017

54. On 26.5.2017, after the Notice was signed by the Enterprises, Madam Yip Choy Har discovered that there was a miscalculation in the amount of fees for the month of November 2017. The Notice signed by the Enterprises stated that the fee for November 2017 was RM750.00 instead of the agreed sum of RM700.00. The figure of RM700.00 is derived from the monthly fee of RM450.00 for existing students and an additional fee of RM250.00 for the annual book and miscellaneous fees.

55. The Enterprises then agreed to rectify the error on their own without having to sign a fresh Notice. Some of the Enterprises rectified that mistake either by using correction fluid, by cutting and pasting rectified figures onto the existing Notice before scanning the manually amended Notice, or by not amending the Notice at all, resulting in some centres having the Notice state the fee for November 2017 as RM750.00 while some had the Notice stating that the fee for November 2017 was RM700.00.

Distribution of the Notice by the Enterprises

56. The Enterprises were not threatened, forced or coerced into distributing the Notice to the parents of their students, nor were there any negative consequences or sanctions imposed upon any of the Enterprises if they did not distribute the Notice.

57. This was due to the fact that the notice was to serve as a guideline only. It is up to the respective Enterprises to decide whether or not to distribute the Notice. As a result, there were tuition and daycare centres which distributed the Notice to the parents of their students and centres that did not do so.

58. It is not known when exactly the Notice was distributed, but Madam Yip Choy Har had sent a message to the WhatsApp group stating that she intended to distribute the Notice on 21.6.2017.

59. Literasi, Inspirasi, Genius and Suria had distributed the Notice via the WhatsApp group between their respective centres and the parents of their students. Progresif EG had given the Notice to about three or four parents by hand when they came to the centre to pick up their children. Miss Ng Mooi Yong from PTWC said that she had only given the Notice to several parents. Miss Ng Wai Leng of PPML claimed that she had only shown the Notice to a parent and had never shown or distributed the Notice to anyone else.

Implementation of the Fee Scale by the Enterprises

60. The Enterprises were also not threatened, forced or coerced to implement the fee scale, nor were there any negative consequences or sanctions imposed upon the Enterprises if they did not implement the revised fee scale. This is due to the fact that the Notice was to serve as a guideline for the Enterprises to set their fees.

61. It was up to the respective Enterprises to decide whether they had wished to implement the fee scale or otherwise. As a result, there were centres which proceeded to implement the fee scale in full, centres which partially implemented the fee scale and centres which did not implement the fee scale at all.

62. There is evidence to suggest that the Enterprises had stopped implementing the fee scale specified in the Notice after their centres were inspected by the Commission Officers.

Involvement of Individual Enterprises in the Agreement and / or Concerted Practice to Fix Prices

63. Miss Ng Mooi Yong of PTWC had attended the First Meeting and Second Meeting on 25.5.2017. Although Miss Ng Mooi Yong did not implement the revised fee scale, there was no evidence to suggest that Miss Ng Mooi Yong had distanced herself from the price fixing agreement either the First or the Second Meeting.

64. Miss Ng Wai Leng of PPML had attended the First and Second Meeting. Although Miss Ng Wai Leng did not implement the revised fee scale, there was no evidence to suggest that Miss Ng Wai Leng had

distanced herself from the collective agreement by the Enterprises to fix the prices in either the First or Second Meeting.

65. Miss Low Ying Ling of Inspirasi attended both the First and Second Meetings and implemented the revised fee scale. There was no evidence to suggest that Miss Low Ying Ling had distanced herself from the collective agreement by the Enterprises to fix the prices in either the First or Second Meeting.

66. The role of Madam Yip Choy Har of Literasi in the subject matter in question covers the following:

(a) Creation of the WhatsApp group;

(b) Invited the other Enterprises into the WhatsApp group;

(c) Proposed to hold the meeting with the Enterprises;

(d) Attended the First and Second Meeting at Pusat Jagaan Harian Genius;

(e) Prepared the draft "Notice" the tuition and daycare fee; and

(f) Informed the Enterprises in the WhatsApp Group that she had intended to circulate the Notice containing the revised fee rates on 21.6.2017.

67. Mr Eg Yik Man of Progresif EG attended both the First and Second Meeting and partially implemented the revised fee scale. There was no evidence to suggest that Mr Eg Yik Man had distanced himself from the price fixing agreement in either the First or Second Meeting.

68. Miss Cheah Li Choo of Genius had attended the First and Second Meeting and had partially implemented the revised scale fee. There is no evidence to suggest that Cheah Li Choo had distanced herself from the price fixing agreement in either the First or Second Meeting.

69. Miss Lim Lin Looi of Suria had attended the First and Second Meeting. Although Ms Lim Lin Looi had not implemented the revised fees, there is no evidence to suggest that Miss Lim Lin Looi had distanced herself from the collective agreement by the Enterprises to fix the price in either the First or Second Meeting.

Theory of Harm

70. Competition in the commercial world refers to the process of rivalry between economic operators who seeks to win businesses from consumers in the market place. This process of rivalry encouraged economic operators to become more innovative by developing new

products and offering better quality goods or services in the market. Economic operators striving to innovate and differentiate their products from the rest, will result in the consumer having increased options and the ability to select products that offer the right balance between price and quality. This process of rivalry also exerts downward pressure on the price of goods and services.

71. The European Experience shows that co-operation between competitors who enter into a price fixing agreement that distort competition in the market have negative effects, in particular on the price, quantity or quality of the goods and services to the detriment of consumers.[1] Hence, price fixing agreements are viewed as a serious form of infringement under the Act.

72. The Commission has assessed whether the Enterprises have infringed the prohibition imposed by s. 4(2)(a) read with s. 4(3) of the Act by participating in a price fixing agreement to adjust and standardise the tuition and daycare fees paid by the parents of students with effect from July 2017, having as its object the prevention, restriction or distortion of

[1] Case C-67/13 P *Groupement des Cartes Bancaires v European Commission* at paragraph 48-51; Case C-286/13 P *Dole Food Co Inc., Dole Fresh Fruit Europe v European Commission* at paragraph 115

competition in the after-school daycare and tuition centre in the SS19 area in Subang Jaya, Selangor market.

73. By colluding to adjust and standardise the tuition and daycare fee charged by their respective centres, the Enterprises had the objective of reducing competition in the market by impeding the ability of the enterprises to independently determine their fees based *inter alia* on their operational costs, which in turn may result in the fees charged being artificially inflated to the detriment of consumers. The collusion by the Enterprises also has as its objective of depriving parents with school-going children around the SS19 in Subang Jaya area the opportunity of switching to other tuition and daycare centres that may offer a more competitive fee for similar services offered by the Enterprises.

The Relevant Market

74. Based on the complaint, the interviews and the analysis of the evidence obtained, the relevant market of this investigation is the after-school tuition and daycare centre operating within the SS19 area in Subang Jaya, Selangor market.

75. An after-school tuition and daycare centre can be described as a place which offers tuition, daycare and homework supervision services to primary school students. The centres are typically attended by the students after they have completed their schooling session for the day. The students will either be fetched from their school by the staff of the centre or are sent to the centre by their parents.

76. At the centre, students will be provided with lunch by the staff of the tuition and daycare centre depending on the request of the parents of the students. The staff will then assist the students with their homework and upon completion, will also be given tuition classes or additional lessons. Students will remain at the centre until completion of their lessons or until they are picked up by parents.

77. It should be noted that tuition centres in Selangor are required to be registered with the Private Education Unit, Selangor State Education Department under the Ministry of Education, Malaysia. Daycare centres in Subang Jaya are required to be registered with the *Pejabat Kebajikan Masyarakat Daerah Subang Jaya,* which comes under the Ministry of Women, Family and Community Development.

78. There is no law which specifically governs or regulates businesses operating as a daycare and tuition centre. The Enterprises subjected to this Decision registered themselves either as a daycare centres with the *Pejabat Kebajikan Masyarakat Daerah Subang Jaya* or as a tuition centre with the Selangor State Education Department. It was observed that the Enterprises represent themselves to the public as a centre offering the service of daycare (after school child-care) and tuition (tuition and additional classes and homework supervision) to primary school students.

79. Throughout the course of the investigation, it was also discovered that the students who attended the after-school tuition and daycare centres operated by the Enterprises consisted of primary school students and almost all of them came from Sekolah Rendah Jenis Kebangsaan Cina ("SRJKC") Lick Hung located nearby at Jalan SS19/6, Subang Jaya, Selangor.

80. Based on Paragraph 1.6 of the Guidelines on Market Definition, the market definition provides a framework for the Commission to take into account, amongst other things, whether there is a significant anti-competitive effect in a market as well as the turnover of the firm in the relevant market in assessing the amount of penalty. The nature of the

infringement particularly s. 4(2)(a) of directly or indirectly fixing prices are by their very nature restrictive of competition negates the need for a Market Definition for the purposes of determining whether there is a significant anti-competitive effect in a market.

81. The relevant market is therefore the provision of tuition and daycare services in the SS19 Subang Jaya, Selangor area.

The Law

82. The Enterprises are alleged to have infringed s. 4 of the Act. Section 4 reads as follows:

> **"Prohibited horizontal and vertical agreement**
>
> 4. (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."

Burden and Standard of Proof

83. It is not disputed that the burden of proof that the Enterprises have infringed s. 4 of the Act rest on the Commission.

84. At the outset it must be stated that competition law and authorities from the United Kingdom, the European Union, the United States of America, Australia and Singapore are highly persuasive as can be seen from the statement made by the Minister of Domestic Trade, Cooperative and Consumerism, Dato' Sri Ismail Sabri bin Yaakob (as he was then) at the second reading of the Competition Bill in the Dewan Rakyat on 20.4.2010. He said as follows:

> 6. "Tuan Yang di-Pertua, kementerian telah meneliti dan menjalankan kajian mengenai Undang-undang Persaingan yang diamalkan di negara-negara lain termasuk di **United Kingdom, Australia, Kesatuan Eropah, Amerika Syarikat dan Singapura**. Di mana amalan-amalan terbaik di peringkat antarabangsa ini telah **dijadikan rujukan untuk dimasukkan di dalam rang undang-undang ini.** Akan tetapi, pada masa yang sama kementerian tetap mengutamakan ciri-ciri dan keperluan ekonomi negara secara spesifik atau lebih terperinci dengan konsep ekonomi negara yang kecil dan terbuka." [2]

85. Relying on the authorities in Singapore[3] and the United Kingdom,[4] the Commission bears the burden of proving that the Enterprises have infringed s. 4 of the Act.

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[2] Penyata Rasmi Dewan Rakyat, Parlimen Kedua Belas Penggal Ketiga, Sesi 20.4.2010, Bil. 22 halaman 129-130
[3] *Pang's Motor Trading v CCS* [2014] SGCAB 1 at paragraph 33
[4] *Napp Pharmaceutial v Director General of Fair Trade* [2002] CAT 1 at paragraph 108

86. The Commission is of the view that the standard of proving an infringement under s. 4 of the Act is that of a civil standard. It is on a balance of probabilities.[5] In any event, it was not seriously disputed by the Enterprises that the standard of proof required to prove an infringement under s. 4 of the Act is that of a balance of probabilities.

87. It is trite law that direct evidence as well as circumstantial evidence can and may be relied upon so long as the evidence is relevant and admissible. The Commission may take into account any and every piece of evidence in so far as they are considered relevant in order to determine and satisfy itself that the ingredients of the infringing provision has been established.[6]

Ingredients of Infringement

88. Before considering the issues raised by the Enterprises it is necessary to consider the ingredients of the infringement. The requirements of s. 4(2) of the Act was discussed extensively in the case

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[5] *JJB Sports PLC, Allsports Limited v Office of Fair Trading* [2004] CAT 17 at paragraph 105-109
[6] Case C-204/00 *Aalborg Portland A/S and Others v Commission of the European Communities* at paragraph 55-57 and *JJB Sports PLC, Allsports Limited v Office of Fair Trading* [2004] CAT 17 at paragraph 205

of *Sibu Confectionery and Bakery Association*[7], where the Commission held at paragraph 32 that:

> "*To establish whether the enterprises have infringed or are infringing section 4(2)(a) of the Act, the Commission has to prove that:*
>
> *(i) The Target Enterprises are "**enterprises**" as defined under Section 2 of the Act;*
> *(ii) There is a **horizontal agreement** between the Target Enterprises;*
> *(iii) The **agreement has the object** of significantly preventing, restricting or distorting competition in any market for goods or services."*

Whether the Enterprises are "Enterprises" Within the Meaning of s. 2 of the Act

89. At the outset, it is necessary to determine whether the Enterprises are enterprises within the definition of s. 2 of the Act which defines "enterprise" to mean "…any entity carrying on commercial activities relating to goods and services, and for the purposes of this Act, a parent and subsidiary company shall be regarded as single enterprise if, despite their separate legal entity, they form a single economic unit

[7] *Sibu Confectionery and Bakery Association* (No.MyCC.0045.2013)

within which the subsidiaries do not enjoy real autonomy in determining their actions in the market".

90. The Enterprises operate tuition and daycare centres in SS19, Subang Jaya Selangor. They are engaged in commercial activities through the provision of tuition and daycare centres in consideration of payment for such services.

The Commission's Findings

91. The Enterprises are registered with the Companies Commission of Malaysia ("SSM") as evidence from the records on Register of Companies maintained by the SSM. From the registration record and based on evidence of the Enterprises' respective turnover generated from the provision of tuition and daycare services it can be concluded that all the Enterprises are going concerns carrying out commercial activities and are therefore enterprises as defined under s. 2 of the Act.

Whether there exists a Horizontal Agreement between the Enterprises

92. In paragraph 39 of the *Ice Manufacturers* case,[8] it was held that:

> "39. The fact that an enterprise may have played only a limited part in the setting up of the agreement, or may not be fully committed to its implementation, or participated only under pressure from other parties does not mean that it is not a party to the agreement."

93. On the concept of agreement under competition law, the European Court of First Instance in the case of *Bayer v Commission* held that:[9]

> "67 It is also clear from the case-law in that in order for there to be an agreement within the meaning of Article 85(1) of the Treaty [equivalent to Section 4 of the Malaysian Competition Act 2010] it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way (Case 41/69 ACF Chemiefarma v Commission [1970] ECR 661, paragraph 112; Joined Cases 209/78 to 215/78 and 218/78 Van Landewyck and Others v Commission [1980] ECR 3125, paragraph 86; Case T-7/89 Hercules Chemicals v Commission [1991] ECR II-1711, paragraph 256).

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[8] *Ice Manufacturers* (No. MyCC.700.2.0001.2014)
[9] Case T-41/96 *Bayer v Commission*

68 As regards the form in which that common intention is expressed, it is sufficient for a stipulation to be the expression of the parties' intention to behave on the market in accordance with its terms (see, in particular, ACF Chemiefarma, paragraph 112, and Van Landewyck, paragraph 86), without its having to constitute a valid and binding contract under national law (Sandoz, paragraph 13).

69 It follows that the concept of an agreement within the meaning of Article 85(1) of the Treaty, as interpreted by the case-law, centres around the existence of a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention."

94. Agreement is defined by s. 2 of the Act to mean *"...any form of contract, arrangement or understanding, whether or not legally enforceable, between enterprises, and includes a decision by an association and concerted practices."* Paragraph 2.6 of the Guidelines on Chapter 1 Prohibition: Anti-Competitive Agreements states:

"2.6 Concerted practices usually involve some form of informal co-operation. A concerted practice could arise whereby parties knowingly enter into an informal arrangement involving some practical co-operation or where their conduct is influenced in some way following contact or communication

between them. This could involve, for example, an informal arrangement where one competitor sets the price and the other competitors follow without any reasonable justification. Competitors should be wary of simply following the prices of competitors unless the decision was made completely independently from all other competitors and there is reasonable explanation for following each other such as an increase in price of an important input."

95. The Guidelines on Chapter 1 Prohibition: Anti-Competitive Agreements at paragraph 2.2 further states that:

"2.2 An agreement could also be found whereby competitors attending a business lunch listen to a proposal for a price increase without objection. On the same note, competitors should avoid meetings or other forms of communication with competitors particularly when price is likely to be discussed. Mere presence with competitors at an industry association meeting where anti-competitive decision was made may be sufficient to be later implicated as a party to that agreement".

96. In *Fixing of Monthly Salaries of New Indonesian Foreign Domestic Workers* case, the Competition Commission of Singapore said: [10]

"52. In this respect, CCS notes that the mere participation by an undertaking in a meeting with an anti-competitive purpose, without expressing manifest

[10] *Fixing of Monthly Salaries of New Indonesian Foreign Domestic Workers* Case Number CCS 500/001/11

opposition to or publicly distancing itself from, the same is tantamount to a tacit approval of that unlawful initiative. CCS further notes that disclosure of intention or conduct of the market serves to eliminate or reduce uncertainty associated with competition and is sufficient to prove that there has been a concerted practice. Indeed, in the case of Cimenteries v Commission, the appellants had argued that merely letting a competitor know of its intention could not have amounted to a concerted practice. In rejecting this argument, the CFI held that:

> 1849. In that connection, the Court points out that the concept of concerted practice does not in fact imply the existence of reciprocal contacts (Opinion of Advocate General in Woodpulp II, cited at paragraph 697 above, points 170 to 175.). That condition is met where one competitor discloses its future intentions or conduct on the market to another when the latter requests it or, at the very least accepts it...
>
> 1852. ...In order to prove that there has been a concerted practice, it is not therefore necessary to show that the competitor in question has formally undertaken, in respect of one or several others, to adopt a particular course of conduct or that the competitors have colluded over their future conduct on the market. ... it is sufficient that, by its statement of intention, the competitor should have eliminated, or at the very least, substantially reduced uncertainty as to the conduct [on the market to be expected on his part]

54. In order to avoid liability by publicly distancing itself, an undertaking must inform the other companies represented with sufficient clarity, that, despite appearances, it disagrees with the unlawful steps which they have taken.

55. In Westfalen v Commission the CFI clarified that the notion of public distancing as a means of excluding liability should be interpreted narrowly. Otherwise, it would be impossible to prevent infringements of competition law committed by cartels if it were to be accepted that undertakings may attend such meetings with impunity.

58. In summary, the approach of case-law is clear. A competitor should not, directly or indirectly, disclose information to another competitor that could influence its future pricing behaviour. A trader is unlikely to determine his commercial policy independently after attending a meeting where future pricing behaviour was shared and discussed. Furthermore, this lack of independence may distort the competitive conditions in the market. In fact, meetings which seek to coordinate the amount, timing and manner of price changes are deemed to change the incentives, knowledge and behaviour of those in attendance."

97. Under European Jurisprudence, the fact that an enterprise does not act on or subsequently implement the anti-competitive agreement does not preclude the finding that an agreement existed.[11] The fact that an enterprise may have played only a limited role in the setting up of the

[11] Case 86/82 *Hasselblad v Commission* at paragraph 85

cartel agreement, or may not be fully committed to its implementation, or may have participated only under pressure from other enterprises does not mean that it is not a party to the anti-competitive agreement.[12]

98. Based on the statements and documents obtained over the course of the investigation, it was found that the Enterprises are competitors in the after-school tuition and daycare market in the SS19 area in Subang Jaya, Selangor, as all seven centres are engaged in the same economic activity of offering the tuition and daycare services to primary school students. Therefore, relying on s. 2 of the Act, the relations between all the Enterprises are horizontal in nature.

The Commission's Findings

99. The Commission is satisfied that if not for the agreement or concerted effort of the Enterprises to fix the fees, each party will have to compete with one another in the SS19 Subang Jaya, Selangor area in order to increase their revenue and/or profits through various means such as improved service quality, better value-added services and or other means of marketing and promotion. As such relying on the cases and guidelines cited in the paragraphs above, it is clear from the

[12] Case C-49/92 *Commission v Anic Participazioni* at paragraph 80

evidence and the circumstances of the case that there existed a horizontal agreement between the Enterprises to raise and set prices.

Whether the Agreement has the Object of Significantly Preventing, Restricting, or Distorting Competition in any Market for Goods and Services

100. In *Sibu Confectionery and Bakery Association* it was held: [13]

> "42. Section 4(2) of the Act provides that an agreement between enterprises to fix a selling price is a horizontal agreement which is "deemed to have the object of significantly preventing, restricting, or distorting competition".
>
> 43. Paragraph 3.25 of the Commission's Guidelines on Chapter 1 Prohibition (Anti- Competitive Agreements) relating to prohibition under section 4 provides further explanation by stating that:
>
> > "It is important to note that Section 4(2) of the Act treats certain kinds of horizontal agreements between enterprises as anticompetitive. In these situations, the agreements are deemed to "have the object of significantly, preventing, restricting or distorting competition in any market for goods or services." This means for these horizontal agreements, the MyCC will not need to examine any anti-competitive

[13] *Sibu Confectionery and Bakery Association* (No. MyCC.0045.2013)

effect of such agreements. The agreements which are deemed to be anti-competitive include:

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

44. The same Guidelines also state that there is no necessity for the Commission to prove effects of the agreement once an object agreement is established. Paragraphs 2.13 and 2.14 of the said Guidelines state the following:

"2.13 ...If the "object" of an agreement is highly likely to have a significant anti-competitive effect, then the MyCC may find the agreement to have an anti-competitive "object".

2.14 Once anti-competitive "object" is shown, then the MyCC does not need to examine the anti-competitive effect of the agreement."

45. Therefore, for infringements under section 4(2)(a) of the Act, there is no need to take into account the actual effects of an agreement which has as its object the prevention, restriction or distortion of competition within the market."

101. Paragraph 3.25 of the *Guidelines on Chapter 1 Prohibition: Anti-Competitive Agreements* relating to prohibition under s. 4(2) of the Act

states that there is no necessity to prove effects of the agreement once an object agreement has been established.

The Commission's Findings

102. The Commission is of the view that the general consensus attained by the Enterprises on the First Meeting held on 12.5.2017 to adjust and standardize the service fees of tuition and daycare RM450.00 per month in the SS19, Subang Jaya, Selangor area is cogent evidence supporting the contention that the Enterprises had engaged in a horizontal price fixing agreement having as its object the prevention, restriction or distortion of competition in the after-school daycare and tuition centre services in the SS19 area in Subang Jaya market.

Conclusion on Legal Assessment

103. Price fixing is a major concern as the restriction of competition is obvious in any price fixing case. The agreement to fix price leaves no room for individual enterprises to assess their own operating costs and to determine for themselves the cost-pass-through effects and whether it should be borne by themselves or by the consumers.

104. The agreement seen in this case, comprising of entities of differing sizes and capacity provides the Enterprises the opportunity to impose higher prices without competition in order to maximize profitability.

105. Based on the evidence, it can be concluded that:

(a) The Enterprises are competitors in the after-school tuition and daycare market in the SS19 area in Subang Jaya, Selangor, as all seven centres are competitors who had engaged in the same economic activity of offering tuition and daycare services to primary school students. Therefore, relying on the definition of the term "horizontal agreement" in s. 2 of the Act, the relationship between all the Enterprises are horizontal in nature.

(b) The Enterprises had entered into a price fixing agreement during the First Meeting on 12.5.2017, notwithstanding the fact that they have not, at that point in time prepared or signed any agreement to adjust and standardise their fees. This is because, concurrence of wills between all the Enterprises to enter into a price fixing agreement had already existed at the end of the First meeting when the Enterprises

collectively agreed to adjust and standardised their tuition and daycare fees.

(c) The signing of the Notice by the Enterprises during the Second Meeting on 25.5.2017 can therefore be construed as a mere formality between the parties which did not change the fact that the Enterprises had already entered into a price fixing agreement on 12.5.2017.

(d) Consequently, the infringement period started from 12.5.2017 when the Enterprises collectively agreed to adjust and standardise their fees.

106. Section 4 the Act therefore serves to prohibit the actions taken by the Enterprises, who through a collective agreement to fix the fees would effectively hamper or reduce the ability of parents and/or students from objectively and reasonably evaluating, changing or switching tuition and daycare centres within the SS19, Subang Jaya, Selangor area. The objective of the agreement clearly is therefore to avoid and reduce the risk of competition amongst the operators of tuition and daycare centres in the market in question.

107. The Commission is satisfied that the Enterprises had participated in the meeting and that none of the Enterprises had voiced their manifest objection and/or publicly distanced itself from the agreement to fix the fees for tuition and daycare centres.

108. As such, based on the evidence gathered, the only reasonable conclusion that can be made under the circumstances is that the Enterprises had participated and engaged in a horizontal price fixing agreement having as its object the prevention, restriction or distortion of competition in the after-school daycare and tuition centre services in the SS19 area in Subang Jaya, Selangor market. The Commission is therefore satisfied that the requirement of s. 4(2)(a) read with s. 4(3) of the Act has been satisfied.

109. Based on evidence, it was found that the Enterprises had in fact agreed to fix and increase the fees and standardize the tuition and daycare fees on 12.5.2017 at Pusat Jagaan Harian Genius and the said increase was targeted to be effective from 1.7.2017.

110. On the basis of the findings of the investigation, the Commission finds that the Enterprises listed in ***Table 1*** above had infringed s. 4(2)(a)

read with s. 4(3) of the Act by agreeing to increase the fees for tuition and daycare centres in SS19, Subang Jaya, Selangor.

Decision of the Commission

111. The Commission finds that the Enterprises had infringed the prohibitions laid down in s. 4 of the Act in that the Enterprises had entered into an agreement or concerted practice to fix the price of tuition and daycare services in the SS19, Subang Jaya Selangor area. The Commission therefore makes a decision of infringement pursuant to s. 40 of the Act.

Direction Upon a Finding of Infringement

112. Section 40(1) of the Act provides that:

> **"Finding of an infringement**
>
> **40.** (1) If the Commission determines there is an infringement of a prohibition under Part II, it –
>
> *(a)* shall require the infringement to be ceased immediately;

(b) may specify steps which are required to be taken by the infringing enterprise, which appear to the Commission to be appropriate for bringing the infringement to an end;

(c) may impose a financial penalty; or

(d) may give any other direction as it deems appropriate."

General Principles on Financial Penalties

113. In relation to the imposition of financial penalties, s. 40(1)(c) and s. 40(4) of the CA state as follows:

"**40.** (1) If the Commission determines that there is an infringement of a prohibition under Part II, it –

(*c*) may impose a financial penalty; or

(4) A financial penalty shall not exceed ten percent of the worldwide turnover of an enterprise of over the period which an infringement occurred."

114. By virtue of powers conferred under s. 40(1)(c) of the Act, a financial penalty can be imposed on an enterprise found to have infringed a prohibition under Part II of the Act and such penalty shall not

exceed ten percent of the worldwide turnover of the said enterprise over the period during which the infringement had taken place.

115. The Commission had also taken cognizance of s. 17 (2) (b) of the Competition Commission Act 2010 (Act 713) (hereinafter referred to as "the CCA") which provides that:

> "**17.** (1) The Commission shall have the power to do all things necessary or expedient for or in connection with the performance of its functions under the competition laws.
>
> (2) Without prejudice to the generality of the subsection (1), the powers of the Commission shall include the power –
>
> ...
>
> (*b*) impose a financial penalty for the infringement of the provisions of the competition laws."

The Commission's Guidelines on Financial Penalty

116. The imposition of financial penalty on the Enterprises should serve the following objectives:

(i) To reflect the seriousness of the infringement; and

(ii) To deter anti-competitive practices leading to an infringement of a prohibition under the Act.

117. Based on the Guidelines on Financial Penalty, some or all of the following factors may be taken into account in determining the amount of financial penalty in a specific case:

(a) the seriousness (gravity) of the infringement;

(b) turnover of the market involved – whereby turnover refers to turnover of the enterprise during the period of infringement or, if figures are not available for that business year, the one immediately preceding it;

(c) duration of infringement – whereby a period of infringement is less than six months, such a period will be counted as half a year and for a period longer than six months but shorter than a year, such a period will be counted as a full year. In the event that the duration of the infringement is more than a year, the formulae to be adopted is as follows:

Maximum 10% of the worldwide turnover x number of years of infringement.

(d) impact of infringement;

(e) degree of fault (negligence or intention);

(f) role of the enterprise in the infringement;

(g) recidivism;

(h) existence of a compliance programme, and

(i) level of financial penalties imposed on similar cases.

Starting Point for the Determination of Financial Penalty

Relevant Turnover

118. Since it has been determined and established that the infringing period was for a period of less than six (6) months, the Commission shall consider the revenue or turnover received by each of the Enterprises during the infringing period, that is to say, from the month of May 2017 to November 2017 as the relevant turnover for each of the Enterprises stipulated in ***Table 2*** below will form the basis for the computation of the financial penalties.

No.	Centre	Total Revenue from May – November 2017
1.	Pusat Tuisyen Wawasan Cemerlang	RM[✂]
2.	Pusat Perkembangan Minda Literasi	RM[✂]
3.	Pusat Jagaan Harian Genius	RM[✂]
4.	Pusat Tuisyen Inspirasi	RM[✂]

No.	Centre	Total Revenue from May – November 2017
5.	Pusat Tuisyen Literasi	RM[✂]
6.	Pusat Progresif EG	RM[✂]
7.	Pusat Jagaan Kanak-Kanak Suria	RM[✂]
TOTAL		**RM[✂]**

Table 2: Total revenue of the Enterprises throughout the infringement period.

Seriousness of the Infringement

119. The Commission will take into consideration the seriousness of the infringement and the relevant turnover of each of the Enterprises in setting the starting point for determining the penalty amount.

120. The seriousness of an infringement will depend on the nature of the infringement. Price-fixing agreements which have as its object the restriction of competition is viewed as a serious infringement under the Act. The Commission is of the view that the imposition of a deterrent financial penalty is necessary to deter other enterprises who may otherwise be contemplating engaging in conduct of a similar nature as that which is covered by this case.[14]

[14] Cases 100/80 etc *Musique Diffusion Française and others v Commission of the European Communities* [105]–[106], Case C-289/08 P *Showa Denko KK v Commission* at [21]–[22].

Degree of Fault

121. In determining the degree of fault of the Enterprises, the Commission will look at whether the infringement has been intentionally or negligently committed. In so doing, the Commission is guided by the decision of the European Court of Justice in Case C-681/11 *Bundeswettbewerbsbehörde and Bundeskartellanwalt v Schekner & Co AG,* which held that:

> "37 In relation to the question whether an infringement has been committed intentionally or negligently and is, therefore, liable to be punished by a fine in accordance with the first subparagraph of art.23(2) of Regulation 1/2003 (*section 40(1)(c) of the Competition Act 2010*), it follows from the case law of the Court that that condition is satisfied where the undertaking concerned cannot be unaware of the anti-competitive nature of its conduct, whether or not it is aware that it is infringing the competition rules of the Treaty (see *IAZ International Belgium SA v Commission of the European Communities* (96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82) [1983] E.C.R. 3369; [1984] 3 C.M.L.R. 276 at [45]; *Nederlandsche Banden-Industrie-Michelin NV v Commission of the European Communities* (322/81) [1983] E.C.R. 3461; [1985] 1 C.M.L.R. 282 at [107]; and *Deutsche Telekom AG v European Commission* (C-280/08 P) [2010] E.C.R. I-9555; [2010] 5 C.M.L.R. 27 at [124]).

38 Therefore, the fact that the undertaking concerned has characterised wrongly in law its conduct upon which the finding of the infringement is based cannot have the effect of exempting it from imposition of a fine insofar as it could not be unaware of the anti-competitive nature of that conduct.

39 ... Undertakings which directly coordinate their behaviour in respect of their selling prices quite evidently cannot be unaware of the anti-competitive nature of their conduct... (Emphasis added)"

122. The following facts and evidence were considered by the Commission in determining whether the Enterprises had intentionally or negligently infringed s. 4 of the Act when they collectively agreed to standardise and fix the fees for tuition and daycare services in the SS19 Subang Jaya, Selangor area:

(i) Madam Yip Choy Har created and used the "Tuition Daycare Centre" WhatsApp group to call for a meeting with the proprietors of the Enterprises to discuss the issue of standardisation of fees charged to their students;

(ii) The proprietors of the Enterprises attended the First Meeting on 12.5.2017, in which by the end of the meeting a general

consensus was reached that there was a need to increase the amount of fees that charged to students;

(iii) At the same meeting on 12.5.2017, the Enterprises agreed to collectively increase their fees to RM450.00 for each student; and

(iv) The proprietors of the Enterprises signed the "Notice" the fee rate of their respective tuition and daycare centres.

123. Four of the Enterprises, namely PTWC, Genius, Progresif EG and Literasi argued in their written representations to the Commission that they were unaware that their conduct of standardising and fixing the tuition and daycare fees had infringed the provisions of the Act. This argument was also raised by PTWC, Genius and Progresif EG in their oral representations to the Commission.

124. Based on all the evidence, the Commission is satisfied that the Enterprises were fully aware that the objective of the "Notice" was to negate the likelihood of customers or potential customers negotiating the fees with individual tuition and daycare centres located within the SS19 Subang Jaya, Selangor area. With the fixing of prices, customers will

have no option but to accept the prices offered by the colluding Enterprises. As such, the Enterprises ought to have known and could not have been unaware that the nature of the agreement to fix the tuition and daycare fees had the objective of restricting, preventing and distorting competition in the relevant market. Thus, the Commission is of the view that infringement was intentional regardless of the fact that the Enterprises argued that they were unaware that their conduct had infringed the prohibitions of the Act.

125. The Malaysian courts, on numerous instances have held that ignorance of the law will not excuse or exonerate anyone from liability under the law. In *Puncak Niaga (M) Sdn. Bhd. v Sykt Sidhu Adek Beradek Sdn Bhd & Anor* [2015] 8 MLJ 586 at paragraph 36 and 38, the High Court held:

> "[36] ... Ignorance of the law is no excuse and the effect of a *gazette* has been decided in the case of *Abdul Aziz bin Mohd Alias v Timbalan Ketua Polis Negara, Malaysia & Anor* [2010] 4 MLJ 1, where it was held that if a law has been gazetted, the public are deemed to have notice of the same.
>
> It is also to be noted that the 1993 Regulations is a federal law and duly gazette under PU(A) 395. *As it is a law duly gazette, the public are deem to have notice of the same*. Therefore, in our view in the present case the appellant as a public officer from service pursuant to reg 28(1)

of the 1993 Regulations is presumed to know his rights under the 1993 Regulations. [Emphasis added.]

...

[38] Thus since Sungai Gombak had been published in the official *gazette*, *Warta Kerajaan PU(A)12, Jil 23 No 3* as a water catchment area under the Fourth Schedule of the Environmental Quality (Sewage and industrial Effluents) Regulation 1979 under the Environmental Quality Act 1974 (P3), the law imposes a statutory duty upon the public, in this case, the first defendant, not to pollute Sungai Gombak. The statutory duty imposed includes placing any waste into the inland waters through a negligent conduct (in our instant case the negligent driving by the first defendant which led to the collision and the oil spillage resulting in the contamination of Sungai Gombak). By publication in the official *gazette*, it constitutes sufficient notice in that the law presume that the public and the first defendant are deemed to have notice of the existence and location of the water catchment area situated at KM 28 of the Highway."

126. The Commission then considered the case of *Gemilang Mirza & Ors v Public Prosecutor* [2014] 11 MLJ 300 at paragraph 19 where the High Court held:

"[19] ...A mistake in law is no defence as ignorance of the law is no excuse. The law as stipulated in s 25(1) read with s 2 definition of deposit and s 106(1) of the BAFIA prescribes the offence in clear term. It is unsustainable for the

> defence to contend that they were ignorant of the law as it is the appellants duty and responsibility to find out before they embarked onto such business."

And in the case of *Binastra Ablebuild Sdn. Bhd v JPS Holdings Sdn Bhd* and another case [2018] 8 MLJ 190, at paragraph 96, the High Court held:

> "[96] …Clearly when applying for extension of time to file its adjudication response on 26 October 2016 the respondent's solicitors did not see any problem with the non-filing of the respondent's payment response. The fact that the respondent is not familiar with adjudication is not an acceptable reason for not filing the payment response. As the old adage goes, the court must proceed from the premise that everyone knows the law and that ignorance of the law is no good excuse."

127. Based on the authorities, it is the Commission's view that ignorance of the law, specifically ignorance of the prohibitions under the Act is not a defence and does not excuse or exonerate an enterprise from liability. The Commission thus concludes that the fixing of tuition and daycare fees was a conduct carried out intentionally. The argument raised by the Enterprises that they were ignorant of the law when they had carried out the infringing conduct is hereby dismissed in its entirety.

Duration of Infringement

128. Based on the Guidelines on Financial Penalties at paragraph 3.2, in determining the amount of financial penalty in a specific case, the Commission may take into account some or all of the following factors:

a) the seriousness (gravity) of the infringement;

b) turnover of the market involved, whereby turnover refers to the turnover of the enterprise during the period of infringement or if figures are not available for that business year, the one immediately preceding it;

c) the duration of infringement – whereby in the event the period of infringement is less than six (6) months, such period will be counted as half a year and for a period longer than six months but shorter than a year, such a period will be counted as a full year.

129. Based on the evidence obtained during investigations, the agreement to increase and fix fees for tuition and daycare services in the SS19 Subang Jaya, Selangor area was entered into by the Enterprises on 12.5.2017. This is the start date of infringement. The "Notice"

specifically stipulated that the revised rates would be applicable until November 2017. The Commission is satisfied that for the purpose of computation of the financial penalties, the duration of infringement was from 12.5.2017 till November 2017.

Deterrence

130. In order to avoid under-deterrence, financial penalty may be increased in so far as the increase does not extend beyond 10% of the Enterprises' worldwide turnover. In Case T-15/02 *BASF AG v Commission of the European Communities*, at paragraph 235, the Commission of the European Communities stated that:

> "235 The link between the size and overall resources of the undertakings, on the one hand, and such a need, on the other, is not open to challenge. It should be noted in this connection that a large undertaking, owing to its considerable financial resources by comparison with those of the other members of a cartel, can more readily raise the necessary funds to pay its fine, which, if the fine is to have a sufficiently deterrent effect, justifies the imposition, in particular by the application of a multiplier, of a fine proportionately higher than that imposed in respect of the same infringement committed by an undertaking without such resources."

131. Having considered the fact that the conduct of the Enterprises is a very serious form of infringement under the Act, the Commission is fully satisfied that the imposition of a deterrent penalty is appropriate under the circumstances.

Mitigating Factors

132. The Commission has also evaluated the evidence to determine whether there are mitigating factors and if so, the necessary downward adjustments shall be made accordingly to determine the final quantum of financial penalty.

133. As stipulated in the Commission's Guideline on Financial Penalty, co-operation given by the Enterprises during the course of investigation is a mitigating factor that the Commission may take into consideration in setting the amount of financial penalty.

134. Throughout the course of investigation, the Enterprises had complied with the directions issued by the Commission by providing the evidence requested by the Commission and attended the interviews conducted by the Commission Officers. However, the Commission does not consider the conduct of the Enterprises to be above and beyond that

which can be reasonably expected of an infringing enterprise. As such, there shall be no reduction of penalty on this ground.

Aggravating Factors

135. The Commission has also evaluated the existence of aggravating factors (if any) described below and shall thereafter make the necessary upward adjustments in determining the final quantum of financial penalty.

(1) Implementation of the Agreement

- Where steps were taken to implement the revised fee scale, such may be considered to be an aggravating factor.
- Inspirasi proceeded to implement the revised fee scale.
- Progresif EG and Genius had partially implemented the revised fee scale.
- There was no evidence to suggest that Miss Low Ying Ling (Inspirasi), Mr Eg Yik Man (Progresif EG) and Miss Cheah Li Choo (Genius) had distanced themselves from the collective agreement in either the First or Second Meeting they attended.

- In view of the evidence, for Enterprises who had implemented the agreement but thereafter took steps to cease the infringing conduct prior to the Commission's Proposed Decision, the Commission concludes that no aggravating factor applies in this situation.

(2) Degree of Involvement with the Price Fixing Agreement

- It is an aggravating factor if any of the Enterprises was actively involved in the conduct leading to the price fixing agreement.
- In this case, all seven of the Enterprises had attended the First and Second Meeting to adjust and standardize the tuition and daycare fees. This is considered to be an aggravating factor.

Leniency Application

136. Vide application dated 29.11.2017, one of the Enterprises had formally applied for leniency under s. 41 of the Act ("the Application"). Section 41(1) of the Act stipulates that:

"**41.** (1) There shall be a leniency regime, with a reduction of up to a maximum of one hundred percent of any penalties, which would otherwise have been imposed, which may be available in the cases of any enterprise which has –

(a) admitted its involvement in an infringement of any prohibition under subsection 4(2); and

(b) provided information or other form of co-operation to the Commission which significantly assisted, or is likely to significantly assist, in the identification or investigation of any finding of an infringement of any prohibition by any other enterprises."

137. The Application was put forward to the Commission on 19.12.2017 for consideration and was duly dismissed on the grounds that:

a) The Application was made at an advanced stage of investigation and the Commission had by that time already obtained most of the evidence required for the purposes of investigations. Consequently, there was no significant contribution by the leniency applicant that would reasonably satisfy s. 41(b) of the Act; and

b) The evidence shows that the role of the leniency applicant as an instigator to the price fixing agreement was obvious and significant.

Cartel Instigator

138. As a general rule, leniency is not granted to a cartel instigator and this has been the practice of competition authorities in the United Kingdom, the European Union and Singapore.

139. Paragraph 27 of the Commission's *Guideline on Leniency Regime* states that:

> "An enterprise would not qualify for a 100% reduction in financial penalties if the enterprise is the one that initiates the cartel or it has taken any steps to coerce another enterprise to take part in the cartel activity."

140. Paragraph 13 of the European Commission's *Notice on Immunity from Fines and Reduction of Fines in Cartel Cases* states that:

> "An undertaking which took steps to coerce other undertaking to join the cartel or to remain in it is not eligible for immunity from fines."

141. Paragraph 2.50 of the UK's *Competition and Market Authority's Guidance on Application of Leniency and No-action in Cartel Cases* states that:

> "Undertakings who have taken steps to coerce another undertaking to take part in the cartel activity are not eligible for corporate immunity"

142. Paragraph 2.4 of Competition Commission of Singapore's *Guidelines on Lenient Treatment for Undertaking Coming Forward with Information on Cartel Activity 2016* states that:

> "An undertaking which has initiated or coerced another undertaking to participate in the cartel will not be eligible for total immunity or receive a reduction in the financial penalty of up to 100%"

143. The interpretation of the term instigator was discussed by the European Court in the following cases:

Case T-15/02 *BASF AG v Commission of the European Communities.*

> 321 It should be noted that in order to be classified as an instigator of a cartel, an undertaking must have persuaded or encouraged other

undertakings to establish the cartel or to join it. By contrast, it is not sufficient merely to have been a founding member of the cartel. Thus, for example, in a cartel created by two undertakings only, it would not be justified automatically to classify those undertakings as instigators. That classification should be reserved to the undertaking which has taken the initiative, if such be the case, for example by suggesting to the other an opportunity for collusion or by attempting to persuade it to do so.

Case T-343/06 *Shell Petroleum NV v European Commission.*

155 It should be noted that, in order to be classified as an instigator of a cartel, an undertaking must have persuaded or encouraged other undertakings to establish the cartel or to join it.

...

198 In order to be classified as a leader in a cartel, an undertaking must have been a significant driving force for the cartel and have borne individual and specific liability for the operation of the cartel. That factor must be assessed in the light of the overall context of the case (*BASF v Commission*, paragraph 140 above, paragraphs 299, 300, 373 and 374, and Case T-410/03 *Hoechst v Commission* [2008] ECR II-881, paragraph 423). It may, inter alia, be inferred from the fact that the undertaking, through specific initiatives, voluntarily gave a fundamental boost to the cartel (*BASF v Commission*, paragraph 140 above, paragraphs 348, 370 to 375 and 427, and *Hoechst v Commission*,

paragraph 426). It may also be inferred from a combination of indicia which reveal the determination of the undertaking to ensure the stability and success of the cartel (*BASF v Commission*, paragraph 140 above, paragraph 351).

With the dismissal of the leniency application, the remedies below would be fully applicable to the Enterprises.

Succession of Target Enterprise

144. PPML through its written and oral representation had brought to the attention of the Commission that there was transfer of new ownership of PPML effective 20.12.2017.

145. The European Court of Justice has confirmed that "... the concept of an undertaking covers any entity engaged in economic activity, irrespective of its legal status and the way in which it is financed... When such an entity infringes competition rules, it falls, according to the principle of personal responsibility, to that entity (in this case PPML) to answer for that infringement."[15] Consequently, Mr. Eg Yik Man, as the sole proprietor of PPML, shall be responsible for the liabilities of PPML.

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[15] Case C-280/06 *Autorita Garante della Concorrenza e del Mercato v Ente Tabacchi Italiani – ETI SpA and Philip Morris,* judgement of 11 December 2007, at paragraphs 38 and 39.

146. It is therefore irrelevant if a legal entity responsible for an infringement has been sold or transferred to another entity since the infringement was committed. Organisational changes should not enable liabilities for competition law infringements to be evaded.

147. In view of the nature of the infringement, by the act of collectively agreeing to fix, directly or indirectly the fees for tuition and daycare centres and taking into account all evidence obtained throughout investigations described above, the Commission hereby makes a finding of infringement under s. 40 of the Act and shall require the Enterprises to comply with the following remedial action including payment of the financial penalty stipulated below with immediate effect:

(a) Cease and desist the act of fixing the price of tuition and daycare services and repudiate and/or terminate the agreement entered into by the Enterprises on 12.7.2017;

(b) Place an official notice at a conspicuous place within the premise of and/or on the official website (where applicable) of the Enterprise assuring their respective customers that with immediate effect all fees and charges imposed by the

Enterprise has been independently determined, and that this notice/s shall supersede all prior notices with immediate effect; and

(c) Enrol and complete the MyCC's e-Learning Course on Competition Compliance for Small and Medium Enterprises ("SMEs") within one month from the issuance of this Decision and produce to the Commission, the certificate of completion thereof.

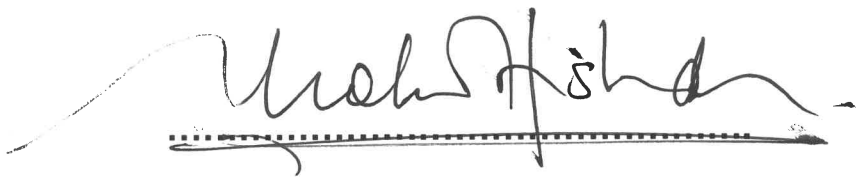
148. After careful consideration all facts, evidence and circumstances of this case including all mitigating and aggravating factors as well as all arguments raised by the Enterprises in both the written and oral representations, the Commission hereby imposes the following financial penalties on the Enterprises, which the Commission has confirmed does not exceed 10% of the Enterprises' worldwide turnover, as stipulated in ***Table 2*** above:

THE FINANCIAL PENALTIES ON THE ENTERPRISES

NO.	ENTERPRISES	FINANCIAL PENALTIES
1.	Pusat Tuisyen Wawasan Cemerlang	RM 3,106.20
2.	Pusat Perkembangan Minda Literasi	RM 3,263.55
3.	Pusat Jagaan Harian Genius	RM 7,916.55
4.	Pusat Tuisyen Inspirasi	RM 3,300.30
5.	Pusat Tuisyen Literasi	RM 8,116.80
6.	Pusat Progresif EG	RM 3,029.25
7.	Pusat Jagaan Kanak-Kanak Suria	RM 4,336.20
	TOTAL	**RM33,068.85**

Table 2 : The Financial Penalties on the Enterprises

Dated:



CHAIRMAN
DATO' SERI MOHD HISHAMUDIN
MD YUNUS