



GIGA SHIPPING SDN BHD

1. The Competition Commission (which is established under the Competition Commission Act 2010 and hereinafter referred to as “the Commission”) had commenced an investigation under Section 15(1) into an alleged infringement of Section 4(1) and/or Section 10(1) of the Competition Act 2010 (hereinafter referred to as “the Act”) in relation to certain agreements and conduct of Giga Shipping Sdn. Bhd. and Nexus Mega Carriers Sdn. Bhd. (hereinafter collectively referred to as “the Enterprises”) concerning the provision of logistic and/or shipment services by sea for motor vehicles from ports in Peninsular Malaysia to ports in Sabah and Sarawak and Labuan (hereinafter referred to as “the Services”). The investigation into the agreements and conduct described above shall hereinafter be referred to as “the Investigation” and this document shall hereinafter be referred to as “the Undertaking Document”. The Act defines an “agreement” as *“any form of contract, arrangement or understanding, whether or not legally enforceable, between enterprises, and includes a decision by an association and concerted practices.”*
2. The Enterprises acknowledge that they have provided and continue to provide the Services to certain motor vehicle manufacturers, motor vehicle distributors and retailers (hereinafter referred to as “customer”, or “customers”, as the context may require) and that since sometime in the year 2010 they have entered into certain agreements with customers containing clauses which stipulate that the Enterprises shall be



the exclusive provider of the Services to such customers for up to 3 years, in consideration of which the Enterprises had agreed to give such customers lower prices arising from the volume of business generated by such agreements (hereinafter referred to as “exclusivity clauses”).

3. The Enterprises acknowledge that the Commission has concerns that such exclusivity clauses could infringe the Act. The Enterprises deny that they have infringed the Act in this regard and believe that, on the contrary, the agreements are overall pro-competitive and pro-consumer.
4. The Enterprises have offered the undertakings contained in this Undertaking Document (hereinafter referred to as “these Undertakings”) with a view to addressing the Commission’s preliminary competition concerns and to avoid the time, inconvenience, and expense of further proceedings or actions between the parties.
5. The Commission has agreed to record these Undertakings, the Commission’s acceptance thereof and to close the Investigation with no finding of infringement, on the terms contained herein, pursuant to Section 43 read together with Section 16(3)(a) of the Act. The date of the Commission’s acceptance of these Undertakings being communicated to the Enterprises shall hereinafter be referred to as “the Effective Date”.



Discontinuance of Exclusivity Clauses

6. The Enterprises hereby undertake that within three (3) months (or such time as may be agreed by the Commission) of the Effective Date, the Enterprises shall cease to include in any of their agreements with their customers or potential customers any exclusivity clauses or clauses which have the same effect as exclusivity clauses for the provision of the Services unless:
 - (i) such agreements have been or are entered into following an open tendering process carried out by the customers or potential customers; and
 - (ii) such agreements containing exclusivity clauses are for a duration of 2 years or less.

7. The Enterprises further undertake that they shall inform all their customers, who have entered into agreements with them containing exclusivity clauses or clauses which have the same effect as exclusivity clauses, of the undertaking contained in Clause 6 above, with an explanation of the reasons therefor.



Notification

8. The Enterprises shall simultaneously publish the undertaking contained in Clause 6 above in 5 major newspapers including in Sabah and Sarawak (hereinafter referred to as “the Notification”). The newspapers in which the Notification is to be published are as follows:
- i) The Star;
 - ii) The Edge;
 - iii) Berita Harian;
 - iv) The Borneo Post; and,
 - v) The Daily Express.

Compliance Programme

9. The Enterprises hereby undertake to continue their competition law compliance programme and training for their senior management and directors who are ordinarily resident in Malaysia (hereinafter referred to as “the Programme”). For ease of reference, a person shall be considered “resident” for this purpose if he is resident within the meaning of the Income Tax Act 1967. The costs of the Programme shall be borne by the Enterprises. The Enterprises further undertake that the



Programme shall apply to all related companies which are part of their “enterprise”, as defined under the Act. The Enterprises will provide an annual report on the status of the Programme to the Commission commencing 31 January 2015 until the expiry of these Undertakings.

The Commission’s Administrative Costs

10. The Enterprises shall reimburse the Commission’s administrative costs consisting of out-of-pocket expenses and other similar or like expenses reasonably incurred from the commencement of the Investigation to the Effective Date. The amount to be reimbursed by the Enterprises shall be agreed by the parties and paid by the Enterprises to the Commission within 2 months of the Effective Date, or the date of such amount being agreed, whichever is the earlier.

Application of these Undertakings

11. These Undertakings shall be binding upon the successors and assignees of the Enterprises.



Duration, Periodic Review and Achieving Best Pro-Competitive Outcome

12. The undertaking contained in Clause 6 above shall remain in full force and effect for a period of 5 years from the Effective Date (hereinafter referred to as the “Duration”).

13. The Enterprises may at any time apply to the Commission to review the application of these Undertakings with a view to obtaining a waiver, modification or discharge of any part or the whole of these Undertakings which may be reasonably required in the light of any material changes in facts, law or market circumstances or to alleviate any unforeseen hardship. The Commission and the Enterprises shall discuss any such application for review in good faith with a view to achieving the best pro-competitive solution or outcome within a reasonable time. The Commission will retain discretion to decide upon any such application.

Close of Investigation and General Provisions

14. The Commission has agreed to accept these Undertakings from the Enterprises to address the Commission’s preliminary competition concerns in regard to Sections 4(1) and/or 10(1) of the Act and pursuant to the terms of Section 43(2) and Section 16(3)(a) of the Act and, as a consequence thereof, to close the Investigation with no finding of infringement against the



Enterprises. The Commission accepts that these Undertakings address or resolve its competition concerns in Clause 1. For so long as the Enterprises are in compliance with the terms of these Undertakings, the Commission shall refrain from instituting or taking proceedings against the Enterprises or their directors, employees, officers or office bearers with respect to the concerns expressed in Clause 1.


15. This Undertaking Document between the parties in no way derogates the rights and remedies available to the Enterprises' customers, potential customers or other persons. Nothing contained in this Undertaking Document precludes the Enterprises, any company within the same enterprise (as defined under the Act) as the Enterprises, or any director, employee, officer or office bearer thereof, from taking any step which has reasonable commercial justification or represents a reasonable commercial response to the market entry or market conduct of a competitor, or from enforcing their rights or remedies, or from relying upon any exemption, relief of liability under the Act (including any subsidiary legislation thereunder) or Malaysian law, whether in relation to any agreement or conduct, or in relation to any proceedings or legal action that may involve them or otherwise, nor does anything contained in this Undertaking Document constitute a waiver of the same.



16. These Undertakings shall be enforceable by the Commission in accordance with Section 43(4) of the Act.

Dated this 1st day of October 2014, Kuala Lumpur, Malaysia.

AGREED TO AND ACCEPTED BY:


Signed by and on behalf of
Giga Shipping Sdn. Bhd.


Agreed and Accepted by and on
behalf of the Commission

TAN SRI DATO' SERI SITI NORMA YAKOB
Chairman
Malaysia Competition Commission (MyCC)