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

IN THE MATTER OF APPEAL NOs:
TRP 1-2022; TRP 2 - 2022 AND TRP 3-2022

BETWEEN

1. Langkawi Ro-Ro Ferry Services Sdn Bhd (TRP 1)
2. Langkawi Auto Express Sdn Bhd (TRP 2)
3. Langkawi Ferry Services Sdn Bhd (TRP 2)
4. Dibuk Cargo Services Sdn Bhd (TRP 3)
5. Dibuk Sdn Bhd (TRP 3) **APPELLANTS**

AND

COMPETITION COMMISSION **RESPONDENT**

....

PRESIDING MEMBERS OF THE COMPETITION APPEAL TRIBUNAL

1. DATO' DR. CHOO KAH SING
2. DATUK DR. MOHD GAZALI BIN ABAS
3. DATIN PADUKA ANG NAI HAR

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GROUNDS OF DECISION

Introduction

[1] These are the grounds of the unanimous decision of this Competition Appeal Tribunal (hereafter the 'Tribunal') in relation to three appeals, namely Appeal Nos. TRP 1 – 2022, TRP 2 – 2022 and TRP 3 – 2022, filed by the respective appellants.

[2] All three appeals are against a final decision made by the Competition Commission (hereafter 'MyCC' or the 'Commission' or the 'respondent') dated 17.12.2021 (hereafter the 'Final Decision'). The respective counsels in the three appeals and the respondent's counsel requested for all three appeals to be heard together because the subject matter of the appeals arose from the Final Decision of the Commission. The Tribunal acceded to the request pursuant to Regulation 18(1)(a) of the Competition (Appeal Tribunal) Regulations 2017.

The Parties

[3] The diagram below depicts the parties in their respective appeals and the respective firm of solicitors representing the appellants.

Appeal Nos.	Appellant	Firm of Solicitors
TRP 1 – 2022	1. Langkawi Ro-Ro Ferry Services Sdn Bhd	Messrs. Wajdi Mohamad & Company
TRP 2 – 2002	1. Langkawi Auto Express Sdn Bhd 2. Langkawi Ferry Services Sdn Bhd	Messrs Rahmat Lim & Partners
TRP 3 – 2002	1. Dibuk Cargo Services Sdn Bhd 2. Dibuk Sdn Bhd	Messrs Yasmeen Hajar & Hairudin

[4] The respondent is represented by Messrs. Jason Teoh & Partners in all three appeals.

Background Facts

[5] Langkawi Ro-Ro Ferry Services Sdn Bhd (hereafter '**LRRFS**'), Langkawi Auto Express Sdn Bhd (hereafter '**LAE**'), Langkawi Ferry Services Sdn Bhd (hereafter '**LFS**') and Dibuk Cargo Services Sdn Bhd (hereafter '**DCS**') are involved or engaged in one way or another in the business of providing and/or operating ferry services for the transportation of motor vehicles and/or passengers, particularly at the jetty known as Dermaga Tanjung Lembung, Kuah, Langkawi.

[6] The Dermaga Tanjung Lembung is one of the four major entry points to the island of Langkawi via sea route, and it is the only jetty that is equipped with specific facilities to load and unload wheeled cargo or transportation vehicles to the island from the mainland in the Kuala Perlis Jetty. The service to load and unload wheeled cargo or transportation vehicles is carried out by a specific vessel known as roll-on/roll-off vessel (also known as Ro-Ro vessel). LRRFS, LAE, and DCS were providing this specific service at the Dermaga Tanjung Lembung at the material time from 31.12.2017 to 14.9.2020 (or the 'Infringement Period' as defined in the Final Decision)

The Relationship - Dibuk Sdn Bhd and DCS

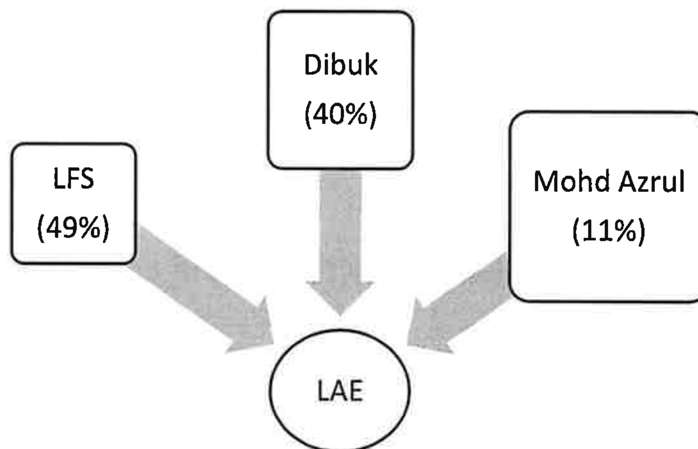
[7] With regard to Dibuk Sdn Bhd (hereafter '**Dibuk**'), there were common shareholders and directors in Dibuk and DCS, namely, one Encik Marzukhi bin Othman and his son Encik Ezreen Muhaizie bin Marzukhi, at that material time. The tables below reveal the common shareholders and directors in Dibuk and DCS respectively at the material time.

	Marzukhi B Othman	Ezreen Muhaizie B Marzukhi	Juliaana Binti Yaakob	
DCS	90%	10%	-	100%
Dibuk	78%	4%	18%	100%

	Marzukhi B Othman	Ezreen Muhaizie B Marzukhi	Juliaana Binti Yaakob
DCS	Director	Director	-
Dibuk	Director	-	Director

The Relationships – LFS, Dibuk and LAE

[8] The primary stakeholder in LAE was LFS who held 49% shareholding. Dibuk held 40% shareholding in LAE, and one Mohd Azrul bin Adnan held the balance shareholding of 11% in LAE at the material time. LAE was formed as a joint venture company between LFS, Dibuk and Mohd Azrul. The diagram below depicts the shareholdings structure.



[9] With regard to the shareholding in LFS, there were eight shareholders at the material time. Encik Mohd Azrul held the largest stake of 30% shareholding; one Ooi Cheng Choon held 20%; Loke Gim San, Ooi Siew Eng, Ooi Lay Hoon and Ooi Chin Huat each held 10% shareholding. The balance of the shareholdings was held by Loke Chee Beng and Loke Chee Hoay at 5% each.

[10] The table below depicts the relevant individuals who held directorship and shareholding in LFS and LAE respectively at the material time.

	Mohd Azrul	Ooi Cheng Choon	Loke Chee Beng	Loke Gim San	Ooi Kooi Bee @ Kooi Bee	Marzukhi b Othman	Ezreen Muhaizie
LFS	D & S	D & S	D & S	D & S	D		
LAE	S	D	D	D	D	D	D

(Note: "D" = Director; "S" = Shareholder)

[11] The above table clearly illustrates the representations on the board of directors in LAE which comprised of the shareholders from LFS (namely, Ooi Cheng Choon, Loke Chee Beng, Loke Gim San) and a common director Ooi Kooi Bee @ Kooi Bee, and the representation from Dibuk who were Encik Marzukhi b Othman and his son Ezreen Muhaizie.

[12] The above explanation of the relationships between the appellants (except LRRFS) are relevant and essential because of the doctrine of single economic entity which will be discussed and examined in the later part of the Grounds of Decision.

Events Leading to the Finding of the Infringing Agreements

[13] The Ministry of Domestic Trade and Consumer Affairs prepared a report entitled "*Laporan Isu Harga Barangan di Langkawi Kedah*" dated 11.2.2019. Following the report, MyCC was directed by the Ministry to exercise its power to investigate into whether any infringement of the **Competition Act 2010** (hereafter 'the CA') had been committed by any party in reference to the fares, prices and pricing imposed by certain service providers in relation to the services of providing transportation via sea route to the island of Langkawi from the States of Kedah and Perlis.

[14] On 28.2.2019, the Commission commenced a formal investigation pursuant to s. 14(1) of the CA. LRRFS, LFS, LAE and DCS were investigated. In the course of the investigation, the Commission found two Memorandums of Understanding (or 'MOUs'), one dated 31.12.2017

and the other undated (both the MOUs shall hereafter collectively be referred to as the 'Infringing Agreements').

[15] The first MOU dated 31.12.2017 was executed by LRRFS, LAE and Dibuk. The relevant part of the said MOU states as follows:

> "1. We hereby agreed and fully understand the purpose of signing this Memorandum of Understanding is to implement the **STANDARISED** [sic] **TICKET FARE** and **INSURANCE PREMIUM COVERAGE** for **RORO FERRY BUSINESS OPERATION BETWEEN LANGKAWI AND KUALA PERLIS** as belows
>
> - For **PASSENGER** and **BICYCLE** – No Changed
> - For **MOTORCYCLE – RM11 per unit (1 way)**
> - For **CAR**: **SEDAN / SUV / MPV / PICK UP / VAN** and **4 x 4**, **LUXURY CAR – RM16 per unit (1 way)**
> - For **BUS / COACH – RM56 per unit (1 way)**
> - For **LORRY – RM56 per unit (1 way)**
>
> **## REFER STANDARISED** [sic] **TICKET FARE TABLE ATTACHED**
>
> 1 We hereby agreed that the above **NEW TICKET FARE TABLE** to be take [sic] effective from **1st JANUARY 2018.**
>
> 2 We also agreed that in the event of any parties found breaching the agreement on the MOU, the said MOU shall automatically considered [sic] void and each party shall bear the consequences of the changes.
>
> 3 In the event there is any penalty imposed on any or all of us, and/or any decision by the relevant Ministry or relevant authorities to withdraw our respective licenses, we agree to abide by the said

decision jointly and unilaterally, and any legal costs or other costs incurred will be bear [sic] by the parties, and also agree to submit our appeal jointly to the authority concern [sic], which shall be maintained by all of us, provided we are not in breach of any legal requirement or obligations and not in breach of any statutory provisions and the laws."

[16] The undated MOU was executed by LRRFS, LAE and DCS, but not Dibuk. The relevant part of the said MOU stated as follows:

"1. We hereby agreed and fully understand the purpose of signing this Memorandum of Understanding is to implement the **STANDARISED** [sic] **TICKET FARE FOR YEAR 2019** for **RORO FERRY BUSINESS OPERATION BETWEEN LANGKAWI AND KUALA PERLIS** as belows

- For **PASSENGER** – No Changed
- For **MOTORCYCLE & BICYCLE – 10% For all Categories**
- For **CAR**: **SEDAN / SUV / MPV / PICK UP / VAN** and **4 x 4, LUXURY CAR – 10% For all Categories**
- For **BUS / COACH – 10% For All Categories**
- For **LORRY – 10% For all Categories**

REFER STANDARISED [sic] **TICKET PRICE LIST 2019 – AS ATTACHED**

1 We hereby agreed that the above **NEW TICKET FARE TABLE** to be take [sic] effective from **1st JANUARY 2019.**

2 We also agreed that in the event of any parties found breaching the agreement on the MOU, the said MOU shall automatically considered [sic] void and each party shall bear the consequences of the changes.

3 In the event there is any penalty imposed on any or all of us, and/or any decision by the relevant Ministry or relevant authorities to withdraw our respective licenses, we agree to abide by the said decision jointly and unilaterally, and any legal costs or other costs incurred will be bear [sic] by the parties, and also agree to submit our appeal jointly to the authority concern [sic], which shall be maintained by all of us, provided we are not in breach of any legal requirement or obligations and not in breach of any statutory provisions and the laws."

[17] Essentially, the MOU dated 31.12.2017 was in reference to the standardizing of the charges for the fares of various types of vehicles using the Ro-Ro ferry services for the year 2018; whereas, the undated MOU was in reference to the standardizing of the charges for the fares of various types of vehicles using the Ro-Ro ferry services for the year 2019.

[18] In view of the agreement to standardize the ticket fares for various types of vehicles engaging the services of the Ro-Ro ferry services for years 2018 and 2019, the parties that entered into the said MOUs were found by MyCC in its Final Decision to have infringed s. 4(1) read together with s.4(2)(a) and 4(3) of the CA.

[19] On 17.12.2021, MyCC issued its Final Decision after having responded to the oral and written representations by the appellants'

representatives in response to MyCC's earlier Proposed Decision dated 14.9.2020 (hereafter 'the Proposed Decision').

[20] Although LFS was not a party to either one of the MOUs, MyCC also found LFS was liable for the infringement of the prohibition provision of the CA on the basis of single economic unit or the doctrine of single economic entity.

[21] MyCC, after having found the appellants had infringed the prohibition provision in the CA, directed the appellants in its Final Decision as follows:

> "(i) to cease and desist from implementing the agreed charges for the provision of vehicle transportation via Ro-Ro vessel in Langkawi; and
>
> (ii) the future charges for the provision of vehicle transportation via Ro-Ro vessel are to be determined independently by each of the 5 enterprises."

[22] In addition to the above direction (cease and desist order), MyCC also imposed on the appellants respectively the financial penalty of various amounts.

The Findings of this Tribunal

The Finding of Liability by the Commission (or MyCC) – Prohibition Section 4 of the CA

[23] Section 4 of the CA states 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."

[24] The 2017 MOU were signed by LRRFS, LAE and Dibuk, and the undated MOU were signed by LRRFS, LAE and DCS. All the signatories to the two MOUs are business entities carrying commercial activities relating to the Ro-Ro vessel services. As such, they fall within the meaning of an "enterprise" as defined in s. 2 of the CA which states "enterprise" is "*any entity carrying on commercial activities relating to goods or services*".

[25] The appellants (LRRFS, LAE, DCS and Dibuk) were operating at the same level in providing the said services, and they had entered into the MOUs. As such, the MOUs qualify to fall within the meaning of

"horizontal agreement" as defined in s. 2 of CA which states "horizontal agreement" is "*an agreement between enterprises each of which operates at the same level in the production or distribution chain.*" As such, the Commission was correct in identifying the MOUs as "a horizontal agreement between enterprises."

[26] The MOUs intended to standardize ticket fares. Hence, the MOUs (a horizontal agreement) between the enterprises had a clear object to fix (directly) the purchase and selling price of ticket fares. The object of the MOUs, by its nature and purpose, had triggered the application of the deeming provision of s.4(2) of the CA. The Commission at paragraphs 131 and 132 of its Final Decision states as follows:

> "131. Where it is deemed by law that an agreement has the object of significantly preventing, restricting or distorting competition in the market, it is unnecessary for the Commission to prove the anti-competition effect or to conduct any effect analysis. It is imperative that the deeming provision be given effect.
>
> 132. A deeming provision is applied after all the facts have been established. Our investigation reveals that the Parties who are in a horizontal relationship with each other had engaged in a horizontal agreement that had the object

of fixing the price of Ro-Ro vessel transportation in Langkawi through the 2018 and 2019 MOUs."

[27] In **Malaysia Airline System Bhd v Competition Commission & Another Appeal** [2022] 1 CLJ 856 the Court of Appeal states that 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.

[28] This Tribunal agrees with the finding of the Commission in invoking the deeming provision because the three requirements or conditions to invoke the deeming provision have been satisfied. The first one is there must be a horizontal agreement, and the second is that the horizontal agreement is entered between enterprises, and lastly, it has the object to fix, directly or indirectly, a purchase or selling price or any other trading condition.

[29] With regard to requirement to define what "market" is so as not to be fixated over what is '*de minimis*', the Commission did define and identify the market in this case as "the market for the provision of vehicle transportation via Ro-Ro vessels in Langkawi" (see paragraph 175 of the Final Decision).

[30] Generally, some quantitative analysis may be required to show what the market may entail before MyCC could determine whether s.4(1) of the CA has been infringed. However, this Tribunal is of the considered view that in this instant case, quantitative analysis is not required to show what the market could entail before determining whether s.4(1) of the CA has been infringed. This is because the "market" in this given situation is confined only to the Ro-Ro vessel services for the sea route between the Dermaga Tanjung Lembung, Langkawi and Kuala Perlis Jetty.

[31] The market concerned is easily identified in terms of its specific geographical involvement, the size and the parties involved. As such, the fixing of the ticket fares for the Ro-Ro vessel services within a confined market could easily be identified and that it could easily be assessed to be significantly preventing, restricting or distorting competition in the market for the said services.

[32] On the issue of standard of proof, the Commission had applied the correct standard of proof which is the civil standard of balance of probabilities. On the burden of proof, this Tribunal finds no issue.

Conclusion – Infringement of S.4(1) read together with 4(2)(a) and 4(3) of the CA

[33] Based on the above analysis, this Tribunal has no hesitation to accept the Commission's finding that reading s. 4(2)(a) together with s.4(3) of the CA, the appellants by entering into the MOUs, including those appellants who were found to be a single economic entity, had infringed the prohibition s. 4(1) of the CA.

[34] The following part of the Grounds of Decision will address each and every ground raised in the three appeals respectively.

Appeal No. TRP 1 – 2022 (LRRFS)

[35] In essence, the appellant (LRRFS) avers that the reason it had agreed to enter into the MOUs was because of a meeting held on 17.1.2013 at the Marine Office in Kuala Perlis, and in the meeting the Marine Department and the Ministry of Transport had decided and/or agreed that the fares for the Ro-Ro ferry services ought to be standardized.

[36] LRRFS's counsel raises three main grounds in the appeal, namely (i) the application of s. 3(4) of the CA, and thereby invoking the doctrine of legitimate expectation; (ii) the Commission erred in deciding that there was a single continuous infringement between the period 31.12.2017 and 14.9.2020 (which ended on the date of the Proposed Decision); and (iii) the breach of procedural fairness committed by the Commission. The Tribunal will deal with the grounds of appeal raised in seriatim.

(i) Application of s.3(4) of the CA

[37] Section 3(4) 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."

[38] The appellant's counsel complains that the Commission failed to take into consideration that there was already a decision made by the government authorities, i.e., the Marine Department and the Ministry of Transport, to standardize the charges for the fares for the Ro-Ro vessel services in a meeting held on 17.1.2013. Following from the meeting, the appellant wrote to the Ministry of Transport and sought for the consideration and approval of the fares. Thereafter, several meetings were held between the appellant's representatives and the Ministry's personnel. The appellant's counsel submits that the Commission failed to appreciate and consider the concerted effort of the appellant by working closely with the authorities to minimise the negative impact on the public interest and consumers' welfare. The appellant's counsel further submits as follows:

> "3.15 The Competition Act 2010 provides for the non-application and the exclusion for certain activity which may be invoked by the enterprises, and in the present case, for commercial activity purpose that is directly or indirectly in the exercise of government authority."

[39] Essentially, the appellant's counsel is submitting that the appellant and others were exercising an activity (standardizing the fare charges for the Ro-Ro vessel services) directly or indirectly in the exercise of

government authority. This position taken by the appellant's counsel could be found in his submission as below:

> "3.20 As such, the decision made by the MOT and the Marine Department collectively during 2013 Meeting to standardise the Fares for the transportation of vehicles via Ro-Ro vessels as captures in the minutes of the said meeting ought to be regarded as a decision made pursuant to a direct or indirect exercise of the governmental authority since such decision was apparently made by the official representatives of the MOT and also the marine Department."

[40] Basically, s 3 of CA refers to the extent the CA shall apply. Sections 3(1) and (2) of the CA explain the applicability of the Act within and without Malaysia. Hence, the burden lies with the Commission to prove the given situation falls within the jurisdiction of the Malaysian anti-competition law. With regard to ss 3(3) and (4), they refer to the non-applicability of the anti-competition law. As such, the party who asserts the CA does not apply to a given situation shall bear the burden of proof.

[41] Section 3(4)(a) of the CA is in reference to a situation where an activity is directly or indirectly in the exercise of government authority.

[42] The law is silent as to whether the entity concerned must be government body or be related to a government body or otherwise. Notwithstanding what has been said, in the present facts, the "activity" referred to in s.3(4)(a) of the CA must be understood to be the activity of providing the Ro-Ro vessels services, i.e., ferrying wheeled cargo or transportation vehicles to the island of Langkawi from the mainland in Kuala Perlis Jetty and vice versa, as opposed to the act (or activity) of standardizing the charges for the fares of Ro-Ro vessel 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 this Act. Hence, the appellant's submission that the act of standardizing the charges for the fares of providing the Ro-Ro vessel services was an activity within the meaning of s.3(4)(a) of the CA is misconceived.

[43] The activity in the present case, i.e., providing Ro-Ro vessel services to ferry wheeled cargo or transportation vehicles to the island of Langkawi from the mainland in Kuala Perlis Jetty and vice versa, is not an activity directly or indirectly in the exercise of government authority, but rather it is a private activity of a commercial nature that is carried out by private entity(ies) with a view to profit making.

[44] Further, it is in evidence that there was no direct or indirect approval or consent given by the Ministry of Transport or the Marine Department to the appellant to enter into the two MOUs to fix the fares. There was also no written approval by the authorities approving the standardized charges of the fares. The appellant's counsel concedes that there was no such approval from the relevant authority(ies) in his submission:

> "3.35 Although there was no approval given in respect of the proposal for the rate of fares, the MOUs was in all practical manner, an attempt to put that into action and it was not an agreement to infringe the provisions of the Competition Act 2010.
>
> 3.36 It is in the Appellant's humble view, an attempt to achieve something tangible and practical to resolve the long standing issue. Bear in mind a lapse of 5 years had passed and the parties were placed in a limbo by the authorities' inaction to quickly approve the proposed fare rates. As such the MOUs was a last-ditch attempt to remain afloat in a business that public have come to put their trust."

[45] This Tribunal is satisfied that the appellant was fully aware it needed the approval from the relevant authority to fix (or to standardize) the fares for the Ro-Ro vessel services at the material times of the execution of the two MOUs.

[46] Whatever the reason(s) or intention(s) that propelled the appellant to enter into the MOUs, it could not negate the fact that the fixing or standardizing of the fare charges of the Ro-Ro vessel services would have the object or effect of significantly preventing, restricting or distorting competition in the market for that service which is prohibited under the anti-competition law, including the reason to prevent or cut losses in the business.

[47] The appellant's reliance on the doctrine of legitimate expectation is a fallacy because even if there was an agreement, intention or decision made by the Marine Department and the Ministry of Transport for the fares for the Ro-Ro ferry services to be standardized, that agreement, intention or decision could not be the *carte blanche* for actions that would violate the law, particularly the anti-competition law in this case. Any promise made by an authority must be responded to within the permitted boundary of the existing law.

[48] As submitted by the respondent's counsel, "section 65D(d) of the **Merchant Shipping Ordinance 1952** states that the Domestic Shipping Licence Board (the Board), with the approval of the Ministry of Transport may make regulations that prescribed the rates which may be charged for

the carriage or passengers or cargo by any ship engaged in domestic shipping." Clearly, the standardized fares in the MOUs were not made via s. 65D(d) of the Merchant Shipping Ordinance 1952.

[49] Further, the doctrine of legitimate expectation is much associated with administrative law where a party has relied on the promise and acted on the promise made by an administrative body, and the party expects that the administrative body will keep its promise, but the administrative body then turns upon its promise. As a result of the administrative body not keeping to its promise, the party is aggrieved by the decision made by the administrative body. Hence, the aggrieved party may seek a judicial review of the decision made by the administrative body relying on the doctrine of legitimate expectation.

[50] In the present case, the facts are far from any application of the doctrine. There was no promise made to the appellants neither was there any promise to approve the fare charges in the Infringing Agreements. The appellants were fully aware that proper approval was required to be obtained before the implementation of the fare charges.

(ii) Single Continuous Infringement: 31.12.2017 - 14.9.2020

[51] The respondent's counsel submits that this ground of appeal does not strike at the core of the finding on liability on the appellant's part which this Tribunal fully agrees. Insofar as the time of inception of the infringement of the CA is concerned, the appellant was part of the pact agreeing to the Infringing Agreement. That is sufficient to find liability on the part of the appellant.

[52] Even if the appellant had given a discount on the agreed standardized fares during the impugned duration of infringement. This does not negate the appellant's contravention of the anti-competition law. As long as an enterprise enters into the common scheme prohibited by the anti-competition law, even though the enterprise may not strictly adhere to the terms, the enterprise remains liable under the law, unless the enterprise publicly distance itself from the common scheme.

[53] Further, a termination clause in the Infringing Agreements does not release the appellant from liability. Such a term could not be used as a shield to escape from liability for infringing the CA. In addition, there is no

evidence to suggest that all the enterprises had mutually agreed that the Infringing Agreements have ceased to take effect.

[54] This Tribunal agrees with the Commission's findings in relation to the issue on single continuous infringement, specifically paragraphs 116 to 123. This Tribunal also agrees with the submissions by the respondent's counsel, specifically paragraphs 54 to 65 of the Respondent's Written Submission. Hence, this Tribunal rejects the appellant's counsel's submission on this ground of appeal.

(iii) Breach of Procedural Fairness

[55] The appellant's counsel submitted as follows:

> "3.76 The Respondent unreasonably acted contrary to the principle of procedural fairness by failing to consider or properly consider and appreciate or properly appreciate the evidence and submission presented by the Appellant, in particular, in relation to the 2013 Meeting. This has been submitted hereinbefore."

[56] The appellant's counsel also complains that the Commission did not conduct a market survey/review before coming to its Final Decision. The

appellant's counsel suggested that if the Commission had done a market survey/review, the result could be favourable to the standardization of the fares as there was no public complaint with regard to the fares. The appellant's counsel further submitted as follows:

> "3.80 Without the support and benefit of such a market survey, it is therefore unreasonable and/or premature for the Respondent to come to a finding that the MOUs were an infringement of the Competition Act 2010 and/or that the Appellant has committed anti-competitive behaviour."

[57] In reply to this ground of appeal, the respondent's counsel submitted that "failing to conduct market review pursuant to s. 11 of the CA" was not pleaded as one of the grounds of appeal. This Tribunal takes cognizance of the respondent's counsel's submission. However, this Tribunal fully agrees with the respondent's counsel's submission that the requirement to conduct market review into any market in order to determine whether any feature or combination of features of the market prevents, restricts or distorts competition in the market is at the discretion of the Commission as it thinks fit or that upon the request of the Minister concerned (see s. 11(1) of the CA). In this present case, the "market" was clearly defined and identified by the Commission in paragraph 175 of the Final Decision which stated as follows:

> "The relevant market, in the present case, is the market for the provision of vehicle transportation via Ro-Ro vessels in Langkawi".

[58] Once the relevant market has been defined and identified, it is up to the Commission whether there is a necessity to carry out a market review for the purposes of determining whether any feature or combination of features of the market preventing, restricting or distorting competition in such market.

[59] In this peculiar case, the size of the market was concentrated and limited to a particular geographical area which is the sea route between the Dermaga Tanjung Lembung, Langkawi and Kuala Perlis Jetty and the market in question is confined only to the Ro-Ro vessels services. Further, the service providers are limited to a few, namely the appellant here and the other appellants in the other two appeals. The MOUs clearly have the object of fixing the purchase and selling price of the fare charges of the Ro-Ro vessel services; as such, there is no need to determine any feature(s) in the market to ascertain a violation of the anti-competition law. This Tribunal is of the considered view that a market review is not necessary in order to determine any feature or combination of any

features of the market that could prevent, restrict or distort competition in the same.

[60] In relation to the complaint that the Commission did not appreciate the evidence pertaining to the 2013 meeting, this Tribunal has scrutinised the Final Decision of the Commission and found the Commission's investigation had considered all the relevant information and evidence before coming to its Final Decision. The appellant's complaint is merely a bare assertion and unsustainable. Hence, the Tribunal is not satisfied that there was a breach of procedural fairness.

Financial Penalty

[61] With regard to the appellant's complaint that the financial penalty amount was erroneous and highly excessive, relying on the reason that its conduct was pursuant to a governmental authority, this Tribunal could not accept such submission because this Tribunal has rejected the appellant's argument relating to the activity being an exercise of government authority. Hence, the Tribunal finds there is no merit in this argument.

[62] This Tribunal has meticulously examined the Commission's reasoning in coming to its decision on the penalty amount, and the Tribunal did not find any error committed by the Commission which warrants any interference by this Tribunal in respect of the penalty amount imposed. The Commission did take into account the mitigating factors and correctly rejected them (see paragraphs 232 to 237).

[63] This Tribunal also did not find any error in the methodology adopted by the Commission in calculating and coming to the penalty amount. This Tribunal fully agrees and accepts the respondent's counsel's submission, particularly paragraphs 71 to 84 of the Respondent's Written Submission and paragraphs 25 to 30 of the Respondent's Submissions In Reply.

Conclusion – TRP 1 - 2022 (LRRFS)

[64] Based on the above reasoning and findings, this Tribunal hereby dismisses the appellant's appeal and confirms the Final Decision of the Commission in the finding of liability and the amount of the financial penalty imposed against LRRFS.

[End of TRP 1 -2022 (LRRFS)]

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Appeal No. TRP 2 – 2022 (LAE and LFS)

[65] With regard to Appeal No. TRP 2 – 2022, the appellants' (LAE and LFS) counsel's submission raises three main grounds of appeal; whereas in the Notice of Appeal, there are five grounds of appeal. The appellants withdrew its complaint on the imposition of excessive financial penalty. The remaining grounds of appeal have been condensed into three main grounds of appeal in the appellant's counsel's submission.

[66] In essence, the three main grounds of appeal are (i) the Commission committed a breach of natural justice; (ii) the Commission had erroneously invoked the deeming provision of s.4(2) of the CA; and (iii) the Commission had erroneously computed the financial penalties in that it had failed to take into consideration certain facts. This Tribunal will deal with each of the grounds in seriatim.

Breach of Natural Justice

[67] The appellants' complaint is on the procedural aspect of the Commission's investigation. The appellants' counsel complains that the Commission failed to state the charge against the appellant when they

were being investigated. This Tribunal is of the considered view that the appellant's counsel's submission which relied on the guidelines and the procedural manuals found in foreign jurisdictions in relation to the investigation of anti-competition in Malaysia is misconceived.

[68] Nowhere in Part III (Investigation and Enforcement) of the CA is there mentioned of the word "charge" or that the Commission is required to frame a charge or provide a charge sheet against the appellants before proceeding to investigate the appellants. Section 14 of the CA reads as follows:

> "(1) The Commission may conduct any investigation as the Commission thinks expedient where the Commission has reason to suspect that any enterprise has infringed or is infringing any prohibition under this Act or any person has committed or is committing any offence under this Act.
>
> (2) The Commission shall, on the direction of the Minister, investigate any suspected infringement of any of the prohibition or commission of an offence under this Act."

[69] Sections 15 and 16 of the CA deal with a complaint that has been made to the Commission which is no relevant to the present discussion.

[70] Section 17 deals with the power(s) granted to the Commission officer(s) in the course of investigation. Section 18 of the CA is the specific power(s) granted to the Commission to "require any person whom the Commission believes to be acquainted with the facts and circumstances of the case" to provide or produce any information or document which is relevant to the performance of the Commission's powers and functions or to give statement(s) to the Commission providing information or document in relation to the performance of the Commission's powers and functions.

[71] The operating words in s. 18 of the CA are "*any person … believes to be acquainted with the facts and circumstances of the case*." A person is said to be acquainted with something if that person is familiar or aware of that something, such person may not be the wrongdoer but is familiar with the facts and circumstances of the case. Section 18 of the CA allows the Commission to gather information or carry out intelligence gathering exercises while in the process of investigation of any wrongdoing within the CA. Although the Commission may, in the midst of gathering information, direct its investigation at any person acquainted to the facts and circumstances of the case, it is misconceived to require the Commission to frame a charge for purposes of s.18 of the CA.

[72] As long as the Commission's Notice states the power in which the Commission is exercising while issuing the Notice, i.e., s. 18 of the CA, that would suffice to justify the Commission's conduct in exercising its power to require any information which is relevant to its preliminary investigation. The acknowledgement by the Commission that there was a defect in its s. 18 Notice in that it omitted to state the relevant provision under the Act which the appellants were suspected to have infringed is inconsequential as clarified above. Even if there is a need to state what provision the party is being investigated, the failure to do so could not prejudice the party that is being investigated. This is because there is no preliminary finding made at that stage.

[73] The Notice (in writing) under s. 18 of the CA cannot be equated as a charge sheet simply because no alleged offence has been levelled against the recipient. Therefore, the principle of "*natural justice requires a person be given adequate notice of the case against him or her clearly setting out the particulars or details of the alleged offence or matter so that he or she may have a fair opportunity of answering the same*" is irrelevant at this juncture.

[74] Anti-competition law in Malaysia has its own regime which is crafted out in the CA by the legislature, therefore, one should not import or

incorporate foreign procedure into the CA. This brings us to the second complaint of breach of natural justice. The appellants' counsel submits that the Commission failed to make grant full and frank disclosure of all information and/or documents that have been relied on by the Commission in arriving at its Final Decision. The appellants' counsel complains that the Commission failed to disclose the transcripts and recordings to the appellants and had deprived them of their opportunity to formulate their defences. Again, the appellants' counsel's submission relies on guidelines from foreign jurisdictions which are not found in our anti-competition law.

[75] From the facts, MyCC had provided the witnesses' statements to the appellants. The Commission in its Proposed Decision had referred to all the relevant documents and information gathered during the investigation stage before coming to its Proposed Decision. Before the Commission came to its Final Decision, opportunity to present oral and written representations was accorded to the appellants.

[76] If there is any complaint of exculpatory information or information given during the investigation stage, and that information if taken into consideration may be favourable to the appellants which the Commission had concealed, the appellants could have raised such complaint during

the oral and written representations stage. If the Commission did not consider the complaint raised during the oral and written representations before coming to its Final Decision, then in such circumstances the appellants may be able to raise legitimate complaint.

[77] If the appellants could explicitly point to any exculpatory information or information given during the investigation stage and that information if taken into consideration may be favourable to the appellants but has been ignored or concealed by the Commission, then this Tribunal could be persuaded that there is a cause for concern. However, there is nothing in the evidence that suggests this is the case here.

[78] based on the facts of this case, this Tribunal is not convinced that the appellants have been deprived of their opportunity to formulate their defences based on any specific exculpatory information or any information favourable to their defences which has been concealed by the Commission. Hence, this Tribunal could not find any procedural impropriety which tantamount to a breach of natural justice.

Invoking the "Deeming" Provision Sec. 4(2) of the CA

[79] The Tribunal reiterates and adopts the earlier part of the reasoning in that the Commission has appropriately and correctly applied the deeming provision.

The Commission had Erroneously Computed the Financial Penalties

[80] In the appellants' Appeal Notice the appellants raised the issue that MyCC had relied on proxy turnover figure to compute the financial penalties. However, in the appellants' main submission, this issue was not raised. As such, presumably the appellants have dropped this issue. The appellants' submission centres on two main items which the Commission failed to take into account as relevant deductibles in computing LAE's turnover in the relevant market in coming to the amount for the financial penalty.

[81] Section 40(1)(c) read together with 40(4) of the CA deals with the financial penalty that MyCC may impose on a party who is found to have infringed the prohibition under Part II of the CA (see also s.17(2)(b) of the

Competition Commission Act 2010). Section 40(4) of the CA reads as follows:

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

[82] The word "turnover" simply means "the total sales figure of an organization for a stated period" (see Oxford Dictionary of Business and Management, sixth Ed, Oxford University Press, 2016). Basically "turnover" refers to the total revenue of an organisation derived from sales of goods or services before deduction of the expenses. In other word the "gross income" or "gross revenue". Any discounts (or rebates), refunds or taxes have to be excluded as part of the gross income / gross revenue.

[83] The appellants complain that the Commission did not take into consideration two items as deductibles in deriving the LAE's turnover in the relevant market, namely vehicle ticket refunds (amounting to RM278,684.53 as submitted) and vehicle levy (amounting to RM1,884,309.12).

[84] With regards to the vehicle levy, the levy amounting to RM1,884,309.12 was not a tax *per se*, but rather they were charges of wharf handling fees imposed by a company Langkawi Port Sdn. Bhd. Langkawi Port Sdn. Bhd. is not a port authority or governmental agency authorised to collect taxes. It is a private limited company providing port handling services. The payment of RM1,884,309.12 was for port service charges (caj perkhidmatan pelabuhan) at Dermaga Tanjung Lembung, Langkawi, not taxes as asserted by the appellants. Hence, this Tribunal could not accept that the levy charges ought to be a deductible item for the calculation of the total turnover of LAE for the relevant period.

[85] With regard to the vehicle ticket refunds amounting to RM278,684.53, the respondent's counsel submitted that the appellants did not provide sufficient supporting documents and information on the ticket refund amount. This item is a deductible item for the computation of the turnover figure for the relevant period. The mere fact that the Commission is unable to identify the exact amount of refunds does not mean it could ignore the same for the computation of the total turnover figure for the relevant period.

[86] This Tribunal, after having examined the documents submitted by the appellants, is satisfied that there is evidence of ticket refunds. Hence,

this Tribunal is of the considered view that it would be just and fair that on this issue of deductible item (vehicle ticket refunds [RM278,684.53] and passenger ticket refunds [RM31,483.20]) be remitted to the Commission for re-assessment of the supporting documents to be provided by the appellants.

[87] The Commission in paragraph 220 of its Final Decision states as follows:

> "Accordingly, the Commission concludes that financial penalty of RM2,261,753.75 is imposed jointly and severally on LAE, Dibuk Sdn. Bhd. And Langkawi Ferry Services. These three enterprises, as we have determined, constitute an SEU."

[88] There is no appeal by the appellants (LAE and LFS) on the Commission's finding on the SEU (Single Economic Unit) in reference to the three enterprises. Hence, this Tribunal will not discuss the SEU issue in this part of the decision.

Conclusion – TRP 2 - 2022 (LAE and LFS)

[89] Based on the above reasonings and findings, this Tribunal hereby dismisses the appellants' appeal on the issue of liability and confirms the Final Decision of the Commission with regard to the finding of liability.

[90] However, on the issue of financial penalty imposed against LAE, LFS and Dibuk (jointly and severally), this Tribunal hereby exercises its power under s.58(2)(a) of the CA to remit the issue of deductible item (vehicle ticket refunds [RM278,684.53] and passenger ticket refunds [RM31,483.20]) to the Commission to re-assess the supporting documents for both (vehicle and passenger) ticket refund amounts to be provided by the appellants. Upon determination of the same, the same methodology for the calculation of the financial penalty shall be applied by the Commission.

[End of TRP 2 -2022 (LAE and LFS)]

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Appeal No. TRP 3 – 2022 (DCS and Dibuk)

[91] In this appeal, the appellants' (DCS and Dibuk) counsel raises nine grounds of appeal. The nine grounds of appeal are as follows:

i) Preliminary point of law that the whole decision should be reviewed and revisited – Breach of Natural Justice;

ii) The Commission acted as investigator, judge and jury;

iii) The Commission failed to conduct a market review before considering there was an infringement of s. 4 of the CA;

iv) Relief of liability under s. 5 of the CA;

v) Finding of fact and investigation by the Commission were illegal;

vi) The Commission failed to consider the implication if RO-RO service industry in Kuala Perlis and Langkawi is being penalized;

vii) The Commission failed to consider the RO-RO services are an infant industry;

viii) DCS and Dibuk do not form a single economic entity;

ix) Dibuk was not a party to the concerted practice.

(see Appellant's Submission dated 26.5.2022)

[92] The Tribunal will address the nine grounds of appeal in seriatim.

First Ground – Breach of Natural Justice

[93] The appellants' counsel submits that when the Commission came up with its Proposed Decision on 14.9.2020 the appellants were not given an opportunity to defend the charges levelled against them. As such, the Commission had breached the fundamental principle of natural law in that right to be heard was not accorded to the appellants before being found liable in the Proposed Decision.

[94] This Tribunal is of the considered view that the appellants' submission it was "liable" in the Proposed Decision is misconceived. Section 36 of the CA states 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."

[95] The Commission's Proposed Decision dated 14.9.2020 is not a conclusive finding of liability on the appellants, but rather it is a preliminary finding based on information and evidence gathered to form an initial finding "to the effect that one of the prohibitions under Part II has been or is being infringed", in this case the prohibition of s.4 of the CA.

[96] The CA requires the Commission to issue a Notice which sets out the reason(s) in details for its proposed decision. The object of the Notice is to provide an informed proposed decision, so that the concerned

enterprise would be able to understand where the Commission is coming from in its proposed decision to enable the enterprise to comment.

[97] Although the word used in s. 36(2)(a) of the CA is "comment", it is clear from s. 36(2)(c) of the CA that the enterprise has the right to submit written and oral representations to the Commission. The procedure for oral representation is spelled out in ss. 37 and 38 of the Act. The CA has an inbuilt mechanism to allow the Commission to act fairly before coming to its final decision.

[98] This Tribunal finds the right to be heard was accorded to the appellants according to the CA. There is no basis to suggest that the Commission had committed a breach of the principle of natural justice. Hence, this first ground of appeal is rejected by the Tribunal.

Second Ground – Investigator, Prosecutor and Judge

[99] The Commission is created by statute, i.e., the Competition Commission Act 2010. It exists to carry out the law as laid down in the CA, and is given powers to act under the CA.

[100] The appellants' complaint of the Commission being the investigator, prosecutor and judge is misconceived. The Tribunal finds the Commission had exercised the powers within the CA.

[101] This Tribunal is created by statute within the framework of the CA, particularly Part V of the Act. This Tribunal has no jurisdiction to decide whether the legality or lawfulness of the CA may be challenged for giving powers to the Commission to investigate as well as to prosecute and judge whether an entity has breached the anti-competition law.

Third Ground – Failed to Conduct a Market Review

[102] As explained earlier in Appeal No. TRP 1 – 2022 (LRRFS), a market survey is not a prerequisite for the Commission to come to a proposed decision or a final decision, especially in this present case. The contents of the MOUs are clear and unambiguous in that they intended to standardize the fare charges of the Ro-Ro vessel services which clearly "has the object to fixing directly a purchase or selling price" which is deemed to have the object of significantly preventing, restricting or distorting competition in the market for the Ro-Ro vessel services.

Fourth Ground – Relief of liability under s. 5 of the CA

[103] Section 5 of the CA is a relief of liability section, and the party who relies on the relief bears the burden of proof. It is not for the Commission to consider whether the alleged infringement of the prohibition provisions could be relieved of liability within s. 5 of the CA before coming to its Proposed Decision or Final Decision.

[104] In the event this relief of liability section is raised in the representation stage, then it is incumbent upon the Commission to consider. In the present fact, it was not raised during the representation stage. In any event, the appellants' counsel's submission on this ground is flawed because the appellants failed to demonstrate, let alone satisfy, each and every reason as provided under s. 5(a) to (d) of the CA.

[105] The appellants' counsel's submission (see paragraphs 24 to 28 of the Appellant's Submission) is fragmented and misconstrued the law. Therefore, this Tribunal is unable to find that the requirements set out in s. 5(a) to (d) of the CA have been satisfied. Hence, this Tribunal rejects this ground of appeal.

Fifth Ground – Finding of fact and investigation by the Commission were Illegal

[106] The Tribunal is of the considered view that the entire submission on this ground of appeal raised by the appellants' counsel is disjointed, incoherent, repetitive and unsustainable in law and in fact (see paragraphs 29 to 41 of the Appellant's Submission and paragraphs 20 to 33 of the Appellant's Submission In Reply).

[107] The appellants' counsel submitted that a caution statement is required to be administered to the appellants' representatives before a statement could be recorded. This Tribunal is perplexed what basis for such submission is because nothing in the CA requires the Commission to provide a caution statement before a statement could be recorded.

[108] The entire investigation process (Part III of the CA) is a civil investigation process of a civil wrong, i.e., the prohibitions of anti-competition, as opposed to a criminal investigation of a criminal wrong under the Penal Code. Therefore, the Criminal Procedure Code is inapplicable with the exception of s. 17(2) of the CA which refers to the "powers of a police officer in relation to police investigation in seizable cases as provided for under the Criminal Procedure Code."

[109] Part V, Chapter XIII of the Criminal Procedure Code (Revised 1999) (hereafter 'the Code') deals with information to police and their powers to investigate. This Tribunal is of the considered view that the application of the Code within the competition law must be confined to limited application. Section 17(2) of the CA refers to the powers, and only the powers, of a police officer in relation to police investigation in a seizable case. It did not refer to the procedural aspect of the Code in which a MyCC officer is required to comply with. The administration of a caution statement to a person before taking or recording statement is a part of the procedural requirement under the Code; it is not a power.

[110] If the entire procedural aspect of the Code is incorporated or imported into the CA by virtue of s.17(2) of the CA as a requirement for the MyCC officer to comply with, then it would make the investigation of any breach of anti-competition law impossible to perform. For example, s. 109(1) of the Code states: "*Any police officer not below the rank of Sergeant or any officer in charge of a police station may without the order of the Public Prosecutor exercise all or any of the special powers in relation to police investigations given by this Chapter in any seizable case.*" MyCC officer is not a police officer under the definition of the Police Act, 1967, i.e., a member of the Royal Malaysia Police.

[111] The procedural requirements set out in s. 109(1) of the Code do not apply in the exercise of powers by the MyCC officer(s) to carry out an investigation under the CA. The application of the Code in the anti-competition law is to be confined to the conferment on MyCC officers of the powers of a police officer, particularly in the investigation of a seizable case.

[112] Further, there are specific powers granted to MyCC officer(s) within the CA to facilitate the Commission's investigation, such as ss 25 and 26 of the CA for search and seizure with warrant and without warrant respectively.

[113] This Tribunal is of the considered view that it is inappropriate and incorrect to say that a caution statement is required to be administered or that consultation of legal counsel must be accorded before a statement could be recorded and that the procedural requirements stated in the Code are applicable in the Commission's investigation. This Tribunal finds nothing illegal in the investigation by the MyCC officers in this case.

Sixth and Seventh Grounds – Commission failed to consider the implication if Ro-Ro service industry in Kuala Perlis and Langkawi is being penalized; And the Commission failed to consider the Ro-Ro services are an infant industry

[114] The Tribunal finds that both these grounds of appeal could not vitiate the Commission's finding of liability on the part of the appellants. The submission of the appellants' counsel on these two grounds could not exempt the appellants from liability under s. 4 of the CA or provide an exemption, defence or protection to the appellant. Any exemption, defence or protection against the violation of the prohibition sections in the CA could only be found within the Act itself. They are ss.3(4)(a) to (c), 5, 6 or 8 (activities which are excluded from definition of "commercial activity", relief of liability, individual or block exemption) and s. 13 (Exclusion) of violating the anti-competition law in the CA. Hence, this Tribunal finds these grounds of appeal are irrelevant, inappropriate and baseless.

Eight and Ninth Grounds – DCS and Dibuk do not form a single economic entity; And Dibuk was not a party to the concerted practice.

[115] The doctrine of single economic entity is found in s. 2 of the CA in the definition of "enterprise", wherein it states "...*a parent and subsidiary company shall be regarded as a single enterprise if, despite their separation legal entity, both form a single economic unit within which the*

subsidiaries do not enjoy real autonomy in determining the actions of the subsidiaries on the market." The idea of single economic unit mentioned in the definition section is a concept of the doctrine of single economic entity within the competition law. In the definition section, although it refers to a relationship between a parent and subsidiary company, the application of the doctrine of single economic entity is not limited only to a parent and subsidiary company, but goes beyond that (see Case T-9/99 **HFB Holding v Commission of the European Communities**).

[116] The test of the doctrine of single economic entity according to the text **Richard Whish & David Bailey**, *Competition Law*, 7th ed, Oxford UP, 2012, p. 94, is "whether parties to an agreement are independent in their decision-making or whether one is able to exercise decisive influence over the other with the result that the latter does not enjoy 'real autonomy' in determining its commercial policy on the market." It goes on to state: "For these purposes it is necessary to examine various factors such as the shareholding that a parent company has in its subsidiary, the composition of the board of directors, the extent to which the parent influences the policy of or issues instructions to the subsidiary and similar matters."

[117] The Commission had taken into account of the facts as stated in paragraph 81(ii), (iii), (iv), (v), (vi) and (vii) of the Final Decision, and the

Commission came to the conclusion in paragraph 83 of the Final Decision which states as follows:

> "...the Commission takes the view that the shareholding, directorship, authority to sign agreements, decision making power, managerial and administrative roles of Marzukhi and Ezreen in Dibuk Sdn. Bhd. And Dibuk Cargo are clear indications of economic, organisational, personal and legal links between the two legal entities."

[118] The Commission had also taken into consideration the relationship between Marzukhi and Ezreen (father and son), the fact both enterprises were a larger part of a family business, the fact both enterprises shared the same registered and business address, and the fact the running of the day-to-day affairs of the two enterprises was overseen by Marzukhi. On that score, the Commission found as follows:

> "86. The Commission finds that the Infringing Agreements were intended to be implemented by Dibuk Cargo although the 2018 memorandum of Understanding ("MOU") was signed by Dibuk Sdn Bhd only.
>
> 87. In light of the evidence before the Commission, Dibuk Sdn Bhd had the ability and indeed had exercised decisive influence over Dibuk Cargo with regard to the

latter's conduct in the market. Dibuk Cargo had no real autonomy to determine its course of action in the market. In addition, Dibuk Sdn Bhd's participation has given effect to the Infringing Agreements. The Commission reiterates its position that the parent-subsidiary relationship stated in section 2 of the Act is not meant to be the only relationship between enterprises where an SEU could exist. An SEU can also exist where the facts concerning the relationship between enterprise A and enterprise B show that enterprise A exercises decisive influence over enterprise B as to the course of actions in the market, even though the former is not the parent company of the latter."

[119] This Tribunal is in agreement with the finding of the Commission in that DCS and Dibuk acted as a single economic entity as envisaged by the doctrine in the context of competition law. There is sufficient finding of facts in terms of the control, relationships and nexus between the two enterprises acting in a single economic unit although they were not parent and subsidiary companies.

[120] Dibuk was one of the signatories to the 2018 MOU (dated 31.12.2017), and DCS was one of the signatories to the undated MOU in the following year, and both MOUs were signed by the same person. This

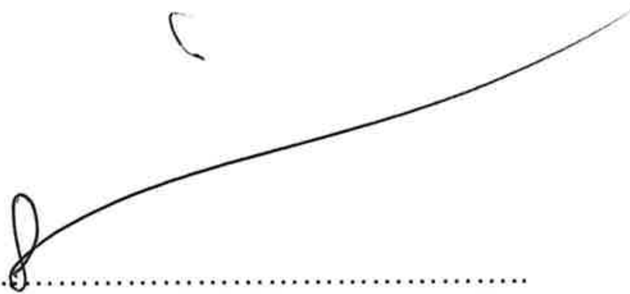
fact speaks volume of the relationship between the two enterprises. It was submitted by the appellants' counsel that Dibuk was in rice milling business. If Dibuk was in rice milling business and was never involved in the RO-RO vessel business, why then was Dibuk a signatory to the MOU dated 31.12.2017?

[121] With regard to the ground of appeal that Dibuk was not part of the concerted practice, this Tribunal accepts the submission from the respondent's counsel, particularly paragraphs 83 to 87 of the Respondent's Written Submission. There are sufficient facts revealing the participation and involvement of Dibuk in the Infringing Agreements.

[122] This Tribunal noticed that the appellants' counsel did not raise the issue of "essential service" (in reference to s 3(4)(a), (b) and (c) of the CA) as one of the grounds of appeal in the written submission although this issue was raised in the appellants' Notice of Appeal (as the sixth Ground of Appeal at paragraph 49; note: there are two sixth Ground of Appeal in the Notice of Appeal). This Tribunal deeming that the appellants have withdrawn or abandoned this ground of appeal.

[123] As a final note, there is also no appeal on the finding of the calculation of the financial penalty imposed on the appellants.

The presiding members of the Competition Appeal Tribunal (For all three appeals)



....

(DATO' DR. CHOO KAH SING)
Chairman

....

(DATUK DR. MOHD GAZALI BIN ABAS)

....

(DATIN PADUKA ANG NAI HAR)

Date: 17.11.2022

Conclusion – TRP 3 - 2022 (DCS and Dibuk)

[124] Based on the above reasonings and findings, this Tribunal hereby dismisses the appellants' appeal on the issue of liability and confirms the Final Decision of the Commission with regard to the finding of liability and the amount of financial penalty.

[End of TRP 3 -2022 (DCS and Dibuk)]

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