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

IN THE MATTER OF APPEAL NOs:
TRP 1-2020; TRP 2 - 2020; TRP 3-2020; TRP 4 - 2020;
TRP 5 -2020; TRP 6 - 2020; TRP 7- 2020; TRP 8 - 2020;
TRP 9 - 2020; TRP 10 - 2020; TRP 11 - 2020; TRP 12 -2020;
TRP 13 -2020; TRP 14 - 2020; TRP 15 -2020; TRP 16 - 2020;
TRP 17 - 2020; TRP 18 - 2020; TRP 19 - 2020; TRP 20 - 2020;
TRP 21 - 2020; TRP 22 - 2020; TRP 23 - 2020 & TRP 24 - 2020

BETWEEN

PERSATUAN INSURANS AM MALAYSIA (PIAM)
CHUBB INSURANCE (MALAYSIA) BERHAD
BANK NEGARA MALAYSIA
GREAT EASTERN GENERAL INSURANCE (M) BERHAD
PACIFIC & ORIENT INSURANCE CO. BHD.
TOKIO MARINE INSURANS (MALAYSIA) BERHAD
LONPAC INSURANCE BHD
BERJAYA SOMPO INSURANCE BERHAD
TUNE INSURANCE MALAYSIA BERHAD
MPI GENERALI INSURANCE BERHAD
PRUDENTIAL ASSURANCE MALAYSIA BERHAD
PROGRESSIVE INSURANCE BHD
AM GENERAL INSURANCE BERHAD
ALLIANZ GENERAL INSURANCE COMPANY (MALAYSIA) BERHAD
LIBERTY INSURANCE BERHAD
RHB INSURANCE BERHAD
AIA BHD
AIG MALAYSIA INSURANCE BERHAD
AXA AFFIN GENERAL INSURANCE BERHAD
ZURICH GENERAL INSURANCE MALAYSIA BERHAD
MSIG INSURANCE (M) BERHAD
ETIQA GENERAL INSURANCE BERHAD
THE PACIFIC INSURANCE BERHAD
QBE INSURANCE (MALAYSIA) BERHAD

APPELLANTS

AND

COMPETITION COMMISSION **RESPONDENT**

.....

PRESIDING MEMBERS OF THE COMPETITION APPEAL TRIBUNAL

1. **DATO' DR. CHOO KAH SING**
2. **DATO'ASMABI BINTI MOHAMAD**
3. **DATUK SERI DR. VICTOR WEE ENG LYE**

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GROUNDS OF DECISION

Date: 2.9.2022

Introduction

[1] These are the grounds of the unanimous decision of this Competition Appeal Tribunal (hereafter 'the CAT' or 'the Tribunal') in relation to 24 appeals filed by the respective appellants against the final decision dated 14.9.2020 (hereafter 'the Final Decision') by the respondent (hereafter 'MyCC' or 'the Commission' or 'the respondent').

[2] The appellants have filed their respective appeals separately. All parties, including MyCC's counsel, agreed and requested that all the appeals should be heard together. The Tribunal acceded to their request and opined it is prudent and practical to do so since there are common grounds of appeal in the appeals filed by the respective appellants. Further, all the appeals are against the Final Decision of the Commission (see Regulation 18 of the Competition (Appeal Tribunal) Regulations 2017).

The Appellants

[3] From the outset, it is instructive to set out the grouping of the appellants and their respective appeal case numbers and firms of

solicitors as below. The appellants will be referred to according to their identified groupings or their respective firms of solicitors

Group	Appellants	TRP Nos.	Firms of Solicitors
A	CHUBB Insurance Malaysia Berhad	TRP 2 - 2020	Messrs. Sreenevasan Young
B	Great Eastern General Insurance (M) Berhad	TRP 4 - 2020	Messrs. Shook Lin & Bok
C	Tokio Marine Insurans (Malaysia) Bhd Lonpac Insurance Bhd Berjaya Sompo Insurance Berhad Tune Insurance Malaysia Berhad	TRP 6 - 2020 TRP 7 - 2020 TRP 8 - 2020 TRP 9 - 2020	Messrs. Azim, Tunku Farik & Wong
D	Prudential Assurance Malaysia Berhad Progressive Insurance Bhd	TRP 11 - 2020 TRP 12 - 2020	Messrs. Christopher & Lee Ong
E1	Pacific & Orient Insurance Co Bhd	TRP 5 - 2020	Messrs. Shearn Delamore & Co
E2	MPI Generali Insurance Berhad AMGeneral Insurance Bhd Allianz General Insurance Company (Malaysia) Berhad Liberty Insurance Berhad RHB Insurance Berhad	TRP 10 - 2020 TRP 13 - 2020 TRP 14 - 2020 TRP 15 - 2020 TRP 16 – 2020	Messrs. Shearn Delamore & Co
F	AIA Bhd AIG Malaysia Insurance Berhad AXA Affin General Insurance Berhad Zurich General Insurance Malaysia Berhad	TRP 17 - 2020 TRP 18 - 2020 TRP 19 - 2020 TRP 20 – 2020	Messrs. Skrine
G	MSIG Insurance (Malaysia) Bhd ETIQA General Insurance Berhad The Pacific Insurance Berhad	TRP 21 - 2020 TRP 22 - 2020 TRP 23 - 2020	Messrs. Raja Darryl & Loh

	QBE Insurance (Malaysia) Berhad	TRP 24 – 2020	
H	Persatuan Insurans Am Malaysia (PIAM)	TRP 1 - 2020	Messrs Shanti Kandiah Chambers
I	Bank Negara Malaysia (BNM)	TRP 3 - 2020	Messrs Tay & Partners

The Relationships between the Appellants and the Relevant Parties

[4] Bank Negara Malaysia (Group I) (hereafter 'BNM') is the sectoral regulator of the appellants in Groups A, B, C, D, E1, E2, F, G (hereafter collectively referred to as 'the Insurers').

[5] All the Insurers are members of the Persatuan Insurans Am Malaysia (Group H) (hereafter 'PIAM').

[6] According to the established framework for motor vehicle insurance claims in Malaysia, the Insurers offer motor insurance policies to motor vehicle owners. A premium is chargeable for the issuance of a motor insurance policy by an insurance company to the motor vehicle owner. The chargeable premium is determined, controlled and regulated by BNM.

[7] When a motor vehicle is damaged in an accident, the motor vehicle owner is required to send the damaged motor vehicle to an approved automobile repairer workshop under the PIAM Approved Repairers Scheme (hereafter 'the PARS workshops') in the event the motor vehicle owner intends to claim against his/her insurance policy. The costs of repair (parts, labour charges and other charges) will be borne by the insurance company that issued the motor vehicle insurance policy.

[8] The PARS workshops are members of The Federation Automobile Workshops Owners' Association (hereafter 'FAWOAM').

[9] In view of the established framework for motor vehicle insurance claim in Malaysia, PIAM and FAWOAM, both of whom are associations, meet, discuss and resolve any problem that arises from the relationship between its respective members *vis-à-vis* between the Insurers and PARS workshops.

Distinct and yet intertwined Interests – The Appellants

[10] It is important to note that there are three distinct interests, and yet they are intertwined, among the appellants against the Final Decision of the Commission. First, the interest of the BNM. Secondly, the interest of

PIAM. Lastly, the interests of the rest of the appellants – Groups A, B, C, D, E1, E2, F, G, who are the insurance companies.

The Salient Facts Cumulating to the Final Decision

[11] The narrative below is not exhaustive, but it is sufficient to set out the salient facts against the backdrop which led to the Final Decision of the Commission.

PARS Workshops - Discontentment

[12] As early as in 2008, the PARS workshops were discontented with the imposition by some of the insurance companies of an unreasonable trade discount on spare parts prices to repair the damaged motor vehicle. Complaints were made to BNM. On 18.11.2008, BNM issued a letter to PIAM, and advised PIAM to remind its members "to be more judicious" in applying trade discounts to spare parts prices.

[13] The discontentment faced by the PARS workshops was not resolved, and it prolonged until 2010. On 25.7.2010, the PARS workshops through FAWOAM made a public announcement in local newspapers. The relevant excerpt of the announcement is as follows:

"Dear All Malaysian Vehicle Owners and Drivers

FAWOAM wishes to inform you that due to the unacceptable trade practices by the Motor Insurance Companies, have burdened and strangled the repair industries to keep moving forward. The association had taken all the initiatives and efforts in trying to resolve the issues with the related Government Agencies and Insurance Companies, but unfortunately all these attempts have failed.

In view of this, the FAWOAM members and PIAM Approved Repairers Scheme (PARS) workshops are taking the stand to defend their basic rights and livelihoods and are forced to declare their rights and action as below:-

PARS WORKSHOPS' RIGHTS & ACTIONS (PARS RULES 7-11)

1. The workshops will deem the insurance companies are requesting for non-OEM parts, if any trade discount imposed by them is more than 10%
2. The workshops will only start the car repair works after receiving the insurance's supplementary and final approval.
3. The workshops will opt for cash repair if the approval from insurance companies do not following [sic] the "FAWOAM COLLISION REPAIR INDUSTRY GUIDE TO RETAIL CHARGES 2009".
4. The workshops will charge customers the variance or repair costs not paid by insurance companies if the approval from the insurance companies do not follow the "FAWOAM COLLISION REPAIR INDUSTRY GUIDE TO RETAIL CHARGES 2009".
5. The workshops will either release the after-repair car to customer only after having received the insurance cheque payment or collected a 10% deposit from customer on

insurance's [sic] final approval amount. The deposit will be refund [sic] to customer once full settlement of the payments received from insurance companies.

6. The workshops have the right to revert and opt for cash repairs."

(hereafter 'the FAWOAM's announcement')

[14] The Insurers were not consulted on the terms set by FAWOAM in the announcement. FAWOAM did not obtain approval from any government agency for its terms. After FAWOAM's announcement, a series of meetings was held by PIAM and its members, as well as some meetings involving PIAM, BNM, Malaysia Takaful Association, Association of Malaysia Adjusters and FAWOAM.

The Meetings

[15] On 18.7.2011, PIAM Claims Management Subcommittee members met with FAWOAM. The issues discussed were, among other things, on the parts trade discounts and chargeable labour rates. PIAM made certain proposals and offers regarding parts trade discounts and chargeable labour rates. FAWOAM agreed and accepted the proposed terms in the meeting.

[16] It is observed that prior to the meeting held on 18.7.2011, PIAM and FAWAOM had several rounds of negotiation on the terms of the parts trade discounts and chargeable labour rates. Counter-proposals were exchanged in those negotiations. The final proposed terms offered by PIAM to FAWOAM with regard to the parts trade discounts and chargeable labour rates were not an instantaneous result of a bargain, but protracted negotiations between the two sides.

[17] On 26.7.2011, following from the meeting held on 18.7.2011, PIAM held its 10th Meeting of PIAM Claims Management Subcommittee. The members of PIAM were informed of the outcome of the meeting with FAWOAM. The members were told that FAWOAM had agreed to the proposed terms in regard to the parts trade discounts and chargeable labour rates.

The Infringing Agreement

[18] On 28.7.2011, PIAM issued a Members' Circular No. 132 of 2011 (hereafter the Members' Circular No. 132) to place on record the PIAM's members' survey result of the proposed terms. The relevant part of the Members' Circular No. 132 is reproduced as below:

"The survey result indicated overwhelming support to the Claims Management Subcommittee's recommendations for Parts Trade Discounts and Labour Rates. Details of the survey are below:-

Recommendation by the Claims Management Subcommittee	Survey Result
Parts Trade Discounts 25% for the six vehicle makes namely Proton, Perodua, Nissan, Toyota, Honda and Naza and 15% for Proton Saga Base Line Model (BLM)	26 members – in support 1 member – the discount should not limited [sic] to 25% only
Labour Rates RM30 per hour but open for member companies to apply either Thatcham Repair Times or Opinion Times as currently practice pending review of Thatchem Repair Times	25 members – in support 2 members – to maintain RM25 per hour.

N.B. membership constitutes 27 direct insurers.

The mandates received from members were discussed and eventually accepted by FAWOAM in a meeting held on 18th July 2011.

It has been further agreed that in special cases where repairers have to purchase parts with "low" trade discounts due to urgency or inability, a lower trade discount than 25% can be considered by insurers on merit of each case and subject to verification by appointed adjusters and proof of purchase invoice.

Members are requested to take note that the above agreements take effect from **1st August 2011**."

(hereafter 'the infringing agreement' or 'Circular 132')

[19] It is observed that the Members' Circular No. 132, or the infringing agreement as MyCC found it to be, was dated 28.7.2011, which was before the **Competition Act 2010** (hereafter 'the CA') came into force on 1.1.2012.

[20] The agreed terms (part trade discount and labour charges) between the Insurers and PARS workshops were followed after the CA came into force.

FAWOAM lodged a complaint

[21] On 1.4.2015, the then President of FAWOAM lodged a complaint to MyCC against PIAM and its members pertaining to the agreement of "fixing discount rate and labour rate" in relation to the spare parts discount of 25% and labour rate of RM30.00 per hour.

[22] On 20.6.2016, MyCC commenced investigations under s.15(1) of the CA to "ascertain whether or not there had been an infringement of s.4 prohibition" under the CA.

[23] On 22.2.2017, MyCC issued notices to PIAM and its members pursuant to s.36 of the CA informing them of its initial finding that "one of the prohibitions under Part II has been or is being infringed". A Proposed Decision dated 22.2.2017 was issued in which MyCC found an infringement of s.4(2)(a) of the CA had been committed by PIAM and the Insurers in relation to the Members' Circular No. 132. Written representations were submitted to MyCC by the Insurers, and oral representation sessions were also carried out by MyCC. On 5.9.2018, there was a change of the Commission's Chairman. On 14.11.2018, a *de novo* proceeding by way of oral representations was granted at the request of the parties.

The Final Decision

[24] On 14.9.2020, MyCC issued its final decision pursuant to s.40(1) of the CA and found that PIAM and its members (the Insurers) had, by having entered into the infringing agreement, thereby, breached s.4(1) read together with ss.4(2) and 4(3) of the CA.

[25] At paragraph 437 of the Final Decision, MyCC directed the parties to undertake the following:

"(a) To cease and desist from implementing the agreed parts trade discount for 6 vehicle makes, namely, Proton, Perodua, Nissan, Toyota, Honda and Naza and the hourly labour rate for PARS workshops with immediate effect; and

(b) The future parts trade discount rate and the hourly labour rate for PARS workshops are to be determined independently by the 22 Enterprises"

(hereafter 'the cease and desist order')

[26] The Commission has also imposed on each of the Insurers financial penalties (hereafter 'the financial penalties') for infringing s.4 of the CA. However, after having taken into account of the "impact of unprecedented COVID-19 pandemic," the Commission granted a reduction of 25% of the financial penalty imposed on the Insurers. The Commission also granted "a moratorium period for the payment of the financial penalty up to 6-months and payment of the financial penalty by equal monthly instalment for up to 6 months."

[27] On 23.3.2021, pursuant to s.53(1) of the CA, this Tribunal granted a stay of the cease and desist order and financial penalties imposed by the Commission pending the disposal of the appellants' appeal.

The Findings of this Tribunal

Legal Propositions

[28] Before embarking on the merits of the appeals, it is instructive to mention some legal propositions enunciated in the recent decision of the Court of Appeal in **Malaysia Airline System Bhd v Competition Commission & Another Appeal** [2022] 1 CLJ 856.

[29] First, the Court of Appeal held that MyCC is a *quasi*-judicial body and it cannot seek a review of the decision of its own appellate body – CAT. To do so would tantamount to "administrative insubordination of a kind repugnant to the whole statutory scheme." MyCC, therefore, cannot be "a person who is adversely affected by the decision" within the meaning of Order 53 rule 2(4) of the Rules of Court 2012. In other words, MyCC cannot file a judicial review before the High Court to review the CAT's final decision.

[30] Secondly, once MyCC has arrived a decision under s.39 (finding of non-infringement) or s.40 (finding of an infringement) of the CA, its role becomes *functus officio*.

[31] Thirdly, MyCC has to take "a neutral and impartial stand before its appellate authority in the CAT and its task is to assist the CAT to arrive at a fair and just decision. It takes no partisan stand and has no personal or official interest in the confirmation or reversal of its order handed down in its *quasi*-judicial capacity."

[32] Fourthly, the CA does not apply retrospectively. "Whatever was the arrangement of the parties on how they should compete or not compete was not the business of the law then but was a matter within the contractual arrangement and agreement of the parties," said the Court of Appeal.

[33] However, the Court of Appeal qualifies the above legal proposition by saying "it would also mean that if they let the *status quo* remain without further collaboration, it would not have been anything wrong for the arrangement or agreement had been entered into before the Act came into force. The important thing is that **they are no longer bound contractually to maintain the *status quo* subsisting before the Act came into force** [emphasis added]. Statutorily they cannot enter into further agreement which would be anti-competitive as referred to in s. 4 of the Act." The Court of Appeal further states: "For the inertia of the *status*

quo to continue is no offence unless the parties had agreed to maintain the *status quo*."

[34] Fifthly, the Court of Appeal said that for a "deemed" clause (referring to s.4(2) of the CA) 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.

[35] Sixthly, with regard to s.4(1) of the CA, in relation to the proving of a horizontal or vertical agreement which is prohibited within the CA, it must be shown it has the object or effect of "significantly preventing, restricting or distorting competition in any market for goods or services." The Court of Appeal accepted that the terms "object" and "effect" are "alternative and not cumulative requirements." They have to be read disjunctively.

[36] Seventhly, "once the object is significantly anti-competitive, it is unnecessary to show or prove that the agreement will have an appreciable adverse effect on competition. It is only when the object of the agreement is not clear with respect to its anti-competitive intent or purpose that there is required the need to examine if the agreement might have an anti-competitive effect." In other words, the probing of the object of the impugned agreement is necessary to be established first, and that the

object must be significantly preventing, restricting or distorting competition in any market for goods or services.

[37] Lastly, "the requirement of 'significantly preventing, restricting or distorting competition in any **market** for goods and services' behoves MyCC to define what 'market' is so as not to be fixated over what is '*de minimis*'," said the Court of Appeal. Hence, before MyCC can invoke the "deemed" provision in s.4(2) of the CA, it is prerequisite for MyCC to first define what the "market" is in the given situation. Some quantitative analysis may be required to show what the market may entail before MyCC can determine whether s.4(1) of the CA has been infringed. It is said that "it is only after having identified the relevant market that the respondent MyCC can assess whether a particular conduct (or agreement) is anti-competitive in nature."

[38] The above legal propositions provide great assistance to MyCC as well as the CAT in dealing with anti-competition cases generally.

The Approach - CAT

[39] As mentioned at the beginning, there are three distinct, and yet intertwined, interests arising from the respective appellants' appeals.

These interests, namely the BNM's interest, PIAM's interest and the Insurers' interest, are peculiar to the respective appellants. However, the outcome of the findings in relation to the appeal of one party could affect appeals of the other parties, in particular the outcome of the appeal of BNM or PIAM could affect the Insurers' appeals.

[40] The Tribunal decides it will first deal with the issues raised by BNM in its appeal, and then move on to discuss the issues raised by PIAM in its appeal. In the last part, the Tribunal will attempt to address the relevant issues (common issues and specified issues) raised by the Insurers in their respective appeals, if necessary. If there is any issue that is raised by the appellants or respondent is not mentioned, it does not mean that the Tribunal did not consider the issue. The issue not discussed in this decision because it is either immaterial to or it has become academic, and it cannot influence the final outcome of the decision of this Tribunal.

The Burden and Standard of Proof

[41] It is incumbent upon this Tribunal first to lay down the burden and standard of proof that are required from the parties.

[42] MyCC in paragraph 352 of its Final Judgment admitted that MyCC bears the burden of proof in that it is the duty of MyCC to prove that PIAM and the Insurers, by having entered into the infringed agreement, have infringed s.4 of the CA (see **Pang's Motor Trading v CCS** [2014] SGCAB 1, at para 33). This Tribunal has no hesitation to accept that the burden lies with MyCC to prove PIAM and the Insurers have infringed the prohibition in s.4 of the CA.

[43] Notwithstanding what has been said, the burden does shift. For example, the burden will shift to the party who seeks relief of liability under s.5 of the CA. The party who seeks relief of liability under s.5 of the CA is required to prove those conditions set out in s.5(a) to (b) of the CA are present in order to be relieved from liability of the infringement of the prohibition under s. 4 of the CA.

[44] With regard to the standard of proof, the CAT (UK) in **JJB Sports Plc and Allsports Ltd v OFT** [2004] CAT 17, para 204-5, concluded that the standard remains the civil standard, after having examined the case of **Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading** [2002] CAT 1 which has caused some confusion to the applicable standard. The CAT (UK) in *JJB Sports* went on to say that "the evidence must however be sufficient to convince the Tribunal in the circumstances

of the particular case, and to overcome the presumption of innocence to which the undertaking is entitled."

[45] This Tribunal recognises that the prohibition under s.4 of the CA is a serious matter, and any infringement of the same can lead to severe financial penalty. Notwithstanding what has been said, the applicable standard, in the opinion of this Tribunal, remains a civil standard of balance of probabilities. This is because the prohibition under s.4 of the CA remains a civil wrong, not a criminal one. This Tribunal opines that the emphasis ought to be placed on the "quality and weight" of the evidence gathered. MyCC bears a *quasi*-judicial duty to examine, evaluate and determine the quality and weight of the evidence gathered before it comes to its final decision.

BNM – Appeal No. TRP 3-2020

[46] BNM raises four statement of issues to be heard before this Tribunal. They are as follows:

- Whether BNM has the *locus standi* pursuant to s.51 of the CA to file this appeal against the Final Decision of MyCC?

- Whether BNM has the legislative power to issue directive(s) under s.22(3) of the **Insurance Act 1996** (hereafter 'the IA 1996')?

- Whether BNM's letter dated 4.7.2011 (Annexe 6 in the Final Decision) (or any subsequent communication to PIAM) is a directive to PIAM and/or its members to fix parts trade discounts and labour rates?

- Whether the BNM's directive (if any) is a legislative requirement falling within the exclusion in Chapter 4 of s.13(1) read together with limb (a) of the Second Schedule of the CA?

[47] The above four statement of issues can be condensed into two main issues, first, the *locus standi* of BNM in filing this appeal, and second, the applicability of the exclusion clause in s.13(1) read together with limb (a) of the Second Schedule of CA. The discussion of the latter issue will cover the second, third and fourth statement of issues.

First Issue: Locus Standi - BNM

[48] The relevant section reads as follows:

"**Appeal to the Competition Appeal Tribunal**

51.(1) A person who is aggrieved or whose interest is affected by a decision of the Commission under section 35, 39 or 40 may appeal to the Competition Appeal Tribunal by filing a notice of appeal to the Competition Appeal tribunal."

[49] It is interesting to note that the law recognises two types of persons who may file an appeal to the CAT. One is person "who is aggrieved" by the decision of the Commission, and the other is person "whose interest is affected" by the decision of the Commission. The decision referred to in s.51(1) is a decision made under s. 35, 39 or 40 of the CA.

[50] In **Wu Shu Chen (Sole Executrix of the Estate of Goh Keng How, deceased) & Anor v Raja Zainal Abidin bin Raja Hussin** [1997] 2 MLJ 487, 499, the Court of Appeal held as follows:

"To be aggrieved means one is dissatisfied with or adversely affected by a wrongful act of someone. An aggrieved person is therefore a person whose legal right or interest is adversely affected by the wrongful act or conduct of another person or body."

[51] In **Re Reed, Brown & Co.** [1887] 19 QBD 174, 177-8, the English court held as follows:

> "A 'person aggrieved' must be a man against whom a decision has been pronounced which has wrongfully refused him something which he had a right to demand."

[52] **In re Sidebotham** [1880] 14 Ch. D 458, 465, wherein it was held:

> "A 'person aggrieved' must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something."

[53] Based on the English court's definition of an "aggrieved person" and the definition found in *Wu Shu Chen* (supra), it is safe to say that the phrase "a person who is aggrieved by a decision" must be understood to mean that the decision has wrongfully deprived that person from exercising his legal right to or interest in something. Hence, to qualify as a person who is aggrieved by the decision of the Commission, the person must demonstrate his legal right to or interest in something has been

affected by the decision, and the person has been deprived of that legal right or interest.

[54] The CAT opines a decision made under ss. 35 or 40 of the CA against a person will surely impact the person's legal right to or interest in something, and that decision could wrongfully deprive him from exercising his legal right to or interest in something.

[55] Section 35 of the CA is an interim measure decision while pending investigation under s.14 of the CA. A decision can be made under this section in the following situations:

> "*(2) if the Commission has reasonable grounds to believe that any prohibition under this Act has been infringed or is likely to be infringed and the Commission considers that it is necessary for it to act under this section as a matter of urgency for the purpose of –*
>
> *(a) preventing serious and irreparable damage, economic or otherwise, to a particular person or category of persons; or*
>
> *(b) protecting the public interest,*

the Commission may give such direction as it considers to be appropriate and proportionate for that purpose."

[56] A decision made under s.35 of the CA is usually directed at the party(ies) who is being investigated. This is because the direction is given when the Commission "has reasonable grounds to believe that any prohibition under this Act has been infringed or is likely to be infringed."

[57] Section 40 of the CA is a final decision of a finding of an infringement of prohibition under Part II of the CA. Where a person is found to have infringed a prohibition under Part II of the CA, it is certain that his legal right to or interest in something would be affected by the decision.

[58] Based on the above analysis, a person is definitely aggrieved and his interest would have been affected by a decision made under s. 35 or 40 of the CA against that person.

[59] With regard to a decision made under s. 39, it is a negative finding by the Commission – "there is no infringement of a prohibition under Part II of the CA." A party who was being investigated and is found not to have infringed a prohibition under Part II of the CA would surely have no interest to file an appeal. Why then did legislature include a decision made under

s. 39 of the CA as appealable? Perhaps, it stands to reason that when the law was drafted the legislature has in mind the interest of a complainant.

[60] A complainant is a person whose interest is somehow affected by the negative finding of the Commission's decision. It is the complainant's complaint that has triggered the investigation. Therefore, a person "whose interest is affected" includes, but is not limited, to a complainant.

[61] Notwithstanding what has been said, there could be other circumstances where a person's interest is affected by a decision of the Commission made under ss. 35, 39 or 40 of the CA.

[62] In this case, a cease and desist order has been issued and directed at PIAM and the Insurers, and further financial penalties have been imposed on the Insurers. There is no imposition of liability or fine made against BNM.

[63] MyCC's counsel submits that the underlying dispute and complaint is in relation to the infringing agreement, and BNM is not a party to the infringing agreement. MyCC's counsel further submits that BNM recognises the Commission's jurisdiction under the CA, therefore, "it

cannot be said that the Commission's investigation on allegations of anti-competitive conduct and enforcement of competition law affects BNM's interest."

[64] This Tribunal is of the considered view that the meaning "a person whose interest is affected" includes a wider spectrum of persons who are aggrieved by the decision of the Commission.

[65] Although the finding of liability and imposition of financial penalties are not directed at BNM, the Final Decision has an overarching effect and impact which affected the interest of BNM. BNM's interest is that it is the regulator of the Insurers. BNM is not an incidental party to the infringing agreement.

[66] As early as in November 2008, BNM was called upon by "repairers" (presumably some owners of PARS workshops) to look into the unfair imposition of trade discount on spare parts prices by some insurance companies.

[67] BNM was involved throughout the whole process seeking for a solution to resolve the problems faced by the PARS workshops and PIAM and its members. BNM's involvement in the pre and post formation of the

infringing agreement is acknowledged by MyCC. This can be seen in various paragraphs of the Final Decision (see paragraphs 87, 95, 99, 115, 119, 122(ii), 122(iii), 122(iv), 122(ix), 122(xvi), 122(xix), 122(xxxii) and 249 to 334).

[68] BNM issued a press release on 30.9.2020, after the pronouncement of the Final Decision, to express its discontentment towards the findings of MyCC. To say the Final Decision does not affect BNM's interest and to not recognise BNM has an interest that has been affected by the Final Decision is unsustainable in the circumstances of this case.

[69] Further, BNM asserted that its letter dated 4.7.2011 (Annexe 6 in the Final Decision) addressed to PIAM is a directive which falls within the meaning of a "legislative requirement" under s.13(1) read with limb (a) of the Second Schedule of the CA. BNM also asserted its power to issue the directive derives from s. 22(3) of the IA 1996. However, MyCC rejected BNM's assertions in its Final Decision. This Tribunal finds that BNM has demonstrated its interest has been affected as a regulator of the Insurers by the Final Decision.

[70] In conclusion, BNM may not be a person who is aggrieved by the Final Decision, but BNM surely is a person whose interest as a regulator

of the Insurers is affected by the Final Decision. Based on the latter, this Tribunal has no hesitation to find BNM has the *locus standi* to file its appeal.

Second Issue: The Exclusion Clause
Section 13(1) read together with para (a) of the Second Schedule

[71] The relevant part of s.13(1) of the CA reads as follows:

> "*13.(1) The prohibitions under Part II shall not apply to the matters specified in the Second Schedule.*

[72] The para (a) of the Second Schedule states as follows (emphasis is ours):

> "**Activities not subject to Chapters 1 and 2 of Part II**
>
> *Chapters 1 and 2 of Part II of this Act shall not apply to –*
>
> *(a) an agreement or conduct to the extent to which it is engaged* ***in an order*** *to comply with a legislative requirement;*
> *(b) …;*
> *(c) ….*"

[73] In essence, BNM and other appellants submit that the BNM's letter dated 4.7.2011 (and two earlier letters dated 4.6.2010 and 14.6.2011) amounts to a directive issued under s.22(3) of the IA 1996. As such, the compliance of the directive by PIAM and its members to the letter is a legislative requirement. The infringing agreement (the Members' Circular No. 132) is, therefore, an agreement made in an order to comply with a legislative requirement.

The Language Used in the CA

[74] The Tribunal wishes to make two important observations in regard to the language used in the CA.

First Observation - "in order to" and "in an order to"

[75] First, this Tribunal observes that the language used by our legislature in para (a) of the Second Schedule is somewhat different from that used in similar legislation in other jurisdictions. Reference is made to the provisions in the **UK Competition Act 1998** and **Singapore Competition Act 2004** that serve the similar purpose.

[76] In the UK Competition Act 1998, Schedule 3 para 5 reads as follows (emphasis is ours):

> "Compliance with legal requirements
>
> (1) The Chapter I prohibition does not apply to an agreement to the extent to which is it made ***in order*** to comply with a legal requirement.
> (2) The Chapter II prohibition does not apply to conduct to the extent to which it is engaged ***in an order*** to comply with a legal requirement.
> (3) In this paragraph "legal requirement" means a requirement –
> (a) Imposed by or under any enactment in force in the United Kingdom;
> (b) Imposed by or under the EU withdrawal agreement or the EEA EFTA separation agreement and having legal effect in the United Kingdom without further enactment (and in this paragraph, "EET EFTA separation agreement" has the same meaning as in the European Union (Withdrawal Agreement) Act 2020 (see section 39(1) of that Act)).
>
> (**Note**: Chapter I deals with prohibition agreements; whereas, Chapter II deals with abuse of dominant position)
>
> (**Note**: Before the amendment on 31.12.2020, para (3)(b) reads: "imposed by or under the Treaty or the EEA

Agreement and having legal effect in the United Kingdom without further enactment; or (c) imposed by or under the law in force in another Member State and having legal effect in the United Kingdom.)

[77] In the Singapore Competition Act 2004, Third Schedule para 2 reads as follows (emphasis is ours):

"Compliance with legal requirements

2. (1) The section 34 prohibition does not apply to an agreement to the extent to which it is made ***in order*** to comply with a legal requirement.
(2) The section 47 prohibition does not apply to conduct to the extent to which it is engaged ***in order*** to comply with a legal requirement.
(3) In this paragraph, "legal requirement" means any requirement imposed by or under any written law".

(Note: section 34 deals with prohibition agreement, and section 47 deals with abuse of dominant position)

[78] The phrases "in order to" and "in an order to" have a very different connotation. The former is a subordinating conjunction, and it is used to express the purpose of something, and it continues or introduces a

subordinate clause. The latter has an article, i.e. "an", before the word "order". An article always comes before a noun. Hence, the "order" in the latter is a noun.

[79] Reading the UK Competition Act 1998, it seems to suggest that if a prohibition agreement is made *in order* to comply with a legal requirement, then Chapter I does not apply to such agreement. If a conduct amounts to an abuse of dominant position, then that conduct has to be engaged *in an order* to comply with a legal requirement. In other words, that conduct is engaged pursuant to *an order* that has been made.

[80] In the Singapore Competition Act 2004, both the prohibition agreement and the conduct which amounts to abuse of dominant position can be excluded from the Act if it is made *in order* to comply with a legal requirement. In other words, there is no requirement to show there is *an order* that has been made to comply with a legal requirement.

[81] The inclusion or omission of the article "an" before the word "order" sets very different requirements of fact and law in the application of the exclusion clause.

[82] In Singapore, there is no requirement for an order to be made to comply with a legal requirement for both a prohibition agreement and conduct that amounts to abuse of dominant position. Did the Singapore legislature intentionally omit the article "an" before the word "order" so to make them consistent in fact and law for the requirement of exclusion?

[83] In summary, it is observed that it is grammatically correct to use a subordinating conjunction to express the requirement subsequent to the object clause that it wants to introduce, whereas, if the word "an order" is placed in the sentence, it changes the entire requirement and meaning.

Second Observation – "is made" and "is engaged"

[84] The second observation is that an agreement is always described as "an agreement is made", whereas, a conduct is described as "a conduct is engaged". These descriptions in the English language can be seen in both the UK and Singapore law. In our legislation, only the word "engaged" is used.

[85] If the sentence is separated into two, they read as follows:

Sentence A

This Act shall not apply to ***an agreement*** to the extent to which it ***is engaged*** in an order to comply with a legislative requirement.

Sentence B

This Act shall not apply to ***conduct*** to the extent to which it ***is engaged*** in an order to comply with a legislative requirement.

[86] In sentence B, it is correct to use "is engaged" to refer to the conduct. Whereas, it may not be accurate to use "is engaged" to refer to an agreement in sentence A.

Intention of the Drafters – The First and Second Observations

[87] As explained earlier, "in order to" and "in an order to" have very different connotations. In the CA, the words "in an order to" are used. Therefore, the Tribunal has no choice but to take the meaning that an order must exist before the exclusion clause can be considered.

[88] With regard to the second observation, the Tribunal is of the view that although the word "engaged" is not the appropriate word to use in

reference to an agreement, the intention of the draftsman appears to be for the phrase "to the extent to which it is **engaged** in an order to comply with a legislative requirement" to apply to both "an agreement" as well as "conduct".

[89] Based on the above analysis, there are two requisitions for the exclusion to apply pertaining to an agreement engaged in an order to comply with a legislative requirement. First, an order has been made. Secondly, the order is made to comply with a legislative requirement.

BNM's (and others) Submission

[90] The BNM and all the other appellants take the position that (i) the letters (dated 4.6.2010, 14.6.2011 and 4.7.2011) amount to a directive issued by BNM which constitutes an order as per para (a) of the Second Schedule; (ii) and the order was issued pursuant to s 22(3) of the IA 1996; (iii) therefore, the order was issued under a legislative requirement.

[91] This Tribunal refers to s. 203(b) of the IA 1996 which states:

> "203 (1) A person who –
>
> (a) ...; or

(b) fails to comply with a requirement, notice, order or *direction* issued by a Minister or by the Bank under this Act ...,

commits an offence and, where...."

[92] Based on the above offence section in the IA 1996, there is a legislative requirement imposed on persons to whom BNM issues a direction under the Act to comply with the direction. Therefore, if the purported "directive" (as submitted by BNM and the other appellants) was indeed a directive issued by BNM under a written law which is s. 22(3) of the IA 1996, it can constitute as "an order to comply with a legislative requirement".

[93] The question is whether s. 22(3) of the IA 1996 empowers BNM to issue such directive in the nature to direct PIAM and its members to enter into the purported infringing agreement?

[94] Section 22(3) of the IA 1996 reads as follows:

"(3) The Bank may direct an association to take, or refrain from taking, such action as it may specify."

[95] Section 22(3) of the IA 1996 empowers BNM to direct an association to do or not to do something as it may specify.

[96] MyCC's finding in its Final Decision states as follows:

> "255. The marginal note to section 22 of the IA reads and this section only deals with "Membership of Association". Thus, the Commission in interpreting the provision of section 22 takes the view that the IA merely confers upon BNM the power to issue direction to an association under section 22(3) of the IA insofar as they are limited to matters relating to the Constitution and membership of the association. Therefore, BNM has no power to issue a direction to PIAM to fix the parts trade discounts and labour rates under section 22(3) of the IA."

[97] BNM's counsel submits that MyCC, as a regulator of equal standing as BNM, has no jurisdiction or power to decide on BNM's power under s. 22(3) of the IA 1996. It is further submitted that MyCC "has no jurisdiction over BNM or review the exercise of powers by BNM or seek to limit the exercise of powers under any statutory provision where only BNM is empowered to act."

[98] This Tribunal is of the considered view that the Commission was acting within its jurisdiction and has the power to interpret the application of s.22(3) of the IA 1996. The Commission, by its nature and function as a quasi-judicial body, is empowered to interpret a provision of law whether it is relevant or otherwise. The mere fact that the outcome of the interpretation of the law affects another regulator's power could not preclude the Commission from exercising its duties.

[99] MyCC's counsel argues that any direction issued under s.22(3) of the IA 1996 has to be confined to a matter arising from or in relation to the membership of the association. It is argued that the marginal notes of s.22 stated "Membership of association". It is submitted that "marginal note to section can be considered to construe the intent of the section" and that it "shows that the intention of Parliament was to limit the effect of the section to issues of membership" (see cases cited – **Foo Loke Ying v Television Broadcasts Ltd & Ors** [1985] 2 MLJ 35; **Kok Wah Kuan v PP** [2007] 5 MLJ 174, CoA; and **Badan Peguam Malaysia v Louis Edward Van Buerle** [2006] 1 MLJ 21, CoA).

[100] BNM's counsel submits that "although the preceding subsections, ss. 22(1) and 22(2) IA 1996, deal with membership and constituent documents of an association, s 22(3) IA 1996 by its very language stands

alone and unfettered by the foregoing sub-sections." The counsel further submits that "section 23(3) does not refer to membership or constituent documents but speaks of a power to direct such action that 'it may specify'. Clearly, section 22(3), IA 1996 enables BNM to regulate PIAM (and by extension its member insurers) on matters other than membership and constituent documents."

[101] This Tribunal is of the considered view that a marginal note to a section is part of the statute (see **Ganesan a/l Singaram v Setiausaha Suruhjaya pasukan Polis & Ors** [1998] 1 MLJ 240 and s. 15 of the consolidated Interpretation Acts 1948 & 1967 [in 1997]), and that when there is a doubt in construing a provision within the section, the marginal note to the section would be the best guidance to the intended meaning of the provision.

[102] However, in the present case, the plain reading of the wording in s. 22(3) of the IA 1996 does not confine to matters arising from or in relation to the membership of the associations. These associations are no ordinary associations. They are associations for enterprises who have been granted a licence by BNM to carry their businesses. These licensed businesses are within the purview and control of BNM. They are part of the financial services in the country. The regulator of these enterprises is

BNM. BNM even has a hand in the constituent documents of the associations. These enterprises are required to be a member of these associations. The power of BNM to issue direction to the associations stands to reason that these associations would then act as a conduit to facilitate any communication or direction given by BNM to their members, because all the members are regulated by BNM. Therefore, s. 22(3) of the IA 1996 cannot be construed as just empowering BNM to direct an association to take, or refrain from taking, such action limited to matters arising from or in relation to membership of the association only. The law refers to "such action as it may specify". "Such action", therefore, could not just confined only to matter arising or in relation to membership of the association.

[103] In conclusion, pursuant to s 22(3) of the IA 1996, BNM is empowered to issue a direction to PIAM and for PIAM and its members to engage into the terms of the infringing agreement. Notwithstanding the conclusion that BNM could issue a direction of such nature within s.22(3) of the IA 1996, the next question is whether the impugned letters were actually issued in the form of a "direction"?

A direction or advisory in nature?

[104] BNM's counsel argues that the letter dated 4.7.2011 is a direction under the IA 1996 which constitutes an order given to PIAM and its members. The letter reads as follows:

> **"Part Trade Discounts and Labour Rates**
>
> We refer to Bank Negara Malaysia's (the Bank) letter to Persatuan Insurans Am Malaysia (PIAM) dated 14 June 2011 and PIAM Members' Circular No: 109 of 2011 dated 24 June 2011 on the above.
>
> 2. As you are aware, the parts trade discounts and labour rate issues have protracted since September 2010 and the Bank had informed PIAM to reach a final agreement on the issues by 30 June 2011. However, we note that PIAM and the Federation of Automobiles Workshop Owners Association of Malaysia (FAWOAM) have yet to resolve these issues, thus resulting in unreasonable delay in claims settlement arising from disputes between Insurers and panel workshops. **Therefore, PIAM and FAWOAM are required to conclude the negotiations on parts trade discounts and labour rate latest by 15 July 2011.**
>
> 3. We take note of PIAM's proposal to set up a Committee comprising members from PIAM, FAWOAM, the Association of Malaysian Loss Adjuster and Motordata Research Consortium to review the Thatcham Repair Times (TRT) and ascertain suitable benchmark for the local environment. The acceptance of TRT by the

various stakeholders as the standard for labour hour would minimize disputes on claims amount and expedite settlement of motor claims.

4. Kindly inform the Bank on the final agreement between PIAM and FAWOAM on trade discounts and labour rate as well as the timeline for completion of the review of TRT by 18 July 2011."

[105] Prior to the above letter dated 4.7.2011, BNM had issued two other letters, one on 4.6.2010 and the other one on 14.6.2011. In the BNM's letter dated 4.6.2010, the relevant part states as follows:

"2. Bank Negara Malaysia (the Bank) is of the view that the issues raised by FAWOAM relate to the commercial relationship and trade issues between the PIAM Approved Repairers Scheme (PARS) workshops and the insurers, and as such, **the Bank would like to see a greater show of commitment on the part of the insurers to engage with PARS workshops in providing satisfactory clarifications and / or solutions to the issues raised by them**, specifically, amongst others, the following issues: - "

[106] In the BNM's letter dated 14.6.2011, the relevant part states as follows:

"3 As you are aware, the trade discount and labour rate issues have been raised at the first meeting between the various parties facilitated by Bank Negara Malaysia (the Bank) on 1 September 2010. Since resolution to these issues would contribute to improvement in claims settlement practices, **the Bank would like to urge PIAM to resolve these issues amicably and expediently**. In this regard,

kindly inform the Bank on the final agreement between PIAM and FAWOAM on the above issues by 30 June 2011.

4. If the above issues are not resolved expediently with FAWOAM, the Bank may consider expanding the scope of the Financial Mediation Bureau to award policy owners indirect financial losses due to unreasonable delay in claims settlement arising from disputes between the insurer and the panel workshop."

[107] At paragraph 330 of the Final Decision, MyCC states as follows:

"It is the considered opinion of the Commission that BNM's letters dated 4.6.2010, 14.6.2011 and 4.7.2011 to PIAM are merely letters urging both PIAM and FAWOAM to resolve their ongoing trade and commercial dispute. The letters do not contain any form of "direction" to fix the parts trade discount and labour rates for PARS workshops. BNM has never at any time, given any "directive" to PIAM or its members to fix the parts trade discount and labour rates for PARS workshops."

[108] MyCC found that BNM did not issue a direction to PIAM to fix the parts trade discount and labour rates for PARS workshops; the impugned letters are merely letters urging the parties to resolve the commercial dispute (see also paragraphs 257- 262 of the Final Decision).

[109] This Tribunal is of the considered view that the impugned letters which BNM alluded to be a "direction" or "directive" fall short of precise language to amount to a "direction" or "directive". BNM could have been more precise in its letters if BNM intended them to amount to a direction or a directive (see examples of wording used by BNM in cases **Lee Cheong Chee v HSBC Bank Malaysia Bhd** [2021] 1 LNS 439 and **Keshore a/l Anupchand Metha & Anor v Abrar Finance Berhad & Anor** [2002] MLJU 565).

[110] In all the three impugned letters, BNM did not state in clear terms that it was directing PIAM and its members to enter into the infringing agreement. BNM merely wanted PIAM and its members to show greater commitment to resolve the commercial dispute and urged the parties to expedite the negotiation and to come to an agreement on the issues raised by FAWOAM *vis-à-vis* an agreement to resolve the dispute on the parts trade discounts and labour rate charges latest by 15 July 2011.

[111] Although the BNM's letter dated 14.6.2011, particularly paragraph 4, stated that if the issues are not resolved, BNM may consider expanding the Financial Mediation Bureau to determine the indirect financial losses suffered by the policy owners, this suggestion by BNM could not be construed as a sanction in the event PIAM (and its members) failed to

resolve the dispute amicably with FAWOAM. The suggestion, in the opinion of the Tribunal, is to address the grievances faced by the policy owners over the long delay in getting their vehicles repaired. The suggestion could increase the financial burden on the insurers, but it does not affect the insurers' licences to carry the insurance activities or impose a financial penalty on the insurers. Hence, this Tribunal is not persuaded that the letters are in the form of a "direction" for purposes of the IA 1996. The Tribunal is unable to accept the BNM's and Insurers' submissions that a sanction would be imposed in the event PIAM and its members did not comply with BNM's letters.

[112] MyCC's counsel submitted that in June 2015, BNM issued a letter to the Commission to explain its position (Note: in actual fact, the letter issued by BNM is dated 1.7.2015 and referred to the meeting held on 3.6.2015 between BNM and MyCC; see Annexe 7 of the Final Decision).

[113] In numerous parts of the letter, BNM has stated that it facilitated in resolving the "prolonged dispute between the parties". Nowhere in the letter did BNM state that it had issued a direction (under a legislative requirement) to direct PIAM and its members to enter into the infringing agreement. If BNM had indeed issued such a direction in 2011, BNM would have stated so in 2015, at the earliest possible opportunity.

[114] The position taken by BNM that those impugned letters were a direction or directive was mentioned for the first time in its letter dated 12.1.2017 (see Annexe 11 of the Final Decision) before the MyCC's proposed decision was issued on 22.2.2017. On the following day, 13.1.2017, BNM issued another letter to the Commission (see Annexe 12 of the Final Decision). In the final note, BNM stated that "if a finding of infringement is made by MyCC and contested by PIAM and the Insurers, the Bank will be compelled to affirm that the insurers acted in compliance with a directive which was issued with the primary aim of protecting the interests of claimants and the public at large...."

[115] After having perused through the correspondences and the submissions by the respective parties' counsels, this Tribunal is in agreement with the finding by MyCC in para 269 of the Final Decision which reads as follows:

> "269. Even though, BNM has the knowledge of the Commission's investigation against the Parties, BNM has never taken the position, prior its letter to the Commission dated 12.1.2017 and 13.2.2017, that the fixing of the parts trade discounts and labour rates was the result of BNM's directive to

PIAM. If there was indeed any direction given by BNM to the Parties to fix the parts trade discount and labour rates over PARS workshops, BNM had every opportunity to notify the Commission during the initial stages of investigations or at the very least, whilst investigations were still ongoing and not after BNM had been informed of the outcome of investigation since by then, investigation was completed and a Proposed Decision was about to be issued by the Commission."

Conclusion – BNM's Appeal

[116] Based on the above reasoning and finding of this Tribunal, the Tribunal answers the four statement of issues as follows:

- Whether BNM has the *locus standi* pursuant to s.51 of the CA to file this appeal against the Final Decision of MyCC?

  Answer: Yes.

- Whether BNM has the legislative power to issue directive(s) under s.22(3) of the **Insurance Act 1996** (hereafter 'the IA 1996')?

  Answer: Yes.

- Whether BNM's letter dated 4.7.2011 (Annexe 6 in the Final Decision) (or any subsequent communication to PIAM) is a directive to PIAM and/or its members to fix parts trade discounts and labour rates?

  Answer: No.

- Whether the BNM's directive (if any) is a legislative requirement falling within the exclusion in Chapter 4 of s.13(1) read together with limb (a) of the Second Schedule of the CA?

  Answer: Follow from the above negative answer, therefore, the answer to the fourth statement of issue is negative.

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[117] In essence, PIAM's counsel has raised five grounds in its appeal. The five grounds are paraphrased as follows:

(i) PIAM is not an enterprise within the definition of the CA;

(ii) the use of presumption in s. 4(2) of the CA is invalid;

(iii) MyCC fails to apply s.5 of the CA;

(iv) MyCC is in breach of natural justice;

(v) MyCC has acted *ultra vires*

[118] It is observed that the finding of this Tribunal in respect of the above second issue will have an overarching effect on the appeals filed by the Insurers. The second issue strikes at the core of MyCC's Final Decision.

[119] In fact, this is one of the most important common issues raised by the appellants. MyCC's finding is premised on the reliance of s. 4(2) of the CA as one of its main reasons in finding that the Insurers and PIAM had violated s.4(1) of the CA.

First Issue: PIAM is not an enterprise

[120] MyCC finds that "an association of enterprises may itself be held liable for an infringement of the section 4 prohibition either because it has adopted an anti-competition decision or because it has itself entered into an anti-competitive agreement or concerted practice." MyCC's finding is premised on the EU case law in relation to s. 101(1) of the **Treaty on the Functioning of the European Union** (hereafter "TFEU").

[121] The setting of anti-competition in s.101(1) TFEU is different from our CA. Section 101(1) TFEU reads as follows:

> "1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:
>
> (a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

— any agreement or category of agreements between undertakings,

— any decision or category of decisions by associations of undertakings, C 326/88 EN Official Journal of the European Union 26.10.2012

— any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."

[122] It is observed that TFEU does not have a definition section. The terms "agreements", "undertakings", "associations of undertakings" and "concerted practices" are not defined. Whereas, in our CA "agreement", "enterprise" (similar as "undertaking") and "concerted practice" are defined in s. 2 of the CA.

[123] It is also observed that s. 101(1) TFEU is the entire offence section; whereas, in our CA the drafters have meticulously defined certain terms used in the Act which is separate from the prohibition section. Section 4 of the CA, the prohibition section, 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."

[124] The CA defines "agreement" to include "*any form of contract, arrangement or understanding, whether or not legally enforceable,*

between enterprises, and includes a decision by an association and concerted practices."

[125] The agreement is formed between ***enterprises***, and includes a decision by an association and concerted practices. However, the offence section states that the agreement is made ***between enterprises***; and "enterprise" is defined as "*any entity carrying on commercial activities relating to goods and services....*"

[126] Hence, s.4 of the CA is more refined. It limits the application to an agreement that is made between entities that are carrying on commercial activities, and not just carrying on any form commercial activities, but commercial activities relating to goods and services.

[127] "Commercial activity" is not specifically defined in the CA, it is mentioned in s.3 of the CA, but the section does not illuminate the intended meaning of the drafters. The ordinary meaning of the term "commercial activity" simply denotes activities involving buying and selling, in this case buying and selling of goods or services.

[128] It is observed that s.3(4) of the CA mentions the word "commercial activity" and "economic activity" within the same section. The drafters

must have considered the two activities as distinct activities. The term "economic activity" would entail a wider meaning than the meaning prescribed to "commercial activity". Economic activity would encompass, but are not limited to, the input of capital resources, labours resources, manufacturing and productions resources, which combine to produce specific goods or services.

[129] MyCC relies on the EU cases which explain that "undertaking" refers to "any entity engaged in an **economic activity**, regardless of its legal status and the way in which it is financed" (see **Höfner and Elser v Macrotron GmbH Case** C-41/90 [1991] ECR I-1979, at para 21). The EU law has adopted a wide scope of activities of an undertaking, not just commercial activity, but also economic activity. The function of an association could well be part of an economic activity for the product of specific goods or services. Therefore, it is no surprise that a decision by an association of undertakings in the EU could be included within the prohibition under the EU anti-competition law.

[130] However, in our CA, the prohibition is confined to an infringing agreement between enterprises that are carrying on commercial activities relating to goods and services, not economic activities. Strictly speaking, PIAM is not an entity that carries on any commercial activity in that it does

not engage in buying or selling any goods or services. The objective of any form of commercial activity is focused on financial gain, in other words, a profit-oriented entity (see **Sakharam Narayan Kherdekar v City of Ngpur Corporation** [1964-ILLJ-156] HC; **Jupiter Securities Sdn Bhd v Datin Wo Tang Koi @ Wu Shya Kwee & Ors and another case** [2015] MLJU 2329, HC, as cited by PIAM's counsel). PIAM is not a profit-oriented entity. PIAM's function and activity could be part of the economic activities, but it does not involve in any commercial activities. Therefore, PIAM cannot fall within of the definition of "enterprise" in s.2 of the CA.

[131] The infringing agreement, i.e. the Members' Circular 132, was adopted by PIAM, and the contents were related to its members. It is a decision of an association and concerted practice that falls within the definition of an "agreement". However, the prohibition section refers to agreement between enterprises. Since a narrow definition is given to an "enterprise", therefore, although Members' Circular 132 contains a decision of the association, PIAM cannot be found to have infringed the prohibition section.

[132] If it is proved that an association engages in commercial activity, and the decision of the association infringes the prohibition provisions in the CA, then the association can be held liable, not only its members who

participated and approved such decision of the association. Under the Malaysian anti-competition law as it stands, an association that does not engage in commercial activity cannot be held liable under the CA.

Second Issue - use of presumption in s. 4(2)(a) of the CA

[133] Section 4(2)(a) of CA states as follows:

> "(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)* ...;
>
> *(c)* ...-
>
> (i) ...;
>
> (ii) ...;
>
> (iii) ...; or
>
> (iv) ...; or
>
> *(d)* ...,

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

[134] In order for the deeming clause s. 4(2)(a) of the CA to apply, two conditions must be present. The first condition is that there must exist a horizontal agreement (between enterprises). The second condition is that the horizontal agreement has the object to fix, directly or indirectly, a purchase or selling price or any other trading condition. Upon satisfying these two conditions, then the horizontal agreement "is deemed to have the object of significantly preventing, restricting, or distorting competition in any market for goods or services."

[135] "Horizontal agreement" is defined as "*an agreement between enterprises each of which operates at the same level in the production or distribution chain*" (see s. 2 of the CA). It is not in dispute that the Insurers are operating at the same level in the motor insurance industry. The question is whether did they enter into an agreement between themselves?

[136] The purported infringing agreement is an agreement which came about from the negotiations between the Insurers and PARS workshops

through their respective associations, namely PIAM and FAWOAM. The nub of the Members' Circular 132 is merely to place on record the feedback of the members in PIAM pertaining to the prolonged negotiations between PIAM and FAWOAM. The said negotiations had been constantly monitored and facilitated by BNM.

[137] This Tribunal agrees with PIAM's counsel's submission that the Members' Circular 132 is an announcement of the results of the survey undertaken by PIAM with its members. The Tribunal are unable to accept that the purported infringing agreement was an agreement concluded between the Insurers solely. It is erroneous to perceive the Members' Circular 132 as an agreement between the Insurers alone by downplaying the involvement of FAWOAM and the back-and-forth negotiations between PIAM and FAWOAM, not to mention the "pressure" looming over PIAM from its regulator BNM.

[138] The Tribunal finds no evidence that PIAM and its members had met to fix the part trade discount and labour rate. There is no evidence to suggest the Insurers and its association had acted or behaved like a cartel. All meetings and the outcome of such meetings are recorded and documented. Clearly, there is no arbitrary behaviour on the part of the

Insurers and its association PIAM. There is nothing close to a cartel behaviour is found in the facts of this case.

[139] In conclusion, this Tribunal finds that Members' Circular 132 or the infringing agreement is not a horizontal agreement within the meaning envisaged in s.2 of the CA. The Members' Circular 132 contains feedback by members in relation to the agreement concluded between PIAM and FAWOAM. The purported infringing agreement is an announcement of the result of a survey conducted among PIAM's members and the terms (so-called price fixing terms) are the terms of an agreement between PIAM and FAWOAM from a prolonged negotiation.

[140] Even if there is a horizontal agreement, which the Tribunal doubts there is, does the agreement have the object to fix, directly or indirectly, a purchase or selling price or any other trading condition?

[141] The terms are: (i) discount 25% for the six vehicle (Proton, Perodua, Nissan, Toyota, Honda and Naza) and 15% for Proton Saga Base Line Model (BLM); and (ii) RM30 per hour but open for member companies to apply either Thatcham Repair Times or Opinion Times as currently practice pending review of Thatchem Repair Times.

[142] MyCC's counsel submitted to this Tribunal that the agreement is for the part trade discount to be kept at maximum 25% and the labour rate to be kept at minimum RM30.00 per hour, as such there is a price fixing of selling or buying of goods and services; a fortiori the agreement is deemed to have the object of significantly preventing, restricting or distorting competition in the market for goods and services. However, PIAM's counsel submits that at the first place there is no such "market" of part trade discount and labour rate where prices can be fixed.

[143] "Market" is defined as "*a market in Malaysia or in any part of Malaysia, and when used in relation to any goods or services, includes a market for those goods and services and other goods or services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services*" (see s. 2 of the CA). The definition of "market" in the CA does not clearly explain what it really means. However, it is safe to say that the market for a particular goods or services entails the buying and selling of that particular goods or services. The buying and selling of a particular goods or service involves an amount of money that one has to pay in order to buy and one has to accept in order to sell, and that amount of money is the price. The question is whether did the Insurers fix, directly or indirectly, the purchase and selling price of a particular goods or services in the market?

[144] The Insurers agree that for the spare parts of certain particular car models the discount rate that they can ask from the PARS workshops is fixed at maximum discount of 25%. This means the discount rate can be ranging from zero discount (or no discount) to maximum discount of 25%. The PARS workshops have the discretion to give or not to give discount or to give discount from 1% to maximum 25%. The real effect of the agreement does not lock-in a price for the spare parts. The prices for the spare parts are actually not fixed directly or indirectly. In other words, the purported infringing agreement does not have the object to fix, directly or indirectly, a purchase or selling price. The agreement only determines the maximum discount rate, even then, the discount rate is not fixed at 25% that the Insurers can ask from the PARS workshops. The discount rate can be from zero percent, which means no discount, to maximum 25%. This is not a case that the PARS workshops must give a discount rate of 25% for the spare parts of certain particular car models.

[145] Likewise, the minimum labour rate fixed at RM30.00 per hour is the minimum rate the Insurers can ask the PARS workshops to charge for the labour. Literally speaking, there is a price fixing for the labour rate, but fixed at a minimum payment of RM30.00 per hour. In other words, the PARS workshops can charge more than RM30.00 per hour for the labour

rate if they so wish. The Insurers would be pleased to pay less than RM30.00 per hour for the labour rate, nevertheless they have agreed to pay a minimum RM30.00 per hour.

[146] The fixing of RM30.00 per hour as the minimum labour rate benefits the PARS workshops, instead of benefit the Insurers. The fixing of RM30.00 per hour as the minimum labour rate is a price that parties have agreed as the monetary consideration for the services to be rendered. Even then, the hourly rate for the labour cost is not locked at RM30.00 per hour. The amount can be more, but cannot be lower than RM30.00 per hour.

[147] The consequence of the terms for the part trade discount and minimum labour rate gives the PARS workshops the edge to negotiate a better pricing for the goods and services which they are selling and providing to the Insurers. The PARS workshops are at the upper hand to gain better profit than the Insurers. The real effect of the agreement is that the Insurers do not have control over the pricing for the spare parts and the labour rate charges.

[148] At para 218 of the Final Decision, MyCC finds otherwise, it states as follows:

> "Accordingly, it is the Commission's finding that the 22 Enterprises being the insurers have the final say in the approval of the cost of PARS repair. It is important to note that this finding demonstrates that the Parties possess the bargaining power in determining what would be the quantum that the 22 Enterprises were willing to pay and conversely, the amount that may be imposed by repairers. The fact that the parts trade discount and the labour rate are determined by the 22 Enterprises clearly indicate that the same methodology for computing the quantum or figure will be imposed on PARS workshops."

[149] This Tribunal comments on the above finding are that first, it is wrong for MyCC to assume that the same methodology for computing the quantum or figure will be imposed on PARS workshops by the Insurers. There is no evidence to support this finding. Secondly, it is also inaccurate to state the parts trade discount and labour rate are determined by the Insurers. The parts trade discount and labour rate were negotiated and determined by the Insurers (through PIAM) and the PARS workshops (through FAWOAM). Lastly, it is also inaccurate to conclude that the Insurers would have the final say over the approval of the repair costs as if the Insurers could arbitrarily determine the final amount to be paid. Insofar as the determination of the part trade discount and labour rate

charges are concerned, they do allow the PARS workshops room to negotiate for a better rate for the discount on spare parts (a lower discount rate) and a higher labour cost (above RM30.00 per hour). There is nothing to stop them from negotiating for a better profit. Hence, it is inaccurate to suggest that the PARS workshops must accept what is offered by the Insurers.

[150] On the issue of fixing the market for part trade discount and minimum labour rate, the PIAM's counsel is correct to say there is no such market of part trade discount and labour rate that can be fixed. Buying and selling spare parts is a market. However, there is no such market for buying and selling of part trade discount. Similarly, there is a market of supply and demand for labour services (or in this case car repair services); there is no such market as fixing a minimum labour rate for car repair services.

[151] In conclusion, MyCC's reliance on s.4(2)(a) of the CA as the deeming provision to find that Member's Circular 132 had infringed the prohibition s.4(1) of the CA is flawed in that both the first and second conditions are not fulfilled.

[152] As stated earlier, one of legal proposition in the Court of Appeal decision in **Malaysia Airline System Bhd** (supra) is 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." Therefore, the decision of MyCC which relies on the deeming clause to conclude PIAM and its members violated the prohibition clause of s.4(1) of the CA is untenable.

Section 4(1) of CA

[153] Based on the above finding that Circular 132 is not a "horizontal agreement" as envisaged in s. 2 of the CA, therefore, the findings by MyCC in its Final Decision cannot support there was an infringement of s. 4(1) of CA. Section 4(1) of the CA begins with "*A horizontal ... agreement between enterprises is prohibited*...." The absence of a finding of a horizontal agreement will cause the entire Final Decision of MyCC to fall.

[154] Even if there is a horizontal agreement, this Tribunal is of the considered view that the infringing agreement could not have the object of significantly preventing, restricting or distorting competition in any market for goods and services as envisaged in s. 4(1) of the CA.

[155] As alluded above, the charge against the Insurers and PIAM is that the Members' Circular 132 infringed anti-competition in the market for goods and services. Ironically, the agreement pertains to the discount rate for the spare parts, but there is no market for part trade discount. Likewise, there is no market for fixing a minimum rate for labour costs.

[156] Assuming for a moment that the fixing of a maximum discount rate and fixing of minimum labour rate have direct impact on the market of buying and selling of the spare parts and the market in car repair services. It is still hard to comprehend within the context of anti-competition law that the Insurers could have entered into an agreement that they have no control over the final pricing, since the parties are at liberty to negotiate the prices for the part trades and labour costs, and yet, be found to be liable for anti-competition.

[157] The maximum discount the Insurers can ask for the part trade discount is fixed at 25%. This is not the case where it is mandatory for the PARS workshops to give a fixed discount of 25% for the spare parts. If PARS workshops are required to give a discount of 25% for the spare parts, then it would be a situation that the agreement has the object to significantly prevent, restrict or distort competition. From the standpoint of the PARS workshops, competition for the repair services market would

have been significantly prevented and restricted in the sense that they are bound to give a fixed discount rate of 25% for the spare parts (the identified car models) to all the Insurers. From the standpoint of the Insurers, the competition for the market of spare part trade is prevented and restricted in the sense that whichever PARS workshop that repairs the car will give the same discount of 25% for the same spare parts.

[158] However, the situations in this case are not as alluded above. Instead, the PARS workshops' owners could ask the Insurers to pay more for the spare parts by reducing the discount rate to less than 25%. It is equally possible that the PARS workshops' owners could ask for more for the labour costs at a rate that is higher than the minimum rate of RM30.00 per hour. In truth, the Insurers are not in control over the charging of prices for the spare parts and labour costs by the PARS workshops.

[159] Likewise for the charge of a minimum labour rate of RM30.00 per hour for the repair works, the fixing of a minimum payment of RM30.00 per hour for the labour cost could hardly have the object of significantly preventing, restricting and distorting competition in the market of labour for repair services. Is MyCC saying the PARS workshops' complaint is that the fixing of a minimum labour rate per hour is too high? Do PARS workshops' owners intend to compete in the market for labour cost so that

they can offer a more competitive rate which means a lower rate? That cannot be the case. The minimum RM30.00 per hour is not a fixed rate. On the contrary, the PARS workshops' complaint was that the minimum rate is too low. If that is the case, they could negotiate for a higher rate. There is nothing to stop the PARS workshops' owners to ask for a higher rate (more than RM30.00 per hour). Therefore, where is the anti-competition?

[160] How would the agreement have the object of significantly preventing, restricting or distorting competition in the market for labour costs? If the Insurers are viewed as the consumer (the parties paying for the spare parts), why would the consumers want to set a minimum payment of RM30.00 per hour for the labour costs? The Insurers are saying we guarantee paying you a minimum of RM30.00 for every hour of labour costs, or even more. Would that offer to pay a minimum price for the labour cost significantly prevent or restrict or distort competition in the market for labour costs? This Tribunal could not see how the fixing of the minimum labour rate would significantly prevent or restrict or distort competition in the market for labour costs. The PARS workshops are free to compete and offer their rate higher than or at the minimum price of RM30.00 per hour for the labour cost.

Third issue: MyCC fails to apply s.5 of the CA

[161] This Tribunal is satisfied that MyCC has committed a fundamental error in its finding based on the above analysis of the law and facts. The Tribunal finds that Members' Circular 132 did not infringe s. 4(1) of the CA. Hence, it follows that there is no finding of liability on the part of the Insurers and PIAM under the anti-competition law. Section 5 of the CA is only relevant when there is establishment of liability on the part of the Insurers and PIAM. This Tribunal finds no liability has been established under s. 4 of the CA, therefore, the discussion of the relief of liability within s. 5 of the CA is a non-issue.

Fourth Issue: MyCC in breach of natural justice & Fifth Issue: MyCC has acted ultra vires

[162] The PIAM's counsel's submissions in relation to the fourth and fifth issues have become academic upon the finding by this Tribunal that there is no violation of the prohibition s.4 of the CA by PIAM and its members.

All Other Appeals (The Insurers)

[163] As mentioned earlier, in the event any one of the appeals by BNM or PIAM is successful, then the Insurers' appeals will follow suit. Hence, this Tribunal will not regurgitate all the submissions made by the Insurers' respective counsels here. This Tribunal has examined and scrutinised all the submissions by the Insurers' respective counsels and is satisfied they have successfully moved this Tribunal to decide in their favour, particularly in relation to the error made by MyCC in applying the "deeming" provision of s.4(2) of the CA, as well as the failure to establish the Insurers and PIAM have violated s.4(1) of the CA. The counsel for the Group E2 accepted that in the event any one of the issues raised in their submissions is allowed, the whole Final Decision will not stand. The applicability of the "deeming" provision and s.4(1) of the CA are the common issues raised by all the Insurers.

[164] This Tribunal had earlier decided that there is no necessity to allow expert witness Daniel Gore to be called to testify in the appeal proceedings. The Tribunal finds MyCC did not appreciate the expert's opinion and did not give sufficient consideration to the empirical data offered in the RBB report(s). This Tribunal fully agrees with PIAM's and

the other counsels' submissions in relation to the simplistic approach adopted by MyCC in relation to MyCC's rejection of the analysis presented to MyCC by Mr. Danial Gore during the oral representations. The flaws on MyCC's part in dealing with the reports are well articulated and presented before this Tribunal by PIAM's counsel, and therefore, this Tribunal agrees and accept the submissions as the reasoning for this Tribunal.

The Tribunal's Decision

[165] Based on the above reasoning and the finding in respect of the salient issues raised in the PIAM's appeal TRP 1-2020, this Tribunal allows the appeals for PIAM and 22 other appeals (the Insurers' appeal – TRP 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23 and 24 of 2020). Hence, this Tribunal hereby decides and orders as follows:

(i) That the Appeal Nos. TRP 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23 and 24 of 2020 be allowed AND the whole of the Final Decision of the Competition Commission dated 14.9.2020 be set aside;

(ii) that the Appeal TRP 3 -2020 be dismissed; and

(iii) that there be no order as to costs for all the appeals.

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The presiding members of the Competition Appeal Tribunal (For all the 24 appeals)

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(YA DATO' DR. CHOO KAH SING)
Chairman

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(DATO'ASMABI BINTI MOHAMAD)

.....

(DATUK SERI DR. VICTOR WEE ENG LYE)

Date: 2.9.2022

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