ENCLOSURE 1

Case No. 700–1/2/6/2017

Competition Act 2010 [Act 712]

Decision of the Competition Commission

Infringement of Section 4(1) read with Section 4(2)(a) and (4)(3) of the Competition Act 2010

Competition Commission

v.

1. SAL Agencies Sdn. Bhd.
2. WCS Warehousing Sdn. Bhd.
3. Regional Synergy (M) Sdn. Bhd.
4. Intrexim Sdn. Bhd.
5. Pioneerpac Sdn. Bhd.
6. Prima Warehousing Sdn. Bhd.
7. Interocean Warehousing Services Sdn. Bhd.

DATED: 26 JULY 2021

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

DECISION

The Decision was deliberated and unanimously decided by the following Members of the Commission:

(i) Dato' Seri Mohd Hishamudin bin Md Yunus (Chairman);
(ii) Dato' Jagjit Singh a/l Bant Singh;
(iii) Dr. Nasarudin bin Abdul Rahman;
(iv) Datuk Tay Lee Ly;
(v) Dato' Ir. Hj. Mohd Jamal bin Sulaiman;
(vi) Dato' Dr. Madeline Berma;
(vii) Dr. Nor Mazny binti Abdul Majid;
(viii) Tuan Anil Abraham;
(ix) Puan Siti Juriani binti Jalaluddin; and
(x) Tuan Arunan a/l K. Kumaran.

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INTRODUCTION

1. It is the finding of the Commission in this Decision ("the Decision") that the 7 enterprises that we have named at **paragraph 3** herein have infringed the prohibition under section 4 ("the section 4 prohibition") of the Competition Act 2010 ("the Act"). In this Decision, the named enterprises shall be individually described herein as "Party" and collectively described as "Parties".

2. The Parties have infringed the section 4 prohibition by participating in an agreement which has, as its object, the prevention, restriction, or distortion of competition in relation to the market of the provision of handling services of long length and heavy lift of import and export cargo in Port Klang, Malaysia from 22.5.2017 until 9.1.2020 ("the Infringing Agreement").

3. This Decision is addressed to the following Parties:

   (i) SAL Agencies Sdn. Bhd.;
   (ii) WCS Warehousing Sdn. Bhd.;
   (iii) Regional Synergy (M) Sdn. Bhd.;
   (iv) Intrexim Sdn. Bhd.;
   (v) Pioneerpac Sdn. Bhd.;
   (vi) Prima Warehousing Sdn. Bhd.; and
   (vii) Interocean Warehousing Services Sdn. Bhd.

4. By this Decision, the Commission hereby issues directions to the Parties as elaborated in **Part 4** of the Decision. In addition, the Commission imposes on each of the Parties financial penalties for the infringement, as set out in **Table 5**.

5. In this Decision, the following acronyms/terms as set out in the left column in the Table below, wherever they appear in the Decision, shall carry the corresponding meanings as set out in the right column of the Table.

ACRONYM/TERM	MEANING
Act 488	Port Authorities Act 1963
CMA	Competition Market Authority, United Kingdom
CCCS	Competition and Consumer Commission of Singapore
CFI	Court of First Instance, the European Union
CFS	Container Freight Station
ECJ	European Court of Justice
FAF	Fuel Adjustment Factor
HLC	Heavy Lift Handling Surcharge
LCL	Less Container Load
LLC	Long Length Handling Surcharge
LPK	Lembaga Pelabuhan Kelang
MOT	Ministry of Transport
PKA	Port Kelang Authority

ACRONYM/TERM	MEANING
PKA GM's circular	General Manager of Port Kelang Authority's Circular (*Pekeliling Pengurus Besar Lembaga Pelabuhan Kelang*)

[The remainder of this page has been left intentionally blank]

PART 1: THE FACTS

A. THE ENTERPRISES CONCERNED

6. The Commission received information alleging that the enterprises described in **paragraphs 7 to 21** below, were parties to an agreement and/or concerted practice that infringes the prohibition imposed by section 4 of the Act.

A.1 SAL AGENCIES SDN. BHD.

7. SAL Agencies Sdn. Bhd. ("SAL Agencies") (816399-T)[1] is a locally incorporated private limited company established on 6.5.2008 and is engaged in the provision of freight forwarding and warehousing services. SAL Agencies' registered address is at No. 49B, Jalan Cungah, 42000, Port Klang, Selangor, Malaysia.

8. The following officers of SAL Agencies will be referred to in this Decision:

   (a) Lim Kwang Yew, Managing Director; and
   (b) Sathiaraj Francis a/l Rajagopal, Operations Manager.

A.2 WCS WAREHOUSING SDN. BHD.

9. WCS Warehousing Sdn. Bhd. ("WCS Warehousing") (900346-P)[2] is a locally incorporated private limited company established on

[1] Companies Commission of Malaysia search on SAL Agencies Sdn. Bhd. dated 13.1.2021.
[2] Companies Commission of Malaysia search on WCS Warehousing Sdn. Bhd. dated 13.1.2021.

10.5.2010, and is engaged in the provision of haulage, transportation, and other related services. WCS Warehousing's registered address is at No.16-1 (1st Floor), Jalan Remia 4/KS6, Bandar Botanik, Klang, 41200, Selangor, Malaysia.

10. The following officers of WCS Warehousing will be referred to in this Decision:

(a) Poon Chee Hoong, Managing Director; and
(b) Gapar bin Said, Assistant Manager.

A.3 REGIONAL SYNERGY (M) SDN. BHD.

11. Regional Synergy (M) Sdn. Bhd. ("Regional Synergy") (478512-V)[3] is a locally incorporated private limited company established on 9.3.1999 and is engaged in the provision of transportation, warehousing, and cargo handling. Regional Synergy's registered address is at No. 89, Jalan SS15/4C, 47500, Subang Jaya, Selangor, Malaysia.

12. The following officers of Regional Synergy will be referred to in this Decision:

(a) Loo Suo Li, Director of Finance; and
(b) Ong Sue Ron (also known as Ronny),[4] Director of Marketing.

[3] Companies Commission of Malaysia search on Regional Synergy (M) Sdn. Bhd. dated 13.1.2021.
[4] Statement of Ong Sue Ron of Regional Synergy recorded on 10.10.2018.

A.4 INTREXIM SDN. BHD.

13. Intrexim Sdn. Bhd. ("Intrexim") (1064825-M)[5] is a locally incorporated private limited company established on 3.10.2013 and is engaged in the business of warehousing and other related services.

14. Previously, Intrexim was known as "Western Warehousing Sdn. Bhd." The change to its present name was effected on 20.8.2018.[6] Intrexim's registered address is at No. 39-1, Jalan 9/9C, Seksyen 9, Bandar Baru Bangi, 43650, Selangor, Malaysia.

15. The following officers of Intrexim as well as Western Warehousing Sdn. Bhd. will be referred to in this Decision:

    (a) Mah Chee Keong was an employee of Western Warehousing Sdn. Bhd.; and
    (b) Hamdan bin Jamin, Director of Intrexim.

A.5 PIONEERPAC SDN. BHD.

16. Pioneerpac Sdn. Bhd. ("Pioneerpac") (911369-K)[7] is a locally incorporated private limited company established on 11.8.2010 and is engaged in the provision of warehousing and management services. Pioneerpac's registered address is at No. 69-1A, OG

[5] Companies Commission of Malaysia search on Intrexim Sdn. Bhd. dated 13.1.2021.
[6] Form 13, Companies Act 2016 – "*Notis Perakuan Pemerbadanan Atas Pertukaran Nama Syarikat"* (Intrexim) (1064825-M).
[7] Companies Commission of Malaysia search on Pioneerpac Sdn. Bhd. dated 13.1.2021.

Business Park, Taman Datuk Tan Yew Lai, 58200, Kuala Lumpur, Wilayah Persekutuan Kuala Lumpur, Malaysia.

17. Eswaran a/l Kulanthaivelu, Managing Director of Pioneerpac will be referred to in this Decision.

A.6 PRIMA WAREHOUSING SDN. BHD.

18. Prima Warehousing Sdn. Bhd. ("Prima Warehousing") (670061-V)[8] is a locally incorporated private limited company established on 20.10.2004, and is engaged in the provision of shipping, freight forwarding, and warehousing services. Prima Warehousing's registered address is at No. 41A (Back), Jalan Goh Hock Huat, 41400, Klang, Selangor, Malaysia.

19. The following officers of Prima Warehousing will be referred to in this Decision:

    (a) Go Mooi Leng (also known as Katherine)[9], Manager; and
    (b) Shafarina binti Sharudin, Supervisor.

A.7 INTEROCEAN WAREHOUSING SERVICES SDN. BHD.

20. Interocean Warehousing Services Sdn. Bhd. ("Interocean Warehousing") (631692-W)[10] is a locally incorporated private limited company established on 17.10.2003, and is engaged in the provision of warehousing, storage, and freight forwarding services.

[8] Companies Commission of Malaysia search on Prima Warehousing Sdn. Bhd. dated 13.1.2021.
[9] Statement Go Mooi Leng of Prima Warehousing recorded on 11.10.2018.
[10] Companies Commission of Malaysia search on Interocean Warehousing Sdn. Bhd. dated 13.1.2021.

Interocean Warehousing's registered address is at No. 12-1A (Room A), Jalan Perdana 4/3, Pandan Perdana, 55300, Kuala Lumpur, Wilayah Persekutuan Kuala Lumpur, Malaysia.

21. Teh Chee Guan, Manager of Interocean Warehousing, will be referred to in this Decision.

B. BUSINESS AND INDUSTRY LANDSCAPE

B.1 PORT KELANG AUTHORITY

22. The Port Kelang Authority ("PKA") is a statutory body corporation established on 1.7.1963 to take over the administration of Port Kelang from the Malayan Railway Administration. Section 2 of the Port Authorities Act 1963 (Revised 1992) ("Act 488") provides for the establishment of port authorities as follows:

> ***Establishment of port authorities***
>
> *2. (1) There shall be established in respect of every port specified in the first column of the First Schedule a port authority (hereinafter referred to as "the authority") which shall be a body corporate to be known by the name specified in the corresponding second column of the Schedule, and such authority shall be established on the date specified in the third column of the said Schedule.*

23. The First Schedule of Act 488[11] states:

FIRST SCHEDULE

[Subsection 2(1) and Section 48]

(1)	*(2)*	*(3)*
Port	*Port Authority*	*Date of Establishment*
Port Kelang	*Port Kelang Authority*	*1 July 1963*
Kuantan Port	*Kuantan Port Authority*	*1 September 1974*
Pasir Gudang Port	*Johore Port Authority*	*1 January 1975*
Kemaman Port	*Kemaman Port Authority*	*1 September 1993*

24. Section 3 of Act 488 confers PKA with statutory functions. The main functions of PKA are as follows:

> *3. (1) The function of the authority shall be to operate and otherwise maintain the port in respect of which it is established, and for that purpose shall have the powers and duties provided under this Act.*
>
> *(2) The authority shall have power to do all things reasonably necessary for or incidental to the discharge of its functions, and in particular —*
>
> ***...***
>
> *(v) to undertake or grant licence on such conditions as the authority may think fit to any company, firm, person or persons to undertake, any activities in the Port as may appear to the authority to be necessary;*[12]

[11] Port Authorities Act 1963 [Act 488].
[12] Section 3 of Act 488.

25. PKA is entrusted by Act 488 with the role of regulating and managing the operations within the Port Klang area.[13] The warehouses that operate within the areas administered by PKA are all located within the port free zone area. The warehouses are subjected to the laws and regulations set by PKA.

26. There are two main ports within the Port Klang area, namely, Northport and Westport. Northport is operated by Northport (Malaysia) Bhd. (146850-A),[14] whereas Westport is operated by Westports Malaysia Sdn. Bhd. (192725-V).[15] Both Northport and Westports are known as port terminal operators and are in charge of the day-to-day operations of the respective ports. They are licensed as port terminal operators by the PKA under section 9 of the Ports (Privatization) Act 1990.[16]

B.2 MOVEMENT OF IMPORT AND EXPORT CONTAINERS WITHIN THE PORT KLANG AREA

27. When an import container arrives at Port Klang from outside of Malaysia, the container will be unloaded from the ship and transported into the warehouse. Thereon, the container is to be opened for cargoes to be offloaded from the container. This process is referred to as unstuffing. The warehouse operators hired by freight forwarders carry out the process of unstuffing cargoes.[17]

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[13] Section 3 of Act 488.
[14] Companies Commission of Malaysia search on Northport (Malaysia) Bhd. dated 15.3.2021.
[15] Companies Commission of Malaysia search on Westports Malaysia Sdn. Bhd. dated 15.3.2021.
[16] Act 422.
[17] Paragraph 15 of Statement of S. Kumaresen a/l R. Silvarajoo of Port Kelang Authority recorded on 20.12.2018.

28. Warehouse operators typically impose charges such as warehouse storage charges for the storage of the cargoes in the warehouse as well as handling charges for unstuffing services which will be paid by the forwarding agents. Sections 16 and 29 of Act 488 empowers PKA to prescribe tariff, charges, and dues which states as follows:

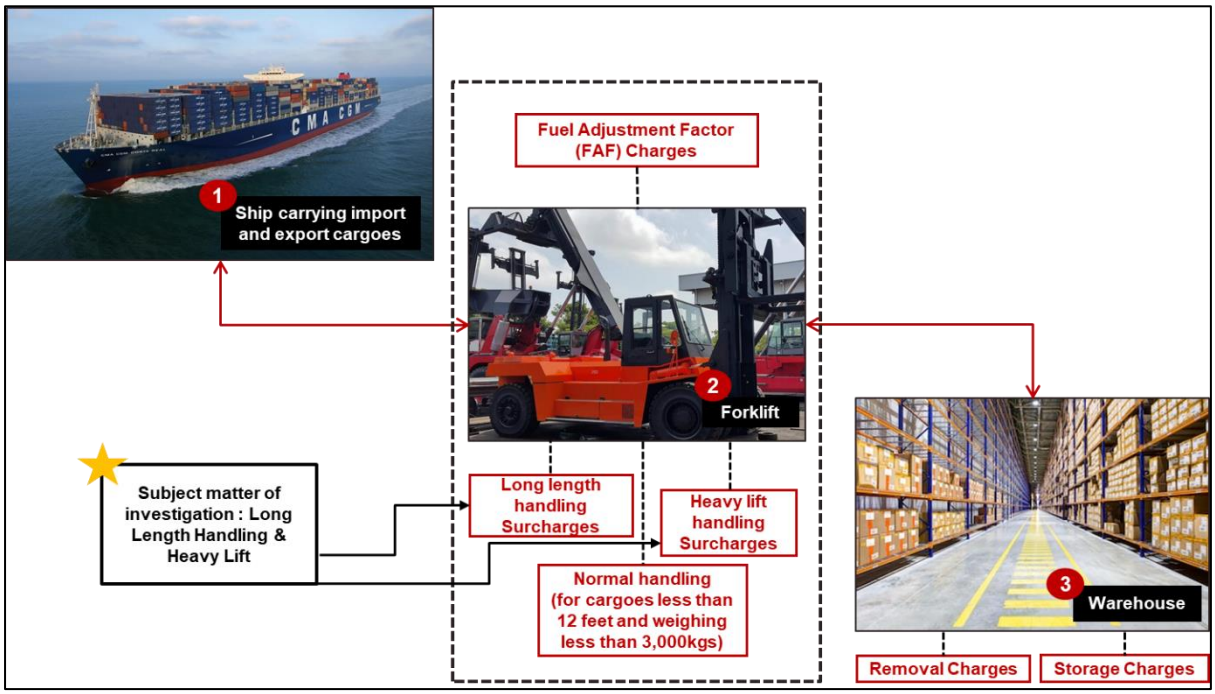
> ***The authority may levy charges***
>
> *16. (1) The authority may in relation to the port levy charges on, and for that purpose shall with the approval of the Minister from time to time prescribe charges or scales of charges and impose penalties or interests on outstanding dues in respect of, all or any of the following matters:*
>
> *(a) the landing, shipping, wharfage, lighterage, cranage, and storage of goods, and the use of the authority's vessels and vehicles and demurrage thereon;*
> *(b) the mooring of vessels and boats;*
> *(c) the carriage of goods by vehicles (whether playing for hire or otherwise);*
> *(d) the embarkation and landing of persons;*
> *(e) the carriage of passengers, vehicles, animals and goods by any ferry service maintained by the authority;*
> *(f) the use of any quay, wharf, dock, jetty, pier, landing place, foreshore or any other property vested in or under the control of the authority;*
> *(g) any services rendered to, or any material supplied to or made use of by, any vessel and person;*
> *(h) the use of tugs, firefloats and launches belonging to or maintained by the authority;*
> *(i) water supplied by the authority;*
> *(j) the towing of and rendering of assistance to any vessel (whether entering or leaving the wharves, docks or piers in the possession of the authority, or whether within or without the port);*
> *(k) the shipping and transhipping of goods or persons; and*

(l) any other matter upon which the authority is empowered to levy any charges.

29. Concerning export containers, cargoes will be sent to warehouses to be placed into export containers. This process is known as stuffing. The process of stuffing is also carried out by the warehouse operators hired by freight forwarders. For export containers, no handling charges are imposed due to the government's policy to encourage the export of local products.[18]

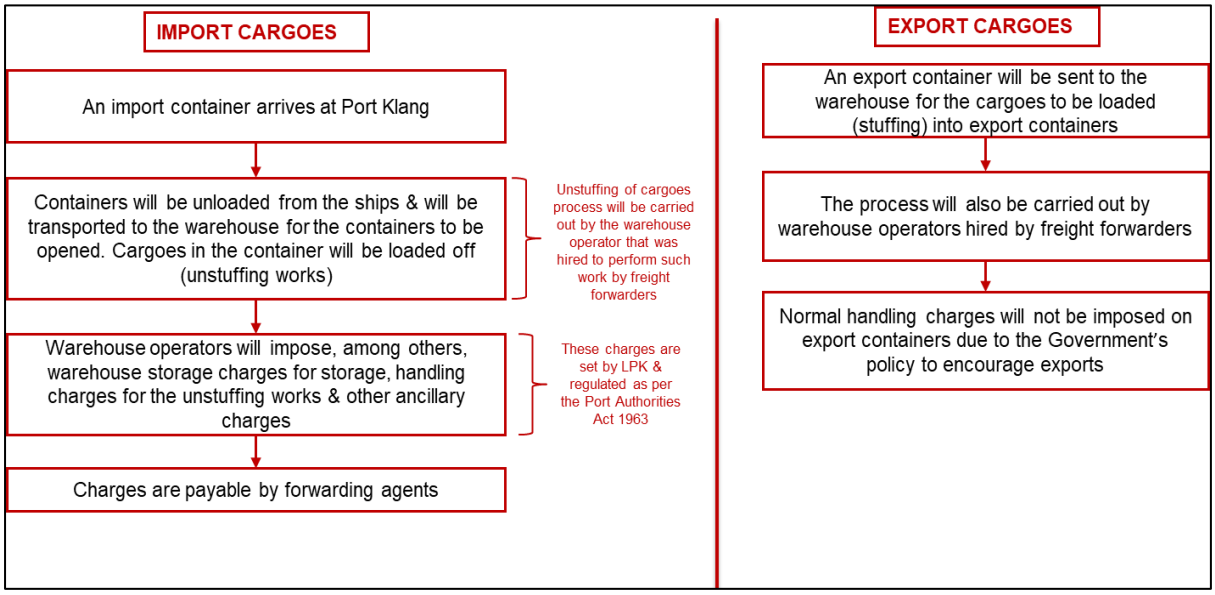
30. The flow-chart of the cargo supply chain at Port Klang and the process flow of import-export cargo are illustrated in ***Diagram 1*** and ***Diagram 2*** below.

***Diagram 1*: Flow-Chart of Cargo Supply Chain**



[18] Paragraph 17 of Statement of S. Kumaresen a/l R. Silvarajoo of Port Kelang Authority recorded on 20.12.2018.

Diagram 2: Flow Chart of Import and Export Cargo Process



B.3 CHARGES IMPLEMENTED AND REGULATED BY PKA

31. All charges prescribed, whether in a form of tariff, charges, dues, and others, shall be gazetted. This is provided for by section 16(8) of Act 488 which states as follows:

> *16. (8) Any charges or scales of charges prescribed shall be published in the Gazette.*[19]

32. Based on the information gathered by the Commission, whilst handling charges, Fuel Adjustment Factor ("FAF") charges, storage and removal charges are regulated by PKA, surcharges for the handling services for long length and heavy lift cargoes are not part of the gazetted charges.

[19] Section 16(8) of Act 488.

33. Charges regulated by PKA are gazetted vide the Port Kelang Authority (Scale of Rates, Dues and Charges) By-Laws 2012.[20] Any charges that are not duly gazetted but merely notified via PKA General Manager's Circular do not have the force of law nor have any legal effect.[21]

34. Under Act 488, the PKA does have the power to prescribe warehouse charges. But be that as it may, at the time of our investigation and upon scrutiny of the governing By-laws, namely, the Port Kelang Authority (Scale of Rates, Dues and Charges) By-laws 2012, it is clear to us that the By-laws do not prescribe any charges pertaining to the handling services of the heavy lift and long length cargoes.

35. The arguments raised by the Parties in relation to the involvement of PKA will be discussed in detail in **Part 3** of this Decision.

B.4 MALTACO M.S. SDN. BHD.

36. Maltaco M.S. Sdn. Bhd. ("Maltaco") (76138-M),[22] is a locally incorporated private limited company established on 25.9.1981. Maltaco has been in the forklift service business for over 30 years, servicing warehouse operators including the Parties.

[20] P.U. (A) 125/2012.
[21] Paragraphs 16 and 17 of Statement of Fazilah Surkisah binti Mohammad of Port Kelang Authority recorded on 16.5.2019.
[22] Companies Commission of Malaysia search on Maltaco M.S. Sdn. Bhd. dated 15.3.2021.

37. On 12.2.2019, the Commission obtained a statement from Maltaco's Executive Director and Chief Operating Officer, Lim Leong Kuen.[23] Lim Leong Kuen informed the Commission as follows:

(i) Maltaco's main business comprises port logistics and ancillary services, including services not offered by terminal operators.[24]

(ii) Maltaco's services include the supply of lorries and forklift services to vessels, shipping lines, forwarding and freight agents, and terminal operators; as well as the supply of tally clerks and labourers.[25]

(iii) Except for "lashing" and "unlashing" services wherein the tariff charges are determined by PKA, the ancillary services market is a free market where service providers have the discretion to determine their respective prices.[26]

(iv) Maltaco possesses the largest fleet of forklifts with accompanying drivers for rent.[27] Maltaco provided the Commission with a list of licensed warehouse operators.[28] The information provided by Maltaco is consistent with the information appearing on PKA's website.[29] Maltaco also

[23] Paragraph 2 of Statement of Lim Leong Kuen of Maltaco recorded on 12.2.2019.
[24] Paragraph 2 of Statement of Lim Leong Kuen of Maltaco recorded on 12.2.2019.
[25] Paragraph 3 of Statement of Lim Leong Kuen of Maltaco recorded on 12.2.2019.
[26] Paragraph 5 of Statement of Lim Leong Kuen of Maltaco recorded on 12.2.2019.
[27] Paragraph 10 of Statement of Lim Leong Kuen of Maltaco recorded on 12.2.2019.
[28] List of Packing and Unpacking Service Providers Licensed by the Port Kelang Authority dated 2.4.2019.
[29] List of Packing and Unpacking Service Providers Licensed by the Port Kelang Authority, at http://pkapp.pka.gov.my/ancillarycomp/paparcomp.php?idanc=8 retrieved on 11.10.2019.

provided the Commission with a list of 21 licensed forklift suppliers,[30] which was also available on PKA's website.[31]

(v) Maltaco's forklift services can be differentiated from that of other forklift service providers in that Maltaco supplies its forklift drivers to ensure that the drivers are accountable for safety and are answerable for any mishaps or damage to the forklift equipment, cargoes, or containers.[32] For the purposes of clarity, Maltaco's forklift rental services, include the services of supplying forklift drivers, fuel, maintenance and insurance.[33]

(vi) Maltaco's charges for forklift rental are computed based on a port working shift or part-day off; that is to say, a period less than one port working shift.[34] There are 3 port working shifts, namely, between 12.00 a.m. to 8.00 a.m., 8.00 a.m. to 4.00 p.m. and 4.00 p.m. to 12.00 a.m. or part thereof. In this context, clients are charged on a per shift basis instead of hourly rates.[35]

(vii) Where a warehouse operator (also referred to as the "client") hires Maltaco to supply forklift services, the stuffing and unstuffing work (i.e., the physical movement

[30] List of Forklift Suppliers in Port Klang Licensed by Port Kelang Authority dated 2.4.2019.
[31] List of Forklift Suppliers in Port Klang Licensed by Port Kelang Authority, at http://pkapp.pka.gov.my/ancillarycomp/paparcomp.php?idanc=12 retrieved on 11.10.2019.
[32] Paragraph 14 of Statement of Lim Leong Kuen of Maltaco recorded on 12.2.2019.
[33] Paragraph 16 of Statement of Lim Leong Kuen of Maltaco recorded on 12.2.2019.
[34] Paragraph 16 of Statement of Lim Leong Kuen of Maltaco recorded on 12.2.2019.
[35] Paragraph 17 of Statement of Lim Leong Kuen of Maltaco recorded on 12.2.2019.

of cargoes in and out of containers) will be carried out by Maltaco as instructed by the client.[36]

(viii) With regard to the rates charged, Maltaco offered 2 separate rates, one for its regular clients, which is based on Maltaco's 14.5.2014 rates, and another for its ad-hoc clients which is based on Maltaco's 15.8.2017 rates.[37]

(ix) The forklift service industry is a free market; where the charges are not regulated by PKA.[38]

38. Based on the information received, the Commission finds that Maltaco revised its offered rates for forklift hire services on 15.8.2017, after the date of the Surcharge Memorandum.

39. As such, the Commission finds that Maltaco's forklift for hire rates was not a contributing factor that could have affected and/or influenced the Parties' conduct in participating in agreement and/or concerted practices with the common objective of distorting the surcharges for the handling services for long length and heavy lift of import and export cargoes, as evidenced by the Surcharge Memorandum dated 22.5.2017.

40. For the purpose of illustration, typical images of forklifts are shown in ***Diagrams 3*** to ***6*** below.

[36] Paragraph 22 of Statement of Lim Leong Kuen of Maltaco recorded on 12.2.2019.
[37] Paragraph 24 of Statement of Lim Leong Kuen of Maltaco recorded on 12.2.2019.
[38] Paragraph 28 of Statement of Lim Leong Kuen of Maltaco recorded on 12.2.2019.

Diagram 3: 5-ton forklift

***Diagram 4*: 5-ton Forklift handling Long Length Cargo (40' bar cargo)**

***Diagram 5*: 20-ton Forklift**

Diagram 6: **15-ton Forklift**

41. The Parties do not dispute the Commission's findings as outlined in this section.

C. INVESTIGATION PROCEDURES AND PROCESS

42. On 2.6.2017, an informant approached the Commission with information on the anti-competitive conduct committed by the Parties as described in the preceding paragraphs above.

43. In October 2018, the Commission decided that there were reasonable grounds for suspecting that the Parties were involved in one or more agreements and/or concerted practices involving price fixing in respect of the handling services of long length and heavy lift for import and export cargoes at Northport and Westport areas of Port Klang.

44. Therefore, the Commission pursuant to section 14(1) of the Act, began a formal investigation.[39] The Commission obtained warrants from the Magistrate Courts under section 25 of the Act[40] to enter and search the business premises of the Parties.

45. On 8.10.2018, search and seizure warrants were issued by the Magistrate Court of Klang in respect of the following Parties:

(i) SAL Agencies;
(ii) WCS Warehousing;
(iii) Regional Synergy;
(iv) Intrexim;
(v) Pioneerpac; and
(vi) Prima Warehousing.

46. On 9.10.2018, another search and seizure warrant were issued in respect of Interocean Warehousing by the Magistrate Court of Petaling Jaya.

47. On 10.10.2018 and 11.10.2018, unannounced inspections to business premises of the Parties were carried out by Commission officers as described in ***Table 1*** below:

[39] Section 14(1) of the Act empowers the Commission to conduct an investigation where it has reasonable grounds to suspect that, among other matters, any enterprise has infringed or is infringing any prohibition under the Act.
[40] Section 25 of the Act empowers the Commission to enter premises to conduct a search (with a warrant obtained from the Magistrate Court) and seize documents or data (including computerised data) that is reasonably expected to provide information regarding an infringement.

Table 1: **List of Parties' business premises in respect of which the Commission had obtained warrants to enter and to conduct searches**

UNANNOUNCED INSPECTION CARRIED OUT ON 10.10.2018	UNANNOUNCED INSPECTION CARRIED OUT ON 11.10.2018
SAL Agencies	Pioneerpac
WCS Warehousing	Prima Warehousing
Regional Synergy	Interocean Warehousing
Western Warehousing	

48. Documents found at these premises indicate that the Parties were involved in the agreement and/or concerted practices that had the object of fixing the rates of handling surcharges for long length and heavy lift of import and export cargoes at Northport and Westport areas of Port Klang.

49. In the course of its investigation, the Commission issued a total of 10 notices pursuant to section 18(1)(a) and (b) of the Act requiring the provision of information and documents in relation to queries made by the Commission's officers.

50. The Commission carried out interviews under section 18(1)(a) and (b) of the Act with the key representatives of the Parties, relevant Port Kelang Authority officers as well as Maltaco. Particulars of the interviews conducted with the key representatives of the Parties are described in ***Table 2*** below:

Table 2: **List of Key Representatives Interviewed by the Commission**

NAME	ENTERPRISE	DESIGNATION	DATE OF INTERVIEW
Lim Kwang Yew	SAL Agencies	Managing Director	10.10.2018
Sathiaraj Francis a/l Rajagopal	SAL Agencies	Operations Manager	10.10.2018
Poon Chee Hoong	WCS Warehousing	Managing Director	5.12.2018
Gapar bin Said	WCS Warehousing	Assistant Manager	10.10.2018
Loo Suo Li	Regional Synergy	Director of Finance	10.10.2018
Ong Sue Ron	Regional Synergy	Director of Marketing	10.10.2018
Hamdan bin Jamin	Intrexim (*previously known as Western Warehousing*)	Director	10.10.2018
Eswaran a/l Kulanthaivelu	Pioneerpac	Managing Director	11.10.2018
Go Mooi Leng	Prima Warehousing	Manager	11.10.2018
Shafarina binti Sharudin	Prima Warehousing	Supervisor	11.10.2018
Teh Chee Guan	Interocean Warehousing	Manager	11.10.2018

51. On 12.2.2019, the Commission also interviewed Lim Leong Kuen, the Executive Director and Chief Operating Officer of Maltaco.

52. The Commission interviewed the following officers of the PKA, namely:

(i) S. Kumaresen a/l R. Silvarajoo, Manager, on 20.12.2018;
(ii) Fazilah Surkisah binti Mohammad, Legal Manager, on 16.5.2019; and
(iii) Capt. Subramaniam a/l Karuppiah, General Manager, on 4.7.2019.

53. On 9.1.2020, the Commission issued a Proposed Decision against the Parties.

54. On 3.2.2021, the Parties were granted access to the Commission file.

55. From 16.2.2021 to 13.3.2021, the Parties submitted their written representations to the Commission.

56. Only Interocean Warehousing requested an oral representation session. Hence, on 1.12.2020, Interocean Warehousing made its oral representation to the Commission virtually, whilst, SAL Agencies, WCS Warehousing, Regional Synergy, Intrexim and Pioneerpac were granted permission to merely observe the session.

C.1 ISSUE RAISED IN RELATION TO PROCEDURE

57. The learned counsel for SAL Agencies, WCS Warehousing, Regional Synergy, Intrexim and Pioneerpac submits that the Commission has imposed the financial penalties upon the issuance of the Proposed Decision.

58. The Proposed Decision was issued pursuant to section 36 of the Act. According to section 36(2)(b) of the Act, the Commission is required to set out any penalties or remedial action that the Commission proposed to apply. This is to give the enterprises the right to make representation against the proposed imposition of financial penalty or remedial action.

59. Relying on sections 36, 40(4) and 42 of the Act, it is the Commission's view that stating the amount of the proposed financial penalty in the Proposed Decision, does not amount to an imposition of financial penalty at the Proposed Decision stage. Consequently, the argument raised by the learned counsel is without merit and is hereby rejected.

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PART 2: CONDUCT OF THE PARTIES

A. CHRONOLOGY OF FACTS

60. Based on evidence gathered, the Commission finds that the Parties knew each other and had constantly communicated with one another. The communications between the Parties ranged from exchanges of views and advice particularly on pricing charges for warehouse related services to discussions on warehouse operations including unstuffing, stuffing, and consignee disputes.[41]

61. The Commission discovered a group chat on a mobile phone messaging application, WhatsApp, named "NP"[42] (hereinafter referred to as the "WhatsApp Group") created on 26.5.2017[43] by Eswaran a/l Kulanthaivelu of Pioneerpac.[44] The Parties are participants of the WhatsApp Group chat, namely:

(i) Loo Suo Li of Regional Synergy;
(ii) Ong Sue Ron of Regional Synergy;[45]
(iii) Eswaran a/l Kulanthaivelu of Pioneerpac;[46]
(iv) Go Mooi Leng of Prima Warehousing;[47]
(v) Mah Chee Keong of Western Warehousing;[48]

[41] Paragraph 16 of Statement of Sathiaraj Francis a/l Rajagopal of SAL Agencies recorded on 10.10.2018.
[42] Exhibit WH3-11 Screenshot of WhatsApp Group Chat named "NP" retrieved from Loo Suo Li of Regional Synergy (IMG_9718); paragraph 39 of Statement of Loo Suo Li of Regional Synergy recorded on 10.10.2018; and paragraphs 4 and 5 of Statement of Ong Sue Ron of Regional Synergy recorded on 10.10.2018.
[43] Paragraph 4 of Statement of Ong Sue Ron of Regional Synergy recorded on 10.10.2018.
[44] Paragraph 22 of Statement of Eswaran a/l Kulanthaivelu of Pioneerpac recorded on 11.10.2018.
[45] Paragraph 13 of Statement of Ong Sue Ron of Regional Synergy recorded on 10.10.2018.
[46] Paragraph 22 of Statement of Eswaran a/l Kulanthaivelu of Pioneerpac recorded on 11.10.2018.
[47] Paragraph 1 of Statement of Go Mooi Leng of Prima Warehousing recorded on 11.10.2018.
[48] Paragraph 4 of Statement of Lim Kwang Yew of SAL Agencies recorded on 10.10.2018.

(vi) Poon Chee Hoong of WCS Warehousing;[49]

(vii) Lim Kwang Yew of SAL Agencies;[50]

(viii) Francis Lim of Edaran;[51] and

(ix) Michael Teh Chee Kiat ("Mick Teh Inter") of Interocean Warehousing.

62. The Parties used the WhatsApp Group chat as the platform to discuss the imposition of surcharges for handling services for long length and heavy lift of import and export cargoes.[52]

63. The chronology of the relevant discussions and meetings are described in ***Table 3*** below:

Table 3: Chronology

DATE	EVENT
26.5.2016	The WhatsApp Group chat was created and known as "NP" and later changed to "Ling".
15.5.2017	In the WhatsApp Group chat, the Parties attempted to standardize the surcharge for long length cargoes.
18.5.2017	Loo Suo Li informed the parties of the WhatsApp Group chat that the effective date for the implementation of the agreed rates for long length and heavy lift handling surcharges for import and export cargo would be 1.6.2017.

[49] Paragraph 4 of Statement of Lim Kwang Yew of SAL Agencies recorded on 10.10.2018.
[50] Paragraph 4 of Statement of Lim Kwang Yew of SAL Agencies recorded on 10.10.2018.
[51] Paragraph 4 of Statement of Lim Kwang Yew of SAL Agencies recorded on 10.10.2018.
[52] Paragraph 7 of Statement of Go Mooi Leng of Prima Warehousing recorded on 11.10.2018.

DATE	EVENT
22.5.2017	The Parties discussed the implementation of these charges in the WhatsApp Group chat during the period between 15.5.2017 and 25.5.2017.
23.5.2017	Eswaran of Pioneerpac finalised the Surcharge Memorandum to include both LLC and HLC surcharges.
25.5.2017	Prima Warehousing, WCS Warehousing, Regional Synergy, Pioneerpac, and Interocean Warehousing signed the Surcharge Memorandum.
26.5.2017	Western Warehousing (now known as “Intrexim”) signed the Surcharge Memorandum.
30.5.2017	SAL Agencies signed the Surcharge Memorandum.
31.5.2017	In the WhatsApp Group chat, Eswaran a/l Kulanthaivelu sent a copy of the Surcharge Memorandum and sought consensus to circulate the same to all customers. The Surcharge Memorandum was circulated among the Parties by Eswaran of Pioneerpac.
2.6.2017	Informant approached the Commission with information on the alleged anti-competitive conduct committed by the Parties.
10.6.2017	Loo Suo Li informed the participants of the WhatsApp Group chat that PKA had requested the LLC and HLC surcharges to be put on hold pending PKA’s approval. She told the participants to bill customers according to the earlier rates and that she planned to meet S. Kumaresen a/l R. Silvarajoo of PKA to discuss the matter.
14.7.2017	Loo Suo Li informed the WhatsApp Group chat that the PKA allowed them to quote the agreed rates for LLC and HLC. Loo Suo Li told them not to forward the Surcharge Memorandum to

DATE	EVENT
	customers because the PKA would be in a position to handle complaints raised by customers against the Parties.
15.8.2017	Lim Kwang Yew of SAL Agencies asked the WhatsApp Group chat whether PKA had instructed them to defer the implementation of the LLC due to complaints received by PKA. He further said that [✂] had lodged a complaint regarding the LLC and would not accept the Memo as there was no official circular from the PKA. Loo Suo Li informed the WhatsApp Group chat that the complaints were about export cargoes, and not import cargoes. Loo Suo Li added that S. Kumaresen a/l R. Silvarajoo of PKA had allowed the Parties to bill their customers following the Surcharge Memorandum notwithstanding the absence of an official circular from PKA.
20.9.2017	Mohd Azuan B. Mohamad Paudzi of PKA issued an invitation to the warehouse operators for a meeting to be held on 29.9.2017 to discuss the charges.
21.9.2017	Lim Kwang Yew asked the WhatsApp Group participants whether they were still implementing the rates set out in the Surcharge Memorandum, pointing to a circular from PKA instructing them to cease the imposition of the surcharges per the Surcharge Memorandum. Loo Suo Li confirmed that the rates were still being implemented as per the Surcharge Memorandum. Poon Chee Hong of WCS Warehousing told the WhatsApp Group chat that he received a letter from PKA to return monies to consignees by way of a refund even though the cargo is over 12 feet.

DATE	EVENT
29.9.2017	A meeting called the "*Mesyuarat Bagi Membincangkan Isu-isu Berkenaan Perudangan di Dalam Zon Bebas Pelabuhan Klang*" was held between the Parties and PKA to discuss the implementation of LLC and HLC surcharges.
6.11.2017	A meeting called the "*Mesyuarat Bersama Operator-operator Gudang bagi Membincangkan Isu-isu Berkaitan Pergudangan LCL*" was held between PKA and the Parties to discuss issues relating to less container load.
10.1.2018	A meeting called the "*Mesyuarat Pengawalseliaan Tariff LCL Consolidation (Eksport) Di Pelabuhan Klang – Caj Heavy Lift & Long Length*" was held between PKA and the Parties to discuss LLC and HLC surcharges.
23.1.2018	Loo Suo Li inquired from the WhatsApp Group chat whether the surcharge is to be billed at RM350. The participants responded that the PKA did not agree with the rate of RM350 and had proposed the rate of RM200.
19.3.2018	Loo Suo Li requested the WhatsApp Group chat for a copy of the PKA meeting minutes. Poon Chee Hoong of WCS Warehousing attached a copy of the meeting minutes.
10.10.2018	The Commission carried out an unannounced inspection at Regional Synergy's premises. The name of the WhatsApp Group chat was changed to "Ling" by Loo Suo Li of Regional Synergy. Loo Suo Li removed two participants from the WhatsApp Group chat, namely "Irene Gunn" and "Mick Teh Inter".
11.10.2018	The Commission carried out unannounced inspections at the business premises of Pioneerpac, Prima Warehousing and Interocean Warehousing.

CHRONOLOGY OF THE INFRINGING AGREEMENT FORMATION

B. CHAT LOGS 2017– 2018

64. In the course of its investigation, the Commission obtained screenshots of the WhatsApp Group chat logs dated 15.5.2017 from the mobile phone belonging to Loo Suo Li of Regional Synergy. Based on the screenshots, the Commission discovered that the Parties had attempted to fix and standardize the rates for handling services for long length at RM350.00 per handling.[53] The rates apply to long length cargo weighing 3 tonnes and is above 12 feet per handling including in and out for import and export cargo.

65. Subsequently, on 18.5.2017, Loo Suo Li informed the Parties in the WhatsApp Group chat that the effective date for the implementation of the agreed rates for long length and heavy lift handling surcharges for import and export cargo would be 1.6.2017.[54]

66. Eswaran a/l Kulanthaivelu of Pioneerpac proceeded to draft the Surcharge Memorandum. He then obtained the support of all Parties who placed their signatures and company stamps on the Surcharge Memorandum. The Parties agreed to circulate the same to their respective customers.[55]

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[53] Exhibit WH3-11 Screenshot of WhatsApp Group Chat Logs dated 15.5.2017 retrieved from Loo Suo Li of Regional Synergy (IMG_4378 and IMG 4379). (Note: Term used was heavy forklift).
[54] Exhibit WH3-11 Screenshot of WhatsApp Chat Logs dated 18.5.2017 retrieved from Loo Suo Li of Regional Synergy (IMG_4384).
[55] Exhibit WH3-11 Screenshots of WhatsApp Group Chat Logs dated from 18.5.2017 until 31.5.2017 retrieved from Loo Suo Li of Regional Synergy (IMG_4384, IMG_4386, IMG_4387, IMG_4388, IMG_4390, IMG_4392, IMG_4393, IMG_4394, IMG_4395, IMG_4396, IMG_4397, IMG_4398, IMG_4399, IMG_4400, IMG_4401, IMG_4402, IMG_4403, IMG_4404, IMG_4405, IMG_4406, IMG_4407, IMG_4408, IMG_4409 and IMG_4410).

67. According to Loo Suo Li, the main objective of issuing the Surcharge Memorandum was to offset or deny any future requests by freight forwarders for a waiver of charges in the event of any damage caused to their cargoes.[56]

68. Based on the WhatsApp Group chat logs on 31.5.2017, Eswaran a/l Kulanthaivelu of Pioneerpac informed the participants that he had posted a copy of the Surcharge Memorandum to the WhatsApp Group chat and sought consensus to circulate the same to all customers.[57]

69. Subsequently, on 10.6.2017, Loo Suo Li of Regional Synergy informed the WhatsApp Group chat that the PKA had requested that the said proposed rates for long length and heavy lift handling surcharges for import and export cargoes be put on hold pending approval from the PKA. Loo Suo Li then informed the WhatsApp Group chat to bill their respective customers in accordance with their previous rates and that she had planned to meet S. Kumaresen a/l R. Silvarajoo[58] of PKA to discuss this matter.[59]

70. On 14.7.2017, Loo Suo Li informed in the WhatsApp Group chat that the Parties were allowed by the PKA to quote the agreed rates for

[56] Exhibit WH1-4 Screenshot of WhatsApp Group Chat Logs dated 26.5.2017 retrieved from Lim Kwang Yew of SAL Agencies (IMG_9675).
[57] Exhibit WH3-11 Screenshot of WhatsApp Group Chat Logs dated 31.5.2017 retrieved from Loo Suo Li of Regional Synergy (IMG_4409).
[58] Exhibit WH3-11 Screenshot of WhatsApp Group Chat Logs dated 10.6.2017 retrieved from Loo Suo Li of Regional Synergy (IMG_4412).
[59] Exhibit WH3-11 Screenshot of WhatsApp Group Chat Logs dated 21.6.2017 retrieved from Loo Suo Li of Regional Synergy (IMG_4414).

the long length and heavy lift handling surcharges accordingly for import and export cargoes.[60]

71. Nevertheless, Loo Suo Li had informed the Parties through the WhatsApp Group chat that they should not forward the Surcharge Memorandum[61] when communicating with their respective customers. Loo Suo Li added that the PKA would be in a position to handle complaints raised by customers against the Parties due to the changes in the surcharges.[62]

72. On 15.8.2017, Lim Kwang Yew of SAL Agencies enquired in the WhatsApp Group chat whether the PKA had instructed the Parties to defer the implementation of long length handling charges due to complaints received by the PKA.[63] Lim Kwang Yew further added that one company known as [✂][64] had lodged a complaint about the long length handling surcharge and refused to accept the Surcharge Memorandum as there was no official circular issued by PKA.[65]

73. In response, Loo Suo Li informed the Commission that the complaints were concerning export cargoes and not import cargoes.[66] Loo Suo Li added that Kumaresen[67] had allowed the Parties to bill their respective customers in accordance with the

[60] Exhibit WH3-11 Screenshot of WhatsApp Group Chat Logs dated 14.7.2017 retrieved from Loo Suo Li of Regional Synergy (IMG_4419). (Note: Term used was group circular).
[61] Exhibit WH3-11 Screenshot of WhatsApp Group Chat Logs dated 14.7.2017 retrieved from Loo Suo Li of Regional Synergy (IMG_4419).
[62] Exhibit WH3-11 Screenshot of WhatsApp Group Chat Logs dated 14.7.2017 retrieved from Loo Suo Li of Regional Synergy (IMG_4419).
[63] Exhibit WH3-11 Screenshot of WhatsApp Group Chat Logs dated 15.8.2017 retrieved from Loo Suo Li of Regional Synergy (IMG_4420).
[64] Companies Commission of Malaysia report on [✂] dated 15.3.2021.
[65] Exhibit WH3-11 Screenshot of WhatsApp Group Chat Logs dated 15.8.2017 retrieved from Loo Suo Li of Regional Synergy (IMG_4421).
[66] Exhibit WH3-11 Screenshot of WhatsApp Group Chat Logs dated 15.8.2017 retrieved from Loo Suo Li of Regional Synergy (IMG_4421).
[67] Statement of S. Kumaresen a/l R. Silvarajoo of Port Kelang Authority recorded on 20.12.2018.

Surcharge Memorandum despite the absence of any official circular by PKA.[68]

74. On 21.9.2017, Lim Kwang Yew had enquired in the WhatsApp Group chat whether the Parties were still charging the agreed long length handling charges and drew the group's attention to an email from PKA[69] instructing the Parties to cease the imposition of the surcharges in accordance with the Surcharge Memorandum.[70] Loo Suo Li then confirmed that the rates contained in the Surcharge Memorandum were still being implemented.[71]

75. On the same date, Poon Chee Hoong of WCS Warehousing informed the WhatsApp Group chat that he had received a letter from the PKA to return monies to consignees by way of a refund even though the cargo is over 12 feet.[72] This is supported by the following statement made by PKA:

> *"…LPK found that the LLC and HLC charges were neither reasonable nor justified. LPK had instructed the 5 warehouse operators involved to refund the charges to their respective clients."*[73]

[68] Exhibit WH3-11 Screenshot of WhatsApp Group Chat Logs dated 15.8.2017 retrieved from Loo Suo Li of Regional Synergy (IMG_4422).
[69] Exhibit WH3-11 Screenshot of WhatsApp Group Chat Logs dated 21.9.2017 retrieved from Loo Suo Li of Regional Synergy (IMG_4423).
[70] Exhibit WH6-5 Email from Mohd Azuan B. Mohamad Paudzi via [✂] to [✂], [✂], [✂], [✂], [✂], [✂], [✂], [✂], [✂], [✂], [✂], [✂], [✂], [✂], dated 20.9.2017 titled, "PELAKSANAAN LONG LENGTH HANDLING CHARGE & HEAVY LIFT HANDLING CHARGE BAGI KARGO LCL".
[71] Exhibit WH3-11 Screenshot of WhatsApp Group Chat Logs dated 21.9.2017 retrieved from Loo Suo Li of Regional Synergy (IMG_4424).
[72] Exhibit WH3-11 Screenshot of WhatsApp Group Chat Logs dated 21.9.2017 retrieved from Loo Suo Li of Regional Synergy (IMG_4425).
[73] Paragraph 12 of Statement of Capt. Subramaniam a/l Karuppiah of Port Kelang Authority recorded on 4.7.2019.

76. Loo Suo Li and Poon Chee Hoong of WCS Warehousing raised their discontentment over the change in PKA's stance,[74] from initially supporting the Parties, to the current stance of instructing the Parties to issue refunds[75] to customers.[76] The Commission captured a discussion in the WhatsApp Group chat in furtherance to PKA's issuance of an invitation email to the Parties for a meeting that was held on 29.9.2017 where the Parties indicated their intention to attend the said meeting.

77. The Commission establishes that the Parties had on numerous occasions, sought PKA's approval on the rates as evidenced by the numerous telephone calls made and emails issued to PKA.

78. The Commission finds that the Parties had participated in the discussions on the implementation of handling charges for export less container load ("LCL") cargoes.[77] In this regard, the Parties had requested PKA's update and feedback on the matter. As no feedback was forthcoming from PKA, the Parties then attempted to schedule an appointment to meet with PKA, and accordingly a

[74] Exhibit WH3-11 Screenshot of WhatsApp Group Chat Logs dated 21.9.2017 retrieved from Loo Suo Li of Regional Synergy (IMG_4426).
[75] Exhibit WH7-5 Email thread from May Siow of Regional Synergy to Mohd Azuan B. Mohamad Paudzi of the PKA dated 7.5.2018 & 8.5.2018 and Exhibit WH5-6 Forwarded Email from May Siow [✂] of Regional Synergy to Kumaty [✂] Email thread dated between 5 and 6 September from [✂] to 'lieza', [✂] and 'WATI"; ZIELA titled, "FW: INV – PIN629092 / RM350 LONG LENGTH CHARGE / MST STAINLESS STEEL" and Exhibit WH3-11 Screenshots of WhatsApp Group Chat Logs dated 21.9.2017 retrieved from Loo Suo Li of Regional Synergy (IMG_4423, IMG_4424, IMG_4425, IMG_4426, IMG_4427, IMG_4428, IMG_4429, IMG_4430 and IMG_4431).
[76] Paragraphs 5 and 8 of the statement of Teh Chee Guan recorded on 11.10.2018; and Exhibit WH5-7 *Minit Mesyuarat Pengawalseliaan Tariff LCL Consolidation (Eksport) Di Pelabuhan Kelang – Caj Heavy Lift & Long Length* dated 10.1.2018.
[77] Exhibit WH3-11 Screenshots of WhatsApp Group Chat Logs dated 15.5.2017 retrieved from Loo Suo Li of Regional Synergy (IMG_4433, IMG_4434, IMG_4435, IMG_4436 and IMG_4437).

meeting with PKA was held on 6.11.2017 as mentioned in **paragraph 63** above.[78]

79. On 23.1.2018, Loo Suo Li of Regional Synergy inquired the participants in the WhatsApp Group chat regarding the charging of rates for long length handling services; and specifically, whether the surcharge is to be billed at RM350.00.[79] Several representatives of the Parties, namely, Mah Chee Keong of Western Warehousing and Poon Chee Hoong of WCS Warehousing, responded by stating that the PKA did not agree with the rate of RM350.00 for the long length handling surcharges and instead, had proposed a sum of RM200.00.[80]

80. On 19.3.2018, Loo Suo Li enquired on the final tariff for the long length handling surcharge in the WhatsApp Group chat. Eswaran a/l Kulanthaivelu confirmed that Pioneerpac was still charging long length handling surcharge as per the Surcharge Memorandum.[81] Loo Suo Li then requested copies of PKA meeting minutes with the hope that the minutes could appease her customers.[82] Subsequently, Poon Chee Hoong attached a copy of the PKA meeting minutes but referred to clause 2.1.3.[83] Loo Suo Li then commented that the PKA meeting minutes could not be shown to

[78] Exhibit WH3-11 Screenshots of WhatsApp Group Chat Logs dated 29.11.2017 retrieved from Loo Suo Li of Regional Synergy (IMG_4433, IMG_4434, IMG_4435, IMG_4436 and IMG_4437).
[79] Exhibit WH3-11 Screenshot of WhatsApp Chat Logs dated 23.1.2018 retrieved from Loo Suo Li of Regional Synergy (IMG_4316).
[80] Exhibit WH3-11 Screenshot of WhatsApp Group Chat Logs dated 23.1.2018 retrieved from Loo Suo Li of Regional Synergy (IMG_4320).
[81] Exhibit WH3-11 Screenshot of WhatsApp Group Chat Logs dated 19.3.2018 retrieved from Loo Suo Li of Regional Synergy (IMG_4321).
[82] Exhibit WH3-11 Screenshot of WhatsApp Group Chat Logs dated 19.3.2018 retrieved from Loo Suo Li of Regional Synergy (IMG_4322).
[83] Exhibit WH3-11 Screenshot of WhatsApp Group Chat Logs dated 19.3.2018 retrieved from Loo Suo Li of Regional Synergy (IMG_4325); and WH7-2*. Minit Mesyuarat Pengawalseliaan* Tariff LCL Consolidation.

customers as it specifically mentioned that the Parties' billing of RM350.00 was excessive.[84]

81. The Commission is satisfied that the Parties had full knowledge of the fact that the long length handling surcharge of RM350.00 was unreasonable.

82. On 5.4.2018, Loo Suo Li requested Eswaran a/l Kulanthaivelu to make arrangements for all Container Freight Station ("CFS") members to sign a letter titled "*RE: LONG LENGTH SURCHARGE*" in relation to the fixing of the long length handling surcharge at RM200.00.[85] This was due to pressure from customers who demanded to sight the PKA's official tariff.[86] In addition, there was also a discussion on utilising individual formats to draft a memorandum to be issued to the Parties' respective customers.[87]

83. Regional Synergy attached a letter for its customers dated 1.4.2018 titled "*RE: LONG LENGTH SURCHARGE*" stating that, effective 1.4.2018, all the import and export long length cargoes (i.e., cargo above 12 feet) would incur a long length handling surcharge at RM200.00 on condition that such cargo could be managed through the use of a 3-tonne forklift equipped with a long fork.[88]

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[84] Exhibit WH3-11 Screenshot of WhatsApp Group Chat Logs dated 19.3.2018 retrieved from Loo Suo Li of Regional Synergy (IMG_4325); and WH7-2. *Minit Mesyuarat Pengawalseliaan* Tariff LCL Consolidation.
[85] Exhibit WH3-11 Screenshot of WhatsApp Group Chat Logs dated 5.4.2018 retrieved from Loo Suo Li of Regional Synergy (IMG_4326).
[86] Exhibit WH3-11 Screenshot of WhatsApp Group Chat Logs dated 5.4.2018 retrieved from Loo Suo Li of Regional Synergy (IMG_4326).
[87] Exhibit WH3-11 Screenshot of WhatsApp Group Chat Logs dated 5.4.2018 retrieved from Loo Suo Li of Regional Synergy (IMG_4327).
[88] Exhibit WH3-11 Screenshot of WhatsApp Group Chat Logs dated 5.4.2018 retrieved from Loo Suo Li of Regional Synergy (IMG_4329).

84. The Commission notes that WCS Warehousing had prepared and issued a similar letter titled, "*Re: WAREHOUSE LONG LENGTH CARGO HANDLING CHARGES*" to their customers with regard to extra-long length handling surcharge for both import and export shipment for cargoes measuring 12 feet or more in length and weighing over 200kgs but not exceeding 3 tonnes.[89]

85. In the same WhatsApp Group chat discussion, the Commission notes that Eswaran a/l Kulanthaivelu had reminded Loo Suo Li and the other WhatsApp Group participants that PKA had warned the Parties against preparing and signing the letter titled "*Re: WAREHOUSE LONG LENGTH CARGO HANDLING CHARGES*" as it was against the law.[90]

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

87. The Commission finds that Eswaran a/l Kulanthaivelu of Pioneerpac had also played the pivotal role of a facilitator amongst the Parties,

[89] Exhibit WH3-11 Screenshot of WhatsApp Group Chat Logs dated 5.4.2018 retrieved from Loo Suo Li of Regional Synergy (IMG_4331).
[90] Exhibit WH3-11 Screenshot of WhatsApp Group Chat Logs dated 5.4.2018 retrieved from Loo Suo Li of Regional Synergy (IMG_4332).

by arranging meetings with the PKA as well as acting as the drafter[91] of the Surcharge Memorandum which was later executed upon the persuasion of Loo Suo Li.

88. The Commission makes the finding that Eswaran a/l Kulanthaivelu of Pioneerpac had informed Loo Suo Li that the PKA had in the past warned the Parties from preparing a "letter"[92] as it was against competition law. What is understood here by the word "letter" is the Surcharge Memorandum. However, despite being warned by PKA, the Parties proceeded to issue the Surcharge Memorandum to their customers.

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[91] Paragraph 24 of Statement of Eswaran a/l Kulanthaivelu of Pioneerpac recorded on 11.10.2018; Paragraph 15 of Statement of Ong Sue Ron of Regional Synergy recorded on 10.10.2018; Paragraph 27 of the Statement of Loo Suo Li of Regional Synergy recorded on 10.10.2018, Paragraph 21 of Statement of Sathiaraj Francis a/l Rajagopal of SAL Agencies recorded on 10.10.2018; and Paragraph 9 of Statement of Lim Kwang Yew of SAL Agencies recorded on 10.10.2018.

[92] Exhibit WH4-1 Screenshot of WhatsApp Chat Logs dated 5.4.2018 retrieved from Lim Kwang Yew of SAL Agencies (IMG_9715).

PART 3: LEGAL AND ECONOMIC ASSESSMENT

89. This section begins by setting out the legal and economic framework in which the Commission relies upon in considering the evidence and the facts in this case. It then sets out the evidence and the facts relating to the Infringing Agreement in which the Commission relies upon. Thereafter, it analyses the evidence and the facts and states the inferences, findings, and conclusions that the Commission draws from the evidence and the facts.

A. APPLICATION OF COMPETITION ACT 2010

Submissions by the Parties

90. The learned counsel for SAL Agencies, WCS Warehousing, Regional Synergy, Intrexim, and Pioneerpac submits that the PKA, operating under Act 488, deals with a very specialised field of trade whereas the Competition Act 2010 applies generally to all industries.

91. The learned counsel relies on the maxim *generalia specialabus non derogant*. The learned counsel refers to the Malaysian case of *Perwaja Steel & Satu Yang Lain v Majlis Daerah Kemaman Terengganu.*[93] The case relied on the assessment of Reilly J in *Corporation of Madras v Electric Tramways Ltd.*[94] wherein the learned Judge said:

> *"…If the legislature makes a special Act dealing with a particular case and later makes a general Act, which by its terms would include the*

[93] [1994] 3 MLJ 15, at paragraph 19.
[94] [1931] 60 MLJ 551, at paragraph 9.

subject of the special Act, nevertheless unless it is clear that in making the general Act the legislature has had the special Act in its mind and has intended to abrogate it, the provisions of the general Act do not override the special Act…"

92. The learned counsel also refers to *Hariram a/l Jayaram & Ors. v Sentul Raya Sdn. Bhd.*[95] and the US case of *Frederick Rodgers v United States*.[96]

93. Applying the principle in the cases referred above, the learned counsel contends that Act 488 enforces a "regime of fixed-price" whereas the Competition Act 2010 eliminates competition. Therefore, the Parties are governed by Act 488 and not the Competition Act 2010.

The Commission's Findings

94. In the case of *Public Prosecutor v Chew Siew Luan,*[97] the Federal Court held that "*generalibus specialia derogant"* is a cardinal principle of interpretation. It means that where a special provision is made in a special statute, that special provision excludes the operation of a general provision in the general law."

95. In the case of *Re Wong Chong Siong; ex p Arab Malaysian Finance Bhd.*[98]*,* in deciding on the conflict between the Rules of High Court 1980 and the Bankruptcy Rules 1969, the High Court relied on the

[95] [2003] 1 MLJ 22.
[96] 185 U.S. 83.
[97] [1982] 2 MLJ 119.
[98] [1998] 7 MLJ 208.

case of *Corporation of Madras v Electric Tramways Ltd.*[99] and held the following:

> *"Finally, Reilly J in of Corporation Madras v Electric Tramways Ltd. 1931 AIR Mad 152 said:*
>
> *There is the old maxim generalia specilibus non derogant: that is general provisions do not derogate from special provisions. If the legislature makes a special Act dealing with a particular case and later makes a general Act, which by its terms would include the subject of the special Act and is in conflict with the special Act, nevertheless unless it is clear that in making the general Act the legislature has had the special Act in its mind and has intended to abrogate it, the provisions of the general Act do not override the special Act.*

96. Act 488 is legislation to provide for the establishment of port authorities, for the functions of such authorities, and matters connected therewith. Section 3(2) of Act 488 states that:

> *(2) The authority shall have power to do all things reasonably necessary for or incidental to the discharge of its functions, and in particular—*
> *…*
> *(b) to undertake all or any work of every description of or in connection with the loading, unloading and storing of goods or cargo in the port, or authorize by way of licence any company, firm, person or persons to undertake such work, subject to such regulations or by-laws as the authority may from time to time make, and such licence may contain conditions which may include a condition that such work shall be undertaken under contract to the authority;*
> *…*

[99] [1931] 60 MLJ 551.

(iv) to undertake or grant licence on such conditions as the authority may think fit to any company, firm, person or persons to undertake, any activities in the Port as may appear to the authority to be necessary"

97. Notwithstanding the power for the PKA to operate and maintain port operations in the Port Klang area, Act 488 does not provide for the promotion and protection of the competition process within the port area. Therefore, the Act (Competition Act 2010) is a statute of general application that applies to all economic sectors in Malaysia, as opposed to Act 488 that only applies to port-related matters. Consequently, the Act applies to enterprises that are licensed or regulated by the PKA under Act 488.

98. Further, if Parliament had intended to exclude the application of the Act in favour of Act 488, Parliament would have excluded Act 488 from the application of the Act as per statutes listed in the First Schedule of the Competition Act 2010.

99. In light of the above, with respect, the Commission rejects the argument raised by the learned counsel that Act 488 excludes the application of Competition Act 2010 to the port sector due to the application of the maxim *generalia specialabus non derogant*.

B. THE SECTION 4 PROHIBITION

100. Section 4(1) of the Act prohibits agreements between enterprises, decisions by associations of enterprises, or concerted practices, that have, as their object or the effect, the prevention, restriction, or distortion of competition within Malaysia.

101. Under section 4(2)(a) of the Act, without prejudice to the generality of subsection (1), a horizontal agreement between enterprises that have the object of price fixing is deemed to have the object of significantly preventing, restricting, or distorting competition in any market for goods or services. Under section 4(3) of the Act, any enterprise who is a party to an agreement that is prohibited under subsection (1) shall be liable for the infringement of the prohibition.

C. APPLICATION OF SECTION 4 PROHIBITION TO PARTIES

C.1 THE CONCEPT OF ENTERPRISE

102. The concept of an “enterprise” in section 2 of the Act covers any entity capable of carrying on commercial activities.

103. Each of the Parties, therefore, constitutes an “enterprise” for the purposes of the Act as each of the Parties carry out commercial activities relating to, amongst other things, the provision of warehousing, haulage, and freight forwarding services.

104. The Parties do not contest the Commission’s conclusions as outlined in this ***Section C.1*** of this Part.

C.1.1 SUCCESSION OF AN INFRINGING PARTY

105. The infringement liability cannot be avoided merely by reason of the fact that the original legal entity no longer exists. It is necessary to consider whether there is functional and economic continuity between the original entity and any new entity that succeeds it.[100] In *Suiker Unie v Commission,*[101] the European Court of Justice ("ECJ") ruled that the applicant, Suiker Unie, must be treated as the successor of the earlier association because it had assumed "*all the rights and liabilities*" of the latter.

106. The ECJ has confirmed that restructurings, sales or other legal or organisational changes will not allow an enterprise to escape liability from competition law infringements. In *Autorita Guarante della Concorrenza e del Mercato v Ente Tabacchi Italiani - ETI SpA and Philip Morris,* [102] the ECJ stated as follows:

> *"…it must be noted that if no possibility of imposing a penalty on an entity other than the one which committed the infringement were foreseen, undertakings could escape penalties by simply changing their identity through restructurings, sales or other legal or organisational changes. This would jeopardise the objective of suppressing conduct that infringes the competition rules and preventing reoccurrence by means of deterrent penalties…the legal forms of the entity that committed the infringement and the entity that succeeded it are irrelevant. Imposing a penalty for the infringement on the successor can therefore not be*

[100] Case IV/31.865 *PVC* [1989] OJ L74 at paragraph 42.
[101] Joined Cases 40-48/73, 50/73. 554-56/73.111/73 and 114/73 *Suiker Unie v Commission* [1975] ECR-1663, at paragraph 84.
[102] Case C-280/06 *Autorita Guarante della Concorrenza e del Mercato v Ente Tabacchi Italiani -ETI SpA and Philip Morris* [2007] ECRR I-10893.

excluded simply because…the successor has a different legal status and is operated differently from the entity that it succeeded."

107. The Commission takes the view that where the natural or legal person engaged in an infringing conduct has undergone organisational changes, such changes do not absolve the party of its liability; and its economic successors will be liable for the infringement.

C.2 APPLICATION TO THE PRESENT CASE

108. Hamdan bin Jamin, a director of Intrexim (formerly known as "Western Warehousing") informed the Commission that Mah Chee Keong[103] had signed the Surcharge Memorandum on behalf of Western Warehousing.[104] The Commission notes that Mah Chee Keong is no longer attached with Intrexim.[105] Hamdan bin Jamin took over the business on 15.10.2017.

109. The Commission notes that Intrexim is the functional and economic successor of Western Warehousing. Following the principle in the case of *Autorita Garante della Concorrenza e del Marcato* that the legal form of the infringing entity and the entity that succeeded it is irrelevant,[106] and given that Western Warehousing as an entity has ceased to exist, Intrexim is responsible for any competition law infringement committed by Western Warehousing.

[103] Paragraphs 1 and 2 of Statement of Hamdan bin Jamin of Intrexim recorded on 10.10.2018.
[104] Paragraph 5 of Statement of Hamdan bin Jamin of Intrexim recorded on 10.10.2018.
[105] Paragraph 2 of Statement of Hamdan bin Jamin of Intrexim recorded on 10.10.2018.
[106] Case C-280/06 *Autorita Garante della Concorrenza e del Mercato v Ente Tabacchi Italiani – ETI SpA and Philip Morris*, judgment of 11 December 2007, at paragraphs 41 and 43.

110. Intrexim does not contest the Commission's conclusions as outlined in this section.

Submissions by the Parties

111. The learned counsel for SAL Agencies, WCS Warehousing, Regional Synergy, Intrexim and Pioneerpac argue that the liability should lie on the PKA for 'failing' to gazette the charges agreed to by the Parties.

112. The learned counsel of Interocean claims that PKA conducted the meetings; the warehouse operators were merely invitees.

The Commission's Findings

113. Maintaining and operating ports in Malaysia are essential functions of the State (meaning the Federation) as shipping, navigation and fisheries, including ports and harbours are listed under Item 9(b) of the Federal List at List 1 of the Ninth Schedule of the Federal Constitution. Pursuant to Article 74(1) read with Item 9(b) of the Federal List of the Federal Constitution, Parliament enacted Act 488 that provides for the establishment of port authorities, for the functions of such authorities and matters connected therewith.

114. The Commission fails to understand how PKA is liable under the Act by the mere fact that it did not gazette the charges that are the subject matter of the Parties' agreement. PKA had no obligation to do so. Moreover, the PKA is a statutory body that was established by section 2 of Act 488. The PKA as a statutory body is entrusted

with performing an essential function of the State. It is not an enterprise under the Act.

115. It is important to note that the PKA did not encourage the Parties to enter into any agreement that infringes the Act. Therefore, PKA cannot be held liable or responsible for the price-fixing agreement that was entered by the Parties. PKA, in the performance of its functions under Act 488, does not carry out a "commercial activity" for the purpose of the Competition Act 2010 (see Section 3(4)(a) of the Act).

116. Whilst the PKA did not gazette the long-length handling and the heavy-lift handling surcharge, the fact remains that the Parties had entered into an agreement and/or concerted practices to fix the rate for the handling services for long length and heavy lift of import and export cargoes.

117. Accordingly, the arguments by the Parties that PKA should be held liable is hereby dismissed.

D. AGREEMENT

118. An agreement is formed in a contract, arrangement or understanding between enterprises, and includes a decision by an association and concerted practices.[107] The term "agreement" is widely construed. It catches agreements whether or not they amount to a contract under national rules, whether or not they are intended

[107] Section 2 of the Act.

to be legally binding and whether they are in writing or oral.[108] It is sufficient that the enterprises in question have expressed their joint intention to conduct themselves on the market in a specified way.[109]

119. In *Bayer v Commission,*[110] the European General Court held that proof of an agreement must be founded upon "the existence of the subjective element that characterises the very concept of the agreement, that is to say, a concurrence of wills between economic operators on the implementation of a policy, the pursuit of an objective, or the adoption of a given line of conduct on the market".[111]

120. An agreement may be regarded as having a restrictive object even if it does not have the restriction of competition as its sole aim but also pursues other legitimate objectives.[112] The Commission does not need to establish that the parties have the subjective intention of restricting competition when entering into the agreement.[113]

D.1 AGREEMENTS AND/OR CONCERTED PRACTICES

121. In addition to the definition of "concerted practices" as stated in section 2 of the Act, concerted practices involve some form of informal co-operation.[114] Thus, the conduct may fall under section 4

[108] The MyCC Guidelines on Chapter 1 Prohibition (Anti-Competitive Agreements).
[109] Case T-7/89 *SA Hercules Chemicals v Commission* [1991] ECR II-1711, at paragraph 256.
[110] Case T-41/96, *Bayer AG v Commission* [2000] ECR II-3383, at paragraph 173, affirmed on appeal Cases C-2 and 3/01P, *Bayer AG v Commission* [2004] 4 CMLR 13.
[111] Case T-41/96, *Bayer AG v Commission* [2000] ECR II-3383, at paragraph 173, affirmed on appeal Cases C-2 and 3/01P, *Bayer AG v Commission* [2004] 4 CMLR 13.
[112] Case C-551/03 P *General Motors v Commission* [2006] ECR I-3173, at paragraph 64.
[113]Joined Cases 29/83 and 30/83 *Compagnie Royale Asturienne des Mines SA and Rheinzink GmbH v Commission of the European Communities,* at paragraph 26.
[114] Paragraph 2.6 of the MyCC Guidelines on Chapter 1 Prohibition (Anti-Competitive Agreements).

of the Act as a concerted practice even where the parties have not explicitly subscribed to a common plan defining their action on the market but knowingly adopt or adhere to collusive devices which facilitate the coordination of their commercial behaviour.[115]

D.2 APPLICATION TO THE PRESENT CASE

The Commission's Findings

122. Interocean Warehousing claims that there is no conspiracy to fix the price as the meeting between the PKA and the Parties on 29.9.2017 was not held in a private place and therefore, the term anti-competitive in paragraph 69 of the Proposed Decision is without merit.

123. Relying on *Bayer v Commission,*[116] the form in which the concurrence of wills is manifested is not important. It catches agreements whether or not held publicly or in private. It is sufficient that the enterprises in question have expressed their joint intention to conduct themselves on the market in a specified way.

124. Without publicly distancing themselves from the content of an unlawful initiative or reporting it to the Commission, members of the cartel effectively compromise the discovery of the cartel and encourage its continuation.

[115] T-7/89 *Hercules Chemicals v Commission*, ECLI:EU:T:1991:75, at paragraph 242.
[116] Case T-41/96, *Bayer AG v Commission* [2000] ECR II-3383, at paragraph 173, affirmed on appeal Cases C-2 and 3/01P, *Bayer AG v Commission* [2004] 4 CMLR 13.

125. Accordingly, the argument that there was no conspiracy as the meeting was not held in private is hereby dismissed.

126. Learned counsel of SAL Agencies, WCS Warehousing, Regional Synergy, Intrexim and Pioneerpac submits that the Surcharge Memorandum was intended to obtain approval from PKA on the surcharges.

127. With respect, the Commission finds that this cannot be the case; for, on the evidence, it has been established that the Parties had signed and circulated the Surcharge Memorandum to their customers without the approval of PKA. The Commission finds the argument that the Surcharge Memorandum is for the purpose of submitting to PKA is without merit and hereby rejected.

E. PARTY TO AN AGREEMENT

128. The Commission's Guidelines on Chapter 1 Prohibition (Anti-Competitive Agreements) states as follows:

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

129. A participant at a meeting at which an anti-competitive agreement is concluded will be taken to have participated in that agreement, even if it does not take an active part unless the enterprise can establish that it manifestly opposed them or publicly distanced itself from what was discussed or agreed.[117] This is because a party that tacitly approves of an unlawful initiative, without publicly distancing itself from its content or reporting it to the competition authority, encourages the continuation of the infringement and compromises its discovery.[118]

130. The fact that a party has not taken part in all aspects of an anti-competitive agreement,[119] may not be fully committed to its implementation,[120] or participated only under pressure from other the other parties, does not mean that it is not a party to the agreement and/or concerted practices.

131. In the case of *Coop de France bétail et viande & Others v Commission of the European Communities* ("the French Beef"), the European Commission found that French beef farmers and slaughterers had entered into an anti-competitive agreement to set the minimum price of cattle and limit the number of imports of beef to France as a result of the mad cow disease crises in the French cattle market. The agreement was entered into by the beef farmers and slaughterers due to the intervention of the Minister of Agriculture of France.

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[117] Case C-70/12 P *Quinn Barlo Ltd v Commission* EU:C: 2013:351, at paragraph 42.
[118] Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 and C-213/02 P *Dansk Rørindustri and Others v Commission*, paragraphs 142 and 143; C-194/14 P *AC-Treuhand v Commission*, at paragraph 31; and C-70/12P *Quinn Barlo v Commission*, at paragraph 29.
[119] Case C-49/92 P *Commission v Anic Partecipazioni SpA* [1999] ECR I-4125, at paragraph 90.
[120] Case C-291/98 P *Sarrio v Commission* [2000] ECR I-9991, at paragraph 50.

132. Despite the intervention by the Minister, the European Commission held that the beef farmers and slaughterers were liable for infringing the anti-competitive agreement prohibition.

E.1 EXCLUSION OF LIABILITY THROUGH PUBLIC DISTANCING

133. The concept of public distancing intervenes in cartel cases and allows an enterprise that has attended anti-competitive meetings to evade liability by showing that it had "publicly distanced itself" from any such anti-competitive discussions.

134. On the concept of public distancing, the ECJ in *Aalborg Portland A/S and Others v Commission of the European Communities*[121] held that:

> *[81] According to settled case law, it is sufficient for the Commission to show that the undertaking concerned participated in meetings at which anti-competitive agreements were concluded, without manifestly opposing them, to prove to the requisite standard that the undertaking participated in the cartel. Where participation in such meetings has been established, it is for that undertaking to put forward evidence to establish that its participation in those meetings was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs.*
>
> *[82] The reason underlying that principle of law is that, having participated in the meeting without publicly distancing itself from what was discussed, the undertaking has given the other participants to*

[121] Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland A/S and Others v Commission of the European Communities*.

believe that it subscribed to what was decided there and would comply with it.

135. In *Total Marketing Services SA v Commission,*[122] the ECJ has also held that:

> *[20] It must be noted that, in accordance with the case law of the Court, a public distancing is necessary in order that an undertaking which participated in collusive meetings can prove that its participation was without any anti-competitive intention. For that purpose, the undertakings must demonstrate that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs.*
>
> *[21] The Court has also held that an undertaking's participation in an anti-competitive meeting creates a presumption of the illegality of its participation, which that undertaking must rebut through evidence of public distancing, which must be perceived as such by the other parties to the cartel.*

E.2 APPLICATION TO THE PRESENT CASE

Submissions by the Parties

136. The learned counsel submits that SAL Agencies, WCS Warehousing, Regional Synergy, Intrexim and Pioneerpac have refunded excess payments upon the "reversal of PKA's approval" (as alleged by counsel), therefore for that reason the Parties were no longer a party to the Infringing Agreement.

[122] Case C-634/13 P *Total Marketing Services SA v Commission*.

137. SAL Agencies, WCS Warehousing, Regional Synergy, Intrexim and Pioneerpac and Interocean Warehousing assert a similar argument. The Parties argue that it was PKA that conducted the meetings and that the Parties were merely invitees.

138. Besides the above argument, Interocean Warehousing submits as follows:

(i) It was not part of the WhatsApp Group chat; and, therefore there is no communication between Interocean Warehousing and other Parties regarding the fixing of surcharges for the handling services for long length and heavy lift cargoes;

(ii) "Mick Teh Inter" and Mr Teh Chee Kien were two different individuals;

(iii) It did not receive the reminder to the effect that PKA had warned the Parties not to prepare or sign any letters as that would be illegal; because the reminder was issued only in the WhatsApp Group chat;

(iv) It did not impose the rates as per the Surcharge Memorandum; and

(v) The purpose of the increased rates was to cover the additional costs of hiring specialised machinery.

The Commission's Findings

139. Referring to the argument by the learned counsel in **paragraph 136**, the Commission is of the view that the conduct and behaviour of the Parties amounted to participation in an agreement. The fact that

some of the Parties have refunded the excess payments, nonetheless, the act of refund by itself does not exonerate the enterprises from liability for breaching the competition law.[123]

140. Relying on the principle applied in *Aalborg Portland A/S and Others v Commission of the European Communities*[124] and *Total Marketing Services SA v Commission*[125] cited above, the Commission is of the view that the act of refunding the payment upon the instruction of PKA, by itself, does not amount to an act of public distancing.

141. For an enterprise to publicly distance itself from an anti-competitive agreement, the enterprise must express firmly and unequivocally to the other cartel members of its intention to distance itself from the anti-competitive conduct.

142. The Parties, except for Prima Warehousing, pleads that the PKA called for the meeting of 29.9.2017 that deliberated the implementation of the surcharges for long length and heavy lift handling services for import and export cargoes.

143. In the present case, the Commission is of the view that despite the meeting of 29.9.2017 being called by PKA, at that meeting, the Parties neither raised the issue of public distancing with regard to the Infringing Agreement, nor did the Parties inform the meeting that they did not have the intention of following through with the price

[123] COMP/35691 *Pre-Insulated Pipe Cartel* at paragraph 172; and COMP/36321 *Nintendo* at paragraphs 440 to 441.
[124] Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P.
[125] Case C-634/13 P *Total Marketing Services SA v Commission.*

fixing agreement. The Parties shall therefore be responsible for their participation in the Infringing Agreement.

144. The Commission has taken into consideration the arguments raised by Interocean Warehousing. During the oral representation session, Interocean Warehousing confirmed to the Commission that "Mick Teh" was its employee at the material time.[126] This substantiated the Commission's position that Interocean Warehousing indeed participated in the WhatsApp Group.

145. Even if Interocean Warehousing was not part of the WhatsApp Group, it is still, nevertheless, a party to the Infringing Agreement. Based on the evidence obtained during the course of investigation, Interocean Warehousing had placed its signature and company stamp on the Surcharge Memorandum denoting its agreement to the rates therein and for the same to be circulated to its respective customers.

146. In law, the conduct of an employee could be decisive and attributed to the enterprise that employs him. The conduct of a person who is generally authorised to act on behalf of the enterprise is sufficient to bring about liability to the enterprise, even if the owner or the managing director of the enterprise himself did not do or participate in the act, or was not even informed of the commission of an infringement of competition law.[127]

[126] Line 34, Page 17 of Transcript of Oral Representation by Interocean Warehousing dated 1.12.2020.
[127] Cases 100-103/80 *Musique Diffusion francaise* ECLI:EU:C:1983:158 at paragraph 97.

147. Interocean Warehousing contends that it was not aware of the reminder that the PKA had warned not to prepare or sign the Surcharge Memorandum as that would be illegal, since the reminder was only issued in the WhatsApp Group chat. We find no merit in this contention. An enterprise has the legal duty to ensure compliance with the Act without the need for any reminder by anyone.

148. It is the Commission's view that the argument by Interocean Warehousing that it did not strictly adhere to the agreement but had exercised some discretion in implementing the agreement does not in any way alter the findings of the Commission that the Parties had engaged in an anti-competitive agreement.

149. Based on the reasonings in the preceding paragraphs, the arguments by the Parties in **paragraphs 136 to 138** are hereby dismissed.

F. SINGLE CONTINUOUS INFRINGEMENT

150. An infringement of section 4 prohibition may result not only from a single isolated act but also from a series of acts or continuous conduct. Where it can be established that a set of individual agreements are interlinked in terms of pursuing the same objective or as part of a plan, they can be characterised as constituting a single continuous infringement. This interpretation cannot be challenged on the ground that one or several elements of that series of acts or continuous conduct are taken in isolation.

151. The concept of single continuous infringement was explained by the EU Court of First Instance ("CFI") in *Rhône-Poulenc v Commission*[128] (whose judgment was confirmed by the ECJ on appeal)[129] as follows:

> *"125. As regards the question whether the Commission was entitled to find that there was a single infringement, described in Article 1 of the Decision as "an agreement and concerted practice", the Court points out that, in view of their identical purpose, the various concerted practices followed and agreements concluded formed part of schemes of regular meetings, target price fixing and quota fixing.*
>
> *126. Those schemes were part of a series of efforts made by the undertakings in question in pursuit of a single economic aim, namely to distort the normal movement of prices on the market in polypropylene. It would thus be artificial to split up such continuous conduct, characterized by a single purpose, by treating it as consisting of a number of separate infringements. The fact is that the applicant took part – over a period of years – in an integrated set of schemes constituting a single infringement, which progressively manifested itself in both unlawful agreements and unlawful concerted practices"*[130]

152. Therefore, as affirmed in the cement cartel case, *Aalborg Portland,*[131] when different actions form an "overall plan", as their identical object distorts competition within the common market, the

[128] Case T-1/89 *Rhône-Poulenc v Commission* [1991] ECR II-867.
[129] Case T-7/89 *Hercules Chemicals v Commission* [1992] 4 CMLR 84.
[130] Case T-1/89 *Rhône-Poulenc v Commission* [1991] ECR II-867, at paragraphs 125 to 126.
[131] Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others v Commission* [2004].

Commission is entitled to impute responsibility for those actions based on participation in the infringement considered as a whole.

153. Moreover, the *Choline Chloride* case at both the European Commission ("EC")[132] and CFI[133] levels illustrate the concept that unequal and differing roles of each participant would not defeat a finding of a common agreement and/or concerted practices.

154. It would be artificial to subdivide into distinct agreements, concerted practices and conduct that form part of an overall plan restricting competition. The Commission is entitled to impute liability to each participant for the infringement as a whole, albeit limited to the period that they participated in the infringement.[134]

F.1 APPLICATION TO THE PRESENT CASE

Submissions by the Party

155. Interocean Warehousing contends the following:

(i) Interocean Warehousing's attendance of meetings organised by PKA was limited to only the first meeting on 29.9.2017;
(ii) It did not attend the meeting on 6.11.2017 despite receiving an invitation from PKA; and
(iii) It had no knowledge of a meeting held on 10.1.2018.

[132] COMP/E-2/37.533 *Choline Chloride* [2005] OJ L190/1.
[133] Joined Cases T-101/05 and T-111/05 *BASF AG and UCB SA v Commission of European Communities* [2007] ECR-4949, at paragraph 159.
[134] Case C-49/92 P, *Commission v Anic Partecipazioni* [1999] ECR I-4125, at paragraphs 82 and 83.

The Commission's Findings

156. The Commission considers each of the series of discussions as constituting a single continuous infringement. The series of discussions were all in pursuit of a common objective, namely, to distort the normal movement of rates for the handling services of long length and heavy lift of import and export cargo in Port Klang, Malaysia.

157. In this regard, the evidence sufficiently proves that Interocean Warehousing contributed to the common objective of the single continuous infringement. This is evident from the facts that Interocean Warehousing was a signatory to the Surcharge Memorandum on 25.5.2017 and there was already the implementation of the agreed rates by Interocean Warehousing before the meetings with PKA on 6.11.2017 and 10.1.2018.

158. The agreements and/or concerted practices establishing the single continuous infringement are complementary of one another. The purpose of the Surcharge Memorandum was to coordinate the rates for the handling services of long length and heavy lift of import and export cargo. These rates were agreed upon by the Parties prior to the meeting with PKA on 29.9.2017.

159. In light of the foregoing paragraphs, arguments submitted by Interocean Warehousing listed in **paragraph 155** are hereby dismissed.

G. OBJECT OR EFFECT OF SIGNIFICANTLY PREVENTING, RESTRICTING OR DISTORTING COMPETITION

160. Section 4(1) of the Act prohibits "a horizontal or vertical agreement between enterprises in so far as the agreement has the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services". In accordance with the plain reading of the section, by reason of the presence of the word "or" in the subsection (1), we interpret "object" and "effect" as being in the alternative and are not cumulative requirements. Thus, to apply section 4(2) of the Act, it is sufficient for the Commission to show the object or objects of that agreement and/or concerted practices.

161. It follows, therefore, that where it is established that an agreement has the *object* of significantly restricting competition, it is unnecessary for the Commission to further prove that the agreement would have an anti-competitive *effect* to establish a finding of infringement of section 4 prohibition.

162. The Commission's Guidelines on Chapter 1 Prohibition (Anti-Competitive Agreements) states the following:

> *"2.13…If the "object" of an agreement is highly likely to have a significant anti-competitive effect, then the MyCC may find the agreement to have an anti-competitive "object".*
>
> *2.14 Once anti-competitive "object" is shown, then the MyCC does not need to examine the anti-competitive effect of the agreement."*

163. As for the deeming provision under subsection 4(2) of the Act, in the recent judgement of the judicial review of Malaysian Airline System/AirAsia Berhad case, *Competition Commission v Competition Appeal Tribunal & Ors.*[135], the High Court of Kuala Lumpur held that:

> "*[85] Subsection 4(2)(b) as alluded to earlier, inter-alia states that a horizontal agreement between enterprises which has the object to share market is deemed to have the object of significantly preventing, restricting or distorting competition in any market for goods or services.*
>
> *[86] On this issue of deeming provision, subsection 4(2) is an express statutory provision and a presumption of law enacted by Parliament to assist the Commission in carrying out its duty to prove an infringement of subsection 4(1). It is obligatory to invoke this deeming provision if the prerequisite fact has been established. In the present case, the prerequisite fact is that the agreement has the object to share market.*"

164. The Commission is not required to prove the effect of the Infringing Agreement to arrive at a finding of infringement under the Act. The Commission's investigation reveals that the Parties had entered into an agreement vide the issuance of a Surcharge Memorandum that has the object of fixing the rates for the handling services of long length and heavy lift of import and export cargoes in Port Klang, Malaysia.

[135] Application for Judicial Review No: WA-25-82-05/2016 *Competition Commission v Competition Appeal Tribunal & Ors.*

H. SECTION 4(2)(a) OF THE ACT – HORIZONTAL PRICE FIXING AGREEMENT

165. Section 4(2)(a) of the Act refers to horizontal agreements that "fix, directly or indirectly, a purchase or selling price or any other trading conditions" as an example of anti-competitive conduct. Price is the main instrument of competition in most markets.

166. As further stated in section 4(2) of the Act, horizontal price fixing agreements between enterprises shall be deemed to have the object of significantly preventing, restricting or distorting the competition in the market. This is a deeming provision.

H.1 APPLICATION TO THE PRESENT CASE

Submissions by the Parties

167. The learned counsel for SAL Agencies, WCS Warehousing, Regional Synergy, Intrexim and Pioneerpac submits that it is fair and reasonable for the Parties to invoice their customers for the additional charges after rendering their services accordingly.

168. Interocean Warehousing raises the following arguments:

(i) It denies issuing and implementing the Surcharge Memorandum;
(ii) It has no knowledge of the WhatsApp Group chat; and
(iii) It was not aware of the communications via WhatsApp Group which show the Parties organising the fixing of the

surcharge for handling services for long length at RM350.00 per handling.

The Commission's Findings

169. It is not disputed that the Parties were carrying out commercial activities and operating at the same level of the supply chain, which is the provision of warehousing. The Parties are therefore in a horizontal relationship with each other.

170. The Commission is of the view that the Parties have the right to issue invoices for extra services rendered to customers but the imposition of rates must be determined independently.

171. The Commission's investigation reveals that the Parties had entered into an agreement vide the issuance of the Surcharge Memorandum having the object of fixing rates for the handling services of long length and heavy lift of import and export cargoes in Port Klang.

H.1.1 THE SURCHARGE MEMORANDUM

172. It is the finding of the Commission that the Parties had agreed to issue a memorandum dated 22.5.2017 titled, "Re: Implementation of Long Length Handling Surcharge for All Import & Export Cargoes Effective from 1st June 2017" (herein referred to as "the Surcharge Memorandum"). The Commission is satisfied that the Parties had proceeded to discuss the implementation of the surcharges for handling services for long length and heavy lift for import and export

cargoes in the WhatsApp Group chat during the period between 15.5.2017 and 25.5.2017.[136]

173. Additionally, Sathiaraj Francis a/l Rajagopal of SAL Agencies informed the Commission that PKA had disallowed the Parties from implementing the proposed surcharges on export cargoes without PKA's prior approval. Sathiaraj Francis a/l Rajagopal made the following statement:

> *"The meaning for the first paragraph of the memo, "Please to inform that warehouse operators in Northport/Westport have suggested to implement warehouse handling charges for Export cargoes." We want to propose the charges on the export cargoes because we have to bear the cost as we don't charge anything to consignee. However, the rate has not been decided yet by LPK. In this case, other operators came to our warehouse and spoke to me informally. There is cost involved and we do want to charge but we cannot charge because LPK does not allow us to do it."*[137]

174. Loo Suo Li informed the Commission that an agreement was reached between the Parties to implement standardised surcharges for the handling services for long length and heavy lift for import and export cargoes. The Parties had executed this agreement by respectively affixing the signatures of their authorised company representatives on the Surcharge Memorandum.

[136] Email from Mohd Azuan B. Mohamad Paudzi (via mohdazuan@pka.gov.my) dated 20.9.2017 and paragraph 32 of Statement of Loo Suo Li of Regional Synergy recorded on 10.10.2018; and Paragraph 13 of Statement of Ong Sue Ron of Regional Synergy recorded on 10.10.2018.
[137] Paragraph 17 of Statement of Sathiaraj Francis a/l Rajagopal of SAL Agencies Sdn. Bhd. recorded on 10.10.2018.

175. Ong Sue Ron of Regional Synergy confirmed to the Commission that the objective of the Surcharge Memorandum was to inform the Parties' respective customers that each warehouse operator was charging the same rate for handling services for long length and heavy lift for import and export cargoes. He explained to the Commission as follows:

> *"...We do this to tell our customers that not only are we charging, but others are also charging."*

176. Go Mooi Leng of Prima Warehousing also stated that the purpose and objective of the Surcharge Memorandum are to recover costs of damage resulting from cargo handling:

> *"Tujuan mengenakan Long Length Handling Surcharge adalah untuk recover cost bagi kerosakan akibat pengurusan kargo long length tersebut. Ini kerana apabila kita mahu mengeluarkan kargo daripada kontena, ia boleh merosakkan floor board. Jika floor board rosak, kami akan dikenakan caj bagi kerosakan tersebut daripada pihak perkapalan.*
>
> *…*
>
> *Sebab kenapa kami berbincang untuk mengenakan caj-caj tersebut adalah kerana kami sebagai warehouse operators perlu recover costs bagi kerja-kerja berkenaan."*

177. On the other hand, Teh Chee Guan of Interocean Warehousing stated that the surcharges were implemented to cover rental costs of heavier forklift equipment. The relevant parts of the statement of Teh Chee Guan of Interocean Warehousing are set out as follows:

> *"…So PioneerPac implement these charges as they incurred the additional costs by renting the heavier forklifts. Initially, the warehouses*

that implemented these charges are Regional Synergy, WCS Warehousing, Prima Warehousing and PioneerPac…" [138]

178. Poon Chee Hoong of WCS Warehousing admitted that the basis for the issuance of the Surcharge Memorandum was to address the complaints raised by consignees on the varying charges (higher or lower rates) imposed by warehouse operators in relation to surcharges for the handling of long length and heavy lift for import and export cargoes. He stated that:

"The Memo is a proposal made by the 7 warehouse operators as stated in the memo. The memo is a proposal to LPK to fix the LLC and HLC at the same time to address the concerns raised by consignees. We proposed to standardise the charge to make it convenient for consignees."

H.1.2 ISSUANCE OF THE SURCHARGE MEMORANDUM

179. The Commission sighted an email dated 1.6.2017 issued by WCS Warehousing to several freight forwarders, attaching the Surcharge Memorandum. The Commission is satisfied that the issuance of the Surcharge Memorandum by the Parties to their customers, amounts to an implementation of the anti-competitive agreement.

[138] Paragraph 5 of Statement of Teh Chee Guan of Interocean Warehousing recorded on 11.10.2018.

H.1.3 IMPLEMENTATION OF THE SURCHARGE MEMORANDUM

180. It is significant to note that, some of the Parties had issued invoices to their respective customers reflecting rates agreed in the Surcharge Memorandum despite the lack of approval from PKA.

181. The implementation of the Infringing Agreement is evident from invoices retrieved by the Commission during the course of the investigation. ***Table 4*** below reflects the implementation of the Infringing Agreement.

[The remainder of this page has been left intentionally blank]

Table 4: **Surcharge Implementation for Handling Services for Long Length and Heavy Lift of Import and Export Cargoes by the Parties**

SUBJECT MATTER/ PARTY	SAL AGENCIES	WCS WAREHOUSING	REGIONAL SYNERGY	INTREXIM	PIONEERPAC	PRIMA WAREHOUSING	INTEROCEAN WAREHOUSING
LONG LENGTH CARGOES <u>BEFORE</u> 22.5.2017	No general ledger and/or tax invoice to verify	Charged at RM [✂]/USD [✂] as per the tax invoice dated 20.2.2017 and 18.3.2017.	Charged at RM [✂] per handling as per the tax invoice sample dated 21.2.2017.	No general ledger and/or tax invoice to verify	Charged at RM [✂] per handling as per the tax invoice dated 10.1.2017, 6.2.2017, 3.3.2017, 9.3.2017 and 6.4.2017.	No general ledger and/or tax invoice to verify	Charged at RM [✂] as per the tax invoice samples dated 6.5.2017 and 9.5.2017.
LONG LENGTH CARGOES <u>AFTER</u> 22.5.2017	Charged at RM [✂] per handling as per the tax invoice samples dated 30.7.2018, 28.8.2018, 4.9.2018,	Charged at RM350.00 as per the Surcharge Memorandum. See Tax Invoice dated 30.5.2017, 7.6.2017, 7.8.2017, 11.8.2017, 24.8.2017,	Maintained charging at RM [✂] per handling as per the tax invoice samples dated 21.8.2017, 4.7.2018, 21.9.2018 and 21.9.3028.	No general ledger and/or tax invoice to verify	Started to charge at RM350.00 per handling as per the tax invoice samples dated 10.10.2017, 9.1.2018, 12.3.2018, 25.4.2018,	No general ledger and/or tax invoice to verify	Charged at RM350.00 as per the tax invoice samples dated 5.1.2018, 20.1.2018, 2.3.2018 and 17.5.2017. Also, charged at RM200.00 – 14.6.2017,

SUBJECT MATTER/ PARTY	SAL AGENCIES	WCS WAREHOUSING	REGIONAL SYNERGY	INTREXIM	PIONEERPAC	PRIMA WAREHOUSING	INTEROCEAN WAREHOUSING
	7.9.2018 and 28.9.2018.	7.10.2017 and 23.10.2017.	See others for more references.		27.4.2018 and 30.8.2018. Also charged RM [✂] per handling as per the tax invoice dated 13.6.2017, 1.7.2017, 10.7.2017, 10.8.2017 and 11.9.2017.		20.7.2017. 19.10.2017, 17.11.2017, 15.12.2017, 12.5.2018, 9.7.2018, 24.8.2018 and 18.9.2018. Also, charged at RM [✂] – 5.7.2017, 2.8.2017 and 18.9.2017.
HEAVY / OVERWEIGHT CARGOES <u>BEFORE</u> 22.5.2017	No general ledger and/or tax invoice to verify.	Charged at RM [✂] per handling as per the tax invoice samples dated 14.1.2017 and 22.3.2017.	Similar / correspond to the new surcharge in the Surcharge Memo. See e.g., Tax invoice dated 19.1.2017, 26.1.2017,	No general ledger and/or tax invoice to verify	Charged at RM [✂] per handling as per the tax invoice dated: 19.1.2017, 16.3.2017, 7.4.2017 and 27.4.2017.	Charged at RM [✂] per handling as per the tax invoice dated 13.9.2016	Charged at RM [✂] per handling as per the tax invoice dated 19.4.2017 (cargo weighing 16,819kg), RM [✂] per handling as per the tax invoice dated

SUBJECT MATTER/ PARTY	SAL AGENCIES	WCS WAREHOUSING	REGIONAL SYNERGY	INTREXIM	PIONEERPAC	PRIMA WAREHOUSING	INTEROCEAN WAREHOUSING
			31.1.2017, 1.2.2017 and 28.3.2017.				23.12.2017 (cargo weighing 15,009.5kg).
HEAVY / OVERWEIGHT CARGOES <u>AFTER</u> 22.5.2017	Charged at **RM1,200.00** per handling as per the tax invoice dated 8.9.2017 (cargo weighing 6,650kg). Charged at **RM750.00** – 26.5.2018 (cargo weighing 3,200kg). Also charged at RM [✂] – 7.3.2018 (cargo	Amended the previous surcharges at RM500.00 to the new surcharges (e.g., **RM750.00 and RM1,200.00**) in the Surcharge Memorandum See e.g., Tax Invoice samples dated 10.6.2017 and 29.7.2017.	Similar / correspond to the new surcharges in the Surcharge Memo. See e.g., Tax invoice dated 15.6.2017 (**RM750.00**, cargo weighing 3,500kg), 17.5.2018, 3.7.2017 (RM750, cargo weighing 12,595kg) 28.7.2018 and 3.10.2018.	Charged at RM [✂] per handling as per the tax invoice dated 17.1.2018 (cargoes weighing 4,005kgs and 3,804kgs). Also charged at RM [✂] per handling as per the tax invoice dated 18.7.2018 (cargo	Amended the charges making them similar / correspond to the new surcharges (e.g., **RM750.00 & RM1,200.00** in the Surcharge Memorandum. See e.g., Tax Invoice dated 2.3.2018, 4.4.2018, 8.6.2018 and 29.6.2018	Similar / correspond to the new surcharges (e.g., **RM1,200.00 & RM2,000.00** in the Surcharge Memorandum. See e.g., Tax Invoice samples dated 16.6.2017 (RM2,000.00 was imposed on a cargo weighing 11,830kgs), 6.10.2017 (RM1,200 was imposed on a cargo weighing 6,200kgs),	Similar / correspond to the new surcharges (e.g., **RM750.00 & RM1,200.00** in the Surcharge Memorandum. See e.g., Tax Invoice samples dated 10.1.2018 (5,130kg), 25.1.2018, 21.2.2018 (3,197kg), 14.3.2018 (4,220kg) 17.4.2018 (4,300kg), 22.3.2018 (6,596kg),

SUBJECT MATTER/ PARTY	SAL AGENCIES	WCS WAREHOUSING	REGIONAL SYNERGY	INTREXIM	PIONEERPAC	PRIMA WAREHOUSING	INTEROCEAN WAREHOUSING
	weighing 15,570kg).			weighing 3,431kgs)		10.7.2018 (charged at RM1,200.00)	23.5.2018 (8,135kg), 9.6.2018 (4,000kg), 21.8.2018 (4,965kg). Also charged at RM [✂] – 12.1.2017 (3,660kg), 4.2.2017 (3,100kg), 16.2.2017 (4,057kg), 3.4.2017 (4,300kg), 10.6.2017, 13.7.2017, 1.8.2017, 8.9.2017, 12.10.2017 and 20.11.2017.

SUBJECT MATTER/ PARTY	SAL AGENCIES	WCS WAREHOUSING	REGIONAL SYNERGY	INTREXIM	PIONEERPAC	PRIMA WAREHOUSING	INTEROCEAN WAREHOUSING
							Also charged at RM [✂] - 8.8.2018. Also charged at RM [✂] – 23.12.2017 and 19.4.2017 (6,620kg). Also charged at RM [✂] – 10.7.2017 and 14.8.2017.

182. The rates for the handling services of long length and heavy lift of import and export cargoes charged to customers as outlined in ***Table 4*** is therefore consistent with the tenor of the Surcharge Memorandum.

183. It is evident from ***Table 4*** that WCS Warehousing and Pioneerpac had implemented the agreed rates for long length cargoes handling service surcharges. The Commission notes that Interocean Warehousing also implemented the surcharges although it provided a discount to some of its customers. The Parties, except for Intrexim had implemented the fixed rates for heavy cargoes handling services surcharges. The Commission observes that SAL Agencies and Interocean Warehousing implemented the Infringing Agreement even though they selectively charged different rates to some of their customers.

184. It is not necessary to establish whether the Infringing Agreement is implemented or has any anti-competitive effect on the market; so long as the Infringing Agreement has the object of significantly preventing, restricting, or distorting competition in any market for goods or services.

I. EXCEPTION UNDER SECTION 3(4)(a) OF THE ACT

185. Section 3(1) and (2) provides that the Act applies to any commercial activity transacted both within and outside of Malaysia if they have an effect on competition in any market in Malaysia. Section 3(3) and subsection (4) of the Act provides for the non-application of the Act. Commercial activities under the Act by virtue of section 3(4)(a) of

the Act means any activity of a commercial nature but excluding "*any activity, directly or indirectly in the exercise of governmental authority*".

186. Acts that are considered as governmental authority were illustrated by the courts in the case of *Hii Yii Ann v Deputy Commissioner of Taxation of the Commonwealth of Australia & Ors.*[139], where it was held as follows:

> "[71] *The acts of D1 and D2 were clearly not "commercial" as they are plainly a discharge of functions by the Australian Tax Office (ATO) which is a statutory body carrying out its obligations of administering the taxation laws of Australia. In my view, the character of ATO's function (i.e., tax assessment and collection and determination of tax residency) and the nature of acts flowing from a discharge of that function, cannot in any sense be classified as "commercial". I am impelled to this view because the ATO's discharge of tax functions was something which a private person was not capable of doing, and thus does not have any private law content or character to bring the present matter under the heading of acta jure gestionis (commercial).*
>
> *[74] … In my view, the actions of D1 and D2 are a clear and obvious manifestation of a discharge of functions by the Australian Tax Office (ATO), which is a statutory body tasked with the obligation of administering the taxation laws of Australia. The character of that function (i.e., tax assessment and collection and determination of tax residency) and the nature of acts flowing from a discharge of that function, are not "commercial" activities… As such, the acts of the defendants (ATO) in carrying out their duties under the relevant*

[139] *Hii Yii Ann v Deputy Commissioner of Taxation of the Commonwealth of Australia & Ors*. [2017] 10 CLJ 743.

taxation laws of Australia undoubtedly fall within the category of governmental authority rather than those of a commercial or private action. The actions of the defendants vis-à-vis the plaintiff, are plainly governmental acts, acta jure imperii, which attract sovereign immunity."

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

I.1 APPLICATION TO THE PRESENT CASE

Submissions by the Parties

188. The learned counsel for SAL Agencies, WCS Warehousing, Regional Synergy, Intrexim and Pioneerpac argues as follows:

(i) PKA informed the Parties that it would oversee the implementation of the surcharges to avoid the increased cost of doing business in Port Klang;

(ii) PKA is the Government body that controls and fixes the rates fixed by the Parties;

(iii) PKA is empowered to gazette the rates under section 16(8) of Act 488 and it is common for PKA to alter any charges without gazetting them;

(iv) The Parties acted on the approval by the PKA hence were unable to "manipulate" PKA into approving the Infringing Agreement;

(v) PKA possesses the power to direct the Parties to take or to refrain from taking such actions as PKA may specify. Pursuant to this, PKA has given a direction to the Parties to fix the rates of the long length and heavy lift handling charges; and

(vi) PKA is empowered to regulate rates raised by licensees and the fixed rates was to "eliminate the uncertainty in pricing".

The Commission's Findings

CHRONOLOGY OF CORRESPONDENCE BETWEEN THE PARTIES AND PKA

I.1.1 MEETING BETWEEN PKA AND THE PARTIES HELD IN SEPTEMBER 2017

189. During the course of the investigation, the Commission discovered that a meeting entitled, *"Mesyuarat Bagi Membincangkan Isu-isu Berkenaan Pergudangan Di Dalam Zon Bebas Pelabuhan Klang"*[140] was held on 29.9.2017 between PKA and the Parties to discuss the implementation of the surcharges for long length and heavy lift handling services for import and export cargoes.

[140] *Minit Mesyuarat Bagi Membincangkan Isu-isu Berkenaan Pergudangan Di Dalam Zon Bebas Pelabuhan Klang* dated 29.9.2017.

190. The meeting deliberated on long length handling surcharges and it was agreed that the surcharges would only be imposed subject to several conditions, such as the cargoes exceed 12 feet in length and have a minimum weight of 1,000kg. It was also agreed that this surcharge did not apply to cargoes above 3 tonnes. For such cargoes, the applicable surcharge was RM350.00 per package which includes the unloading and loading of cargoes.[141] PKA retained the right to revise the conditions as it deems necessary.[142]

191. In relation to the issue of heavy lift handling charge, the Chairman of the meeting said that some warehouse operators were imposing the surcharge based on the aggregated weight of several packages when this surcharge was only applicable for individual package exceeding 3 tonnes. The meeting then decided that the heavy lift handling surcharge could be imposed subject to the following conditions:

(i) prior approval of the Freight Agent and Consignee;
(ii) the Consignee is given the option to appoint other suppliers of forklift and driver services;
(iii) early preparation is made in writing by the Delivery Agent before the opening of container by the Warehouse Operator;
(iv) the surcharges apply to individual cargo/package exceeding 3,000kg;
(v) the authorized surcharges are as follows:

[141] Page 2 of *Minit Mesyuarat Bagi Membincangkan Isu-isu Berkenaan Pergudangan Di Dalam Zon Bebas Pelabuhan Klang* dated 29.9.2017.
[142] Page 2 of *Minit Mesyuarat Bagi Membincangkan Isu-isu Berkenaan Pergudangan Di Dalam Zon Bebas Pelabuhan Klang* dated 29.9.2017.

(a) > 3,000kg - ≤5,000kg - RM750.00 / shift
(b) > 5,000kg - ≤10,000kg - RM1,200.00 / shift
(c) > 10,000kg - ≤15,000kg - RM2,000.00 / shift
(d) > 15,000kg - ≤18,000kg - RM2,800.00 / shift
(e) > 18,000kg - ≤24,000kg - RM3,800.00 / shift

(vi) the above surcharges are applicable for the handling of cargo at one time, on the same day; and
(vii) the PKA may revise the above conditions where necessary.

192. From the contents of the said minutes, it can be inferred that PKA had instructed the warehouse operators to halt the imposition of long length handling surcharge for cargo less than 300 kg as follows:

> *Tuan Pengerusi memaklumkan bahawa caj 'long length' juga dikenakan bagi kargo kurang daripada 300kg dimana ianya tidak memerlukan penngendalian tambahan dan ianya harus diberhentikan serta merta.*[143]

193. Lim Kwang Yew of SAL Agencies clarified to the Commission as follows:

> *"23. There was a meeting with LPK held on 29 September 2017 to discuss on the handling surcharge of the long length cargoes. At the meeting LPK had asked the warehouse operators to temporarily stop imposing the handling surcharge of long length*

[143] Page 2 of *Minit Mesyuarat Bagi Membincangkan Isu-isu Berkenaan Pergudangan Di Dalam Zon Bebas Pelabuhan Klang* dated 29.9.2017.

cargoes until LPK has got a clearance to enable the warehouse operators to do so."[144]

194. The heavy lift handling surcharges as documented in the minutes of the meeting dated 29.9.2017 were similar to the rates stipulated in the Surcharge Memorandum dated 22.5.2017. The evidence, therefore, suggests that the Parties were attempting to influence PKA into agreeing with the Parties' Surcharge Memorandum rates on heavy lift handling charges because the Parties had intended to avoid receiving further complaints from their respective customers.[145]

195. On the same note, the Commission found that the long length handling and heavy lift handling surcharges for import and export cargoes are not part of the tariffed and/or gazetted charges that are regulated by PKA.[146] From the aforesaid minutes and the earlier WhatsApp Group chat discussions, the Commission is satisfied that the Parties had come to an agreement and/or concerted practices on the rates of the long length and heavy lift handling charges to be billed to their customers even before the meetings held with PKA.

196. The Commission obtained an email correspondence of Mohd Azuan B. Mohamad Paudzi of PKA addressed to several representatives of the Parties.[147] The email states that PKA had received feedback

[144] Paragraph 23 of Statement of Lim Kwang Yew of SAL Agencies recorded on 10.10.2018.
[145] Paragraph 15 of Statement of Go Mooi Leng of Prima Warehousing recorded on 11.10.2018; and paragraph 19 of statement of S. Kumaresen a/l R. Silvarajoo of Port Kelang Authority recorded on 20.12.2018.
[146] Paragraph 18 of Statement of S. Kumaresen a/l R. Silvarajoo of Port Kelang Authority recorded on 20.12.2018.
[147]Exhibit WH6-5 Email from Mohd Azuan B. Mohamad Paudzi to [✂], [✂], [✂], [✂], [✂], [✂], [✂], [✂], [✂], [✂], [✂], [✂], [✂], [✂], dated 20.9.2017 titled, "PELAKSANAAN LONG LENGTH HANDLING CHARGE & HEAVY LIFT HANDLING CHARGE BAGI KARGO LCL".

from consignees that many warehouse operators were imposing long length handling charges for cargo measuring below 10 feet in length and cargo that could be lifted with a single forklift. Additionally, the email further states that the consignees also provided PKA with information that the charges for handling service of heavy lift cargo were also imposed by warehouse operators on consignees for cargoes weighing below 3 tonnes. In an effort to resolve these issues, PKA instructed the warehouse operators to cease imposing the said charges with immediate effect.[148] An excerpt from the email reads as follows:

> ***"PELAKSANAAN LONG LENGTH HANDLING CHARGE & HEAVY LIFT HANDLING CHARGE BAGI KARGO LCL***
> ***Mohd Azuan B. Mohamad Paudzi*** <[redacted]>*Wed, Sep 2017*
> *To:* [redacted] <[redacted]>, "[redacted]" <[redacted]>, "[redacted]" <[redacted]>, "[redacted]" <[redacted]>, "[redacted]", <[redacted]>, "[redacted]", <[redacted]>, "[redacted]" <[redacted]>, "[redacted]" <[redacted]>, "[redacted]" <[redacted]>, "[redacted]" <[redacted]>, "[redacted]" <[redacted]>, *Hairul Rizal bin Abu Hassan* <[redacted]>, "[redacted]" <[redacted]>
> *Cc: "S.Kumaresen"* <[redacted]>, *Mehala A/P Navaratnasingam* <[redacted]>, *Haslinda Bt Ahmad* <[redacted]>

[148] Exhibit WH1-6 Extracted email entitled *PELAKSANAAN LONG LENGTH HANDLING CHARGE & HEAYV LIFT HANDLING CHARGE BAGI KARGO LCL* dated 20.9.2017 retrieved on 12.10.2018.

Tuan/Puan

Adalah saya dengan segala hormatnya diarah merujuk kepada perkara di atas.

2. Dimaklumkan bahawa pihak Lembaga Pelabuhan Kelang (LPK) telah menerima maklum balas daripada pihak Konsaini yang mana kebanyakan Operator Gudang mengenakan Long Length Handling Charge bagi kargo yang panjangnya berukuran kurang daripada 10 kaki dan kargo yang boleh dikendalikan menggunakan satu forklift sahaja serta Heavy Lift Handling Charge bagi kargo yang beratnya kurang daripada 3000 kg.

3. Sehubungan itu, semua Operator Gudang diarahkan untuk memberhentikan caj-caj tersebut berkuat kuasa serta merta dan hadir ke mesyuarat yang akan diadakan pada ketetapan seperti berikut:

Tarikh : 29 September 2017 (Jumaat)
Masa : 9.30 pagi*…"*

197. Additionally, during the unannounced inspection at Regional Synergy's premises on 10.10.2018, the Commission retrieved an internal email of Regional Synergy dated 13.12.2017, sent by Loo Suo Li to employees of Regional Synergy. The email states that the long length handling surcharge amounting to RM350.00 per cargo shall not be shared with external parties since PKA was revising or adjusting the minimum weight requirements. The same email correspondence attached a copy of the meeting minutes with PKA dated 29.9.2017.[149] The email excerpt states as follows:

"Sue <[redacted]>
To: [redacted], [redacted], [redacted]
Cc: [redacted], [redacted], [redacted], [redacted], [redacted], [redacted]

[149] Email titled, "heavy forklift fee" dated 13.12.2017 from [redacted] to KPM Import, [redacted], Westport import' [redacted].

Heavy forklift fee

Attachment: Minit Mesyuarat Pelaksanaan Long Length Handling Charges Heavy Lifting.pdf

Dear All,

Pls take note for the heavy cargo no more use the RM40.00 rate as mention before. kindly help to delete off from the system and check any possible to insert per ton basis to control the charges auto appear.

Long length surcharge under RM 350.00/ case.

Do not provide this Tariff to anyone yet cause LPK still need to do some adjustment for the long length should not have any Min weight control. Thanks…."

I.1.2 MEETING BETWEEN PKA AND THE PARTIES HELD IN NOVEMBER 2017

198. A meeting was held between the PKA and the Parties on 6.11.2017 entitled "*Mesyuarat Bersama Operator-operator Gudang bagi Membincangkan Isu-isu Berkaitan Pergudangan LCL"*[150] to discuss, among others, issues relating to less container load. The meeting was held to refine the first proposal to standardise the long length and heavy lift handling surcharges for import and export cargoes.[151]

199. The Commission retrieved an email from Mohd Azuan B. Mohamad Paudzi of PKA dated 3.11.2017 entitled "*Mesyuarat Bagi*

[150] Exhibit WH5-24 *Minit Mesyuarat Bersama Operator-operator Gudang Bagi Membincangkan Isu-isu Berkaitan Pergudangan LCL* prepared by Port Kelang Authority.
[151] Paragraph 16 of Statement of Capt. Subramaniam a/l Karuppiah of Port Kelang Authority recorded on 4.7.2019.

Membincangkan Isu-isu Berkaitan Pergudangan (LCL)" inviting the Parties for a meeting with PKA to be held on 6.11.2017.[152]

200. The meeting of 6.11.2017 deliberated on the issue of long length cargoes wherein PKA would reconsider the proposal made by the Parties regarding the imposition of RM200.00 charge on cargoes of more than 12 feet in length and weighing less than 3,000 kg. PKA suggested that, among other conditions, the weight for long length cargoes should be between 500 kg to 3,000 kg and the length should exceed 12 feet.

201. Based on the minutes of the abovementioned meeting, the Commission also observed that the Chairman of the meeting had informed the meeting of the proposed rates to be implemented on heavy lift cargoes as follows:

(a)	> 3,000kg	- ≤5,000kg	- RM750.00 / shift
(b)	> 5,000kg	- ≤10,000kg	- RM1,200.00 / shift
(c)	> 10,000kg	- ≤15,000kg	- RM2,000.00 / shift
(d)	> 15,000kg	- ≤18,000kg	- RM2,800.00 / shift
(e)	> 18,000kg	- ≤24,000kg	- RM3,800.00 / shift

202. The meeting agreed that the imposition of the proposed rates shall be subjected to the conditions that consignees would be allowed to

[152] Exhibit WH3-13 Email from Mohd Azuan B. Mohamad Paudzi to [redacted]; Hairul Rizal bin Abu Hassan; [redacted]; dated 3.11.2017. (FW *MESYUARAT BAGI MEMBINCANGKAN ISU-ISU BERKAITAN PERGUDANGAN (LCL).*

utilise their contractors and prior notification is to be given to warehouse operators. Moreover, the Commission also notes that the proposed rates have been discussed with the forklift lifting equipment service provider, Maltaco.[153]

203. Based on the preceding paragraphs as well as the said minutes of the meeting, the Commission finds that the Parties were consistent in their approach to influence PKA to standardize the long length and heavy lift handling surcharges for import and export cargoes, to prevent any future complaints from customers. The Parties had made repeated attempts to convince PKA to standardize the long length and heavy lift handling surcharges for import and export cargoes as in the previous PKA meeting on 29.9.2017.[154]

I.1.3 MEETING BETWEEN PKA AND THE PARTIES HELD IN JANUARY 2018

204. A meeting was held on 10.1.2018 between PKA and the Parties, entitled "*Mesyuarat Pengawalseliaan Tariff LCL Consolidation (Eksport) Di Pelabuhan Klang – Caj Heavy Lift & Long Length".*[155] The meeting discussed the surcharges for long length and heavy lift handling services.[156]

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[153] Page 3, Item 2 of *Minit Mesyuarat Bersama Operator-Operator Gudang Bagi Membincangkan Isu-Isu Berkaitan Pergudangan LCL* prepared by Port Kelang Authority dated 6 November 2017.
[154] *Minit Mesyuarat Bagi Membincangkan Isu-isu Berkenaan Pergudangan di Dalam Zon Bebas Pelabuhan Klang bertarikh 29.9.2017.*
[155] Exhibit WH7-2 *Minit Mesyuarat Pengawalseliaan Tariff LCL Consolidation (Eksport) Di Pelabuhan Klang – Caj* Heavy Lift & Long Length prepared by Port Kelang Authority dated 10.1.2018.
[156] Paragraph 16 of Statement of Capt. Subramaniam a/l Karuppiah of Port Kelang Authority recorded on 4.7.2019.

205. From the meeting minutes, the Chairman of the meeting disagreed with the Parties' proposal to impose RM350.00 for long length handling surcharge. The Chairman of the meeting was of the view that the proposed charge was excessive and there should be a minimum weight amount along with several other conditions to be considered before the RM350.00 surcharge proposed by the Parties could be imposed.

206. Based on the minutes of this meeting, the Chairman suggested a ceiling price of RM200.00 per shipment for long length cargoes to be subjected to the following conditions:

(i) includes inward and outward-bound cargoes;
(ii) the cargoes must exceed 12 feet in length and weigh more than 200kgs per shipment but not exceeding 3 tonnes per package;
(iii) the delivery or consignee agent shall be allowed to appoint a PKA "licensed service provider" to handle the cargoes; and
(iv) the delivery or consignee agent shall be required to inform the warehouse operator, if the former has appointed its service provider, with complete details on the shipment before the commencement of cargo unloading.

207. The Parties agreed with the Chairman's suggestion at this meeting that long length and heavy lift handling surcharges for import and export cargoes are to be enforced only upon the issuance of a circular by PKA.

208. The minutes of the meeting also captured discussions on heavy lift handling charges, wherein PKA stated that it had received multiple complaints on the lifting charges on heavy cargoes, weighing above 3 tonnes, from importers. The Chairman of the meeting then suggested a list of ceiling prices for the handling of heavy cargoes, the details of which are as follows:

	WEIGHT (TONNES)	**PROPOSED CHARGES (RM)**
(a)	>3 - ≤ 5	750.00
(b)	>5 - ≤10	1200.00
(c)	>10 - ≤15	2000.00
(d)	>15 - ≤18	2800.00
(e)	>18 - ≤24	3800.00

209. The above proposed rates shall be subject to the weight of the cargoes as well as the following conditions:

(i) applicable to cargoes weighing 3 tonnes and above;
(ii) the delivery or consignee agent is allowed to appoint a PKA licensed service provider;
(iii) the delivery or consignee agent is required to notify the warehouse operator of the decision to appoint its service provider; providing full details of the shipment before cargo unloading; and
(iv) the charges will be imposed based on one shift (based on the port operation hours) or a part thereof, independent of the number of containers handled.

210. The PKA informed the meeting that it would oversee the implementation of the charges to prevent arbitrary or excessive charging which could lead to increased costs of doing business in Port Klang. The Parties agreed with PKA's suggestions and the Chairman of the meeting informed that the charges shall only be implemented upon issuance of PKA's circular.

211. An email communication thread dated between 24.12.2017 and 26.12.2017 entitled, *"RE: PENGAWALSELIAAN TARIFF LCL CONSOLIDATION (ESKPORT) DI PELABUHAN KLANG"* between Mehala a/p Navaratnasingam (via mehala@pka.gov.my) and the Parties, confirmed the Parties' attendance in the abovesaid meeting with PKA on 10.1.2018.[157]

212. The Commission finds that PKA had changed its stand from initially allowing warehouse operators to impose a surcharge for the long length handling services of the import and export cargoes[158] to disallowing the same due to complaints received from customers. Moreover, PKA regarded the rate of RM350.00 to be exorbitant. An extract of the meeting minutes is set out below:

[157] Email from Mehala a/p Navaratnasingam ([redacted]) to [redacted]; and [redacted] (RE PENGAWALSELIAAN TARIFF LCL CONSOLIDATION (EKSPORT) DI PELABUHAN KLANG.msg) dated 24.12.2017.

[158] Exhibit WH3-11 Screenshot of WhatsApp Chat Logs dated 29.9.2017 retrieved from Loo Suo Li of Regional Synergy (IMG_4432) and *Minit Mesyuarat Bagi Membincangkan Isu-isu Berkenaan Pergudangan Di Dalam Zon Bebas Pelabuhan Klang* dated 29.9.2017; and paragraph 12 of the Statement of Poon Chee Hoong of WCS Warehousing recorded on 5.12.2018.

*"**2. PERBINCANGAN***

2.1 Lifting Charges – Long Length Cargo

2.1.1 Tuan Pengerusi memaklumkan lifting charges bagi long length cargo perlu diselaraskan kerana pihak LPK telah menerima beberapa aduan daripada pihak Pengimport.

2.1.2 Beliau juga memaklumkan caj yang dicadangkan oleh Operator Gudang sebanyak RM350.00/shipment adalah sangat tinggi dan ianya perlu mempunyai berat minima dan syarat-syarat lain tertentu.[159]…"

213. It is not disputed that the PKA is empowered by section 16 of Act 488 to maintain, or provide for the maintenance of adequate and efficient port services and facilities at reasonable charges in addition to its power to levy charges. The levying of charges by the PKA under section 16 of Act 488, relying on the decision in *Hii Yii Ann v Deputy Commissioner of Taxation of the Commonwealth of Australia & Ors.* amounts to the discharge of functions by PKA which is a statutory body carrying out its obligation in maintaining and operating the port services in Port Klang. Thus, the levying of charges amounts to an exercise of governmental authority.

214. It is the Commission's considered opinion that the standardisation of rates was initiated by the Parties, not PKA. The Parties approached PKA to standardise several unregulated charges, namely, long length and heavy lift handling surcharges for import and export cargoes, export handling surcharges, and export Fuel Adjustment Factor ("FAF").[160]

[159] Paragraph 2 of *Minit Mesyuarat Pengawal Seliaan* dated 10.1.2018.
[160] Paragraph 21 of Statement of S. Kumaresen a/l R. Silvarajoo of Port Kelang Authority recorded on 20.12.2018.

215. Discussions between PKA and the warehouse operators for Northport and Westport on the heavy lift and long length lifting and handling surcharges had taken place even before September 2017 and had continued between November 2017 and January 2018.[161] Discussions between PKA and the warehouse operators had continued after September 2017 as PKA was not agreeable to the proposed rates by the warehouse operators at that material time.[162]

216. A meeting between the PKA and the warehouse operators held in January 2018 decided for the imposition of a ceiling price of RM200.00 for the handling surcharges of long length to be further deliberated by PKA. PKA informed the Commission that in the event the top management of PKA was to approve the ceiling price, the warehouse operators would then be allowed to charge RM200.00 or below.[163]

217. PKA informed that all charges were to remain *status quo* and the proposal to standardize and/or regulate the charges of heavy lifting, long length export handling and export FAF had to be put on hold as a result of ministerial direction.[164]

218. The Commission takes note, in particular, that PKA had prepared a draft circular on the proposed new charges in January 2018 which

[161] Paragraph 32 of Statement of S. Kumaresen a/l R. Silvarajoo of Port Kelang Authority recorded on 20.12.2018
[162] Paragraph 34 of Statement of S. Kumaresen a/l R. Silvarajoo of Port Kelang Authority recorded on 20.12.2018
[163] Paragraph 35 of Statement of S. Kumaresen a/l R. Silvarajoo of Port Kelang Authority recorded on 20.12.2018.
[164] Paragraph 21 of Statement of S. Kumaresen a/l R. Silvarajoo of Port Kelang Authority recorded on dated 20.12.2018.

was subsequently deferred. This relevant statement sets out as follows:

> *"The charges that were proposed by the warehouse operators are for heavy lifting, long length, export handling, and export FAF. However, due to the recent ministerial direction, these charges shall be maintained which explains why the proposed draft circular prepared in January 2018 on the new charges have been put on hold."*[165]

219. This is supported by the following statement made by Capt. Subramaniam a/l Karuppiah, the General Manager of PKA as follows:

> *"19. In this regard, the Ministry of Transport ("MOT") had instructed LPK to avoid increasing any charges that may have an increase to cost of doing business. Hence, the matter was put on hold until the completion of the general election…*
>
> *21. Subsequently, after the change of government, a general announcement by the Minister of Transport was made indicating no increase to cost of doing business was allowed for the time being."*[166]

220. It is the Commission's view that the conduct of the Parties in fixing the rates for long length and heavy lift handling surcharges was not the result of PKA's intervention to avoid the increased cost of doing business in Port Klang and to eliminate the pricing uncertainty as claimed by the learned counsel.

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[165] Paragraph 21 of Statement of S. Kumaresen a/l R. Silvarajoo of Port Kelang Authority recorded on dated 20.12.2018.
[166] Paragraphs 19 and 21 of Statement of Capt. Subramaniam a/l Karuppiah of Port Kelang Authority recorded on 4.7.2019.

221. Based on the details outlined in **Part 3:H** above, the Parties signed and implemented the Surcharge Memorandum. The surcharges were never prescribed by the PKA. This expressed the Parties' joint intention to fix the rates for long length and heavy lift handling surcharges. The issuance of the Surcharge Memorandum by the Parties to their customers amounts to an implementation of the Infringing Agreement.

222. There is no evidence submitted by the learned counsel to support his argument that PKA granted approval for the Parties to implement the Infringing Agreement. The Commission reiterates its position as expressed in **paragraph 34** of this Decision. The Commission takes note of the statement of the PKA's legal adviser, which states:

> *"Bagi pendapat saya, long-length handling surcharge dan heavy-lift handling surcharge adalah perkara yang tidak dinyatakan di dalam Undang-undang Kecil Lembaga Pelabuhan Kelang 2012. Oleh itu, long-length handling surcharge dan heavy-lift handling surcharge tidak dikawalselia oleh LPK. LPK hanya membantu sebagai pengantara (intermediary) antara pengendali operator (warehouse operators) dan pengguna pelabuhan (port users) apabila timbul pertelingkahan."*[167]

223. The Commission reiterates its position that PKA neither encouraged nor authorized the Parties to enter into the Infringing Agreement. In any event, the Commission would like to refer to *Greek Ferries*[168] and *Spanish Raw Tobacco*[169] where the European Commission made a finding that encouragement or authorisation to the anti-

[167] Paragraph 21 of Statement of Puan Fazilah Surkisah binti Mohammad of PKA recorded on 16.5.2019.
[168] COMP/34466 *Greek Ferries*, at paragraph 163.
[169] COMP/38238 *Spanish Raw Tobacco*, at paragraph 427.

competitive agreement by a public authority does not absolve the enterprises from infringing the law.

224. The Commission is satisfied that the conduct of the Parties in fixing the rates of handling surcharges for long length and heavy lift of import and export cargoes was not a result of their compliance to the directions of PKA. The Commission is therefore of the view that the Infringing Agreement is not exempted from the application of the Act by virtue of section 3(4)(a).

J. RELIEF OF LIABILITY UNDER SECTION 5 OF THE ACT

Submissions by the Parties

225. The counsel for SAL Agencies, WCS Warehousing, Regional Synergy, Intrexim and Pioneerpac argues that the Infringing Agreement does not allow the Parties to eliminate competition completely in respect of a substantial part of the relevant services.

226. In this regard, counsel relies on limb (d) of section 5 of the Act. We find no merits in this argument as any reliance on section 5 of the Act as a defence, the Parties must convince the Commission that it satisfies all the 4 conditions and not just one of the conditions provided under section 5 of the Act.

K. BURDEN AND STANDARD OF PROOF

227. It is trite law that the Commission bears the burden of proving that an infringement under section 4 of the Act has been committed. The standard of proof to be applied is the civil standard which is on the balance of probabilities.

228. This follows the structure of the Act, that is, the decision by the Commission follows an administrative procedure, and directions and financial penalties are enforceable by way of civil proceedings under section 42 of the Act by bringing proceedings before the High Court.

Discretion to Rely on Any Available Evidence

229. The Commission relies on the principles laid down in *JJB Sports v Office of Fair Trade,*[170] wherein the Commission will look at the available evidence as a whole when deliberating its decision in a case.

230. The Commission maintains the view that the Commission may rely on all evidence, be it direct evidence or indirect evidence. The Commission is at liberty to take into account every piece of evidence in so far as they are considered relevant by the Commission to determine and satisfy itself that the ingredients of the infringing provision have been established.

[170] *JJB Sports v Office of Fair Trade* [2004] CAT 17, at paragraph 206.

231. The Commission's legal burden to prove the infringement on a balance of probabilities is discharged when there is strong and convincing evidence that such infringement exists.[171] The court in *Lafarge SA v European Commission*[172] stated that:

> [22] *… Even if the Commission discovers evidence explicitly showing unlawful contact between traders, such as the minutes of a meeting, it will normally be only fragmentary and sparse, so that it is often necessary to reconstitute certain details by deduction. In most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules.* [Emphasis added]

232. There is no legal burden on the Commission to establish the subjective intention of the Parties when assessing the object of an agreement.[173] The fact that the Parties did not intend to restrict competition and infringe the section 4 prohibition will not deprive an agreement of an anti-competitive object if, considering the agreement as a whole objectively, has the object of fixing prices.

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[171] *JJB Sports v Office of Fair Trade* [2004] CAT 17.
[172] Case C-413/08 *Lafarge SA v European Commission*, at paragraph 22.
[173] Joined Cases 29/83 and 30/83 Compagnie *Royale Asturienne des Mines SA and Rheinzink GmbH v Commission of the European Communities*, at paragraph 26; and Case C-8/08 *T-Mobile Netherlands BV and Others v Raad van bestuur van de Nederlandse Mededingingsautoriteit.*

K.1 APPLICATION TO THE PRESENT CASE

The Commission's Findings

233. The Commission rejects the argument of Interocean Warehousing that the Commission has failed to discharge the burden of proof that Interocean Warehousing intends to prevent or distort the value of goods or services by attending a meeting organised by the PKA.

234. The number of meetings attended by Interocean Warehousing is immaterial so long as there were opportunities to take into account the information exchanged with its competitors; and that the information was then used to determine its conduct on the relevant market in question resulting in knowingly discarding practical cooperation between them at the expense of competition. This is translated through the signing of the Surcharge Memorandum and the implementation of the Infringing Agreement.

235. The learned counsel for SAL Agencies, WCS Warehousing, Regional Synergy, Intrexim and Pioneerpac raises the issue that the Commission fails to establish the infringement because the Commission only relies on one document, namely the Surcharge Memorandum. With respect, it is not true that the Commission relies only on one document. The Commission finds that there is strong and convincing evidence that an infringement of section 4 prohibition had been committed, and this we have elaborated in **paragraphs 90 to 226**. Accordingly, the argument raised by the learned counsel is hereby dismissed.

L. RELEVANT MARKET

236. The term “market” is defined in section 2 of the Act 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 or services and other goods and services that are substitutable for, or otherwise competitive with, the first-mentioned goods and services.”[174]

237. Market definition is a useful step to ascertain whether anti-competitive conduct has a significant effect on competition or whether enterprises possess market power.[175]

238. The Commission has formed a view of the relevant market in order to calculate the Parties’ relevant turnover in the market affected by the Infringing Agreement for the purposes of establishing the level of financial penalties that the Commission decides to impose which will be discussed in **Part 4** of this Decision.

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

240. The Parties do not contest the Commission’s conclusion as outlined in this section.

[174] Section 2 of the Act.
[175] Paragraphs 1.8 and 1.9 of the MyCC Guidelines on Market Definition.

PART 4: THE COMMISSION'S DECISION

A. DIRECTIONS UPON A FINDING OF AN INFRINGEMENT

241. In light of the nature of the infringement of the Act, and taking into consideration all evidence obtained throughout the investigations described above, the Commission hereby issues this Decision pursuant to section 40 of the Act against the Parties for entering into agreements in breach of section 4(1) read with section 4(2) and section 4(3) of the Act.

242. Section 40(1) of the Act provides that where the Commission has decided that an agreement has infringed the section 4 prohibition, the Commission may give the infringing enterprises directions as it considers appropriate to bring the infringement to an end.

243. Accordingly, the Commission hereby directs the Parties to undertake the following:

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

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

B. GENERAL POINTS ON FINANCIAL PENALTIES

244. Pursuant to section 40(1)(c), read with section 40(4) of the Act, where the Commission has made a decision that an agreement has infringed the section 4 prohibition, the Commission may impose on any party to that infringement a financial penalty not exceeding 10% of the worldwide turnover of the infringing enterprise over the period during which the infringement occurred.

C. METHODOLOGY FOR COMPUTING QUANTUM OF PENALTIES

245. Based on the Commission's Guidelines on Financial Penalties, in determining the amount of financial penalty in a specific case, the Commission may consider some or all of the following factors:

(a) the seriousness (gravity) of the infringement;
(b) turnover of the market involved;
(c) duration of the infringement;
(d) impact of the infringement;
(e) degree of fault (negligence or intention);
(f) role of the enterprise in the infringement;
(g) recidivism;
(h) existence of a compliance programme; and
(i) level of financial penalties imposed on similar cases.[176]

246. In calculating financial penalty for each of the Parties, the Commission begins by setting a base figure, which is worked out by

[176] Paragraph 3.2 of the MyCC Guidelines on Financial Penalties.

taking a proportion of the relevant turnover during the period of infringement (how this proportion is determined is explained hereinbelow). This base figure is then adjusted after taking into account various factors such as deterrence, aggravating and mitigating considerations to arrive at the ultimate value of the financial penalty.[177]

C.1 SERIOUSNESS OF THE INFRINGEMENT

247. The Commission considers that the seriousness of the infringement should be taken into account in setting the base figure.

248. With regard to the seriousness of the infringement in question, the Commission will take into account the nature of the infringement and the size of the relevant market. The Commission considers the Infringing Agreement, which has the object of significantly prevent, restrict or distort of competition, to be a very serious infringement of the Act.

C.2 RELEVANT TURNOVER AND THE BASE FIGURE

249. The relevant turnover used to determine the base figure is the enterprise's turnover in the relevant service market and the relevant geographic market affected by the infringement.

250. The Commission identifies the relevant service market affected by the Infringing Agreement as being no wider than the scope as stated

[177] Paragraph 3.2 of the MyCC Guidelines on Financial Penalties.

in **Part 3: L** above. The relevant geographic market for the focal service is no wider than the geographical location of Port Klang, Malaysia.

251. For the purpose of computing the financial penalty, the Commission relies on the data submitted by the Parties pursuant to the section 18 Notices dated 10.10.2018 and 11.10.2018 issued by the Commission, as well as the submissions by the Parties via their written and oral representations.

252. The base figure of the financial penalty is calculated by taking into account the relevant turnover of the enterprise and the seriousness of the infringement.

253. In this regard, the Commission views price-fixing cartels to be the most heinous of all anti-competitive conduct and therefore ought to be dealt with sternly by the Commission. In the United States case of *Verizon Communications v. Law Offices of Curtis V. Trinko*, Judge Scalia described cartels as the "supreme evil of antitrust.[178]

254. The harm brought about by hard-core cartels, in essence, forces consumers to pay more for a product or service than they would have had to had there been no price fixing conduct.

255. As such, it is reasonable for the Commission to take an appropriate proportion of the Parties' relevant turnover as the base figure in

[178] *Verizon Communications v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 408 (2004).

determining the financial penalty to reflect the seriousness of the Infringing Agreement.

256. In light of the aforesaid, the Commission is of the view that the appropriate proportion in determining the base figure of the financial penalty for each of the Parties ought to be 10% of the relevant turnover of each of the Parties.

C.3 ADJUSTMENT FOR DETERRENT FACTOR

257. In relation to the base figure, in the event the Commission finds that the value of the figure is insufficient to achieve the Commission's policy objectives, particularly, the objective of deterring enterprises from engaging in anti-competitive practices such as price fixing, the Commission may increase the value of the base figure to a higher value to act as a deterrent factor to the Parties.

258. This approach, known as the "minimum deterrence threshold ("MDT") principle", is in line with the position taken by other competition authorities. For instance, the UK Competition Market Authority ("CMA") (previously known as the Office of Fair Trading) in its guidelines, "*The CMA's Guidance as to the Appropriate Amount of Penalty"* adopts a similar approach. In the case of *Makers UK Limited v Office of Fair Trading*[179], the CMA applied the MDT to all parties for deterrence purposes.

[179] Case 1061/1/1/06 *Makers UK Limited v Office of Fair Trading*.

259. The UK Competition Appeal Tribunal, in the case of *Makers UK Limited v Office of Fair Trading*, affirmed that the adoption of the MDT principle by the Office of Fair Trading was appropriate to ensure that the overall figure of the penalty met the objective of deterrence.

260. The MDT approach taken in *Makers UK Limited v Office of Fair Trading* was similarly adopted by the Competition and Consumer Commission of Singapore ("CCCS") (previously known as Competition Commission of Singapore) in the cases of *Collusive Tendering (Bid-Rigging) for Termite Treatment/Control Services by Certain Pest Control Operators in Singapore*[180] and *Bid Rigging by Motor Vehicle Traders at Public Auctions of Motor Vehicles*.[181] The CCCS took the position that the imposition of a MDT in relation to one of the infringing parties was appropriate to serve as an effective deterrent. However, the imposition of MDT is varied from case to case.

261. In the present case, the Commission takes into consideration the nature of the conduct which is price fixing and the fact that the relevant services are not central to the Parties' business models.

262. Due to this consideration, the Commission finds that the penalty figure arrived at for the period of infringement was insufficient to act as a deterrent as each of the Parties' relevant turnover was less than 3% of its total worldwide turnover. Therefore, the Commission uplifts

[180] *Collusive Tendering (Bid-Rigging) for Termite Treatment/Control Services by Certain Pest Control Operators in Singapore,* Case Number: CCS 600/008/06.
[181] *Bid Rigging by Motor Vehicle Traders at Public Auctions of Motor Vehicles*, Case number: CCS 500/003/10.

the value of the base figure to the MDT figure which is 10% out of 10% of the worldwide turnover of each of the Parties for the purpose of calculating the financial penalty.

263. In addition, the Commission notes that based on the submission by the Parties in their written and oral representations, particularly, on the infrequency of the long length and heavy lift handling services, the application of the MDT is to uplift from the base figure in this Decision; as compared to the approach taken in the Proposed Decision where the MDT was imposed as an additional factor on top of the base figure plus aggravating factors (if any).

264. The approach taken in this Decision will not be prejudicial to the Parties. On the contrary, it works in favour of the Parties in the ultimate penalty sum imposed on each of them. This approach is consistent with the approach adopted by the CCCS in the cases of *Collusive Tendering (Bid-Rigging) for Termite Treatment/Control Services by Certain Pest Control Operators in Singapore*[182] and *Bid Rigging by Motor Vehicle Traders at Public Auctions of Motor Vehicles.*

C.4 DURATION OF THE INFRINGEMENT

265. The Parties were involved in a single continuous infringement from 22.5.2017[183] until 13.12.2019.[184]

[182] *Collusive Tendering (Bid-Rigging) for Termite Treatment/Control Services by Certain Pest Control Operators in Singapore* Case Number: CCS 600/008/06.
[183] The date whereby the Parties signed the agreement as discussed in part **H.1.1.**
[184] The Commission states that the duration of the infringement is from 22.5.2017 till the date of the issuance of Proposed Decision dated 9.1.2020 in the Proposed Decision (paragraph 184) as there is no evidence shows that the infringement had ended prior to the said date. However, for the purpose of calculating the financial penalty, the date is fixed from 22.5.2017 to 13.12.2019.

C.5 AGGRAVATING FACTORS

266. The Commission will consider the presence of aggravating factors and make upward adjustments to the “base figure” in determining the ultimate financial penalty.

267. In the present case, the Commission considers the role of instigator or leader of the cartel to be an aggravating factor.

268. In addition, the Commission considers any attempt to destroy evidence as an aggravating factor.

269. The Commission identifies one of the Parties playing the role of facilitator of the cartel. This is also considered to be an aggravating factor.

C.6 MITIGATING FACTORS

270. The Commission will also consider the presence of mitigating factors and make a downward adjustment to the MDT figure where there are mitigating factors.

271. In the present case, the Commission considers the admission of liability by one of the Parties to be a mitigating factor.

D. FINANCIAL PENALTY IMPOSED SHALL NOT EXCEED 10% OF WORLDWIDE TURNOVER

272. The Commission is mindful of the statutory limit that the final amount of the financial penalty shall not exceed 10% of the worldwide turnover of each of the Parties throughout the infringement period. Thus, the Commission will adjust the financial penalty where necessary if the financial penalty value exceeds the maximum percentage permitted under section 40(4) of the Act.

E. GENERAL ARGUMENTS ON FINANCIAL PENALTY BY SAL AGENCIES, WCS WAREHOUSING, REGIONAL SYNERGY, INTREXIM AND PIONEERPAC

273. The learned counsel for the SAL Agencies, WCS Warehousing, Regional Synergy, Intrexim and Pioneerpac raises the following arguments:

(i) that long length and heavy lift handling services are infrequent and not central to the Parties' business models and that there should be a distinction between regular revenue and revenue earned from the Infringing Agreement; and

(ii) that the Commission calculated the financial penalty from the total turnover instead of the turnover from the relevant market ascertained by the Commission.

274. In relation to the first argument, there is no obligation for the Commission to make a distinction between regular revenue and revenue earned from the Infringing Agreement in the computation of the financial penalty. The Commission has the discretion in determining the quantum of financial penalties to be imposed, subject to adhering to established principles on penalty, and subject to the statutory maximum stipulated in section 40(4) of the Act.

275. In *Thyssen Stahl AG v European Commission,*[185] it was held that:

> *[639] ... the Court takes the view that the Commission was quite entitled, when calculating the fine, to take account of the appreciable economic impact which the infringements had on the market.* [emphasis added]

276. Port services are an essential service sector to the Malaysian economy. The Commission considers the Infringing Agreement to be a serious infringement of the Act despite the irregular demand for the services. Therefore, the first argument put forth by the counsel is accordingly rejected.

277. In relation to the second argument, the learned counsel contended that the Commission ought to calculate the financial penalty based on the relevant turnover.

278. Having considered the argument of the learned counsel, the Commission, in calculating the financial penalties, makes its assessment on a case-by-case basis having regard to all relevant

[185] Case T-141/94 *Thyssen Stahl AG v European Commission.*

circumstances and taking into consideration the objectives of its policy on financial penalties.

279. In line with established principles, in imposing the financial penalties, the Commission take into account the objective of deterring the Parties and other market players from engaging in similar anti-competitive behaviour, that is, the infringement of the section 4 prohibition.[186]

280. Therefore, upon assessing the submissions by the Parties, the Commission is of the view that the MDT should be applied in calculating the financial penalty as deliberated under [**Part 4:C.3]**.

F. PENALTY FOR SAL AGENCIES

281. As discussed in **Part 3,** SAL Agencies was involved in a single continuous infringement with the object of significantly preventing, distorting and restricting competition in the market for handling services for long length and heavy lift of import and export cargoes at Northport and Westport in Port Klang, Malaysia.

282. For the purpose of computing the financial penalty for this enterprise, the Commission relies on financial data submitted by SAL Agencies pursuant to section 18 Notice dated 10.10.2018.[187] The Commission takes note that the submitted revenue was for the period from 1.1.2017 until 30.4.2019. However, as the duration of

[186] Case C-413/08 *Lafarge Sa v European Commission*, at paragraph 102; and Case 45/69 *Boehringer Mannheim*, at paragraph 53.
[187] Financial information provided by SAL Agencies dated 17.5.2019 via email pursuant to the section 18 Notice issued by the Commission dated 10.10.2018.

infringement was for the period from 22.5.2017 until 13.12.2019, the information that is available to the Commission is only up to 30.4.2019.

283. The Commission notes that the relevant turnover of SAL Agencies from 22.5.2017 until 30.4.2019 is RM [✂]. Meanwhile, the worldwide turnover of SAL Agencies for the same period is RM [✂].[188]

284. Due to the unavailability of data from 1.5.2019 until 13.12.2019, the Commission uses a proxy figure in the computation of the financial penalty for the aforesaid period.

285. In order to determine the value of the proxy figure, the Commission takes the available daily turnover value based on the period of 6 months[189] prior to 1.5.2019. As a result, the Commission uses the daily turnover value from 1.11.2018 to 30.4.2019 (a period of 181 days). Based on this period, the Commission adds the daily turnover value thus arriving at a figure of RM [✂] (for the worldwide turnover) and at a figure of RM [✂] (for the relevant turnover). We then divide each of these figures by 181 days, thereby arriving at the daily proxy figures of RM [✂] (for worldwide turnover) and RM [✂] (for the relevant turnover).

286. Next, each of the daily proxy figures is multiplied by the number of days from 1.5.2019 to 13.12.2019 (a period of 227 days) to derive

[188] Financial information provided by SAL Agencies dated 17.5.2019 via email pursuant to the section 18 Notice issued by the Commission dated 10.10.2018.
[189] The Commission considers this period of 6 months as a sufficient period to enable it to derive the daily turnover value of the Party taking into account the infrequency of the services in the relevant service market.

the revenue of RM [✂] (for the worldwide turnover) and RM [✂] (for the relevant turnover) for the said period of 227 days.

287. Hence, SAL Agencies' worldwide turnover throughout the period of infringement is RM [✂] (RM [✂] + RM [✂]); and the 10% of the RM [✂] is RM [✂] (10% of the worldwide turnover).

288. Meanwhile, its relevant turnover figure for the period from 22.5.2017 until 13.12.2019 was RM [✂] (RM [✂] + RM [✂]).[190] This figure represents merely [✂] % of its worldwide turnover, that is to say, less than 3% of its worldwide turnover.

289. Therefore, the base figure in calculating the financial penalty for SAL Agencies is fixed at 10% of the relevant turnover for the period of infringement, which amounts to RM [✂] (10% of RM [✂]).

290. In this regard, the Commission considers that the base figure of RM [✂] is insufficient to act as an effective deterrent to SAL Agencies due to the fact that its relevant turnover is less than 3% of its worldwide turnover. Hence, the Commission uplifts the value of the base figure of RM [✂] to the MDT value, which is 10% from the 10% of the worldwide turnover amounting to RM [✂] (10% of RM [✂]). The provisional penalty figure for SAL Agencies up to this point is RM [✂].

[190] Financial information provided by SAL Agencies dated 17.5.2019 via email pursuant to the section 18 Notice issued by the Commission dated 10.10.2018.

291. As there are no aggravating and mitigating factors to be considered, the ultimate financial penalty that is imposed on SAL Agencies is RM144,609.35.

292. The financial penalty of RM144,609.35 does not exceed the maximum financial penalty that the Commission can impose in accordance with section 40(4) of the Act, i.e., RM [✂].

293. Accordingly, the Commission concludes that a financial penalty of RM144,609.35 is to be imposed on SAL Agencies.

G. PENALTY FOR WCS WAREHOUSING

294. As discussed in **Part 3**, WCS Warehousing was involved in a single continuous infringement with the object of significantly preventing, distorting and restricting competition in the market for handling services for long length and heavy lift of import and export cargoes at Northport and Westport in Port Klang, Malaysia.

295. For the purpose of computing the financial penalty for this enterprise, the Commission relies on financial data submitted by WCS Warehousing pursuant to section 18 Notice dated 10.10.2018.[191] The Commission takes note that the submitted revenue was for the period from 1.1.2017 until 31.3.2019. However, as the duration of infringement was for the period from 22.5.2017 until 13.12.2019, the information that is available to the Commission is only up to 31.3.2019.

[191] Financial information provided by WCS Warehousing dated 7.05.2019 via email pursuant to the section 18 Notice issued by the Commission dated 10.10.2018.

296. The Commission notes that the relevant turnover of WCS Warehousing from 22.5.2017 until 31.3.2019 is RM [✂]. Meanwhile, the worldwide turnover of WCS Warehousing for the same period is RM [✂].[192]

297. Due to the unavailability of data from 1.4.2019 until 13.12.2019, the Commission uses a proxy figure in the computation of the financial penalty for the aforesaid period.

298. In order to determine the value of the proxy figure, the Commission takes the available daily turnover value based on the period of 6 months[193] prior to 1.4.2019. As a result, the Commission uses the daily turnover value from 1.10.2018 to 31.3.2019 (a period of 182 days). Based on this period, the Commission adds the daily turnover value thus arriving at a figure of RM [✂] (for the worldwide turnover) and at a figure of RM [✂] (for the relevant turnover). We then divide each of the figures by 182 days, thereby arriving at the daily proxy figures of RM [✂] (for worldwide turnover) and RM [✂] (for the relevant turnover).

299. Next, each of the daily proxy figures is multiplied by the number of days from 1.4.2019 to 13.12.2019 (a period of 257 days) to derive the revenue of RM [✂] (for worldwide turnover) and RM [✂] (for the relevant turnover) for the said period of 257 days.

[192] Financial information provided by WCS Warehousing dated 7.05.2019 via email pursuant to the section 18 Notice issued by the Commission dated 10.10.2018.
[193] The Commission considers this period of 6 months as a sufficient period to enable it to derive the daily turnover value of the Party taking into account the infrequency of the services in the relevant service market.

300. Hence, WCS Warehousing's worldwide turnover throughout the period of infringement is RM [✂] (RM [✂] + RM [✂]); and the 10% of RM [✂] is RM [✂] (10% of worldwide turnover).

301. Meanwhile, its relevant turnover figure for the period from 22.5.2017 until 13.12.2019 was RM [✂] (RM [✂] + RM [✂]).[194] This figure represents merely [✂]% of its worldwide turnover, that is to say, less than 3% of its worldwide turnover.

302. Therefore, the base figure in calculating the financial penalty for WCS Warehousing is fixed at 10% of the relevant turnover for the period of infringement, which amounts to RM [✂] (10% of RM [✂]).

303. In this regard, the Commission considers that the base figure of RM [✂] is insufficient to act as an effective deterrent to WCS Warehousing due to the fact that its relevant turnover is less than 3% of its worldwide turnover. Hence, the Commission uplifts the value of the base figure of RM [✂] to the MDT value, which is 10% of the 10% of the worldwide turnover amounting to RM [✂] (10% of RM [✂]). The provisional penalty for WCS Warehousing is RM [✂] up to this point.

304. As there are no aggravating and mitigating factors to be considered, the ultimate financial penalty that is imposed on WCS Warehousing is RM207,733.24.

[194] Financial information provided by WCS Warehousing dated 7.05.2019 via email pursuant to the section 18 Notice issued by the Commission dated 10.10.2018.

305. The financial penalty of RM207,733.24 does not exceed the maximum financial penalty that the Commission can impose in accordance with section 40(4) of the Act, i.e., RM [✂].

306. Accordingly, the Commission concludes that a financial penalty of RM207,733.24 is to be imposed on WCS Warehousing.

H. PENALTY FOR REGIONAL SYNERGY

307. As discussed in **Part 3**, Regional Synergy was involved in a single continuous infringement with the object of significantly preventing, distorting and restricting competition in the market for handling services for long length and heavy lift of import and export cargoes at Northport and Westport in Port Klang, Malaysia.

308. For the purpose of computing the financial penalty for this enterprise, the Commission relies on financial data submitted by the Regional Synergy pursuant to section 18 Notice dated 10.10.2018.[195] The Commission takes note that the submitted revenue was for the period from 1.1.2017 until 31.3.2018. However, as the duration of infringement was for the period from 22.5.2017 until 13.12.2019, the information that is available to the Commission is only up to 31.3.2018.

309. The Commission notes that the relevant turnover of Regional Synergy from 22.5.2017 until 31.3.2019 is RM [✂]. Meanwhile, the

[195] Financial information provided by Regional Synergy dated 2.5.2019 via email pursuant to the section 18 Notice issued by the Commission dated 10.10.2018.

worldwide turnover of Regional Synergy for the same period is RM [✂].[196]

310. Due to the unavailability of data from 1.4.2019 until 13.12.2019, the Commission uses a proxy figure in the computation of the financial penalty for the aforesaid period.

311. In order to determine the value of the proxy figure, the Commission takes the available daily turnover value based on the period of 6 months[197] prior to 1.4.2019. As a result, the Commission uses the daily turnover value from 1.10.2018 to 31.3.2019 (a period of 182 days). Based on this period, the Commission adds the daily turnover value thus arriving at a figure of RM [✂] (for the worldwide turnover) and at a figure of RM [✂] (for relevant turnover). We then divide each of these figures by 182 days, thereby arriving at the daily proxy figures of RM [✂] (for worldwide turnover) and RM [✂] (for the relevant turnover).

312. Next, each of the daily proxy figures is multiplied by the number of days from 1.4.2019 to 13.12.2019 (a period of 257 days) to derive the revenue of RM [✂] (for the worldwide turnover) and RM [✂] (for the relevant turnover) for the said period of 257 days.

313. Hence, Regional Synergy's worldwide turnover throughout the period of infringement is RM [✂] (RM [✂] + RM [✂]); and the 10% of RM [✂] is RM [✂] (10% of worldwide turnover).

[196] Financial information provided by Regional Synergy dated 2.5.2019 via email pursuant to the section 18 Notice issued by the Commission dated 10.10.2018.
[197] The Commission considers this period of 6 months as a sufficient period to enable it to derive the daily turnover value of the Party taking into account the infrequency of the services in the relevant service market.

314. Meanwhile, its relevant turnover figure for the period from 22.5.2017 until 13.12.2019 was RM [✂] (RM [✂] + RM [✂]).[198] This figure represents merely [✂] % of its worldwide turnover, that is to say, less than 3% of its worldwide turnover.

315. The base figure in calculating the financial penalty for Regional Synergy is fixed at 10% of the relevant turnover for the period of infringement which amounts to RM [✂] (10% of RM [✂]).

316. In this regard, the Commission considers that the base figure of RM [✂] is insufficient to act as an effective deterrent to Regional Synergy due to the fact that its relevant turnover is less than 3% of its worldwide turnover. Hence, the Commission uplifts the value of the base figure of RM [✂] to the MDT value, which is 10% from the 10% of the worldwide turnover amounting to RM [✂] (10% of RM [✂]). The provisional penalty for Regional Synergy up to this point is RM [✂].

317. The Commission identifies Regional Synergy as the instigator of the cartel as discussed in **Part 3:H**. The Commission considers this an aggravating factor and hereby adjusts the provisional penalty of RM [✂] upwards by 100% from the base figure of RM [✂]. Therefore, the provisional penalty for Regional Synergy up to this point is RM [✂] (RM [✂] + RM [✂]).

[198] Financial information provided by Regional Synergy dated 2.5.2019 via email pursuant to the section 18 Notice issued by the Commission dated 10.10.2018.

318. The Commission, in the course of the investigation, further finds that Regional Synergy had attempted to destroy, conceal, mutilate or alter evidence. Loo Suo Li of Regional Synergy had changed the name of the WhatsApp Group chat to "Ling".[199] This alteration of the WhatsApp Group name was carried out during the Commission officers' unannounced inspection at Regional Synergy's premises on 10.10.2018. Loo Suo Li admitted to the Commission that she had altered the name of the WhatsApp Group chat.[200] Nevertheless, the Commission successfully secured and preserved the chat logs, chat conversations as well as obtained screenshots contained in the WhatsApp Group chat.

319. The Commission regards the conduct of Regional Synergy as a deliberate attempt to prevent the Commission from identifying the WhatsApp Group chat, that contained inculpatory evidence of infringing conduct by the Parties.

320. The Commission also notes that one WhatsApp Group chat participant whose mobile phone number is +60[✂] had left the WhatsApp Group chat and 2 participants identified as "Irene Gunn" and "Mick Teh Inter" had been removed by Loo Suo Li on 10.10.2018.[201]

321. When questioned, Loo Suo Li responded that her reason for deleting the names of these persons was because she no longer

[199] See paragraph 5 of Statement of Ong Sue Ron of Regional Synergy recorded on 10.10.2018.
[200] See paragraph 39 of Statement of Loo Suo Li of Regional Synergy recorded on 10.10.2018 and Exhibit WH3-11 Screenshot of WhatsApp Group Chat Logs retrieved from Loo Suo Li of Regional Synergy (IMG_4372).
[201] See paragraph 38 of Statement of Loo Suo Li of Regional Synergy recorded on 10.10.2018.

communicated with them.[202] The Commission finds Loo Suo Li's justification for removing the WhatsApp Group participants to be feeble and incredible; whereby little or no weight ought to be given to her explanation. The conduct of Regional Synergy in intentionally removing the names "Irene Gunn" and "Mick Teh Inter" from the WhatsApp Group chat at the time of the Commission's unannounced inspection at Regional Synergy's premises, was calculated to destroy, conceal and alter existing computerized data or records within the possession of Regional Synergy to prevent, delay or obstruct the carrying out of an investigation under the Act.

322. The Commission finds that the conduct described in the preceding paragraph had hampered the investigation process. The Commission considers this as an aggravating factor and hereby further adjusts the penalty upwards by 20% from the base figure of RM [✂] which amount to RM [✂]. The total financial penalty computed at this stage, after considering the aggravating factors, is RM [✂] (RM [✂] + RM [✂]).

323. Therefore, the final financial penalty to be imposed on Regional Synergy is RM367,177.31.

324. However, in the Proposed Decision, the Commission had proposed a financial penalty for Regional Synergy to be at RM336,369.13. This is lower than the financial penalty value of RM367,177.31 as stated in **paragraph 323**.

[202] Paragraph 38 of Statement of Loo Suo Li of Regional Synergy recorded on 10.10.2018.

325. The reason for this discrepancy is due to the technical error in the Proposed Decision pertaining to the inadvertent exclusion of certain relevant data in the excel spreadsheets in calculating the proxy figure to arrive at the value of the financial penalty. Had it not been due to this inadvertent technical error, we would have arrived at the same penalty value in the Proposed Decision as we have arrived in this Decision. Be that as it may, the Commission is of the view that the technical error on its part in calculating the financial penalty should not be prejudicial to Regional Synergy.

326. Therefore, the Commission takes the view that the appropriate amount of the ultimate financial penalty to be imposed to Regional Synergy shall be maintained at RM336,369.13.

327. The financial penalty of RM336,369.13 does not exceed the maximum financial penalty that the Commission can impose in accordance with section 40(4) of the Act, i.e., RM [✂].

328. Accordingly, the Commission concluded that a financial penalty of RM336,369.13 is to be imposed on Regional Synergy.

I. PENALTY FOR INTREXIM

329. As discussed in **Part 3,** Intrexim was involved in a single continuous infringement with the object of significantly preventing, distorting and restricting competition in the market for handling services for long length and heavy lift of import and export cargoes at Northport and Westport in Port Klang, Malaysia.

330. For the purpose of computing the financial penalty for this enterprise, the Commission relies on financial data submitted by Intrexim pursuant to section 18 Notice dated 10.10.2018.[203] The Commission takes note that the submitted revenue was for the period from 1.1.2017 until 31.12.2018. However, as the duration of infringement was for the period from 22.5.2017 until 13.12.2019, the information that is available to the Commission is only up to 31.12.2018.

331. The Commission notes that the relevant turnover of Intrexim from 22.5.2017 until 31.12.2018 is RM [✂]. Meanwhile, the worldwide turnover of Intrexim for the same period is RM [✂].[204]

332. Due to the unavailability of data from 1.1.2019 until 13.12.2019, the Commission uses a proxy figure in the computation of the financial penalty for the aforesaid period.

333. In order to determine the value of the proxy figure, the Commission takes the available daily turnover value based on the period of 6 months[205] prior to 1.1.2019. As a result, the Commission uses the daily turnover value from 1.7.2018 to 31.12.2018 (a period of 184 days). Based on this period, the Commission adds the daily turnover value thus arriving at a figure of RM [✂] (for the worldwide turnover) and at a figure of RM [✂] (for the relevant turnover). We then divide each of these figures by 184 days, thereby arriving at daily proxy

[203] Financial information provided by Intrexim dated 24.5.2019 via email pursuant to the section 18 Notice issued by the Commission dated 10.10.2018.
[204] Financial information provided by Intrexim dated 24.5.2019 via email pursuant to the section 18 Notice issued by the Commission dated 10.10.2018.
[205] The Commission considers this period of 6 months as a sufficient period to enable it to derive the daily turnover value of the Party taking into account the infrequency of the services in the relevant service market.

figures of RM [✂] (for worldwide turnover) and RM [✂] (for the relevant turnover).

334. Next, each of the daily proxy figures is multiplied by the number of days from 1.1.2019 to 13.12.2019 (a period of 347 days) to derive the revenue of RM [✂] (for the worldwide turnover) and RM [✂] (for the relevant turnover) for the said period of 347 days.

335. Hence, Intrexim's worldwide turnover throughout the period of infringement is RM [✂] (RM [✂] + RM [✂]); and the 10% of RM [✂] is RM [✂] (10% of the worldwide turnover).

336. Meanwhile, its relevant turnover figure for the period from 22.5.2017 until 13.12.2019 was RM [✂] (RM [✂] + RM [✂]).[206] This figure represents merely [✂] % of its worldwide turnover, that is to say, less than 3% of its worldwide turnover.

337. Therefore, the base figure in calculating the financial penalty for Intrexim is fixed at 10% of the relevant turnover for the period of infringement which amounts to RM [✂] (10% of RM [✂]).

338. In this regard, the Commission considers that the base figure of RM [✂] is insufficient to act as an effective deterrent to Intrexim due to the fact that its relevant turnover is less than 3% of its worldwide turnover. Hence, the Commission uplifts the value of the base figure of RM [✂] to the MDT value which is 10% from the 10% of the

[206] Financial information provided by Intrexim dated 24.5.2019 via email pursuant to the section 18 Notice issued by the Commission dated 10.10.2018.

worldwide turnover amounting to RM [✂] (10% of RM [✂]). The provisional penalty for Intrexim is RM [✂] up to this point.

339. As there are no aggravating and mitigating factors to be considered, the ultimate financial penalty that is imposed on Intrexim is RM36,316.16.

340. The financial penalty of RM36,316.16 does not exceed the maximum financial penalty that the Commission can impose in accordance with section 40(4) of the Act, i.e., RM [✂].

341. Accordingly, the Commission concluded that a financial penalty of RM36,316.16 is to be imposed on Intrexim.

J. PENALTY FOR PIONEERPAC

342. As discussed in **Part 3**, Pioneerpac was involved in a single continuous infringement with the object of significantly preventing, distorting and restricting competition in the market for handling services for long length and heavy lift of import and export cargoes at Northport and Westport in Port Klang, Malaysia.

343. For the purpose of computing the financial penalty for this enterprise, the Commission relies on financial data submitted by Pioneerpac pursuant to section 18 Notice dated 10.10.2018.[207] The Commission takes note that the submitted revenue was for the period from 1.1.2017 until 31.3.2019. However, as the duration of

[207] Financial information provided by Pioneerpac dated 16.5.2019 via email pursuant to the section 18 Notice issued by the Commission dated 11.10.2018.

infringement was for the period from 22.5.2017 until 13.12.2019, the information that is available to the Commission is only up to 31.3.2019.

344. The Commission notes that the relevant turnover of Pioneerpac from 22.5.2017 until 31.3.2019 is RM [✂]. Meanwhile, the worldwide turnover of Pioneerpac for the same period is RM [✂].[208]

345. Due to the unavailability of data from 1.4.2019 until 13.12.2019, the Commission uses a proxy figure in the computation of the financial penalty for the aforesaid period.

346. In order to determine the value of the proxy figure, the Commission takes the available daily turnover value based on the period of 6 months[209] prior to 1.4.2019. As a result, the Commission uses the daily turnover value from 1.10.2018 to 31.3.2019 (a period of 182 days). Based on this period, the Commission adds the daily turnover value thus arriving at a figure of RM [✂] (for the worldwide turnover) and at a figure of RM [✂] (for the relevant turnover). We then divide each of these figures by 182 days, thereby arriving at the daily proxy figures of RM [✂] (for the worldwide turnover) and RM [✂] (for the relevant turnover).

347. Next, each of the daily proxy figures is multiplied by the number of days from 1.4.2019 to 13.12.2019 (a period of 257 days) to derive

[208] Financial information provided by Pioneerpac dated 16.5.2019 via email pursuant to the section 18 Notice issued by the Commission dated 11.10.2018.
[209] The Commission considers this period of 6 months as a sufficient period to enable it to derive the daily turnover value of the Party taking into account the infrequency of the services in the relevant service market.

the revenue of RM [✂] (for the worldwide turnover) and RM [✂] (for the relevant turnover) for the said period of 257 days.

348. Hence, Pioneerpac's worldwide turnover throughout the period of infringement is RM [✂] (RM [✂] + RM [✂]) and the 10% of RM [✂] is RM [✂] (10% of the worldwide turnover).

349. Meanwhile, its relevant turnover figure for the period from 22.5.2017 until 13.12.2019 was RM [✂] (RM [✂] + RM [✂]).[210] This figure represents merely [✂] % of its worldwide turnover, that is to say, less than 3% of its worldwide turnover.

350. Therefore, the base figure in calculating the financial penalty for Pioneerpac is fixed at 10% of the relevant turnover for the period of infringement, which amounts to RM [✂] (10% of RM [✂]).

351. In this regard, the Commission considers that the base figure of RM [✂] is insufficient to act as an effective deterrent to Pioneerpac due to the fact that its relevant turnover is less than 3% of its worldwide turnover. Hence, the Commission uplifts the value of the base figure of RM [✂] to the MDT value, which is 10% from the 10% of the worldwide turnover amounting to RM [✂] (10% of RM [✂]). The provisional penalty for Pioneerpac is RM [✂] up to this point.

352. The Commission identifies Pioneerpac as the facilitator of the Infringing Agreement. The Commission finds that Eswaran a/l Kulanthaivelu of Pioneerpac had also played the pivotal role of a

[210] Financial information provided by Pioneerpac dated 16.5.2019 via email pursuant to the section 18 Notice issued by the Commission dated 11.10.2018.

facilitator amongst the Parties, by arranging meetings with PKA as well as acting as the drafter[211] of the Surcharge Memorandum, which was later executed upon the persuasion of Loo Suo Li.

353. The Commission considers the facilitator role an aggravating factor and hereby adjusts the penalty upwards by 50% from the base figure of RM [✂] which amount to RM [✂]. The total financial penalty computed at this stage, after considering the aggravating factor, is RM [✂] (RM [✂] + RM [✂]).

354. Therefore, the financial penalty to be imposed on Pioneerpac is RM213,981.40.

355. However, in the Proposed Decision, the Commission had proposed a financial penalty for Pioneerpac to be at RM206,773.40. This is lower than the financial penalty value of RM213,981.40 as stated in **paragraph 354**.

356. The reason for this discrepancy is due to the technical error in the Proposed Decision pertaining to the inadvertent exclusion of certain relevant data in the excel spreadsheets in calculating the proxy figure to arrive at the value of the financial penalty. Had it not been due to this inadvertent technical error, the same penalty value in the Proposed Decision would have been arrived at as in this Decision. Be that as it may, the Commission is of the view that the technical

[211] Paragraph 24 of Statement of Eswaran a/l Kulanthaivelu of Pioneerpac recorded on 11.10.2018; paragraph 15 of Statement of Ong Sue Ron of Regional Synergy recorded on 10.10.2018; paragraph 27 of the Statement of Loo Suo Li of Regional Synergy recorded on 10.10.2018; paragraph 21 of Statement of Sathiaraj Francis a/l Rajagopal of SAL Agencies recorded on 10.10.2018; and paragraph 9 of Statement of Lim Kwang Yew of SAL Agencies recorded on 10.10.2018.

error on its part in calculating the financial penalty should not be prejudicial to Pioneerpac.

357. Therefore, we take the view that the appropriate amount of the ultimate financial penalty to be imposed on Pioneerpac shall be maintained at RM206,773.40.

358. The financial penalty of RM206,773.40 does not exceed the maximum financial penalty that the Commission can impose in accordance with section 40(4) of the Act, i.e., RM [✂].

359. Accordingly, the Commission concluded that a financial penalty of RM206,773.40 is to be imposed on Pioneerpac.

K. PENALTY FOR PRIMA WAREHOUSING

360. Prima Warehousing was involved in a single continuous infringement with the object of significantly preventing, distorting and restricting competition in the market for handling services for long length and heavy lift for import and export cargoes at Northport and Westport in Port Klang, Malaysia.

361. The Commission takes note that Prima Warehousing, in its written submission,[212] admits liability to the infringement as set out in the Proposed Decision. Prima Warehousing also submits the following should be considered as mitigating factors:

[212] Written Representation of Prima Warehousing dated 11.3.2020.

(a) Since the Commission ordered the halting of infringing conduct in the Proposed Decision, the ceasing of conduct should be considered in the computation of financial penalty;

(b) Long length and heavy lift cargoes are infrequent and not central to Prima Warehousing's business model;

(c) The seriousness of the infringement is reduced as Prima Warehousing's customers are given the right not to choose its handling services;

(d) The relevant service makes up a very small percentage of its revenue;

(e) The infringement only lasted four months;

(f) The infringement had a very minimal impact;

(g) Prima Warehousing possesses a small market share within the relevant market;

(h) The purpose of the WhatsApp Group chat was to update on matters related to unstuffing and stuffing activities between PKA and the Parties; and

(i) It acted under the direction of PKA and the Commission does not have authority over Prima Warehousing.

362. Prima Warehousing has also provided a copy of its financial statement for the years 2017, 2018 and 2019 (up to 31 March 2019) in its written representation.[213]

363. For the purpose of computing the financial penalty for this enterprise, the Commission relied on the financial data submitted by

[213] Bundle of Documents (Prima Warehousing), Exhibit 1.

Prima Warehousing pursuant to the section 18 Notice dated 11.10.2018[214] and information provided via Exhibit 1 attached to its written representation as a part of the Bundle of Documents.[215]

364. The Commission takes note that the submitted revenue was for the period between 1.1.2017 until 31.3.2019. However, as the duration of infringement was for the period between 22.5.2017 until 13.12.2019, the information that is available to the Commission is up to 31.3.2019.

365. The Commission notes that the relevant turnover of Prima Warehousing from 22.5.2017 until 31.3.2019 is RM [✂]. Meanwhile, the worldwide turnover of Prima Warehousing for the same period is RM [✂].[216]

366. Due to the unavailability of data from 1.4.2019 until 13.12.2019, the Commission uses a proxy figure in the computation of the financial penalty for the aforesaid period.

367. In order to determine the value of the proxy figure, the Commission takes the available daily turnover value based on the period of 6 months[217] prior to 1.4.2019. As a result, the Commission uses the daily turnover value from 1.10.2018 to 31.3.2019 (a period of 182 days). Based on this period, the Commission adds the daily turnover value thus arriving at a figure of RM [✂] (for the worldwide turnover)

[214] Financial information provided by Prima Warehousing dated 2.5.2019 via email pursuant to the section 18 Notice issued by the Commission dated 11.10.2018.
[215] Bundle of Documents (Prima Warehousing), Exhibit 1.
[216] Financial information provided by Prima Warehousing dated 2.5.2019 via email pursuant to the section 18 Notice issued by the Commission dated 11.10.2018.
[217] The Commission considers this period of 6 months as a sufficient period to enable it to derive the daily turnover value of the Party taking into account the infrequency of the services in the relevant service market.

and at a figure of RM [✂] (for the relevant turnover). We then divide each of these figures by 182 days, thereby arriving at daily proxy figures of RM [✂] (for the worldwide turnover) and RM [✂] (for the relevant turnover).

368. Next, each of the daily proxy figures is multiplied by the number of days from 1.4.2019 to 13.12.2019 (a period of 257 days) to derive the revenue of RM [✂] (for the worldwide turnover) and RM [✂] (for the relevant turnover) for the said period of 257 days.

369. Hence, Prima Warehousing's worldwide turnover throughout the period of infringement is RM [✂] (RM [✂] + RM [✂]); and the 10% of RM [✂] is RM [✂].

370. Meanwhile, Prima Warehousing's relevant turnover figure for the period between 22.5.2017 until 13.12.2019 was RM [✂] (RM [✂] + RM [✂]).[218] This figure represents merely [✂] % of its worldwide turnover, that is to say, less than 3% of its worldwide turnover.

371. The base figure in calculating the financial penalty for Prima Warehousing is fixed at 10% of the relevant turnover for the period of infringement, which amounts to RM [✂] (10% of RM [✂]).

372. In this regard, the Commission considers that the base figure of RM [✂] is insufficient to act as an effective deterrent to Prima Warehousing due to the fact that its relevant turnover is less than 3% of its worldwide turnover. Hence, the Commission, therefore,

[218] Financial information provided by Prima Warehousing dated 2.5.2019 via email pursuant to the section 18 Notice issued by the Commission dated 11.10.2018.

uplifts the value of the base figure of RM [✂] to the MDT value, which is 10% from the 10% of the worldwide turnover amounting to RM [✂] (10% of RM [✂]). The provisional penalty for Prima Warehousing up to this point is RM [✂].

373. The Commission takes note that Prima Warehousing admits liability to the infringement as set out in the Proposed Decision. Therefore, the Commission considers the admission of liability by the party as a mitigating factor and hereby adjusts the penalty downward by 20% from the MDT figure of RM [✂] which is amount to RM [✂]. Therefore, the total financial penalty computed at this stage is RM [✂] (RM [✂] – RM [✂] = RM [✂]).

374. The Commission is of the view that the factors submitted by Prima Warehousing in **paragraph 361 (a) to (i)** are not mitigating factors. The submission is devoid of merit.

375. The Commission is under no obligation to make a mitigating factor's adjustment on the ground of immediate cessation by Prima Warehousing upon the issuance of the Proposed Decision. This is supported by *ABB Asea Brown Boveri v Commission*[219] and *Tokai Carbon and Others (Specialty Graphite).*[220] In any case, Prima Warehousing did not at any point adduce evidence to support its claim of cessation.

[219] T-31/99 *ABB Asea Brown Boveri v Commission* [2002] ECR II-1881, at paragraph 213.
[220] Joined Cases T-71/03 *Tokai Carbon and Others* [2005] ECR II-10, at paragraph 292.

376. The financial penalty of RM26,363.03 does not exceed the maximum financial penalty that the Commission can impose in accordance with section 40(4) of the Act, i.e., RM [✂].

377. Accordingly, the Commission concludes that a financial penalty of RM26,363.03 is to be imposed on Prima Warehousing.

L. PENALTY FOR INTEROCEAN WAREHOUSING

378. As discussed in **Part 3**, Interocean Warehousing was involved in a single continuous infringement with the object of significantly preventing, distorting and restricting competition in the market for handling services for long length and heavy lift for import and export cargoes at Northport and Westport in Port Klang, Malaysia.

379. In its written submission,[221] Interocean Warehousing pleads to the Commission to 'waive' the financial penalty imposed on them on the grounds that the said enterprise had not infringed section 4(1) read together with section 4(2)(a) of the Act. The Commission rejects this plea for on the evidence the Commission is satisfied that an infringement had been committed by the said enterprise.

380. For the purpose of computing the financial penalty, the Commission relies on financial data submitted by Interocean Warehousing pursuant to section 18 Notice dated 11.10.2018.[222] The Commission takes note that the submitted revenue was for the period from

[221] Paragraph 40 of the Written Representation of Interocean Warehousing Sdn. Bhd. dated 13.3.2020.
[222] Financial information provided by Interocean Warehousing dated 7.05.2019 via email pursuant to the section 18 Notice issued by the Commission dated 11.10.2018.

1.1.2017 until 31.3.2019. However, as the duration of infringement was for the period from 22.5.2017 until 13.12.2019, the information that is available to the Commission is only up to 31.3.2019.

381. The Commission notes that the relevant turnover of Interocean Warehousing from 22.5.2019 until 31.3.2019 is RM [✂]. Meanwhile, the worldwide turnover of Interocean Warehousing for the same period is RM [✂].[223]

382. Due to the unavailability of data from 1.4.2019 until 13.12.2019, the Commission uses a proxy figure in the computation of the financial penalty for the aforesaid period.

383. In order to determine the value of the proxy figure, the Commission takes the available daily turnover value based on the period of 6 months[224] prior to 1.4.2019. As a result, the Commission uses the daily turnover value from 1.10.2018 to 31.3.2019 (a period of 182 days). Based on this period, the Commission adds the daily turnover value thus arriving at a figure of RM [✂] (for the worldwide turnover) and at a figure of RM [✂] (for the relevant turnover). We then divide each of these figures by 182 days, thereby arriving at daily proxy figures of RM [✂] (for worldwide turnover) and RM [✂] (for the relevant turnover).

384. Next, each of the daily proxy figures is multiplied by the number of days from 1.4.2019 to 13.12.2019 (a period of 257 days) to derive

[223] Financial information provided by Interocean Warehousing dated 7.05.2019 via email pursuant to the section 18 Notice issued by the Commission dated 11.10.2018.
[224] The Commission considers this period of 6 months as a sufficient period to enable it to derive the daily turnover value of the Party taking into account the infrequency of the services in the relevant service market.

the revenue of RM [✂] (for worldwide turnover) and RM [✂] (for the relevant turnover) for the said period of 257 days.

385. Hence, Interocean Warehousing's worldwide turnover throughout the period of infringement is RM [✂] (RM [✂] + RM [✂]); and the 10% of RM [✂] is RM [✂] (10% of the worldwide turnover).

386. Meanwhile, its relevant turnover figure for the period between 22.5.2017 until 13.12.2019 was RM [✂] (RM [✂] + RM [✂]).[225] This figure represents merely [✂] % of its worldwide turnover, that is to say, less than 3% of its worldwide turnover.

387. The base figure in calculating the financial penalty for Interocean Warehousing is fixed at 10% of the relevant turnover for the period of infringement, which amounts to RM [✂] (10% of RM [✂]).

388. In this regard, the Commission considers that the base figure of RM [✂] is insufficient to act as an effective deterrent to Interocean Warehousing due to the fact that its relevant turnover is less than 3% of its worldwide turnover. Hence, the Commission uplifts the value of the base figure of RM [✂] to the MDT value, which is 10% from the 10% of the worldwide turnover amounting to RM [✂] (10% of RM [✂]). The provisional penalty for Interocean Warehousing is RM [✂] up to this point.

[225] Financial information provided by Interocean Warehousing dated 7.05.2019 via email pursuant to the section 18 Notice issued by the Commission dated 11.10.2018.

389. As there are no aggravating and mitigating factors to be considered, the financial penalty to be imposed on Interocean Warehousing is RM90,015.79.

390. However, in the Proposed Decision, the Commission had proposed a financial penalty for Interocean Warehousing to be at RM84,848.21. This is lower than RM90,015.79 as stated in **paragraph 389**.

391. The reason for this discrepancy is due to the technical error in the Proposed Decision pertaining to the inadvertent exclusion of certain relevant data in the excel spreadsheets in calculating the proxy figure to arrive at the value of the financial penalty. Had it not been due to this inadvertent technical error, we would have arrived at the same penalty value in the Proposed Decision as we have arrived in this Decision. Be that as it may, the Commission is of the view that the technical error on its part in calculating the financial penalty should not be prejudicial to Interocean Warehousing.

392. Therefore, we take the view that the appropriate amount of the ultimate financial penalty to be imposed to Interocean Warehousing shall be maintained at RM84,848.21.

393. The financial penalty of RM84,848.21 does not exceed the maximum financial penalty that the Commission can impose in accordance with section 40(4) of the Act, i.e., RM [✂].

394. Accordingly, the Commission concluded that a financial penalty of RM84,848.21 is to be imposed on Interocean Warehousing.

PART 5: CONCLUSION ON THE FINANCIAL PENALTY

395. In conclusion, the Commission pursuant to section 40(4) of the Act, imposes the following financial penalties to the Parties as shown in ***Table 5*** below:

PARTY	FINANCIAL PENALTY (RM)
SAL AGENCIES	**144,609.35**
WCS WAREHOUSING	**207,733.24**
REGIONAL SYNERGY	**336,369.13**
INTREXIM	**36,316.16**
PIONEERPAC	**206,773.40**
PRIMA WAREHOUSING	**26,363.03**
INTEROCEAN WAREHOUSING	**84,848.21**

DATED: 26 JULY 2021

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CHAIRMAN

DATO' SERI MOHD HISHAMUDIN BIN MD YUNUS