



Case No. 700–1/1/38/2016

Competition Act 2010 [Act 712]

Decision of the Competition Commission

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

Competition Commission

v.

1. Tuah Packet Sdn. Bhd.
2. Caliber Interconnects Sdn. Bhd.
3. Aliran Digital Sdn. Bhd.
4. Viamed Sdn. Bhd.
5. Novatis Resources Sdn. Bhd.
6. Silver Tech Synergy Sdn. Bhd.
7. Basenet Technology Sdn. Bhd.
8. Venture Nucleus (M) Sdn. Bhd.

DATED: 27 JUNE 2022

INFRINGEMENT 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) Puan Siti Juriani binti Jalaluddin; and
- (viii) Tuan Arunan a/l K. Kumaran.

TABLE OF CONTENTS		
INTRODUCTION		1
PART 1 : THE FACTS		4
A.	THE ENTERPRISES CONCERNED	4
	A.1 TUAH PACKET SDN. BHD.	4
	A.2 CALIBER INTERCONNECTS SDN. BHD.	4
	A.3 ALIRAN DIGITAL SDN. BHD.	5
	A.4 VIAMED SDN. BHD.	5
	A.5 NOVATIS RESOURCES SDN. BHD.	5
	A.6 SILVER TECH SYNERGY SDN BHD	6
	A.7 BASENET TECHNOLOGY SDN. BHD.	6
	A.8 VENTURE NUCLEUS (M) SDN. BHD.	7
B.	BUSINESS AND INDUSTRY LANDSCAPE	7
	B.1 BACKGROUND OF ASWARA	7
	B.2 OVERVIEW OF PROCUREMENT IN ASWARA	8
	B.3 THE RELEVANT PROJECTS	9
C.	INVESTIGATION PROCEDURES AND PROCESS	13
	C.1 PARTIES' ALLEGED PROCEDURAL IMPROPRIETY ON THE PART OF THE COMMISSION	17
PART 2: LEGAL AND ECONOMIC ASSESSMENT		36
A.	THE SECTION 4 PROHIBITION	36
B.	APPLICATION OF SECTION 4 PROHIBITION TO PARTIES	36
	B.1 THE CONCEPT OF ENTERPRISE	36
C.	AGREEMENTS AND/OR CONCERTED PRACTICES	37
D.	SECTION 4(2)(d) OF THE ACT – AGREEMENT TO PERFORM BID RIGGING	38
	D.1 APPLICATION TO THE PRESENT CASE	40

TABLE OF CONTENTS			
	D.1.1	SEBUT HARGA A	40
	D.1.2	TENDER A	89
	D.1.3	SEBUT HARGA C	100
	D.1.4	SEBUT HARGA ACTIVE DIRECTORY	114
E.	PARTY TO AN AGREEMENT AND/OR CONCERTED PRACTICE		117
F.	OBJECT OR EFFECT OF SIGNIFICANTLY PREVENTING, RESTRICTING OR DISTORTING COMPETITION		119
	F.1	APPLICATION IN THE PRESENT CASE	120
G.	RELIEF OF LIABILITY UNDER SECTION 5 OF THE ACT		122
	G.1	APPLICATION TO THE PRESENT CASE	122
H.	BURDEN AND STANDARD OF PROOF		123
	H.1	APPLICATION TO THE PRESENT CASE	125
I.	RELEVANT MARKET		126
PART 3: THE COMMISSION'S DECISION			128
A.	DIRECTIONS UPON A FINDING OF AN INFRINGEMENT		128
B.	GENERAL POINTS ON FINANCIAL PENALTIES		128
C.	METHODOLOGY FOR COMPUTING QUANTUM OF PENALTIES		128
	C.1	SERIOUSNESS OF THE INFRINGEMENT	129
	C.2	RELEVANT TURNOVER AND THE BASE FIGURE	130
	C.3	DURATION OF THE INFRINGEMENT	136
	C.4	AGGRAVATING FACTORS	138
	C.5	MITIGATING FACTORS	139
D.	FINANCIAL PENALTY IMPOSED SHALL NOT EXCEED 10% OF THE WORLDWIDE TURNOVER		139
E.	PENALTY FOR TUAH PACKET		140

TABLE OF CONTENTS		
F.	PENALTY FOR CALIBER	142
G.	PENALTY FOR ALIRAN DIGITAL	144
H.	PENALTY FOR VIAMED	146
I.	PENALTY FOR NOVATIS	148
J.	PENALTY FOR SILVER TECH	150
K.	PENALTY FOR VENTURE NUCLEUS	152
L.	PENALTY FOR BASENET	153
PART 4: CONCLUSION ON THE FINANCIAL PENALTY		155

INTRODUCTION

1. This Decision (“the Decision”) concludes that the enterprises listed in paragraph 3 (individually described herein as “Party” and collectively described as the “Parties”) have infringed the prohibition imposed by section 4 (“the section 4 prohibition”) of the Competition Act 2010 (“the Act”).
2. The Parties have infringed the section 4 prohibition by participating in a series of anti-competitive bid-rigging agreements and/or concerted practices concerning several projects at the National Academy of Arts, Culture and Heritage of Malaysia (“ASWARA”) (“Infringement” or “Infringements”).
3. This Decision is addressed to the enterprises set out below:
 - (i) Tuah Packet Sdn. Bhd.
 - (ii) Caliber Interconnects Sdn. Bhd.
 - (iii) Aliran Digital Sdn. Bhd.
 - (iv) Viamed Sdn. Bhd.
 - (v) Novatis Resources Sdn. Bhd.
 - (vi) Silver Tech Synergy Sdn. Bhd.
 - (vii) Basenet Technology Sdn. Bhd.
 - (viii) Venture Nucleus (M) Sdn. Bhd.
4. By this Decision, the Commission hereby issues directions to the Parties as elaborated in **Part 3** of the Decision. In addition, the Commission imposes on each of the Parties a financial penalty for their respective Infringement, as set out in **Table 22**.

5. In this Decision, the following terms in Bahasa Malaysia as set out in the left column of **Table 1** below, wherever they appear in the Decision shall carry the corresponding meanings as set out in the right column of **Table 1**. The terms provided in Bahasa Malaysia shall prevail in the case of any discrepancies with the English translated version, if any.

Table 1: English Translations to Bahasa Malaysia Terms

BAHASA MALAYSIA TERM	ENGLISH TRANSLATION
Buku log akaun penerimaan	Acknowledgement of receipt logbook
Bahagian Pengguna	User Division
Bahagian Teknologi Maklumat	Information Technology Division
Borang A / C	Form A / C
Borang B - Maklumat Petender	Form B – Tenderer Information
Borang Kehadiran Taklimat/Lawatan Tapak	Attendance Briefing/Site Visit Form
Borang Membeli Dokumen Tender	Tender Documents Purchase Form
Borang Penyerahan Dokumen Sebut Harga	Quotation Documents Submission Form
Borang Penyerahan Dokumen Tender	Form on Service of Tender Document
Direktori Aktif Perkhidmatan Penyelenggaraan ASWARA	ASWARA Active Directory Maintenance Service
Dokumen teknikal	Technical documents
Dokumen tender	Tender document
E-perolehan	E-procurement
Fakulti Animasi dan Multimedia	Faculty of Animation and Multimedia
Harga bidaan / tawaran	Bid price

BAHASA MALAYSIA TERM	ENGLISH TRANSLATION
Harga bidaan tender	Tender bid price
Kod Bidang	Field Code
Kos pengurusan	Management cost
Lampiran Q	Attachment Q
Lembaga Perolehan	Board of Procurement
Notis Dokumen Tender	Notice of Tender Documents
Notis Pelawaan	Notice of Invitation
Pegawai Pengawal	Control Officer
Penolong Pegawai Tadbir (Perolehan)	Assistant Administrative Officer (Procurement)
Pengarah (Teknologi Maklumat)	Director (Information Technology)
Pembekal	Principal
Pengurus Jualan	Sales Manager
Sebut Harga	Quotation
Senarai Kehadiran Taklimat/Lawatan Tapak	Attendance Briefing/Site Visit List
Surat Pengakuan Kebenaran Maklumat dan Kesesahan Dokumen Yang Dikemukakan oleh Penyebut Harga	Letter of Acknowledgment of Truth of Information and Validity of Documents Submitted by the Price Quoter
Surat Pengesahan	Letter of Authorization
Surat Setuju Terima	Letter of Acceptance

PART 1: THE FACTS

A. THE ENTERPRISES CONCERNED

6. The Commission received information that the following enterprises described in **paragraphs 7 to 14** below, had been Parties to agreements and/or concerted practices that infringe the prohibition imposed by section 4 of the Act.

A.1 TUAH PACKET SDN. BHD.

7. Tuah Packet Sdn. Bhd. (“Tuah Packet”) (784789-P)¹ is a private limited company established on 15.8.2007 and is engaged in the provision of information technology-related business, medical software and hardware related business and general trading. Tuah Packet’s registered address is at No. 53-2, Jalan Seri Putra 1/4, Bandar Seri Putra, Bangi, 43000 Kajang, Selangor, Malaysia.

A.2 CALIBER INTERCONNECTS SDN. BHD.

8. Caliber Interconnects Sdn. Bhd. (“Caliber”) (680589-A)² is a private limited company established on 4.2.2005 and is engaged in the provision of supply, installation, testing and commissioning of networking cabling and its related activities. Caliber’s registered address is at B-03-10, Gateway Corporate Suite, Gateway Kiaramas, No.1 Jalan Desa Kiara, 50480 Mont Kiara, Wilayah Persekutuan Kuala Lumpur, Malaysia.

¹ Companies Commission of Malaysia search on Tuah Packet dated 24.1.2022.

² Companies Commission of Malaysia search on Caliber dated 24.1.2022.

A.3 ALIRAN DIGITAL SDN. BHD.

9. Aliran Digital Sdn. Bhd. (“Aliran Digital”) (771884-T)³ is a private limited company established on 4.5.2007 and is engaged in the provision of information and communication technology products. Aliran Digital’s registered address is at Unit 1-2G, Tingkat 2, Jalan AU 1A/4E, Taman Keramat Permai, 54200 Kuala Lumpur, Wilayah Persekutuan Kuala Lumpur, Malaysia.

A.4 VIAMED SDN. BHD.

10. Viamed Sdn. Bhd. (“Viamed”) (777451-V)⁴ is a private limited company established on 18.6.2007 and is engaged in system and technology consultancy and supply of medical and hospital equipment. Viamed’s registered address is at No. 8-1A, Jalan Biadara 6/3, Saujana Utama 3, 47000 Sungai Buloh, Selangor, Malaysia.

A.5 NOVATIS RESOURCES SDN. BHD.

11. Novatis Resources Sdn. Bhd. (“Novatis”) (819622-A)⁵ is a private limited company established on 29.5.2008 and is engaged in the provision of computer and electronic consultancy, application development, data centre, cloud service solution, maintenance services, civil aviation, maritime surveillance solution and cyber

³ Companies Commission of Malaysia search on Aliran Digital dated 24.1.2022.

⁴ Companies Commission of Malaysia search on Viamed dated 24.1.2022.

⁵ Companies Commission of Malaysia search on Novatis dated 24.1.2022.

security solution. Novatis' registered address is at No.19, Jalan 7/7C, Seksyen 7, 43650 Bandar Baru Bangi, Selangor, Malaysia.

A.6 SILVER TECH SYNERGY SDN. BHD.

12. Silver Tech Synergy Sdn. Bhd. ("Silver Tech") (688945-K)⁶ is a private limited company established on 20.4.2005 and is engaged with the provision of information communication technology solutions for organisations, private and government sector, general multi trading and services, computer network and cable television wiring and wholesale of a variety of goods. Silver Tech's registered address is at No. 310B, Lorong Kedah, Melawati Square, Pusat Bandar Melawati, 53100 Kuala Lumpur, Wilayah Persekutuan Kuala Lumpur, Malaysia.

A.7 BASENET TECHNOLOGY SDN. BHD.

13. Basenet Technology Sdn. Bhd. ("Basenet") (293703-D)⁷, formerly known as Pascamuda Diversified Sdn. Bhd. is a private limited company established on 4.4.1994 and is engaged in the provision of information technology. Basenet's registered address is at No. 71B, Jalan SG 3/10 Taman Sri Gombak, 68100 Batu Caves, Selangor, Malaysia.

⁶ Companies Commission of Malaysia search on Silver Tech dated 24.1.2022.

⁷ Companies Commission of Malaysia search on Basenet dated 24.1.2022.

A.8 VENTURE NUCLEUS (M) SDN. BHD.

14. Venture Nucleus (M) Sdn. Bhd. (“Venture Nucleus”) (672444-A)⁸ is a private limited company established on 22.11.2004 and is engaged in the provision of information technology. Venture Nucleus’ registered address is at No. 36, Jalan Datuk Sulaiman, Taman Tun Dr Ismail, 60000 Kuala Lumpur, Wilayah Persekutuan Kuala Lumpur, Malaysia.

B. BUSINESS AND INDUSTRY LANDSCAPE

B.1 BACKGROUND OF ASWARA

15. ASWARA (formerly known as *Akademi Seni Kebangsaan*) was established in 1994 under the Ministry of Culture, Arts and Tourism Malaysia. With the coming into force of *Akademi Seni Budaya dan Warisan Kebangsaan Act 2006* [Act 653], *Akademi Seni Budaya dan Warisan Kebangsaan* was administratively referred to as “ASWARA”.
16. ASWARA is an institution of higher learning and education that provides learning, research and academic publication as well as professional advice and services in the field of culture, arts and heritage. Computer animation, which forms part of the art subject offered by ASWARA, commenced in 2015.

⁸ Companies Commission of Malaysia search on Venture Nucleus on 24.1.2022.

B.2 OVERVIEW OF PROCUREMENT IN ASWARA

17. The ASWARA procurement process is governed by *Pekeliling Perbendaharaan Malaysia PK2.1 Kaedah Perolehan Kerajaan* (“PK 2.1”)⁹ and other relevant circulars depending on the type of purchase executed.
18. Under PK 2.1, the relevant procurements involving the Infringements are categorised according to the allocated project value as described in **Table 2** below:

Table 2: Procurement Types Undertaken by ASWARA

NO.	PROCUREMENT TYPE	AMOUNT (RM)
1	<i>Pembelian Terus</i> (Direct Negotiation)	Up to RM20,000.00 (each year or each contract)
2	<i>Sebut Harga</i>	>RM20,000.00 – RM500,000.00 (each year or each contract)
3.	<i>Tender Terbuka</i> (Open Tender)	>RM500,000.00 (each year or each contract)

19. Based on the new requirement in PK 2.1, only authorised representatives are allowed to attend briefings and site visits for the company it represents.¹⁰ This new requirement is expressly included in the advertisement of any tender or request for quotation.
20. The appointment of company representatives to attend briefings and site visits as well as to purchase procurement documents shall

⁹ *Kaedah Perolehan Kerajaan* issued by the Ministry of Finance Malaysia.

¹⁰ Paragraph 46 of the Statement of Aziziamli of ASWARA recorded on 23.7.2018.

be supported by a Letter of Authorisation (“LOA”) bearing the respective company’s letterhead and further verified with the national registration identification card of the representative before being allowed to purchase the procurement documents.

21. Generally, a company can determine if it is qualified to participate in a tender or quotation by looking at the field code which is specified in the tender or quotation specifications. The relevant field codes are set out in **Table 3** below:

Table 3: Relevant Field Code

FIELD CODE	WORKS SPECIFICATION
210101	<i>Hardware (low-end technology) – Supply all types of computer hardware including PC, notebook, printer, document scanner, peripherals and maintenance</i>
210103	<i>Software – Supply all computer software, operating system, database, off-the-shelf packages including maintenance</i>
210104	<i>Software/ System Development/ Customization and Maintenance including data entry, data processing</i>
210105	<i>Telecommunication/ networking-supply product, infrastructure, services including maintenance (LAN/WAN/ Internet/ wireless/ satellite)</i>
210106	<i>Data management – Provide services including Disaster</i>
210108	<i>Multimedia products, services and maintenance (video conferencing, webcast, Graphic design, animation)</i>

B.3 THE RELEVANT PROJECTS

22. **Table 4** below sets out, for each of the Infringements specified by the Commission in **Part 2**, the projects in question, the

advertisement date, the names of enterprises who placed tender or to quote, the Parties and the recipient for each project. In each case, enterprises that received support from other Parties in order to secure the project are highlighted in bold in the “Infringing Parties” column in **Table 4** below:

Table 4: Details of Parties' Involvement in Relevant Projects

NO.	PROJECT	FIELD CODE	ADVERTISEMENT DATE	NUMBER OF BIDDERS	INFRINGING PARTIES	SUCCESSFUL BIDDER
1.	<p>SH/KPK/ASWARA/S/01/2016</p> <p><i>Sebut Harga Perkhidmatan Membekal, Menghantar, Memasang, Menguji dan Mentauliah Serta Menyelenggara (Dalam Tempoh Jaminan) Peralatan Sistem Bekalan Kuasa Bersepadu dan Backup Data Di Akademi Seni Budaya dan Warisan Kebangsaan, Kementerian Pelancongan dan Kebudayaan Malaysia.</i></p> <p>("Sebut Harga A")</p>	<p>210101 210103 210105 210106</p>	18.7.2016	15 Bidders	<ul style="list-style-type: none"> ▪ Caliber ▪ Tuah Packet ▪ Novatis ▪ Silver Tech ▪ Venture Nucleus ▪ Basenet 	Caliber
2.	<p>T/KPK/ASWARA/S/01/2015</p> <p><i>Tender Perkhidmatan Membekal, Menghantar, Memasang, Menguji dan Mentauliah Serta Menyelenggara (Dalam Tempoh Jaminan) Peralatan dan Perisian Pengkomputeran Untuk Pembelajaran Makmal Animasi 2D (2D Animation Lab), Graphic Production dan HD Projector di Akademi Seni Budaya dan Warisan Kebangsaan, Kementerian Pelancongan dan Kebudayaan Malaysia.</i></p> <p>("Tender A")</p>	<p>210103 210104 210105 210106</p>	15.8.2015	2 Bidders	<ul style="list-style-type: none"> ▪ Tuah Packet ▪ Aliran Digital 	[X]

NO.	PROJECT	FIELD CODE	ADVERTISEMENT DATE	NUMBER OF BIDDERS	INFRINGING PARTIES	SUCCESSFUL BIDDER
3.	<p>SH/KPK/ASWARA/S/01/2015</p> <p><i>Sebut Harga Perkhidmatan Membekal, Menghantar, Memasang, Menguji dan Mentauliah Serta Menyelenggara (Dalam Tempoh Jaminan) Perkakasan ICT Fakulti Animasi Dan Multimedia di Akademi Seni Budaya dan Warisan Kebangsaan, Kementerian Pelancongan dan Kebudayaan Malaysia.</i></p> <p>("Sebut Harga C")</p>	<p>210101</p> <p>210103</p> <p>210108</p>	30.1.2015	10 Bidders	<ul style="list-style-type: none"> ▪ Viamed ▪ Aliran Digital ▪ Tuah Packet 	[X]
4.	<p>Sebut Harga B 2015</p> <p><i>Sebut Harga Perkhidmatan Penyelenggaraan 'Active Directory' Untuk ASWARA (Configuration Microsoft Windows 2008 Server, Diagnose & Troubleshooting Active Directory Problems & Configure Virtual Server, Back Up, Support for Active Directory, Maintain & Support Network Domain Name Server).</i></p> <p>("Sebut Harga Active Directory")</p>		1.3.2015 (estimated advertisement date)	3 Bidders	<ul style="list-style-type: none"> ▪ Tuah Packet ▪ Viamed 	Viamed

C. INVESTIGATION PROCEDURES AND PROCESS

23. In September 2016, the Commission received information regarding an alleged bid rigging arrangement in relation to *Sebut Harga A*.
24. On 14.2.2017, the Commission commenced an investigation under section 15 to ascertain whether infringements have been committed under section 4 prohibition of the Act. During the course of the investigation, the Commission also found that there were three other projects, namely, *Tender A*, *Sebut Harga C* and *Sebut Harga Active Directory* potentially to have been rigged by the Parties.
25. During the course of the investigation, the Commission issued 43 notices pursuant to sections 18(1)(a) and (b) of the Act to require the provision of information and/or documents; and to make statements to the Commission based on the information and documents requested or in relation to any queries made by the Commission officers. The Commission had also issued 9 notices to the Parties to access their records under section 20 of the Act.¹¹
26. In addition to the above, the Commission had relied on the evidence of certain witnesses to supplement the documentary evidence in particular where those witnesses were directly involved in the relevant communications. The Commission carried out interviews under sections 18(1)(a) and (b) of the Act with the key

¹¹ Section 20 Notice issued to Tuah Packet dated 15.5.2018; Section 20 Notice issued to Basenet dated 4.7.2018; Section 20 Notice issued to Caliber dated 23 and 25 May 2018; Section 20 Notice issued to Novatis dated 15.5.2018; Section 20 Notice issued to Silver Tech dated 4.7.2018; Section 20 Notice issued to Aliran Digital dated 23.5.2018; and Section 20 Notice issued to Venture Nucleus dated 4.7.2018; and Section 20 Notice issued to Viamed dated 27.6.2018.

representatives of the Parties. The interviews with the key representatives of the Parties are described in **Table 5** below:

Table 5: Interviews Conducted by the Commission

NAME	PARTY	DESIGNATION	DATE OF INTERVIEW
Zuzairi bin Othman	Tuah Packet	System Engineer	24.8.2017 11.6.2018
Mujahidin bin Mat Rata	Tuah Packet	Despatch Rider	24.8.2017
Mohamad Hisham bin Rahim	Tuah Packet	Director	13.9.2017 11.6.2018
Mohamad Rani bin Ahmad Saliman	Tuah Packet	Director	11.6.2018
Siti Azura binti Md Said	Tuah Packet	Sales Executive	5.7.2018
Mohd Fauzi bin Abdollah@Buyong	Caliber	Operation and Sales Executive	25.8.2017 11.6.2018 31.7.2018
Anuar bin Haron	Caliber	Director	13.9.2017 26.7.2018
Ridzaudddeen bin Zakaria	Caliber	Sales Manager	26.7.2018
Muhammad Saifuddin bin Mazlan	Caliber	Sales Administrator and Tender Writer	31.7.2018
Jasny Hanif bin Hasan	Aliran Digital	Network Engineer	23.5.2018
Ku Adam bin Ku Azhar	Aliran Digital	Administration Assistant	23.5.2018
Asrol bin Bakar	Aliran Digital	Director	28.6.2018
Kartini binti Zainon	Viamed	Director	27.6.2018
Mohamad Hanis bin Hashim	Novatis	Sales Manager	15.5.2018 9.7.2018
Noor Hizaan bin Mahayudin	Novatis	Director	15.5.2018
Mohd Husni bin Abdul Karim	Silver Tech	Director	4.7.2018
Nur Hasmah binti Kauzai@Fauzi	Silver Tech	Purchasing Executive	4.7.2018

NAME	PARTY	DESIGNATION	DATE OF INTERVIEW
Mohd Rosli bin Shamsuddin	Basenet	Director	4.7.2018
Ryan Zakry bin Zakaria	Basenet	Sales Manager	4.7.2018
Zarilhasreen bin Zulkipli	Basenet	Human Resource and Administrative Manager	4.7.2018
Dalmata Rabidah binti Muallap	Venture Nucleus	Sales Administrative Executive	4.7.2018
Faizal bin Jamat	Venture Nucleus	Director/Chief Executive Officer	4.7.2018
Mohd Hasmy bin Kamsani	Venture Nucleus	Account Manager	4.7.2018

27. The Commission also interviewed the following ASWARA officers listed in **Table 6** below:

Table 6: Interviews Conducted by the Commission

NAME	ORGANISATION	DESIGNATION	DATE OF INTERVIEW
Aziziamli bin Salman	ASWARA	Assistant Administrative Officer (Procurement)	23.7.2018
Ku Aznal Shahri Ku Bin Ku Abd Hamid	ASWARA	Director (Information Technology)	5.4.2017
Norhairizam Abd Manap	ASWARA	Assistant Treasurer	23.7.2018

28. The Commission issued further section 18 notices on 13.7.2018 and 30.7.2018 requesting documents and financial information relating to each Party's turnover. Consequently, the Commission received the Parties' responses between 19.7.2018 and 3.8.2018.

29. On 4.3.2019, the Commission served the Proposed Decision dated 26.2.2019 to the Parties. From 12.3.2019 to 19.6.2019, the documents in the Commission's file were made available to the Parties for inspection. Upon request by the enterprises, the Commission granted an extension to submit their written representation respectively.
30. By 19.7.2019, all the Parties submitted their respective written representations to the Commission.
31. On 25.10.2019, the Commission issued a notice of the amendment¹² to the Proposed Decision dated 26.2.2019.
32. On 23.12.2019, the Commission issued a second notice of the amendment¹³ to the Proposed Decision.
33. Following the Commission's notice of amendment dated 23.12.2019, only Novatis requested for another round of oral representation. The Commission accepted Novatis' request for a continued oral representation. On 5.2.2020, Novatis submitted a supplemental written representation and a bundle of documents.
34. The Parties', oral representations to the Commission are as described in **Table 7** below:

¹² Notice of Amendment to the Proposed Decision against the Eight (8) System Integrator Companies in the Procurement at ASWARA – Case No. 700-1.1.38.2016 dated 25 October 2019.

¹³ Notice of Amendment to the Proposed Decision against the Eight (8) System Integrator Companies in the Procurement at ASWARA – Case No. 700-1.1.38.2016 dated 23 December 2019.

Table 7: Oral Representation Sessions

DATE	PARTY
5.9.2019	(i) Tuah Packet (ii) Caliber (iii) Aliran Digital (iv) Viamed (v) Silver Tech (vi) Venture Nucleus
4.11.2019	(i) Novatis (ii) Basenet
3.9.2020	(i) Novatis

C.1 PARTIES' ALLEGED PROCEDURAL IMPROPRIETY ON THE PART OF THE COMMISSION

Arguments by the Parties

35. The Commission should not be given the right in the future to refer to and rely on any additional documentary evidence obtained by the Commission.

The Commission's Findings

36. The Commission is entitled to cite additional evidence not referred to in the Proposed Decision to respond to the Parties' submissions.¹⁴ The additional evidence is ancillary to the findings in the Proposed Decision. Further, the Commission had not made any new allegation or finding beyond the confines of the Proposed Decision.¹⁵

¹⁴ Case T-588/08 *Dole Food Company & Anor v European Commission* [2013], paragraph 335.

¹⁵ Case T-228/97 *Irish Sugar plc v European Commission* [7 October 1999] II-02969, at paragraph 34.

37. Moreover, the Parties had access to all documents which have been obtained and produced by the Commission during the investigation period, thus allowing the Parties to exercise their defence rights. Therefore, the Commission should be able to refer to the same documents accessed by the Parties.¹⁶

Arguments by Novatis

38. Novatis argues the following:

- (i) Hanis' two written statements dated 15.5.2018 and 9.7.2018, are unreliable and ought to be expunged, omitted and/or rendered inadmissible. Novatis forwarded the original stamped statutory declaration dated 26.11.2019 by Hanis;
- (ii) The Commission failed to grant full access to the Commission's investigation papers and working file;
- (iii) The Commission's public statement dated 5.3.2019 was highly prejudicial to Novatis as it creates a perception that Novatis had indeed engaged in anti-competitive behaviour at the provisional stage;
- (iv) There is a lack of procedural fairness in relation to Hanis' statement;
 - (a) The section 18 notice was only produced after the completion of the interview;
 - (b) The Commission failed to advise the witness as to their rights;

¹⁶ Case T-86/95 *Compagnie Generale Maritime and Others v Commission* [2002], paragraph 448.

- (c) The Commission failed to produce a transcript of the statement;
- (d) The Commission did not issue any notice pursuant to section 18 of the Act before the commencement of the statement taking session held on 9.7.2018; and
- (e) The statement taking session was conducted for 5 hours without break and rest in between.
- (v) The 'dawn raid' conducted was in contravention of section 26 of the Act;
- (vi) The Proposed Decision does not contain sufficient details in contravention of section 36 of the Act;
- (vii) The first amendment to the corrections made in the Proposed Decision was communicated to Novatis only after the oral representation session held on 4.11.2019 was convened;
- (viii) Novatis offers an undertaking to the Commission without admission of any liability;
- (ix) The issue of the reliability of the amended Proposed Decision; and
- (x) Personal data protection ought to be upheld by the Commission.

The Commission's Findings

39. The Commission disagrees with the argument that the Commission has erroneously relied on statements by Hanis of Novatis. On the contrary, the Commission had relied on both direct and indirect evidence to corroborate statements by Hanis. This will be discussed in the succeeding paragraphs of this Decision.

40. Additionally, the Commission takes the view that the witness statements provided by Hanis are true, accurate and complete pursuant to section 18(3) of the Act. Before the statement was finalised, the witness is able to review the statement before signing the statement, which includes a declaration that he or she is not aware of any other information which would make the information provided untrue or misleading.
41. In view of the statutory declaration, the Commission takes into account relevant contemporaneous events to arrive at a finding that the statutory declaration serves as nothing more than an afterthought on the part of Novatis. **Table 8** is the chronology outlining the relevant dates:

Table 8: Overview of Events Leading up to the Issuance of Statutory Declaration

RELEVANT DATE	DESCRIPTION OF DOCUMENT
15.5.2018	Statement of Mohamad Hanis bin Hisham (Hanis' 1 st Statement).
9.7.2018	Statement of Mohamad Hanis bin Hashim (Hanis' 2 nd Statement).
26.2.2019	Issuance of the Proposed Decision.
4.3.2019	Service of the Proposed Decision on the Parties.
4.11.2019	Possibility of a Statutory declaration was discussed during Novatis' oral representation session.
26.11.2019	A statutory declaration was made by Mohamad Hanis bin Hashim.

42. Based on **Table 8**, the statutory declaration was made eight months after the issuance of the Proposed Decision. The Commission finds that the statutory declaration was a dishonest attempt to alter the two statements by Hanis of Novatis and ought to be given no weight

at all.¹⁷ The Commission finds no basis for the argument by Novatis that the Commission failed to grant full access to the Commission's file including the investigation paper and working file. This is in line with the principle that the right of access to the file does not extend to confidential information and internal documents of the Commission.

43. We shall address Novatis' claims of discrepancies and inaccuracies relating to the facts contained in Hanis' witness statement in **Table 9** below:

Table 9: Novatis' Claim of Discrepancies and Inaccuracies

NO.	CLAIM OF DISCREPANCIES AND INACCURACIES	THE COMMISSION'S RESPONSE
1.	Hanis is not the sales manager of Novatis.	<p>Hanis' designation stated in his statement provided to the Commission is immaterial. Regardless of his position in Novatis, Hanis informed the Commission that he prepared the bid submission documents of Silver Tech, Basenet and Venture Nucleus for <i>Sebut Harga A</i>. This is corroborated by Silver Tech.¹⁸</p> <p>Documentary evidence was also found in his laptop which further proved that he indeed prepared the tender documents for Silver Tech,</p>

¹⁷ See *Ng Chooi Kor v. Isyoda (M) Sdn. Bhd.* [2010] 1 MLJ 346, at paragraph 20.

¹⁸ Paragraph 13 of the Statement of Nur Hasmad of Silver Tech recorded on 4.7.2018.

NO.	CLAIM OF DISCREPANCIES AND INACCURACIES	THE COMMISSION'S RESPONSE
		Basenet and Venture Nucleus for <i>Sebut Harga A</i> .
2.	Paragraph 4 of Hanis' statement recorded on 15.5.2018 was referring to the general workflow at Novatis and not <i>Sebut Harga A</i> .	The Commission agrees that paragraph 4 of Hanis' statement appears to be a general statement and does not refer to <i>Sebut Harga A</i> . The Commission would also like to point out that paragraph 4 of Hanis' statement dated 15.5.2018 was never referred to by the Commission in its Proposed Decision.
3.	Paragraph 9 of Hanis' statement recorded on 15.5.2018 is referring to the fact that <i>Sebut Harga A</i> requires the cooperation of a minimum of four companies of different IT expertise to comply with the <i>Sebut Harga A</i> tender specification.	The Commission is unable to accept this argument. Paragraph 9 of Hanis' statement dated 15.5.2018 was made in furtherance of his statements in paragraphs 6 to 8 whereby Hanis has acknowledged that he prepared the tender documents for <i>Sebut Harga A</i> for Silver Tech, Basenet and Venture Nucleus. Nowhere in paragraphs 6 to 9 of his statements indicates that he was describing that cooperation between IT companies was needed to comply with <i>Sebut Harga A</i> tender specification.
4.	Hanis clarifies that his statement dated 15.5.2018 in paragraph 11 "... <i>syarikat-syarikat ini juga akan meminta bantuan yang sama daripada kami</i> " does not refer to <i>Sebut</i>	Upon perusing the entirety of Hanis' statement, the Commission is unable to accept the clarification given and views this as an afterthought to minimise Novatis' role in the bid-rigging arrangement.

NO.	CLAIM OF DISCREPANCIES AND INACCURACIES	THE COMMISSION'S RESPONSE
	<p><i>Harga A</i> and was a general statement regarding the assistance sought by companies that have no expertise in a specific area of the IT sector. He also stated that the assistance to other companies is provided through a subcontracting arrangement.</p>	<p>Although not expressly stated, a plain reading of Hanis' statement in paragraph 11 shows that Hanis' statement was referring to <i>Sebut Harga A</i>; and the collusion between the enterprises in preparing the tender documents for <i>Sebut Harga A</i> was stated in paragraphs 6 to 9.</p> <p>It is important to note that Hanis was also allowed to check his statement that was prepared by the Commission Officer. If Hanis had intended his statement in paragraph 11 to reflect that assistance was given through a subcontracting relationship, he would have notified the Commission Officer about the error and requested for the error to be corrected. Hence, the Commission views Hanis' alleged 'clarification' as an afterthought by Novatis.</p>
5.	<p>Novatis prepared the bids independently.</p>	<p>The Commission has gathered evidence which reflects that Novatis had prepared the bids in the name of Silver Tech, Basenet and Venture Nucleus which will be explained in Part 2.</p>
6.	<p>Hanis did not volunteer for the second witness statement.</p>	<p>As stated in the second witness statement, it was taken as a follow-up to the first witness statement</p>

NO.	CLAIM OF DISCREPANCIES AND INACCURACIES	THE COMMISSION'S RESPONSE
		conducted with Hanis of Novatis on 15.5.2018.
7.	Hanis did not make phone calls to other Parties.	Despite the absence of a telephone conversation record, it is evident that Novatis prepared and submitted the bids for <i>Sebut Harga A</i> in the name of Silver Tech, Basenet and Venture Nucleus.
8.	Novatis denies paragraph 9 (relating to commission payment) and paragraph 10 (relating to the issuance of invoice and commission payment) of his statement.	<p>Venture Nucleus¹⁹ and Basenet²⁰ both indicated in their statements that the winner will receive a form of payment for allowing their company names to be used by Novatis.</p> <p>Documentary evidence was also found in Hanis' laptop which further proves that he is indeed the person who prepared the tender documents for Silver Tech, Basenet and Venture Nucleus.²¹</p> <p>The Commission found in Hanis' email to Yusri of Novatis dated 1.8.2016²² evidence that Hanis was responsible for setting the offer price when asked about one of the documents for <i>Sebut Harga A</i>.</p>

¹⁹ Paragraphs 10, 11, 12, 13, 14 and 15 of Statement Faizal of Venture Nucleus provided pursuant to section 18 notice dated 4.7.2018.

²⁰ Paragraphs 30 and 31 of the Statement of Mohd Rosli of Basenet recorded on 4.7.2018.

²¹ Paragraph 8 of the Statement of Mohamad Hanis of Novatis recorded on 9.7.2018; and copies of Basenet's, Silver Tech's and Venture Nucleus' tender documents found in the possession of Hanis' laptop.

²² Email thread between Hanis and Yusri of Novatis dated 1.8.2016.

NO.	CLAIM OF DISCREPANCIES AND INACCURACIES	THE COMMISSION'S RESPONSE
		<p>Even without the kickback arrangement and payment, the Parties had engaged in horizontal agreements that had the object to perform bid rigging for <i>Sebut Harga A</i>.</p>
9.	<p>Subcontracting work is common within the IT sector for some portion of the work required by the tender, and subcontracting also reduces the cost incurred for the project.</p> <p>Paragraph 12 of Hanis' statement dated 9.7.2018 implies that there is an agreement before the submission of <i>Sebut Harga A</i> between Novatis, Basenet, Venture Nucleus and Silver Tech. If Novatis wins <i>Sebut Harga A</i>, a portion of the work under <i>Sebut Harga A</i> will be subcontracted to other enterprises.</p> <p>The existence of such an arrangement is also denied.</p>	<p>Cooperation between enterprises must be within the limits permissible under the law such that the cooperation does not lead to the prevention, restriction or distortion of competition in the market.</p> <p>Tendering procedures are designed to provide competition and a fundamental principle in competition law is that enterprises are presumed to act independently when determining their conduct in the market.</p> <p>An essential feature of a competitive tendering process is that each interested bidder prepares and submits its bids independently.²³ Any tenders submitted as a result of collusion or cooperation between bidders competing for the same</p>

²³ CCCS 500/7003/17 *Infringement of the section 34 prohibition in relation the provision of maintenance services for swimming pools, spas, fountains and water features* (14 December 2020), at paragraph 44.

NO.	CLAIM OF DISCREPANCIES AND INACCURACIES	THE COMMISSION'S RESPONSE
		tender, by their very nature, have the ability to restrict competition. ²⁴

44. In addition, enterprises have no right to access the investigation file before the Commission issues provisional findings pursuant to section 36 of the Act. The High Court in *Wealthy Care Consortium Sdn Bhd lwn Ketua Pegawai Eksekutif Suruhanjaya Persaingan Malaysia (MyCC) dan satu lagi* affirmed the principle as follows:

“...Siasatan bukan sahaja sulit, tetapi juga tidak boleh ada halangan dan campur tangan oleh pihak yang tidak berkenaan. ...”²⁵

45. The Commission had provided Novatis access to the Commission’s file which includes all documents obtained and produced by the Commission during the investigation, with the exception of internal documents, business secrets and other confidential information. Accordingly, the Commission finds that Novatis had accessed the Commission’s file on 12.3.2019, 29.5.2019, 31.5.2019 and 19.6.2019.

46. On another note, in relation to the issuance of the Commission’s news release, we find Novatis’ argument that the news release was prejudicial against Novatis to be baseless. On the contrary, the news release was far from prejudging Novatis as culpable. With reference

²⁴ *Apex Asphalts and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, at paragraphs 209 to 211.

²⁵ *Wealthy Care Consortium Sdn Bhd lwn Ketua Pegawai Eksekutif Suruhanjaya Persaingan Malaysia (MyCC) dan satu lagi* [2020] 7 MLJ 616, at paragraph 20.

to *United Brands*²⁶ and *Atlantic Container Line*²⁷, the news release issued²⁸ merely intended to raise awareness of competition law. Therefore, the argument by Novatis is without merit and hereby rejected.

47. In regards to the procedural issue relating to Hanis' statement, the following states the Commission's position:

- (i) Hanis was served the section 18 notice and subsequently acknowledged receiving the notice;²⁹
- (ii) The Commission officers have advised the witnesses on their rights and obligations under the law verbally before conducting the statement taking session;
- (iii) The request for the transcripts of the witnesses' interview sessions was denied as the Commission in its Proposed Decision had relied on written statements signed by the witnesses;
- (iv) Hanis' witness statement dated 9.7.2018 was a continuation of the session conducted with Hanis on 15.5.2018; and
- (v) Hanis' statement taking session comprises the time in taking the statement, preparation of the written witness statement by the Commission officers, as well as review and finalisation of the statement by the Commission officers together with Hanis. Light refreshments and drinking water were provided throughout the session. Thereupon, the duration of the

²⁶ Case 27/76 *United Brands Company and United Brands Continental BV v the Commission of the European Communities* [1978] ECR1978 -00207, at paragraphs 284 and 285.

²⁷ Case T-191/98 *Atlantic Container Line and Others v Commission of the European Communities* [2003] ECR 2003 II-03275, at paragraphs 442 and 443.

²⁸ MyCC's news release titled, "*RM 1.94 Million Penalty to Eight Enterprises for Bid Rigging*", dated 4.3.2019.

²⁹ Section 18 Notice issued to Novatis dated 15.5.2018 (acknowledged by Hanis of Novatis).

statement taking session is deemed reasonable and unoppressive.³⁰

48. The statements of Hanis and Hizaan of Novatis were taken and the documents were provided pursuant to the section 18 notice dated 15.5.2018 and not pursuant to section 26 of the Act. Section 20 of the Act provides for the power of the Commission to give direction to allow the Commission to access records, books, accounts or other things to carry out the Commission's functions or powers.
49. The Proposed Decision also contained sufficient details of the alleged infringement.
50. Regarding the issue on the Commission's amendments to the Proposed Decision, there are two issues raised by Novatis, namely:
 - (i) The delay in communicating the 1st notice of amendment dated 25.10.2019; and
 - (ii) The Commission has disregarded the errors raised by Novatis via its supplemental written representation dated 31.10.2019, oral representation held on 4.11.2019, and Novatis' letter to the Commission dated 8.11.2019.
51. Further, the 1st notice of amendment dated 25.10.2019 were made pursuant to the typographical errors brought to the Commission's attention during the oral representation made by Tuah Packet, Caliber, Aliran Digital and Viamed on 5.9.2019. Novatis stated that the 1st notice of amendment was received at 4p.m., on 4.11.2019,

³⁰ See *Public Prosecutor v Veeran Kutty* [1990] 3 MLJ 498, at page 1.

after the conclusion of Novatis oral representation session held on the same day.

52. Novatis had raised the issue on the accuracy of Hanis' statement and the finding of fact in the Proposed Decision via its supplemental written representation dated 31.10.2019 and Novatis' oral representation on 4.11.2019.
53. Pursuant to that, Novatis, in its letter dated 8.11.2019, again raised the issue on the accuracy of the Proposed Decision, particularly in relation to the statement provided by Hanis.
54. The Commission then issued the 2nd notice of amendment dated 23.12.2019 where Novatis was given the opportunity to comment on the amended version of the Proposed Decision.
55. Thereafter, Novatis filed a second supplemental written representation dated 5.2.2020 and presented its case during its continued oral representation held on 3.9.2020.
56. The Commission maintains that the delay arising from the 1st Notice of Amendment does not jeopardise, in any way, Novatis' right of defence given that Novatis was able to provide comments and to make its oral representation before the Commission via its second supplemental written representation dated 5.2.2020 and continued oral representation held on 3.9.2020. Notwithstanding the above, the issues raised by Novatis regarding the alleged inaccuracies have already been addressed by the Commission in **Table 9**.

57. Novatis offered an undertaking post-issuance of the Proposed Decision and conclusion of the investigation by way of its written representation dated 12.7.2019.³¹ In exchange of the Commission ceasing investigation and/or issuing a non-infringement decision, Novatis stated it was prepared to give an undertaking as follows:
- (i) It will not prepare and submit tendering document on behalf of other parties without their prior express consent;
 - (ii) It will implement regular competition law compliance programme and training for its directors and employees involved in the tendering process; and
 - (iii) Novatis is prepared to reimburse Commission's administrative costs and other expenses incurred from the commencement of investigation
58. It is the Commission's view that it was too late for Novatis to offer an undertaking after the conclusion of an investigation and after the issuance of a proposed decision. The Commission takes the position that the rejection of Novatis' proposed undertaking was within the Commission's discretion.
59. We find no merit in the argument raised by Novatis concerning the Personal Data Protection Act 2010 [Act 709]. Act 709 regulates the processing of personal data concerning commercial transactions whereas a decision issued under sections 36, 39 or 40 of the Act is not a form of commercial transaction. Therefore, the Commission is of the view that Act 709 is inapplicable in the present circumstance.

³¹ Written Representation of Novatis dated 12 July 2019.

60. On the entirety of the evidence produced above, the Commission hereby rejects Novatis' arguments on the alleged procedural improprieties.

Arguments by Basenet

61. The following are procedural impropriety issues raised by Basenet:

- (i) Access to the Commission's file should have been given without imposition of a fee as it is an integral part of Basenet's right to be heard;
- (ii) The Commission had delayed Basenet's access to the initial complaint document wherein the Commission's investigation against Basenet was based upon;
- (iii) The Commission had based its investigation upon a vaguely worded complaint; and
- (iv) The Commission should not be given the right in the future to refer to and rely on any additional documentary evidence obtained by the Commission.

The Commission's Findings

62. Access to the Commission's file is intended to enable the Parties to exercise their rights of defence against any Proposed Decision by the Commission in cases brought under sections 4 and 10 of the Act.

63. Under section 17(2)(c) of the Competition Commission Act 2010 [Act 713], the Commission is empowered to impose fees or charges

for services rendered by the Commission. The imposition of such fees does not interfere with the Party's right of defence as access was granted subject to the imposition of a nominal hourly rate fee. Therefore, Basenet's argument that the nominal fee has undermined an integral part of Basenet's right to be heard is without merit and hereby dismissed.

64. The Commission acknowledges that the complaint form was not made available to Basenet during its access to file sessions. Nevertheless, the delay is not fatal nor prejudiced against Basenet's right of defence. It is worth noting that Basenet was granted access to the Commission's files twice on 14.3.2019 and 29.5.2019, respectively. Additionally, the Commission has provided Basenet with the other requested documents on two occasions (i.e on 4.4.2019 and 15.4.2019).
65. The Commission had verified and obtained further clarification on the complaint before investigating the present case.
66. Based on the Commission's assessment of the above relevant evidence, the arguments by Basenet on the alleged procedural improprieties are hereby dismissed.

Arguments by Tuah Packet, Viamed, Caliber and Aliran Digital

67. The Parties submit that the Commission omitted facts of *Sebut Harga A*, *Tender A*, *Sebut Harga C* and *Sebut Harga Active Directory*, thereby resulting in the Commission being unable to ascertain what has transpired. Tuah Packet, Viamed, Caliber and

Aliran Digital also raised dissatisfaction with the manner in which the witness statement taking was conducted.

68. In addition, the Parties claim that they were only given one hour to inspect a large volume of documents. Last but not least, Tuah Packet, Viamed, Caliber and Aliran Digital contend that the Commission has failed to record the statement of ASWARA's officials.

The Commission's Findings

69. The Commission is of the view that, on a balance of probabilities, sufficient evidence had been gathered to conclude that the Parties had entered into agreements and/or concerted practices that have the object to significantly prevent, restrict or distort competition in the tendering process.
70. Section 18 of the Act does not restrict the manner and format of the statement taking process carried out by the Commission.
71. Tuah Packet, Viamed, Caliber and Aliran Digital had two opportunities to access the Commission's files, whereby the sessions took place on 13.3.2019 and 29.5.2019 respectively. In having the opportunity to do so, the Commission is of the opinion that the Parties' rights of defence were duly protected.
72. Further, it is the Commission's prerogative to call upon a person whom the Commission believes to be acquainted with the facts and circumstances of the case.

73. Therefore, we find that the arguments raised by Tuah Packet, Viamed, Caliber and Aliran Digital are devoid of merit.

Arguments by Silver Tech

74. Silver Tech contends that it was not given full access to the Commission's investigation file.

75. Secondly, Silver Tech proposes to give an undertaking pursuant to section 43 of the Act in its written representation.

The Commission's Findings

76. The Commission has provided Silver Tech access to the Commission's files on 11.4.2019 and 29.5.2019. The right of access to the file does not extend to confidential information and internal documents of the Commission. Therefore, the Commission finds the argument by Silver Tech, that the Commission did not grant full access to its investigation file, baseless.

77. In the present case, Silver Tech offered an undertaking by way of its written representation dated 12.7.2019³² post-issuance of the Proposed Decision and conclusion of the investigation. With the agreement of the Commission in ceasing the investigation and/or issuing a non-infringement decision, Silver Tech was prepared to undertake the following:

³² Written Representation of Silver Tech dated 12.7.2019.

- (i) To implement and/or conduct a regular competition law compliance programme and training for its director and employees who are regularly involved in the tendering process; and
- (ii) To reimburse the Commission's administrative costs and other expenses incurred from the commencement of the investigation.

78. The Commission rejected the proposed undertaking because the Commission takes the position that it is too late for Silver Tech to offer an undertaking after the conclusion of the investigation and issuance of the proposed decision. By virtue of the powers vested to the Commission under section 43 of the Act, we take the view that the rejection of Silver Tech's proposed undertaking was within the Commission's discretion.

79. Based on the overall evidential assessment above, the Commission rejects the arguments raised by Silver Tech relating to the alleged procedural improprieties.

PART 2: LEGAL AND ECONOMIC ASSESSMENT

80. This section begins by setting out the legal and economic framework in which the Commission relies upon in its evidential assessment for the present case. It then sets out the evidence relating to the infringement which the Commission relies upon. Thereafter, it analyses the evidence and states the inferences, findings and conclusions that the Commission draws from the evidence.

A. THE SECTION 4 PROHIBITION

81. Section 4(1) of the Act prohibits agreements between enterprises insofar as the agreements have as their object or effect the prevention, restriction or distortion of competition

82. Under section 4(2)(d) of the Act, without prejudice to the generality of subsection (1), a horizontal agreement between enterprises that has the object of bid rigging 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 which is a party to an agreement that is prohibited under section 4(1) read with section 4(2) shall be liable for infringement of the prohibition.

B. APPLICATION OF SECTION 4 PROHIBITION TO PARTIES

B.1 THE CONCEPT OF ENTERPRISE

83. Each of the Parties, therefore, constitutes an “enterprise” for the

purpose of the Act as each of the Parties carried out commercial activities relating to, amongst other things, the provision relating to information technology.

C. AGREEMENTS AND/OR CONCERTED PRACTICES

84. According to section 2 of the Act, an agreement is formed in a contract, arrangement or understanding, whether or not legally enforceable, between enterprises, and includes a decision by an association and concerted practices. For an arrangement to form an “agreement”, it is sufficient that the enterprises in question expressed their joint intention to conduct themselves on the market in a specified way.³³
85. Section 2 of the Act defines ‘concerted practice’ in line with the principle adopted from *Suiker Unie v Commission*³⁴. The concept of concerted practice is catered for looser forms of collusion such as informal co-operation³⁵ falling short of an agreement.
86. In *Hüls v Commission*, the European Court held that “...the mere fact that it exchanged with them information which an independent operator would keep strictly confidential as a business secret is sufficient to show that it acted in an anti-competitive spirit.”³⁶
87. The Commission reiterates the principle upheld in *Polypropylene*³⁷

³³ Case T-7/89 *SA Hercules Chemicals v Commission* [1991] ECR II-1711, at paragraph 256.

³⁴ C-114/73 *Suiker Unie v Commission* [1975] ECR 1663, p 1942, at paragraph 174.

³⁵ MyCC Guidelines on Chapter 1 Prohibition, Anti-competitive Agreement, at paragraph 2.6.

³⁶ Case T-9/89 *Hüls AG v Commission of the European Communities* [1992] II-00499, at paragraph 127.

³⁷ *Polypropylene* (1986) O JL 230/1, 86/398/EEC, at paragraph 87.

that the concept of concerted practice forestalls the possibility of enterprises evading liability for a bid rigging infringement by colluding in an anti-competitive manner falling short of a definite agreement. The EU Commission further noted in the same decision that in the context of complex cartels, “some producers at one time or another might not express their definite assent to a particular course of action agreed by the others but nevertheless indicate their general support for the scheme in question and conduct themselves accordingly”.³⁸

D. SECTION 4(2)(d) OF THE ACT – AGREEMENT TO PERFORM BID RIGGING

88. Section 4(2)(d) of the Act refers to a horizontal agreement that has the object to “perform an act of bid rigging” as an example of anti-competitive conduct.
89. As further stated in section 4(2) of the Act, an agreement which has the object to perform an act of bid rigging between enterprises shall be “deemed to have the object of significantly preventing, restricting or distorting competition in the market for goods and services”. Hence, section 4(2) is a deeming provision.
90. The Commission is of the position that bid rigging can take many different forms but ultimately all forms of bid rigging will have a significant adverse effect on competition. The United Kingdom Competition and Markets Authority (“CMA”) in *England and*

³⁸ *Polypropylene* (1986) O JL 230/1, 86/398/EEC, at paragraph 87.

*Scotland Roofing*³⁹ sets out the four types of agreements that can result in a pre-selected supplier winning the contract, namely, cover bidding, bid suppression, bid rotation and market sharing. We find that any form of bid rigging is equally prohibited according to established competition principles. No form of bid rigging is less serious than the other, and thus no bid rigging conduct warrants a reduction in the amount of financial penalty to be imposed.⁴⁰

91. In *Apex Asphalts*⁴¹, the United Kingdom Competition Appeal Tribunal (“CAT”) upheld the finding in *West Midland Roofing Contractors*⁴² stating that cover bidding amounted to an infringement. In the context of the aforementioned case, the Office of Fair Trading (“OFT”) described cover bidding as conduct arising when a bidder submits a price for a contract with the intention of not winning the contract; rather, it is a price that has been decided upon in conjunction with another bidder that wishes to win the contract.

92. Generally, the Commission observes that procurement procedures are designed to ensure competitive bidding among bidders. This corresponds with a fundamental principle in competition law

³⁹ Case CA 98/01/2006CA 98/01/2006 (Joined Cases CE/3123-03 and CE/3645-03) *England and Scotland Roofing*.

⁴⁰ CCCS 500/7003/17 *Infringement of the section 34 prohibition in relation the provision of maintenance services for swimming pools, spas, fountains and water features* (14 December 2020), at paragraph 170.

⁴¹ *Apex Asphalts and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, at paragraphs 209 to 211; See also CCCS 500/7003/17 *Infringement of the section 34 prohibition in relation the provision of maintenance services for swimming pools, spas, fountains and water features* (14 December 2020), at paragraph 44.

⁴² (Case CP/0001-02) Decision of the Office of Fair Trading, No. CA98/1/2004 *Collusive tendering in relation to contracts for flat-roofing services in the West Midlands* (16 March 2004).

whereby enterprises are expected to act independently when determining their conduct on the market.⁴³

93. Therefore, an essential feature of a competitive tendering process is that each interested bidder prepares and submits its bid independently. Tenders submitted as a result of collusion or cooperation between bidders who are competing for the tender, by their very nature, have the ability to restrict competition.
94. In *Ski Taxi*⁴⁴, Norway's Supreme Court has upheld an infringement decision against two enterprises that jointly bid on a public tender. Joint tendering between actual and potential competitors is anticompetitive, the court ruled, as their cooperation removed the competitive pressure between them.⁴⁵

D.1 APPLICATION TO THE PRESENT CASE

D.1.1 SEBUT HARGA A

95. *Sebut Harga A* is referred to as the quotation for uninterrupted power supply ("UPS") equipment and backup system. Based on the request for *dokumen sebut harga* (quotation documents), a bidder is required to provide three components, namely, central UPS,

⁴³ *Apex Asphalts and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, at paragraphs 209 to 211; Cases 40-48/73, 50/73, 54-56/73, 111/73, 113-114/73 *Coöperatieve Vereniging "Suiker Unie" UA and others v E.C. Commission, Unione Nazionale Consumatori intervening* [1976] 1 C.M.L.R 295, at paragraphs 173 and 174; and Case T-202/98 *Tate & Lyle Plc v Commission of the European Communities* [2001] II-02035, at paragraph 55.

⁴⁴ Case E-3/16 Judgement of the Borgarting Court of Appeal of 17 March 2015 in 13-075034ASD-BORG/01 *Competition Authority v. Follo Taxisentral Ba and others*. See also, Case T 18896-10 *Competition Authority v. Däckia and Euromaster*, and KL-2-2015 *Eurostar and LKF Vejmarkering v. Competition Authority*.

⁴⁵ Case E-3/16 Judgement of the Borgarting Court of Appeal of 17 March 2015 in 13-075034ASD-BORG/01 *Competition Authority v. Follo Taxisentral Ba and others*, at paragraph 76 and 77.

backup system and stand-alone UPS in addition to the provision of services.⁴⁶ *Sebut Harga A* was awarded for RM467,727.00.

96. It is important to highlight that Novatis had prepared the bid documents for Novatis and three other Parties, namely Basenet, Silver Tech, and Venture Nucleus. Each bilateral agreement will be discussed separately in the succeeding paragraphs. In addition to the agreements between the four Parties, Caliber and Tuah Packet were found to have entered into an agreement and/or concerted practices to rig *Sebut Harga A*.

The Conduct of Caliber and Tuah Packet

97. Below is the chronology of *Sebut Harga A* and the participation of the relevant Parties:

Table 10: Chronology of Sebut Harga A

DATE	RELEVANT FACTS
18.7.2016	<i>Sebut Harga A</i> was advertised on ASWARA's websites.
25.7.2016	(i) Site visit at ASWARA. ⁴⁷ (ii) Caliber and Tuah Packet reached an agreement to "subcontract". (iii) Internal email of Tuah Packet which confirmed Tuah Packet and Caliber would submit a quotation for <i>Sebut Harga A</i> .
Between 25.7.2016 and 2.8.2016	(i) Tuah Packet prepared the technical documents for Caliber. (ii) Tuah Packet prepared its bid documents.
2.8.2016	(i) Last day of bid submission.

⁴⁶ Dokumen *Sebut Harga A*, page 16, 43 until 49.

⁴⁷ Borang Kehadiran Lawatan Tapak/Taklimat dated 25.7.2016, at 10 a.m.

DATE	RELEVANT FACTS
	(ii) Tuah Packet submitted bid documents of Tuah Packet and Caliber.
6.9.2016	(i) Letter of acceptance issued by ASWARA to Caliber. (ii) Email from Caliber to Tuah Packet requesting quotation documents of Caliber.
7.9.2016	(i) Tuah Packet prepared the presentation slides on behalf of Caliber. (ii) Tuah Packet and Caliber communicated with regard to the preparation of the presentation slides, among other things.
8.9.2016	Kick-off meeting organised by ASWARA and attended by Caliber accompanied by Tuah Packet.
12.9.2016 and 21.10.2016	Tuah Packet provided a quotation to Caliber for the works done as per their agreement on 25.7.2016.
28.3.2017	Caliber informed and forwarded to Tuah Packet a letter of demand from ASWARA.

Prior Coordination and Preparation of Documents

98. Following the advertisement of *Sebut Harga A* on 18.7.2016, a site visit was held at ASWARA on 25.7.2016 at 10 am. On the same day, at 2.59 pm, Tuah Packet had sent an internal email.⁴⁸ An extract of the email is set out below:

From: "mimie Kamaruddin" <[redacted]@tuahpacket.net>
Date: Jul,25, 2016 2:59 PM
Subject: SH-25/07/2016-SH/KPK/ASWARA/S/01/2016–Sebut Harga Perkhidmatan Membekal, Menghantar, Memasang, Menguji Dan Mentauliah Seta [Serta] Menyelenggara (Dalam Tempoh Jaminan) Peralatan Sistem Bekelan [Bekalan] Kuasa Bersepadu Dan Backup Data Di Akademi [Akademi] Seni Budaya Dan Warisan Kebangsaan, Kementerian Pelancongan Dan Kebudayaan Malaysia–Tutup: -02/08/016

⁴⁸ Email from Mimie to Mohamad Rani and Zuzairi of Tuah Packet dated 25.7.2016.

To: "Mohamad Rani Ahmad Saliman" <[REDACTED]@tuahtablet.net>, "Zuzairi Othman" <[REDACTED]@tuahtablet.net>
Cc: "[REDACTED]@TuahPacket" <[REDACTED]@tuahtablet.net>

Assalamuailaikum

En Zairi/ En. Rani
Ini SH ASWARA untuk backup data

Ada dua syarikat yang masuk
Caliber dan Tuah Packet

tq

Clause	Description of Equipment	Quantity	
G.1	Central Uninterrupted Power Supply (UPS)		
G.1.1	Server Room UPS And Cabling (Or Equivalent)	1 Lot	
G.2	Backup System		
G.2.1	Data Recovery Software And Device (Or Equivalent)	1 Lot	

99. The email was explained by Zuzairi of Tuah Packet⁴⁹ and stated as follows:

"Email Mimie Kamaruddin bertarikh 25 Julai 2016 mengenai Caliber Interconnects dan Tuah Packet akan memasuki sebutbarga ASWARA yang telah dihantar kepada saya dan En Rani adalah berkenaan dengan persetujuan Tuah Packet dan Caliber Interconnects untuk Kerjasama untuk melaksanakan projek sebutbarga ini sekiranya Tuah Packet menang...

Jadi pada Tarikh 25 Julai 2016, Tuah Packet telah bersetuju dengan Caliber Interconnects untuk menggunakan khidmat Caliber Interconnects untuk pelaksanaan kerja-kerja elektrik bagi sebutbarga ini jika Tuah Packet memenangi sebutbarga ini".

⁴⁹ Paragraphs 30 and 32 of the Statement of Zuzairi of Tuah Packet recorded on 11.6.2018.

100. The consensus reached between the Parties is consistent with the statement by Fauzi of Caliber that Tuah Packet and Caliber had pre-agreed to work together as “main contractor” and “subcontractor” in the event one of the Parties were to win *Sebut Harga A*. This mutual understanding was based upon Tuah Packet’s expertise in carrying out server works which would complement Caliber’s expertise in doing cabling works.⁵⁰ It was also agreed that for the subcontracting agreement, Tuah Packet will prepare Caliber’s technical document for the purpose of the submission to ASWARA.⁵¹

101. Zuzairi of Tuah Packet possessed a copy of the technical LOA⁵² issued by [X]⁵³ and quotation documents of Caliber. [X] is the supplier of the necessary UPS equipment to comply with the technical specification of *Sebut Harga A*. Zuzairi admitted that the documents were requested by him from the supplier for the purpose of preparing Caliber’s technical documents for *Sebut Harga A*.⁵⁴ Zuzairi also admitted that he prepared the technical quotation document of Caliber.⁵⁵ This is affirmed by Hisham of Tuah Packet⁵⁶ and Fauzi of Caliber⁵⁷.

102. Anuar, the director of Caliber, had acknowledged and affirmed Caliber’s decision to work together with Tuah Packet through a

⁵⁰ Paragraphs 38 and 50 of the Statement of Mohd Fauzi of Caliber recorded on 31.7.2018.

⁵¹ Paragraphs 8 and 35 of the Statement of Mohamad Hisham of Tuah Packet recorded on 11.6.2018; and Paragraph 31 of the Statement of Zuzairi of Tuah Packet recorded on 11.6.2018.

⁵² Letter of Authorisation issued by [X] Sdn. Bhd. dated 29.7.2016.

⁵³ Currently now known as [X] Sdn. Bhd.

⁵⁴ Paragraphs 31 and 32 of the Statement of Zuzairi of Tuah Packet recorded on 11.6.2018.

⁵⁵ Email from Fauzi of Caliber to Zuzairi of Tuah Packet dated 6.9.2016; and Paragraph 23 of the Statement of Zuzairi of Tuah Packet recorded on 11.6.2018.

⁵⁶ Paragraph 12 of the Statement of Mohamad Hisham of Tuah Packet recorded on 11.6.2018.

⁵⁷ Paragraph 67 of the Statement of Mohd Fauzi of Caliber recorded on 31.7.2018.

purported subcontracting arrangement and was fully aware of Tuah Packet's involvement in *Sebut Harga A*.⁵⁸

103. Zuzairi had stated that he did not know that Caliber would participate in *Sebut Harga A* until Fauzi of Caliber himself had told him (Zuzairi) during the site visit at ASWARA.⁵⁹

104. Based on the factual circumstances above, the Commission finds that Caliber had in fact taken the lead role as an instigator in the bid rigging arrangement with Tuah Packet by approaching Tuah Packet and requested for Tuah Packet to prepare Caliber's technical document and deciding to select Tuah Packet as its "subcontractor" which is a form of reward in relation to *Sebut Harga A*.

Submission of the Quotation Documents

105. Tuah Packet submitted the quotation documents using both its company name and Caliber's company name to ASWARA.⁶⁰ This was confirmed by Caliber's statement.⁶¹

106. The Commission further finds that Caliber's documents and company stamps were made available to Tuah Packet for the purpose of tender submission. It must be highlighted that this finding is inconsistent with ASWARA's requirement that only the company's representative was authorised to submit quotation documents and

⁵⁸ Paragraphs 17, 18, 20 and 21 of the Statement of Anuar of Caliber recorded on 26.7.2018.

⁵⁹ Paragraph 8 of the Statement of Zuzairi of Tuah Packet recorded on 11.6.2018.

⁶⁰ Borang Penyerahan Dokumen Sebutharga dated 2.8.2016; and Paragraph 9 of the Statement of Mujahidin recorded on 24.8.2017.

⁶¹ Paragraphs 27, 28 and 29 of the Statement of Mohd Fauzi of Caliber recorded on 31.7.2018.

to sign and place the company's stamp on ASWARA's *buku log penerimaan* (acknowledgement of receipt logbook).⁶²

Documents Provided to Caliber by Tuah Packet

107. On 6.9.2016, Zuzairi of Tuah Packet had submitted the Gantt Chart and technical specifications, and *answered documents* to Fauzi and Anuar. Zuzairi states as follows:

“Gantt chart itu adalah timeline atau tempoh masa yang diperlukan untuk melaksanakan projek tersebut manakala ‘Technical Specification Answered Documents’ pula merupakan dokumen yang menyenaraikan technical specification bagi hardware dan software yang akan digunakan bagi pelaksanaan projek tersebut.

En Fauzi daripada Caliber Interconnects telah menghubungi saya selepas Caliber Interconnects menang sebutharga tersebut dan meminta Tuah Packet untuk memberikan anggaran sebenar (proper estimation) bagi pelaksanaan kerja server dan backup.”⁶³

Preparation and Attendance of the Kick-off Meeting

108. Although the project was awarded to Caliber, Tuah Packet attended the kick-off meeting held on 8.9.2019 at the request of Caliber.⁶⁴

109. Based on Caliber's request, Zuzairi even used Caliber's company name to deliver a presentation on the technical aspects of *Sebut Harga A*.⁶⁵ In relation to the presentation slides. Tuah Packet

⁶² Paragraph 9 of Statement of Mujahidin of Tuah Packet recorded on 24.8.2017; and Paragraph 22 of the Statement of Mohamad Rani of Tuah Packet recorded on 11.6.2018.

⁶³ Paragraphs 25 and 26 of the Statement of Zuzairi of Tuah Packet recorded on 11.6.2018; and Email from Zuzairi to Fauzi and Anuar dated 6.9.2016.

⁶⁴ Paragraph 11 of the Statement of Mohd Fauzi of Caliber recorded on 25.8.2017.

⁶⁵ Paragraph 59 of the Statement of Mohd Fauzi of Caliber recorded on 31.7.2018.

assisted Caliber in preparing the presentation slides and proceeded to request a sample of presentation slides from Caliber.⁶⁶

110. To further substantiate the apparent relationship between Tuah Packet and Caliber, the Commission refers to the exchanges of mobile application WhatsApp messages on 7.9.2016 between Ridzaudden and Saifuddin, both from Caliber. The messages showed that Saifuddin had asked Ridzaudden regarding a soft copy of Caliber's latest presentation slides template which was asked by Zuzairi of Tuah Packet.⁶⁷
111. According to ASWARA, the attendance of Tuah Packet during the meeting resulted in Ku Aznal of ASWARA cancelling the kick-off meeting.⁶⁸ This was also affirmed by Caliber.⁶⁹
112. The Commission noted that inconsistent with Zuzairi's standpoint that there was no objection by ASWARA⁷⁰, the involvement of Zuzairi at the kick-off meeting was in fact not welcomed by ASWARA.⁷¹

⁶⁶ Paragraphs 33, 34 and 35 of the Statement of Zuzairi of Tuah Packet on 11.6.2018; Paragraphs 31,32,33, and 34 of the Statement of Muhammad Saifuddin of Caliber recorded on 31.7.2018; and Paragraph 11 of the Statement of Mohd Fauzi of Caliber recorded on 25.8.2017.

⁶⁷ Screenshot 2.1 and WhatsApp Application Correspondence between Saifuddin of Caliber and Ridzaudden of Caliber; and Screenshot 3.1 WhatsApp Application Correspondence between Zuzairi of Tuah Packet to Ridzaudden of Caliber on 7.9.2016.

⁶⁸ Paragraph 9 of the Statement of Ku Aznal Shahri of ASWARA recorded on 5.4.2017.

⁶⁹ Paragraph 12 of the Statement of Mohd Fauzi of Caliber recorded on 25.8.2017.

⁷⁰ Paragraph 39 of the Statement of Zuzairi of Tuah Packet recorded on 11.6.2018.

⁷¹ Paragraph 62 of the Statement of Mohd Fauzi of Caliber recorded on 31.7.2018.

Quotations and Liquidated Ascertained Damages by Tuah Packet to Caliber

113. Tuah Packet issued quotations to Caliber dated 12.9.2016 and 21.10.2016 for the works carried out by Tuah Packet for *Sebut Harga A*.⁷² These quotations reflect the transactions that took place between Tuah Packet and Caliber in relation to server and storage works which were wholly executed by Tuah Packet based on the standing relationship between the two Parties.⁷³
114. On 28.3.2017, Caliber informed Tuah Packet regarding the issue of liquidated ascertained damages (“LAD”) imposed by ASWARA on Caliber as the contract holder.⁷⁴ LAD was issued by ASWARA due to the delay in the work execution for *Sebut Harga A*.
115. Based on the preceding paragraphs, it is evident that Tuah Packet and Caliber coordinated to rig the bidding process of *Sebut Harga A*. On this premise, we find the agreement and/or concerted practice between Tuah Packet and Caliber had the object to perform an act of bid rigging; and by law is deemed to have the object of significantly preventing, restricting or distorting competition.

⁷² Paragraph 35 of the Statement of Mohamad Hisham of Tuah Packet recorded on 11.6.2018; Paragraph 40 of the Statement of Zuzairi of Tuah Packet recorded on 11.6.2018; and Paragraph 44 of the Statement of Anuar of Caliber recorded on 26.7.2018.

⁷³ Paragraph 42 of the Statement of Mohd Fauzi of Caliber recorded on 31.7.2018; Paragraph 36 of the Statement of Ridzaudeen of Caliber recorded on 26.7.2018; Paragraph 44 of the Statement of Anuar of Caliber recorded on 26.7.2018; and Paragraph 27 of the Statement of Muhammad Saifuddin of Caliber recorded on 31.7.2018.

⁷⁴ Email from Aziziamli Salman of ASWARA and Fauzi of Caliber dated 28.3.2017; Paragraph 25 of the Statement of Mohamad Hisham of Tuah Packet recorded on 11.6.2018; and Paragraph 42 of the Statement of Zuzairi of Tuah Packet recorded on 11.6.2018.

Arguments by Parties

116. Tuah Packet and Caliber argue that there was no agreement between them to rig *Sebut Harga A*. Both Parties also claim that the agreement was to engage in a subcontract relationship due to the fact that both Parties possessed different expertise required for the execution of *Sebut Harga A*.
117. Further, Tuah Packet and Caliber submit that the arrangement between the Parties did not amount to a bid rigging arrangement as there was no predetermined winner and no bidding price fixed.
118. In addition to the above arguments, Tuah Packet contends the following:
- (i) Tuah Packet submitted the bid documents of Caliber in order to minimise cost;
 - (ii) Tuah Packet did not gain any profit from the conduct considering it offered a low price; and
 - (iii) Zuzairi of Tuah Packet acted under his personal capacity and not under the instruction of Tuah Packet when assisting Caliber.

The Commission's Findings

119. In response to the Parties' submission, the Commission is of the view that in principle, a bid rigging scheme may be formed under the guise of a subcontracting arrangement. The said principle arises from the notion that competitors, who agree not to bid or agree to submit a losing bid, frequently, in exchange, receive a

subcontracting agreement or supply contract from the successful bidder.⁷⁵

120. Section 4 protects not only actual competition but also potential competition. Protecting potential competition means taking action against collusive behaviors that reduces the probability of a potential competitor entering the market.
121. In our opinion, the subcontracting arrangement between Caliber and Tuah Packet ahead of the quotation submission represents a cover bidding-cum-subcontracting relationship. In reality, the facts indicate that there was indeed an arrangement between both Parties for Tuah Packet to prepare the technical document of Caliber pursuant to the agreement to rig *Sebut Harga A*. The subcontracting arrangement between the two Parties in a way had increased their chances of gaining reward should one of the Parties win the tender. We posit that Caliber and Tuah Packet would have submitted a single bid if indeed both enterprises genuinely collaborated as partners. Applying *Ski Taxi*⁷⁶, Since Caliber and Tuah Packet could have submitted individual bids, they are to be considered as potential competitor.
122. Moreover, the Commission views that the bid rigging arrangement between Caliber and Tuah Packet was to increase their chances of winning and to ensure both Parties were able to reap the rewards. This is reflected in the statement below:

⁷⁵ Provisions Relating to Bid Rigging by Competition Commission of India, at page 7.

⁷⁶ Case E-3/16 *Competition Authority v. Follo Taxisentral Ba and others*.

“...Jadi, kami telah bersetuju sekiranya Caliber menang sebut harga ini, Caliber akan menawarkan Tuah Packet untuk membuat kerja-kerja server. Jika Tuah Packet yang menang sebut harga ini, Tuah Packet akan menawarkan Caliber untuk membuat kerja-kerja cabling”⁷⁷

123. On this premise, the Commission finds that it is highly unlikely for Caliber and Tuah Packet to compete against each other in the same bidding process. It makes no commercial sense for a subcontractor to compete in the same bidding process as its principal and simultaneously for a principal to engage with a subcontractor that also bids for the same project; unless if the purpose of entering into the same tender was solely to increase the likelihood of either one of the Parties winning the bid.
124. It is argued that Caliber does not possess the required technical expertise for the vital part of this project, namely, the UPS System.⁷⁸ This argument has no merit as Caliber possessed the required field code to bid for *Sebut Harga A*.⁷⁹ Caliber received 90.61% in its technical score for *Sebut Harga A* which was one of the important winning factors. We reiterate that Tuah Packet had prepared Caliber’s technical documents by overtly using Caliber’s company name for the tender submission.
125. Adopting the principle outlined in *Delhi Jal Board*, Caliber and Tuah Packet consciously represented themselves as separate companies when submitting quotation documents to ASWARA. The conduct of

⁷⁷ Paragraph 50 of the Statement of Mohd Fauzi of Caliber recorded on 31.7.2018; See also paragraphs 8, 9 and 10 of the Statement of Mohamad Hisham of Tuah Packet recorded on 11.6.2018.

⁷⁸ Paragraphs 34 and 61 of the Statement of Mohd Fauzi of Caliber recorded on 31.7.2018; Paragraph 11 of the Statement of Mohd Fauzi of Caliber recorded on 25.8.2017; Paragraph 32 of the Statement of Anuar of Caliber recorded on 26.7.2018; Paragraph 23 of the Statement of Zuzairi of Tuah Packet recorded on 11.6.2018; and Paragraph 12 of the Statement of Mohamad Hisham of Tuah Packet recorded on 11.6.2018.

⁷⁹ Caliber’s *Sijil Akuan Pendaftaran Syarikat*, 10.03-2014 – 9.3.2017.

Caliber and Tuah Packet created an illusion for ASWARA that its procurement process at the material time was competitive. The collusion between Caliber and Tuah Packet has resulted in ASWARA being unable to benefit from competitive tendering.

126. Based on **paragraphs 97 to 115** above, it is evident that there was an agreement between Caliber and Tuah Packet to rig *Sebut Harga A*. Aside from price fixing, an agreement and/or concerted practices to perform bid rigging can be in different forms of conduct such as market sharing, bid rotation, bid suppression, subcontracting arrangement and cover bids. In the above arrangement, the Parties had submitted cover bids to ASWARA by way of Tuah Packet using Caliber's company name and the coordination of a bid rigging scheme between the Parties under the guise of a subcontracting arrangement.
127. Moving on to the claim by Tuah Packet in limbs (i) and (ii) of **paragraph 118**, it is apparent from the evidence that the purpose of the bid rigging agreement was to increase either of the Parties' chances of winning *Sebut Harga A*. This is in opposition to competition law principles which obligate enterprises to decide their commercial conduct on the market independently.
128. The Commission cites the Latvian case of *SIA VM Remonts*⁸⁰, to support its finding that Tuah Packet was aware of the conduct of Zuzairi in performing a bid rigging agreement with Caliber based on prior established arrangements.

⁸⁰ Case 542/14 *SIA 'VM Remonts' (formerly SIA 'DIV un KO') and Others v Konkurences padome* [2016] 578, at paragraphs 23 and 24.

129. Fixing the content of the bid submission document to influence the outcome of the procurement process⁸¹, manipulating the bidding process to limit or eliminate competition among competitors bidding for the same tender⁸², and agreeing on the technical features and quality of products or services supplied⁸³, are among the forms of collusion between competing bidders that prevents, restricts or distorts competition in the tendering market.
130. In relation to the arguments raised by Caliber and Tuah Packet in limb (iii) of **paragraph 118**, the Commission is of the view that 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 perform or participate in the act, or was not even informed of the commission of an infringement of competition law.⁸⁴
131. Based on the entire evidence, the Commission finds that the preparation and submission of the quotation documents as well as the arrangement for cover bidding-cum-subcontracting were pursuant to the bid rigging arrangement between Caliber and Tuah Packet.

⁸¹ European Commission Notice on Tools to Fight Collusion in Public Procurement and on Guidance on How to Apply the Related Exclusion Ground (2021/C 91/01) at paragraph 1.1.

⁸² European Commission, European Anti-Fraud Office (OLAF), Working Document on Fraud in Public Procurement: A Collection of Red Flags and Best Practices at page 25.

⁸³ European Commission, European Anti-Fraud Office (OLAF), Working Document on Fraud in Public Procurement: A Collection of Red Flags and Best Practices at page 26.

⁸⁴ Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others v Commission* [1983] ECR 1825 at paragraph 97; Case C-68/12 *Protimonopolný úrad Slovenskej republiky v Slovenská sporiteľňa a.s.* [2013] 4 C.M.L.R. 16, at paragraph 25; and Case 542/14 *SIA 'VM Remonts' (formerly SIA 'DIV un KO') and Others v Konkurences padome* [2016] 578, at paragraph 24.

Conduct of Novatis Coordinating Arrangements to Rig Sebut Harga A

132. In addition to the bilateral bid rigging arrangement between Caliber and Tuah Packet, the Commission finds that a separate bid rigging arrangement was coordinated by Novatis together with Basenet, Silver Tech, and Venture Nucleus.
133. Novatis informed the Commission that it had intended to participate in *Sebut Harga A* from the very beginning.⁸⁵ Following this, Novatis contacted Basenet, Silver Tech, Venture Nucleus and [X] to inquire if they were interested in participating in *Sebut Harga A*.⁸⁶ [X] informed Novatis that it intended to independently participate in *Sebut Harga A*.⁸⁷ The remaining three Parties, namely Basenet, Silver Tech and Venture Nucleus (“three Parties”) however did not have any objection against Novatis using their company names in *Sebut Harga A*.⁸⁸
134. From the documents found in Hanis’ laptop, the Commission finds that Novatis prepared the *Sebut Harga A* documents using the four Parties’ company names.⁸⁹ This was to ensure that Novatis had a higher chance of winning *Sebut Harga A*.⁹⁰ Novatis had requested the three Parties’ quotations, brochures, and company documents, namely Form 9, Form 49 and Form 34.⁹¹ The documents were to

⁸⁵ Paragraph 3 of the Statement of Mohamad Hanis of Novatis recorded on 9.7.2018.

⁸⁶ Paragraphs 3 and 4 of the Statement of Mohamad Hanis of Novatis recorded on 9.7.2018.

⁸⁷ Paragraph 6 of the Statement of Mohamad Hanis of Novatis recorded on 9.7.2018.

⁸⁸ Paragraph 5 of the Statement of Mohamad Hanis of Novatis recorded on 9.7.2018.

⁸⁹ Paragraph 6 of the Statement of Mohamad Hanis of Novatis recorded on 15.5.2018; Paragraphs 7 and 8 of the Statement of Mohamad Hanis of Novatis recorded on 9.7.2018; and copies of Basenet’s, Silver Tech’s and Venture Nucleus’s tender documents found in the possession of Hanis’ laptop.

⁹⁰ Paragraphs 6,7 and 8 of the Statement of Mohamad Hanis of Novatis recorded on 15.5.2018.

⁹¹ Paragraphs 8 and 9 of the Statement of Mohamad Hanis of Novatis recorded on 15.5.2018.

be submitted with the corresponding enterprises' (including Novatis') offer price to ASWARA.⁹²

135. On 27.7.2016 and 28.7.2016, Novatis requested an LOA from [REDACTED] Sdn. Bhd.⁹³, [REDACTED] Sdn. Bhd.⁹⁴, and [REDACTED] Sdn. Bhd.⁹⁵, respectively, for the four Parties' company names. However, Novatis requested an LOA from [REDACTED] Sdn. Bhd.⁹⁶ for only the three Parties' (excluding Novatis) company names.

136. Novatis prepared the documents for the four Parties (this includes Novatis itself) in such a manner that would give the impression that Novatis had the best offer price. This was achieved by way of adjusting and/or manipulating the offer price in *Sebut Harga A* documents of the four Parties.⁹⁷ Evidence gathered by the Commission also reveals that Novatis varied prices between the four Parties by adding add-on services, specifying different distributors and proposing different solutions.⁹⁸

137. Drawing an inference from the facts above, the Commission therefore finds that Novatis had instigated the three Parties' participation in the bid rigging arrangement for *Sebut Harga A*.

138. The Commission's findings on the three separate bilateral bid

⁹² Paragraph 14 of the Statement of Mohamad Hanis of Novatis recorded on 9.7.2018.

⁹³ Email thread and attachments between Nurlissa or Novatis and [REDACTED] Sdn. Bhd. on 27.7.2016 until 1.8.2016.

⁹⁴ Email thread and attachments between Nurlissa of Novatis and [REDACTED] Sdn. Bhd. on 28.7.2016 until 29.7.2016.

⁹⁵ Email thread between Nurlissa of Novatis and [REDACTED] Sdn. Bhd. on 28.7.2016.

⁹⁶ Email thread and attachments between Nurlissa of Novatis and [REDACTED] Sdn. Bhd. on 27.7.2016 until 1.8.2016.

⁹⁷ Paragraph 16 of the Statement of Mohamad Hanis of Novatis recorded on 9.7.2018.

⁹⁸ Paragraph 17 of the Statement of Mohamad Hanis of Novatis recorded on 9.7.2018.

rigging arrangements between Novatis and the respective Parties will be set out in the paragraphs below.

The Conduct of Basenet and Novatis

Understanding between Basenet and Novatis

139. The Commission finds there was an existing understanding between Basenet and Novatis to use each other's company name in bidding for public tenders. The said Parties also prepared and submitted the necessary documents using each other's company names in response to the invitation for bids or quotations.⁹⁹

140. This understanding was further manifested in responses to the invitation for bids by both relevant Parties in other public bodies such as the [X], [X] and [X]. Communication and exchange of documents between Basenet and Novatis were found in the computer belonging to Zarilhasreen of Basenet. The first conduct was exhibited as follows:

Table 11: Conduct One

DATE	EMAIL CORRESPONDENCE	DESCRIPTION
Email thread and attachments from Novatis to Basenet dated 10.5.2017 ¹⁰⁰ and 15.5.2017 ¹⁰¹ .		
10.5.2017	An email from Hanis of Novatis to Yanti of Basenet which was carbon copied to Azwan Tamin,	In the email, Hanis of Novatis had requested Basenet to insert Basenet's information

⁹⁹ Paragraphs 17 to 19 of the Statement of Ryan Zakry of Basenet recorded on 4.7.2018; Paragraphs 28 to 31 of the Statement of Mohd Rosli of Basenet recorded on 4.7.2018; Paragraphs 19 to 24 of the Statement of Zarilhasreen of Basenet recorded on 4.7.2018; and Paragraphs 3 to 6 of Mohamad Hanis of Novatis recorded on 9.7.2018.

¹⁰⁰ Email and attachments from Novatis to Basenet on 10.5.2017.

¹⁰¹ Email and attachments from Novatis to Basenet on 15.5.2017.

DATE	EMAIL CORRESPONDENCE	DESCRIPTION
	Nurlissa Azwa Mohammad Razali and Zamzalina Mahusin of Novatis; and Mariah and Zarilhasreen of Basenet.	into the template documents and to forward the documents to the former. The documents attached to the email comprised tender forms, information on the tenderers, a schedule of the complete offer price, a tenderer declaration letter, a sample of LOA and a checklist.
15.5.2017	An email from Hanis of Novatis to Yanti of Basenet was carbon copied to Azwan Tamin, Nurlissa Azwa Mohammad Razali and Zamzalina Mahusin of Novatis and Mariah and Zarilhasreen of Basenet.	In the email, Hanis of Novatis requested Basenet to insert Basenet's company information into the template documents and to forward the documents to the former. The documents attached to the said email comprised of information relating to company staff and the company's experience.

141. The second conduct was carried out as follows:

Table 12: Conduct Two

DATE	EMAIL CORRESPONDENCE	DESCRIPTION
	Email thread and attachments between Novatis and Basenet dated 7.3.2018 ¹⁰² , 12.3.2018 ¹⁰³ , 18.3.2018 ¹⁰⁴ and 19.3.2018 ¹⁰⁵ .	
7.3.2018	An email from Zamzalina of Novatis to Mariah of Basenet was carbon copied to Alif Hafiz	In the said email, Novatis had requested softcopies of

¹⁰² Email between Novatis and Basenet on 7.3.2018.

¹⁰³ Email between Novatis and Basenet on 12.3. 2018.

¹⁰⁴ Emails and attachments between Novatis and Basenet on 18.3.2018.

¹⁰⁵ Email and attachments between Novatis and Basenet on 19.3.2018.

DATE	EMAIL CORRESPONDENCE	DESCRIPTION
	Yusof, Mohamad Hanis Hashim and Azwan Tamin of Novatis.	Basenet's documents and information, as follows: (i) Verified copies of Bank Statements for November 2017, December 2017 and January 2018; and (ii) Assets and Liabilities.
12.3.2018	An email from Liyana of Basenet replying to Zamzalina Mahusin of Novatis.	Basenet had provided the said requested document and information to Novatis.
18.3.2018	An email from Hanis of Novatis to Liyana Mohamad of Basenet carbon copied to Zarilhasreen and Ryan Zakry of Basenet and Zamzalina Mahusin, Alif Hafiz Yusof and Azwan Tamin of Novatis.	Novatis instructed Basenet to upload Basenet's <i>jawapan teknikal</i> (technical input) and Basenet's verified bank statements to the eProcurement system and to fill in the relevant sections in the eProcurement system. Basenet's <i>jawapan teknikal</i> was provided by Novatis via this email.
19.3.2018	An email from Hanis of Novatis to Liyana of Basenet carbon copied to Zarilhasreen and Ryan Zakry of Basenet and Zamzalina Mahusin, Alif Hafiz Yusof and Azwan Tamin of Novatis.	Novatis had provided a redacted CIDB Certificate, redacted LOAs and supplier's brochure to Basenet for Basenet to upload into the e-Procurement system.

142. The Commission views that the conduct above does not reflect a genuine main contractor and subcontractor relationship. There were exchanges of instructions and information between Novatis and

Basenet for the purpose of participating in the tender using Basenet's company name.

143. Another conduct was executed as follows:

Table 13: Conduct Three

DATE	EMAIL CORRESPONDENCE	DESCRIPTION
Email and attachment between Novatis and Basenet dated 21.4.2018 ¹⁰⁶		
21.4.2018	From Hanis of Novatis to Ryan Zakry and Zarilhasreen of Basenet	<p>In the said email, Hanis of Novatis requested Ryan Zakry of Basenet to upload the documents attached to the email at "ep". The Commission is of the view that "ep" refers to the e-Procurement system.</p> <p>On the first page of the attachment is the <i>Sebut Harga Bekalan/Perkhidmatan</i> whereby the name of the tenderer is stated as, "Basenet Technology Sdn Bhd".</p> <p>On the second page of the attachment is the scope of work and the price stated for the scope of work.</p> <p>On the third page of the attachment is the <i>jurat</i> for the declaration made by Basenet as the tenderer. This document contains the signatories of "Mohd Rosli bin Shamsuddin" and "Fadzeanti Binti Ahmad Dali" as the representatives of Basenet.</p>

¹⁰⁶ Email and attachment between Novatis and Basenet dated 21.4.2018.

144. Basenet informed the Commission that it had prepared several tender documents for Novatis which required Basenet's expertise in relation to a particular project. In such situations, Basenet prepared the technical documents which were submitted using the company name Novatis.¹⁰⁷ Basenet also confirmed that the Party had at one time requested Novatis to bid for a tender using Basenet's company name.¹⁰⁸
145. The conduct outlined in **paragraphs 139 to 144** does not reflect a genuine main contractor and subcontractor relationship but rather an established practice between Novatis and Basenet to use each other's company names. Thereafter, the Parties prepared and submitted the documents using each other's company names for the purpose of bid submission.¹⁰⁹
146. Consequently, Basenet and Novatis had an arrangement that they will both receive kickbacks in return for allowing the use of each other's company name for bidding purposes. It was agreed that the winning enterprise will receive from 5% to 10% of the project value as the kickback from the arrangement.¹¹⁰
147. On 15.5.2018, the Commission inspected Novatis' premises under section 20 of the Act.¹¹¹ During the inspection, the Commission inspected several laptops and obtained documents from Novatis'

¹⁰⁷ Paragraph 18 of the Statement of Ryan Zakryn of Basenet recorded on 4.7.2018.

¹⁰⁸ Paragraph 30 of the Statement of Mohd Rosli of Basenet recorded on 4.7.2018.

¹⁰⁹ Paragraphs 7, 8 and 14 of the Statement of Mohamad Hanis of Novatis recorded on 9.7.2018; Paragraph 6, 8 and 9 of the Statement of Mohamad Hanis of Novatis recorded on 15.5.2018; and Paragraphs 19 and 24 of the Statement of Zarilhasreen of Basenet recorded on 4.7.2018.

¹¹⁰ Paragraphs 9 to 11 of the Statement of Mohamad Hanis of Novatis recorded on 9.7.2018; and Paragraph 31 of the Statement of Mohd Rosli of Basenet recorded on 4.7.2018.

¹¹¹ Section 20 Notice issued to Novatis dated 15.5.2018.

premises. The Commission found a folder in Hanis' laptop entitled, "Basenet" which contained various Basenet's project documents in Microsoft Word format. The documents retrieved by the Commission were digitally signed.¹¹²

148. Based on the above evidence, the Commission finds that Novatis had prepared the said documents using the company name of Basenet with the ultimate aim of increasing their chances of winning *Sebut Harga A*.¹¹³

Arguments by Basenet

149. Basenet contends the following:

- (i) The statements by Basenet's staff relied on by the Commission in establishing the agreement between Basenet and Novatis were misconstrued as the statements were referring to a genuine subcontract relationship between Basenet and Novatis;
- (ii) It is common practice to prepare the technical documents for a tender or quotation on behalf of a partnering company in a particular project;
- (iii) On 4.7.2018, Basenet lodged a police report upon knowing that Basenet's documents and/or information had been used without its authorisation or consent; and
- (iv) Basenet denies that its staff purchased the tender document, attended the site visit, prepared Basenet's tender submission

¹¹² Documents found in Hanis' laptop; the Commission finds that Novatis prepared the *Sebut Harga A* documents using its competitors' company names including Venture Nucleus.

¹¹³ Paragraph 8 of the Statement of Mohamad Hanis of Novatis recorded on 15.5.2018.

and/or submitted the said tender submission. Basenet also argues that none of its staff spoke to Hanis of Novatis nor did any of its staff authorised Novatis to use Basenet's company name to participate in *Sebut Harga A*.

150. Basenet's did not provide documents and/or information to Novatis for *Sebut Harga A*. The information contained in the documents relied on by the Commission was inaccurate and the signatories contained in Basenet's tender documents were forged.

151. The referred documents are inaccurate for reasons set out in **Table 14** below and indicate no exchange of information and documents having taken place for *Sebut Harga A*:

Table 14: Alleged Inaccuracies

NO.	DOCUMENT	INACCURACIES ALLEGED BY BASENET	INFORMATION PROVIDED BY BASENET
1.	Basenet's tender documents submitted to ASWARA	<ul style="list-style-type: none"> (i) Old letterhead of Basenet was used; (ii) The wrong contact number was used; (iii) Different company stamps were affixed; and (iv) Signatures of Rosli and Fadzeanti were forged. 	<ul style="list-style-type: none"> (i) Sample of current letterhead of Basenet; (ii) Sample of Basenet's company profile and <i>Borang LHDN</i> to show the actual contact number of Basenet's office; (iii) Sample of Basenet's company stamp; and (iv) Specimens of the signatures of Mohd Rosli and Fadzeanti.

NO.	DOCUMENT	INACCURACIES ALLEGED BY BASENET	INFORMATION PROVIDED BY BASENET
2.	<i>Senarai Kehadiran Taklimat/Lawatan Tapak</i>	(i) Shahrulazli is not an employee of Basenet; and (ii) The email address stated is not Basenet's official email address.	(i) Employee Provident Fund, Inland Revenue Board and Social Security Organisation statements of Basenet for the years 2015, 2016 and 2017; and (ii) Statements by Mohd Rosli, Ryan Zakry and Zarihasreen.
3.	<i>Borang Kehadiran Taklimat/Lawatan Tapak</i>	The stated premise address of Basenet is an old address.	Statements by Mohd Rosli, Ryan Zakry and Zarihasreen
4.	<i>Borang Membeli Dokumen Sebut Harga</i>	Shahrulazli is not an employee of Basenet.	Employee Provident Fund, Inland Revenue Board and Social Security Organisation statements of Basenet for the years 2015, 2016 and 2017.
5.	<i>Borang Penyerahan Dokumen Sebut Harga</i>	(i) The stated name "Basenet Sdn Bhd" is inaccurate; and (ii) Sanyshahril is neither an employee of Basenet nor an authorised person by Basenet.	The statement made by Mohd Rosli of Basenet.

152. The statements by Basenet's staff in preparing the documents for other enterprises referred to the subcontracting relationship.

Accordingly, the monetary benefits received by Basenet were for the subcontracting work. Basenet also submitted its agreement with the [X] as a supporting document.

The Commission's Findings

153. Basenet argues that the statements of Zarilhasreen were given under the context of a genuine subcontract agreement between Basenet and Novatis whereby certain projects required vast and different technical expertise. The Commission maintains that in the statement below there was an established understanding between Basenet and Novatis to use each other's company names in response to the calling for bids. Therefore, the relationship between Basenet and Novatis is not a genuine subcontract relationship. The relevant paragraphs of the statement are as follows¹¹⁴:

*"19. Saya ingin menyatakan bahawa kebiasaannya, Basenet tidak akan menyertai mana-mana sebutharga jika Basenet tidak mempunyai kepakaran seperti yang diperlukan di sebutharga tersebut. Walaubagaimanapun, saya tidak nafikan bahawa **Basenet pernah berkerjasama dengan syarikat lain (partner) jika Basenet tidak mempunyai kepakaran penuh di sebutharga tersebut.**" [Emphasis Added]*

*"24. Saya tidak mempunyai pengetahuan jika Novatis pernah menggunakan nama Basenet tanpa pengetahuan saya. **Walaubagaimanapun, saya tidak nafikan jika saya pernah beri maklumat kepada Novatis mengenai Basenet** semasa kami bersetuju untuk bekerjasama dalam sesuatu projek yang memerlukan kepakaran kedua-dua pihak. Selain daripada projek tersebut, saya tidak mempunyai pengetahuan jika Novatis pernah menggunakan nama Basenet untuk projek lain." [Emphasis Added]*

¹¹⁴ Paragraphs 19 and 24 of the Statement of Zarilhasreen of Basenet recorded on 4.7.2018.

154. The Commission, in referring to the arrangement between Basenet and Novatis on other projects, finds that the communication and exchange of documents between Basenet and Novatis took place before the closing dates of the bid invitations.
155. The Commission is of the view that the request and exchange of documents between Basenet and Novatis ventured beyond a mere business partnership. We find that the exchange of information and documents on the offer price, the declaration of the tenderer, the information relating to Basenet's employees and Basenet's past work experience comprise information outside the scope of technical specifications.
156. The email correspondence on 21.4.2018¹¹⁵ exhibited digital signatures of Mohd Rosli and Fadzeanti of Basenet affixed on the third page of the attachment.
157. In responding to Basenet's allegation that the signatures of Mohd Rosli and Fadzeanti affixed on Basenet's financial document submitted to ASWARA were forged, the Commission compares the signatures of Mohd Rosli and Fadzeanti on Basenet's financial document with the digital signature on the document attached to the email dated 21.4.2018.


¹¹⁵ Email and attachment between Novatis and Basenet dated 21.4.2018.

Figure 1: Basenet's Financial Document submitted to ASWARA


*Akademi Seni Budaya dan Warisan Kebangsaan,
Kementerian Pelancongan dan Kebudayaan Malaysia*

5. Kami yang bertandatangan di bawah ini setelah meneliti dan menyemak segala dokumen Sebut Harga serta syarat dan peraturan seperti yang dinyatakan adalah dengan ini bersetuju mengikut syarat dan peraturan yang ditetapkan oleh pihak ASWARA dengan Jumlah Keseluruhan RM **471,700.00** termasuk cukai perkhidmatan (Dalam Perkataan Ringgit Malaysia: **Empat Ratus Tujuh Puluh Satu RibuTujuh Ratus Sahaja**)

* (Harga yang dinyatakan hendaklah sama seperti di Ringkasan Sebut Harga)
Butir-butir lanjut mengenai Sebut Harga ini adalah seperti yang dinyatakan di Ringkasan Sebut Harga.


(Tandatangan orang yang diberi kuasa)

Nama : Mohd Rosli bin Shamsuddin
No. Kad Pengenalan : [REDACTED]
Jawatan : Pengarah Urusan
Tarikh : 02/08/2016


Cop Syarikat

Nama Saksi : Fadzeanti binti Ahmad Dali
No. Kad Pengenalan : [REDACTED]
Jawatan : Administrator
Alamat : B-01-02, Paragon Point @ BICC,
Jalan Medan PB 5, Pusat Bandar,
43650 Bandar Baru Bangi,
Selangor Darul Ehsan
Tarikh : 02/08/2016


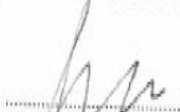

Tandatangan Saksi


Figure 2: Attachment titled, "Fwd: Lampiran Q PHN"


(i) Harga yang ditawarkan adalah harga bersih; dan
(ii) Tarikh penyerahan/ penyempumaan ialah : 14 hari (sila nyatakan tempoh)

Saya/ Kami dengan ini menawarkan untuk membekalkan bekalan/perkhidmatan di atas dengan harga dan syarat-syarat yang dinyatakan di atas tertakluk kepada syarat-syarat di atas dan dibelakang ini.

Tandatangan Penyebut Harga : 
Nama dan K.P : Mohd Rosli bin Shamsuddin
[REDACTED]

Alamat Syarikat : B-01-02, Paragon Point,
Jalan Medan PB 5,
Pusat Bandar, 43650 Bandar
Baru Bangi, Selangor.
Tarikh : 30 April 2018

Tandatangan Pemohon : 
Nama dan jawatan : Fadzeanti Binti Ahmad Dali
Administrator
Tarikh : 30 April 2018



158. Based on the comparison above, the Commission observed that Hanis prepared the relevant documents under the company name “Basenet”. As such, the Commission finds it probable for Novatis to possess the digital signature of Mohd Rosli and Fadzeanti to be affixed to tender documents in response to a calling for bids and hereby dismisses Basenet’s argument. As such, the argument raised by Basenet is not substantiated and Basenet cannot argue that its signatures were forged without its knowledge. Nevertheless, we emphasise that the onus falls upon Basenet to prove otherwise.
159. Further, the Commission draws an inference that there exists an understanding between Basenet and Novatis which subsequently led to an exchange of company information and documents between both Parties to facilitate the preparation and submission of documents to any procuring agency.
160. In relation to the argument on the police report lodged by Basenet, the Commission views the lodging of the report as a bare denial. The police report only serves as a cover report and was not lodged for the purpose of having the police investigate Novatis. On this point, the Commission refers to *PP v Dato’ Seri Anwar Ibrahim*:¹¹⁶

“It has also been held that a police report is not a condition precedent for the commencement of a criminal prosecution (see *Apren Joseph v State of Kerala* 1973 AIR SC 1, *Herchun Singh & Ors v PP* [1969] 2 MLJ 209). I also refer to *PP v Foong Chee Cheong* [1970] 1 MLJ 97 where Gill J (as he then was) said at pp 97–98:

... However important a document a first information report is, it can never be treated as a piece of substantive evidence...”

¹¹⁶ *PP v Dato Seri Anwar Ibrahim* [2013] (No 3) [1999] 2 CLJ 215, page 278.

161. Moreover, Basenet refutes knowledge of *Sebut Harga A*, denied authorisation was given to Novatis and further submits that the conduct of Hanis was strictly unilateral. The Commission has established that Basenet and Novatis have an existing understanding which allows them to use each other's company names. With this understanding, Basenet has enabled Novatis to undertake the necessary steps to submit the tender documents for *Sebut Harga A* under Basenet's company name.
162. Basenet also argues that the Commission has mistakenly relied on the email correspondence and the tender documents to arrive at its findings of the bid rigging arrangement between Basenet and Novatis. By applying the principles in *Pre-Insulated Pipe Cartel*¹¹⁷ and *People's All India Anti Corruption and Crime Prevention Society v Usha International Limited. & Others*¹¹⁸, the Commission's proposition is that for an anti-competitive agreement to exist, it is not necessary for every cartel member to grant express consent or have awareness of each and every individual aspect of the cartel throughout its adherence to the common anti-competitive conduct scheme.
163. Other competition authorities have proven the existence of anti-competitive conduct based on its inferences from several coincidences and indicia, in absence of another plausible

¹¹⁷ Commission Decision Case No IV/35.691/E-4 – *Pre-Insulated Pipe Cartel* [26 October 1998], at paragraph 134.

¹¹⁸ *People's All India Anti Corruption and Crime Prevention Society v Usha International Limited. & Others* 17 March, 2021, Competition Commission of India, Case No. 90 of 2016, at paragraph 77.

explanation, given “the clandestine nature of a cartel”.¹¹⁹ In light of this, we adopt the position that passive participation without clearly opposing it is indicative of collusion capable of rendering an enterprise liable under section 4 of the Act.

164. Additionally, the Commission finds that the alleged inaccurate information would not have affected the evaluation by the procuring agency as the inaccuracies only concern the name, address and contact details of Basenet, company stamps, letterhead and signatures. We opine that these alleged inaccuracies are immaterial in refuting the Commission’s case as tenderers should submit accurate information relating to the tenderer, as expressed in the tender document “*Surat Pengakuan Kebenaran Maklumat dan Keesahan Dokumen Yang Dikemukakan oleh Penyebut Harga*”.
165. On 4.7.2018, during the Commission’s inspection on Basenet’s premises under section 20 of the Act, the Commission had inspected several laptops and obtained documents from Basenet’s premises. The Commission discovered email correspondence between Basenet and Novatis dated 3.8.2016 and 10.8.2016.
166. In the Proposed Decision, the Commission referred to email correspondence between Basenet and Novatis¹²⁰. The Commission discovered that Mariah of Basenet and Lissa of Novatis had provided Basenet’s confidential documents including the latest bank

¹¹⁹ *Gold Chic Poultry Supply Pte. Ltd & Ors v Competition and Consumer Commission of Singapore* [2020] SGCAB 1, at paragraphs 69 and 70; *Case C-413/08 Lafarge SA v European Commission* [17 June 2010], at paragraph 22; *Joined Cases C-204/00 P, 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 Aalborg Portland A/S and Others v Commission* [7 January 2004] 6, at paragraphs 55 to 57.

¹²⁰ Email correspondence between [redacted]@basenet.com.my, Hanis of Novatis and [redacted]@novatis.com.my on 10.8.2016.

statements and audited financial statements, likely supporting Novatis' intended tender submission. However, the Commission concedes that the email correspondences took place after the closing date of *Sebut Harga A*.

167. We take the view that the argument of Basenet of merely acting as a subcontractor to Novatis should not negate the fact that it has been an accepted practice between Basenet and Novatis to use each other's company name. Basenet's argument is without merit as competition authorities have found that bid rigging can also be manifested in the form of a subcontract relationship.¹²¹

168. On a separate note, the Commission respectfully disagrees that the bank statements and audit report attached to the email correspondence have no economic value and thus the sharing of such documents is not anti-competitive in nature. On the contrary, we take the view that these documents do indeed have economic value in the context of the overall tendering process as the procuring agency considers the company's financial strength when making its assessment. By possessing these documents, the cartelists can manipulate the procurement evaluation system by misrepresenting its financial strength to increase or decrease their chances of winning the project.

¹²¹ Spanish Competition Authority, *Advanced Accelerator Applications Ibérica / Curium Pharma Spain*, Case S/0644/18, 2.2.2021 (Spanish); Polish Competition Authority, *Auto czok/ Warm*, RKT04/2017, 19.4.2017. See also Case E-3/16 Judgement of the Borgarting Court of Appeal of 17 March 2015 in 13-075034ASD-BORG/01 *Competition Authority v. Follo Taxisentral Ba and others*; Case T 18896-10 *Competition Authority v. Däckia and Euromaster*; and KL-2-2015 *Eurostar and LKF Vejmarkering v. Competition Authority*.

169. The email correspondence dated 10.8.2016¹²² is important as the address stated in the bank statements attached to the email corresponds with the address stated in *Borang Kehadiran Taklimat/Lawatan Tapak*¹²³. Based on the evidence gathered throughout the investigation, the Commission finds an established agreement and/or concerted practices between Basenet and Novatis which has the object to rig *Sebut Harga A*.

The Conduct of Silver Tech and Novatis

170. The Commission has gathered evidence in the form of witness statements, email correspondence, softcopy of tender documents belonging to Silver Tech that were found in the laptop of Hanis of Novatis, company stamps, company profile and other personal company documents which support the Commission's finding of an agreement and/or concerted practices between Silver Tech and Novatis to rig *Sebut Harga A*.

Established Understanding between Silver Tech and Novatis

171. Silver Tech had previously requested assistance from Novatis for the supply of products on the condition that Novatis was duly appointed as the authorised reseller of the distributor.¹²⁴ The Commission also observed that Hasmat of Silver Tech had supplied Silver Tech's confidential documents such as its company's past working experiences to Hanis of Novatis and she added that it was a common practice to do as such.¹²⁵

¹²² Email correspondence between [redacted]@basenet.com.my, Hanis of Novatis and [redacted]@novatis.com.my on 10.8.2016.

¹²³ Senarai Kehadiran Taklimat Lawatan Tapak bertarikh 25.7.2016.

¹²⁴ Paragraph 17 of the Statement of Nur Hasmat of Silver Tech recorded on 4.7.2018.

¹²⁵ Paragraph 18 of the Statement of Nur Hasmat of Silver Tech recorded on 4.7.2018.

172. Evidence gathered indicated that Silver Tech and Novatis communicated via telephone. This is confirmed by Hanis of Novatis,¹²⁶ Nur Hasmad and Mohd Husni of Silver Tech.¹²⁷
173. There was also an established understanding between Silver Tech and Novatis to use each other's company name to place bids in a public procurement process.¹²⁸
174. Consistent with Hasmad's statements,¹²⁹ Husni of Silver Tech confirmed that he was aware that the approval was granted to Novatis to use Silver Tech's company name in *Sebut Harga A*.¹³⁰
175. On 1.8.2016, Nurlissa of Novatis requested Hanis to fill in certain information required on Silver Tech. Afterwards, Hanis emailed Silver Tech requesting Silver Tech for information. It is important to note that there are documents such as *Borang A, Borang B, Borang C, Borang Sebut Harga, Jadual Harga, Lampiran Q and Surat Akaan Pembida of Sebut Harga A* prepared under Silver Tech's name attached to the email in a zip file titled "Kewangan.ar".¹³¹

Subject FW: Checklist Aswara
From Mohamad Hanis [✂]@novatis.com.my
To 'hasmat' ,[✂]@silverttechsynergy.com>, Mohd Husni
Ab Karim < [✂]@silverttechsynergy.com>
Copy [✂]@novatis.com.my, <[✂]@novatis.com.my>
Date 2016-08-01 14:53
• Kewangan.rar (~230 KB)

¹²⁶ Paragraphs 3 and 4 of the Statement of Mohamad Hanis of Novatis recorded on 9.7.2018.

¹²⁷ Paragraphs 16 of the Statement of Nur Hasmad of Silver Tech recorded on 4.7.2018; and Paragraphs 24, 25, 27 and 28 of the Statement of Mohd Husni of Silver Tech recorded on 4.7.2018.

¹²⁸ Paragraphs 17 and 18 of the Statement of Nur Hasmad of Silver Tech recorded on 4.7.2018; Paragraphs 6,11,12 and 13 of the Statement of Mohamad Hanis of Novatis recorded on 15.5.2018.

¹²⁹ Paragraphs 13, 14 and 18 of the Statement of Nur Hasmad of Silver Tech recorded on 4.7.2018.

¹³⁰ Paragraph 27 of the Statement of Mohd Husni of Silver Tech recorded on 4.7.2018.

¹³¹ Email correspondence between Novatis and Silver Tech on 1.8.2016 from Novatis to Silver Tech and Paragraphs 6 and 7 of the Statement of Mohamad Hanis of Novatis recorded on 15.5.2018.

Salam Puan,

Minta kerjasama untuk sediakan maklumat berikut:-

1. No. IC Mohd Husni Bin Abdul Kawim dan Nooraidah Binti Hussein
2. Modal dibenarkan dan Dibayar
3. Kemudahan kredit ada? Kalau ada, sila sertakan bukti

Best Regards
Mohamad Hanis Hashim
NOVATIS|Novatis Resources Sdn Bhd

176. Silver Tech supplied the requested documents and information for the preparation of Silver Tech's quote documents by Novatis. Consequently, Novatis proceeded to prepare the bid documents using the company name of Silver Tech.¹³² Novatis would offer price adjustment and manipulation on behalf of all Parties. This act was to guarantee Novatis as the selected supplier for *Sebut Harga A*.¹³³

177. Novatis assisted Silver Tech, Basenet and Venture Nucleus to obtain the required LOA from the principal.¹³⁴ Upon obtaining the LOA from other companies, Novatis also requested a price quotation for the authorised products from the principal under its name as Novatis is able to obtain the products at a cheaper price.¹³⁵ The Commission retrieved from Hanis' laptop a copy of an LOA dated 1.8.2016 issued by [X] Sdn. Bhd.¹³⁶ to Silver Tech.

Submission of the Quotation Documents

178. On 2.8.2016, Novatis submitted the quotation documents for four of

¹³² Paragraphs 7 and 8 of the Statement of Mohamad Hanis of Novatis recorded on 9.7.2018; and Paragraph 8 of the Statement of Mohamad Hanis of Novatis recorded on 15.5.2018.

¹³³ Paragraph 14 of the Statement of Mohamad Hanis of Novatis recorded on 15.5.2018.

¹³⁴ Paragraphs 14 and 15 of the Statement of Mohamad Hanis of Novatis recorded on 9.7.2018.

¹³⁵ Paragraph 16 of the Statement of Mohamad Hanis of Novatis recorded on 9.7.2018.

¹³⁶ Currently registered under [X].

the Parties, namely, Novatis, Silver Tech, Basenet and Venture Nucleus.¹³⁷

Possession of Company Stamps Belonging to Another Party

179. The softcopy of the same documents was retrieved from Hanis' laptop. The Commission also discovered Novatis' company stamps at Silver Tech's premises which were used for the preparation of bid documents. These company stamps were also made available with the consent of Novatis.¹³⁸

The Objective of the Agreement to Rig *Sebut Harga A*

180. Regarding the objective of the agreement between Novatis and Silver Tech, we find that Novatis admitted to the Commission of its intention of increasing its chances to be chosen as the supplier for *Sebut Harga A* by way of using multiple other company names in submitting bid documents.¹³⁹

Kickback from the Arrangement

181. In the instance where Silver Tech was selected as the supplier for *Sebut Harga A*, it was agreed by the related Parties that Silver Tech would receive 5% to 10% of the project value from Novatis.¹⁴⁰

¹³⁷ Paragraph 14 of the Statement of Mohamad Hanis of Novatis recorded on 15.5.2018.

¹³⁸ Paragraph 20 of the Statement of Nur Hasmad of Silver Tech recorded on 4.7.2018; and Paragraphs 19 and 20 of the Statement of Mohd Husni of Novatis recorded on 4.7.2018.

¹³⁹ Paragraphs 6 to 8 of the Statement of Mohamad Hanis of Novatis recorded on 15.5.2018.

¹⁴⁰ Paragraphs 9 to 12 of the Statement of Mohamad Hanis of Novatis recorded on 9.7.2018.

Arguments by Silver Tech

182. Silver Tech contends that both, Silver Tech and Novatis, were in the main contractor and subcontractor relationship together for past projects. Silver Tech submits that the participation of Silver Tech and Novatis in *Sebut Harga A* was not intended to restrict competition.

The Commission's Findings

183. Notwithstanding the past main contractor and subcontractor relationship between Silver Tech and Novatis, the Commission is of the view that both Parties are required to determine their participation in *Sebut Harga A* independently. Such participation includes the preparation of quotation documents submitted to ASWARA.

184. The Commission finds that Silver Tech and Novatis did not act independently nor was there any genuine subcontracting relationship between both Parties for *Sebut Harga A*. The Commission also takes into consideration the manner in which Silver Tech and Novatis represented themselves to the procuring agency, ASWARA.

185. With reference to the principle upheld in *Delhi Jal Board*¹⁴¹, Silver Tech and Novatis consciously represented themselves as two separate enterprises when submitting quotation documents to

¹⁴¹ *Delhi Jal Board v Grasim Industries Ltd. & Others*, Ref Case No. 03 & 04 of 2013, at paragraph 120.

ASWARA. Further, the Parties did not, in any event, inform ASWARA of their subcontracting arrangement when participating in *Sebut Harga A*.

186. The separate bids submitted in the company name of Silver Tech and Novatis have created a façade of a competitive bidding process when, in fact, the bids were coordinated by a single enterprise which, in the present case, was Novatis. Accordingly, the Commission finds the arguments raised by Silver Tech are without merit and hereby dismissed.

Conduct of Venture Nucleus and Novatis

Prior Coordination between Venture Nucleus and Novatis

187. In relation to the agreement between Venture Nucleus and Novatis to rig *Sebut Harga A*, the Commission finds there was at the material time an existing understanding between Venture Nucleus and Novatis to use each other's company name in an informal manner.¹⁴²

188. Prior to *Sebut Harga A*, it was discovered that there was previous conduct between Venture Nucleus and Novatis to use each other's company name to bid or submit quotations to several public bodies. In doing so, the Commission relies on various email correspondences which indicate an arrangement to collude in

¹⁴² Paragraph 19 of the Statement of Faizal of Venture Nucleus provided pursuant to section 18 notice dated 4.7.2018; Paragraphs 14 and 16 of the Statement of Mohd Hasmy of Venture Nucleus recorded on 4.7.2018; Paragraphs 4 and 5 of the Statement of Mohamad Hanis of Novatis recorded on 9.7.2018; Paragraph 13 of the Statement of Dalmata Rabidah of Venture Nucleus recorded on 4.7.2018.

tendering process by various public bodies.¹⁴³ Such evidence shows collusive behaviour patterns by both Venture Nucleus and Novatis.

Possession of Company Stamps Belonging to Novatis

189. On 4.7.2018, Novatis' company stamps were found at Venture Nucleus' office premises. Novatis had granted permission to Venture Nucleus to use its company stamps for documentation purposes.¹⁴⁴ The gentlemen's agreement pursuant to such arrangement was made via telephone; and upon obtaining such consent, Faizal of Venture Nucleus would direct his staff to prepare the required documents.¹⁴⁵

190. Further reinforcing the Commission's findings, Venture Nucleus had admitted to the Commission that these company stamps were used in the preparation of documents in the name of Novatis when Novatis had agreed to assume its role as the supporting company to Venture Nucleus.¹⁴⁶

Kickbacks from the Arrangement

191. Regarding the agreed kickbacks from the arrangement between Venture Nucleus and Novatis, it was agreed that Venture Nucleus would receive about 3% to 10% of the project value from Novatis

¹⁴³ Email correspondence from Venture Nucleus to Novatis Resources dated 19.9.2014; Email correspondence from Novatis Resources to Venture Nucleus on 21.5.2015; Email correspondence from Novatis Resources to Venture Nucleus dated 23.3.2016; Email correspondence from Venture Nucleus to Novatis Resources dated 14.6.2016.

¹⁴⁴ Paragraphs 17 and 18 of the Statement of Faizal of Venture Nucleus provided pursuant to section 18 notice dated 4.7.2018.

¹⁴⁵ Paragraph 19 of the Statement of Faizal of Venture Nucleus provided pursuant to section 18 notice dated 4.7.2018.

¹⁴⁶ Paragraphs 18, 19 and 20 of the Statement of Faizal of Venture Nucleus provided pursuant to section 18 notice dated 4.7.2018.

provided Venture Nucleus was selected as the successful bidder. This is an understanding which was mutually affirmed by both Venture Nucleus and Novatis.¹⁴⁷

Arguments by Venture Nucleus

192. Venture Nucleus relies on the case of *Competition Commission v Nutanix Hong Kong*¹⁴⁸ and *Registrar of Restrictive Trading Agreement v W.H. Smith & Sons*¹⁴⁹ to submit that it has no knowledge of the bid rigging arrangement by its employee. Therefore, the conduct of Dalmata of Venture Nucleus cannot be attributed to the company.

193. In addition, Venture Nucleus submits the following:

- (i) Mere past participation of Venture Nucleus and Novatis in other tenders and a good past working relationship do not establish any bid rigging agreement or collusive bid rigging relating to *Sebut Harga A*;
- (ii) Its bid document for *Sebut Harga A* was submitted by Sany Shahril without its knowledge; and
- (iii) The statements made by its representatives were taken out of context and Hanis' statement was not tested and corroborated.

¹⁴⁷ Paragraph 9 of the Statement of Mohamad Hanis of Novatis recorded on 9.7.2018; and Paragraph 14 of the Statement of Faizal of Venture Nucleus provided pursuant to section 18 notice dated 4.7.2018.

¹⁴⁸ *Competition Commission v Nutanix Hong Kong* [2019] HKCT 2.

¹⁴⁹ *Registrar of Restrictive Trading Agreements v W. H. Smith & Son Ltd* [1969] EWCA Civ J0626-2.

The Commission's Findings

194. The Commission has gathered evidence in the form of a witness statement, email correspondences, tender documents belonging to Venture Nucleus that were found in the laptop of Hanis of Novatis, company stamps, company profile and other personal company documents such as bank statements, name, and identification number of Venture Nucleus' personnel and the company's previous working experience. Given the evidence gathered, the Commission finds there exists an agreement and/or concerted practice between Novatis and Venture Nucleus to rig *Sebut Harga A*.

195. The Commission refers to paragraph 556 of the *Nutanix* judgement, in which the Competition Tribunal of Hong Kong decided:

“Shek’s [the employee’s] conduct, however, is not attributable to SiS [the employer]. Shek was a junior employee whose general duties did not include submission of tender or even provision of any binding quotation, and had no authority to bind SiS in relation to any commercial commitment. SiS was a distributor whose business did not include a sale to end-users. The Commission also failed to show that Shek’s seniors were cognisant of his arrangements with Hung, as Shek alleged.”

196. Based on paragraph 556 of the *Nutanix*¹⁵⁰ judgement, it appears that the Competition Tribunal of Hong Kong made a finding that the anti-competitive conduct of a junior employee cannot in law be attributed to the employer on the basis that the employee's general duties did not include submission of tender or provision of any binding quotation; and further, the Hong Kong Competition

¹⁵⁰ *Competition Commission v Nutanix Hong Kong* [2019] HKCT 2, at paragraph 556.

Commission failed to show that the employer was aware of the anti-competitive conduct of the employee.

197. Given the facts of the bid-rigging arrangement between Novatis and Venture Nucleus, the Commission is of the view that the present case can be distinguished from the *Nutanix* judgement which held that the employer is not liable for the conduct of a junior employee whose scope of duties does not include the submission of tenders or who has no authority to bind the company.
198. The Commission is of the view that Dalmata's general duties as a Sales Administrative Executive at Venture Nucleus include the preparation of tender documents for Venture Nucleus. Based on the statement she provided to the Commission, her designation as Sales Administrative Executive required her to be responsible for handling bid documents. She added that part of her duties is to ensure that the requirements have been complied with, prior to submission of the bid documents to her superior, Faizal, for his approval. Hasmy of Venture Nucleus also gave a statement corroborating the fact that Dalmata is involved in the preparation of tender documents for Venture Nucleus.¹⁵¹
199. It is implausible that Venture Nucleus was not aware of the conduct of Dalmata. Moreover, Dalmata's actions ultimately would benefit Venture Nucleus if it receives incentives from Novatis in the instance of a successful bid.
200. By the same token, we find that it is not necessary for there to have

¹⁵¹ Paragraphs 4, 5 and 6 of the Statement of Mohd Hasmy of Venture Nucleus recorded on 4.7.2018.

been action by or even knowledge on the part of the principal managers of the Parties concerned. Besides, based on the witness statements and documentary evidence, the Commission is satisfied that there exists an understanding between Venture Nucleus and Novatis that allows them to use each other's company name in response to a calling of bids by a procuring agency.

201. Noting the nature of the cartel outlined in *Pre-Insulated Pipe Cartel* and *People's All India Anti Corruption and Crime Prevention Society v Usha International Limited. & Others*,¹⁵² the Commission is of the view that in the absence of a telephone record between Hanis of Novatis and Dalmata of Venture Nucleus, the statement by Faizal of Venture Nucleus¹⁵³ confirmed that any approval given or gentleman's agreement made between the two Parties was often communicated through phone call. Hanis of Novatis¹⁵⁴ and Dalmata of Venture Nucleus¹⁵⁵ further informed the Commission that both Parties have communicated with each other via telephone prior to Novatis' submission of cover bids in *Sebut Harga A*. This is supported with a plethora of documentary evidence¹⁵⁶ which prove an existing understanding between Venture Nucleus and Novatis which allowed them to use each other's company name in response to a calling of a tender or quotation by a procuring agency.

¹⁵² Commission Decision Case No IV/35.691/E-4 – *Pre-Insulated Pipe Cartel*; and *People's All India Anti Corruption and Crime Prevention Society v Usha International Limited. & Others Case No. 90 of 2016*.

¹⁵³ Paragraph 19 of the Statement of Faizal of Venture Nucleus pursuant to section 18 notice dated 4.7.2018.

¹⁵⁴ Paragraphs 3 until 5 of the Statement of Mohamad Hanis of Novatis recorded on 9.7.2018; See also paragraphs 7 and 8 of the Statement of Mohamad Hanis of Novatis recorded on 9.7.2018.

¹⁵⁵ Paragraphs 12 and 13 of the Statement of Dalmata Rabidah of Venture Nucleus recorded on 4.7.2018; See also paragraphs 17 until 19 of the Statement of Faizal of Venture Nucleus pursuant to section 18 notice dated 4.7.2018.

¹⁵⁶ Email correspondence from Venture Nucleus to Novatis Resources dated 19.9.2014; email correspondence from Novatis Resources to Venture Nucleus dated 21.5.2015; email correspondence from Novatis Resources to Venture Nucleus dated 23.3.2016; and email correspondence from Venture Nucleus to Novatis Resources dated 14.6.2016.

202. Pertaining to the identity of Sany Shahril, Hanis of Novatis informed the Commission that he prepared *Sebut Harga A* documents for Venture Nucleus which were later submitted by Sany Shahril who also works for Novatis.
203. The Commission is of the view that even if the identity of Sany Shahril cannot be ascertained, the fact remains that there is an existing pattern of behaviour by Venture Nucleus in allowing other relevant Parties to use its company name to bid for the public tendering process.
204. Ultimately, the Commission emphasises that each enterprise must independently determine the policy and conduct that they intend to adopt on the market. Enterprises are strictly precluded from having any direct or indirect contact with their competitors when the object or effect of the conduct is to influence the conduct of the competitors in the market.¹⁵⁷
205. An essential feature of a competitive tendering process is that each interested bidder prepares and submits their bids independently.¹⁵⁸ Any bids submitted as a result of collusion or cooperation between bidders who are competing for the same project, by their very nature, have the ability to restrict competition.
206. In the present case, Venture Nucleus and Novatis did not prepare and submit a bid for *Sebut Harga A* independently. Contrarily, Novatis had prepared and submitted a bid for *Sebut Harga A* by

¹⁵⁷ Case 114/73 *Suiker Unie v Commission* [1975] ECR 1663, at paragraphs 173 and 174; and Case T-202/98 *Tate & Lyle Plc v Commission of the European Communities* [2001] II-02035 at paragraph 55.

¹⁵⁸ *Apex Asphalts and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, at paragraphs 209 to 211.

using Venture Nucleus' company name. The Commission also refers to *Gold Chic Poultry Supply Pte. Ltd & Ors v Competition and Consumer Commission of Singapore*¹⁵⁹ in drawing inferences from the given circumstances that Novatis and Venture Nucleus had an agreement to rig *Sebut Harga A*.

207. The Commission further finds that the argument by Venture Nucleus, relating to statements by its representatives and Hanis, that they were taken out of context, was merely an afterthought and was not tested nor corroborated. In light of the above evidence, there was an understanding between Venture Nucleus and Novatis allowing them to use each other's company names to place bids in the tendering process. This finding is affirmed by Faizal as follows:

“Saya kenal Encik Hizaan dari Novatis semenjak 2001, kami merupakan rakan sekelas di universiti. Arrangement antara Novatis dan VN wujud secara gentleman's agreement (perjanjian tidak bertulis). Pada pendapat saya, penggunaan nama syarikat sebagai bantuan (back-up) adalah suatu kebiasaan di dalam industri Teknologi Maklumat (IT). Ini adalah untuk tujuan tawaran back-up dalam sesuatu tender jika berlaku kesalahan teknikal atau disqualified pada tawaran tender”¹⁶⁰

208. Furthermore, in rebutting the argument by Venture Nucleus and maintaining the credibility of Dalmata's and Hanis' statements, the Commission relies on email correspondence dated from 4.10.2016 to 5.10.2016 titled “*Sebutharga [Sebut Harga] 2016*”. The email was sent by Dalmata to Hanis and Nurlissa Azwa of Novatis¹⁶¹ which states:

¹⁵⁹ *Gold Chic Poultry Supply Pte. Ltd & Ors v Competition and Consumer Commission of Singapore* [2020] SGCAB 1, at paragraph 69.

¹⁶⁰ Paragraph 17 of the Statement of Faizal of Venture Nucleus pursuant to section 18 notice dated 4.7.2018. See also, paragraph 8 of the Statement of Noor Hizaan of Novatis recorded on 15.5.2018; and Paragraphs 6,7 and 11 of the Statement of Mohamad Hanis of Novatis recorded on 15.5.2018.

¹⁶¹ Email correspondence between Dalmata Rabidah of Venture Nucleus, Hanis of Novatis and Nurlissa Azwa of Novatis on 4.10.2016 to 5.10.2016.

“...Pihak kami ingin menyertai sebutharga berikut dengan menggunakan nama syarikat Novatis...Mohon email kepada saya dokumen-dokumen berikut:

1. Penyata bank 3 bulan terkini
2. Senarai kakitangan teknikal terkini beserta carta organisasi, CV dan sijil-sijil
3. Senarai pengalaman syarikat terkini beserta SS
4. Surat kemudahan kredit

Thank you.”

209. Based on the email above, Venture Nucleus clearly was aware of Hanis’ identity as the email dated 4.10.2016 was directed to him.

210. According to the principle enunciated in *Polypropylene*¹⁶², Venture Nucleus and Novatis did not act independently in determining their conduct on the market as they acted according to the agreement entered by both Parties.¹⁶³

Arguments by Novatis

211. Novatis contends that reciprocal contact between the Parties is required to establish the existence of a concerted practice. In an attempt to justify their actions, Novatis claims that it unilaterally decided to prepare the tender documents for and on behalf of four Parties, namely Basenet Silver Tech, Venture Nucleus and Novatis to increase its chances of winning *Sebut Harga A*.

¹⁶² *Polypropylene* (1986) O JL 230/1, 86/398/EEC.

¹⁶³ *Polypropylene* (1986) O JL 230/1, 86/398/EEC, at paragraph 87.

212. It further submits that Basenet, Venture Nucleus, Silver Tech and itself are not competing against one other. This is because the said Parties could not fulfil the scope of work required for *Sebut Harga A*.
213. Novatis argues that there is no evidence of a mutual exchange of price information. Novatis' request for non-pricing information for *Sebut Harga A*, therefore, does not amount to bid rigging.
214. In addition to the above arguments, Novatis submits the following:
- (i) Absence of concurrence of wills between Novatis and the three Parties;
 - (ii) The Commission wrongly relied on circumstantial evidence to conclude that the enterprises rigged *Sebut Harga A*. The said Parties had merely collaborated as a subcontractor in the previous project; and
 - (iii) No complaint was lodged from ASWARA against Novatis, Silver Tech, Venture Nucleus and Basenet.

The Commission's Findings

215. Having regard to the principles on concerted practice, the Commission finds that Novatis had entered into a bid rigging arrangement with the corresponding three Parties by way of concerted practices to rig the tendering process for *Sebut Harga A* through the following conducts:
- (i) There was an established understanding between Novatis and the three Parties to submit cover bids in order to increase

chances of winning tenders prior to participating in *Sebut Harga A*;

- (ii) Communication took place between Novatis and the three Parties to rig bids for *Sebut Harga A* prior to the preparation of bid submission documents via telephone call and/or emails;
- (iii) There was evidence showing possession of each other's company stamps between Novatis and the three Parties; and
- (iv) The evidence showed exchange of documents between Novatis and the three Parties in view of the preparation of the tender documents which was coordinated by Hanis of Novatis.

216. The Commission finds that Novatis did not act unilaterally in deciding to prepare the bid documents for and on behalf of Silver Tech, Basenet and Venture Nucleus. On the contrary, the related Parties gave their implicit acquiescence to allow Novatis to use their documents and information to submit bids for *Sebut Harga A*.

217. The Commission has gathered evidence in the form of a witness statements, email correspondences, tender documents belonging to Novatis, Silver Tech, Venture Nucleus and Basenet, company stamps, company profile and other confidential company documents such as bank statements, names and identification numbers of personnel of Silver Tech and Venture Nucleus and a document containing the company's experience. It is the Commission's view that Novatis possessed the necessary tools to place cover bids by coordinating with the Parties to submit the bid submission documents using the company names of the three other Parties.

218. An act to perform bid rigging is not necessarily limited to a price fixing arrangement. This is in light of the law obligating enterprises

to act independently¹⁶⁴; therefore, dictating that enterprises ought to prepare and place bids independently.

219. Referring to *Delhi Jal Board*¹⁶⁵, Novatis consciously represented to ASWARA that Silver Tech, Basenet and Venture Nucleus participated in *Sebut Harga A* separately. Based on this representation, ASWARA evaluated each submission individually. Therefore, for the purpose of the present case, all four enterprises are regarded as competitors.
220. With regard to the argument that the stated Parties are in a subcontracting relationship for a previous tender project, the Commission is of the opinion that there is a need to distinguish between a genuine subcontracting relationship as opposed to a subcontracting relationship that forms part of a greater bid rigging scheme.
221. Any subcontracting arrangement between Novatis, Silver Tech, Basenet and Venture Nucleus for *Sebut Harga A* forms part of a larger scheme to rig *Sebut Harga A* and is not a subcontracting arrangement *per se*. Novatis together with Silver Tech, Venture Nucleus and Basenet, respectively, have colluded to rig the bidding process to increase their individual chances to gain monetary benefit from the anti-competitive agreement.
222. The Commission also finds it highly unlikely for enterprises that are in a genuine subcontracting relationship to compete against each

¹⁶⁴ *Apex Asphalts and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, at paragraphs 209 to 211.

¹⁶⁵ *Delhi Jal Board v Grasim Industries Ltd. & Others*, Ref Case No. 03 & 04 of 2013.

other in the same tender as it is assumed that the subcontractor would be providing their service only when required by the principal that won the tender.

223. It makes no commercial sense for a subcontractor to compete for the same project as its principal and for a principal to engage with multiple potential subcontractors that also bid for the same project; other than to place cover bids to increase the likelihood of either one of the enterprises to succeed.¹⁶⁶
224. The Act does not prevent any cooperation between enterprises as long as it does not exceed the limits provided by the law. Therefore, cooperation between enterprises must not have the object or effect of significantly preventing, restricting or distorting competition. In the context of the present case, any form of direct or indirect contact or cooperation that unequivocally leads to an agreement to perform bid rigging is prohibited under the Act.
225. The Commission reiterates that an essential feature of a competitive tendering process is that each interested bidder prepares and submits its bid independently.¹⁶⁷ Any bid submitted as a result of collusion or cooperation between bidders competing for the same tender, by its very nature, can restrict competition.¹⁶⁸
226. The evidence demonstrates that the claimed subcontracting

¹⁶⁶ CCCS 500/7003/17 Infringement of the section 34 prohibition in relation the provision of maintenance services for swimming pools, spas, fountains and water features (14 December 2020), at paragraph 170.

¹⁶⁷ CCCS 500/7003/17 Infringement of the section 34 prohibition in relation the provision of maintenance services for swimming pools, spas, fountains and water features (14 December 2020), at paragraph 44.

¹⁶⁸ *Apex Asphalts and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, at paragraph 209 – 211; *Case 114/73 Suiker Unie v Commission* [1975] ECR 1663173 and 174; *Case T-202/98 Tate & Lyle Plc v Commission of the European Communities* [2001] II-02035, at paragraph 55.

relationship in place for *Sebut Harga A* was pursuant to a bid rigging scheme between Novatis and the three Parties. According to the principle enunciated in *Polypropylene*, Novatis and the three Parties did not act independently in determining their conduct on the market as they acted according to the separate bilateral agreements entered into by Novatis and the three Parties.¹⁶⁹ Therefore, the argument raised by Novatis is hereby rejected.

227. Furthermore, the fact that ASWARA did not complain about the relevant Parties above is irrelevant, as the Commission, upon verifying the complaint by ASWARA, and through the use of its investigation power under Act 712, gathered convincing evidence that Novatis, Basenet, Silver Tech and Venture Nucleus, have jointly engaged in agreements to perform bid rigging for *Sebut Harga A*.

D.1.2 TENDER A

228. *Tender A* is the tender to supply, install, test, commission as well as maintain the computer hardware and software for the 2D animation lab, graphic production and HR projector. *Tender A* was awarded for RM939,852.00.

Conduct of Tuah Packet and Aliran Digital

229. During an inspection at Tuah Packet's premises on 15.5.2018¹⁷⁰ and Aliran Digital's premises on 23.5.2018¹⁷¹, the Commission had scrutinised documents and obtained statements from the relevant

¹⁶⁹ *Polypropylene* (1986) OJL 230/1, 86/398/EEC, at paragraph 87.

¹⁷⁰ Section 20 Notice issued to Tuah Packet dated 15.5.2018.

¹⁷¹ Section 20 Notice issued to Aliran Digital dated 23.5.2018.

personnel of Tuah Packet whom the Commission believed to be acquainted with the facts and circumstances of the investigation to provide or produce any relevant information or document. Below is the chronology of *Tender A* and the relevant Parties' participation:

Table 15: Chronology of *Tender A*

DATE	RELEVANT FACTS
15.8.2015	The tender was advertised by ASWARA. ¹⁷²
21.8.2015	(i) Tuah Packet emailed Aliran Digital requesting to use Aliran Digital's name to bid for <i>Tender A</i> . (ii) Aliran Digital granted the request via email.
24.8.2015	(i) Tuah Packet and Aliran Digital attended the site visit at ASWARA. ¹⁷³ (ii) Tender documents of Tuah Packet and Aliran Digital were purchased by Khairul Affendy of Tuah Packet. ¹⁷⁴
4.9.2015	Mimie of Tuah Packet forwarded Aliran Digital's tender documents to the sales team of Tuah Packet.
14.9.2015	(i) Tuah Packet forwarded Borang B – <i>Maklumat Petender</i> (Form B – Tenderer Information) to Aliran Digital for tender submission. (ii) Tuah Packet requested a price quotation and LOA from Khairul of [REDACTED] Sdn Bhd. ¹⁷⁵
15.9.2015	(i) Tuah Packet requested a LOA from Masitoh of [REDACTED] Sdn. Bhd. For Tuah Packet and Aliran Digital. ¹⁷⁶ (ii) Tender document of Tuah Packet was purchased by Khairul Affendy of Tuah Packet. ¹⁷⁷
17.9.2015	Tuah Packet requested information and documents from Aliran Digital.

¹⁷² Kenyataan Tender, *Tender A*. (*Tender Notice*).

¹⁷³ Senarai Kehadiran Lawatan Tapak (*Attendance List for Site Visit*), *Tender A*.

¹⁷⁴ Borang Membeli Dokumen Tender, Aliran Digital Sdn Bhd; and Borang Membeli Dokumen Tender, Tuah Packet.

¹⁷⁵ Email correspondence of Zuzairi of Tuah Packet and [REDACTED]@[REDACTED].com on 14.9.2015.

¹⁷⁶ Email correspondence of Zuzairi of Tuah Packet and [REDACTED]@[REDACTED].com on 15.9.2015.

¹⁷⁷ Borang Membeli Dokumen Tender, Tuah Packet.

DATE	RELEVANT FACTS
18.9.2015	(i) Aliran Digital forwarded the requested information to Tuah Packet. ¹⁷⁸ (ii) Tuah Packet requested the latest bank statement from Aliran Digital. ¹⁷⁹
19.9.2015	Tuah Packet forwarded company details of Tuah Packet and Aliran Digital to [X] for LOA.
21.9.2015	Last day of the tender document submission period: (i) Only Tuah Packet submitted a bid ¹⁸⁰ . (ii) Aliran Digital's documents were unable to be prepared on time.
5.11.2015	<i>Surat Setuju Terima</i> (letter of acceptance) was issued to [X].

Relationship between Tuah Packet and Aliran Digital

230. Tuah Packet and Aliran Digital have a long-standing working relationship based on mutual trust.¹⁸¹ Both Parties would provide assistance to one another in the event either party has insufficient manpower to complete certain project deliverables,¹⁸² in which payment would be made to the company who had provided the resources.

Coordination between Tuah Packet and Aliran Digital

231. On 21.8.2015, Tuah Packet requested permission from Aliran Digital to use Aliran Digital's company name for *Tender A* and subsequently proceeded to do the same. This was illustrated

¹⁷⁸ Email correspondence of Asrol of Aliran Digital to Mimie of Tuah Packet on 18.9.2015 at 12:23 am.

¹⁷⁹ Email correspondence from Mimie of Tuah Packet to Asrol of Aliran Digital on 18.9.2015 at 1:10 am.

¹⁸⁰ Borang Penyerahan Dokumen Tender, Tuah Packet.

¹⁸¹ Paragraph 47 of the Statement of Mohamad Hisham of Tuah Packet recorded on 11.6.2018; Paragraph 15 of the Statement of Asrol of Aliran Digital recorded on 28.6.2018; and Paragraph 35 of the Statement of Mohamad Rani of Tuah Packet recorded on 11.6.2018.

¹⁸² Paragraph 10 of the Statement of Jasny Hanif of Aliran Digital recorded on 23.5.2018.

through the email correspondence between Tuah Packet and Aliran Digital, the contents of which are reproduced below:

Mimie Kamaruddin [✉]@tuahpacket.net Fri, Aug 21, 2015 at 12:07 PM
To: asrol bakar [✉]@alirandigital.com
Cc: [✉]@TuahPacket" <[✉]@tuahpacket.net>

Assalam

En.Asrol
Tuah Packet ada masuk SH ASWARA jd mohon kebenaran Aliran Digital untuk kami menggunakan nama ALIRAN DIGITAL bg SH tersebut

*Dokumen sampingan akan kami minta kemudian

TQ...¹⁸³

232. In less than 30 minutes, Aliran Digital gave the go-ahead to Tuah Packet as follows:

Asrol Bakar [✉]@alirandigital.com Fri, Aug 21, 2015 at 12:30 PM
To: Mimie Kamaruddin [✉]@tuahpacket.net asrol bakar [✉]@alirandigital.com
Cc: "[✉]@TuahPacket" [✉]@tuahpacket.net

Ok. Noted.¹⁸⁴

233. The above email excerpts depicted an apparent arrangement between Tuah Packet and Aliran Digital to participate in *Tender A*. We also take note that the email correspondence was sent only a few days prior to the date of the site visit and briefing at ASWARA on 24.8.2015.

¹⁸³ Email Correspondence between Mimie of Tuah Packet and Asrol of Aliran Digital on 21.8.2015.

¹⁸⁴ Email correspondence between Asrol of Aliran Digital and Mimie of Tuah Packet on 21.8.2015.

234. After permission to use Aliran Digital's company name was granted¹⁸⁵, Tuah Packet purchased tender documents for itself and Aliran Digital.¹⁸⁶ Based on *Borang Membeli Dokumen Tender (Form on Purchasing of Tender Documents)*, the series number of Aliran Digital's tender document is "03".¹⁸⁷ The series number of Tuah Packet's tender document is "07".¹⁸⁸
235. Tuah Packet proceeded to prepare tender documents for Aliran Digital including the offer price.¹⁸⁹ On 4.9.2015, Mimie of Tuah Packet ("Mimie") sent an email to the sales team of Tuah Packet forwarding Aliran Digital's tender documents.¹⁹⁰
236. On 14.9.2015, Tuah Packet emailed Aliran Digital requesting Aliran Digital to fill out *Borang B – Maklumat Petender (Form B – Bidder Information)*.¹⁹¹ Tuah Packet also requested Aliran Digital's financial documents including the latest bank statements in order to prepare Aliran Digital's financial and technical documents.¹⁹²
237. On 17.9.2015 and 18.9.2015, there were email exchanges that reflected communication taking place between Tuah Packet and Aliran Digital on the preparation of the submission documents using Aliran Digital's company name for *Tender A*.¹⁹³

¹⁸⁵ Paragraphs 12, 14 and 23 of the Statement of Asrol of Aliran Digital recorded on 28.6.2015.

¹⁸⁶ Borang Penyerahan Dokumen Tender Tuah Packet and Paragraphs 50 and 56 of Statement of Zuzairi of Tuah Packet recorded on 11.6.2018.

¹⁸⁷ Borang Membeli Dokumen Tender, Bahagian 'A', Aliran Digital.

¹⁸⁸ Borang Membeli Dokumen Tender, Bahagian 'A', Tuah Packet.

¹⁸⁹ Email correspondence between Mimie of Tuah Packet and Asrol of Aliran Digital on 21.8.2015; Paragraph 53 of statement of Zuzairi of Tuah Packet recorded on 11.6.2018; and Paragraph 25 of the Statement of Asrol of Aliran Digital recorded on 28.6.2015

¹⁹⁰ Paragraph 55 of the Statement of Zuzairi of Tuah Packet recorded on 11.6.2018; and email correspondence between Mimie of Tuah Packet, [✉]@tuahpacket.net on 4.9.2015.

¹⁹¹ Email correspondence between Mimie of Tuah Packet and Asrol of Aliran Digital on 14.9.2015.

¹⁹² Paragraphs 24 and 25 of Statement of Asrol of Aliran Digital recorded on 28.6.2015.

¹⁹³ Email correspondence between Mimie of Tuah Packet and Asrol of Aliran Digital on 17.9.2015 and 18.9.2015.

238. Mimie of Tuah Packet prepared the financial documents while Zuzairi of Tuah Packet prepared the technical documents using Aliran Digital's company name for Tender A.¹⁹⁴ Zuzairi of Tuah Packet prepared the said documents for Aliran Digital by requesting a quotation and the LOA from the principal¹⁹⁵ in order to prepare Aliran Digital's estimated price quotation.¹⁹⁶

239. Consequently, based on the factual circumstances above, the Commission finds that Tuah Packet had instigated Aliran Digital to participate in the bid rigging agreement in relation to *Tender A* by way of submitting cover bids using Aliran Digital's company name.

Possession of Company Stamps Belonging to Another Party

240. During the inspection at Aliran Digital's office premises under section 20 of the Act on 23.5.2018¹⁹⁷, the Commission discovered Tuah Packet's company stamps.¹⁹⁸ Further, Tuah Packet had knowledge that its company stamps found in Aliran Digital's premises had been used for the purpose of preparing tender documents.¹⁹⁹

¹⁹⁴ Paragraphs 24, 25 and 26 of the Statement of Asrol of Aliran Digital recorded on 28.6.2018.

¹⁹⁵ Email correspondence of Zuzairi of Tuah Packet and [redacted]@[redacted].com on 14.9.2015; Email correspondence of Zuzairi of Tuah Packet and [redacted]@[redacted].com on 15.9.2015; Email from [redacted]@[redacted].com to Zuzairi of Tuah Packet on 22.9.2015 at 3:11 pm; Paragraph 58 of the Statement of Zuzairi of Tuah Packet recorded on 11.6.2018; and Paragraph 26 of the Statement of Asrol of Aliran Digital recorded on 28.6.2015.

¹⁹⁶ Paragraph 25 of the Statement of Asrol of Aliran Digital dated 28.6.2018.

¹⁹⁷ Section 20 Notice issued to Aliran Digital dated 23.5.2018.

¹⁹⁸ IMG_1489, IMG_1486 and IMG_1472.

¹⁹⁹ Paragraph 38 of the Statement of Mohamad Rani of Tuah Packet recorded on 11.6.2018.

241. Similarly, Tuah Packet also had in its possession, among others, the company stamps belonging to Aliran Digital for the same purpose of bid submission.²⁰⁰

Common Practice between the Parties

242. At the material time, unlike Tuah Packet, ASWARA was not Aliran Digital's target customer.²⁰¹ Tuah Packet, therefore, required Aliran Digital's company name to increase its chances of winning *Tender A*.²⁰²

243. The Commission observes that both Parties acted reciprocally in using each other's name for the purpose of placing bids in various tenders, while simultaneously ensuring both Parties benefit from the arrangement.²⁰³ Ultimately, Tuah Packet and Aliran Digital shared an understanding that if one of the Parties' company names was used to submit a bid, the other Party will refrain from submitting a bid using its company name for the same tendering process.²⁰⁴

244. In the event that Tuah Packet uses Aliran Digital's company name to participate in a tender, Aliran Digital would not be directly involved in the execution of the project as Tuah Packet will carry out all the works required by the tender.²⁰⁵ In exchange for the use of Aliran Digital's company name, Aliran Digital will receive 5% of the tender value as a kickback from the arrangement.²⁰⁶ Following the same

²⁰⁰ Paragraph 30 of the Statement of Siti Azura of Tuah Packet recorded on 5.7.2018.

²⁰¹ Paragraphs 3 and 4 of the Statement of Asrol of Aliran Digital recorded on 28.6.2018; and Paragraph 7 of the Statement of Mohamad Rani of Tuah Packet recorded on 11.6.2018.

²⁰² Paragraph 38 of the Statement of Mohamad Hisham of Tuah Packet recorded on 11.6.2018.

²⁰³ Paragraphs 13 and 34 of the Statement of Asrol of Aliran Digital recorded on 28.6.2018.

²⁰⁴ Paragraph 21 of the Statement of Asrol of Aliran Digital recorded on 28.6.2018.

²⁰⁵ Paragraphs 35 and 36 of the Statement of Asrol of Aliran Digital recorded on 28.6.2018.

²⁰⁶ Paragraph 37 of the Statement of Asrol of Aliran Digital recorded on 28.6.2018.

arrangement, any payment Aliran Digital received from the procurement agency was agreed to be handed to Tuah Packet.²⁰⁷

245. Each time Aliran Digital's company name was used by Tuah Packet to bid in a tendering process, a representative of Tuah Packet would contact Aliran Digital to inform the latter of its intention to use Aliran Digital's company name to place a bid in the tendering process in question.²⁰⁸ Subsequently, the technical document that forms part of the bid submission documents would be prepared by Tuah Packet.²⁰⁹ Aliran Digital would also provide its financial documents to Tuah Packet for the preparation of the said documents. ²¹⁰

246. After the bid submission documents are completely prepared by Tuah Packet, Aliran Digital would certify and sign the documents before Tuah Packet submitted the same to the procurement agency.²¹¹

247. In a like manner, there are instances wherein Aliran Digital submitted an additional bid by using Tuah Packet's company name for the invitation to bid from various public bodies. For this purpose, Aliran Digital prepared the necessary documents for bid submission using Tuah Packet's company name. ²¹²

248. Tuah Packet informed the Commission that it had been a supplier for, and customer of, Aliran Digital in the past. In the event Tuah

²⁰⁷ Paragraphs 37, 38 and 39 of the Statement of Asrol of Aliran Digital recorded on 28.6.2018.

²⁰⁸ Paragraph 7 of the Statement of Ku Adam of Aliran Digital recorded on 23.5.2018.

²⁰⁹ Paragraph 44 of the Statement of Asrol of Aliran Digital recorded on 28.6.2018; and Paragraphs 9 and 13 of the Statement of Ku Adam of Aliran Digital recorded on 23.5.2018.

²¹⁰ Paragraph 44 of the Statement of Asrol of Aliran Digital recorded on 28.6.2018; and Paragraph 9 of the Statement of Ku Adam of Aliran Digital recorded on 23.5.2018.

²¹¹ Paragraph 44 of the Statement of Asrol of Aliran Digital recorded on 28.6.2018.

²¹² Paragraphs 14 and 15 of the Statement of Jasny Hanif recorded on 23.5.2018.

Packet intends to use the company name of Aliran Digital to participate in a tender or quotation, Tuah Packet would be labelled as a supplier. On the other hand, in the event when the company name of Tuah Packet was used by Aliran Digital to participate in a tender or quotation, Tuah Packet would be labelled as a customer.²¹³

249. Each time Tuah Packet used Aliran Digital's company name to participate in a tender or quotation, we find that Tuah Packet would determine and mark up the bid price.²¹⁴

250. The existence of established coordination to perform bid rigging between the said Parties can be inferred by the fact that Tuah Packet possessed documents of Aliran Digital.²¹⁵ The Commission takes the view that private documents such as the *sijil akuan pendaftaran syarikat* (company registration certificate) and company form are commonly required for bid submissions in the public procurement tendering process. Thus, the Commission finds that the purpose of having possession of such documents was mainly for the preparation of the bid submission documents.²¹⁶

251. Consequently, based on the facts above, it is observed that Tuah Packet and Aliran Digital possessed each other's company stamps for the purpose of bid documentation.²¹⁷ Bearing this in mind, the Commission is of the view that Tuah Packet and Aliran Digital had

²¹³ Paragraph 11 of the Statement of Ku Adam of Aliran Digital recorded on 23.5.2018.

²¹⁴ Paragraph 13 of the Statement of Ku Adam of Aliran Digital recorded on 23.5.2018.

²¹⁵ Paragraph 45 of the Statement of Asrol of Aliran Digital recorded on 28.6.2018.

²¹⁶ Paragraph 45 of the Statement of Asrol of Aliran Digital recorded on 28.6.2018.

²¹⁷ Paragraph 46 of the Statement of Asrol of Aliran Digital recorded on 28.6.2018; Paragraph 13 of the Statement of Jasny Hanif recorded on 23.5.2018; and Paragraph 38 of the Statement of Mohamad Rani of Tuah Packet recorded on 11.6.2018.

the necessary tools to perform acts of bid rigging using each other's company names.

Arguments by the Parties

252. Tuah Packet and Aliran Digital posit that there is no agreement to rig *Tender A*. Both Parties claim that the agreement was for the purpose of requesting each other's expertise and to form a subcontract relationship in the event either one of the Parties were awarded the contract to execute *Tender A*.

253. Further, Tuah Packet and Aliran Digital argue that ASWARA's officials requested Tuah Packet to search for an additional two bid submissions to avoid the re-tendering process.

254. Both Parties assert that since Aliran Digital did not submit a bid, the competition process of *Tender A* was not impaired.

255. In addition, Tuah Packet argues that it did not gain any profit from the conduct considering it offered a low price.

The Commission's Findings

256. Based on **paragraphs 229 to 251** above, it is evident that there was an agreement between Tuah Packet and Aliran Digital to rig *Tender A*.

257. In response to the Parties' submission, the Commission takes the position that subcontracting arrangements potentially form part of a

greater bid rigging scheme. This is in light of the observation made by the Competition Commission of India (“CCI”) that competitors, who agree not to bid or to submit a losing bid, frequently receive a subcontract agreement or supply contract in exchange from the successful bidder.²¹⁸

258. The Commission is of the opinion that the subcontracting arrangement between Tuah Packet and Aliran Digital ahead of the quotation submission is not a genuine subcontract relationship. Instead, the subcontracting arrangement was in fact concerning the agreement to rig *Tender A*. The subcontracting arrangement between the Parties is in place to guarantee a form of reward should one of the Parties win the tender. Having taken the facts into account, the Commission opines that had both Parties genuinely intended to collaborate as legitimate partners, Tuah Packet and Aliran Digital would have submitted a single bid instead.

259. The Commission therefore finds that the tender cooperation in question is deemed to have had an object of significantly preventing, restricting or distorting competition in contravention of section 4 prohibition.

260. In *Delhi Jal Board v Grasim Industries*, the separate bids submitted by the infringing parties have “...create a façade of the competitive bidding process when, in fact, the bids were designed and coordinated by the same set of professionals.”²¹⁹

261. Referring to *Delhi Jal Board*, both Tuah Packet and Aliran Digital

²¹⁸ Provisions Relating to Bid Rigging by Competition Commission of India, at page 7.

²¹⁹ *Delhi Jal Board v Grasim Industries Ltd. & Others*, Ref Case No. 03 & 04 of 2013, paragraph 125.

consciously represented themselves as separate companies when submitting quotation documents to ASWARA. The conduct of Buah Packet and Aliran Digital created an illusion for ASWARA that its tendering process was competitive. Further, the collusion between Buah Packet and Aliran Digital had caused ASWARA unable to benefit from competitive tendering. It potentially reduces the number of tenderers and eliminates potential competition between Buah Packet and Aliran Digital.

262. On a different note, the Commission dismisses the claim on ASWARA's official request for additional bidders as wholly irrelevant in the present case.

263. The Commission finds the arguments by the said Parties in **paragraphs 252 and 253** are without merit. We reiterate that based on the evidence gathered, the horizontal agreement between Buah Packet and Aliran Digital had an object to perform an act of bid rigging in relation to *Tender A*, by way of cover bidding, that is in law deemed to have the object of significantly preventing, restricting or distorting competition.

D.1.3 SEBUT HARGA C

264. *Sebut Harga C* involves the quotations to supply, deliver, install, test, commission as well as to maintain the ICT hardware in the Faculty of Animation and Multimedia at ASWARA. In *Sebut Harga C*, the supplier is required to provide computer hardware, interactive board room solution and computer peripherals in addition to the provision of services. *Sebut Harga C* was awarded for RM475,000.00.

Conduct of Tuah Packet and Viamed

265. Below is the chronology of *Sebut Harga C* and the participation of the relevant Parties:

Table 16: Chronology of Sebut Harga C

DATE	RELEVANT FACTS
30.1.2015	(i) <i>Sebut Harga C</i> was advertised. (ii) Internal mail of Tuah Packet.
10.2.2015	Site visit at ASWARA's premises attended by 26 enterprises.
12.2.2015	An email from Tuah Packet to use Viamed's name to bid for <i>Sebut Harga C</i> and request for latest documents such as a recent bank statement.
13.2.2015	A reply from Viamed asking Tuah Packet to collect bank statements at Viamed's office.
24.2.2015	Last day submission for <i>Sebut Harga C</i> .
18.5.2015	A letter of acceptance was issued to [X].

Coordination between Tuah Packet and Viamed

266. On 30.1.2015, there were email correspondences between Zuzairi and Azura of Tuah Packet. Zuzairi explained to the Commission that the email correspondences indicated that Tuah Packet was in the midst of requesting other enterprises' assistance to bid for *Sebut Harga C* in order to fulfil the quorum.²²⁰

²²⁰ Email correspondence between Zuzairi of Tuah Packet and Azura of Tuah Packet on 30.1.2015; Paragraphs 91 and 92 of the Statement of Siti Azura of Tuah Packet recorded on 5.7.2018; Paragraph 59 of the Statement of Mohamad Hisham of Tuah Packet recorded on 11.6.2018; and Paragraph 71 of the Statement of Zuzairi of Tuah Packet recorded on 11.6.2018.

267. Subsequently, on 12.2.2015, Tuah Packet sought permission to use the company name of Viamed in *Sebut Harga C*. Tuah Packet further requested confidential documents such as the latest company experience, and bank statements for October, November, and December 2014 as well as the company profile. The relevant email excerpt is as follows:

From: mimie Kamaruddin <[REDACTED]@tuahpacket.net>
Date: February 12, 2015 at 1:06:29 PM GMT+8
To: Kartini Zainon <[REDACTED]@viamed.com.my>, zulaiha bakar <[REDACTED]@alirandigital.com>, Zainoriza Wagiman <[REDACTED]@viamed.com.my>, asrol bakar <[REDACTED]@alirandigital.com>
Cc: Nurul Nazira Roswira <[REDACTED]@tuahpacket.net>, Nur Shazlena Sharif Puddin <[REDACTED]@tuahpacket.net>, "[REDACTED]@TuahPacket" <[REDACTED]@tuahpacket.net>
Subject: Re: Tender-05/02/2015-SH/KPK/ASWARA/S/01/2015-Perkhidmatan Membekal, Menghantar, Memasang, Menguji dan Mentauliah Serta Menyelenggara (Dalam Tempoh Jaminan) Perkakasan ICT Fakulti Animasi Dan Multimedia Di Akademi Seni Dan Budaya Dan Warisan Kebangsaan, Kementerian Pelancongan Dan Kebudayaan Malaysia-Tutup: -24/02/2015
Assalammuailaikum

Puan Kartini / Puan Zulaiha
Pihak Tuah Packet Mohon jasa pihak Viamed / Aliran Digital untuk membenarkan kami menggunakan nama syarikat bagi menyertai Tender ASWARA untuk tajuk Perkhidmatan Membekal, Menghantar, Memasang, Menguji Dan Mentauliah Serta Menyelenggara (Dalam Tempoh Jaminan) Perkakasan ICT Fakulti Animasi dan Multimedia Di Akademi Seni Budaya Dan Warisan Kebangsaan, Kementerian Pelancongan Dan Kebudayaan Malaysia. Mohon jasa dan kebenaran. Tarikh akhir Tender ini adalah pada 24/02/2015 (Selasa).

Disini mimi mohon jasa untuk mimi mendapat maklumat TERKINI / Detail Syarikat terkini seperti yang mimi lampirkan (Aswara-Maklumat Syarikat).

Kami juga perlukan beberapa dokumen terkini seperti:-

- 1) Pengalaman Semasa
- 2) Penyata Bank Terbaru (OKTOBER / NOVEMBER / DISEMBER) 2014
- 3) Profil Syarikat

Terima Kasih²²¹

²²¹ Email correspondence between Mimie of Tuah Packet, Kartini of Viamed, Zulaiha of Aliran Digital, Nur Suriati of Viamed and Asrol of Aliran Digital on 12.2.2015.

268. Viamed had followed up on the progress of the request made by Tuah Packet with Viamed's staff as follows:

From: Kartini Zainon [✉]@viamed.com.my
Subject: Fwd: Tender-05/02/2015-SH/KPK/ASWARA/S/01/2015-Perkhidmatan Membekal, Menghantar, Memasang, Menguji Dan Mentauliah Serta Menyelenggara (Dalam Tempoh Jaminan) Perkakasan ICT Fakulti Animasi Dan Multimedia Di Akademi Seni Budaya Dan Warisan Kebangsaan, Kementerian Pelancongan Dan Kebudayaan Malaysia-Tutup: -24/02/2015
Date: 12 February 2015 at 2:33PM
To: Zainoriza Wagiman [✉]@viamed.com.my

Zai
Bank statement yg mimi mintak ni, tlg print pastu call dia suh dtg amik
Sent from my iPhone²²²

269. On 13.2.2015, Viamed replied by requesting for the financial statement to be collected by Tuah Packet at Viamed's office. The email excerpt is as follows:

From: mimie Kamaruddin [✉]@tuahpacket.net
Subject: Re:Tender-05/02/2015-SH/KPK/ASWARA/S/01/2015-Perkhidmatan Membekal, Menghantar, Memasang, Menguji Dan Mentauliah Serta Menyelenggara (Dalam Tempoh Jaminan) Perkakasan ICT Fakulti Animasi Dan Multimedia Di Akademi Seni Budaya Dan Warisan Kebangsaan, Kementerian Pelancongan Dan Kebudayaan Malaysia-Tutup:-24/02/2015
Date: 13 February 2015 at 9:34 AM
To: Kartini Zainon [✉]@viamed.com.my

oh mimi lupa.
ok Pn.Kartini
tq

2015-02-13 9:33 GMT+8:00 Kartini Zainonn <[✉]@viamed.com.my>:

Penyata bank boleh dtg ambil di ofis.
Tq.²²³

²²² Email correspondence between Kartini of Viamed and [✉]@viamed.com.my on 12.2.2015.

²²³ Email correspondence between Mimie of Tuah Packet and Kartini of Viamed on 13.2.2015.

270. Kartini of Viamed in supplying the requested document was fully aware of the arrangement between Tuah Packet and Viamed.
271. Kartini of Viamed prepared the financial document whilst Tuah Packet prepared the technical documents on behalf of Viamed for *Sebut Harga C*.²²⁴
272. Consequently, Tuah Packet used Viamed's company name to participate in *Sebut Harga C*.²²⁵ The Commission finds that the facts above when assessed pinpoints to Tuah Packet taking the lead role in the bid rigging arrangement using cover bids and therefore instigating Viamed to participate in the bid rigging arrangement for *Sebut Harga C*.

Possession of Company Stamps Belonging to other Enterprises

273. Tuah Packet had in its possession, among others, the company stamps belonging to Viamed for documentation and certification.²²⁶

²²⁴ Paragraphs 9 and 10 of the Statement of Kartini of Viamed recorded on 27.6.2018.

²²⁵ *Borang Penyerahan Dokumen Sebutharga* and Paragraph 6 of the Statement of Kartini of Viamed recorded on 27.6.2018.

²²⁶ Paragraphs 29 and 30 of the Statement of the Siti Azura of Tuah Packet recorded on 5.7.2018.

Established Understanding between Tuah Packet and Viamed

274. In the present case, the permission to use each other's company name, including providing the relevant documents such as financial documents (such as the latest bank statement, Form 44, Form 48 and others as well as company profile) and technical documents (past company's work experience, resume and employee certificates) is allegedly founded on the basis of "friendship, mutual trust, and loyalty".²²⁷

275. In furtherance to the permission granted in using each other's company name, Viamed's market priority was telemedicine. Therefore, Viamed had no objection to Tuah Packet using Viamed's company name to secure any market outside of telemedicine.²²⁸

Benefits Derived from Coordination, Agreement and/or Concerted Practice

276. In the event, Viamed is awarded the project that was prepared by Tuah Packet, all works arising from the project would in reality actually be carried out by Tuah Packet. In return, Viamed would retain a certain percentage of the contract sum.

277. For instance, on 10.6.2015, Tuah Packet issued a tax invoice to Viamed for services rendered for *Perkhidmatan Penyelenggaraan Active Directory* for ASWARA.²²⁹ This piece of evidence shows that the agreement to coordinate and engage in concerted practice had

²²⁷ Paragraph 16 of the Statement of Kartini of Viamed recorded on 27.6.2018.

²²⁸ Paragraph 17 of the Statement of Kartini of Viamed recorded on 27.6.2018.

²²⁹ Tax Invoice dated 10.6.2015; and Paragraphs 18 and 19 of the Statement of Kartini of Viamed recorded on 27.6.2018.

existed between both related Parties. Having considered all of the facts and circumstances above, the Commission is satisfied that Tuah Packet and Viamed had the object to perform an act of bid rigging in relation to *Sebut Harga C* and, in law, had the object of significantly preventing, restricting or distorting competition.

Arguments by the Parties

278. Tuah Packet and Viamed contend there is no agreement to rig *Sebut Harga C*. Both related Parties claim that the agreement was strictly to request each other's expertise and form a subcontracting relationship in the event either one of the Parties were selected to supply for *Sebut Harga C*.

279. In addition, Tuah Packet and Viamed claim that the arrangement between them was to fulfil the minimum quota for the tendering process and consequently avoid the re-tendering process. Moreover, Viamed did not submit any bid document to ASWARA for *Sebut Harga C*.

280. The related Parties also argue that they determined their costing independently based on the solution offered for *Sebut Harga C*.

The Commission's Findings

281. The Commission is of the opinion that the subcontracting arrangement between Tuah Packet and Viamed is not a genuine subcontract relationship. The subcontracting arrangement was made pursuant to the established understanding between Tuah Packet and Viamed to use each other's company name to bid in the said tendering process.
282. The Commission is of the view that the objective to fulfil the minimum quota requirement and non-submission of Viamed is immaterial in determining whether the related Parties performed an act of bid rigging. Based on **paragraphs 265 to 277** above, we find that there is sufficient evidence that Tuah Packet and Viamed had submitted a cover bid in Viamed's name to ASWARA for *Sebut Harga C*. Tuah Packet and Viamed had entered into an agreement and/or concerted practice to perform an act of bid rigging which, in law, had an object of significantly preventing, restricting or distorting competition.
283. Even if the Parties determined their costing independently, there was an apparent and significant effort to rig *Sebut Harga C*, along with the expectation of receiving the said benefits.²³⁰

Conduct of Tuah Packet and Aliran Digital

284. Below is the chronology of *Sebut Harga C* and the participation of Tuah Packet and Aliran Digital:

²³⁰ Paragraphs 13 to 17 of the Statement of Kartini of the Viamed recorded on 27.6.2018.

Table 17: Chronology of Sebut Harga C

DATE	RELEVANT FACTS
30.1.2015	(i) <i>Sebut Harga C</i> was advertised. (ii) Internal communication of Tuah Packet.
12.2.2015	An email from Tuah Packet to use Aliran Digital's name to bid for <i>Sebut Harga C</i> and request for latest documents such as a recent bank statement.
24.2.2015	Last day submission of <i>Sebut Harga C</i> .
18.5.2015	A letter of acceptance was issued to [X].

Coordination between Tuah Packet and Aliran Digital

285. On 30.1. 2015, there were email correspondences between Zuzairi and Azura of Tuah Packet. Zuzairi explained to the Commission that the email correspondences indicated that Tuah Packet was in the midst of requesting other related Parties' assistance to bid for *Sebut Harga C* to fulfil the 'quota'.²³¹

286. On 12.2.2015, Tuah Packet sought permission to use Aliran Digital's company name in *Sebut Harga C*. Tuah Packet further requested confidential documents such as the latest bank statement. Subsequently, Tuah Packet purchased the bid document of *Sebut Harga C* using the company name of Aliran Digital.²³²

²³¹ Email correspondence between Zuzairi of Tuah Packet and Azura of Tuah Packet on 30.1.2015; Paragraphs 91 and 92 of the Statement of Siti Azura of Tuah Packet recorded on 5.7.2018; Paragraph 59 of the Statement of Mohamad Hisham of Tuah Packet recorded on 11.6.2018; and Paragraph 71 of the Statement of Zuzairi of Tuah Packet recorded on 11.6.2018.

²³² Borang Pembelian Dokumen Sebutharga SH.S.01.2015; and Paragraph 93 of the Statement of Siti Azura of Tuah Packet recorded on 5.7.2018.

287. The Commission infers from the factual timeline above that *Tuah Packet* took the lead role in conducting a bid rigging agreement in *Sebut Harga C* between itself and *Aliran Digital*.
288. *Aliran Digital* stated that due to the technical specification of works required by *ASWARA*, *Aliran Digital* was not interested to bid for any project in *ASWARA*. This was also because *Aliran Digital* had a different set of target customers.²³³
289. On the other hand, *Tuah Packet* informed the Commission that its target customers were public education institutions such as [X] and *ASWARA*.²³⁴ The above evidence when assessed cumulatively thus pinpoints apparent coordination between *Tuah Packet* and *Aliran Digital* for the purpose of *Sebut Harga C* bid submission.

Established Understanding between *Tuah Packet* and *Aliran Digital*

290. In furtherance of the evidence of coordination between the said Parties, there also exists an understanding between *Tuah Packet* and *Aliran Digital* to utilise each other's company names to submit cover bids. Both related Parties provided mutual assistance in the event either one of them lacked sufficient manpower to complete certain project tasks. Following the said understanding, payment would be made to the company that had provided the resources.²³⁵
291. Upon assessing the evidence, the Commission views that the email sent on 12.2.2015 was merely a courtesy or formality to inform one

²³³ Paragraphs 3 and 4 of the Statement of Asrol of *Aliran Digital* recorded on 28.6.2018.

²³⁴ Paragraph 7 of the Statement of Mohamad Rani of *Tuah Packet* recorded on 11.6.2018.

²³⁵ Paragraph 10 of the Statement of Jasny Hanif of *Aliran Digital* recorded on 23.5.2018.

another as there was already an understanding established between both related Parties.

292. Further, we posit that the defining objective of the arrangement between Tuah Packet and Aliran Digital was to increase the chances of winning the bid. The coordination between the related Parties, therefore, in the eyes of the law, amounts to a concerted practice.

293. It is observed that both related Parties had acted reciprocally by using each other's company names for the purpose of placing a bid in various tenders with both parties gaining benefits from the arrangement.²³⁶ Tuah Packet and Aliran Digital displayed an understanding that if one of the related Parties' company names is used to bid, the other Party will not submit a bid in the same procurement process.

294. In the event that Tuah Packet uses Aliran Digital's company name to participate in a tender, Aliran Digital would not be directly involved in the execution of the project as Tuah Packet would be the Party carrying out the work required by the tender.²³⁷ Aliran Digital was then agreed to receive 5% of the tender value as the kickback from the arrangement.²³⁸ Any payment that Aliran Digital received from the procurement agency was determined to be given to Tuah Packet.²³⁹

²³⁶ Paragraphs 13 and 34 of the Statement of Asrol of Aliran Digital recorded on 28.6.2018.

²³⁷ Paragraphs 35 and 36 of the Statement of Asrol of Aliran Digital recorded on 28.6.2018.

²³⁸ Paragraph 37 of the Statement of Asrol of Aliran Digital recorded on 28.6.2018.

²³⁹ Paragraphs 37,38 and 39 of the Statement of Asrol of Aliran Digital recorded on 28.6.2018.

295. The concept of concerted practice must be understood in light of the principle that each economic operator must determine independently the conduct it intends to adopt on the market.²⁴⁰ In this regard, the Commission finds that there was indeed an agreement and/or concerted practices between Tuah Packet and Aliran Digital.
296. Each time Aliran Digital's company name was used to bid in a tendering process, a representative of Tuah Packet will contact Aliran Digital to express that it wishes to use Aliran Digital's company name to place a bid in the tendering process.²⁴¹ Subsequently, the technical document that forms part of the bid submission documents would be prepared by Tuah Packet²⁴²; this includes the determination of the offer price and request for a quotation from a relevant supplier.²⁴³ Aliran Digital would also then provide its financial documents that will be used in preparing the bid submission documents.²⁴⁴
297. Upon the preparation of the bid submission documents by Tuah Packet, Aliran Digital will certify and sign the document before the document is submitted to the relevant procurement agency.²⁴⁵
298. The established arrangement between Tuah Packet and Aliran Digital to perform a cover bid can be inferred from the fact that Aliran Digital provided Tuah Packet with its documents belonging to Aliran

²⁴⁰ Case C-40/73, *Suiker Unie and Others v Commission*.

²⁴¹ Paragraph 7 of the Statement of Ku Adam of Aliran Digital recorded on 23.5.2018.

²⁴² Paragraph 44 of the Statement of Asrol of Aliran Digital recorded on 28.6.2018.

²⁴³ Paragraphs 9 and 13 of the Statement of Ku Adam of Aliran Digital recorded on 23.5.2018.

²⁴⁴ Paragraph 44 of the Statement of Asrol of Aliran Digital recorded on 28.6.2018; and Paragraph 9 of the Statement of Ku Adam of Aliran Digital recorded on 23.5.2018.

²⁴⁵ Paragraph 44 of the Statement of Asrol of Aliran Digital recorded on 28.6.2018.

Digital such as the *sijil akuan pendaftaran syarikat* (company registration certificate) and *borang syarikat* (company form).²⁴⁶ The purpose of having possession of such documents was for the preparation of the bid submission documents.²⁴⁷

299. The Commission also refers to the conduct of Tuah Packet and Aliran Digital in *Tender A* which took place after *Sebut Harga C* to affirm the continuing understanding between Tuah Packet and Aliran Digital to use each other's company name to place a bid in the related tendering process.

300. Furthermore, Tuah Packet and Aliran Digital possessed each other's company stamps to be used for the purpose of bid documentation.²⁴⁸ Thus, it is paramount that Tuah Packet and Aliran Digital had the necessary tools to rig bids using each other's company names.

Arguments by the Parties

301. Tuah Packet and Aliran Digital take the position that there is no agreement to rig *Sebut Harga C* as neither Tuah Packet nor Aliran Digital submitted a bid for *Sebut Harga C*.

302. Tuah Packet and Aliran Digital contend that the correspondences between both Parties did not have the object or effect of significantly

²⁴⁶ Paragraph 45 of the Statement of Asrol of Aliran Digital recorded on 28.6.2018.

²⁴⁷ Paragraph 45 of the Statement of Asrol of Aliran Digital recorded on 28.6.2018.

²⁴⁸ Paragraph 46 of the Statement of Asrol of Aliran Digital recorded on 28.6.2018; Paragraph 13 of the Statement of Jasny Hanif recorded on 23.5.2018; Paragraph 38 the Statement of Mohamad Rani of Tuah Packet recorded on 11.6.2018; and Paragraph 26 and 27 of the Statement of Mohamad Hisham of Tuah Packet recorded on 11.6.2018.

preventing, restricting or distorting competition. Tuah Packet and Aliran Digital also claim that there was no discussion between them to fix the price and the discussion between the said Parties merely amounted to cooperation to 'complement' each other's expertise.

303. Finally, Tuah Packet and Aliran Digital assert that prices quoted to ASWARA were below the value estimated by ASWARA which conflicted with the objective of bid rigging.

The Commission's Findings

304. Based on **paragraphs 284 to 300** above, it is evident that there was an agreement to rig *Sebut Harga C* between Tuah Packet and Aliran Digital. Aside from price fixing for bids, an agreement and/or concerted practices to perform bid rigging can exist via scheme from different modus operandi such as market sharing, bid suppression, bid rotation, cover bid and a subcontracting arrangement. In the present case, Aliran Digital's company name was requested to be used by Tuah Packet as a cover bid for *Sebut Harga C*.
305. The Commission takes the position that the non-submission of the bids by the relevant Parties and the absence of price discussion as immaterial. It is apparent from the evidence that the purpose of the bid rigging agreement was to increase either of the said Parties' chances of winning *Sebut Harga C*. We take the position that the Parties' conduct was in contravention of competition law principles that obligate enterprises to determine their commercial conduct on the market independently.

306. Having considered all of the facts and circumstances above, the Commission is satisfied that Tuah Packet and Aliran Digital had engaged in an agreement and/or concerted practices to perform bid rigging in relation to *Sebut Harga C*.

D.1.4 SEBUT HARGA ACTIVE DIRECTORY

307. *Sebut Harga Active Directory* is a request for quotation for maintenance of ASWARA's active directory. In *Sebut Harga Active Directory*, the work components that a bidder is required to provide are as follows:

- (i) To configure Microsoft Windows 2008 server to be a domain controller for the ASWARA network;
- (ii) To diagnose and troubleshoot active directory problems and configure virtual server backup;
- (iii) To provide one year support for active directory including phone and email support; and
- (iv) To maintain and support the ASWARA network domain name server (internal and external for one year).

308. Three companies that submitted a quotation in *Sebut Harga Active Directory* were Viamed, [REDACTED] Sdn. Bhd., and Caliber. The quotation was awarded for RM42,786.90. Viamed was selected by ASWARA to execute the *Sebut Harga Active Directory*.

Conduct of Tuah Packet and Viamed

309. On 27.6.2018, the Commission discovered a copy of a document referred to as "local order" dated 17.4.2015 issued by ASWARA to

Viamed.²⁴⁹ On 24.4.2015, the local order was emailed by Tuah Packet to Viamed.²⁵⁰ The email established that Tuah Packet had used Viamed's company name to bid for *Sebut Harga Active Directory*.²⁵¹

310. Viamed admitted that there was indeed communication between Viamed and Tuah Packet with regard to *Sebut Harga Active Directory* in which Tuah Packet had used Viamed's company name to participate in *Sebut Harga Active Directory*. Eventually, Viamed was appointed to execute the said quotation.²⁵² Tuah Packet's act of using Viamed's company name to submit a cover bid therefore constitutes the underlying *modus operandi* in rigging *Sebut Harga Active Directory*.

311. The evidence gathered also pinpoints Tuah Packet having prepared bid submission documents using Viamed's company name. The Commission retrieved documents from the laptop of Zuzairi of Tuah Packet labelled "QT-1040316" which referred to *Sebut Harga Active Directory*.²⁵³ The file named "QT – 1040316" is the quotation of Viamed and the modified date for PDF and excel format was 19.3.2015 and 25.3.2015, respectively.

312. The Commission proceeded to compare the files retrieved from Zuzairi's laptop with the quotation in the report entitled *Laporan Jawatankuasa Penilaian Bagi Sebut Harga: Perkhidmatan Penyelenggaraan 'Active Directory' Di Akademi Seni Budaya dan*

²⁴⁹ Local Order (No. 004066-00) from ASWARA to Viamed dated 17.4.2015.

²⁵⁰ Email correspondence between Siti Azura of Tuah Packet and Kartini of Viamed dated 24.4.2015. See also Paragraph 18 of the Statement of Kartini of Viamed recorded on 27.6.2018.

²⁵¹ Paragraphs 13 to 17 of the Statement of Kartini of Viamed recorded on 27.6.2018.

²⁵² Paragraphs 17 and 18 of the Statement of Kartini of Viamed recorded on 27.6.2018.

²⁵³ Quotation of Viamed dated 19 March 2015.

Warisan Kebangsaan, Kementerian Pelancongan dan Kebudayaan dated 13.4.2015 and discovered that Viamed's quotation contained in Zuzairi's laptop to be identical to the quotation attached to the report. This piece of evidence is further corroborated by Kartini's statement and the email dated 24.4.2015 from Azura to Kartini of Viamed regarding the use of Viamed's company name by Tuah Packet to participate in *Sebut Harga Active Directory*.

313. The Commission also retrieved a tax invoice dated 10.6.2015 issued by Tuah Packet to Viamed for the services rendered by Tuah Packet for *Sebut Harga Active Directory*.²⁵⁴

314. With reference to the agreement between the said Parties to use Viamed's company name to bid in the *Sebut Harga Active Directory*, Viamed had received 5% of the total value of the *Sebut Harga Active Directory* amounting to RM42,786.90 as monetary consideration for Viamed's willingness to allow Tuah Packet to use its company name.²⁵⁵

315. The Commission notes that Tuah Packet did not participate in *Sebut Harga Active Directory*. However, we posit that the act of using Viamed's name as Tuah Packet's proxy to participate in the quotation amounts to an act of bid rigging through submission of a cover bid. Therefore, the Commission finds that Tuah Packet had instigated Viamed to participate in the bid rigging arrangement for *Sebut Harga Active Directory*.

²⁵⁴ Tax Invoice dated 10.6.2015; and Paragraphs 18 and 19 of the Statement of Kartini of Viamed recorded on 27.6.2018.

²⁵⁵ Paragraph 19 of the Statement of Kartini of Viamed recorded on 27.6.2018.

316. Having assessed the evidence and statements obtained during the course of the investigation, the Commission finds that Tuah Packet and Viamed had engaged in an agreement and/or concerted practices to rig *Sebut Harga Active Directory* for the provision of active directory.

Arguments by Parties

317. Tuah Packet and Viamed argue that there is no agreement to rig *Sebut Harga Active Directory* between them. Additionally, Tuah Packet claimed that it offered a lower bid price than ASWARA's estimated price. Therefore, there was no profit gained by the said Parties from the bid rigging arrangement.

The Commission's Findings

318. The Commission is of the opinion that the bidding price amount is immaterial in proving an agreement to perform bid rigging of *Sebut Harga Active Directory* between Tuah Packet and Viamed. Based on **paragraphs 309 to 316**, it is evident that there is an agreement and/or concerted practices to rig *Sebut Harga Active Directory* between Tuah Packet and Viamed. We, therefore, take the position that based on the evidence above, the agreement and/or concerted practices between the said Parties had the object to perform an act of bid rigging and, in law, had the object of significantly preventing, restricting or distorting competition.

E. PARTY TO AN AGREEMENT OR A CONCERTED PRACTICE

319. The fact that a party may have contributed only a limited part in setting up the agreement or concerted practice, or may not be fully

committed to its implementation, or may have participated only under pressure from other parties, does not mean that it is not a party to the agreement or concerted practice.²⁵⁶

320. The subjective intentions of a party to a concerted practice are immaterial where the obvious consequence of the conduct is to prevent, restrict or distort competition.²⁵⁷ It is also irrelevant for the finding of a bid rigging infringement that there were other bidders from which the tenderer could choose, apart from the parties who were colluding, as the competitive process, in the end, remains distorted and tainted with bid rigging practices.²⁵⁸

321. For the purpose of ascertaining whether or not an enterprise is a party to an agreement or a concerted practice, it is sufficient for the Commission to show that the enterprise concerned participated in arrangements at which the agreement was concluded, without manifestly opposing them;²⁵⁹ or publicly distancing itself from what was discussed or agreed.²⁶⁰ In this respect, participation of an enterprise in an arrangement with an anti-competitive purpose is tantamount to tacit approval of that unlawful initiative.

²⁵⁶ OFT's Guidance on Agreements and Concerted Practices (OFT401, December 2004), adopted by the CMA Board, at paragraph 2.8. See also, for example, judgment of 15 March 2000; *Cimenteries CBR v Commission* T-25/95, EU:T:2000:77, at paragraphs 1389 and 2557; *Aalborg Portland and Others v Commission* joined cases C-204/00 P etc., EU:C:2004:6; and judgment of 8 July 1999, *Commission v Anic Partecipazioni SpA* Case C-49/92 P, EU:C:1999:356, paragraphs 79 and 80.

²⁵⁷ *Apex Asphalt and Paving Co Limited v OFT*, [2005] CAT 4 at paragraph 250.

²⁵⁸ *Apex Asphalt and Paving Co Limited v OFT*, [2005] CAT 4 at paragraph 251.

²⁵⁹ 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 *Aalborg Portland A/S and Others v Commission of the European Communities* [2004] 6, at paragraphs 81 to 86; and C-219/00 *Aalborg Portland A/S and Others v Commission of the European Communities* [2004].

²⁶⁰ C-291/98PP *Sarrío v Commission* [2000] ECR I-9991, at paragraph 50.

F. OBJECT OR EFFECT OF PREVENTING, RESTRICTING OR DISTORTING COMPETITION

322. 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”. Section 4(2) of the Act provides for a deeming provision.²⁶¹
323. For the types of horizontal agreements specified under the various limbs of section 4(2), the Commission is not under any obligation to inquire into the anti-competitive effect of such agreements.²⁶² In respect of these agreements, once the specified objects are established, they are deemed to be anti-competitive, and this includes an agreement to perform an act of bid rigging.
324. The Court of Appeal in *Malaysian Airline Systems Berhad v Competition Commission* discussed the applicability of a deeming provision in the Act as follows:

“Once the ‘deemed’ provision is validly invoked, all that the evidential tool does is bring into existence a situation which would not come into being otherwise. It dispenses with the party, in this case, the MyCC, having to prove the effect of the Agreement. It is as if the object of significantly preventing, restricting or distorting competition on the market for the services has been proved.”²⁶³

²⁶¹ Application for Judicial Review No: WA-25-82-05/2016 *Competition Commission v Competition Appeal Tribunal & Ors [2016]*, at paragraphs 85 and 86.

²⁶² MyCC Guidelines on Chapter 1, at paragraph 3.25; and Application for Judicial Review No: WA-25-82-05/2016 *Competition Commission v Competition Appeal Tribunal & Ors*, at paragraphs 64, 65, 67, 68, 85 and 86.

²⁶³ Civil Appeal No.: W-01(A)-31-01/2019, *Malaysia Airline System Berhad v Competition Commission [2019]*, at paragraph 188.

325. With respect to the application of the deeming provision for bid rigging cases, the Commission finds that the bid rigging conducts in relation to the four Infringements by their very nature as being injurious to the proper functioning of normal competition.²⁶⁴
326. Although the Commission is under no obligation to prove the harmful effects of bid rigging conducts, by reason of the deeming provision of subsection 2 of section 4 of the Act, nevertheless we take the position that the bid rigging conducts have deprived ASWARA, as the procuring agency, the ability to benefit from a competitive procurement process. Adopting the principle applied in the *Apex Asphalts* case, we find that the bid documents submitted by the Parties as a result of collusion or cooperation between one another for the same quotation or tender, by their very nature, have the ability to prevent, restrict or distort competition.²⁶⁵
327. The Parties' involvement in the bid rigging schemes in the form of cover bidding or cover bidding-cum-subcontracting has distorted the procurement process by creating a false impression of the Parties submitting their bids independently in a competitive bidding process.

F.1 APPLICATION TO THE PRESENT CASE

Argument by the Parties

328. Basenet argues that the relevant facts that trigger the invoking of

²⁶⁴ Case C-67/13 P *Groupement des cartes bancaires (CB) v European Commission* [2014] 5 CMLR 2, at paragraph 50.

²⁶⁵ *Apex Asphalts and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, at paragraphs 209 to 211.

the deeming provision were not sufficient thus the reliance on section 4(2)(d) cannot be sustained.

329. Novatis, on the other hand, takes the position that the Commission must have regard for the legal criteria of restriction by object as set by the EU case laws. Novatis submits that the deeming provision in section 4(2) is rebuttable. It argues that the meaning of ‘deem’, ‘deemed’ or ‘shall be deemed’ is not inflexible or invariable hence it is a rebuttable provision.

The Commission’s Findings

330. In the present case, as elaborated in the preceding paragraphs, the Commission finds that the Parties were engaged in horizontal agreements with the object to perform an act of bid rigging across four different projects procured by ASWARA.
331. It is the Commission’s position that the deeming provision in section 4(2) is an irrebuttable presumption that is automatically triggered (or “is validly invoked” using the words of the Court of Appeal in *Malaysia Airline Systems Berhad*) once the prerequisite facts, as specified by the relevant limb of subsection (2) of section 4, have been established.
332. With respect, the Commission disagrees with the argument raised by Novatis that the Commission must consider the legal criteria of restriction by object set by EU case laws. The Commission relied on the judgements of the Federal Court in *Raphael Pura v Insas*

Bhd.,²⁶⁶ *Public Services Commission Malaysia v Vickneswary RM Santhivelu*²⁶⁷, *Chong Chieng Jen v Government of State of Sarawak*,²⁶⁸ and the decision of the High Court in *PP v Mohd Fazli Awaludin* ²⁶⁹, wherein it was held that “courts should not import common law from other countries where legislation in Malaysia has clearly provided for it.”²⁷⁰

G. RELIEF OF LIABILITY UNDER SECTION 5 OF THE ACT

333. Agreements which satisfy the criteria set out in section 5 can be exempted from the section 4 prohibition. In doing so, the requirements stipulated under section 5 must be cumulatively met.

G.1 APPLICATION TO THE PRESENT CASE

Application by the Party

334. Novatis argues that the Commission failed to consider the relief of liability provision in section 5 of the Act applies.

The Commission’s Findings

335. The Commission finds that none of the relevant exemptions applies to any of the infringements in this Decision.

²⁶⁶ *Raphael Pura v Insas Bhd. & Anor* [2003] 1 MLJ 513, at page 24.

²⁶⁷ *Public Services Commission Malaysia & Anor v Vickneswary a/p RM Santhivelu (substituting M Senthivelu a/l R Marimuthu, deceased)*, [2008] 6 MLJ 1, at paragraph 16.

²⁶⁸ *Chong Chieng Jen v Government of State of Sarawak* [2019] 3 MLJ 300, at paragraph 37.

²⁶⁹ *PP v Mohd Fazil Awaludin* [2009] 7 MLJ 741, at paragraph 18.

²⁷⁰ *Public Services Commission Malaysia & Anor v Vickneswary a/p RM Santhivelu (substituting M Senthivelu a/l R Marimuthu, deceased)* [2008] 6 MLJ 1, at paragraph 21.

336. Although it is for the Parties to demonstrate that the conditions for exemption have been satisfied in relation to the relevant infringements, the Commission does not consider that these conditions would be satisfied in the present case, in particular, given the underlying nature of the infringements.

H. BURDEN AND STANDARD OF PROOF

337. It is trite law that the Commission bears the burden of proving 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.

338. 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 before the High Court.

Discretion to Rely on Any Available Evidence

339. The Commission relies on the principles laid down in *Argos*²⁷¹ wherein the Commission will look at the available evidence as a whole when deliberating its decision in a case.²⁷²

340. Anti-competitive practices are by their very nature, hidden and discrete. Given the clandestine nature of such activities, it is highly likely that evidence obtained by the Commission during its investigation may be fragmentary and sparse; such that it will be

²⁷¹ *Argos Ltd & Anor. v Office of Fair Trading* [2004] CAT 24, at paragraph 311.

²⁷² *JJB Sports Plc v Office of Fair Trading* | [2004] CAT 17, at paragraphs 205 and 206.

necessary to reconstruct certain details by deduction. This principle is affirmed in *People's All India Anti-Corruption and Crime Prevention Society v Usha International Limited. & Others Case*:

“...there is rarely direct evidence of action in concert and in such situations, the Commission has to determine whether those involved in such dealings had some form of understanding and were acting in co-operation with each other. 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...²⁷³

In the present case, it is important to look at the conduct of the OPs in other tenders as well to infer the existence of any agreement .in relation to the Impugned Tender. Modus of a cartel is not a one-time affair; rather, people who cartelise, pursue their anti-competitive agenda through various means, either simultaneously or one followed by the other. Thus, there is merit in the DG relying upon the cooperation exhibited by OPs in other tenders also...” [emphasis added]

341. Further, the law dictates that there is no legal burden on the Commission to establish the subjective intention of the Parties when assessing the object of an agreement and/or concerted practices.²⁷⁴

²⁷³ *People's All India Anti Corruption and Crime Prevention Society v Usha International Limited. & Others Case No. 90 of 2016*, at paragraph 77.

²⁷⁴ *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*.

H.1 APPLICATION TO THE PRESENT CASE

Argument by the Parties

342. Basenet, Silver Tech and Venture Nucleus contend that the Commission did not fulfil the elements in establishing an agreement or concerted practice required by international best practices.

The Commission's Findings

343. The Commission finds that there is an existing understanding between Basenet and Novatis to use each other's company name to submit for a bid in the public procurement process.

344. For *Sebut Harga A*, it is evident that Novatis had submitted the bids of Novatis, Venture Nucleus, Basenet and Silver Tech based on an established understanding between the said Parties. This conduct has undoubtedly created a false impression for ASWARA that the Parties submitted their bids separately and independently.

345. Therefore, the Commission finds that there is strong and convincing evidence, on the balance of probabilities, that an infringement of section 4 prohibition had been committed, and this we have elaborated on in the foregoing paragraphs.

I. RELEVANT MARKET

346. 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.

347. The purpose of defining the relevant market is to identify all enterprises competing in the same product or geographical market or to define the boundaries of the product or geographical market in which all enterprises compete.²⁷⁵

348. The Commission is required to determine the relevant market in order to calculate the Parties’ relevant turnover in the market affected by the respective Infringement for the purposes of establishing the level of financial penalties that the Commission decides to impose. This will be discussed in **Part 3** of this Decision.

349. As explained above, the Commission considers that all the Infringements took place in the supply of relevant services at ASWARA as below:

- (i) *Sebut Harga A*
- (ii) *Tender A;*
- (iii) *Sebut Harga C*
- (iv) *Sebut Harga Active Directory*

²⁷⁵ The Commission’s Guidelines on Market Definition, at paragraph 2.3.

350. The Commission identifies that the relevant service market affected by the Infringements are therefore all the projects based on the focal products offered in the quotation and tender in ASWARA. The projects are listed as follows:

- (i) the provision of UPS and backup data;
- (ii) the provision of hardware and software for 2D Animation Lab, Graphic Production and HD Projector;
- (iii) the provision of ICT Hardware; and
- (iv) the provision of services concerning the active directory.

PART 3: THE COMMISSION'S DECISION

A. DIRECTIONS UPON A FINDING OF AN INFRINGEMENT

351. In view of the nature of the infringement under the Act, and taking into consideration all evidence obtained throughout the investigations described above, the Commission hereby issues a Decision of infringement under section 40 of the Act against the Parties for engaging in conducts which amount to an anti-competitive agreement in breach of section 4(1) read with section 4(2)(d) of the Act.

B. GENERAL POINTS ON FINANCIAL PENALTIES

352. By virtue of section 40(1)(c) of the Act where the Commission has determined that an agreement has infringed the section 4 prohibition, the Commission may impose a financial penalty on any enterprise who is a party to that agreement.

C. METHODOLOGY FOR COMPUTING QUANTUM OF PENALTIES

353. 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 factors²⁷⁶:

- (a) the seriousness (gravity) of the infringement;
- (b) turnover of the market involved;
- (c) duration of the infringement;

²⁷⁶ MyCC Guidelines on Financial Penalties, at paragraph 3.2.

- (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.

354. In calculating the financial penalty for each of the Parties, the Commission begins by setting a “base figure”, which is computed by taking a proportion of the “relevant turnover” during the period of infringement. The Commission’s methodology for deriving the relevant turnover and the determination of this proportion is explained herein below. 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.²⁷⁷

C.1 SERIOUSNESS OF THE INFRINGEMENT

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

356. 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 more serious and widespread the infringement, the higher the starting percentage point is likely to be.

²⁷⁷ MyCC Guidelines on Financial Penalties, at paragraph 3.2.

357. The Commission considers the Infringements, which have the object of significant prevention, restriction or distortion of competition, to be a very serious infringement of the Act. In assessing the seriousness of the Infringements, the assessment will be made on a case-by-case basis for each separate infringement between the relevant Parties, taking into account the relevant circumstances of each Infringement.
358. The Commission is of the view that collusive tendering or bid-rigging agreements as in this case, are serious infringements of the section 4 prohibition, which have the objective to prevent, restrict or distort competition, and are committed intentionally.
359. The harm brought about by collusive tendering or bid-rigging, in essence, creates a false impression that the procurement process was fair and competitive. This conduct prevents the procurement agency from considering bids on the merits of competition at the competitive price and quality.

C.2 RELEVANT TURNOVER AND THE BASE FIGURE

360. 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.
361. The value of the projects according to the relevant service market as provided in **paragraph 350** above, ranges from RM42,789.90 to RM939,852.00.

362. In the Proposed Decision, the Commission defined the relevant geographic market as Malaysia. Upon reviewing the submissions by the Parties, the Commission decides to confine the relevant geographic market for the above focal services to ASWARA.
363. 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.
364. In order to determine the respective relevant turnover of the enterprises in respect of the relevant service market, the Commission relies on the financial data submitted by the enterprises. In this regard, the relevant service market is defined as per **paragraph 350**. However, based on the submission on the financial data by the enterprises, the Commission observes that two Parties, namely, Basenet and Venture Nucleus, did not earn any turnover from the respective relevant service market.
365. Therefore, for the purpose of calculating the penalty, the Commission has first to determine the relevant turnovers of all the enterprises. However, in order to determine the relevant turnovers of the enterprises that did not earn any revenue from the respective relevant service market, the Commission is of the view that a proxy figure should be used for this purpose. In this regard, the Commission is guided by the approach adopted in the OFT case relating to bid rigging in the construction industry²⁷⁸ as well as the

²⁷⁸ See the case of *Bid Rigging in the construction industry in England* CE/4327-04 21 September 2009, at paragraph VI.98, at page 1648.

CCCS infringement decision.²⁷⁹ This proxy figure is calculated based on the average percentage of the relevant turnovers out of the worldwide turnovers of the respective eight enterprises. In employing this method, the Commission derives a proxy figure of 10.56%. The Commission is mindful of the fact that the OFT, in the aforesaid case, computed the proxy figure based on the median percentage of the relevant turnovers, however, the Commission in this case uses the average percentage of the relevant turnovers in order to reflect the seriousness of the Infringements. The illustration on the calculation is shown in **Table 18** as follows:

Table 18: Calculation of Average Percentage of Relevant Turnovers

	A	B	C (A/B) x 100	D (Sum of C/8)
Enterprise	Relevant Turnover (RM)	Worldwide Turnover (RM)	Percentage of Relevant Turnover out of Total Worldwide Turnover (%)	Average of the Percentage of Relevant Turnover out of Total Worldwide Turnover (%)
Tuah Packet Sdn. Bhd.	[X]	[X]	0.51	10.56
Caliber Interconnects Sdn. Bhd.	[X]	[X]	2.78	
Aliran Digital Sdn. Bhd.	[X]	[X]	19.23	
Viamed Sdn. Bhd.	[X]	[X]	51.46	
Novatis Resources Sdn. Bhd.	[X]	[X]	2.74	

²⁷⁹ Notice of Infringement Decision issued by Competition Commission of Singapore “*Bid Rigging by Motor Vehicle Traders at Public Vehicles*” 23 March 2013 (Case Number: CCS 500/003/10), at paragraphs 257 until 260.

	A	B	C (A/B) x 100	D (Sum of C/8)
Enterprise	Relevant Turnover (RM)	Worldwide Turnover (RM)	Percentage of Relevant Turnover out of Total Worldwide Turnover (%)	Average of the Percentage of Relevant Turnover out of Total Worldwide Turnover (%)
Silver Tech Synergy Sdn. Bhd.	[REDACTED]	[REDACTED]	7.79	
Basenet Technology Sdn. Bhd.	[REDACTED]	[REDACTED]	0.00	
Venture Nucleus (M) Sdn. Bhd.	[REDACTED]	[REDACTED]	0.00	
TOTAL	2,840,844.97	100,554,422.88	84.50	

366. It is to be noted that this proxy figure of 10.56% is slightly lower as compared to the previous proxy figure stated in the Proposed Decision which was 14.08%. The illustration on the calculation of the proxy figure in the Proposed Decision is in **Table 19** as follows:

Table 19: Calculation in the Proposed Decision

	A	B	C (A/B) x 100	D (Sum of C/6)
Enterprise	Relevant Turnover (RM)	Worldwide Turnover (RM)	Percentage of Relevant Turnover out of Total Worldwide Turnover (%)	Average of the Percentage of Relevant Turnover out of Total Worldwide Turnover (%)
Tuah Packet Sdn. Bhd.	[REDACTED]	[REDACTED]	0.51	14.08
Caliber Interconnects Sdn. Bhd.	[REDACTED]	[REDACTED]	2.78	
Aliran Digital Sdn. Bhd.	[REDACTED]	[REDACTED]	19.23	
Viamed Sdn. Bhd.	[REDACTED]	[REDACTED]	51.46	
Novatis Resources Sdn. Bhd.	[REDACTED]	[REDACTED]	2.74	
Silver Tech Synergy Sdn. Bhd.	[REDACTED]	[REDACTED]	7.79	
Basenet Technology Sdn. Bhd.	[REDACTED]	[REDACTED]	0.00	
Venture Nucleus (M) Sdn. Bhd.	[REDACTED]	[REDACTED]	0.00	
TOTAL	2,840,844.97	100,554,422.88	84.50	

367. The distinction between the value of the proxy figure in the Proposed Decision and this Decision is due to the different number of enterprises that is being used to calculate the average percentage to derive the proxy figures. In the Proposed Decision the number used was six enterprises (excluding Basenet and Venture Nucleus), whereas in this Decision the number of enterprises used is eight enterprises.
368. The rationale being that taking the average percentage of all eight enterprises is more reflective in terms of the total participation of all enterprises in the procurement projects rather than taking the average percentage of only six enterprises who earned relevant turnover.
369. Based on the proxy figure, in the event the percentage of relevant turnover out of total worldwide turnover is lower than 10.56%, the relevant turnover of the respective enterprises will be adjusted accordingly up to 10.56%. The Commission is in the view that the purpose of the adjustment of the relevant turnover (adjusted relevant turnover) up to 10.56% out of its total worldwide turnover is due to, in the event the Parties manage to win the procured project, the amount earned from the project will be reflected in their turnover in which may be higher than its current relevant turnover. However, in the event the percentage of relevant turnover out of total worldwide turnover is higher than the value of the proxy figure which is 10.56%, there will be no adjustment on the value of the relevant turnover.
370. Having determined the relevant turnover, the Commission will now

proceed to determine the base figure for the purpose of calculating the penalty. As we have aforesaid explained, the Commission will take an appropriate proportion of the Parties' relevant turnover to set the base figure in determining the financial penalty to reflect the seriousness of the Infringements.

371. In light of the above, the Commission is of the opinion that the appropriate proportion in determining the base figure of the financial penalty for each of the Parties is 10% of the relevant turnover of each of the Parties.

C.3 DURATION OF THE INFRINGEMENT

372. In the *Guidelines on Financial Penalties*²⁸⁰, it is stated that where a period of infringement is less than six months, such a period will be counted as half a year and for a period longer than six months but shorter than a year, such period will be counted as a full year.

373. Following this Guideline, the Commission finds that the Parties had performed the acts of bid-rigging during the periods of Infringements as per **Table 20** below:

²⁸⁰ Paragraph 3.2 of Guidelines on Financial Penalties.

Table 20: Periods of Infringements

PROCUREMENT	PERIODS OF INFRINGEMENTS	PARTIES
<i>Sebut Harga A</i>	<p>Advertisement Date: 18.7.2016</p> <p>Closing Date: 2.8.2016</p> <p>Period of Infringement is 16 days (from 18.7.2016 until 2.8.2016)</p>	<ul style="list-style-type: none"> ▪ Caliber ▪ Tuah Packet ▪ Venture Nucleus ▪ Novatis ▪ Silver Tech ▪ Basenet
<i>Tender A</i>	<p>Advertisement Date: 15.8.2015</p> <p>Closing Date: 21.9.2015</p> <p>Period of Infringement is 37 days (from 15.8.2015 until 21.9.2015)</p>	<ul style="list-style-type: none"> ▪ Tuah Packet ▪ Aliran Digital
<i>Sebut Harga C</i>	<p>Advertisement Date: 30.1.2015</p> <p>Closing Date: 24.2.2015</p> <p>Period of Infringement is 26 days (from 30.1.2015 until 24.2.2015)</p>	<ul style="list-style-type: none"> ▪ Viamed ▪ Aliran Digital ▪ Tuah Packet
<i>Sebut Harga Active Directory</i>	<p>March to April 2015</p> <p>Period of Infringement is 61 days (from 1.3.2015 until 30.4.2015)</p>	<ul style="list-style-type: none"> ▪ Tuah Packet ▪ Viamed

374. Based on **Table 20**, it is to be noted that the Commission relies on the advertisement date and the closing date for the purpose of estimating the period of infringement. This method is adopted because the Commission is of the opinion that the anti-competitive agreement between the parties to manipulate the submission of the documents to the procuring agency could only be made within this period. The Commission notes that the Infringements took place in

a discrete manner from January 2015 until August 2016, each of which lasted for a short period of time, that is to say, within the time span of 16 days up to 61 days. However, the Commission considers that the effects of bid-rigging are generally irreversible, cannot easily be rectified, and continue to be felt long after the duration when the Infringements occurred.²⁸¹

375. Accordingly, in the present case, the Commission determines that the duration of Infringement, for the purpose of calculating penalties, should be one full year for each separate occasion of Infringement.

C.4 AGGRAVATING FACTORS

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

377. In the present case, the Commission considers any attempt by a party to obstruct the investigation as an aggravating factor, and will make a 20% upward adjustment of the base figure.

378. The Commission also considers the frequency of participation in the Infringements as an aggravating factor as follows:

Table 21: Frequency of Infringements

FREQUENCY	UPWARD ADJUSTMENT OF THE BASE FIGURE
1	0
2	+5%

²⁸¹ CCCS 500/7003/17 *Infringement of the section 34 prohibition in relation the provision of maintenance services for swimming pools, spas, fountains and water features* (14 December 2020), at paragraph 178.

FREQUENCY	UPWARD ADJUSTMENT OF THE BASE FIGURE
3	+5%
4	+5%

379. In addition, the Commission considers the role of the instigator or leader of the bid-rigging in respect of an Infringement to be an aggravating factor whereby there will be a 50% upward adjustment of the base figure for each Infringement.

C.5 MITIGATING FACTORS

380. The Commission will also consider the presence of mitigating factors and make a downward adjustment to the base figure where mitigating factors are applicable.

381. In the present case, the Commission considers the cooperation by two of the Parties, namely, Aliran Digital and Viamed involved in the bid-rigging agreement to be a mitigating factor for which there will be a 20% downward adjustment of the base figure.

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

382. 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. PENALTY FOR TUAH PACKET

383. Tuah Packet was involved in four Infringements, namely, *Sebut Harga A, Tender A, Sebut Harga C, and Sebut Harga Active Directory*. The act of bid-rigging in the Infringements had the object of preventing, distorting and restricting competition in the market for the provision of UPS and backup data, provision of hardware and software for 2D Animation Lab, Graphic Production and HD Projector, provision of ICT Hardware; and provision of services with regard to active directory.
384. For the purpose of computing the Party's financial penalty, the Commission relies on financial data submitted by Tuah Packet pursuant to the section 18 Notices dated 13.7.2018 and 30.7.2018.²⁸² The Commission notes that the submitted data on revenue was for the period of two years from 2015 to 2016.
385. Based on the available data, the value of the relevant turnover for 2015 to 2016 is [X] and the value for the worldwide turnover is [X]. In this regard, the value of the percentage of relevant turnover out of the total worldwide turnover is 0.51% which is below the proxy figure of 10.56%. As such, the Commission adjusts the figure of relevant turnover upwards from [X] to [X] (10.56% x [X]).
386. Based on the adjusted relevant turnover, the base figure in calculating the financial penalty for Tuah Packet is fixed at 10% of the adjusted relevant turnover which amounts to [X] (10% x [X]).

²⁸² Reply from Tuah Packet dated 16.7.2018 via email pursuant to the section 18 Notice issued by the Commission dated 13.7.2018; and financial information provided by Tuah Packet dated 1.8.2018 via email pursuant to the section 18 Notice issued by the Commission dated 30.7.2018.

387. As stated above, the Commission will treat multiple infringements as an aggravating factor. In this regard, Tuah Packet was involved in bid-rigging in connection with four separate Infringements. No adjustment will be made on the base figure for the first Infringement; however, the succeeding three Infringements will be adjusted upwards by 5% each. Therefore, the Commission increases the value of the financial penalty by 15% from the base figure (5% x 3 infringements) which amounts to [x] (15% x [x]). At this juncture, the value of the financial penalty imposed on Tuah Packet is RM97,463.20 ([x] + [x]).
388. With reference to the Commission's findings in **Part 2** of the Decision, the Commission identifies Tuah Packet as an instigator in three Infringements, namely for *Tender A*, *Sebut Harga C*, and *Sebut Harga Active Directory*. Therefore, the Commission imposes an increase of 150% from the base figure (50% x 3 infringements) which amounts to [x] (150% x [x]). Taking into account the said aggravating factor, the value of financial penalty imposed on Tuah Packet is [x] ([x] + [x]).
389. The Commission finds that there are no mitigating factors available against Tuah Packet to warrant any reduction in the level of financial penalty. Tuah Packet submits that 'ignorance of the law' is a mitigating factor to be considered. The Commission does not recognise 'ignorance of the law' as a mitigating factor.
390. Therefore, the final amount of financial penalty to be imposed on Tuah Packet is **RM224,589.13**.
391. The Commission notes that the financial penalty of **RM224,589.13**

does not exceed the maximum financial penalty of [X] i.e., 10% of the Tuah Packet's worldwide turnover, which is the amount that the Commission may legally impose in accordance with section 40(4) of the Act.

F. PENALTY FOR CALIBER

392. Caliber was involved in the conduct of bid-rigging for *Sebut Harga A* which had the object of preventing, distorting and restricting competition in the market of provision of UPS and backup data.

393. For the purpose of computing the financial penalty for the Party, the Commission relies on financial data submitted by Caliber pursuant to section 18 notices dated 13.7.2018 and 30.7.2018.²⁸³ The Commission takes note that the submitted revenue was for the period of 2016.

394. Based on the available data, the value of the relevant turnover for 2016 is [X] and the value for the worldwide turnover is [X]. In this regard, the value of the percentage of relevant turnover out of total worldwide turnover is 2.78% which is below the proxy figure of 10.56%. As such, the Commission adjusts the figure of relevant turnover upwards from [X] to [X] (10.56% x [X]).

395. Based on the adjusted relevant turnover, the base figure in calculating the financial penalty for Caliber is fixed at 10% of the adjusted relevant turnover which amounts to [X] (10% x [X]).

²⁸³ Financial information provided by Caliber dated 26.7.2018 via email pursuant to the section 18 Notice issued by the Commission dated 13.7.2018; and financial information provided by Caliber dated 1.8.2018 via email pursuant to the section 18 Notice issued by the Commission dated 30.7.2018.

396. As elaborated in **Part 2** of this Decision, the Commission identifies Caliber as an instigator in one Infringement, namely, for *Sebut Harga A*. Therefore, the Commission adjusts upwards by 50% of the base figure (50% x 1 infringement) which amounts to [X] (50% x [X]). Taking into account the aggravating factor, the value of financial penalty imposed on Caliber at this stage is [X] ([X] + [X]).
397. The Commission also considers Caliber's attempt to destroy evidence in relation to *Sebut Harga A* as an obstruction during the investigation. As such, the Commission adjusts upwards by 20% of the base figure which amounts to [X] (20% x [X]) in consideration of the aforementioned factor. Factoring in this aggravating factor, the value of financial penalty imposed on Caliber is [X] ([X] + [X]).
398. Based on the evidence gathered relating to Caliber's conduct throughout the Infringement period, the Commission does not find any mitigating factor warranting a reduction in the level of their financial penalty.
399. Therefore, the final amount of financial penalty to be imposed on Caliber is **RM301,822.45**.
400. The financial penalty of **RM301,822.45** does not exceed the maximum financial penalty of [X] that the Commission may legally impose in accordance with section 40(4) of the Act, that is to say, the penalty shall not exceed 10% of the Caliber's worldwide turnover.

G. PENALTY FOR ALIRAN DIGITAL

401. Aliran Digital was involved in two Infringements, namely, *Tender A and Sebut Harga C*. The conduct of bid-rigging in the Infringements had the object of significantly preventing, distorting and restricting competition in the market for the provision of hardware and software for 2D Animation Lab, Graphic Production and HD Projector and provision of ICT Hardware.
402. For the purpose of computing the financial penalty for this enterprise, the Commission relies on financial data submitted by the Aliran Digital pursuant to section 18 notices dated 13.7.2018 and 30.7.2018.²⁸⁴ The Commission notes that the submitted revenue was for the period of 2015.
403. Based on the available data, the value of the relevant turnover for 2015 is [X] and the value for the worldwide turnover is [X]. In this regard, the value of the percentage of relevant turnover out of total worldwide turnover is 19.23% which is higher than the proxy figure of 10.56%. As mentioned above, there will be no adjustment made on the value of the relevant turnover in the event that the percentage of relevant turnover out of total worldwide turnover is higher than the proxy figure.
404. Based on the relevant turnover, the base figure in calculating the financial penalty for Aliran Digital is fixed at 10% of the relevant turnover. This amounts to [X] (10% x [X]).

²⁸⁴ Financial information provided by Aliran Digital dated 20.7.2018 pursuant to the section 18 Notice issued by the Commission dated 13.7.2018; and financial information provided by Aliran Digital dated 1.8.2018 via email pursuant to the section 18 Notice issued by the Commission dated 30.7.2018.

405. As stated above, the Commission will treat multiple Infringements as an aggravating factor. In this regard, Aliran Digital was found to be involved in bid-rigging in connection with *Tender A* and *Sebut Harga C*. No adjustment will be made on the base figure for the first Infringement. However, in respect of the second Infringement, there will be an upwards adjustment of the base figure by 5%. Therefore, the Commission increases the value of the financial penalty by 5% from the base figure (5% x 1 Infringement) which amounts to [x] (5% x [x]). At this juncture, the value of financial penalty imposed on Aliran Digital is [x] ([x] + [x]).
406. The Commission takes into account the fact that Aliran Digital was cooperative in relation to providing information and detailed explanation on the modus operandi of the bid rigging act performed by the Parties; which significantly assisted the Commission in its investigation. Thus, the Commission makes a downward adjustment of 20% of the base figure which amounts to [x] (20% x [x]), in consideration of the mitigating factor. Taking into account the mitigating factor, the value of financial penalty imposed on Aliran Digital is reduced to [x] ([x] - [x]).
407. Therefore, the final amount of financial penalty to be imposed on Aliran Digital is **RM32,471.26**.
408. The financial penalty of **RM32,471.26** does not exceed the maximum financial penalty of [x] that the Commission may legally impose in accordance with section 40(4) of the Act, that is to say, the penalty shall not exceed 10% of the Aliran Digital's worldwide turnover.

H. PENALTY FOR VIAMED

409. Viamed was involved in two Infringements, namely, *Sebut Harga C* and *Sebut Harga Active Directory*. The conduct of bid-rigging in the said Infringements had the object of significantly preventing, distorting and restricting competition in the market of provision of ICT Hardware and provision of services with regards to active directory.
410. For the purpose of computing the financial penalty for this Party, the Commission relies on financial data submitted by Viamed pursuant to section 18 notices dated 13.7.2018 and 30.7.2018.²⁸⁵ The Commission takes note that the submitted revenue was for the period of 2015.
411. Based on the available data, the value of the relevant turnover for 2015 is [X] and the value for the worldwide turnover is [X]. In this regard, the value of the percentage of relevant turnover out of total worldwide turnover is 51.46% which is higher than the proxy figure of 10.56%. As mentioned above, there will be no adjustment to made on the value of the relevant turnover in the event of the percentage of the relevant turnover out of total worldwide turnover is higher than the proxy figure.
412. Based on the relevant turnover, the base figure in calculating the financial penalty for Viamed is fixed at 10% of the relevant turnover. This amount to [X] (10% x [X]).

²⁸⁵ Financial information provided by Viamed dated 20.7.2018 pursuant to the section 18 Notice issued by the Commission dated 13.7.2018; and financial information provided by Viamed dated 2.8.2018 via email pursuant to the section 18 Notice issued by the Commission dated 30.7.2018.

413. As stated above, the Commission will treat Parties' involvement in more than one Infringement as an aggravating factor. In this regard, Viamed was involved in bid-rigging in connection with *Sebut Harga C* and *Sebut Harga Active Directory*. No adjustment will be made on the base figure for the first Infringement. However, for the second Infringement, the base figure will be adjusted upwards by 5%. Therefore, the Commission increases the value of the financial penalty by 5% from the base figure (5% x 1 Infringement) which amounts to [x] (5% x [x]). At this juncture, the value of financial penalty imposed on Viamed is [x] ([x] + [x]).

414. The Commission has taken into account of the fact that Viamed was cooperative in relation to the providing of the information and detailed explanation on the modus operandi of bid rigging adopted by the Parties. Such cooperation significantly assisted the Commission in its investigation. As such, the Commission reduces the penalty by 20% of the base figure which amounts to [x] (20% x [x]). Considering the above, the financial penalty imposed on Viamed is [x] ([x] - [x]).

415. Therefore, the final amount of financial penalty imposed on Viamed is **RM95,512.17**.

416. The financial penalty of **RM95,512.17** does not exceed the maximum financial penalty of [x] that the Commission may legally impose in accordance with section 40(4) of the Act, that is to say, the penalty shall not exceed 10% of the Viamed's worldwide turnover.

I. PENALTY FOR NOVATIS

417. Novatis was involved in the conduct of bid-rigging in *Sebut Harga A* which had the object of significantly preventing, distorting and restricting competition in the market of provision of UPS and backup data.
418. For the purpose of computing the financial penalty for this Party, the Commission relies on financial data submitted by Novatis pursuant to the section 18 notices dated 13.7.2018 and 30.7.2018.²⁸⁶ The Commission takes note that the submitted revenue was for the period of 2016.
419. Based on the available data, the value of the relevant turnover for 2016 is RM717,349.00 and the value for the worldwide turnover is RM26,188,723.71. In this regard, the value of the percentage of relevant turnover out of total worldwide turnover is 2.74% which is below than the proxy figure of 10.56%. As such, the Commission adjusts the figure of relevant turnover from [X] to [X] (10.56% x [X]).
420. Based on the adjusted relevant turnover, the base figure in calculating the financial penalty for Novatis is fixed at 10% of the adjusted relevant turnover. This amounts to [X] (10% x [X]).
421. As elaborated in **Part 2** of the Decision, the Commission identifies Novatis as an instigator in one Infringement, namely, for *Sebut*

²⁸⁶ Financial information provided by Novatis dated 20.7.2018 pursuant to the section 18 Notice issued by the Commission dated 13.7.2018; and financial information provided by Novatis dated 31.7.2018 pursuant to the section 18 Notice issued by the Commission dated 30.7.2018.

Harga A. Therefore, the Commission adjusts the financial penalty by an upward adjustment of 50% of the base figure. This amounts to [RM<] (50% x [RM<]). Taking the aggravating factor into account, the value of financial penalty imposed on Novatis is [RM<] ([RM<] + [RM<]).

422. In relation to Novatis' conduct throughout the relevant Infringement period, the Commission is of the view that there are no mitigating factors available to warrant a reduction in Novatis' level of financial penalty.

423. Therefore, the final amount of financial penalty imposed on Novatis shall be **RM414,829.38**.

424. The financial penalty of **RM414,829.38** does not exceed the maximum financial penalty of [RM<] that the Commission may legally impose in accordance with section 40(4) of the Act, that is to say, the penalty shall not exceed 10% of the Novatis' worldwide turnover.

Arguments by Novatis

425. A summary of the arguments raised by Novatis regarding financial penalty is outlined below:

- (i) Cover bidding is a less serious infringement;
- (ii) ASWARA did not suffer any damages or losses from the conduct of the parties;
- (iii) The Commission failed to take into account the short duration of the infringement;
- (iv) The Commission wrongfully adopts a proxy figure of 14.08% and miscalculated the financial penalty; and

- (v) The Commission failed to take into account cooperation rendered by Novatis as a mitigating factor.

The Commission's Findings

426. For the argument in (i), as emphasised in **Part 2** of this Decision, no form of bid rigging is less evil than the other.

427. Where it is established that there was an agreement with the object to perform an act of bid rigging, such an agreement is deemed by law to have the object of significantly preventing, restricting or distorting competition in the relevant market for goods or services. Where it is deemed by law that an agreement has the object of restricting competition, it is unnecessary for the Commission to further prove that the agreement would have an anti-competitive effect in order to establish a finding of infringement of section 4 prohibition.

428. The Commission has addressed arguments (iii), (iv) and (v) above.

J. PENALTY FOR SILVER TECH

429. Silver Tech was involved in the conduct of bid-rigging in *Sebut Harga A* which had the object of preventing, distorting and restricting competition in the market of provision of UPS and backup data.

430. For the purpose of computing the financial penalty for the said Party, the Commission relies on financial data submitted by Silver Tech

pursuant to section 18 notices dated 13.7.2018 and 30.7.2018.²⁸⁷
The Commission takes note that the submitted revenue was for the period of 2016.

431. Based on the available data, the value of the relevant turnover for 2016 is [RM] and the value for the worldwide turnover is [RM]. In this regard, the value of the percentage of relevant turnover out of the total worldwide turnover is 7.79% which is below the proxy figure of 10.56%. As such, the Commission adjusts the figure of the relevant turnover from [RM] to [RM] (10.56% x [RM]).
432. Based on the adjusted relevant turnover, the base figure in calculating the financial penalty for Silver Tech is fixed at 10% of the adjusted relevant turnover which amounts to [RM] (10% x [RM]).
433. The Commission finds that there are no aggravating and mitigating factors to be considered. Therefore, the final amount of financial penalty to be imposed on Silver Tech is **RM14,836.26**.
434. The financial penalty of **RM14,836.26** does not exceed the maximum financial penalty of [RM] that the Commission may legally impose in accordance with section 40(4) of the Act, that is to say, the penalty shall not exceed 10% of the Silver Tech's worldwide turnover.
435. In relation to financial penalty, Silver Tech claims that the financial penalty was unfair and the Commission fails to consider mitigating

²⁸⁷Financial information provided by Silver Tech dated 24.7.2018 via email pursuant to the section 18 Notice issued by the Commission dated 13.7.2018; and financial information provided by Silver Tech dated 1.8.2018 via email pursuant to the section 18 Notice issued by the Commission dated 30.7.2018.

factor. The Commission firmly believe all issues raised by Silver Tech concerning financial penalty have been addressed in the foregoing paragraphs.

K. PENALTY FOR VENTURE NUCLEUS

436. Venture Nucleus was involved in the conduct of bid-rigging in *Sebut Harga A* which had the object of significantly preventing, distorting and restricting competition in the market of provision of UPS and backup data.
437. For the purpose of computing the financial penalty for the said Party, the Commission relies on financial data submitted by Venture Nucleus pursuant to the section 18 notices dated 13.7.2018 and 30.7.2018.²⁸⁸ The Commission takes note that the submitted revenue was for the period of 2016.
438. Based on the available data, the Commission finds that Venture Nucleus did not earn any turnover from the relevant service market and during the relevant Infringement period. Meanwhile, the value for the worldwide turnover is [X]. As such, the Commission derives the adjusted relevant turnover for Venture Nucleus from the proxy figure of 10.56%, which amounts to [X] (10.56% x [X]).
439. Based on the adjusted relevant turnover, the base figure in calculating the financial penalty for Venture Nucleus is fixed at 10% of the adjusted relevant turnover which amounts to [X] (10% x [X]).

²⁸⁸ Financial information provided by Venture Nucleus dated 19.7.2018 pursuant to the section 18 Notice issued by the Commission dated 13.7.2018; and Email correspondence by Venture Nucleus dated 3.8.2018 pursuant to the section 18 Notice issued by the Commission dated 30.7.2018.

440. As there are no aggravating and mitigating factors to be considered, the final amount of financial penalty to be imposed on Venture Nucleus is **RM320,848.46**.

441. The financial penalty of **RM320,848.46** does not exceed the maximum financial penalty of [RM<] that the Commission may legally impose in accordance with section 40(4) of the Act, that is to say, the penalty shall not exceed 10% of the Venture Nucleus' worldwide turnover.

L. PENALTY FOR BASENET

442. Basenet was involved in the conduct of bid-rigging *in Sebut Harga A* which had the object of significantly preventing, distorting and restricting competition in the market of provision of UPS and backup data.

443. For the purpose of computing the financial penalty for the said Party, the Commission relies on financial data submitted by Basenet pursuant to the section 18 notices dated 13.7.2018 and 30.7.2018.²⁸⁹ The Commission takes note that the submitted revenue was for the period of 2016.

444. Based on the available data, the Commission finds that Basenet did not earn any turnover from the relevant service market and during the relevant Infringement period. Meanwhile, the value for the worldwide turnover is [RM<]. As such, the Commission derives the

²⁸⁹ Financial information provided by Basenet dated 20.7.2018 pursuant to the section 18 Notice issued by the Commission dated 13.7.2018; and financial information provided by Basenet dated 1.8.2018 pursuant to the section 18 Notice issued by the Commission dated 30.7.2018.

adjusted relevant turnover for Basenet from the proxy figure of 10.56%. This amounts to [X] (10.56% x [X]).

445. Based on the adjusted relevant turnover, the base figure in calculating the financial penalty for Basenet is fixed at 10% of the adjusted relevant turnover. This amounts to [X] (10% x [X]).

446. As there are no aggravating and mitigating factors to be considered, the final amount of financial penalty to be imposed on Basenet is **RM143,283.24**.

447. The financial penalty of **RM143,283.24** does not exceed the maximum financial penalty of [X] that the Commission may legally impose in accordance with section 40(4) of the Act, that is to say, the penalty shall not exceed 10% of Basenet's worldwide turnover.

PART 4: CONCLUSION ON THE FINANCIAL PENALTY

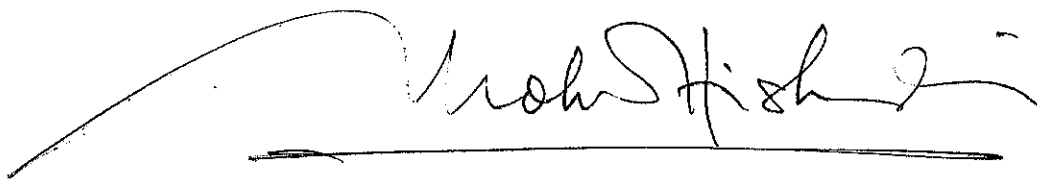
448. In conclusion, the Commission, pursuant to section 40(4) of the Act, imposes the following financial penalties to the Parties as shown in **Table 22** below:

Table 22: Financial Penalty

INFRINGING PARTY	FINANCIAL PENALTY (RM)
TUAH PACKET	224,589.13
CALIBER	301,822.45
ALIRAN DIGITAL	32,471.26
VIAMED	95,512.17
NOVATIS	414,829.38
SILVER TECH.	14,836.26
VENTURE NUCLEUS	320,848.46
BASENET	143,283.24

449. The payment of the financial penalty can be made via direct transfer or cheque deposited to the Commission within 30 days from the date of this Decision.

DATED: *27* JUNE 2022



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CHAIRMAN
DATO' SERI MOHD HISHAMUDIN BIN
MD YUNUS