

**IN THE COMPETITION APPEAL TRIBUNAL AT PUTRAJAYA
IN THE FEDERAL TERRITORY, MALAYSIA**

APPEAL NO: TRP 3-2016

BETWEEN

1. MY EG SERVICES BHD
2. MY EG COMMERCE SDN BHD

..... APPELLANTS

AND

COMPETITION COMMISSION

.....RESPONDENT

DECISION

[1] This is an appeal to us (Competition Appeal Tribunal) ('Tribunal') by the Appellants pursuant to section 51 (1) of the Competition Act 2010 (Act 712) (Act) filed on 22nd July 2016 against the following orders / directions of the Competition Commission ('Commission') made on 24th June 2016. The orders/directions are –

(a) Total financial penalty of RM2, 272,200.00 as at 24th June 2016 comprising –

(i) RM307, 200.00 for the infringement periods of 5th January 2015 to 22nd January 2015 and 2nd May 2015 to 6th October 2015; and

(ii) daily penalty of RM7,500.00 from 7th October 2015 to the date of its decision i.e. 24th June 2016 amounting to RM1,965,000.00

(b) (i) Cease and desist immediately from imposing different conditions to equivalent transaction in the processing of mandatory insurances for online Pas Lawatan (Kerja Sementara) ('PLKS') renewal applications;

(ii) To provide an efficient gateway for ALL its competitors in the market for the sale of the mandatory insurances and allows the other competitors to compete at the same level within

sixty (60) days from the date of its decision i.e. 24th June 2016; and

- (iii) To provide an undertaking in the form and manner acceptable to the Commission and to be fully compliant with Persatuan Insuran AM Malaysia (General Insurance Associations of Malaysia) (PIAM).

(c) In the event of non-compliance of the aforesaid directions the Commission is at liberty to impose a higher daily penalty for the subsequent period thereof.

[2] In the meantime, before the hearing of the appeal, the Appellants filed an application for stay of the above orders/directions pending outcome of the Appellants' appeal against the decision of the Commission. The said application was made pursuant to section 53 of the Act. It was opposed by the Commission.

[3] On the hearing of the said application, we indicated to the parties to consider whether they can work out the terms of the orders/directions particularly in respect of the monetary penalty.

[4] After a short adjournment, the parties reported to us that in respect of the monetary penalty, it was agreed that the Appellants will pay to the Commission the sum of RM2, 272,200.00 within one month of the date of the hearing of the said application. By consent the other orders/directions be stayed pending the outcome of the appeal. Accordingly, we made the orders/directions as agreed by the parties.

The Appeal

[5] The relevant facts of the case are sufficiently set out in the decision of the Commission.

[6] We set out the relevant brief background facts of the case.

[7] My EG Services Bhd, the first Appellant (My EG) is a company registered in Malaysia. My EG is involved in the business of development and implementation of the electronic government services project and the

provision of other related services for the electronic Government service project as well as an investment holding.

[8] My EG Commerce Sdn. Bhd., the second Appellant (My EG Commerce) is a wholly owned subsidiary of My EG and is principally engaged in the business of providing auto insurance intermediary services and other related ancillary services. Both My EG and My EG Commerce have common directors.

[9] In 2011, My EG proposed to the Government of Malaysia for the provision of an online system for the renewal of PLKS.

[10] On 7th February 2011, Kementerian Dalam Negeri (KDN) had agreed to implement the online renewals of PLKS for domestic helpers. The online renewal of PLKS would be provided by My EG.

[11] On 17th November 2014, KDN issued a letter to My EG and Jabatan Imigresen (JIM) stating the Minister of Home Affairs' decision for My EG to implement a proof of concept (POC) for the renewal of PLKS for all foreign workers from all sectors through online services.

[12] Subsequently, JIM issued a press statement on 29th April 2015 confirming that effective 2nd May 2015 all PLKS renewals would be processed online through My EG only. This sole right given to My EG for PLKS renewal is not an issue before us.

[13] However, in order for PLKS renewal to be successful through the online service, the employer has to fulfill several conditions including the purchase of three (3) mandatory insurance policies for foreign workers namely:

- (i) Foreign Workers Insurance Guarantee (FWIG);
- (ii) Foreign Workers Hospitalisation and Surgical Scheme (FWHS);
- and
- (iii) Foreign Workers Compensation Scheme (FWCS).

These three insurances are collectively referred to as 'Mandatory Insurances'.

[14] My EG Commerce had previously entered into an Agency Agreement with RHB Insurance on 5th November 2008 to act as an agent of RHB Insurance to transact agency business.

[15] Clause 4 of the Agency Agreement states that My EG Commerce will be paid a commission by RHB Insurance for every business transacted. It was asserted that My EG Commerce is also competing against other insurance agents representing the insurance companies as well as other insurances in the downstream market for the provision of the Mandatory Insurances.

[16] Complaints were filed with the Commission against the Appellants for infringing the Act. On or about February 2015, the Commission initiated an investigation against the Appellant pursuant to section 15 of the Act.

[17] After the close of the investigation, the Commission under section 36(1) of the Act then issued written notice of its proposed decision to the Appellants.

[18] Pursuant to section 37 of the Act, the Appellants gave notice for oral representation and it was granted by the Commission. After the oral representation, the Commission pursuant to section 40 of the Act held that there was an infringement of a prohibition under Part II of the Act by the Appellants, and imposed a penalty as well as gave directions under section 40(1) of the Act.

[19] Hence, the appeal before us under section 51 of the Act against the penalty imposed by the Commission and the directions made thereon.

The Law

[20] The Commission held that the Appellants had infringed section 10(2) (d) (iii) of the Act, which reads –

“10 (1)

(2) Without prejudice to the generality of subsection (1), an abuse of a dominant position may include –

(a)

(b).....

(c).....

(d) applying different conditions to equivalent transactions with other trading parties to an extent that may –

(i)

(ii)

(iii) harm competition in any market in which the dominant enterprise is participating or in any upstream or downstream market,"

(underlining is ours)

[21] 'Dominant position' under section 2 of the Act means "a situation in which one or more enterprises possess such significant power in a market to adjust prices or outputs or trading terms, without effective constraint from competitors or potential competitors."

[22] 'Enterprise' under section 2 of the Act means "any entity carrying on commercial activities relating to goods or services, and for the purpose of this Act, a parent and subsidiary company shall be regarded as a single enterprise if, despite their separate legal entity, both form a single economic unit within which the subsidiaries do not enjoy real autonomy in determining the actions of the subsidiaries on the market". Within this provision, it is not disputed that My EG Commerce as subsidiary company of My EG is to be regarded as a single enterprise.

[23] 'Market' under section 2 of the Act means "a market in Malaysia or 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 or services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services."

[24] In so far as 'market' is concerned it is not disputed by the Appellants, that it is related to the insurance business for the renewal of PLKS. In this case, My EG Commerce as agent of RHB Insurance is in fact competing with other insurance companies and their agents.

Issues

[25] It is not disputed that My EG as the sole enterprise given by KDN/JIM for renewal of PLKS is in a dominant position in the upstream market. By virtue of My EG and My EG Commerce being a single legal entity, My EG Commerce can be considered to be in a dominant position in the downstream market. The dominant position of the Appellants fits within the meaning of the dominant position in section 2 of the Act.

[26] After the investigations by the Commission and after hearing the oral representation of the Appellants, the Commission came to a finding that the Appellants had infringed section 10(2) (d) (iii) of the Act. According to the Commission the duration of the infringement period by My EG is as follows-

- (i) 5th January 2015 to 22nd January 2015, and
- (ii) 2nd May 2015 to 6th October 2015

[27] The main issue, in our view, is centered on the interpretation of section 10(2)(d) of the Act i.e. "*applying different conditions to equivalent transactions*" read with section 10 (2) (d) (iii) thereof.

Infringement Period 5th January 2015 to 22nd January 2015

[28] In relation to the FWIG, the Commission found that there was a Frequently Asked Question ('FAQ') published on My EG's website stating that it would be a mandatory requirement for FWIG to be purchased through My EG effective 1st December 2014. My EG confirmed that such a FAQ existed but stated that it was taken down and was no longer on its website.

[29] With regards to FWCS and FWHS, My EG in its FAQ stated that the employers are advised to purchase the mandatory insurances through My EG Commerce for easier and faster renewal.

[30] As the dominant concession holder, there is an obligation on My EG to grant equal access of its facilities and promote competition in the downstream market. However, My EG had made it mandatory for the end users to purchase FWIG through My EG only. This is clear when the FAQ uploaded on its website on 5th January 2015 which states -

"14. Can I purchase my preferred insurance company for my Foreign workers PLKS permit renewal Insurance Guarantee (IG).
For IG, it must be purchased through My EG."

[31] The fact of the existence of the above FAQ is not rebutted. The only dispute is when it was removed. From the record, it is clear to us that there was no direct evidence when it was removed. Notwithstanding the fact that it was allegedly removed, end users could be directed via cookies back to the old uniform research locator (URL).

[32] Some explanations were given by the Appellants regarding the removal of the website and why the old URL still exist in respect of the mandatory requirement for end users to purchase the Mandatory Insurance for FWIG through My EG.

[33] Be that as it may, we note that the counsel for the Appellants in the written submission dated 24th March 2017 at paragraphs 6.3 and 6.4, page 32 stated as follows –

“6.3 The Appellants assert that the infringement period, if any, should only be from 05.01.2015 to 09.01. 2015, which is the period when confusion arose amongst the End Users following the Appellants’ Old FAQ and the announcement made by the Appellants on Bursa Malaysia.”

“6.4 However, the Appellants are willing to concede that the infringement period may be up till 22.01.2015 if the Respondent wishes to also take into consideration the period where there may be still certain technical issues arising from the Online Renewal System which may have not been rectified in time by the Appellant.”

(underlining is ours)

[34] It seems clear to us that on the evidence and the submission as stated above by the counsel for the Appellants, we are of the view that the Commission did not err in its finding of the infringement committed by the Appellant during the above stated period.

[35] We now proceed to consider the infringement period, 2nd May 2015 to 6th October 2015 as determined by the Commission.

Infringement Period 2nd May 2015 to 6th October 2015

[36] Without prejudice to the generality of section 10(1) of the Act in regard to an abuse of a dominant position in any market for goods or services, section 10(2) of the Act provides an abuse of a dominant position may include under section 10(2)(d)(iii) of the Act which reads –

“(d) applying different conditions to equivalent transactions with other trading parties to an extent that may -

(i)

(ii)

(iii) harm competition in any market in which the dominant enterprise is participating or in any upstream or downstream market;"
(underlining is ours)

[37] We agree with the submission of the counsel for the Appellants that the Commission did not adequately consider whether, on the facts of this case, there is "*equivalent transactions*" within section 10(2) (d) of the Act. We note that there is no local authority on this aspect. Be that as it may, it is important to consider the issue of the meaning of "*equivalent transactions*". If the evidence in this case failed to meet the meaning of "equivalent transactions hence, "*applying different conditions*" thereof does not arise and in the circumstances the appellant should succeed in this appeal.

[38] The counsel for the Appellants contended that there is no "*equivalent transactions*" in this case. He went on by analogy to suggest that in the case of the payment of utility bill in this country the users pay their bills online or through the post office or at the counters at the relevant utility company. It was submitted that the outcome is the same and the end users are merely exercising the payment options through methods as mentioned earlier and therefore does not constitute "*equivalent transactions*" as the methodology involved for each method is different. The counsel for the Appellants relied on the Commission of the European Communities' case of Scandlines Sverige AB v Port of Helsingborg (COMP/A.36.568/03) dated 23rd July 2004, in support thereof. The facts of the case of Scandlines are different from this case. However, is that the situation in this case as counsel for the Appellants tried to convince us by his analogy as stated above.

[39] In our view, the purchase of the Mandatory Insurances by the employers whether directly with My EG such as RHB Insurance or with other insurance companies or agents would amount to as "*equivalent transactions*" i.e. the same type of transaction. The issue of different methodology does not arise here. Hence the analogy illustrated by the counsel for the Appellants does not apply to the case before us.

[40] Having concluded that the facts of the case constitute "*equivalent transactions*", we then need to consider the other limb of section 10 (2) (d) of the Act ie "*applying different conditions*". The facts of the case before us stated that there is a need for Mandatory Insurance verification imposed by JIM for the renewal of PLKS. The Mandatory Insurances purchased directly through My EG are automatically verified. However, if the purchase of the Mandatory Insurances is through other than My EG, it would appear that

there is an additional step imposed by My EG in the verification exercise. The end users (other insurances and agents) are required to take additional step to scan and upload the insurance policies for each foreign worker according to the specification including the size of the file. The additional step constitutes a different condition to equivalent transaction. MY EG 's server file size capacity was small and could not facilitate the uploading of the required documents scanning and uploading documents as verification will have to be carried out with insurance companies to check on the validity and authenticity of the insurance policies. The process invariably delays the renewal of PLKS and causes harm to companies in the downstream market. In our view, it amounts to My EG putting pressure on end users to purchase Mandatory Insurances from My EG by virtue of its dominant position in the downstream market.

[41] In addition thereto, the Commission in its decision referred to the evidence of Mr. Lim Kian Wei (paragraph 146 at 62) who confirmed that the representatives of the insurance companies as well as the insurance agents were facing operational/administrative problems and no proper and consistent verification was done on all Mandatory Insurances purchased through other insurance companies.

[42] Further at paragraph 147 page 62 of its decision, the Commission states-

"In fact, various insurance companies' representatives and agents gave statements to the Commission that up until July 2015, no proper and consistent verifications was done on all Mandatory Insurances."

[43] In our view, the verification exercise amounts to "*applying different conditions to equivalent transactions*". If the purchase of Mandatory Insurances is directly from My EG, there is automatic verification. From the evidence, it would appear clearly that such a condition imposed amounts to an abuse of the dominant position of My EG in the downstream market (section 10(2) (d) (iii) of the Act).

[44] In our view, by "*applying the different conditions to equivalent transactions*", resulting in the need for a longer verification time in respect of insurances purchased from other than RHB Insurance is to that extent may harm competition in the relevant market of insurance business which My EG as the dominant enterprise is participating in the downstream market (section 10(2)(d)(iii) of the Act).

[45] As My EG is given the sole right for renewal of PLKS, it would be ideal for it as a dominant party not to compete in the insurance business. However, if My EG wishes to compete in such an insurance business in the downstream market, it has to compete on a level playing field. In other words, there should be automatic verification in respect of the purchase of other insurances as in the case of the purchase of RHB Insurance. It is a matter for My EG to work out the system for doing so with the other insurance companies. Hence, the issue of delay would not arise.

[46] It is not seriously disputed that as of 5th January 2015 the FAQ was available on the Appellant website. It reads –

- “5. Can I purchase my preferred insurance company for my foreign workers PLKS permit renewal?
Insurance Guarantee (IG) Foreign Workers Compensation Scheme (FWCS) & Foreign Workers Hospitalisation & Surgical Scheme (FWHS).
For faster and easier renewal, you may purchase IG, FWCS and FWHS with My EG.”

As of 8th August 2015 to date, it reads –

- “6. Can I purchase my preferred insurance company for my foreign workers PLKS permit renewal?

Insurance Guarantee (IG) Foreign Workers Compensation Scheme (FWCS) & Foreign Workers Hospitalisation & Surgical Scheme (FWHS).

You may purchase the insurance from your preferred Insurance company but we will require the scanned IG, FWCS and FWHS cover notes to be uploaded for us to verify with the respective insurance principals.”

[47] Even though the words ‘faster and easier renewal’ were subsequently (i.e. by 8th August 2015) removed from My EG website, for non-My EG insurers, the end user will still need to scan IG, FWCS and FWHS cover notes for My EG to verify with the respective insurance companies. The process clearly involves two different time sensitive processing methods, meaning different conditions were applied to equivalent transactions.

[48] It is not in dispute and admitted by the Appellants that if the buying is direct through My EG Commerce (RHB Insurance), the verification is automatic and the approval for the extension of PLKS is fast. If the purchase is through other insurance companies/agent, due to the verification process i.e. *"... but we will require the scanned IG, FWCS and FWHS cover notes to be uploaded for us to verify with the respective insurance companies."*, there would be a delay. In other words, the verification is not automatic!

[49] It is our view that the condition on My EG's website constitutes an additional condition to be undertaken by the end users in the verification exercise. It is not a 'teething problem' process as submitted by the counsel for the Appellants. According to Datuk P.S. Jaya, My EG system at the time must be scanned and uploaded by the customers to its system for validation and verification purposes due to its limited file capacity of its system. On the evidence, we are of the view that the Commission rightly held that the Appellants abused the dominant position within the meaning of section 10(2)(d)(iii) of the Act.

[50] On the issue of the three (3) options proposed by My EG, at paragraph 157 page 66 of its decision, the Commission stated it's finding as follows –

"It is the Commission's findings that these three (3) options will not resolve the anti-competitive concerns raised by the Commission in its proposed decision. In fact, the Commission, views that this would distort the competition at the downstream market even further as My EG would still position itself in an advantaged position as opposed to its competitors in the sale of Mandatory Insurances market. The Commission therefore rejects these options as a solution to create a level playing field in the downstream market."

[51] My EG application of different conditions to equivalent transactions are in insurance buying process through its website. For a person buying insurance, through MY EG portal, the first web page (after filing in details of the applicant), is the offer of a choice of nine (9) insurance companies where the Mandatory Insurance can be bought. In this case, the Mandatory Insurances bought from the nine (9) companies will be instantly verified (Referred to as Option 1 of the Commission). These nine (9) companies are My EG's insurance agents. That, this first web page lists only all the My EG linked insurance companies gives My EG an advantage and thus constitutes a different trading condition over other non My EG insurance companies.

[52] If the buyer chooses to buy outside of these nine (9) insurance companies, the buyer would have to go to another non-My EG insurance website. With that purchase, the buyer then goes back to My EG portal and keys in the policy number for verification. This is the case for insurance companies which have chosen to integrate their system to that of My EG (Option 2 of the Commission).

[53] Insurance companies which do not wish to participate in My EG's direct online verification system, the insurance applicant having bought insurance from one of these companies will have to manually upload the policies onto My EG's website for purpose of verification (Option 3 of the Commission).

[54] From these 3 Options, it is clear that Option 2 and Option 3 involve additional steps to process the mandatory insurance than Option 1; which means My EG has imposed different trading conditions to equivalent transaction.

[55] Hence, we agree with the findings of the Commission rejecting the three (3) options offered by My EG purportedly under section 10(3) of the Act.

[56] There was argument put forth on the market share by My EG by virtue of its dominant position. However, it shall not be regarded as conclusive whether My EG occupies or does not occupy a dominant position in the insurance business. This is clearly stated in section 10(4) of the Act which reads -

“(4) The fact that the market share of any enterprises above or below any particular level shall not in itself be regarded as conclusive as to whether that enterprise occupies, or does not occupy, a dominant position”

[57] We agree that the Commission's findings, *inter alia*, on “*equivalent transactions*” may not be adequately considered by it in its decision. We can if we want to remit the matter to the Commission under section 58(2)(d) of the Act. However, we do not think we should do so as we can act under section 58(2)(c) or (d) of the Act.

Section 58(2)(c) or (d) reads -

“(2) The Competition Appeal Tribunal may confirm or set aside the decision which is the subject of the appeal, or any part of it, and may -

- (c) give such direction, or take such other step as the Commission could itself have given or taken; or
- (d) make any other decision which the Commission could itself have made".

Considering the totality of the evidence before the Commission there are no compelling grounds for us to interfere with the decision of the Commission.

[58] In the circumstances and for the reasons stated by us we dismiss the appeal except on the order of the liability by My EG to comply with PIAM's rules and regulations as My EG is not within the jurisdiction of PIAM. We affirm hereunder the Commission's decision with consequential amendments as follows:

- (i) Total financial penalty of RM2, 272,200.00 as at 24th June 2016 comprising -
 - i.i RM307,200.00 for the infringement periods of 5th January 2015 to 22nd January 2015 and 2nd May 2015 to 6th October 2015; and
 - i.ii daily penalty of RM7,500.00 from 7th October 2015 to the date of Commission's decision i.e. 24th June 2016 amounting to RM1,965,000.00
- (ii) Daily penalty of RM7, 500.00 from 25th June 2016 to the date of the Tribunal's decision i.e. 28th December 2017.
- (iii) Cease and desist immediately from imposing different conditions to the equivalent transaction in the processing of Mandatory Insurances for online Pas Lawatan (Kerja Sementara) ('PLKS') renewal applications; and
- (iv) To provide an efficient gateway (Online Renewal System Services) for ALL its competitors and potential new entrants in the relevant market for the sale of the Mandatory Insurances and allow the other competitors to compete at the same level within sixty (60) days from the date of the Tribunal's decision i.e. 28th December 2017.

(v) In the event of non-compliance of the aforesaid directions the Commission is at liberty to impose a daily penalty of RM7, 500.00 (instead of higher penalty) for the subsequent period thereof.

[59] As there is no provision under the Act for costs to be ordered we make no order in respect of costs.

Dated 28th December 2017


TAN SRI HAIDAR BIN MOHAMED NOR
Chairman


DATUK DR PANG TECK WAI
Member


PROF. MADYA DR. WAN LIZA MD. AMIN
Member