COMPETITION ACT 2010 [*ACT 712*]
(Section 40)

SURUHANJAYA PERSAINGAN
COMPETITION COMMISSION

To:

ICS Depot Services Sdn Bhd
No. 2443, Lorong Perusahaan 1
Kawasan Perindustrian Prai
13600 Prai
PULAU PINANG

DATE OF NOTICE: JUNE 2016

Dear Sir,

NOTICE ("NOTICE") OF FINDING OF AN INFRINGEMENT BY THE COMPETITION COMMISSION UNDER SECTION 40 OF THE COMPETITION ACT 2010 [*ACT 712*]

Pursuant to section 40 of the Competition Act 2010 ("the Act"), the Commission has determined that ICS Depot Services Sdn. Bhd. ("ICS Depot") has infringed the prohibition of section 4(1) of the Act with Containerchain (Malaysia) Sdn. Bhd. ("Containerchain"), E.A.E. Freight & Forwarding Sdn. Bhd., Ayza Industries Sdn. Bhd./ Ayza Logistics Sdn. Bhd. and Prompt Dynamics Sdn. Bhd and section 4(2)(a) of the Act by entering into a horizontal agreement with E.A.E. Freight & Forwarding Sdn. Bhd., Ayza Industries Sdn. Bhd./ Ayza Logistics Sdn. Bhd. and Prompt Dynamics Sdn. Bhd that has the object to fix the depot gate charge together with a rebate. Both infringements are in relation to the market for the provision of empty container storage, maintenance and handling services within a 5-15km radius of Penang Port.

2. The Commission hereby gives written notice ("Notice") of its finding of an infringement to ICS Depot as set out in **Enclosure 1**. The reasons for the Commission's finding of an infringement are also set out in **Enclosure 1** of this Notice.

3. The financial penalty imposed is set out in **Table 3 of Enclosure 1** of this Notice and shall be paid to the Commission within thirty (30) days of receipt of the notice. Payment to be made by cheque addressed to the **"COMPETITION COMMISSION"**

4. Please do not hesitate to contact my officer, Puan Dhaniah Ahmad at dhaniah@mycc.gov.my or Cik Low Jiah Yee at jiahyee@mycc.gov.my or via telephone at 03-2273 2277 should you have any further queries regarding the same.

Notice Issued by,

(DATO' ABU SAMAH BIN SHABUDIN)
Chief Executive Officer

PRIVATE & CONFIDENTIAL

ENCLOSURE 1



Competition Act 2010 [Act 712]

Decision of the Competition Commission

Infringements of sections 4(1) and (2)(a) of the Competition Act 2010 by Containerchain (Malaysia) Sdn. Bhd.; Ayza Industries Sdn. Bhd./Ayza Logistics Sdn. Bhd.; ICS Depot Services Sdn. Bhd.; E.A.E. Depot & Freight Forwarding Sdn. Bhd.; and Prompt Dynamics Sdn. Bhd.

1 June 2016

(MyCC File Reference: 700.2.005.2013)

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1. INTRODUCTION

1. This is a Decision pursuant to section 40 of the Competition Act 2010 ('the Act') issued against the following:

(i) Containerchain (Malaysia) Sdn. Bhd. [1015698-D] ('Containerchain');

(ii) Ayza Industries Sdn. Bhd. [26581-P] and Ayza Logistics Sdn. Bhd. [560398-V] (together known as 'Ayza');

The Commission considers Ayza Industries Sdn. Bhd. as an enterprise that forms a single economic unit with Ayza Logistics Sdn. Bhd. This is elaborated further down in Item 2.2 at pages 9 and 10 of this Decision.

(iii) ICS Depot Services Sdn. Bhd. [568562-W] ('ICS');

(iv) E.A.E. Depot & Freight Forwarding Sdn. Bhd. [324867-D] ('EAE'); and

(v) Prompt Dynamics Sdn. Bhd. [450111-K] ('Prompt Dynamics').

for an infringement of section 4(1) of the Act; and against the following:

(i) Ayza;

(ii) ICS;

(iii) E.A.E.; and

(iv) Prompt Dynamics

for an infringement of section 4(2)(a) of the Act.

For ease of reference, Ayza, ICS, EAE and Prompt Dynamics are collectively referred to as the 'Target CDOs'.

2. The Commission initiated investigations under section 15(1) of the Act based on complaints[1] received alleging that a number of Container Depot Operators ('CDOs') in Penang issued notices and flyers[2] to their customers, at around the same time, informing them of an increase in their respective Depot Gate Charges ('DGC') from RM5 to RM25.

3. It is the Commission's finding that Containerchain had entered into vertical agreements by way of concerted practices with the Target CDOs which had the effect of the Target CDOs

[1] Complaints filed by Federation of Malaysian Manufacturers dated 26 April 2013; Federation of Malaysian Freight Forwarders dated 29 April 2013; and Penang Freight Forwarders Association dated 30 April 2013 respectively.
[2] See flyers issued by the Target CDOs informing the increase of the DGC from RM5 to RM25.

increasing the DGC imposed on their customers from RM5 to RM25 and the Target CDOs fixing a rebate[3] of RM5 offered to hauliers in respect of the DGC.

4. By their conduct, Containerchain and the Target CDOs have infringed section 4(1) of the Act by entering into vertical concerted practices which have the effect of significantly preventing, restricting or distorting competition amongst the CDOs in the market for the provision of empty container storage, maintenance and handling services within a 5-15km radius of Penang Port.

5. In addition, the Target CDOs agreed amongst themselves to fix the RM25 DGC together with the RM5 rebate which is deemed to have the object of significantly preventing, restricting or distorting competition in the market for the provision of empty container storage, maintenance and handling services within a 5-15km radius of Penang Port.

6. By their conduct, the Target CDOs have infringed section 4(2)(a) of the Act.

[3] "Rebate" and "credit" are used interchangeably. See paragraph 18 of Ronnie Tan's Statement dated 28 October 2014.

2. THE ENTERPRISES SUBJECT TO THE SECTION 4(1) INFRINGEMENT

2.1 CONTAINERCHAIN

7. Containerchain is a private limited company registered in Malaysia. It provides information technology services to the shipping and logistics industry including the CDOs.

8. The shareholders of Containerchain[4] are Mr. Maxvel Antony Paldano ('Tony Paldano') and the Australian parent company, Containerchain Pty Ltd [CAN 127945564] ('Containerchain Pty Ltd')[5] in which both Mr. Tony Paldano and Containerchain Pty Ltd each holds one (1) issued share capital of Containerchain.

9. Mr. Tony Paldano is the director and shareholder of both Containerchain and Containerchain Pty Ltd. Mr. Tony Paldano holds 60 units of shares out of 120 units of shares of Containerchain Pty Ltd.

10. Mr. Gan Wai Leong was the Chief Operating Officer for Containerchain in Malaysia since 2012 and was then transferred to MaxFame Technologies as the Business Development Manager since August 2013.

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[4] See Companies Commission of Malaysia report on Containerchain dated 11 April 2014.
[5] See Australian Securities and Investments Commission Search dated 11 July 2014.

11. Mr. Luke Duffy is the Chief Executive Officer of Containerchain Pty Ltd.

12. Containerchain Pty Ltd is an Australian registered company that specializes in providing software used for managing empty containers at container depots.

2.2 AYZA

13. Ayza Industries Sdn. Bhd. is a private limited company registered in Malaysia. It is involved in a number of businesses, including logistics, storage, maintenance and repair services of shipping containers[6].

14. As of 1 October 2013, Ayza's business operations, including its depot services, have been transferred to its subsidiary, Ayza Logistics Sdn. Bhd.

15. Although the depot business operations have been transferred, Ayza Industries Sdn. Bhd.'s assets are rented out to Ayza Logistics Sdn. Bhd. for their newly acquired business operations[7]. The company searches revealed that Mr. Tan Meng Kang is the common shareholder and director of Ayza Industries Sdn. Bhd. and Ayza Logistics Sdn. Bhd. and he

[6] See Companies Commission of Malaysia report on Ayza Industries dated 10 April 2014 and Ayza Logistics Sdn. Bhd. dated 30 October 2013.
[7] See paragraph 2 of Mr. Goh Guat Seng's Statement dated 29 April 2014

holds more than half of the issued share capital in both enterprises[8]. Furthermore, the current shareholders and directors of the Ayza Logistics Sdn. Bhd. are the ex-employees of Ayza Industries Sdn. Bhd.

16. Based on the evidence obtained as abovementioned, the Commission concluded that Ayza Logistics Sdn. Bhd. and Ayza Industries Sdn. Bhd. form a single economic unit[9] for the purposes of the conduct under investigation as Mr. Tan Meng Kang as the common shareholder and director controls, both the enterprises and their business operations complement each other. Ayza Industries Sdn. Bhd. and Ayza Logistics Sdn Bhd are hereinafter collectively referred to as 'Ayza'.

17. Mr. Tan Kim Chuan (referred to as 'KC Tan') was the director of Ayza Industries Sdn. Bhd. during the introduction and implementation period of the Containerchain system.

[8] Mr Tan Meng Kang holds 95.49% of the shares of Ayza Industries Sdn Bhd and 90% of the shares of Ayza Logistics Sdn Bhd.

[9] Under section 2 of the Act, a parent and subsidiary company shall be regarded as an enterprise if, despite their separate legal entity, they form a single economic unit within which the subsidiaries do not enjoy real autonomy in determining their actions on the market.

2.3 EAE

18. EAE is a private limited company registered in Malaysia. It provides freight forwarding services, storage, maintenance and repair services for shipping containers[10].

19. Mr. Andrew Tan is the Branch Manager for the EAE depot in Penang.

2.4 ICS

20. ICS is also a private limited company registered in Malaysia. It provides storage, maintenance and repair services for shipping containers[11].

21. Mr. Ronnie Tan Kean Sing (referred to as 'Ronnie Tan') is the Branch Manager for the ICS depot in Penang.

2.5 PROMPT DYNAMICS

22. Likewise, Prompt Dynamics is also a private limited company registered in Malaysia and provides storage, repair and maintenance services for shipping containers[12].

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[10] See Companies Commission of Malaysia report on EAE dated 30 October 2013.
[11] See Companies Commission of Malaysia report on ICS dated 11 December 2013.
[12] See Companies Commission of Malaysia report on Prompt Dynamics dated 19 April 2016.

23. Mr. Andy Yee Kooi Oon is the shareholder and director of Prompt Dynamics where he holds 97.99% shares in Prompt Dynamics.

3. OVERVIEW OF THE CONTAINER DEPOT INDUSTRY IN PENANG

3.1 USE OF CONTAINERS IN THE SHIPPING INDUSTRY

24. The storage, maintenance and handling of empty containers are essential parts of the container logistics and supply chain. Each shipping line will select a particular CDO to store, repair and clean its empty containers. The shipping lines are also the owners of the empty containers.

25. A shipping line may engage with more than one CDO in an area depending on the storage capacity, traffic congestion and facilities available[13].

26. Due to the close proximity of the CDOs in Penang, each CDO competes with one another to secure contracts with shipping lines to provide container storage services.

27. When the shippers[14] import and/or export goods, they may appoint their own shipping line that offers the best deal for shipment. Unlike shipping lines, the shippers do not have any direct demand for services supplied by the CDOs.

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[13] See paragraph 4 of Mr. Ronnie Tan's Statement dated 28 October 2014.

[14] Shippers are the consignors, exporters or sellers that initiate the shipment and the parties who bear the freight cost.

28. A haulier[15] will be engaged either by the shipper or the shipping line to pick up the empty container from a CDO at an assigned depot.

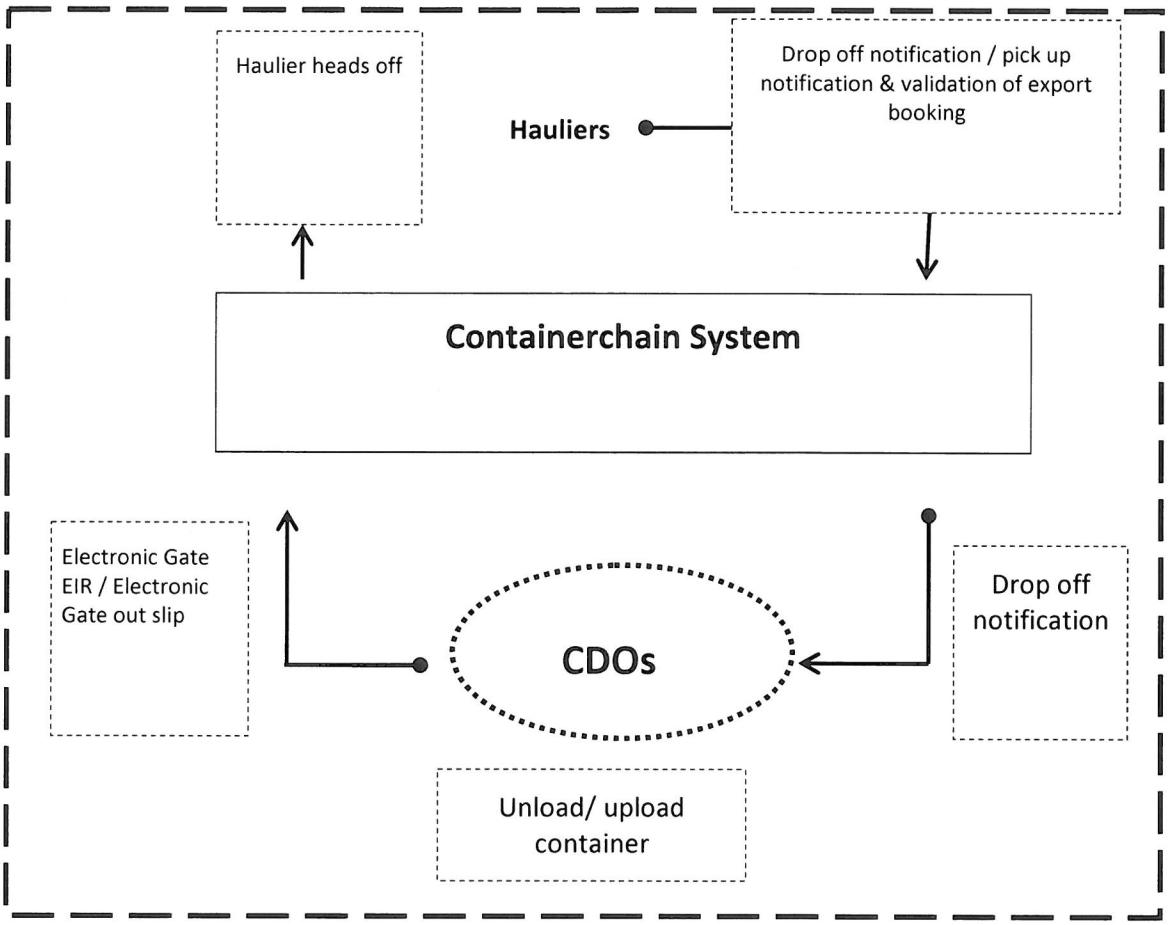
29. The hauliers are transporters who transport empty containers from the port to the shippers and vice versa. For the purposes of importing goods, empty containers are collected from the shippers to be stored in container depots. For the purposes of exporting goods, the hauliers will collect empty containers from the CDOs to be transported to the shippers. The hauliers are charged a DGC[16] for every access to the CDOs' site to either collect or store empty containers.

3.2 THE CONTAINERCHAIN SYSTEM

30. Figure 1 below illustrates the interaction between the various parties using the Containerchain system to manage empty containers at depots. Figure 1 shows that Containerchain is in a vertical relationship with the CDOs.

[15] The hauliers are enterprises employed to transport goods or materials by road.
[16] The DGC is imposed based on the return or pick up of empty shipping containers from the CDOs.

FIGURE 1: HAULIERS DROP OFF AND PICK UP MOVEMENTS USING THE CONTAINERCHAIN SYSTEM



31. The Containerchain system works (with reference to Figure 1 above) as follows:

(i) In the case of exported goods, a shipper will engage a haulier to collect an empty container from a particular CDO. The haulier will then be required to log into the Containerchain system to obtain a pick up notification on the preferred time to collect empty containers from that particular CDO.

(ii) Once a pick up notification has been obtained from the Containerchain system, the haulier will be required to pick up the empty container from the particular CDO in accordance with the allotted time given. Once an empty container has been picked up, the haulier will then transport the empty container to the shipper in order for it to be loaded with goods to be exported.

(iii) In the case of incoming imported goods, a shipping line will engage a haulier to store the empty container at a particular CDO (once the imported goods have been unloaded at a particular shipper). The haulier would then be required to log into the Containerchain system to obtain a drop off notification for the preferred time to drop off the empty container at that particular CDO.

(iv) Once a drop off notification has been obtained from the Containerchain system, the haulier would be required to drop off the empty container at the particular CDO in accordance with the allotted time given.

(v) A haulier is required to notify the CDO of its arrival to drop off or pick up an empty container. To notify the CDO, a haulier needs to have an active commercial

account with Containerchain[17]. The Containerchain system would send the notification to the CDO to prepare for any uploading or unloading of empty shipping containers.

[17] Source: www.containerchain.com.my.

4. THE RELEVANT MARKET

32. The Commission's Guidelines on the Chapter 1 Prohibition stipulated that it is necessary to establish the significant anti-competitive effect for infringements under section 4(1) of the Act. However, in respect of any infringement under section 4(2) of the Act, the Commission does not have to determine the anti-competitive effect as this is a deeming provision.

33. In the context of this case, the CDOs either manage the inflow and outflow of empty containers at their depots manually or they utilise Information Technology ('IT') software to do so. The most used IT software that are utilised by the CDOs in Malaysia include Maximas, Containerchain System and G-software.

34. The IT softwares provide real-time information pertaining to the inflow and outflow of empty containers at a particular depot. Hence, it would enhance the CDOs' efficiency in managing empty containers and the overall operation of their depots.

35. There are a few IT software providers in Malaysia including Containerchain. However as of July 2014, eight (8) out fifteen[18]

[18] The fifteen (15) CDOs are Ayza, EAE, ICS, Prompt Dynamics, Bumikon Services Sdn. Bhd., Eng Kong Container Services Sdn. Bhd., Infinity Sdn. Bhd., Konrep Services Sdn. Bhd., MISC Integrated Logistics Sdn. Bhd., Multimodal Freight Sdn. Bhd., Mutual Space Sdn. Bhd., One Century Logistics Terminal, Penang Port Sdn. Bhd. and Trilimaju Sdn. Bhd.

(15) CDOs in the area of Penang Port have implemented the Containerchain system[19].

36. This indicated that Containerchain commands 53.33% market share in the market for the provision of IT software that manage the inflow and out flow of empty containers at depots in Penang port. The figures exceeded the 25% indicative "safe harbour" that was set out in the Commission's Guidelines on the Chapter 1 Prohibition.

37. The Commission found that Containerchain has significant market power in the relevant market in which the vertical agreements entered into between Containerchain and Target CDOs by way of concerted practices had enabled the fixing of DGC and the imposition of the rebate.

[19] Source: http://www.containerchain.com.my/Docs.aspx.

5. FACTS OF THE CASE

5.1 INDUSTRY DISCUSSIONS

38. Sometime in June 2012, a meeting was held among the CDOs operating within the area of the Penang Port, including the Target CDOs at the Penang Konrep Depot[20]. At the time, the CDOs in Penang were charging a RM5 DGC.

39. Attendees of the said meeting which included the other CDOs discussed the rising cost of depot operations and depot tariffs. There was a general consensus that the DGC charged was too low and there should be an increase from the current DGC. At this meeting, Mr. Jamaluddin Samad, Managing Director of Konrep Services Sdn. Bhd. reportedly cautioned the attendees that the CDOs cannot impose the same DGC, as the "MyCC" may take action against companies that are involved in price fixing[21].

40. Mr. Ronnie Tan[22] of ICS has stated that, in or about the same time as the meeting at the Penang Konrep Depot, Mr. Tony Paldano of Containerchain, via an email dated 24 June 2012, told him that the Containerchain system can be the platform to

[20] See paragraph 10 of Mr. Abdul Halim Mustaffa's Statement dated 7 November 2013. See also minutes of telephone conversation between the Commission and Mr. Jamaluddin Samad dated 11 November 2013.
[21] See paragraph 12 of Mr. Abdul Halim Mustaffa's Statement dated 7 November 2013.
[22] See paragraphs 12 and 15 of Mr. Ronnie Tan's Statement dated 28 October 2014.

inform the industry of the need to increase the DGC. His email stated:

".....My thoughts are during that presentation to announce ICS Penang's intention to go live some time in September. This could be one of the catalyst you can use to inform the industry the need to increase the DGC charge since it costs the depot to implement systems to improve the truck turn times and reduce queues in your depot. In return this will benefit us to launch Containerchain in Penang."

41. Mr. Ronnie Tan stated that Mr. Tony Paldano emphasised that the implementation of the Containerchain system was a great opportunity for the CDOs to increase their DGC and that it was an opportunity not to be missed by the CDOs.

42. Sometime in August 2012, a second meeting amongst the CDOs operating in the area of the Penang Port, including the Target CDOs, was held at the ICS depot[23]. At this meeting, Mr. Abdul Halim Mustaffa, Director of MHS Depot Sdn. Bhd., stated that there was a discussion regarding an intention by ICS to increase its DGC and it was stated that such an increase

[23] See paragraph 13 of Mr. Abdul Halim Mustaffa's Statement dated 7 November 2013.

should be backed by an improvement in the quality of the services offered[24].

5.2 SEPTEMBER 2012 WORKSHOP

43. In or about August 2012, Mr. Tony Paldano issued a written invitation to the Malaysia Container Depot Association Northern Region ('MCDA') and the Association of Malaysia Hauliers Northern Region ('AMH') with regards to an event called the 'Containerchain Workshop', to be held on 19 September 2012 at Ixora Hotel, Prai[25] ('the September 2012 Workshop').

44. The September 2012 Workshop was attended by a large number of the CDOs in Penang, including the Target CDOs[26].

45. At the September 2012 Workshop, representatives of Containerchain namely Mr. Arvin Nair, Mr. Rohan Rajakumar, Mr. Tony Paldano and Mr. Gan Wai Leong explained how the Containerchain system works and how it may benefit the container depot industry. Containerchain claimed that the

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[24] See paragraph 9 of Mr. Ronnie Tan's Statement dated 28 October 2014 and paragraph 13 of Mr. Abdul Halim Mustaffa's statement dated 7 November 2013.

[25] See letter of invitation for the September 2012 Workshop from Containerchain to the MCDA and AMH.

[26] See paragraph 18 of Mr. Abdul Halim Mustaffa's Statement dated 7 November 2013 and paragraph 9 of Witness C's Statement dated 25 October 2013. See also the list of attendees of the September 2012 Workshop provided by Containerchain on 10 October 2013. This witness is named as 'Witness C' due to the confidentiality of his identity.

system aims to eliminate delays by the CDOs and promote efficiencies.

46. Mr. Abdul Halim Mustaffa stated that during a break at the September 2012 Workshop, there were discussions among the CDOs about the RM25 DGC and the majority of them felt that it is possible for them to increase their DGC through the Containerchain system.

47. During the September 2012 Workshop, the CDOs queried how the system worked, including what should be the appropriate DGC[27].

5.3 RM5 REBATE

48. At some stage in or around September 2012, Mr. Tony Paldano informed Mr. Ronnie Tan of ICS that the RM5 rebate was essential in maintaining cash flows in depots as it would provide an incentive for the hauliers to make prompt payments within fourteen (14) days, failing which the hauliers will not be entitled to the rebate.

49. A proposed rebate of RM5 was discussed between Mr. Tony Paldano, Mr. Ronnie Tan and Mr. Amaiappan Retnasamy, the

[27] See page 14 of Mr. Gan Wai Leong's Statement dated 6 May 2014.

President of the AMH Northern Region on behalf of the hauliers[28].

50. The rebate of RM5 was subsequently discussed with the CDOs and implemented together with the revised RM25 DGC.

51. Out of the RM25 DGC that will be charged by the CDOs, via subscription to the Containerchain system, RM5 will be given to Containerchain as a service fee and another RM5 will be returned to the hauliers in the form of a rebate as an incentive for them to make prompt payment.

52. All the Target CDOs implemented the RM5 rebate on the same date as they implemented the increased DGC of RM25.

5.4 SIGNING OF THE IMPLEMENTATION, SUPPORT AND LICENSE AGREEMENTS BY THE TARGET CDOs

53. Subsequent to the September 2012 Workshop, each of the Target CDOs signed an Implementation, Support and Licence Agreement ('ISLA') for a period of three (3) years with Containerchain as follows:

(i) Agreement between Containerchain and EAE was signed on 1 October 2012;

[28] See paragraph 18 of Mr. Ronnie Tan's Statement dated 28 October 2014.

(ii) Agreement between Containerchain and ICS was signed on 1 October 2012;

(iii) Agreement between Containerchain and Prompt Dynamics was signed on 2 October 2012; and

(iv) Agreement between Containerchain and Ayza was signed on 27 November 2012.

54. Under the ISLA, each of the Target CDOs agreed to use the Containerchain system for the management of empty containers at their respective depots for all container movements to and from their respective locations.

55. During the three (3) years term of ISLA, Containerchain would collect the DGC on behalf of the CDOs and remit the charges to the CDOs, less a commission based on the total number of notifications at the depot locations during a particular calendar month[29].

56. Under the terms stipulated in the ISLA, each of the Target CDOs agreed to pay the Containerchain a commission of RM5 for each transaction made by a haulier for the return or pick up of an empty container to or from their depots.

[29] See Clause 6 of ISLA.

5.5 OCTOBER 2012 WORKSHOP

57. On 11 October 2012, Containerchain organised a briefing workshop – "the Implementation Rollout Plan" - at Ixora Hotel, Prai ('the October 2012 Workshop')[30].

58. The October 2012 Workshop was attended by a majority of the CDOs in Penang, including representatives of ICS, EAE and Prompt Dynamics[31].

59. According to several CDOs' representatives, at the October 2012 Workshop, the DGC was discussed and it was suggested by Mr. Ronnie Tan of ICS that this was an opportunity to raise the DGC from RM5 to RM25[32].

60. According to Witness A[33], during the October 2012 Workshop, Mr. Luke Duffy of Containerchain informed the attendees that Containerchain would deduct RM5 for every transaction made as its fee for the services it provided.

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[30] See paragraph 11 of Witness C's Statement dated 25 October 2013 and paragraph 6 of Witness A's Statement dated 25 October 2013.
[31] See paragraph 11 of Witness C's Statement dated 25 October 2013 and Mr. Abdul Halim's Statement dated 7 November 2013.
[32] Paragraph 8 of Witness A's Statement dated 25 October 2013, paragraph 24 of Abdul Halim Mustaffa's Statement dated 7 November 2013 and paragraph 11 of Witness C's Statement dated 25 October 2013.
[33] This witness is named as 'Witness A' due to the confidentiality of his identity.

61. Mr. Luke Duffy also informed the attendees that a further RM5 would be refunded back to the hauliers if payments were made within fourteen (14) days.

62. According to Witness A, during the October 2012 Workshop, Mr. Ronnie Tan said words to the following effect:

"*We should all now fix RM25 for the depot gate charge. This is our perfect opportunity to raise the depot gate charge because Port Klang has already raised their depot gate charge. We have not had an opportunity for us to raise the price before this*[34]."

63. In furtherance to the above, Witness A also stated that when the issue of the RM25 DGC was raised by the CDO representatives during the October 2012 Workshop, Mr. Luke Duffy reportedly said words to the following effect:

"*It was alright to charge at this rate as you will be getting RM15 at the end of 60 days while RM5 will be refunded to the Hauliers if they pay within 14 days and Containerchain will only earn RM5 for the services we provided. However, it is up to each of you to determine your depot gate charges*[35]."

[34] See paragraph 8 of Witness A's Statement dated 25 October 2013.
[35] See paragraph 11 of Witness A's Statement dated 25 October 2013.

64. Mr. Ronnie Tan had acknowledged that he encouraged the other CDOs to attend the September 2012 Workshop and the October 2012 Workshop in order for them to obtain further information about the Containerchain system[36].

65. Mr. Ronnie Tan has also acknowledged that he contacted and had informal conversations with the other CDOs about the efficiencies of the Containerchain system with the hope that it would gain enough support to implement the Containerchain system in Penang.

5.6 THE TARGET CDOs' FLYERS AND CARRIER ACCESS ARRANGEMENTS

66. By 23 April 2013, the Target CDOs had begun distributing flyers to their customers stating that each of their respective depots would be implementing the Containerchain system with a DGC of RM25[37].

67. All the flyers issued by the Target CDOs contained the following similar terms and conditions:

[36] See paragraph 16 of Ronnie Tan's Statement dated 28 October 2014.
[37] See email from Mr. Arvin Nair to Mr. Luke Duffy dated 23 April 2013.

(i) Hauliers will be required to complete a process called 'Notification' for every container they wish to pick up/drop off;

(ii) To complete a 'Notification', hauliers will be required to register an account at www.containerchain.com.my;

(iii) The process of making a 'Notification' will attract a DGC of RM25;

(iv) DGC will be collected by Containerchain on behalf of the depot;

(v) DGC will be cashless;

(vi) The 'Notification' process is mandatory;

(vii) Hauliers without a valid notification will not be serviced by the depot; and

(viii) The Containerchain system will go live at each depot on 6 May 2013.

68. Pursuant to the ISLA that each of the Target CDOs had entered into with Containerchain in 2012, each Target CDO was

required to prepare a Carrier Access Arrangement' ('CAA') to be published on Containerchain's website.

69. The CAA is an agreement between the CDOs and the hauliers. The CAA contains terms and conditions set out by the CDOs for the hauliers to follow before they enter into that depot's premises. Each CDO was to have its own CAA which required the hauliers to pay a DGC and to comply with traffic management, notification timing and truck arrival procedures amongst other things.

70. These agreements are available on the Containerchain's website for everyone, including the CDOs and the hauliers, to gain access to the terms and conditions of each CDO.

71. Containerchain stated that it prepared a template CAA for each of the Target CDOS, based on its industry practices in Australia[38]. Containerchain then forwarded the sample CAA to each of the Target CDOs requiring them to amend any term they deemed fit including their DGC rate[39].

72. At some time prior to 6 May 2013, Containerchain uploaded the CAAs on its website for each of the Target CDOs.

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[38] See page 5 of Mr. Gan Wai Leong's Statement dated 4 June 2013 and email from Mr. Arvin Nair to Mr. Gan Wai Leong dated 15 January 2013.
[39] See email from Mr. Gan Wai Leong to Mr. Ronnie Tan dated 6 February 2013.

73. These CAAs contained the terms and conditions to be complied with by the hauliers when contracting with the respective CDOs.

74. Each of these CAAs referred to the imposition of an increased DGC of RM25, and also contained a term providing for a common rebate to be offered by each of the Target CDOs of RM5 which would be refunded to the hauliers if DGC payments were made within fourteen (14) days from the date of the invoice[40].

75. From a series of emails exchanged between Containerchain and the CDOs, it appeared that the Target CDOs confirmed the decision to implement the increased DGC of RM25 on the following dates:

(i) ICS on 15 February 2013[41];

(ii) EAE on 7 February 2013[42];

(iii) Ayza by 3 May 2013[43]; and

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[40] See email from Mr. Luke Duffy to Mr. Gan Wai Leong dated 2 May 2013.
[41] See email correspondence between Mr. Ronnie Tan and Mr. Gan Wai Leong from 6 February 2013 to 15 February 2013.
[42] See email correspondence between Mr. Gan Wai Leong and Mr. Steven Chew of EAE from 6 February 2013 to 7 February 2013.
[43] See email correspondence between Mr. Gan Wai Leong and one Chiah Mee Youg of Ayza from 3 May 2013 to 2 May 2013.

(iv) Prompt Dynamics by 12 April 2013[44].

5.7 THE TARGET CDOs INCREASED THEIR DGC TO RM25 AND IMPLEMENTED THE RM5 REBATE

76. On 6 May 2013, ICS, EAE and Ayza implemented the increased DGC from RM5 to RM25.

77. On 20 May 2013, Prompt Dynamics implemented the increased DGC from RM5 to RM25[45]. Emails obtained from Containerchain appeared to show that Prompt Dynamics was scheduled to increase its DGC on 6 May 2013, but this had to be delayed due to technical complications it had in installing the Containerchain system.

78. As described above, all the Target CDOs implemented the RM5 rebate on the same date they implemented the increased DGC of RM25.

5.8 AYZA'S SUBSEQUENT REDUCTION OF DGC

79. Mr. KC Tan of Ayza had stated that, when Ayza implemented the RM25 DGC on 6 May 2013, he encountered problems with his clients (namely; the shipping lines NYK and MOL) because there were other CDOs charging lower DGC rates compared to

[44] See email from Mr. Gan Wai Leong to Mr. Luke Duffy dated 12 April 2013.
[45] See email from Mr. Luke Duffy to Mr. Gan Wai Leong & others dated 5 May 2013.

the depots who had signed up with Containerchain. Mr. KC Tan stated that he faced pressure from his clients who wanted to switch to a depot with a lower DGC[46].

80. Subsequently, Mr. KC Tan sent an email dated 31 May 2013 to Mr. Tony Paldano seeking a response on whether all CDOs would continue to adhere to the "standard" DGC[47].

81. Mr. KC Tan informed the Commission that he had felt that it was absolutely crucial for everyone to implement the Containerchain system and fix a standard DGC so that shipping lines would not have an option to switch CDOs with lower DGC to store their shipping containers.

82. Apparently, Mr. KC Tan did not receive a written reply to his email dated 31 May 2013 from Mr. Tony Paldano. Subsequently, on 1 July 2013, Mr. KC Tan decided to reduce Ayza's DGC to RM15, as he faced the possibility of losing his biggest clients if he maintained the higher DGC of RM25.

83. After Ayza reduced its DGC, Mr. KC Tan stated that Mr. Gan Wai Leong, said to him words to the following effect:

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[46] See paragraph 19 of Mr. Tan Kim Chuan's Statement dated 20 November 2013.
[47] See Mr. Tan Kim Chuan's Statement dated 20 November 2013.

"*Although lowering the DGC is entirely up to you, but you should try to maintain the RM25 DGC because that is what everyone is charging*[48]."

84. Thereafter, Ayza's DGC rate was increased back to RM25 on 1 October 2013[49].

85. Subsequently, following contacts from the Commission in relation to its investigations, Ayza reduced its DGC from RM25 to RM23 with effect from 1 August 2014[50].

[48] See paragraph 20 of Mr. Tan Kim Chuan's Statement dated 20 November 2013.
[49] See email from Mr. Chiah Mee Youg to Mr. Gan Wai Leong dated 23 September 2013.
[50] See Mr. Goh Guat Seng's email to the Commission dated 18 December 2014.

6. CONTAINERCHAIN'S INVOLVEMENT

86. In addition to the various industry meetings and discussions described above, Containerchain was involved in the following conduct.

87. As mentioned above, Mr. Tony Paldano told Mr. Ronnie Tan that the Containerchain system could be an opportunity for the industry to increase the DGC.

88. According to Mr. Ronnie Tan, in or around September 2012, he informed Mr. Gan Wai Leong that ICS was going to raise its DGC to RM25.

89. Between the period of September 2012 and April 2013, representatives of Containerchain embarked on a marketing campaign to solicit customers for the Containerchain system.

90. Mr. Gan Wai Leong visited various CDOs and had acknowledged that he informed them that other CDOs were going to charge RM25[51].

91. After the October 2012 Workshop, Mr. Gan Wai Leong contacted Witness A on numerous occasions to persuade him

[51] See Mr. Gan Wai Leong's Statement dated 6 May 2014 and paragraphs 6 and 7 of Witness B's Statement.

to sign up with Containerchain. Witness A had stated that during the course of a telephone conversation, Mr. Gan Wai Leong had said to him words to the following effect:

"Ayza, ICS, EAE and Prompt Dynamics are the first batch and we are going to go live soon and there might not be an opening or opportunity anymore if you do not sign up."

"Ayza, ICS, EAE and Prompt Dynamics are all going to charge RM25 and they are going to go live soon[52]*."*

92. In or around the same period, Mr. Gan Wai Leong reportedly informed Witness A that it was important to get his depot together with the Target CDOs with the Containerchain system as it would represent at least 50% of the container depot market in Penang[53].

93. In addition, Mr. Gan Wai Leong informed Mr. Abdul Halim Mustaffa that the CDOs implementing the Containerchain system would be charging RM25 as their new DGC[54] and said words to the following effect:

[52] See paragraph 12 of Witness A's Statement dated 25 October 2013.
[53] See paragraph 14 of Witness A's Statement dated 25 October 2013.
[54] See paragraph 25 of Mr. Abdul Halim Mustaffa's Statement dated 7 November 2013.

"The DGC can be fixed at RM25 since it was already agreed by the other depots like ICS, Ayza and EAE[55]*".*

94. Prior to signing up with Containerchain, Mr. KC Tan of Ayza stated that Mr. Gan Wai Leong had said to him words to the following effect:

"So far, there are 3 depots who had signed up with Containerchain. They are ICS, EAE and Selama Depot. All of these depots will be charging RM25 as their new DGC[56]*."*

95. Following circulation of the flyers by the Target CDOs announcing the increase of their DGC to RM25 (as discussed above), Mr. Jamaluddin Samad sent an email to Mr. Gan Wai Leong stating that he had concerns about the legitimacy of RM25 DGC and whether it was done in accordance with the Act[57].

96. Mr. Gan Wai Leong had acknowledged that Mr. Jamaluddin Samad in his email was seeking an explanation whether the RM25 was legitimate since it was agreed by most CDOs prior to the release of the flyers.

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[55] See paragraph 20 of Mr. Abdul Halim Mustaffa's Statement dated 7 November 2013.
[56] See paragraph 14 of Mr. Tan Kim Chuan's Statement dated 20 November 2013.
[57] See Mr. Gan Wai Leong's Statement dated 6 May 2014.

97. Mr. Gan Wai Leong had acknowledged that he was instrumental in passing on information about the RM25 DGC and confirming that DGC of RM25 would be charged by the Target CDOs[58].

98. Mr. Gan Wai Leong had stated that in the process of disseminating and sharing information on the proposed increase to RM25 of the DGC amongst the CDOs, he had always used the standard response of *"It is up to you to decide your own DGC"* whenever a CDO asked him what the DGC should be[59].

99. Witness B[60], another CDO representative, also stated that Mr. Gan Wai Leong contacted him on numerous occasions urging his depot to subscribe to the Containerchain system. Witness B stated that Mr. Gan Wai Leong said words to the following effect to him during these discussions:

"Everybody is charging RM25. If you sign up to Containerchain you can also charge the same but it is up to you"[61]

100. Furthermore, in or about April 2013, Mr. Gan Wai Leong addressed a meeting of representatives from the Penang Port

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[58] See pages 16 to 23 of Mr. Gan Wai Leong's Statement dated 6 May 2013.
[59] See page 23 of Mr. Gan Wai Leong's Statement dated 6 May 2013.
[60] This witness is named as 'Witness B' due to the confidentiality of his identity.
[61] See paragraphs 6 to 8 of Witness B's Statement dated 20 October 2013.

Sdn. Bhd. to present the Containerchain system. Prior to the meeting, Mr. Gan Wai Leong informed Mr. Luke Duffy about the presentation in an email dated 24 April 2013.

101. In his reply email, Mr. Luke Duffy instructed Mr. Gan Wai Leong to inform the Penang Port Sdn. Bhd. that they can stop collecting cash and start charging RM25 as its DGC[62].

102. Mr. Gan Wai Leong had acknowledged that, as discussed in the email with Mr. Luke Duffy, he passed the said information to the representatives of Penang Port Sdn. Bhd. in April 2013[63].

103. Mr. Gan Wai Leong had acknowledged that he convinced the CDOs to implement the RM5 rebate by telling them it was an incentive for early DGC payments and that it was beneficial to them[64].

[62] See email from Mr. Luke Duffy to Mr. Gan Wai Leong dated 24 April 2013.
[63] See page 26 of Mr. Gan Wai Leong's Statement dated 6 May 2014.
[64] See pages 28 to 30 of Mr. Gan Wai Leong's Statement dated 6 May 2014.

7. PROCEDURE

7.1 THE INVESTIGATIONS

104. The Commission initiated its investigations pursuant to section 15(1) of the Act based on the following complaints:

(i) Complaint filed by the Federation of Malaysian Manufacturers on 26 April 2013;

(ii) Complaint filed by the Federation of Malaysian Freight Forwarders on 29 April 2013; and

(iii) Complaint filed by the Penang Freight Forwarders Association on 30 April 2013.

105. In the course of the Commission's investigations, the Commission issued a number of section 18 notices to obtain documents and information from some of the industry players.

106. A section 20 direction for access to records was also issued to Mr. Ronnie Tan of ICS. The Commission also conducted field investigations in Penang.

7.2 PROPOSED DECISION

107. On 19 June 2015, the Commission served its Proposed Decision on Containerchain and the Target CDOs (hereinafter referred as 'Target Enterprises'). The Proposed Decision outlines the reasons for the Commission's decision as well as the proposed penalties and remedial actions imposed on the Target Enterprises.

108. The Proposed Decision stipulated the Commission's provisional findings that Containerchain had engaged in concerted practices with the Target CDOs which resulted in the Target CDOs increasing the DGC imposed on their customers from RM5 to RM25 and the Target CDOs offering a rebate of RM5 to hauliers on the agreed DGC.

109. The Commission also provisionally found that the Target CDOs had entered into a price fixing agreement which is deemed to have the object of significantly preventing, restricting or distorting competition in the market for the provision of empty container storage maintenance and handling services within a 5-15km radius of the Penang Port. The Commission proposed to impose financial penalty and other remedies on each enterprise.

7.3 WRITTEN REPRESENTATIONS

110. In response to the Proposed Decision, Containerchain and the Target CDOs submitted their written representations to the Commission within the stipulated datelines.

7.4 ORAL REPRESENTATIONS

111. Only two (2) enterprises i.e. Containerchain and Prompt Dynamics indicated that they wished to make oral representations before the Commission pursuant to section 36 of the Act.

112. Following this, the Commission convened an oral representation session on 20 November 2015 for these two enterprises.

8. WITNESSES REFERRED BY THE COMMISSION

113. In finalising this Decision, the Commission relied on the following witnesses:

(i) Mr. Gan Wai Leong – Chief Operating Officer for Containerchain;

(ii) Mr. KC Tan – Director for Ayza;

(iii) Mr. Goh Guat Seng – Operation Manager for Ayza;

(iv) Mr. Ronnie Tan Kean Sing – Branch Manager for ICS; and

(v) Mr. Abdul Halim Mustaffa, Director of MHS Depot Sdn. Bhd.;

Other witnesses with whom their identities remain confidential

(i) Witness A;

(ii) Witness B; and

(iii) Witness C.

9. REPRESENTATIONS BY THE TARGET ENTERPRISES

114. As stated above, three (3) enterprises did not wish to make any oral representation before the Commission. These enterprises are ICS, EAE and Ayza. However, they did submit their written representations to the Commission.

9.1 ICS

115. In its written representation, ICS accepted the Commission's findings in the Proposed Decision. ICS however appealed for a reduction of the financial penalty proposed to be imposed.

116. ICS submitted various mitigating factors in support of its written representation, namely: limited geographic scope; the depot sector is not a central sector to the Malaysian economy; low involvement and degree of fault; short duration of the infringement; fining trends in the European Union; significant cooperation given to the Commission; termination of the infringement on the Commission's intervention; lack of exposure to competition laws; position of Malaysian companies; and benefits of the Containerchain system.

9.2 EAE

117. EAE also accepted the Commission's findings in the Proposed Decision. However, it appealed for a reduction and/or a waiver of the financial penalty proposed to be imposed.

118. EAE submitted that the decision to raise the DGC was mainly due to various economic reasons such as the revised electricity tariffs; the enforcement of the minimum wage policy; the increase of diesel price and widespread increase in general cost due to the implementation of the Goods and Services Tax. EAE also submitted that that the Commission should take into consideration EAE's mitigating factors: EAE's first breach of the Act; full cooperation given to the Commission; EAE's role in the infringements was less significant; EAE did not actively promote the Containerchain system to the other CDOs in Penang and EAE did not initiate any meetings between the Target CDO for the purpose of increasing and fixing the DGC at RM25 and the RM5 offered to the hauliers.

9.3 AYZA

119. Ayza in its written representations did not make any admission of liability. However it submitted that the Containerchain system was very user-friendly and was able to handle daily operations as well as collection of DGC seamlessly. Ayza also submitted

that the reason to increase the DGC was due to the high operating costs. Ayza further claimed that it did not meet or discuss with any staff member of Containerchain to fix the DGC. Ayza requested for the proposed financial penalty to be waived or reduced to the minimum.

9.4 PROMPT DYNAMICS

120. In its representations, Prompt Dynamics submitted that it did not attend any meeting conducted by Containerchain and the rest of the CDOs in June 2012 and August 2012. It claimed it did attend the meeting conducted in September 2012 as a participant to gain knowledge and explanation on how the Containerchain system works, the benefits of the system as well as the efficiency of the system.

121. Prompt Dynamics further submitted that it attended a workshop in October 2012 in order to have a better understanding on the Containerchain system. Prompt Dynamics also submitted that none of the evidence adduced from the witnesses would relate to the involvement of Prompt Dynamics in any meeting to negotiate the price fixing.

122. Prompt Dynamics submitted that it has two (2) separate depots that are charging RM25 and RM5 respectively. The increment of the DGC from RM5 to RM25 is not mainly or solely

contributed through the introduction of the Containerchain system but due to an increase of overall operation cost.

123. Prompt Dynamics argued that the act of entering into the agreement prepared by Containerchain is merely for the utilization of the system and is solely based on a willing buyer and willing seller basis.

124. Prompt Dynamics also argued that it should not be held liable for an infringement of section 4(1) of the Act and that a total discharge from such an allegation be granted.

9.5 CONTAINERCHAIN

125. Containerchain submitted that it did not fix or influence the fixing of the DGC and the rebate. Containerchain argued that as a service provider it was never in a position to fix the DGC or the rebate. It is also unable to unwind any DGC or the rebate that was fixed by the Target CDOs and cannot be held responsible for the Target CDOs' decisions or collusion.

126. Containerchain also submitted that its business model is such that the services are provided for a fixed fee of RM5 and this is not related to what the Target CDOs charge as their DGC or the rebate given to hauliers.

127. The Target CDOs had already agreed to increase the DGC even before Containerchain entered the Penang market and had used the subscription to the Containerchain system as an opportunistic basis to increase and fix the DGC and the rebate.

128. Mr. Tony Poldano's suggestion to Mr. Ronnie Tan to use the Containerchain system as a catalyst to increase the DGC was nothing more than a sales value proposition. The Target CDOs did not need the Containerchain system to collude amongst each other. As such, it submitted that the Commission cannot discount the likelihood that the Target CDOs would have increased the DGC even without the implementation of the Containerchain system.

129. Containerchain had repeatedly informed the CDOs, even before the Target CDOs signed up for the Containerchain system that the DGC and the rebate were entirely up to the CDOs.

130. Mr. Gan Wai Leong on the other hand was no more than an overzealous employee trying to secure contracts i.e the ISLAs with the CDOs. Any information which Mr. Gan Wai Leong conveyed to the CDOs on the amount of the DGC was already known to them, and was not strategic.

131. Containerchain argued that from a technical perspective, the functions of the Containerchain system are such that they do not allow third parties to view a CDO's intended DGC rate or rebate before the CAA is uploaded. It is only upon the CAA being uploaded that the pricing becomes visible to third parties i.e. the hauliers and other CDOs which signed up with the relevant CDOs. When the CAA is uploaded, the DGC and the rebate become effective. As such, the CDOs could not have used the Containerchain system to view or exchange information on the future pricing of the DGC or rebate.

132. Containerchain also submitted that the Containerchain system has proven efficiencies and brought significant improvements to the empty container logistics industry in Penang. The efficiencies of the system have been recognized in other jurisdictions.

133. Containerchain submitted that the Australian Competition and Consumer Commission ('ACCC') had acknowledged that the system is likely to result in significant public benefits arising from improved efficiency across the supply chain in its Statement of Reasons dated 26 August 2011.

134. The system was brought to Penang as a solution to the notorious problems and inefficiencies including delays and

costs overruns caused by long queues by haulage trucks at depots.

135. Containerchain argued that there are pro-competitive effects in the publication of the DGC and the rebate using the Containerchain system.

136. In relation to the powers of the Commission to issue directions under section 40 of the Act, Containerchain argued that the Commission is estopped from directing Containerchain to terminate the usage of the Containerchain system as stipulated in the Commission's Proposed Decision ('Termination Direction') as it does not comply with section 40(1) ad section 40(3) of the Act whereby:

(i) Section 40(1) – It is not clear how the Termination Direction (to terminate the usage of the Containerchain system) would work to bring the infringement to an end; and

(ii) Section 40(3) – the Commission has failed to provide in the Proposed Decision any explanation on the functions of the system which it found problematic from a competition law perspective; and on how the Termination Direction is appropriate for bringing the infringement to an end.

137. Containerchain had repeatedly informed the Commission that it was willing to cooperate with it to find a solution to unwind the DGC and the rebate including if required, to change the elements in the Containerchain system which the Commission regarded as objectionable.

138. Containerchain also submitted that the quantum of the financial penalty is excessive and disproportionate to the gravity of Containerchain's alleged conduct.

139. The calculation by the Commission of the period of the alleged infringement is flawed as Containerchain's starting point of the alleged infringement should be from the time the Target CDOs went live and implemented the DGC price increase.

140. The period of infringement should only be from the implementation of the purported cartel agreement by the Target CDOs until there was a break from the cartel by Ayza. The Commission must consider that there were a few events which broke the alleged cartel or at least Containerchain's alleged causation to the effects; which are:

(i) 1 July 2013: Ayza decided to reduce the DGC to RM15;

(ii) 1 October 2013: There was further fluctuation of the DGC when Ayza increased the DGC back to RM25;

(iii) 1 August 2014: Ayza reduced the DGC again to RM23 from 1 August 2014, following contacts from the Commission; and

(iv) 30 November 2014: ICS increased its DGC to RM26.

141. It is unreasonable for the Commission to penalize Containerchain for the duration the Target CDOs continued with the cartel despite Containerchain having no power to force the Target CDOs to "unscramble" the DGC and Rebate. The Commission must take into account that there were a few events which broke the alleged cartel or at least, Containerchain's alleged causation to the effects.

142. The financial penalties do not reflect the degree of culpability of the parties. The facts clearly show that Containerchain's culpability (if any) is much lesser than that of the Target CDOs.

143. Containerchain also submitted that it had also implemented a compliance programme for its employees, to underline Containerchain's commitment to compliance and communicate its genuineness.

10. LEGAL AND ECONOMIC ASSESSMENTS FOR SECTION 4(1) INFRINGEMENT

10.1 APPLICATION OF SECTION 4(1) OF THE ACT

144. Section 4(1) of the Act states that:

> *"(1) A horizontal or vertical agreement between enterprises is prohibited insofar as the agreement has the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services."*

145. Section 4(3) further states that:

> "*(3) Any enterprise which is a party to an agreement which is prohibited under this section shall be liable for infringement of the prohibition*".

10.2 ENTERPRISES

146. The Commission found that Containerchain and the Target CDOs are enterprises carrying out commercial activities.

10.3 VERTICAL AGREEMENTS BY WAY OF CONCERTED PRACTICES

147. As illustrated by Figure 1 and the discussions above, Containerchain is in a vertical relationship with the Target CDOs.

148. The Commission found that Containerchain had entered into vertical agreements by way of concerted practices with the Target CDOs to fix the DGC and impose the unfair rebate through the following conduct:

(i) Mr. Tony Paldano, in or about the same time, at the meeting that took place at the Penang Konrep Depot, told Mr. Ronnie Tan that the Containerchain system could be one of the catalysts to inform the industry of the need to increase the DGC. Mr. Ronnie Tan stated that Mr. Tony Paldano emphasised that the implementation of the Containerchain system was a great opportunity for the CDOs to increase their DGC and that it was an opportunity not to be missed by the CDOs;

(ii) In the process of introducing and implementing the Containerchain system, Containerchain organised and was actively involved in the September 2012 Workshop for the purpose of influencing the general behaviour of

the Target CDOs to increase their DGC from RM5 to RM25;

(iii) Mr. Luke Duffy, in the October 2012 Workshop, informed the Target CDOs words to the following effect:

"*It was alright to charge at this rate as you will be getting RM15 at the end of 60 days while RM5 will be refunded to the Hauliers if they pay within 14 days and Containerchain will only earn RM5 for the services we provided. However, it is up to each of you to determine your depot gate charges.*";

(iv) Mr. Gan Wai Leong, upon Ayza lowering its DGC to RM15 on 1 July 2013, said to Mr. KC Tan words to the following effect:

"*Although lowering the DGC is entirely up to you, but you should try to maintain the RM25 DGC because that is what everyone is charging.*";

(v) Mr. Gan Wai Leong visited various CDOs and informed them that the other CDOs were going to charge RM25;

(vi) Mr. Gan Wai Leong, after the October 2012 Workshop, contacted Witness A to persuade him to sign up with the

Containerchain. Witness A has stated that during the course of a telephone conversation, Mr. Gan Wai Leong had said to him words to the following effect:

"*Ayza, ICS, EAE and Prompt Dynamics are the first batch and we are going to go live soon and there might not be an opening or opportunity anymore if you do not sign up.*"

"*Ayza, ICS, EAE and Prompt Dynamics are all going to charge RM25 and they are going to go live soon.*"

(vii) Mr. Gan Wai Leong, in around the same period, informed Witness A that it was important to get his depot together with the Target CDOs with the Containerchain system as it would represent at least 50% of the container depot market in Penang;

(viii) Mr. Gan Wai Leong informed Mr. Abdul Halim Mustaffa, that the CDOs implementing the Containerchain system would be charging RM25 as their new DGC and said words to the following effect:

"*The DGC can be fixed at RM25 since it was already agreed by the other depots like ICS, Ayza and EAE*";

(ix) Mr. Gan Wai Leong, prior to signing up with the Ayza, said to Mr. KC Tan words to the following effect:

"*So far, there are 3 depots who had signed up with Containerchain. They are ICS, EAE and Selama Depot. All of these depots will be charging RM25 as their new DGC.*";

(x) Mr. Gan Wai Leong informed Witness B as follows:

"*Everybody is charging RM25. If you sign up to Containerchain you can also charge the same but it is up to you.*";

(xi) Mr. Luke Duffy instructed Mr. Gan Wai Leong to inform Penang Port Sdn. Bhd. that it can stop collecting cash and start charging RM25 as its DGC;

(xii) Containerchain coordinated the implementation of the RM25 DGC and the RM5 rebate by the Target CDOs through the Containerchain System;

(xiii) Mr. Tony Paldano, in or around September 2012, discussed with Mr. Ronnie Tan and Mr. Amaiappan Retnasamy on the proposed rebate of RM5; and

(xiv) Containerchain recommended and facilitated the RM5 rebate to hauliers for early payment agreed by the Target CDOs.

10.4 ANTI-COMPETITIVE EFFECT

149. Section 4(1) of the Act states that a horizontal or vertical agreement between enterprises is prohibited insofar as the agreement has the object, or the effect, of significantly preventing, restricting, or distorting competition in any market for goods or services.

150. For the reasons discussed above, the Commission found that Containerchain had engaged in concerted practices through the following conduct:

(i) with ICS, Ayza, EAE and Prompt Dynamics which have the effect of influencing their conduct to increase their DGC from RM5 to RM25 in the market for the provision of empty container storage, maintenance and handling services within a 5-15km radius of the Penang Port; and

(ii) with the Target CDOS in which it recommended, facilitated, influenced and coordinated their conduct in agreeing to a RM5 rebate to hauliers in respect of the DGC in the market for the provision of empty container

storage, maintenance and handling services within a 5-15km radius of the Penang Port.

151. The Commission's Guidelines on Chapter 1 Prohibition stated that in order to meet the "significance" threshold, the Commission took the view that an agreement must have more than a trivial impact. A good guide to the trivial impact might be the combined market share of those participating in such an agreement. The Commission took the position that, in general, anti-competitive agreements will not be considered "significant" if:

(i) The parties to the agreement are competitors who are in the same market and their combined market share of the relevant market does not exceed 20%; and

(ii) The parties to the agreement are not competitors and all of the parties individually have less than 25% in any relevant market.

152. Containerchain supplies the Containerchain system to 53.33% of the CDOs operating in the Port Penang area. This indicates its relevant market share has exceeded the 25% indicative "safe harbours" set out in the Commission's Guidelines on the Chapter 1 Prohibition.

153. The Target CDOs have a combined market share of 64.64%. This calculation is derived from the DGC revenue data from July 2013 to July 2014 submitted by fifteen (15) CDOs including the Target CDOs. The remaining eleven (11) CDOs are Bumikon Services Sdn. Bhd., Eng Kong Container Services Sdn. Bhd., Infinity Sdn. Bhd., Konrep Services Sdn. Bhd., MISC Integrated Logistics Sdn. Bhd., Multimodal Freight Sdn. Bhd., Mutual Space Sdn. Bhd., One Century Logistics Terminal, Penang Port Sdn. Bhd. and Trilimaju Sdn. Bhd.

154. The Commission also found that Containerchain's conduct of influencing the behaviour of the Target CDOs via bringing the CDOs together in meetings; disseminating and sharing information about their revised DGCs; and coordinating the implementation of the agreed revised DGC as well as the rebate are non-trivial.

155. Accordingly, the Commission found that the vertical agreements entered into between Containerchain and the Target CDOs have the effect of significantly preventing, restricting, or distorting competition in the market for the provision of empty container storage, maintenance and handling services within a 5-15km radius of the Penang Port.

156. With regard to Containerchain's argument that a counterfactual analysis on the effects of competition is necessary, the Commission took the position that this is not a legal requirement under the Act.

157. Furthermore, a counterfactual analysis is never a mandatory requirement in any infringement by effect cases. A counterfactual analysis may assist an authority's findings in a case whereby infringement impact on competition is not obvious. The Commission in this regard viewed that effect on competition in the context of this case is obvious and more than trivial and therefore there is no necessity for the Commission to conduct any counterfactual analysis.

10.5 CONCLUSION

158. The Commission found that Containerchain and the Target CDOs have infringed section 4(1) of the Act.

11. ENTERPRISES SUBJECT TO SECTION 4(2)(a) INFRINGEMENT

159. Enterprises subject to section 4(2)(a) infringement of the Act are the Target CDOs. The details of the Target CDOs are as described above.

12. INVOLVEMENT OF THE TARGET CDOs

160. Sometime in June 2012 and August 2012, the CDOs had initial discussions amongst themselves to increase the DGC. However, since there was no consensus on the next course of action, the intention had not materialised. However, when Containerchain came into the picture and introduced the idea of the Containerchain system, the Target CDOs viewed this as an avenue for them to raise the DGC. In addition to the various industry discussions described above, the Target CDOs were involved in the following conduct.

12.1 ICS

161. Mr. Ronnie Tan has acknowledged that between the period of September 2012 and February 2013, he often attended phone calls or had informal conversations with the other CDOs regarding the Containerchain system and what ICS's revised DGC would be.

162. According to Mr. Ronnie Tan, the CDOs who contacted him included Mr. Andrew Tan of EAE and Mr. KC Tan of Ayza.

163. During these discussions, the CDOs would often enquire what each other's revised DGC was going to be[65] and Mr. Ronnie Tan informed them that he was going to charge a DGC of RM25.

164. In its representations to the Commission, ICS admitted its liability and accepted the Commission's findings.

12.2 EAE

165. Evidence gathered by the Commission shows that, in early 2013, Mr. Andrew Tan of EAE told Witness B words to the following effect:

"We and other depots have agreed to raise the depot gate charge to RM25[66]."

166. On 16 February 2013, representatives from several CDOs, including Mr. Andrew Tan of EAE, were invited for a luncheon

[65] See paragraph 22 of Mr. Ronnie Tan's Statement dated 28 October 2014.
[66] See paragraphs 6 to 8 of Witness C's Statement dated 25 October 2013.

at Kim Hee Restaurant in Penang that was held on 18 February 2013[67].

167. According to Mr. Gan Wai Leong, the purpose of the meeting was to convince the other CDOs to sign up with Containerchain[68].

168. When leaving the said luncheon, Mr. Andrew Tan reportedly told Witness B words to the following effect:

"You should join up because we have all agreed to RM25 for the depot gate charge. You should seriously consider subscribing to Containerchain[69]."

169. EAE also admitted its liability and did not dispute the Commission's findings as stated in the Proposed Decision.

12.3 AYZA

170. Upon being served with the Commission's Proposed Decision, Ayza did not make any admission although Ayza did seek a waiver of the proposed financial penalty.

171. The Commission's evidence against Ayza are as follows:

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[67] See email dated 16 February 2013 from Mr. Mariamma (of LTS) and paragraph 10 of Witness B's Statement dated 25 October 2013.
[68] See pages 30 to 31 and Mr. Gan Wai Leong's Statement dated 6 May 2014.
[69] See paragraph 10 of Witness C's Statement dated 25 October 2013.

172. Mr. KC Tan stated that, prior to signing the ISLA in November 2012, Mr. Gan Wai Leong had informed him that ICS and EAE had signed up with Containerchain. With that information, Mr. KC Tan contacted Mr. Ronnie Tan of ICS and Mr. Andrew Tan of EAE to find out what would be their DGC rate.

173. According to Mr. KC Tan, Mr. Ronnie Tan and Mr. Andrew Tan each told him:

"We are going to charge RM25 as our new Depot Gate Charge[70]*."*

174. In these conversations, they discussed that it was crucial for everyone to fix a standard DGC, failing which there would be a possibility of shipping lines switching to depots with a lower DGC.

175. Further, Mr. Ronnie Tan and Mr. Andrew Tan told Mr. KC Tan words to the following effect:

"It is crucial that we get as many depots on board with Containerchain so we can fix the same Depot Gate Charge so

[70] See paragraph 10 of Mr. Tan Kim Chuan's Statement dated 20 November 2013.

that the liners will not jump to other depots with a lower Depot Gate Charge[71]*."*

"I think we should all fix the new DGC rate at RM25 and we can tell everyone we are now investing in providing better quality services[72]*."*

176. Mr. KC Tan has indicated that, by late 2012, everyone in the industry knew what the DGC was going to be.

177. He also stated that most of the CDOs in Penang knew about the proposed RM25 as Containerchain had been informing other CDOs that ICS, EAE, Ayza had signed up with Containerchain and they were all going to charge RM25 DGC.

178. Mr. KC Tan has also stated that discussions about the DGC among CDOs were considered a "normal practice" in the industry. He further stated that the CDOs in the area of the Penang Port took the opportunity of the introduction of the Containerchain system to increase their DGC to cover additional cost being incurred by the depots.

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[71] See paragraph 13 of Mr. Tan Kim Chuan's Statement dated 20 November 2013.
[72] See paragraph 11 of Mr. Tan Kim Chuan's Statement dated 20 November 2013.

12.4 PROMPT DYNAMICS

179. Prompt Dynamics denied that it agreed with other CDOs to fix the DGC at RM25 and to impose a rebate of RM5. Prompt Dynamics also argued that it only attended the meeting conducted in September 2012 as a participant to gain knowledge on the Containerchain system. Prompt Dynamics also submitted that it attended a workshop in October 2012 for the same reason.

180. Prompt Dynamics informed the Commission that it increased its DGC from RM5 to RM25 after it saw the flyers of ICS, EAE and Ayza announcing the increase of their DGC from RM5 to RM25.

181. However, based on the evidence gathered by the Commission, Prompt Dynamics had decided to implement a DGC of RM25 sometime in February 2013, some two (2) months prior to the ICS, EAE and Ayza publicly releasing flyers regarding their price increases.

182. Witness A has informed the Commission that sometime after the October 2012 Workshop, Mr. Gan Wai Leong told him words to the following effect:

"Ayza, ICS, EAE and Prompt Dynamics are all going to charge RM25 and they are going to go live soon[73]*."*

183. Further, in the process of implementing the Containerchain system, Prompt Dynamics released similar flyers containing the same terms and conditions as the other Target CDOs, including the term 'RM5 rebate'.

184. Prompt Dynamics was also aiming to impose its increased DGC of RM25 and the RM5 rebate on 6 May 2013, the same date as ICS, Ayza and EAE, but had to delay until 20 May 2013 due to technical issues, as referred to above.

[73] See paragraph 12 of Witness A's Statement dated 25 October 2013.

13. LEGAL AND ECONOMIC ASSESSMENTS FOR SECTION 4(2)(a) INFRINGEMENT

13.1 APPLICATION OF SECTION 4(2)(a) OF THE ACT

185. Section 4(2) of the Act states that:

"(2) Without prejudice to the generality of subsection (1), a horizontal agreement between enterprises which has the object to –

(a) fix, directly or indirectly, a purchase or selling price or any other trading conditions;
(b) share market or sources of supply;
(c) limit or control –
  a. production;
  b. market outlets or market access;
  c. technical or technological development; or
  d. investment; or
(d) perform an act of bid rigging."

186. Section 4(3) further states that:

"*(3) Any enterprise which is a party to an agreement which is prohibited under this section shall be liable for infringement of the prohibition*".

13.2 ENTERPRISES

187. The Target CDOs are enterprises carrying out commercial activities.

13.3 HORIZONTAL AGREEMENT

188. The Target CDOs are in a horizontal relationship with each other as they are operating at the same level of the distribution chain within a 5-15km radius of Penang Port.

189. In the circumstances, the Target CDOs had:

(i) In a meeting held in August 2012 communicated and discussed amongst themselves regarding the ICS' intention to increase its DGC;

(ii) In the October 2012 Workshop, Mr. Ronnie Tan said words to the following effect:

"*We should all now fix RM25 for the depot gate charge. This is our perfect opportunity to raise the depot gate charge because Port Klang has already raised their depot gate charge. We have not had an opportunity for us to raise the price before this.*"

(iii) Contacted each other, discussed and exchanged information about the revised DGC;

(iv) Announced the proposed increase in DGC and the RM5 rebate in or about the same time through flyers and the CAA; and

(v) Implemented the increase in DGC and the RM5 rebate in or about the same time.

190. The Commission therefore found that the Target CDOs have entered into a horizontal agreement with one another.

13.4 ANTI-COMPETITIVE OBJECT

191. Section 4(2)(a) of the Act provides that a horizontal agreement between enterprises which has the object to fix, directly or indirectly, a purchase or selling price or any other trading conditions is deemed to have the object of significantly preventing, restricting, or distorting competition in any market for goods or services.

192. The Commission found that, during the process of introducing and implementing the Containerchain system, the Target CDOs collectively:

(i) Increased their DGC from RM5 to RM25 around the same period; and

(ii) Implemented a RM5 rebate to hauliers on the same date they increased their respective DGC.

193. The Commission therefore found that the horizontal agreement entered into by the Target CDOs is a price fixing agreement, which is thereby deemed to have the object of significantly preventing, restricting or distorting competition in the market for the provision of empty container storage maintenance and handling services within a 5-15km radius of the Penang Port.

13.5 CONCLUSION

194. The Commission found that the Target CDOs have infringed section 4(2)(a) of the Act.

14. ADDITIONAL OBSERVATIONS

195. The Commission has observed the following market developments subsequent to the Target CDOs increasing the DGC from RM5 to RM25:

(i) Four (4) CDOs who subsequently implemented the Containerchain system increased their DGC from RM5 to between RM23 and RM25; and

(ii) Five (5) CDOs who did not implement the Containerchain system have also increased their DGC from RM5 to between RM20 and RM25.

TABLE 1: LEVEL AND STRUCTURE OF DGC AS OF 1 JULY 2014

CDO	DGC	Date introduced	Rebate
(a) *CDOs who have implemented the Containerchain system			
Mutual Space	25	1/11/13	RM5 if DGC is paid within 14 days
Konrep	25	3/3/14	RM3 if DGC is paid within 30 days
Sony Depot	25	15/4/14	RM5 if DGC is paid within 14 days
MISC	23	15/5/14	RM3 if DGC is paid within 30 days
(b) *CDOs who did not implement the Containerchain system			

Eng Kong	20	1/8/13	RM5 (no information on condition for rebate)
OCT1	25	30/9/13	(no information on condition for rebate)
MSC	25	2/1/14	(no rebate)
Bumikon	25	1/6/14	RM5 if DGC is paid within 14 days
Trilimaju	20	2/6/14	(no rebate)

[*] As at the time when rate information was obtained.

15. REMEDIES

195. Section 40(1) of the Act provides that:

"If the Commission determines there is an infringement of a prohibition under Part II, it –

(a) shall require the infringement to be ceased immediately;

(b) may specify steps which are required to be taken by the infringing enterprises, which appear to the Commission to be appropriate for bringing the infringement to an end;

(c) may impose a financial penalty; or

(d) may give any other direction as it deems appropriate.

196. Any financial penalty imposed by the Commission shall not exceed the statutory maximum established by section 40(4) which provides:

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

197. The Commission imposed financial penalties against the Target Enterprises as stated in Table 3 below. Additional financial penalties of RM7,000.00 shall be imposed on any of the Target Enterprises for each day the Target Enterprises fail to comply with the following remedial actions within thirty (30) days from the date of this Decision:

(i) Ayza, ICS, EAE and Prompt Dynamics to cease and desist from implementing the agreed rate for the DGC and rebate which arose from their anti-competitive conduct;

(ii) In line with the above direction, clause 7 of the CAA that stipulated the DGC and the rebate or any similar clauses shall be removed as this clause is anti-competitive in nature;

(iii) The CAA published on the Containerchain system shall not contain any clause which may allow the sharing of confidential information relating to any CDO who has subscribed to the Containerchain system;

(iv) Containerchain to provide an undertaking in the form and manner acceptable to the Commission to reconfigure the Containerchain system in order to ensure that it is not

being used for any anti-competitive conduct including those mentioned in paragraph 197(i) above; and

(v) All future prices and other trading conditions should be determined independently by all CDOs who have subscribed to the Containerchain system.

15.1 DETERMINATION OF FINANCIAL PENALTIES

198. The Commission took into consideration the following factors in determining the amount of financial penalties to be imposed on the Target Enterprises:

(i) Seriousness (gravity) of the infringement/ Impact of the infringement;

(ii) Duration of the infringement;

(iii) The relevant turnover of the Target Enterprises for the period of infringement;

(iv) Aggravating and mitigating factors; and

(v) Financial penalty is no more than 10% of the target enterprise's worldwide turnover.

199. The infringements caused a wide impact within the industry as majority of the CDOs in Penang increased their DGC regardless of their respective cost structures and/or whether or not they implemented the Containerchain system.

200. Even though Ayza reduced its DGC to RM23.00 and ICS increased its DGC to RM26.00, all of the Target CDOs are still giving RM5.00 rebate to the hauliers. This indicates that the Target CDOs are still implementing the agreements.

201. The Commission decided that Containerchain is liable as long as the concerted practice or agreement to fix the DGC continues.

202. The infringement period began when the Target CDOs signed the ISLAs with the Containerchain and the cut-off date is 14 May 2015 when the Commission served its Proposed Decision on the Target Enterprises.

TABLE 2: DURATION OF INFRINGEMENT BY THE TARGET ENTERPRISES

No.	Enterprises	Infringement Periods
1.	Containerchain (Malaysia) Sdn. Bhd.	1 October 2012 until 14 May 2015
2.	Ayza Industries Sdn. Bhd./ Ayza Logistics Sdn. Bhd.	27 November 2012 until 14 May 2015

No.	Enterprises	Infringement Periods
3.	ICS Depot Services Sdn. Bhd.	1 October 2012 until 14 May 2015
4.	E.A.E. Depot & Freight Forwarding Sdn. Bhd.	1 October 2012 until 14 May 2015
5.	Prompt Dynamics Sdn. Bhd.	2 October 2012 until 14 May 2015

203. The Commission took into account the Containerchain's turnover generated from the fixed fee of RM5.00 per transaction which was imposed on the Target CDOs throughout the infringement period. The Commission also took into account each Target CDO's turnover generated from the RM15.00 DCG (excluding RM 5.00 fixed fee paid to Containerchain and RM5.00 rebate to the haulier) throughout their respective infringement periods[74] as mentioned above.

204. After taking into account the written and oral representations of the Target Enterprises, the Commission held that there is no aggravating factor on any of the Target Enterprises. However, the Commission decided to reduce the financial penalty on ICS after taking into consideration its significant cooperation throughout the investigation process. In this case, all the Target Enterprises were approached by the Commission to assist the

[74] Data on the relevant turnover was provided by the respective Target Enterprises.

Commission at the later stage of its investigations. However, ICS was the only enterprise that came forward and had been fully cooperative with the provision of the additional relevant facts and evidence.

205. Therefore, the Commission decided to impose the following financial penalties on the Target Enterprises.

TABLE 3: THE FINANCIAL PENALTIES ON THE TARGET ENTERPRISES

No	Enterprises	Financial Penalties
1.	Containerchain (Malaysia) Sdn. Bhd.	RM 158,901.00
2.	Ayza Industries Sdn. Bhd./ Ayza Logistics Sdn. Bhd.	RM 52,980.00
3.	EAE Depot & Freight Forwarding Sdn. Bhd.	RM 163,623.00
4.	ICS Depot Services Sdn. Bhd.	RM 118,228.00
5.	Prompt Dynamics Sdn. Bhd.	RM 152,042.00
Total		**RM 645,774.00**

206. The financial penalties do not exceed 10% of the Target Enterprises' worldwide turnovers[75].

[75] Data on the worldwide turnover was provided by the respective Target Enterprises.

16. CONCLUSION

207. In view of the foregoing, the Commission held that Containerchain has entered into vertical agreements by way of concerted practices with the Target CDOs and their conduct has infringed section 4(1) of the Act. The Commission further determined that the Target CDOs have infringed section 4(2)(a) of the Act by entering into a horizontal agreement to fix the depot gate charges.

208. The Commission imposed financial penalties against the Target Enterprises as stated in Table 3 above. Additional financial penalties of RM7,000.00 shall be imposed on any of the Target Enterprises for each day the Target CDOs fail to comply with the following remedial actions within thirty (30) days from the date of this Decision:

(i) Ayza, ICS, EAE and Prompt Dynamics to cease and desist from implementing the agreed rate for the DGC and rebate which arose from their anti-competitive conduct;

(ii) In line with the above direction, clause 7 of the CAA that stipulated the DGC and the rebate or any similar clauses shall be removed as this clause is anti-competitive in nature;

(iii) The CAA published on the Containerchain system shall not contain any clause which may allow the sharing of confidential information relating to any CDO who has subscribed to the Containerchain system;

(iv) Containerchain to provide an undertaking in the form and manner acceptable to the Commission to reconfigure the Containerchain system in order to ensure that it is not being used for any anti-competitive conduct including those mentioned in paragraph 208(i); and

(v) All future prices and other trading conditions should be determined independently by all CDOs who have subscribed to the Containerchain system.