DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
DALAM WILAYAH PERSEKUTUAN KUALA LUMPUR
(BAHAGIAN KUASA-KUASA KHAS)
PERMOHONAN BAGI SEMAKAN KEHAKIMAN NO.: WA-25-109-03/2024

Dalam perkara Tribunal Rayuan Persaingan Rayuan No.1 Tahun 2021 antara Dagang Net Technologies Sdn Bhd (No. Syarikat: 177974-T) dengan Suruhanjaya Persaingan;

Dan

Dalam perkara keputusan Tribunal Rayuan Persaingan Rayuan No. 1 Tahun 2021 bertarikh 18/12/2023 yang diputuskan oleh Dato' Abdul Aziz bin Abdul Rahim (Pengerusi), Datuk Dr. Mohd Gazali bin Abas (Ahli Tribunal Rayuan Persaingan) dan Datuk Mohd Rafee bin Mohamed (Ahli Tribunal Rayuan Persaingan);

Dan

Dalam perkara Tribunal Rayuan Persaingan mengenai Kes No. 700-2/2/003/2015;

Dan

Dalam perkara Notis Dapatan Pelanggaran oleh Suruhanjaya Persaingan bertarikh 26/2/2021 di bawah Seksyen 40 Akta Persaingan 2010;

Dan

S/N jS/aEKdG0mZz7Su6Sy1Wg
**Note : Serial number will be used to verify the originality of this document via eFILING portal

Dalam perkara Keputusan Muktamad Suruhanjaya Persaingan mengenai Kes No. 700-2/2/003/2015 bertarikh 16/2/2021;

Dan

Dalam perkara Keputusan yang Dicadangkan oleh Suruhanjaya Persaingan menurut Seksyen 36 Akta Persaingan 2010 mengenai MyCC Rujukan Fail: MyCC(ED)700-2.2.003.2015 bertarikh 6/4/2018;

Dan

Dalam perkara Perkara 5 dan 8 Perlembagaan Persekutuan;

Dan

Dalam perkara Seksyen 25 (2) dan Jadual Akta Mahkamah Kehakiman 1964;

Dan

Dalam perkara Aturan 53 Kaedah- kaedah Mahkamah 2012 dan/atau di bawah bidang kuasa sedia ada Mahkamah yang Mulia ini;

Dan

Dalam perkara Akta Persaingan 2010, antara lain, Seksyen-seksyen 2, 10, 13, 36, 39, 40, dan 58;

Dan

S/N jS/aEKdG0mZz7Su6Sy1Wg
**Note : Serial number will be used to verify the originality of this document via eFILING portal

Dalam perkara Akta Suruhanjaya Persaingan 2010;

Dan

Dalam perkara Peraturan-peraturan Persaingan (Tribunal Rayuan) 2017, antara lain, Peraturan 3.

ANTARA

DAGANG NET TECHNOLOGIES SDN BHD
(NO. SYARIKAT: 177974-T) **… PEMOHON**

DAN

1. TRIBUNAL RAYUAN PERSAINGAN

2. SURUHANJAYA PERSAINGAN … RESPONDEN-RESPONDEN

GROUNDS OF JUDGMENT

Introduction

1. The present proceedings result from the imposition of Exclusivity Clauses in the agreements entered into between the Applicant and its business partners.

2. Upon receipts of two complaints, the Competition Commission ("**MyCC**") commenced investigation pertaining to the Applicant

S/N jS/aEKdG0mZz7Su6Sy1Wg
**Note : Serial number will be used to verify the originality of this document via eFILING portal

having engaged in conduct which constituted an abuse of its dominant position under section 10(1) of the Competition Act 2010.

3. A Notice under section 18(1)(a) of the Act was issued to provide information and documents, following which MyCC then issued a Proposed Decision. The Applicant was allowed to submit its written and oral representation to the Proposed Decision.

4. Upon considering the representations, MyCC then made a Final Decision, resulting in the issuance of a Notice of Finding of Infringement under the Act. The Applicant was directed to cease its actions which had the effect of disrupting competition. MyCC also ordered its directors and senior management executives to enroll into a competition compliance program. In addition, a financial penalty of RM 10,302,475.97 was imposed.

5. Against MyCC's decision, the Applicant appealed to the Competition Appeal Tribunal ("**CAT**"). On 18.1.2023, the CAT affirmed the decision of MyCC. Aggrieved with the decision of the CAT, the Applicant files the present Judicial Review application.

6. The reliefs sought are as follows:

   (i) An order of certiorari for the decision of the Competition Appeal Tribunal Appeal No 1 of 2021 dated 18.12.2023 ("**CAT Decision**") handed down by Dato' Abdul Aziz bin Abdul Rahim (Chairman), Datuk Dr Mohd Gazali bin Abas (Member of the Competition Appeal Tribunal) and Datuk

S/N jS/aEKdG0mZz7Su6Sy1Wg
**Note : Serial number will be used to verify the originality of this document via eFILING portal

Mohd Rafee bin Mohamed (Member of the Competition Appeal Tribunal) to be quashed forthwith;

(ii) Consequentially to prayer (a) above, an order of certiorari for the Notice of Finding of Infringement by the Competition Commission dated 26.2.2021 under section 40 of the Competition Act 2010 ("**Section 40 Notice**") which enclosed the Final Decision of the Competition Commission in respect of case No. 700-2/2/003/2015 dated 16.2.2021 ("**Final Decision**") to be quashed forthwith; and

(iii) A declaration that the CAT Decision was tainted with procedural impropriety, illegality and/or irrationality;

(iv) A declaration that the CAT Decision, the Section 40 Notice and the Final Decision are collectively revoked, null and void and of no effect;

(v) A declaration that the Competition Commission is to forthwith pay the Applicant the sum of RM 10,302,475.98 being the financial penalty imposed under Section 40 (1)(c) and Section 40 (4) of the Competition Act 2010 against the Applicant which has been fully paid to the Competition Commission; and

(vi) An order of *mandamus* that the Competition Commission is to forthwith pay the Applicant the sum of RM 10,302,475.97 being the financial penalty imposed under section 40(4) of

S/N jS/aEKdG0mZz7Su6Sy1Wg
**Note : Serial number will be used to verify the originality of this document via eFILING portal

the Competition Act 2010 against the Applicant which has been fully paid to the Competition Commission.

History of the NSW and uCustoms

7. This case is set against the following developments. Sometime before the turn of the century, the Government decided that Customs declarations are to be submitted electronically to enhance its tax collection system and to facilitate trading in Malaysia. Towards that end, Edaran IT Services Sdn Bhd was awarded the tender to develop the Sistem Maklumat Kastam ("**SMK**") for the Royal Malaysian Customs ("**RMC**").

8. Subsequent thereto, the Government decided to implement a trade documentation system which would be connected to the SMK of the RMC to facilitate the exchange of data, submission of documents and transmission of messages electronically using the United Nations/EDIFACT standards.

9. Pursuant to an agreement dated 1/3/2005 ("**TDS Agreement**"), the Government engaged the Applicant ("**Dagang Net**") to operate the system. The tenure of the TDS Agreement was up to 24/9/2009

10. In 2009, the Government was desirous of establishing a system for trade facilitation for the purposes of:

    (i) enabling a secure, safe, and efficient electronic exchange of trade-related documents through a single point of entry in

S/N jS/aEKdG0mZz7Su6Sy1Wg
**Note : Serial number will be used to verify the originality of this document via eFILING portal

order to expedite the smooth flow of information and goods for import, export or transit;

(ii) simplifying, standardising and harmonising trade processes and thereby enhancing trade efficiency and national competitiveness; and

(iii) facilitating the exchange of international trade data through the NSW via seamless connection or integration with the ASEAN Single Window and/or its other trading partners.

11. Pursuant to an *Agreement for the Design, Development, Operation and Maintenance of the National Single Window for Trade Facilitation System* dated 19.11.2009 ("**NSW Agreement**"), the Government appointed Dagang Net to design, develop, operate and maintain the National Single Window system ("**NSW**") for the purpose of providing front-end services to End-Users.

12. The NSW is an electronic-based eco system that enables Customs related documents and transactions to be transferred electronically between the trading communities and regulatory authorities in Malaysia via a single point of entry. NSW provides services necessary for trade facilitation. To name a few, they are customs declarations, customs duty payment and preparation of permit for approval. All these services are essential to the end users when carrying out import and export trading services.

13. The NSW operated by Dagang Net is connected to the SMK.

S/N jS/aEKdG0mZz7Su6Sy1Wg
**Note : Serial number will be used to verify the originality of this document via eFILING portal

14. The end users can use any of the following methods for Customs Declaration:

(i) eDeclare through Dagang Net's own online web portal;

(ii) Enterprise Application Interface which is the end users' own back-end software; and

(iii) Software from the software providers.

15. Since no other enterprise was appointed by the Government, Dagang Net became the sole provider for the NSW. The concession was renewed several times; the last extension was up to until 31.8.2024.

16. To facilitate the provision of its services, Dagang Net entered into partner agreements with other software providers. Between 15.4.2008 to 17.4.2009, Dagang Net entered into Master Solution Partner Agreements ("**MSPA**") with some of the software providers for a term of 5 years. Among others, was Rank Alpha Technologies Sdn. Bhd. ("**Rank Alpha**") which was to later lodge one of the two complaints with MyCC. None of these agreements contained any exclusivity clauses.

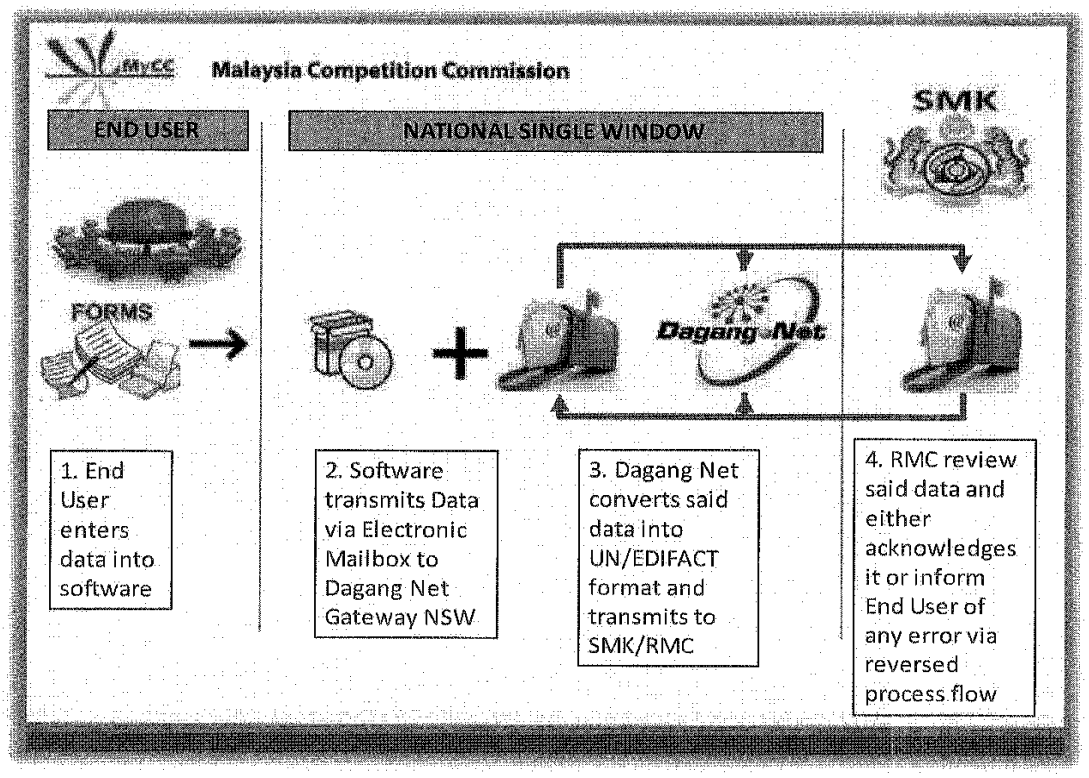
17. In utilizing the software, end users will purchase the software from the software providers. The software must be connected to an electronic mailbox in order to transmit the trade facilitation data. End users will not be able to use the software without the electronic

S/N jS/aEKdG0mZz7Su6Sy1Wg
**Note : Serial number will be used to verify the originality of this document via eFILING portal

mailbox. Dagang Net was the sole generator of the electronic mailbox.

18. The process flow for the submission and transmission of Customs Declarations from end user to the RMC is graphically presented as follows:

Diagram 2: Process flow for the submission and transmission of Customs Declarations from the end user to the RMC



19. Sometime in 2013, the Government envisioned the Ubiquitous Customs system ("**uCustoms**") which would see the merger of the NSW-SMK system. The projected launching date was to be in 2016. The uCustoms will provide a one-stop center for trade facilitation providing end to end services for end users in terms of obtaining or submitting relevant trade facilitation documents to/from government agencies and/or to the RMC.

S/N jS/aEKdG0mZz7Su6Sy1Wg
**Note : Serial number will be used to verify the originality of this document via eFILING portal

20. On 23.5.2015, Dagang Net issued an invitation letter to Rank Alpha to participate in the new partner programme named MyChannel Partner Agreement ("**MCPA**"). The invitation letter contained the terms and conditions of the MCPA, which included the Exclusivity Clause stipulating that during the tenure of the MCPA, Rank Alpha shall not engage with other Service Providers, to be appointed by the RMC under uCustoms.

21. Subsequent thereto, Dagang Net entered into MCPA with its other business partners, where the Exclusivity Clause was imposed.

22. On 23.11.2015, the RMC announced the appointments of Dagang Net and Edaran Trade as the National Single Window Service Providers for the uCustoms to all relevant stakeholders in a circular issued. The appointment of more than one service provider was intended to provide more value-added services to the end users.

23. On 2.12.2015, Rank Alpha lodged a complaint to MyCC that Dagang Net had engaged in conduct which amounted to an abuse of its dominant position as the government appointed sole operator of the NSW in relation to electronic trade facilitation data transmission by end users to the RMC.

24. On 21.6.2016, MyCC commenced an investigation under section 15(1) of the Act.

25. On 4.1.2017, Titimas Logistics Sdn Bhd ("**Titimas**") lodged a complaint with MyCC on the refusal by Dagang Net to supply electronic mailboxes to the end users.

S/N jS/aEKdG0mZz7Su6Sy1Wg
**Note : Serial number will be used to verify the originality of this document via eFILING portal

26. Subsequent to the complaint by Rank Alpha, Dagang Net entered into supplemental agreements with some of its business partners to remove the Exclusivity Clause.

MyCC's decision

27. On 6.4.2018, MyCC issued its Proposed Decision pursuant to Section 36 of the Competition Act 2010 ("**the Act**"). In the Proposed Decision, MyCC made a finding that Dagang Net had abused its dominant position by:

(i) Refusing to supply the electronic mailboxes for the submission of trade facilitation data to the SMK via the NSW; and

(ii) Imposing an exclusivity clause in the MCPA agreements made between the software providers in the year 2015 to 2016.

28. Following this, Dagang Net was granted access to MyCC's files and submitted its written representations to MyCC on 30.8.2018, 25.4.2019 and 29.7.2019, and was also given the opportunity to make oral representations to MyCC on 16.1.2019, 25.4.2019 and 29.7.2019.

29. On 16.2.2021, after considering the representations made by Dagang Net, MyCC issued its Final Decision. The primary finding was that Dagang Net had infringed section 10(1) of the Act by engaging in exclusive dealing through the imposition of the

S/N jS/aEKdG0mZz7Su6Sy1Wg
**Note : Serial number will be used to verify the originality of this document via eFILING portal

Exclusivity Clauses in the MCPA between Dagang Net and the software providers in the year 2015 and 2016.

30. In the Final Decision, MyCC also found that the refusal to supply electronic mailboxes by Dagang Net did not infringe section 10 of the Act as it did not significantly prevent, restrict or distort competition.

31. Accordingly, in respect of the infringement of section 10(1) of the Act in respect of the imposition of the Exclusivity Clause, MyCC imposed the following:

(i) A direction to cease and desist, and refrain from taking any measure having the same object or effect as to the previous exclusivity clause that may disrupt competition in the provision of trade facilitation services;

(ii) A direction for Dagang Net to enroll its directors and senior management executives of Dagang Net into a competition law compliance program and training within 3 months of the date of the decision; and

(iii) A financial penalty of RM 10,302,475.97.

The CAT appeal

32. On 17.3.2021, pursuant to Section 51 of the Act, Dagang Net filed its appeal to the CAT against MyCC's Final Decision. Dagang Net also filed an application to cross examine several individuals. The

S/N jS/aEKdG0mZz7Su6Sy1Wg
**Note : Serial number will be used to verify the originality of this document via eFILING portal

CAT directed that the appeal be heard first, and should the need arise, they would direct for witnesses to be called for cross-examination.

33. The CAT subsequently took the position that the cross-examination of witnesses was not necessary for the disposal of the appeal.

34. It is to be noted that prior to the issuance of MyCC's Final Decision, Dagang Net had also requested for an opportunity to cross-examine specific individuals previously interviewed by MyCC. This request was considered but eventually denied by MyCC.

35. The hearing of Dagang Net's appeal was conducted on 14 March 2023 and 15 March 2023.

36. The CAT decision was delivered on 18.12.2023, affirming MyCC's Final Decision.

Grounds for judicial review

37. Dagang Net contends that the decision of the CAT was tainted with procedural impropriety, illegality and/or irrationality. The reasons have been summarized by its counsel as follows:

38. With respect to the ground of procedural impropriety,

(i) In the section 18(1)(a) Notice, MyCC notified Dagang Net of investigation related to complaints of refusal to supply mailboxes. However, the Proposed Decision then went

S/N jS/aEKdG0mZz7Su6Sy1Wg
**Note : Serial number will be used to verify the originality of this document via eFILING portal

beyond the scope of the S.18(1)(a) Notice to include a finding that Dagang Net had abused its dominant position by the imposition of an Exclusivity Clause;

(ii) MyCC revised the definition of 'relevant market' in the Final Decision without adequately giving Dagang Net the opportunity to respond to the revised definition of the same;

(iii) CAT refused to allow the Cross-Examination application to afford Dagang Net the opportunity to clarify facts relied on by MyCC which were biased and/or baseless.

39. With respect to the ground of illegality,

(i) Dagang Net holds a monopoly in the relevant market for trade facilitation under the NSW. In this regard the cases of **Labuan Ferry Corp Sdn Bhd v Chin Mui Kien [2018] 3 MLJ 256** and **Real Big Ventures Sdn Bhd v Pentadbir Daerah Tanah Petaling & Ors [2022] MLJU 1198** are applicable as they held that a monopoly does not come within the purview of the Act. For the purpose of the alleged horizontal anti-competitive act, Dagang Net was a monopoly; and

(ii) CAT had wrongly accepted MyCC's reliance on **MY E.G. Services Berhad & Anor v Competition Commission & Anor [2020] 3 CLJ 36** and EU cases despite the fact that the *MY E.G* case was differentiated from the present case

S/N jS/aEKdG0mZz7Su6Sy1Wg
**Note : Serial number will be used to verify the originality of this document via eFILING portal

and that EU law was different as it involves various member states within a “super nation”.

40. With respect to the ground of irrationality/unreasonableness,

(i) The CAT failed to consider that MyCC did not provide its explanation on how it arrived at the revised relevant market. Its definition of the relevant market shifted from the definition in the Proposed Decision when it delivered the Final Decision;

(ii) If MyCC had applied the relevant tests, it would have identified that Dagang Net had no competition as the NSW and uCustoms is not interchangeable or substitutable;

(iii) There is no evidence of the effects of the alleged non-competitive act despite abundance of opportunity for MyCC to obtain the same during the course of its interview process with the end-users of the NSW;

(iv) The CAT accepted the fact that MyCC had placed reliance on the evidence of Nor Fauzi who was identified as biased by Dagang Net and did not have any relevant qualifications without affording the Applicant the chance to examine him.

S/N jS/aEKdG0mZz7Su6Sy1Wg
**Note : Serial number will be used to verify the originality of this document via eFILING portal

Analysis and findings

Key principles

41. The grounds upon which a decision of an inferior tribunal can be successfully challenged in judicial review proceedings, namely procedural impropriety, illegality and irrationality are settled and trite law (See: **R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145**).

42. I shall now deal with the issues arising from arguments advanced by Dagang Net in support of its case.

Procedural Impropriety- Proposed Decision went beyond complaints in s. 18(1)(c) Notice

43. On 13.4.2017, MyCC notified Dagang Net via a section 18 (1)(a) Notice that it was investigating into two complaints received on 2.12.2015 and 4.1.2017, by Rank Alpha and Titimas. These complaints were related to its refusal to supply mailboxes. It added that Dagang Net was suspected to have infringed section 10(2)(b) and section 10(2)(c) of the Act.

44. The Proposed Decision of 6.4.2018 however, went on to find that Dagang Net had abused its dominant position by:

    (i) Refusing to supply electronic mailboxes for the submission of trade facilitation data to the SMK via the NSW to Rank Alpha and Wynet; and

S/N jS/aEKdG0mZz7Su6Sy1Wg
**Note : Serial number will be used to verify the originality of this document via eFILING portal

(ii) Imposition of an Exclusivity Clause which had the potential effect of raising barriers to entry for Edaran Trade under the uCustoms market.

45. In view of the findings of MyCC, Dagang Net then contends that MyCC had gone beyond the scope of the section 18 (1)(a) Notice.

46. I find nothing turns on this ground. The Proposed Decision was notified to Dagang Net in accordance with the provisions of s. 36 of the Act. It had sufficiently set out the reasons for the Proposed Decision in detail so as to allow Dagang Net to comment and make its representations thereto.

47. It cannot be disputed that Dagang Net was aware of the substance of the investigations. MyCC had made it clear that investigations were conducted not only in respect of refusal to supply mail boxes, but also into the exclusive arrangement with its business partners. This is evident from the following paragraphs of its Final Decision:

> 2. On 2.12.2015, the Commission received a complaint made by Rank Alpha. In its complaint, Rank Alpha alleged that Dagang Net had engaged in conduct which amount to an abuse of its dominant position as the government appointed sole operator of the National Single Window in relation to electronic trade facilitation data transmission by end users to the RMC.
>
> 3. Upon conducting a preliminary inquiry, the Commission identified the following conduct on the part of Dagang Net: an imposition of an exclusive dealing arrangement and a refusal to supply the electronic mailboxes by Dagang Net.

S/N jS/aEKdG0mZz7Su6Sy1Wg
**Note : Serial number will be used to verify the originality of this document via eFILING portal

> 50. The Commission commenced its investigations in respect of the complaints over Dagang Net's conduct of imposing the exclusivity clause in the MCPA on the software providers.

48. More importantly, having been informed of the Proposed Decision, Dagang Net knew what it was required to make representations in respect of.

49. In the circumstances, there can be no procedural impropriety or breach of natural justice as alleged.

Procedural Impropriety-widening the definition of relevant market

50. The definition of market is significant in the context of the infringement provision. Section 10 of the Competition Act provides:

> **Abuse of dominant position is prohibited**
>
> 10. (1) An enterprise is prohibited from engaging, whether independently or collectively, in any conduct which amounts to an abuse of a dominant position in any market for goods or services.

51. MyCC is said to have widened the definition of the relevant market in its Proposed Decision from "*provision of trade facilitation services under the National Single Window"* to "*provision of trade facilitation in Malaysia*" in its Final Decision. Having changed the definition, the CAT ought to have known that Dagang Net was not given an opportunity to respond before the Final Decision was issued.

S/N jS/aEKdG0mZz7Su6Sy1Wg
**Note : Serial number will be used to verify the originality of this document via eFILING portal

52. The contention presupposes that MyCC had in fact shifted its definition. I find no merit in this allegation. A careful reading of MyCC's Proposed Decision shows that it considered the relevant market to comprise of both the NSW and the uCustoms system. Paragraph 208 of the Proposed Decision reads:

> 208. The relevant market concerns the provision of trade facilitation services under the National Single Window ("NSW") of which Dagang Net as the sole service provider occupies the upstream level whilst Rank Alpha and Wynet as the providers of front-end software solutions for the submission of trade facilitation data to the System Maklumat Kastam (SMK) via the NSW occupy the downstream level of the said market. A related market here is that of the upcoming UCustoms System which will replace the NSW at a later date.

53. Paragraph 218 and 219 of the Proposed Decision further confirms that uCustoms was considered a relevant market for assessment:

> 218. Though not yet existent, the uCustoms system is, in the Commission's view, also a relevant market for assessment as the imposition of the above-mentioned exclusivity clause is related to its implementation which will replace the current NSW for national trade facilitation.
>
> 219. The imposition of the exclusivity clause by Dagang Net raises competition concerns not only in the current NSW system as described above but also in the upcoming uCustoms system as it has the potential effect of raising barriers to entry for Edaran Trade to the market for trade facilitation services in the uCustoms operating environment to the extent that they may not be able to compete effectively with Dagang Net when they enter the market with the implementation of the uCustoms system.

S/N jS/aEKdG0mZz7Su6Sy1Wg
**Note : Serial number will be used to verify the originality of this document via eFILING portal

54. It is therefore evident that MyCC had taken into consideration RMC's proposal to improve the trade facilitation services through the uCustoms system project. At the time of the investigation, MyCC was aware that the uCustoms systems had not been implemented. Nonetheless, it was considered as a relevant market for assessment.

55. Further, Dagang Net's contention that it was not given an opportunity to respond to MyCC's definition of relevant market which includes uCustoms, lacks merit. The evidence shows to the contrary. Its own written representation to the Proposed Decision addressed the uCustoms environment as shown below:

Uncertainty of the uCustoms environment 78. At the present moment, no one is certain of the uCustoms environment. As such, the Company is unable to ascertain if the uCustoms evironment is similar to that of the SMK/NSW.

The Genesis of the Exclusivity Clause ('the Clause') (Paragraphs 181 to 184) 79. As the uCustoms environment is uncertain, the Company is equally uncertain whether there would be changes to the requirements under the uCustoms environment.

132. As explained by Wan Ahmad Syatibi and Dato' Patrick Wong and Datuk Samsul, the Clause does not prevent a particular user from using only one front end or service provider in the uCustoms environment. Their testimonies are as follows:-…

S/N jS/aEKdG0mZz7Su6Sy1Wg
**Note : Serial number will be used to verify the originality of this document via eFILING portal

56. The same issue was raised before the CAT. MyCC's definition of relevant market was considered and confirmed by CAT. This is evident from CAT's decision at paragraph 30, reproduced below:

> [31] Regarding the issues of approbation and reprobation by the respondent we do not think there is any merit at all. At paragraph 208 of the respondent's proposed decision, the respondent already identified uCustoms system as the related market. And the appellant is aware of this fact because the proposed decision was given to the appellant to comment upon and in fact the appellant was given opportunity by the respondent to make representations on the proposed decision. Furthermore, since 2009 the appellant had been the sole service provide for trade facilitation services for the RMC. This was, and still is, the systems that is operational for the purpose of trade facilitation services with the RMC using the SMK and the NSW until the Government (i.e. RMC) announced the proposed uCustoms system that will eventually merge with and replace the ongoing NSW. But the nature and kind of services offered for trade facilitation under the proposed uCustoms is still the same – the trade facilitations services. Thus, in our view it is still the same market; it is only a migration from one existing system to an enhanced and probably more efficient system. Therefore, we find no merit in this ground of appeal by the appellant.

57. CAT affirmatively found that MyCC's definition of the relevant market in the Proposed Decision had included the uCustoms. This demolishes Dagang Net's contention that the definition was widened in the Final Decision to include the uCustoms.

58. I therefore find no denial of natural justice as Dagang Net was given the right to be heard on the issue of relevant market. Consequently, the complaint that there was procedural impropriety premised on the change in the definition has no basis.

S/N jS/aEKdG0mZz7Su6Sy1Wg
**Note : Serial number will be used to verify the originality of this document via eFILING portal

Procedural Impropriety-breach of natural justice in refusing cross examination of witnesses

59. Dagang Net's complaint of breach of natural justice stems from not being allowed to cross-examine witnesses in the appeal. The same request was also refused by MyCC. These were individuals interviewed by MyCC whom Dagang Net viewed as having personal interests in the outcome of the complaint made to MyCC.

60. In addition, Dagang Net submitted that it was imperative to cross-examine some individuals for the purpose of verifying that there were technical and security risks in the use of unauthorized software. This was to substantiate Dagang Net's reason for the imposition of the exclusivity clauses which it contends was introduced to avoid possible security issues.

61. To my mind, Dagang Net has no automatic right to cross-examine witnesses. The provisions of s. 38 of the Act gives MyCC the discretion to decide on manner in which witnesses are to be heard. The provision reads:

> **Conduct of hearings**
>
> **38**. (1) Notwithstanding section 37, the Commission may at any time conduct a hearing for the purpose of determining whether an enterprise has infringed or is infringing any prohibition under Part II.
>
> …
>
> (3) When the Commission decides to hold a hearing, the Commission shall also decide—

S/N jS/aEKdG0mZz7Su6Sy1Wg
**Note : Serial number will be used to verify the originality of this document via eFILING portal

(a) whether to hold individual hearings with each of the enterprises and any other interested third parties separately or to hold a single hearing attended by all the enterprises involved and the interested third parties;

62. There is nothing in the provision which makes it mandatory to allow witnesses who had been interviewed by MyCC to be cross-examined by the party against whom the complaint is lodged.

63. Similarly, at the appeal, the CAT is given the discretion in relation to a request to cross-examine a witness. This is evident from the provisions of Regulation 13 of the Competition (Appeal Tribunal) Regulations 2017. It states that:

13. Directions

(1) The Tribunal may give direction under paragraph 57(1)(g) of the Act at any time, whether at a case management or otherwise, on its own motion or on the request of any party, as may be necessary or expedient for the expeditious decision of the appeal, which includes directions relating to—

(a)……;

(b)……;

(j) the examination of a witness;

64. The wordings of the above regulations make it clear that CAT is the master of its own proceedings. The discretion whether or not to allow or dismiss a request to cross-examine witnesses lies with the CAT. The CAT is not obliged to accede to Dagang Net's request to cross-examine merely because it was made.

S/N jS/aEKdG0mZz7Su6Sy1Wg
**Note : Serial number will be used to verify the originality of this document via eFILING portal

65. The Federal Court in **Lembaga Jurutera Malaysia v Leong Pui Kun [2009] 2 MLJ 36** held:

> "[35] Further, the learned judge also held that the respondent had an inalienable fundamental right to cross-examine the complainant which he read into s 15(2) of the Act as the meaning of opportunity to be heard when he said at p 117 of the appeal record:
>
> > Section 15(2)(b) clearly spells out that an opportunity to be heard must be given to the registered engineer against whom the Board intends to make the order. I am of the opinion that the opportunity to be heard would mean that the (engineer) had an inalienable fundamental right to question the person who has complained against him as a professional...
>
> [36] The above legal propositions of the learned judge are flawed. They are in direct contrast with a long line of established Supreme Court, Federal Court and Court of Appeal authorities that hold that every administrative body is the master of its own procedure and need not assume the trappings of a court. The rules of natural justice do not contain any inalienable fundamental right to cross-examination of a witness, including the complainant…"

66. It follows that a denial of the request to cross-examine does not occasion a breach of natural justice. Whether or not there has been a breach is a question that depends on the context, nature and statutory backdrop of the proceedings in question. (See: **Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang v Utra Badi K Perumal [2001] 2 MLJ 417**).

S/N jS/aEKdG0mZz7Su6Sy1Wg
**Note : Serial number will be used to verify the originality of this document via eFILING portal

67. CAT was satisfied that on the material before it, it was unnecessary to allow for cross-examination. Its stand was also consistent with MyCC's position which had rejected the request.

68. I therefore find that on the factual matrix before me, no breach of natural justice had occurred. MyCC and the CAT acted within confines of its own power as provided under the Act and the CAT Regulations.

Ilegality-a monopoly does not come under the purview of the Act

69. S.10(1) of the Act prohibits conduct which constitutes abuse of dominant position as follows:

> **Abuse of dominant position is prohibited**
> 10. (1) An enterprise is prohibited from engaging, whether independently or collectively, in any conduct which amounts to an abuse of a dominant position in any market for goods or services.
>
> (2) Without prejudice to the generality of subsection (1), an abuse of a dominant position may include—
> (a) …
> (b) …
> (c) refusing to supply to a particular enterprise or group or category of enterprises;

70. In the case of Dagang Net, the offending conduct fell within paragraph (c).

S/N jS/aEKdG0mZz7Su6Sy1Wg
**Note : Serial number will be used to verify the originality of this document via eFILING portal

71. Dagang Net however contends that there is no question of abuse of dominant position as it held a monopoly in the relevant market for trade facilitation under the NSW.

72. In support of its contention, Dagang Net relies on the Court of Appeal case of **Labuan Ferry Corp Sdn Bhd v Chin Mui Kien [2018] 3 MLJ 256** and **Real Big Ventures Sdn Bhd v Pentadbir Daerah Tanah Petaling & Ors [2022] MLJU 1198**. The principle in *Labuan Ferry* sought to be applied is that a monopoly does not come within the purview of the Competition Act. It was therefore illegal to have found Dagang Net to have abused its dominant position within the meaning of section 10(1). In *Real Big Ventures,* the court held that a private limited company with a permit for extraction of stockpile sand production was excluded from the Act.

73. The reliance by Dagang Net on these cases were duly considered by the CAT. It was of the view that whilst preference is for decisions emanating from our own jurisdiction, reference can be made to decisions from other jurisdictions if they are relevant. In this instance, CAT held that **MY E.G. Services Berhad & Anor v Competition Commission & Anor [2020] 3 CLJ 36** and EU cases were better authorities to follow. On the other hand, *Labuan Ferry* and *Real Big Ventures* relied on by Dagang Net, were not cases emanating from a decision by MyCC.

74. I am of the view that the CAT was right in so deciding. The facts in *Labuan Ferry*, is clearly distinguishable from the present case. There, the appellant ran a state-sanctioned monopoly on the ferry service between Menumbok and Labuan, which was essential for

S/N jS/aEKdG0mZz7Su6Sy1Wg
**Note : Serial number will be used to verify the originality of this document via eFILING portal

transport and trade. It then raised its fares drastically, prompting complaints from the respondent, who was then barred from using the ferry service. The respondent incurred losses as a result. The court was called to determine the application of the common law doctrine of prime necessity to require the appellant to charge a reasonable price for its monopoly ferry service.

75. It was clearly not a decision pertaining to an abuse of dominant position and an infringement of section 10(1) of Act. Instead, it was a private suit and was primarily focused on the doctrine of prime necessity.

76. Similarly, the case of *Real Big Ventures* is also not a case that arose from a breach of section 10 of the Act. Instead, the suit was an application for judicial review of the rejection of a permit for stockpile extraction. The point of a monopoly was raised by the Applicant against the 5th Respondent which was a limited company. The Applicant alleged that the 5th Respondent was acting in contravention of the Act. In disagreeing with the point raised, the High Court held that the Act did not apply to a monopoly. This was the narrow context in which the monopoly point was decided.

77. On the other hand, I agree with the CAT's reference to *MY E.G* as the better authority. This case is a case on point as it was decided on the provisions of the Competition Act. The High Court held:

S/N jS/aEKdG0mZz7Su6Sy1Wg
**Note : Serial number will be used to verify the originality of this document via eFILING portal

> [51] The CAT has made a finding that MyEG is in a dominant position within the ambit of s. 2, as can be seen from para. [25] of the CAT's decision, which reads:
>
> > [25] It is not disputed that My EG as the sole enterprise given by KDN/JIM for the renewal of PLKS is in a dominant position in the upstream market. By virtue of My EG and My EG Commerce being a single 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. (emphasis added)
>
> [52] Having considered the facts in this case, I agree with the decision of the CAT that MyEG holds the dominant positions in both the upstream and downstream market. As such, there is nothing illegal nor irrational about this finding.

78. Counsel for MyCC also drew my attention to **MyCC's Guidelines on Chapter 2 Prohibition** which states that '*an enterprise with 100% market share is likely to be dominant*'. This further supports MyCC's and CAT's decision that Dagang Net being the sole provider of the NSW can be said to have abused its dominant position.

79. Apart from *MY E.G***,** the CAT viewed the EU authorities cited by MyCC to be better precedents to follow. In opposition to MyCC's position, Dagang Net submits that reference to EU cases is a contravention of section 3 of the Civil Law Act 1956.

80. Bearing in mind that the legislative framework of the Competition Act adopted some aspects of the EU model, reference to the EU

S/N jS/aEKdG0mZz7Su6Sy1Wg
**Note : Serial number will be used to verify the originality of this document via eFILING portal

cases are justified when there are no local authorities on point. It is not contrary to the provisions of the Civil Law Act.

81. My attention was drawn to the speech of the Minister of Domestic Trade, Cooperatives and Consumerism when the Bill was tabled. He explained that the Competition Act was inspired by the regime in various jurisdiction, the EU being one of them.

82. MyCC relied on following EU case laws and authorities, which I find, support the position that a monopoly can still be regarded as an enterprise in a dominant position. They are as follows:

(i) Abuse of dominance cases in EU are investigated as offences under Article 102 of the Treaty on the Functioning of the European Union ("**TFEU**") (Formerly Article 86 of the EC Treaty) Article 102 is, in substance, similar to Section 10(1) of the Act. Article 102 TFEU reads:

> Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited…

(ii) In **General Motors Continental NV v Commission Case 26/75** the European Court of Justice held that a '*legal monopoly…leads to the creation of a dominant position within the meaning of Article 86*…'.

(iii) In **Telemarketing (CBEM) SA Case 311/84** the court similarly held that the fact that there is an absence of

S/N jS/aEKdG0mZz7Su6Sy1Wg
**Note : Serial number will be used to verify the originality of this document via eFILING portal

competition by reason of provisions laid down in law does not preclude the finding that an undertaking is in a dominant position pursuant to Article 86.

(iv) **In Klaus Hofner and Fritz Elser v Macrotron GmbH Case C-41/90** the court held that '*it must remembered, first, that an undertaking vested with a legal monopoly may be regarded as occupying a dominant position within the meaning of Article 86 of the Treaty*'.

83. I therefore find that MyCC was correct to refer to cases both locally and from the EU that dealt directly with abuse of dominant position offences. These cases establish the principle that a monopoly can be equated to an enterprise holding a dominant position. As such, the CAT was correct in affirming MyCC's decision on the same.

84. Consequently, the ground of illegality is not established.

Irrationality-failure to apply the HMT and SSNIP tests

85. I now come to the final ground of irrationality. CAT's finding is said to be irrational as having concluded that MyCC failed to apply the HMT/SSNIP tests, nonetheless this failure is not fatal. Dagang Net contends that the finding ignores the prevailing legal position.

86. SSNIP refers to *Small but Significant Non-transitory Increase in Price* test or commonly known as HMT, the *Hypothetical Monopolist* test. It is a method utilized to determine whether the

S/N jS/aEKdG0mZz7Su6Sy1Wg
**Note : Serial number will be used to verify the originality of this document via eFILING portal

products or services are substitutable by reference to the prevailing market.

87. CAT's decision on this issue is set out below:

> [30] "Secondly, and regarding the determination of the relevant market the appellant also submitted that the respondent had failed to apply the legal and economic tests. We agree with the submissions by the learned counsel for the appellant that the respondent had not applied the HMT and the SSNIP test in its determination of the relevant market. But in our opinion, the failure to apply those tests are not fatal, and not necessarily render the determination of the relevant market by the respondent wrong in fact and in law. In our view the two tests as laid down by the cases from the European Union jurisdiction in particular the case of *Europeanballage Corpn and Continental Can Co Inc v. Commission* (Case No. 6/72) cited by the appellant counsel in his written submission are just tools that can be used in situation where the actual relevant marker is in doubt or overlapped geographically. The case cited by the appellant is a good example. In that case the Commission in the first instance held that the *Continental Can* and its subsidiary had a dominant position in three different product markets – cans for meat, can for fish and metal tops - without giving a satisfactory explanation. On that ground, the Court of Justice, on appeal by the Company, annulled the decision of the Commission (see paragraph 138 at page 69 of the appellant's written submissions dated 02 September 2022). But regarding the 'market' which factual situation is clear and can be easily identified, it may not be necessary to apply the tests to determine the market. The ordinary dictionary meaning of 'market' is a concept of space or gathering place where products and services are offered for trade. This concept of space or gathering place may be limited or defined geographically or it may be borderless; its definition is governed only by the type of goods and services that are offered for trade. This is obvious from the wording of the term 'market' in section 2 of the Act which we have quoted

S/N jS/aEKdG0mZz7Su6Sy1Wg
**Note : Serial number will be used to verify the originality of this document via eFILING portal

above when it says that in relation to goods or services it includes market for the substitutes for the said goods or services but confines to market in Malaysia or any part thereof. In this instance appeal, the goods or services that are offered for trade are the services for the facilitation of trade (or more accurately in our views Customs services) for the purpose of Customs tax collections using IT technology available at the material time. It is only one kind or one category of service; and it is being offered by a sole service provider that is the appellant through agreement with the Government of Malaysia. So, the market is easily identifiable. In the case referred to and cited by the appellant the underlying principle is substitutability of the products, goods or services which may require the application of either or both tests to determine the market. In this instance, there is no substitutability issue because the services that are offered remain the same whether using the NSW, or uCustoms, in the event the latter becomes operation.

88. In other words, the CAT was of the view that the application of the HMT/SSNIP Tests was not mandatory, especially in cases where the market can be identified. The CAT also found that the tests were unnecessary as there was no substitutability issue because the services to be offered by Dagang Net be it NSW or uCustoms, were the same.

89. In coming to its decision, CAT considered the EU case of **Topps Europe Ltd v Commission ECLI:EU:T:2017:2** relied on by MyCC where it was held:

> In that regard, it is to be noted that the Commission has a certain discretion concerning the definition of the relevant market, in so far as that definition involves complex economic assessments…

S/N jS/aEKdG0mZz7Su6Sy1Wg
**Note : Serial number will be used to verify the originality of this document via eFILING portal

> The concept of the relevant market in fact implies that there can be effective competition between the products or services which form part of it and this presupposes that there is a sufficient degree of interchangeability between all the products or services forming part of the same market in so far as a specific use of such products or services is concerned. The interchangeability or substitutability is not assessed solely in relation to the objective characteristics of the products and services at issue, but the competitive conditions and the structure of supply and demand on the market must also be taken into consideration.
>
> In the present case, as regards, first of all, the applicant's argument that the Commission ought to have carried out an SSNIP test, it must be found that although that type of economic test is indeed a recognised method for defining the market at issue, it is not the only method available to the Commission. It may also take into account other tools for the purposes of defining the relevant market, such as market studies or an assessment of consumers' and other competitors' points of view. The SSNIP test may also prove unsuitable in certain cases, for example in the presence of the 'cellophane fallacy', that is, the situation where the undertaking concerned already holds a virtual monopoly and the market prices are already at a supra-competitive level, or where there are free goods or goods the cost of which is not borne by those determining the demand. It is also apparent from point 25 of the Commission notice on the definition of relevant market for the purposes of Community competition law (OJ 1997 C 372, p. 5) that the definition of the relevant market does not require the Commission to follow a rigid hierarchy of different sources of information or types of evidence. The Commission did not, therefore, commit a manifest error of assessment in basing its conclusions on the relevant market on its assessment of the evidence gathered without having recourse to an SSNIP test.

90. In the light of the decision of *Topps Europe*, I am of view that the CAT's decision in this regard is not irrational as:

S/N jS/aEKdG0mZz7Su6Sy1Wg
**Note : Serial number will be used to verify the originality of this document via eFILING portal

(i) MyCC has the discretion to decide on the relevant market based on the evidence before it. This is provided for in Paragraph 2.6 of the MyCC Guidelines on Market Definition. In this instance, MyCC considered the documentary evidence and the oral evidence based on the statements it obtained from RMC officers, complainants and software providers. The SSNIP/HMT test is one that measures competition based on price and cannot be considered a fully sufficient tool for defining markets;

(ii) The SSNIP/HMT test is not the only test to be adopted by MyCC. It only provides a means of analyzing whether other products can substitute trade facilitation services in Malaysia provided by Dagang Net; and

(iii) In this case, no such substitute exists, as it undisputed that Dagang Net has a 100% monopoly in the NSW-SMK system where it is capable of entering into agreements with multiple software providers.

91. In the upshot, CAT's decision that MyCC's failure to use the SSNIP/HMT is not fatal, and cannot be considered to be irrational.

Irrational-failure to consider effect of the Exclusivity Clause

92. Another aspect of the CAT's decision being irrational is that it had misdirected itself in law on the available evidence. Section 10(1) of the Act is an effect-based prohibition. The CAT acknowledged it to be so.

S/N jS/aEKdG0mZz7Su6Sy1Wg
**Note : Serial number will be used to verify the originality of this document via eFILING portal

93. Dagang Net contends that the CAT, having correctly stated the legal position, then wrongly decided there was an absence of evidence of actual anti-competitive effects on the market. The CAT conclusion that the exclusivity clause had the ultimate effect of stultifying and killing competition is not justified.

94. Its decision is as follows:

> 66. Taking the totality of evidence and the environment surrounding the introduction of the Clause by the appellant, we are on the opinion that the introduction of the Clause and the announcement of uCustoms and the appointment of Edaran Trade as the other service provider is not mere co-incidence in the circumstances. In our opinion it is a deliberate and planned act by the appellant to ensure that all software service providers are tied up contractually with the appellant leaving them with no option to join or use other service providers appointed for the uCustoms for the duration of their contracts with the appellant. This is the ultimate effect of the appellant's Exclusivity Clause – it kills competition."

95. One material fact needs to be mentioned. At the time of the impugned decisions of MyCC and the CAT, the uCustoms system has yet to be implemented due to technical issues and the complex nature of the project. The existing NSW system was still in operation with Dagang Net as the sole service provider.

96. Dagang Net relies strongly on this fact. As at the material date, uCustoms was not yet operational, CAT's finding that it kills competition is fallacious. Potential anti-competitive effects must be clearly demonstrated.

S/N jS/aEKdG0mZz7Su6Sy1Wg
**Note : Serial number will be used to verify the originality of this document via eFILING portal

97. The finding of the CAT as set out in the paragraph 94 above cannot be any clearer as to the anti-competitive effects of the Exclusivity Clause. It found the exclusivity clause effectively left the software service providers with no option but to be bound contractually with Dagang Net during the duration of their contracts. This operates as a competitive restraint, and has significant effects on competition.

98. The wordings of the Exclusivity Clause speak for itself. It states as follows:

> 4. Exclusivity
>
> During the Contract Period or extended tenure, the Channel Partner shall not enter into any agreements, contracts or arrangements with any other party or service provider to be appointed by the Royal Customs of Malaysia under the uCustoms Service Provider Program and providing similar services to the end user.

99. Having examined the import of the clause, I have no hesitation in finding a restraint placed on its partner software providers. It prohibits the software providers from providing similar service to the end users in the uCustoms market. They are clearly prevented from dealing with any other Service Providers.

100. The MCPAs were executed prior to the implementation of the uCustoms system, and the Exclusivity Clause takes effect during the tenure of the agreement. The CAT finding that it was deliberate is not without basis.

S/N jS/aEKdG0mZz7Su6Sy1Wg
**Note : Serial number will be used to verify the originality of this document via eFILING portal

101. This exclusivity arrangement orchestrated by Dagang Net has the effect of disincentivising competition. By locking in the relevant software providers during the tenure of the NSW-SMK System, Edaran Trade would be prevented from competing with Dagang Net when uCustoms comes into operation, as it would not have access to these software providers.

102. The effect would be that Dagang Net's position is strengthened when it enters the uCustoms market, and Edaran Trade would be at a competitive disadvantage. This potential anti-competitive effect constitutes an abuse of Dagang Net's dominant position.

103. I am of the view that is suffices to show the potential anti-competitive effects as opposed to actual effects. I have considered the case cited by counsel for **MyCC Konkurrensverket v TeliaSonera AB CLI:EU:C:2010:483** a case dealing with margin squeeze, the European Court of Justice held at [64] that:

> "…in order to establish whether such a practice is abusive, that practice must have an anti-competitive effect on the market, but the effect does not necessarily have to be concrete, and it is sufficient to demonstrate that there is an anti-competitive effect which may potentially exclude competitors who are at least as efficient as the dominant undertaking.

104. Therefore, whilst section 10(1) is an effect-based prohibition, it suffices if Dagang Net's conduct has a potential anti-competitive effect. Upon reading the import of the Exclusivity Clause, I agree with the CAT's finding the competition would be stultified.

S/N jS/aEKdG0mZz7Su6Sy1Wg
**Note : Serial number will be used to verify the originality of this document via eFILING portal

105. What is more telling is the admission by Dagang Net's own personnel on the effect of the Exclusivity Clause. As the evidence is material, I have produced it below:

> 21. Based on my reading of the Exclusivity Clause of the myChannel Partner Agreement, during the myChannel Partner Agreement contractual period, the effect of the exclusivity clause is that any Business Partner would be bound to Dagang Net in the uCustoms operating environment when it is implemented and that they may not enter into any agreement with any other party appointed by the RMCD as a service provider under the uCustoms operating environment. I also agree with the Commission's assessment that there is no mention of the specific term "technical and security" in the said Clause.

106. In addition, Dagang Net through its witness acknowledged that the decision to include the Exclusivity Clauses was in response to a potential conflict of interest between software provider and the Service Provider for uCustoms. The decision to include the clause was a business strategy to ensure business continuity. The relevant evidence is as below:

> 11. Furthermore, Dagang Net was not comfortable with the fact that at that time Rank Alpha had some form of collaboration with Edaran IT to be the service provider for uCustoms, and as such a conflict of interest would arise as Rank Alpha would be both uCustoms service provider and software provider to Edaran. As such, the Exclusivity clause is regarded as a business strategy by Dagang Net to ensure its business' continuity.

107. Dagang Net's conduct in eliminating its competitors is also contrary to the aspiration of the uCustoms system, which is to stimulate

S/N jS/aEKdG0mZz7Su6Sy1Wg
**Note : Serial number will be used to verify the originality of this document via eFILING portal

competition within the uCustoms system and to provide end users the benefit of multiple options in utilising the trade facilitation services. Edaran Trade, having been appointed a Service Provider to the uCustoms, apart from Dagang Net, would be unable to engage with existing software providers bound to Dagang Net as a result of the Exclusivity Clause.

108. In the circumstances, I find no misdirection in law and hence no irrationality in the CAT decision with respect to the Exclusivity Clause.

Irrationality-failure to consider fact that Dagang Net removed the Exclusivity Clause

109. Dagang Net eventually removed the Exclusivity Clauses. The CAT found that the removal suggests that it was not necessary to have the clause in the first place.

110. Premised on this finding, Dagang Net alleged that CAT had taken into consideration irrelevant consideration and failed to take into account relevant consideration. The removal of the clause was done through pegging and/or limiting the duration of the MCPA with the duration of the NSW Agreement with the RMC. As such there would be no overlap between the provision of connectivity to the NSW-SMK system by Dagang Net and the uCustoms environment.

111. In addition, the CAT was also said to have failed to consider the statement given by Dagang Net's Chief Technology Officer when she explained the purpose of the Exclusivity Clause. Its Chief

S/N jS/aEKdG0mZz7Su6Sy1Wg
**Note : Serial number will be used to verify the originality of this document via eFILING portal

Technology Officer said that it was required to address technical and security risks. However, having said that, I find that there was a lack of substantiation of the security risks and no explanation as to why the imposition of the Exclusivity Clause was the only method to address these risks.

112. Instead, CAT found that the "*worries on the technical risks and security issues at this point of time is only speculative and not real*." It further added that it agreed with MyCC that Dagang Net had not produced any evidence of actual technical risks and security of the probability of it in the current NSW environment because the Chief Technology Officer stated that the configuration (specifications) for the uCustoms have yet to be decided.

113. There is no cogent reason advanced as to the alleged irrationality of the CAT's finding that the risks were imaginary rather than real. Instead, there is merit in CAT's conclusion if the Exclusivity Clause could be removed, it was not necessary to begin with, other than to create a limitation to potential competitors.

114. To establish irrationality on the part of the CAT decision, I am reminded that it must be established that its decision was so outrageous in its defiance of logic that no sensible person who had applied his mind to the question to be decided could have arrived at it. On the reasons relied on by Dagang Net, I do not find it to be so.

S/N jS/aEKdG0mZz7Su6Sy1Wg
**Note : Serial number will be used to verify the originality of this document via eFILING portal

Conclusion

115. Premised on the foregoing reasons above, I find that the Applicant has not established that the CAT Decision on appeal from the Final Decision of MyCC falls within any of the grounds relied on for review.

116. In the circumstances, the application for Judicial Review is dismissed. I also order that costs of RM 20,000.00 be paid to the 2nd Respondent.

Dated: 12th March 2026

-sgd-
Alice Loke Yee Ching
Judge
High Court Kuala Lumpur

S/N jS/aEKdG0mZz7Su6Sy1Wg
**Note : Serial number will be used to verify the originality of this document via eFILING portal

Counsels for the Applicant:	En. Brian Foong Mun Loong (En. Muhammad Hiqman Danial together with him) Tetuan Cheang & Ariff
Counsels for 2nd Respondent:	En. Kwan Will Sen (Cik Chiang Jia Yin together with him) Tetuan Lim Chee Wee Partnership

S/N jS/aEKdG0mZz7Su6Sy1Wg
**Note : Serial number will be used to verify the originality of this document via eFILING portal