



Malaysia Competition Commission

Case No. 700–2/2/003/2015

Competition Act 2010 [Act 712]

Decision of the Competition Commission

Infringement of Section 10(1) of Competition Act 2010

Competition Commission

v.

Dagang Net Technologies Sdn. Bhd.

DATED: 16 FEBRUARY 2021

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

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INTRODUCTION

1. This Decision (“the Decision”) concerns an enterprise known as Dagang Net Technologies Sdn. Bhd. (“Dagang Net”) (177974-T)¹.
2. Earlier, in the Proposed Decision against Dagang Net,² the Commission had made a provisional finding that Dagang Net had on 29.10.2015, committed an act that amounts to an abuse of its dominant position in a market for services thereby infringing section 10(1) of the Competition Act 2010 (“the Act”) (“the Infringement”). The Proposed Decision was based on the provisional finding of fact that Dagang Net had engaged in the practice of exclusive dealing by imposing an exclusivity clause in the MyChannel Partner Agreement (“MCPA”) agreements that it made between the software providers in the year 2015 to 2016 and subsequently the refusal to supply electronic mailboxes to the end users of the *Sistem Maklumat Kastam* (“SMK”).
3. Upon considering the representations made by Dagang Net, both written and oral, the Commission is satisfied on a balance of probabilities that Dagang Net had infringed section 10(1) of the Act by engaging in exclusive dealing through the imposition of an exclusivity clause in the MCPA between Dagang Net and the software providers in the year 2015 to 2016. However, it is also our finding that the refusal to supply electronic mailboxes by Dagang Net does not significantly prevent, restrict or distort competition; and

¹ Companies Commission of Malaysia search on Dagang Net dated 29.12.2015.

² Served on Dagang Net on 10.7.2018.

therefore, such refusal does not constitute an infringement of section 10.

4. By this Decision, the Commission hereby issues directions to Dagang Net as elaborated in **Part 3** of the Decision. In addition, the Commission imposes on Dagang Net a financial penalty of **RM10,302,475.97** for the infringement.
5. In this Decision, the following acronyms/terms as set out in the left column in the Table below, wherever they appear in the Decision, shall carry the corresponding meanings as set out in the right column of the Table.

ACRONYM/TERM	MEANING
AFAM	Airfreight Forwarders Association of Malaysia
B2G	Business to Government
CVI	Customs Verification Initiatives
EAI	Enterprise Application Interface
end users	Manufacturers, importers, exporters, freight forwarders and shipping agents
FMFF	Federation of Malaysian Freight Forwarders
Government	Government of Malaysia
IILS	International Integrated Logistics Services
MCPA	MyChannel Partner Agreement
MCPP	MyChannel Partner Program
MIDA	Malaysian Investment Development Authority
MOF	Ministry of Finance
MSPA	Master Solution Partner Agreement

ACRONYM/TERM	MEANING
NCCIM	National Chamber of Commerce and Industry Malaysia
NSW	National Single Window
OGA	Other Government Agencies
PDK	<i>Perintah Duti Kastam</i>
PIA	Permit Issuing Agencies
PRISKA	<i>Pusat Risikan Kastam</i>
RMC	Royal Malaysian Customs Department
SAC	Single Agent Code
SAFFLA	Selangor Freight Forwarders and Logistics Association
SMK	<i>Sistem Maklumat Kastam</i> (Customs Information System)
uCustoms	Ubiquitous Customs
UN/EDIFACT	United Nations' Electronic Data Interchange for Administration, Commerce and Transport

PART 1: THE FACTUAL BACKGROUND

A. THE COMPLAINANTS

A.1 RANK ALPHA TECHNOLOGIES SDN. BHD.

1. Rank Alpha Technologies Sdn. Bhd. (“Rank Alpha”) (269716-T)³ is a private limited company and is principally engaged in the provision of software services and sales of computers and peripherals.
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.⁴
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.

³ Companies Commission of Malaysia search on Rank Alpha dated 16.6.2020.

⁴ E-Complaint from Rank Alpha dated 2.12.2015.

A.2 TITIMAS LOGISTICS SDN. BHD.

4. Titimas Logistics Sdn. Bhd. (“Titimas Logistics”) (55556-U)⁵ is a private limited company and is principally engaged in the provision of forwarding and cargo handling services.
5. On 4.1.2017, Titimas Logistics lodged a complaint to the Commission.⁶ In its complaint, Titimas Logistics alleged that Dagang Net had engaged in conduct that 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. Upon making an inquiry on the complaint, the Commission identifies a refusal on the part of Dagang Net to supply electronic mailboxes to Titimas Logistics.

B. THE ENTERPRISE CONCERNED

B.1 DAGANG NET TECHNOLOGIES SDN. BHD.

6. Dagang Net is a private limited company. Previously, Dagang Net was known as “Electronic Data Interchange (M) Sdn. Bhd.” However, on 13.7.2000 Dagang Net had its name changed from “Electronic Data Interchange (M) Sdn. Bhd.” to the present name.⁷

⁵ Companies Commission of Malaysia search on Titimas Logistics dated 16.6.2020.

⁶ E-Complaint from Titimas Logistics dated 4.1.2017.

⁷ Companies Commission of Malaysia search on Dagang Net dated 29.12.2015.

7. Dagang Net is carrying on commercial activities relating to, amongst other things, the provision of business-to-government e-commerce services and computerised transaction facilitation services.

B.2 CORPORATE STRUCTURE OF DAGANG NET

8. Dagang Net is wholly owned by Dagang Nexchange Berhad (“DNEX”) (10039-P).⁸ DNEX is a public limited investment holding company⁹ and is principally engaged in the business of information communication technology and energy. DNEX was previously known as “Time Engineering Berhad” before changing to its current name on 19.5.2015.
9. At the time of the issuance of the Proposed Decision, Censof Holdings Berhad (“Censof”) (828296-A)¹⁰ was the largest non-nominee shareholder in DNEX with 16% shares. Concurrently, at the time of the issuance of the Proposed Decision, Saas Global Sdn. Bhd. (“Saas Global”) (730791-U)¹¹ was the largest shareholder in Censof with 38% shares.¹²
10. The shareholders for Dagang Net, DNEX, Censof and Saas Global are described in **Table 1** below.

⁸ Companies Commission of Malaysia search on Dagang Net dated 16.6.2020.

⁹ Companies Commission of Malaysia search on DNEX dated 16.6.2020.

¹⁰ Companies Commission of Malaysia search on Censof dated 29.2.2016.

¹¹ Companies Commission of Malaysia search on Saas Global dated 29.2.2016.

¹² Companies Commission of Malaysia search on Censof dated 29.2.2016.

Table 1: List of Shareholders in 2015

SHAREHOLDERS			
DAGANG NET	DNEX	CENSOF	SAAS GLOBAL
DNEX (100%)	Lim Kooi Fui (0.25%)	Mohd Akob Bin Ahmad (0.4%)	Tamil Selvan A/L M. Durairaj (10%)
	Lim Siang Hee (0.37%)	Mohd Hassan Bin Madon (0.5%)	Ang Hsin Hsien (10%)
	Mohd Shafei Abdullah (0.39%)	Tan Sri Mohd Ibrahim Bin Mohd Zain (0.3%)	Samsul Bin Husin (50%)
	Eashwary A/P Mageswaran (0.29%)	Lu Loke Moy (0.0001%)	Ameer Bin Shaik Mydin (30%)
	Tan Tiam Yee (0.36%)	Raja Mohd Nazir Bin Raja Abd Malek (0.3%)	
	Public Nominees (Tempatan) Sdn. Bhd. (2.05%)	Kua Kim Soon (0.5%)	

SHAREHOLDERS			
DAGANG NET	DNEX	CENSOF	SAAS GLOBAL
	Maybank Securities Nominees (Tempatan) Sdn. Bhd. (0.90%)	Saas Global Sdn. Bhd. (38.3%)	
	Cimsec Nominees (Tempatan) Sdn. Bhd. (1.58%)	Public Nominees (Tempatan) Sdn. Bhd. (0.4%)	
	Maybank Nominees (Tempatan) Sdn. Bhd. (1.96%)	Malaysia Venture Capital Management Bhd. (1.8%)	
	Kenanga Nominees (Tempatan) Sdn. Bhd. (0.43%)	Expedient Equity Ventures Sdn. Bhd. (2.1%)	
	RHB Nominees (Tempatan) Sdn. Bhd. (23.49%)	Cimsec Nominees (Tempatan) Sdn. Bhd. (0.3%)	

SHAREHOLDERS			
DAGANG NET	DNEX	CENSOF	SAAS GLOBAL
	Censof Holdings Berhad (16.14%)	DB (Malaysia) Nominee (Tempatan) Sdn. Bhd. (2.7%)	
	SJ Sec Nominees (Tempatan) Sdn. Bhd. (0.64%)	Tasec Nominees (Tempatan) Sdn. Bhd. (8.3%)	
	RHB Capital Nominees (Tempatan) Sdn. Bhd. (0.36%)	Maybank Nominees (Tempatan) Sdn. Bhd. (0.5%)	
	HLIB Nominees (Tempatan) Sdn. Bhd. (0.69%)	Citicorp Nominees (Tempatan) Sdn. Bhd. (0.6%)	
	Affin Hwang Nominees (Tempatan) Sdn. Bhd. (0.43%)	M&A Nominee (Tempatan) Sdn. Bhd. (0.9%)	

SHAREHOLDERS			
DAGANG NET	DNEX	CENSOF	SAAS GLOBAL
	Affin Hwang Nominees (Asing) Sdn. Bhd. (0.32%)	Singapore Enterprises Private Ltd. (0.4%)	
	JF Apex Nominees (Tempatan) Sdn. Bhd. (0.98%)	Affin Hwang Nominees (Asing) Sdn. Bhd. (0.4%)	
	Alliancegroup Nominees (Tempatan) Sdn. Bhd. (0.69%)	TA Nominees (Tempatan) Sdn. Bhd. (0.7%)	
	TA Nominees Sdn. Bhd. (0.48%)	Amsec Nominees (Tempatan) Sdn. Bhd. (0.4%)	
	Remaining (46.77%)	JF Apex Nominees (Tempatan) Sdn. Bhd. (4.2%)	

SHAREHOLDERS			
DAGANG NET	DNEX	CENSOF	SAAS GLOBAL
		Alliancegroup Nominees (Tempatan) Sdn. Bhd. (0.5%)	
		Remaining (35.1%)	

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11. The Commission notes that Azman bin Karim [REDACTED] [REDACTED] is the current largest non-nominee shareholder in DNEX with 5.16%.¹³
12. The current shareholders for Dagang Net and DNEX, are described in **Table 2** below.

Table 2: List of Shareholders in 2020

SHAREHOLDERS	
DAGANG NET	DNEX
DNEX (100%)	Cimsec Nominees (Tempatan) Sdn. Bhd. (2.13%)
	Khoo Kok Seng (0.93%)
	Azman Bin Karim (5.16%)
	Maybank Nominees (Tempatan) Sdn. Bhd. (4.58%)
	Public Nominees (Tempatan) Sdn. Bhd. (2.07%)
	Maybank Securities Nominees (Tempatan) Sdn. Bhd. (0.49%)

¹³ Companies Commission of Malaysia search on DNEX dated 16.6.2020.

SHAREHOLDERS	
DAGANG NET	DNEX
	BI Nominees (Tempatan) Sdn. Bhd. (20.48%)
	HLIB Nominees (Tempatan) Sdn. Bhd. (0.53%)
	JF Apex Nominees (Tempatan) Sdn. Bhd. (0.57%)
	Kenanga Nominees (Tempatan) Sdn. Bhd. (7.47%)
	MIDF Amanah Investment Nominees (Tempatan) Sdn. Bhd. (9.01%)
	RHB Nominees (Tempatan) Sdn. Bhd. (1.37%)
	M & A Nominee (Tempatan) Sdn. Bhd. (0.34%)
	Alliancegroup Nominees (Tempatan) Sdn. Bhd. (0.95%)
	Citigroup Nominees (Tempatan) Sdn. Bhd. (1.59%)
	Amanahraya Trustees Berhad (0.58%)

SHAREHOLDERS	
DAGANG NET	DNEX
	HLB Nominees (Tempatan) Sdn. Bhd. (0.50%)
	CIMB Group Nominees (Asing) Sdn. Bhd. (0.30%)
	Citigroup Nominees (Asing) Sdn. Bhd. (4.63%)
	RHB Capital Nominees (Tempatan) Sdn. Bhd. (0.87%)
	Remaining (35.45%)

C. BUSINESS AND INDUSTRY LANDSCAPE: TRADE FACILITATION UNDER THE NATIONAL SINGLE WINDOW – SMK AND THE UBIQUITOUS CUSTOMS SYSTEM

C.1 HISTORY OF THE SMK

- Trade facilitation involves a range of activities centred on lowering trade transaction costs for companies in the field of global commerce. These costs are related to and include the price of moving freight cargo from one destination to another.

14. The Government decided that Customs declarations are to be submitted electronically in order to enhance its tax collection system and to facilitate trading in Malaysia.
15. Accordingly, in 1992 the RMC issued an invitation to tender for the development and maintenance of the SMK. Edaran IT Services Sdn. Bhd. (“Edaran IT Services”) (155273-A)¹⁴ was awarded the tender and had since developed the SMK for the RMC. At the same time, Edaran IT Services has been maintaining the provision of the back-end services of the said system.¹⁵

C.2 HISTORY OF THE NATIONAL SINGLE WINDOW

16. Based on the agreement dated 1.3.2005, the Government granted to the NCCIM the sole and exclusive right to undertake the organisation, development and implementation of a trade documentation system. The NCCIM appointed Electronic Data Interchange (M) Sdn. Bhd. (as Dagang Net was previously known) to undertake the development and production of all aspects of the trade documentation system and the provision of services that facilitated the trading and finance communities in the exchange of data, submission of documents and transmission of messages electronically, using the UN/EDIFACT standards between themselves and the RMC.¹⁶

¹⁴ Companies Commission of Malaysia search on Edaran IT Services dated 29.12.2015.

¹⁵ Minutes of Meeting between Edaran Trade and the Commission dated 13.4.2016; and Paragraph 4 of Statement of Mohd Nor Fauzi bin Abdul Kayum of Edaran IT recorded on 6.10.2017.

¹⁶ Agreement between Government of Malaysia and Dagang Net dated 1.3.2005.

17. Dagang Net's provision and scope of its front-end services was further extended.¹⁷ Dagang Net was granted the right to operate a trade documentation system connected to the SMK to facilitate data exchange, submission of trade documentation (such as Customs Declarations, Cargo manifests and several related documents) and transmission of messages electronically using the UN/EDIFACT standards.
18. By an agreement dated 19.11.2009, Dagang Net was appointed by the Government to be the provider to design, develop, operate and maintain the NSW system for the purposes of providing the NSW services.¹⁸ The appointment was for 5 years from 2009 to 2014. Since no other enterprise was appointed by the Government, therefore, Dagang Net became the sole provider for the NSW system.
19. This arrangement has been renewed for another 4 years by the Ministry of Finance ("MOF") via the Supplemental Agreement dated 24.10.2014 and a letter dated 19.9.2016.¹⁹ Subsequently on 20.12.2017, the duration of Dagang Net's appointment was extended to 31.8.2019 via a letter from the MOF to Dagang Net dated 20.12.2017.²⁰

¹⁷ Agreement between Government of Malaysia and Dagang Net dated 1.3.2005.

¹⁸ Agreement between Government of Malaysia and Dagang Net dated 19.11.2009; Minutes of Meeting between MOF, MITI and the Commission dated 3.3.2016; and Part A of Statement of Mohammad Haizam Bin Hashim of RMC recorded on 17.4.2017.

¹⁹ Supplemental Agreement to the Agreement for the Design, Development, Operation and Maintenance of the National Single Window for Trade Facilitation System between Government of Malaysia and Dagang Net dated 24.10.2014; and Letter from MOF to Dagang Net dated 19.9.2016.

²⁰ Letter from MOF to Dagang Net dated 20.12.2017.

20. As of the date of this Decision, Dagang Net's appointment has been extended until 31.8.2021.²¹

C.3 OVERVIEW TRADE FACILITATION VIA THE NSW–SMK

21. The NSW is an electronic-based ecosystem 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.
22. The trading communities consist of manufacturers, importers, exporters, freight forwarders and shipping agents (hereinafter referred to as “end users”) whereas the regulatory authorities consist of the RMC, terminal and port operators, port authorities, banks and permit issuing agencies such as the Ministry of International Trade and Industry, Ministry of Agriculture and SIRIM Berhad.²²
23. Dagang Net as the sole service operator of the NSW provides the following services:²³

²¹ Dagang Net's Newsletter titled “Dagang Net receives contract extension for National Single Window for Trade Facilitation” dated 24.7.2019.

²² Minutes of Meeting between Edaran Trade Network and the Commission dated 17.1.2017; and Paragraphs 3 and 5 of Statement of Datuk Samsul bin Husin of Dagang Net recorded on 5.6.2017.

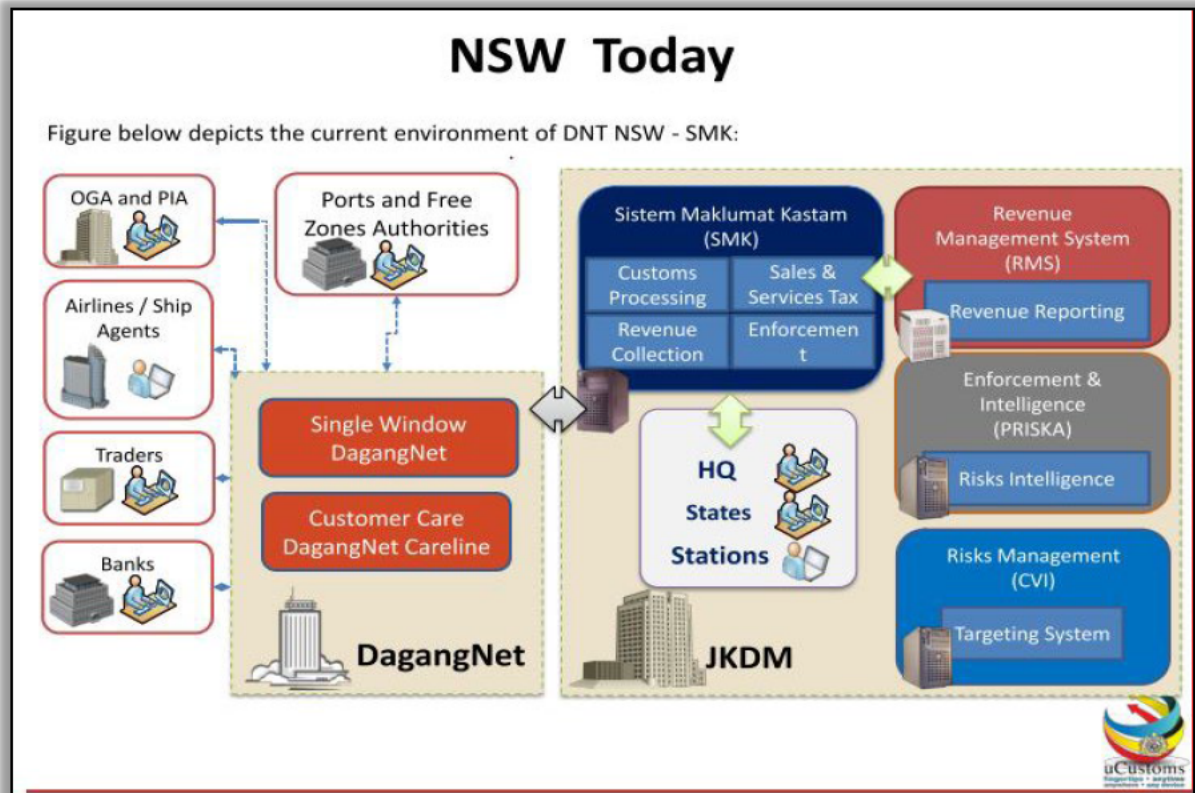
²³ Paragraph 3 of Statement of Zahari Azar bin Zainuddin of Dagang Net recorded on 5.6.2017; Paragraph 6 of Statement of Zulkeflee bin Sahni of Dagang Net recorded on 7.6.2017; and services provided by Dagang Net.

- (a) Customs Declarations – allows the end users to submit customs declaration forms to the RMC for its approval before the goods can reach the respective ports;
- (b) Customs Duty Payment – allows the end users to pay their duties and tax to the RMC, permit fees to permit issuing agencies, and any bill payment to Dagang Net;
- (c) Preparation of Permits for Approval – allows the end users to obtain the permits from the permit issuing agencies electronically;
- (d) Preparation of Permits under the Strategic Trade Act 2010 – allows the end users to obtain the permits from the permit issuing agencies electronically;
- (e) Preferential Certificates of Origin – allows the end users to obtain the permits from the permit issuing agencies electronically; and
- (f) Electronic Manifest System – allows the end user to submit their cargo manifest and vessel information to the relevant port authority for their approval.

24. All of the above services are essential to the end users when carrying out import and export trading activities.

25. In order to utilise the above services, the end users will have to transmit the required information to the regulatory authorities via the NSW and the process flow is then reversed from the regulatory authorities to the end users via the NSW. The connectivity between the end users and the regulatory authorities via the NSW is only possible using a system known as SMK. This process flow can be further illustrated in **Diagram 1** as below:

Diagram 1: The NSW/SMK System



26. In utilizing the services of Customs Declaration, the end users may use any of the following methods:²⁴

- (i) eDeclare (Dagang Net's own online web portal);
- (ii) Enterprise Application Interface ("EAI") which is the end users' own back-end software²⁵; and
- (iii) software from the software providers as listed in **Paragraph 31**.

27. In utilizing the software, end users may purchase the software from software providers as listed in **Paragraph 31**. It is important to note that 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 mailbox.²⁶ Dagang Net is the sole generator of the electronic mailbox.

28. Each software is hardcoded with the electronic mailbox's unique identification number as well as the end user's username and

²⁴ Paragraph 4 of Statement of Datuk Samsul bin Husin of Dagang Net recorded on 5.6.2017; Paragraph 5 of Statement of Wan Ahmad Syatibi bin Wan Abd Manan of Dagang Net recorded on 5.6.2017; Paragraph 4 of Statement of Zahari Azar bin Zainudin of Dagang Net recorded on 5.6.2017; and Letter from Dagang Net to the Commission dated 4.5.2017.

²⁵ Paragraph 6 of Statement of Tan Hee Bo of Buttonwood recorded on 29.12.2016.

²⁶ Paragraph 5 of Statement of Datuk Samsul bin Husin of Dagang Net recorded on 5.6.2017; Paragraph 9 of Statement of Abdul Khalil bin Abdullah of Dagang Net recorded on 5.6.2017; Paragraph 6 of Statement of Zahari Azar Bin Zainudin of Dagang Net recorded on 5.6.2017; Paragraph 11 of Asvinder Kaur A/P Asha Singh of Dagang Net recorded on 5.6.2017; Paragraphs 7 and 8 of Statement of Zulkeflee Bin Sahni of Dagang Net recorded on 7.6.2017; Paragraphs 3 to 5 of Statement of Jane Lim Juck Noi of Rank Alpha recorded on 25.10.2016; and Paragraphs 2 and 3 of Statement of Alwyn Hoa Chee Keong of Wynet recorded on 12.10.2016.

password. Therefore, one electronic mailbox can only be used for one software.

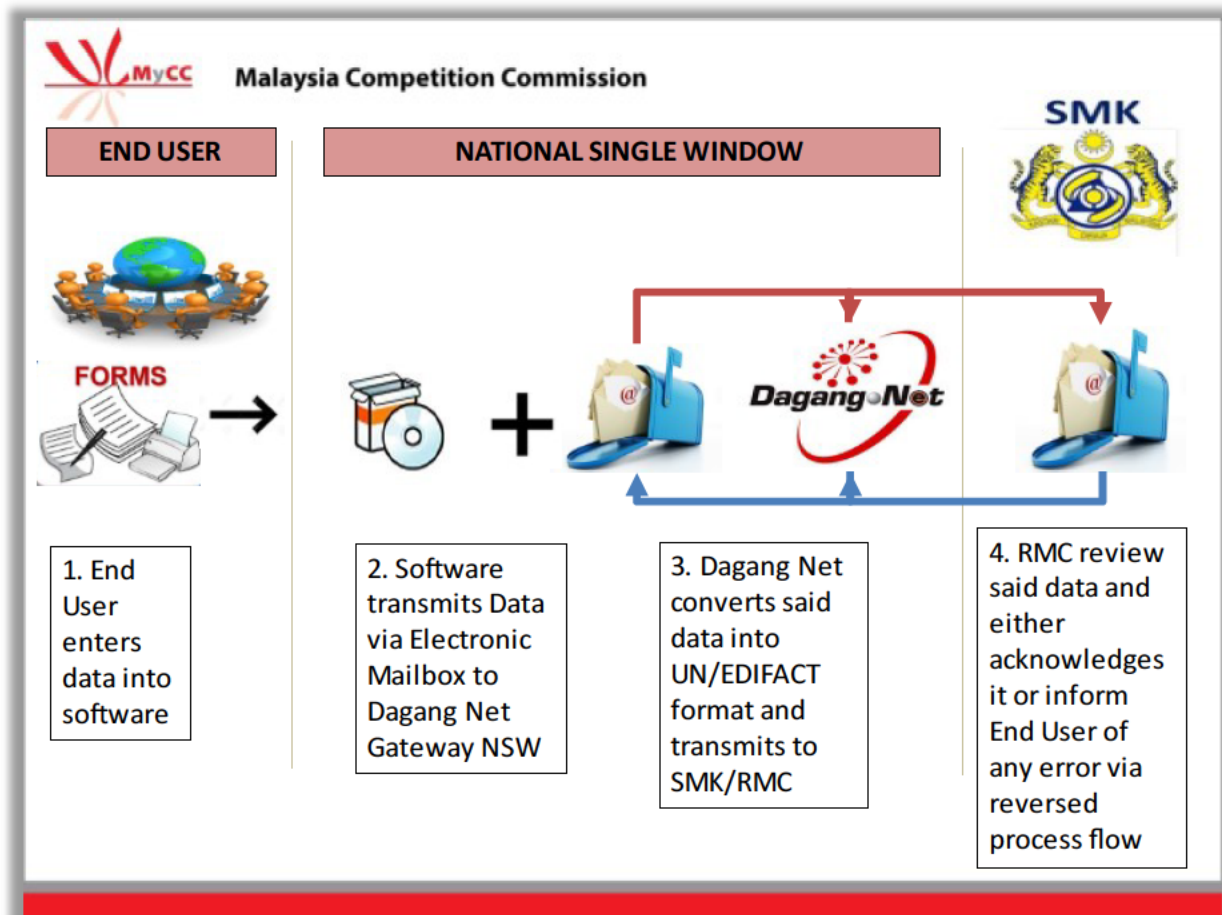
29. Upon obtaining the software and an electronic mailbox, end users are able to submit the Customs Declaration forms. The process flow for the submission of Customs Declaration by end users are as follows:

- (i) The end user enters the required data (customs related data) into the software and the said data will be transmitted using the electronic mailbox to Dagang Net's gateway platform under the NSW.
- (ii) Once received, Dagang Net converts the data into the UN/EDIFACT standard and transmit them via the same electronic mailbox to the RMC under SMK.
- (iii) RMC will then review the data and will acknowledge the same or will inform the end user of any errors in their Customs Declaration data via a reversed process flow.²⁷

30. The above-mentioned process flow of transmission of Customs Declaration is further illustrated in **Diagram 2** below:

²⁷ Video recording of Rank Alpha's Cargo Declare software dated 15.8.2017; and the slides by RMC titled "uCustoms system overview @logisware 2016" at page 4.

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



C.3.1 SOFTWARE PROVIDERS

31. Software providers in the NSW – SMK market for trade facilitation services are as follows:

- (i) Rank Alpha;
- (ii) Wynet Computer Sdn. Bhd. ("Wynet") (185919-V);²⁸

²⁸Companies Commission of Malaysia search on Wynet dated 29.12.2015.

- (iii) Mobile-Force Software (M) Sdn. Bhd. (“Mobile-Force”) (729350-K);²⁹
- (iv) Buttonwood smartLogistics Sdn. Bhd. (“Buttonwood”) (866686-T);³⁰
- (v) Crimsonlogic Etrade Services Pte Ltd. (“Crimsonlogic”);³¹
- (vi) DNeXPORT Sdn. Bhd. (“DNeXPORT”);³²
- (vii) Digital System (Malaysia) Sdn. Bhd. (“DSM”) (73543-D);³³
and
- (viii) MCDS Software (M) Sdn. Bhd. (“MCDS”) (1053297-U).³⁴

32. The entry of new software providers into the market is uncommon because the market is niche and mature with established players such as Rank Alpha and Wynet, which end users are familiar with.³⁵ At the material time, recent software providers such as Buttonwood and DSM

²⁹Agreement between Dagang Net and Mobile-Force dated 15.4.2008; Agreement between Dagang Net and Mobile-Force dated 5.10.2015; Supplemental Agreement between Dagang Net and MCDS dated 2.11.2017.

³⁰Companies Commission of Malaysia search on Buttonwood dated 25.7.2016.

³¹Agreement between Dagang Net and Crimsonlogic dated 22.1.2016

³²Companies Commission of Malaysia search on DNeXPORT dated 29.12.2015.

³³ Companies Commission of Malaysia search on DSM dated 24.11.2020.

³⁴ Companies Commission of Malaysia search on MCDS dated 25.7.2016.

³⁵ Paragraph 10 of Kelvin Tiong Chin Hock of Rank Alpha recorded on 26.10.2017; Paragraph 12 of Alwyn Hoa Chee Keong of Wynet recorded on 13.10.2017; Paragraph 16 of Dato Wong Kam Yin of DNEX recorded on 18.9.2017; Paragraph 25 of Statement of Zulkeflee bin Sahni of Dagang Net recorded on 26.9.2017; and Paragraph 19 of Statement of Mohd Nor Fauzi Bin Abdul Kayum of Edaran IT recorded on 6.10.2017.

were considered fringe players in the market and do not have many end users.³⁶

C.3.2 COSTS BORNE BY END USERS

33. Dagang Net will charge the end users a one-time registration fee, a monthly charge as well as transaction charges according to the amount of data transmitted monthly by the end users to the NSW/SMK for the use of the electronic mailbox.³⁷ The breakdown of the charges are as follow:

Table 3: Charges by Dagang Net to End Users

CHARGES	CORPORATE USER	SME USER
Registration Fee	RM500.00	RM200.00
Mailbox monthly charges	RM160.00	RM90.00
Transaction charges	RM0.80 per kilobyte	RM0.80 per kilobyte

³⁶ Paragraph 20 of Statement of Mohd Nor Fauzi Bin Abdul Kayum of Edaran IT recorded on 6.10.2017

³⁷ Email correspondence between Fadzilah Md Dahan of Dagang Net and the Commission dated 11.8.2017; Paragraph 13 of Statement of Asvinder Kaur A/P Asha Singh of Dagang Net recorded on 5.6.2017; and Paragraph 10 of Statement of Zulkeflee Bin Sahni of Dagang Net recorded on 7.6.2017.

34. Software providers will charge the end user a one-time payment for the purchase of the software and an annual maintenance charge thereafter for every year the software is subscribed.³⁸

C.3.3 CUSTOM AGENT LICENCE REQUIREMENT ON END USERS

35. End users are required to obtain a Customs Agent Licence from the RMC in order to submit customs related documents and to make transactions in the NSW-SMK.³⁹ It should be noted however that, as of 2007, with the exception of those with International Integrated Logistics Services (“IILS”) status, the RMC has frozen the issuance of the Customs Agent License due to large inactive licenses in the logistics market.⁴⁰
36. Any new company forming part of the trading communities that wishes to enter the logistics market at the material time must apply for an IILS status from the Malaysian Investment Development Authority (“MIDA”). Upon being granted the status, the company may apply to the RMC for the Customs Agent License.
37. IILS status enterprises are exempted from the above-mentioned freeze on the issuance of Customs Agent Licenses by RMC. As of August

³⁸ Paragraph 18 of Statement of Jane Lim Juck Noi of Rank Alpha recorded on 25.10.2016; and Paragraph 14 of Statement of Alywn Hoa Chee Keong of Wynet recorded on 12.10.2016.

³⁹ Paragraph 2 of the Statement of Lim Seok Hua of SP Brilliant Strategy recorded on 16.11.2016.

⁴⁰ Minutes of Meeting between the representatives of the RMC’s *Bahagian Teknologi Maklumat* and the Commission held on 11.9.2017.

2017, 102 enterprises have been granted ILS status by MIDA since its initial issuance in 2008.⁴¹

C.4 UBIQUITOUS CUSTOMS SYSTEM

38. The Ubiquitous Customs (“uCustoms”) system was envisioned by the Government in 2013 with a projected launching date in 2016.⁴² The uCustoms system would see the merger of the NSW and the SMK systems into a new NSW system which will be operated by the RMC. It will provide a one-stop centre for trade facilitation providing end-to-end services for end users in terms of obtaining or submitting the relevant trade facilitation documents from/to the relevant government agencies and/or to the RMC.⁴³
39. Pursuant to the above-mentioned project, the RMC issued a Request for Proposal (“RFP”) – *Tawaran Merekabentuk, Membangun, Memasang, Mengkonfigurasi, Menguji, Mentaulliah dan Menyelenggara Sistem Service Provider untuk National Single Window* which was announced on 24.1.2015.⁴⁴

⁴¹ Minutes of Meeting between the representative of MIDA and the Commission held on 18.8.2017; Email correspondence from MIDA to the Commission dated 15.11.2017; and the attachment enclosed to the email correspondence from MIDA to the Commission dated 15.11.2017.

⁴² uCustoms Brochure 1 retrieved from RMC’s website <http://www.customs.gov.my/en/uc/Pages/ucintrobrochure.aspx> on 19.11.2020.

⁴³ Part C of Statement of Mohammad Haizam bin Hashim of RMC recorded on 17.4.2017.

⁴⁴ Attachment 1 of Edaran Trade’s Formal Reply to the Commission’s Queries sent on 17.1.2017.

40. On 23.11.2015, the RMC announced the appointments of both Dagang Net and Edaran Trade as National Single Window Service Providers to all relevant stakeholders by means of a circular.
41. Edaran Trade Network Sdn. Bhd. (“Edaran Trade”) (1156875-T)⁴⁵ was appointed as the service provider in the uCustoms system. The appointment of Edaran Trade as the service provider was conditional on the formation of a joint venture between Edaran IT Services and Rank Alpha for the duration of Edaran Trade’s appointment as a service provider in the uCustoms system.⁴⁶
42. Edaran Trade is a private limited company established on 25.8.2015 and is principally engaged in providing information technology services activities, NEC computer training, and wholesaling of computer hardware, software and peripherals. It is the National Single Window Service Provider for the uCustoms project.⁴⁷
43. The reason for the appointment of more than one service provider is to provide more value-added services to the end users.⁴⁸
44. Under the proposed uCustoms system, the end user would have two options in submitting or preparing its trade facilitation documents. Firstly, the end user may directly submit or prepare trade facilitation

⁴⁵ Companies Commission of Malaysia search on Edaran Trade dated 16.6.2020.

⁴⁶ Attachment 3 of Edaran Trade’s Formal Reply to the Commission’s queries sent on 17.1.2017.

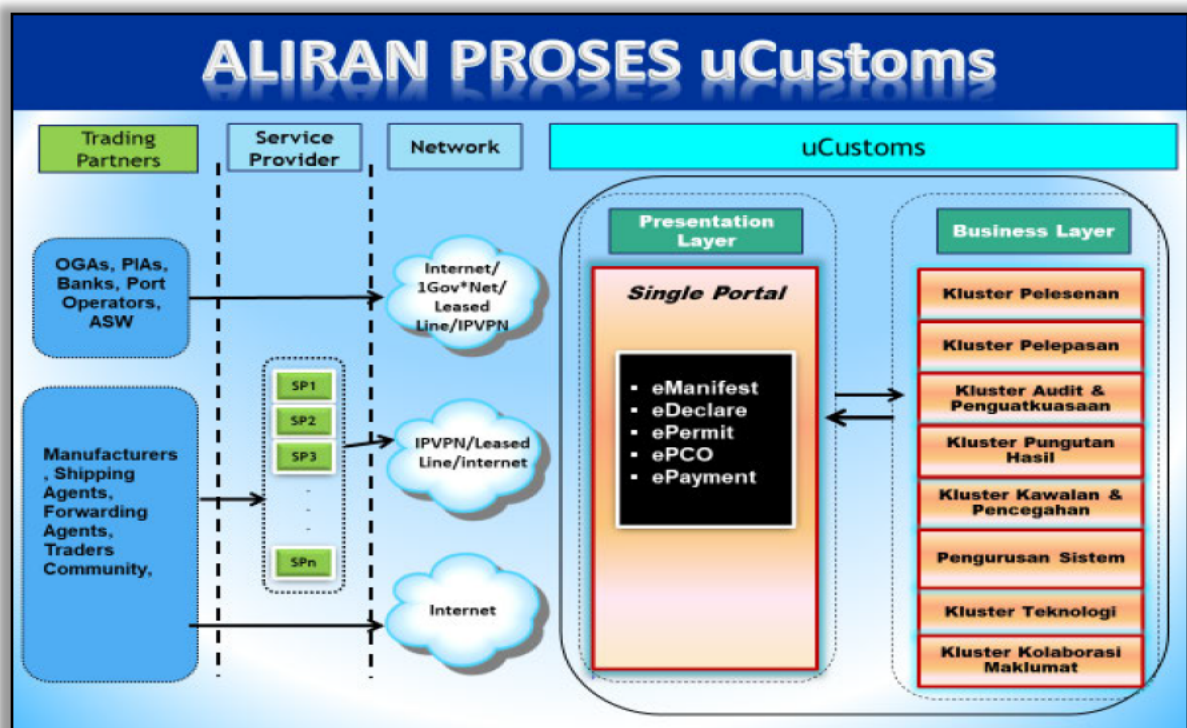
⁴⁷ Attachment 7 of Edaran Trade’s Formal Reply to the Commission’s queries sent on 17.1.2017.

⁴⁸ Part C of Statement of Mohammad Haizam bin Hashim of RMC recorded on 17.4.2017.

documents via the uCustoms online web-based portal without a fee. This option does not involve any service or software provider in completing their trade facilitation document.

45. Alternatively, the end user may acquire the services of Service Providers in the uCustoms system for additional value-added services.⁴⁹
46. **Diagram 3** below depicts the environment of the upcoming uCustoms system:

Diagram 3: The Environment of the Upcoming uCustoms System



⁴⁹ Part C of Statement of Mohammad Haizam bin Hashim of RMC recorded on 17.4.2017.

47. Due to technical issues on the development of the uCustoms system and the complex nature of the project, the uCustoms system has been delayed from its aimed launch date.⁵⁰
48. Despite the delay, the uCustoms system is evidently shown to be progressing on a yearly basis. The scheduled date for the pilot and simulation of the uCustoms with selected companies based in West Port and Port Klang held on 17.12.2018.⁵¹ However, right until the issuance of this Decision, the current trade facilitation system is still in operation where Dagang Net is the sole service provider.
49. At the time of the issuance of this Decision, the operating environment of uCustoms has yet to be finalized by RMC and is subject to change before the actual date of implementation.

D. CONDUCT OF DAGANG NET

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. This imposition allegedly led to new and existing Rank Alpha and Wynet end users unable to obtain new and additional electronic mailboxes by reason of

⁵⁰ Minutes of Meeting between Edaran Trade and the Commission dated 17.1.2017; and Minutes of Meeting of Meeting between the Commission and RMC held on 18.8.2017.

⁵¹ Retrieved from RMC's website, entitled "*uCustoms Latest News & Announcement – Implementation of Pilot Live uCustoms in Westport, Port Klang*" on 19.1.2021.

Rank Alpha's and Wynet's objections to the exclusivity clause and their refusals to sign the MCPA.

51. The Commission views the following events as material and relevant in coming to this Decision:

- (i) On 15.4.2008, Dagang Net entered into an agreement with Mobile-Force, namely, the "Master Solution Partner Agreement" ("MSPA") for a term of 5 years.⁵²
- (ii) On 17.2.2009, Dagang Net entered into an agreement with Rank Alpha, namely, the MSPA for a term of 5 years.⁵³
- (iii) On 17.4.2009, Dagang Net entered into an agreement with Wynet, namely, the MSPA for a term of 5 years.⁵⁴

52. The Commission observes at this point that the MSPA mentioned in sub-points (i) to (iii), did not contain any exclusivity clause.

- (iv) On 8.4.2013, Dagang Net was aware of the additional service provider to be appointed by the Government for the upcoming uCustoms.⁵⁵

⁵² Agreement between Dagang Net and Mobile-Force dated 15.4.2008.

⁵³ Agreement between Dagang Net and Rank Alpha dated 17.2.2009.

⁵⁴ Agreement between Dagang Net and Wynet dated 17.4.2009.

⁵⁵ Minutes of Meeting entitled "Notes on discussion on Extension of NSW and Strategy Post uCustom" dated 8.4.2013.

- (v) On 14.3.2014 and 24.9.2014, Dagang Net issued letters to Rank Alpha on the term extension of the MSPA. The new term of the MSPA was set to be until 31.3.2015. Dagang Net informed Rank Alpha of a new agreement replacing MSPA, which is pending finalisation of the terms and conditions.⁵⁶

53. The Commission observes that the new agreement mentioned in sub-point (v) does not contain any exclusivity clause.

- (vi) On 24.1.2015, RMC announced on the issuance of RFP for the appointment of the uCustoms Service Provider.⁵⁷
- (vii) On 25.3.2015, Dagang Net issued an invitation letter to Rank Alpha to participate in the new partner programme which is the “MyChannel Partner Agreement”.⁵⁸
- (viii) The invitation letter contained the terms and conditions of the MCPA, notably, the exclusivity clause and the fee clause. Dagang Net informed Rank Alpha to respond as to whether or not it accepted the terms and conditions of the MCPA not later than 27.3.2015.⁵⁹ The exclusivity clause stipulates that during the tenure of the agreement, the

⁵⁶ Letter from Dagang Net to Rank Alpha dated 14.3.2014; and Letter from Dagang Net to Rank Alpha dated 24.9.2014.

⁵⁷ Attachment 1 of Edaran Trade’s Formal Reply to the Commission’s queries sent on 17.1.2017.

⁵⁸ Letter from Dagang Net to Rank Alpha dated 25.3.2015.

⁵⁹ Appendix 1 of Letter from Dagang Net to Rank Alpha dated 25.3.2015.

vendor shall not engage with other Service Provider, to be appointed by the Royal Malaysian Customs Department under the uCustoms Service Provider Program, to provide similar services to the end users.

54. The Commission observes in sub-points (vii) and (viii) that there was an introduction of an exclusivity clause in the MCPA between Dagang Net and the software providers.

(ix) On 2.4.2015, Dagang Net issued a reminder letter to Rank Alpha with an extension of time until 10.4.2015 for the latter's confirmation of acceptance of the MCPA.⁶⁰

(x) Between 10.4.2015 and 15.4.2015, there were communications between Rank Alpha and Dagang Net on the extension of time for Rank Alpha to confirm its agreement to the MCPA. On 13.4.2015, Dagang Net proposed for a meeting with Rank Alpha to clarify issues regarding the MCPA.⁶¹

(xi) Dagang Net agreed to meet Rank Alpha on 20.4.2015.⁶²

⁶⁰ Letter from Dagang Net to Rank Alpha dated 2.4.2015.

⁶¹ Email Correspondence between Dagang Net and Rank Alpha between 10.4.2015 to 15.4.2015.

⁶² Email Correspondence between Dagang Net and Rank Alpha between 10.4.2015 to 15.4.2015.

- (xii) On 14.8.2015, Edaran Trade and Dagang Net were appointed as the service providers for uCustoms.⁶³
- (xiii) On 5.10.2015, Mobile-Force signed the MCPA containing the exclusivity clause with Dagang Net.⁶⁴
- (xiv) On 8.10.2015, Edaran Trade and Dagang Net attended a meeting with the RMC on the uCustoms implementation timeline.⁶⁵
- (xv) In the 9th Steering Committee Meeting held on 24.10.2015, Dagang Net informed the attendees that the uCustoms would be implemented on 1.12.2015, and registration with the uCustoms would start on 1.1.2016.⁶⁶
- (xvi) On 29.10.2015, Dagang Net made an announcement to the end users on its appointment as the service provider for uCustoms. Dagang Net announced that DNeXPORT and Mobile-Force were their current business partners for the NSW and the end users were encouraged to migrate to their business partners.

⁶³ News article by the Edge titled "Royal Malaysian Customs appoints DNeX as trading solution service provider" dated 18.4.2015; and Attachment 3 of Edaran Trade's Formal Reply to the Commission's Queries sent on 17.1.2017.

⁶⁴ Agreement between Dagang Net and Mobile-Force dated 5.10.2015.

⁶⁵ Minutes of 9th Steering Committee Meeting between FMFF and Dagang Net dated 24.10.2015.

⁶⁶ Minutes of 9th Steering Committee Meeting between FMFF and Dagang Net dated 24.10.2015.

- (xvii) On 30.10.2015, DNeXPORT signed the MCPA containing the exclusivity clause with Dagang Net.⁶⁷
- (xviii) On 2.12.2015, Rank Alpha lodged a complaint to the Commission on the exclusivity arrangement by Dagang Net.
- (xix) On 4.12.2015, Buttonwood signed the MCPA containing the exclusivity clause with Dagang Net.⁶⁸
- (xx) On 22.1.2016, Crimsonlogic signed the MCPA containing the exclusivity clause with Dagang Net⁶⁹.
- (xxi) On 21.6.2016, the Commission commenced an investigation on the basis of the allegations made in the complaint.
- (xxii) On 4.1.2017, Titimas Logistics lodged a complaint with the Commission on the refusal by Dagang Net to supply electronic mailboxes to the end users.
- (xxiii) On 27.10.2017, DSM signed the MCPA without an exclusivity clause.⁷⁰

⁶⁷ Agreement between Dagang Net and DNeXPORT dated 30.10.2015.

⁶⁸ Agreement between Dagang Net and Buttonwood dated 4.12.2015.

⁶⁹ Agreement between Dagang Net and Crimsonlogic dated 22.01.2016.

⁷⁰ Letter from Dagang Net to the Commission dated 30.10.2017.

- (xxiv) On 1.8.2017, Wynet signed the MCPA without an exclusivity clause.⁷¹
- (xxv) On 30.10.2017, GeTS Asia signed a supplemental agreement to remove the exclusivity clause in the MCPA.⁷²
- (xxvi) On 2.11.2017, Buttonwood and MCDS signed a supplemental agreement to remove the exclusivity clause in the MCPA.⁷³
- (xxvii) On 15.11.2017, DNeXPORT signed a supplemental agreement to remove the exclusivity clause in the MCPA.⁷⁴
- (xxviii) On 30.10.2017, Dagang Net informed the Commission on the removal of the exclusivity clause in the MCPA.⁷⁵
- (xxix) On 15.11.2017 Dagang Net sent an email to Rank Alpha with an attachment of the draft MCPA precluding any exclusivity clause. Dagang Net requested a discussion with Rank Alpha on 20.11.2017.⁷⁶ Rank Alpha informed Dagang Net of its unavailability to attend the discussion.⁷⁷

⁷¹ Agreement between Wynet and Dagang Net dated 1.8.2017.

⁷² Supplemental Agreement between Dagang Net and Crimsonlogic dated 30.10.2017.

⁷³ Supplemental Agreement between Dagang Net and Buttonwood dated 2.11.2017; and Supplemental Agreement between Dagang Net and MCDS dated 2.11.2017.

⁷⁴ Supplemental Agreement between Dagang Net and DNeXPORT dated 15.11.2017.

⁷⁵ Letter from Dagang Net to the Commission dated 30.10.2017.

⁷⁶ Email correspondence between Dagang Net and Rank Alpha dated 15.11.2017.

⁷⁷ Email correspondence between Dagang Net and Rank Alpha dated 15.11.2017.

E. INVESTIGATION PROCEDURES AND PROCESS

55. On 2.12.2015, the Commission received a complaint under section 15 of the Act, lodged by Rank Alpha against Dagang Net.
56. On 21.6.2016, the Commission commenced an investigation under section 15(1) of the Act into the alleged infringement to ascertain whether or not there had been an infringement of the section 10 prohibition under the Act.
57. On 5.1.2017, the Commission received the second complaint, from Titimas Logistics pertaining to the alleged anti-competitive conduct of Dagang Net.
58. During the course of investigation, the Commission issued 79 formal notices pursuant to section 18(1)(a) and (b) of the Act requiring the parties concerned to provide information and/or documents and to make statements to the Commission based on information and documents requested or in relation to any queries made by the Commission's officers. The Commission issued 8 notices pursuant to section 20 of the Act to access the records of the relevant parties.
59. In addition to the above, the Commission carried out interviews and obtained statements under section 18(1) and (b) of the Act with the key representatives of Dagang Net, DNEX, and DNeXPORT. The

interviews with the key representatives of Dagang Net, DNEX, and DNeXPORT are described in **Appendix A**.

60. The Commission also interviewed and obtained statements from representatives of the relevant market participants and government agencies as set out in **Appendix B**.
61. The Commission also carried out discussions with several relevant parties and government agencies as set out in **Appendix C**.
62. Additionally, the Commission issued a notice pursuant to section 16 of the Competition Commission Act 2010 (“Act 713”) to Dagang Net for the purpose of collecting information required in the performance of the Commission’s functions.
63. On 6.4.2018, the Commission issued a Proposed Decision against Dagang Net.
64. From 23.7.2018 to 24.7.2018, Dagang Net was granted access to the Commission’s file.
65. On 8.8.2018, Dagang Net requested an extension of time of 3 months to submit its written representation to the Commission. Dagang Net was granted the extension until 3.9.2018.

66. Dagang Net submitted its written representations to the Commission dated 30.8.2018. Subsequently, on 25.4.2019 and 29.7.2019, Dagang Net submitted two additional written representations to the Commission.
67. Dagang Net requested for and subsequently made its oral representations to the Commission on the following dates:
- (i) 16.1.2019;
 - (ii) 25.4.2019; and
 - (iii) 29.7.2019.

F. DAGANG NET'S ALLEGED PROCEDURAL IMPROPRIETY ON THE PART OF THE COMMISSION

F.1. APPLICATION FOR A HEARING UNDER SECTION 38 OF THE COMPETITION ACT 2010

68. At the commencement of the oral representation, Dagang Net applied to the Commission to conduct a hearing pursuant to section 38 of the Act. The purpose of the application was that Dagang Net intended to cross examine a list of individuals referred in the Proposed Decision.

Arguments by Dagang Net

69. Dagang Net argues that the statements and information provided by the individuals as listed in **Table 4** below had been accepted without proper evaluation by the Commission in the Proposed Decision despite being contradictory to other evidence.

Table 4: The List of Individuals

NO.	INDIVIDUAL	DESIGNATION
1.	Mohamad Haizam Bin Hashim	<i>Penolong Pengarah Kanan II, Bahagian Projek uCustoms</i>
2.	Jane Lim Juck Noi	Senior Manager, Rank Alpha
3.	Kelvin Tiong Chin Hock	Chief Executive Officer, Rank Alpha
4.	Alwyn Hoa Chee Keong	Managing Director, Wynet
5.	Paul Seo Tet Chong	Executive Secretary of Federation of Malaysian Freight Forwarders (“FMFF”) and Selangor Freight Forwarders and Logistics Association (“SFFLA”)
6.	Francis Walter Culas	Chairman, Airfreight Forwarders Association of Malaysia (“AFAM”)

NO.	INDIVIDUAL	DESIGNATION
7.	Mohd Nor Fauzi bin Abdul Kayum	Head of NSW Edaran Trade and Edaran IT and RMC Project
8.	Yeoh Keng Yao	Director, Titimas Group of Companies

70. Dagang Net sought to verify, test and seek clarifications from the individuals in **Table 4** through the cross examination. Dagang Net contended that the credibility of the individuals could have been impeached if Dagang Net were given the opportunity of cross examination.
71. Dagang Net also alleges, which we disagree, that the Commission, in arriving at its findings of facts in the Proposed Decision, had relied on “informal discussions” without any statements taken from the following individuals as listed in **Table 5**.

Table 5: The List of Individuals

NO.	INDIVIDUAL	DESIGNATION
1.	Dato' Zaini Bin Md. Desa	<i>Pengarah, Bahagian Perkastaman</i>
2.	Mazuki Bin Md Taib	<i>Penolong Kanan Pengarah Kastam I</i>

NO.	INDIVIDUAL	DESIGNATION
3.	Zabedah Binti Hussain	<i>Ketua Penolong Pengarah Bahagian uCustoms</i>
4.	Mazwin Binti Muhamad Yusof	Project Management Office of RMC
5.	Mohd Nor Hisyam Bin Mohd Arshad	<i>Penolong Kanan Pengarah Kastam II</i>
6.	Zaidah Binti Mohd Noor	<i>Timbalan Pengarah Cawangan Aplikasi Bahagian Teknologi Maklumat</i>
7.	Ibrahim Helmi Abdullah	<i>Penolong Pengarah Kanan Bahagian Dasar Pelaburan dan Fasilitasi Perdagangan</i>
8.	Jamilah Hj Hassan	<i>Pengarah Bahagian Sokongan Perdagangan dan Industri</i>
9.	Masri Zohaini Idris	Deputy Director, Business Services and Supply Chain Innovation
10.	Mohd Harun Elik	Deputy Director, Business Services Supply Chain Innovation
11.	John Patrick Antonysamy	<i>Timbalan Setiausaha Bahagian Cukai (Galakan Cukai dan Sektor), Tax Division</i>

NO.	INDIVIDUAL	DESIGNATION
12.	Zainordin Bin Shahlal	<i>Wakil Kerajaan Persekutuan Bahagian Cukai (Galakan Cukai dan Sektoral)</i> , Tax Division
13.	Noreen Haiza Binti Khairuddin	<i>Ketua Penolong Setiausaha Bahagian Cukai (Perkhidmatan 1)</i> , Tax Division
14.	Noor Azlina Bt Mat Saidi	<i>Penolong Setiausaha Bahagian Cukai (Cukai Langsung)</i> , Tax Division

72. Dagang Net contends that its inability to examine the individuals in **Table 5** amounts to a serious miscarriage of justice as it impacted the evidence relied upon by the Commission in coming to the Proposed Decision.
73. Dagang Net further argues that the Commission unfairly rejected its application for a section 38 hearing and had directed that the application for a hearing to be made during the oral representation for the Commission's consideration.
74. Dagang Net contends that the absence of a hearing and the inability to cross-examine the listed individuals would be prejudicial to their defence.

The Commission's Decision on the Application

75. Having given due consideration to Dagang Net's application for a section 38 hearing and the arguments of learned counsel, the Commission was of the view that in the circumstances of the case, a section 38 hearing was unnecessary. Accordingly, the application was rejected, and learned counsel was directed to proceed with the oral representation. The Commission opined that Dagang Net by its written submissions and oral representation had been provided with adequate opportunity to respond to the alleged inconsistencies and inaccuracies of the statements relied upon by the Commission. In other words, we take the position that the credibility or veracity of the statements of the persons listed could be evaluated without the need of any cross-examination. We shall now explain our reasons for rejecting the application for a section 38 hearing by dealing with the statements of the listed persons individually.

Mohamad Haizam Bin Hashim ("Haizam")

Dagang Net's Contentions

76. Dagang Net is dissatisfied with the statement made by Haizam dated 17.4.2017, whose statement was relied upon by the Commission in arriving at paragraphs 45, 74 and 128 of the Proposed Decision. We shall discuss each of these paragraphs.

Paragraph 45:

77. In this paragraph, the Commission notes that Haizam stated that uCustoms was introduced to address the issue of there being only a single service provider in the NSW-SMK system.
78. Dagang Net argues that this statement was factually inaccurate as the uCustoms was conceived in 2013, while whilst the complaints by Rank Alpha and Titimas Logistics were lodged in 2015 and 2017, respectively. As such, uCustoms could not have been introduced to address the complaints concerning the unavailability of the electronic mailbox as raised by the service providers and end users.

Paragraph 74:

79. In this paragraph, the Commission notes that Haizam provided a statement on behalf of the RMC, that was perceived to be in support of the complaint by Rank Alpha.
80. Dagang Net sought to cross-examine Haizam with the view to challenge the partiality of the RMC.⁷⁸

⁷⁸ Letter from RMC to Edaran IT dated 14.8.2015.

Paragraph 128:

81. In this paragraph, the Commission notes that Haizam said that the Single Agent Code (“SAC”) (*Satu Kod Agen Kastam*) was only intended to standardise the forwarding agent code and not as a measure to address the supply of mailboxes from Dagang Net to the end users.
82. Dagang Net argues that this statement is inconsistent as there were statements made by Paul Seo Tet Chong, Francis Walter Culas and all the stakeholders including end users to the effect that the SAC reduced the need for additional electronic mailbox.

The Commission’s Findings

83. The following are the Commission’s findings regarding each of the aforesaid paragraphs.

On paragraph 45:

84. It is our position that Dagang Net had considered paragraph 45 of the Proposed Decision in isolation and had disregarded the historical background to the creation of uCustoms as set out in paragraphs 45 to 56 of the Proposed Decision.

85. Dagang Net had also disregarded the statement made by Wan Ahmad Syatibi bin Wan Abd Manan of Dagang Net⁷⁹, and the finding of facts by the Commission as stated in paragraphs 160 to 162 of the Proposed Decision⁸⁰ to the effect that Wan Ahmad Syatibi's statement corroborated the statement made by Haizam in relation to the non-compliance of the terms set by Dagang Net.

On paragraph 74:

86. It is our position that Dagang Net had considered paragraph 74 of the Proposed Decision in isolation and had disregarded the background of the appointment process as stated in paragraphs 71 to 73 of the Proposed Decision.
87. Further, Dagang Net had failed to furnish any evidence to support the allegation that Haizam was biased in his statement to the Commission. The cross examination of Haizam for the purpose of paragraph 74 of the Proposed Decision would have been a futile exercise as it would not provide further clarification to the information already provided to the Commission during the investigation.

⁷⁹ Paragraph 34 of Statement of Wan Ahmad Syatibi of Dagang Net recorded on 27.9.2017.

⁸⁰ Paragraph 34 of Statement of Wan Ahmad Syatibi of Dagang Net recorded on 27.9.2017.

On paragraph 128:

88. It is our position that Dagang Net had considered paragraph 128 of the Proposed Decision in isolation and had disregarded the function of the SAC as stated in paragraphs 124 to 130 of the Proposed Decision.
89. The statements relied upon by Dagang Net as the “supporting evidence” do not, as a whole, indicate the purpose of the utilisation of the additional electronic mailbox by the end users.
90. Dagang Net had also disregarded the statements made by Asvinder Kaur A/P Asha Singh⁸¹, Wan Ahmad Syatibi⁸² and Abdul Khalil bin Abdullah,⁸³ all of Dagang Net, that corroborated the statement made by Haizam regarding his view on the function of the SAC and additional electronic mailbox that may be required by the end users for the purposes of segregation of information for the end users’ business operations.
91. Furthermore, Dagang Net had disregarded the fact that upon receiving the request for additional electronic mailbox by the end users, Dagang Net had not advised them to utilise SAC but instead advised the end users to opt for the authorised software providers.⁸⁴

⁸¹ Paragraph 12 of Statement of Asvinder Kaur A/P Asha Singh of Dagang Net recorded on 5.6.2017.

⁸² Paragraph 8 of Statement of Wan Ahmad Syatibi bin Wan Abd Manan of Dagang Net recorded on 5.6.2017.

⁸³ Paragraph 10 of Statement by Abdul Khalil bin Abdullah of Dagang Net recorded on 5.6.2017.

⁸⁴ Email correspondence between Dagang Net and DNeXPORT dated 3.11.2016; Paragraphs 11 and 12 of Statement of Zahari Bin Mohamed Yusoff of DNeXPORT recorded on 13.7. 2017; and Paragraphs 34 and 35 of Statement of Wan Ahmad Syatibi bin Wan Abd Manan of Dagang Net dated 27.9.2017.

92. As such, the cross examination of Haizam for the purpose of paragraph 128 of the Proposed Decision would not provide further clarification to the information already provided to the Commission during the investigation.

Jane Lim Juck Noi (“Jane Lim”)

Dagang Net’s Contentions

93. Dagang Net is dissatisfied with the statement made by Jane Lim dated 25.10.2016, whose statement was relied upon by the Commission in arriving at paragraphs 66, 70 and 105 of the Proposed Decision. Dagang Net is also dissatisfied with the information provided by Jane Lim during the meeting of 23.3.2017 with the Commission⁸⁵, which information was relied upon by the Commission in arriving at paragraph 142 of the Proposed Decision. We shall discuss each of these paragraphs.

Paragraph 66:

94. In this paragraph, the Commission notes that Jane Lim stated that Rank Alpha objected to the exclusivity and fee clauses in the MCPA, and this led to the non-signing of the MCPA.

⁸⁵ Minutes of Meeting between Rank Alpha and the Commission dated 23.3.2017.

95. Dagang Net argues that the objection to the said clauses was never communicated to Dagang Net when the offer for participation in the MCPA was first made to Rank Alpha in March 2015.⁸⁶

Paragraph 70:

96. In this paragraph, it is stated that the Commission has sighted the draft MCPA and found that the draft does not contain the purported exclusivity clause.
97. Dagang Net argues that the cessation of Rank Alpha as the authorised software provider for Dagang Net was at the behest and action of Rank Alpha.⁸⁷
98. Dagang Net further submits that Rank Alpha had not sign the MCPA that was offered to Rank Alpha in 2017 to participate, despite the fact that the proposed agreement no longer contained the exclusivity clause.

Paragraph 105:

99. In this paragraph, Jane Lim informed the Commission that additional mailboxes may be required should the end users wishes to submit their

⁸⁶ Letter from Dagang Net to Rank Alpha dated 2.4.2015; Paragraph 15 of Statement of Zulkeflee bin Sahni of Dagang Net recorded on 26.9.2017; and Paragraph 20 of Statement of Zulkeflee bin Sahni of Dagang Net recorded on 7.6.2017.

⁸⁷ Notice by Rank Alpha to end users dated 3.11.2015.

trade facilitation data from more than one computer/location or they wish to segregate their imports and exports information.

100. Dagang Net argues that the statement made by Jane Lim discounts and contradicts the function of the SAC.

Paragraph 142:

101. In this paragraph, the Commission notes that Jane Lim had informed the Commission that Dagang Net did not provide any information updates with regards to the *Perintah Duti Kastam* (“PDK”) 2017 certification and Rank Alpha subsequently had to obtain the said certification from Edaran IT.

102. Dagang Net asserts that Rank Alpha was in fact invited for the PDK 2017 certification. Dagang Net further contended that Rank Alpha subsequently attended the PDK 2017 certification that was held on 27.3.2017 and 28.3.2017.⁸⁸

The Commission’s Findings

The following are the Commission’s findings regarding each of the aforesaid paragraphs.

⁸⁸ Email correspondences from Dagang Net to Rank Alpha between 22.3.2017 to 23.3.2017; and Email correspondences from Dagang Net to Wynet between 22.3.2017 to 23.3.2017.

On paragraph 66

103. It is the Commission's finding that Dagang Net had deliberately ignored the fact that Rank Alpha had requested for a clarification as to the terms and conditions of the MCPA, and that this led to a scheduled meeting on 20.4.2015.⁸⁹ At all material time, Dagang Net was aware that Rank Alpha disagreed with the exclusivity clause and the fee clause contained in the terms and conditions.⁹⁰

104. Dagang Net had also disregarded the documentary evidence⁹¹ and statement made by Kelvin Tiong Chin Hock⁹² ("Kelvin Tiong") that corroborated the statement made by Jane Lim on Rank Alpha's disagreement over the terms and conditions of the MCPA in March 2015.

On paragraph 70

105. It is the Commission's finding that Rank Alpha's request for clarification of the terms and conditions of the MCPA had been deliberately disregarded by Dagang Net, which led to a scheduled meeting on

⁸⁹ Email correspondence between Dagang Net and Rank Alpha between 10.4.2015 to 15.4.2015; Minutes of Meeting between Rank Alpha and the Commission dated 17.1.2017; and Paragraph 18 of Statement of Wan Ahmad Syatibi bin Wan Abd Manan of Dagang Net recorded on 5.6.2017.

⁹⁰ Paragraph 14 of Statement of Dato' Wong Kam Yin of DNEX recorded on 5.6.2017.

⁹¹ Letter from Dagang Net to its Subscribers dated 29.10.2015; and Letter from Rank Alpha to AFAM dated 12.11.2015.

⁹² Paragraph 6 of Statement of Kelvin Tiong Chin Hock of Rank Alpha recorded on 26.10.2017.

20.4.2015.⁹³ At all material times, Rank Alpha's disagreement with the exclusivity clause and the fee clause contained in the terms and conditions was known to Dagang Net.⁹⁴

106. Furthermore, Dagang Net had disregarded the letters⁹⁵ and the statement made by Kelvin Tiong⁹⁶ as corroborating evidence to the statement made by Jane Lim on Rank Alpha's disagreement over the terms and conditions of the MCPA.

107. Dagang Net further disregarded the Commission's finding at paragraph 244 of the Proposed Decision to the effect that Rank Alpha had started to diversify and expand its business in light of the fact that it was unable to generate sales of software in NSW-SMK related business, and that prior to May 2017, the income generated from non-SMK information technology related business was zero.

On paragraph 105

108. It is the Commission's finding that Dagang Net disregarded the statements made by Wan Ahmad Syatibi⁹⁷, Abdul Khalil bin Abdullah⁹⁸,

⁹³ Email Correspondence between Dagang Net and Rank Alpha between 10.4.2015 to 15.4.2015; Minutes of Meeting between Rank Alpha and the Commission dated 17.1.2017; and Paragraph 18 of Statement of Wan Ahmad Syatibi bin Wan Abd Manan of Dagang Net recorded on 5.6.2017.

⁹⁴ Paragraph 16 of Statement of Dato' Wong Kam Yin of DNEX recorded on 5.6.2017.

⁹⁵ Letter from Dagang Net to its Subscribers dated 29.10.2015; and Letter from Rank Alpha to AFAM dated 12.11.2015.

⁹⁶ Paragraph 6 of Statement of Kelvin Tiong Chin Hock of Rank Alpha recorded on 26.10.2017.

⁹⁷ Paragraph 8 of Statement of Wan Ahmad Syatibi bin Wan Abd Manan of Dagang Net recorded on 5.6.2017.

⁹⁸ Paragraph 10 of Statement of Abdul Khalil bin Abdullah of Dagang Net recorded on 5.6.2017.

Zahari Azar bin Zainudin⁹⁹, Asvinder Kaur A/P Asha Singh¹⁰⁰, all of Dagang Net, Dato' Wong Kam Yin of DNEX¹⁰¹ and Alwyn Hoa Chee Keong of Wynet¹⁰² that corroborate the statement made by Jane Lim and that support the finding of the Commission in paragraph 105 of the Proposed Decision.

On paragraph 142

109. It is the Commission's finding that Dagang Net had deliberately disregarded the meeting held between the RMC, MOF, Dagang Net and Edaran IT on 22.3.2017 which addressed the fact that Rank Alpha was not provided with the information updates for PDK 2017 certification. Additionally, Dagang Net had informed the Commission that it had extended invitation to Rank Alpha pursuant to the meeting and upon the instruction of the representatives from the MOF.¹⁰³ The above-mentioned instances support the Commission's finding in paragraph 142 of the Proposed Decision.

110. As such, the cross examination of Jane Lim for the purpose of paragraph 142 of the Proposed Decision would be an exercise in futility; for it would not provide further clarification to the information already provided to the Commission during the investigation.

⁹⁹ Paragraph 8 of Statement of Zahari Azar bin Zainudin of Dagang Net recorded on 5.6.2017.

¹⁰⁰ Paragraph 12 of the Statement by Asvinder Kaur A/P Asha Singh of Dagang Net recorded on 5.6.2017.

¹⁰¹ Paragraph 16 of the Statement by Dato' Wong Kam Yin of DNEX recorded on 5.6.2017.

¹⁰² Paragraph 3 of the Statement by Alwyn Hoa Chee Keong of Wynet recorded on 12.10.2016.

¹⁰³ Paragraphs 33 to 39 of the Statement by Wan Ahmad Syatibi bin Wan Abd Manan of Dagang Net recorded on 5.6.2017.

Kelvin Tiong Chin Hock (“Kelvin Tiong”)

Dagang Net’s Contentions

111. Dagang Net challenges the accuracy of paragraphs 69 and 70 of the Proposed Decision and sought to cross examine Kelvin Tiong. We shall discuss these paragraphs.

Paragraphs 69 and 70:

112. Dagang Net sought to cross examine Kelvin Tiong in relation to Rank Alpha’s motive for the complaint made to the Commission in 2015, and the omission on the part of Rank Alpha to sign the MCPA in 2017, although the draft did not contain the exclusivity clause. Dagang Net argues that the end users using Rank Alpha’s software were still allowed to submit their respective declaration through the NSW-SMK system.

The Commission’s Findings

The following are the Commission’s findings regarding the aforesaid paragraphs.

113. It is the Commission’s finding that Dagang Net had disregarded the statement made by Kelvin Tiong in which he had said that since 2017,

Rank Alpha had been committed to other on-going projects and thus had not engaged with Dagang Net to re-join as a partner.¹⁰⁴

114. Dagang Net had also disregarded the consideration made by the Commission in paragraph 299 of the Proposed Decision that the cut-off date on 9.11.2017 for the alleged infringement is based on the invitation date extended to the Rank Alpha for the signing of the MCPA sans the exclusivity clause.

115. The Commission finds that there is merit in the complaint lodged by Rank Alpha in 2015 as the Customs declarations made by the end users using Rank Alpha's software had experienced "errors" as evidenced by the cases¹⁰⁵ and the said software errors were corroborated by the statement made by Abdul Khalil Bin Abdullah of Dagang Net.¹⁰⁶

Alwyn Hoa Chee Keong ("Alwyn Hoa")

Dagang Net's Contentions

116. Dagang Net is dissatisfied with the statement of Alwyn Hoa dated 12.10.2016 and the information provided by him during the meeting with the Commission on 20.3.2017.¹⁰⁷ The statement and information were

¹⁰⁴ Paragraph 6 of Statement of Kelvin Tiong Chin Hock of Rank Alpha recorded on 26.10.2017.

¹⁰⁵ Email correspondence from Dagang Net to the Commission dated 8.6.2017.

¹⁰⁶ Paragraph 34 of Statement of Abdul Khalil Bin Abdullah of Dagang Net recorded on 5.6.2017.

¹⁰⁷ Minutes of Meeting between Wynet and the Commission dated 20.3.2017; and Statement of Alwyn Hoa Chee Keong of Wynet recorded on 12.10.2016.

relied by the Commission in arriving at paragraphs 81, 82, 83, 103 and 125 of the Proposed Decision. We shall discuss each of these paragraphs.

Paragraphs 81, 82 and 83

117. In these paragraphs, the Commission notes that Alwyn Hoa had stated that during negotiations with Dagang Net, he had objected to the imposition of the exclusivity clause, but Dagang Net insisted on maintaining the said clause.

118. Alwyn Hoa had also stated that the imposition of the exclusivity clause by Dagang Net went against the original intention of the RMC to provide more choices to the end users in light of the appointment of Dagang Net and Edaran Trade as the service providers for the uCustoms system.

119. Dagang Net argues that the disagreement over the terms and conditions of the MCPA was not communicated to them when the offer for the MCPA was first made in March 2015. The disagreement was only made known by Wynet to Dagang Net after Wynet had signed the Developer and Solution Partner Program with Edaran Trade on 30.11.2015.¹⁰⁸ Dagang Net further argues that the draft MCPA was later

¹⁰⁸ Front page of Developer and Solution Partner Program Agreement between Edaran Trade and Wynet dated 30.11.2015.

extended to Wynet in 2017 wherein there were discussions to remove the exclusivity clause.¹⁰⁹

120. Dagang Net also submits that during the material time, Alwyn Hoa would not have known that there would be more than one service provider under the uCustoms system. As such, his statement contradicts the statement of Zulkeflee bin Sahni of Dagang Net.¹¹⁰

Paragraph 103:

121. Regarding this paragraph, Dagang Net sought to cross examine Alwyn Hoa in relation to the allegation made by Wynet that many of its existing end users were denied additional electronic mailboxes by Dagang Net.

122. Dagang Net argues that there was no evidence of being denied provided by Alwyn Hoa save for the case of the three end users that were denied the additional electronic mailboxes.

Paragraph 125:

123. In this paragraph, the Commission notes that Alwyn Hoa informed the Commission that the usage of the SAC is impractical as the current mailbox system causes information received by the end user from the

¹⁰⁹ Internal email correspondence of Dagang Net and text correspondence between Dagang Net and Wynet.

¹¹⁰ Statement of Zulkeflee bin Sahni of Dagang Net recorded on 7.6.2017; and Statement of Zulkeflee bin Sahni of Dagang Net recorded on 26.9.2017.

RMC, in relation to his declaration to the SMK via the NSW, to be non-segregated between branches/headquarters of the end user and would result in loss of information and/or confusion for the end user.

124. Dagang Net claims that Alwyn Hoa's view is not corroborated by any other evidence. Dagang Net relies on the statements made by Francis Walter Culas of AFAM¹¹¹ and Paul Seo Tet Chong¹¹² to support its argument that additional electronic mailboxes are no longer required with the utilization of the SAC.

The Commission's Findings

The following are the Commission's findings regarding the aforesaid paragraphs.

On paragraphs 81, 82 and 83

125. It is the Commission's finding that Dagang Net had disregarded the statements made by Wan Ahmad Syatibi of Dagang Net¹¹³ and Dato' Wong Kam Yin of DNEX.¹¹⁴ Their statements corroborated the statement and information provided by Alwyn Hoa, and supported the

¹¹¹Statement of Francis Walter Culas of AFAM recorded on 16.3.2017.

¹¹²Paragraph 8 of Statement of Paul Seo Tet Cheong of FMFF and SFFLA recorded on 28.2.2017.

¹¹³Paragraph 18 of Statement of Wan Ahmad Syatibi bin Wan Abd Manan of Dagang Net recorded on 5.6.2017.

¹¹⁴Paragraph 14 of Statement Dato' Wong Kam Yin of DNEX recorded on 5.6.2017.

findings of the Commission in paragraphs 81 to 83 of the Proposed Decision.

126. Furthermore, the Commission is of the view that the inclusion of the exclusivity clause is sufficient to establish an infringement and the knowledge of the reason behind software providers' refusal to sign up is immaterial in establishing the infringement.

On paragraph 103

127. It is the Commission's finding that Dagang Net had viewed paragraph 103 of the Proposed Decision in isolation and had disregarded the totality of the Commission's findings as stated in paragraphs 103 to 114 of the Proposed Decision.

128. Dagang Net had also disregarded the documentary evidence¹¹⁵ supporting the Commission's finding in paragraph 103 of the Proposed Decision.

On paragraph 125

129. It is the Commission's finding that Dagang Net had viewed paragraph 125 of the Proposed Decision in isolation and had disregarded the

¹¹⁵ Email correspondence between Kuehne + Nagel and Dagang Net between 9.11.2015 and 2.12.2015; and Email correspondence between Wangi Logistics and Dagang Net from 18.11.2015 to 4.12.2015.

totality of the Commission's findings as stated in paragraphs 124 to 130 of the Proposed Decision.

130. Dagang Net had disregarded the fact that the utilization of the SAC would not enable the segregation of information with respect to mailbox billings for each office branch and headquarter, the type of declaration, the mode of transportation, or any other type of segregation that is required by the end users. The Commission refers to the statements made by Wan Ahmad Syatibi¹¹⁶, Abdul Khalil bin Abdullah¹¹⁷, Zahari Azar bin Zainudin¹¹⁸, Asvinder Kaur A/P Asha Singh all of Dagang Net¹¹⁹, Dato' Wong Kam Yin of DNEX¹²⁰ and Jane Lim of Rank Alpha.¹²¹ These statements corroborated the statement and information provided by Alwyn Hoa and supported the finding of the Commission in paragraph 125 of the Proposed Decision.

Paul Seo Tet Chong ("Paul Seo")

Dagang Net's Contentions

131. Dagang Net is dissatisfied with the statement made by Paul Seo on 28.2.2017 that was relied upon by the Commission in arriving at

¹¹⁶ Paragraph 8 of Statement Wan Ahmad Syatibi bin Wan Abd Manan of Dagang Net recorded on 5.6.2017.

¹¹⁷ Paragraph 10 of Statement Abdul Khalil bin Abdullah of Dagang Net recorded on 5.6.2017.

¹¹⁸ Paragraph 8 of Statement Zahari Azar bin Zainudin of Dagang Net recorded on 5.6.2017.

¹¹⁹ Paragraph 12 of Statement Asvinder Kaur A/P Asha Singh of Dagang Net recorded on 5.6.2017.

¹²⁰ Paragraph 16 of Statement Dato' Wong Kam Yin of DNEX recorded on 5.6.2017.

¹²¹ Paragraph 5 of Statement Jane Lim Juck Noi of Rank Alpha recorded on 25.10.2016.

paragraph 117 of the Proposed Decision. We shall now discuss this particular paragraph.

Paragraph 117:

132. Dagang Net argues that paragraph 117 of the Proposed Decision and the statement made by Paul Seo were contradictory to the statement made by Dato' Wong Kam Yin of DNEX and the minutes of the 9th Steering Committee Meeting between FMFF and Dagang Net on 24.10.2015. Dagang Net maintained that it would continue to support end users of Rank Alpha's software.

The Commission's Findings

The following are the Commission's findings regarding the aforesaid paragraph.

On paragraph 117

133. It is the Commission's finding that Dagang Net had considered paragraph 117 of the Proposed Decision in isolation and had disregarded the totality of the Commission's findings at paragraphs 117 to 120 of the Proposed Decision.

134. The cross examination of Paul Seo for the purpose of paragraph 117 of the Proposed Decision would be futile as it would not provide further

clarification to the information already provided to the Commission during the investigation.

Francis Walter Culas

Dagang Net's Contentions

135. Dagang Net sought to cross examine Francis Walter Culas as his statement of 16.3.2017 contradicts the statements made by Jane Lim and Alwyn Hoa in relation to the claim that the SAC would render the additional electronic mailbox to be unnecessary.

The Commission's Findings

136. It is the Commission's finding that Dagang Net had ignored the fact that the utilization of the SAC would not enable the segregation of information with respect to mailbox billings for each office branch and headquarter, the type of declaration, the mode of transportation, or any other type of segregation that is required by the end users. The Commission refers to the statements made by Wan Ahmad Syatibi bin Wan Abd Manan¹²², Abdul Khalil bin Abdullah¹²³, Zahari Azar bin Zainudin¹²⁴, Asvinder Kaur A/P Asha Singh¹²⁵, all of Dagang Net, and

¹²² Paragraph 8 of Statement Wan Ahmad Syatibi bin Wan Abd Manan of Dagang Net recorded on 5.6.2017.

¹²³ Paragraph 10 of Statement Abdul Khalil bin Abdullah of Dagang Net recorded on 5.6.2017.

¹²⁴ Paragraph 8 of Statement Zahari Azar bin Zainudin of Dagang Net recorded on 5.6.2017.

¹²⁵ Paragraph 12 of Statement Asvinder Kaur A/P Asha Singh of Dagang Net recorded on 5.6.2017.

Dato' Wong Kam Yin of DNEX.¹²⁶ These statements corroborated the statements and information provided by Jane Lim of Rank Alpha and Alwyn Hoa of Wynet.

137. Dagang Net also had disregarded the information considered by the Commission as stated in paragraphs 124 to 130 of the Proposed Decision.

138. Furthermore, Dagang Net had disregarded the fact that upon receiving the request for additional electronic mailboxes by the end users, it did not advise them to utilise the SAC but instead urged the end users to choose the authorised software providers.¹²⁷

Mohd Nor Fauzi bin Abdul Kayum (“Mohd Nor Fauzi”)

Dagang Net's Contentions

139. Dagang Net is dissatisfied with the statement made by Mohd Nor Fauzi on 28.4.2017 which was relied upon by the Commission in arriving at paragraph 146 of the Proposed Decision. Dagang Net is also dissatisfied with Mohd Nor Fauzi's statement made on 6.10.2017 which

¹²⁶ Paragraph 16 of Statement Dato' Wong Kam Yin of DNEX recorded on 5.6.2017.

¹²⁷ Email correspondence between Dagang Net and DNEXPORT dated 3.11.2016; Paragraphs 11, 35 and 36 of Statement of Wan Ahmad Syatibi Wan bin Wan Abd Manan of Dagang Net recorded on 27.9.2017; and Paragraphs 11 and 12 of Statement of Zahari Bin Mohamed Yusoff of DNeXPORT recorded on 13.7.2017.

was relied upon by the Commission in arriving at paragraph 267(b) of the Proposed Decision. We shall now discuss these paragraphs.

Paragraph 146:

140. Dagang Net challenges the credibility of Mohd Nor Fauzi by reason of the fact that he was a former employee of Dagang Net who was asked to leave his employment earlier than the term of his employment contract. In this context, Dagang Net contended that Mohd Nor Fauzi was biased and not independent in giving his statement to the Commission.

141. Dagang Net further argues that his statement also contains hearsay evidence in relation to the statements allegedly made by Dato Mohd Nor bin Hasan of RMC and John Patrick of MOF.

142. Dagang Net also argues that Mohd Nor Fauzi had given his statement on Dagang Net's obligation under the NSW-SMK that went beyond his knowledge.

Paragraph 267(b):

143. Dagang Net argues that the statement made by Mohd Nor Fauzi contradicts the statement made by Jasbendarjit Kaur of Dagang Net and he is incompetent to provide a statement on the technicality surrounding the hypothetical issue of connectivity within the system.

The Commission's Findings

The following are the Commission's findings regarding the aforesaid paragraphs.

On paragraph 146

144. It is the Commission's finding that Dagang Net had considered paragraph 146 of the Proposed Decision in isolation and had disregarded the totality of the Commission's findings as stated in paragraphs 138 to 148 of the Proposed Decision.

145. Dagang Net also disregarded the minutes of the meeting that it had with the RMC, MOF and Edaran IT dated 22.3.2017 prepared by the RMC that supported the statement by Mohd Nor Fauzi in relation to the position of RMC and MOF. The Commission views the said minutes as corroborative evidence which supported the Commission's finding at paragraph 146 of the Proposed Decision.

146. The cross examination of Mohd Nor Fauzi for the purpose of paragraph 146 of the Proposed Decision would not provide further clarification to the information already provided to the Commission during the investigation.

On paragraph 267(b)

147. The Commission maintains that it is empowered to take statements from any person believed to be acquainted with the facts and circumstances of the case.

148. In this regard, Mohd Nor Fauzi at the time of his statement, holds the position of the Head of National Single Window and RMC Project at Edaran IT Services Sdn. Bhd. Edaran IT is the vendor of RMC responsible to set up the SMK and has been maintaining the SMK IT infrastructure and software for the past 25 years. Moreover, Edaran IT also collects data and information from the market for the use of RMC.

149. The cross examination of Mohd Nor Fauzi for the purpose of paragraph 267(b) of the Proposed Decision would not provide further clarification to the information already provided to the Commission during the investigation.

Yeoh Keng Yao

Dagang Net's Contentions

150. Dagang Net sought to cross examine Yeoh Keng Yao in relation to his complaint lodged to the Commission and the accuracy of paragraphs 160 to 162 of the Proposed Decision. We shall discuss these paragraphs.

Paragraphs 160 and 162:

151. Dagang Net argues that it had granted a temporary electronic mailbox to Titimas Logistics.

152. Dagang Net further submits that the action by Titimas Logistics was with ulterior motive considering the statement made by Yeoh Keng Yao on 13.1.2017 in relation to Titimas Logistics's application for the additional electronic mailboxes and its usage. In this context, Dagang Net further contended that Titimas Logistics's complaint was not *bona fide*.

The Commission's Findings

The following are the Commission's findings regarding the aforesaid paragraphs.

On paragraphs 160 to 162

153. The Commission finds that Dagang Net had challenged the motive of Yeoh Keng Yao but did not rebut the fact that the temporary additional electronic mailbox was granted on the condition that Titimas Logistic was required to migrate from Rank Alpha to other authorised software providers within the period from the date the temporary additional electronic mailbox was granted until 30.12.2016.¹²⁸

¹²⁸ Email Correspondence between Dagang Net and Titimas Logistics dated 24.9.2016.

154. The cross examination of Yeoh Keng Yao for the purpose of paragraphs 160 to 162 of the Proposed Decision would not provide further clarification to the information already provided to the Commission during the investigation.
155. The Commission takes the position that it is sufficient if the body of evidence, considered as a whole, proves on a balance of probabilities that an infringement of the section 10 prohibition had occurred. Such evidence could consist of direct evidence, circumstantial evidence, and inferences from established facts. The Commission also takes into account of the fact that the statements recorded from the listed individuals were to a great extent corroborated.
156. The Commission is of the view that Dagang Net was offered a fair and reasonable opportunity to respond to the Proposed Decision including, but not limited to, responding to the veracity and accuracy of the statements of Dagang Net's listed individuals. In this regard, the Commission has considered all the evidence as well as the written and oral representations by Dagang Net.

F.2 THE COMMISSION'S ALLEGED FAILURE TO GRANT SUFFICIENT EXTENSION OF TIME

157. Dagang Net was required to submit its written representation by 20.8.2018. On 31.7.2018, Dagang Net applied to the Commission for an extension of time of three months to submit its written

representation on the grounds, *inter alia*, that the issues involved are numerous and complex as well as the gravity of the financial penalty that might be imposed on Dagang Net. The Commission, via an email, granted Dagang Net an extension of time to submit its written representation by 3.9.2018.

158. Thereafter, the Commission further accepted additional written submissions dated 25.4.2019 and 29.7.2019, bundles of authorities and bundles of documents.
159. The Commission therefore is of the view that it had granted Dagang Net reasonable time to submit its written representation. The Commission also afforded reasonable time for Dagang Net to prepare for its oral representations.
160. The Commission has considered all arguments raised by Dagang Net in its representations, and therefore has adhered to the principle of natural justice.

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PART 2: LEGAL AND ECONOMIC ASSESSMENT

161. This section begins by setting out the legal and economic framework in which the Commission relied upon in considering the evidence in this case. It then sets out the evidence relating to Dagang Net's conduct on which the Commission relied upon. Thereafter, it analyses the evidence and states the inferences, findings and conclusions that the Commission draws from the evidence.

A. THE SECTION 10 PROHIBITION

162. Section 10(1) of the Act prohibits an enterprise from engaging, whether independently or collectively, in a conduct which amounts to an abuse of a dominant position in any market for goods or services in Malaysia.

163. Section 10(2) of the Act lists out several conduct that the provision is aimed at preventing. However, the list is not an exhaustive enumeration of the sort of abuses of dominant position prohibited by section 10. The section 10(1) prohibition, therefore, can even be applied to a conduct that is not specified in section 10(2).

164. In order to arrive at a finding of infringement of a section 10 prohibition, the Commission must establish that:

- (i) at the time of the alleged infringement, the enterprise held a dominant position in the relevant market; and
- (ii) the enterprise had abused its dominant position.

165. Section 10(3) of the Act does not prohibit a dominant enterprise from engaging in conduct that has a reasonable commercial justification or is a reasonable commercial response to market entry or conduct by competitor.¹²⁹

166. It is for the party intending to rely on section 10(3) to adduce the necessary evidence for the claimed reasonable commercial justification. The Commission will consider evidence adduced by the party when assessing whether the reasonable commercial justification in section 10(3) of the Act is satisfied.

A.1 APPLICATION IN THE PRESENT CASE

Arguments by Dagang Net

167. Dagang Net submits that the Commission has erred in its provisional findings against Dagang Net for abuse of dominant position for the non-provision of electronic mailboxes and the imposition of the exclusivity clause by solely relying on the prohibition section of 10(2)(c) of the Act.

¹²⁹ Paragraphs 1.4 and 5.1 of the MyCC Guidelines on Chapter 2 Prohibition: Abuse of Dominant Position.

The Commission's Findings

168. The Commission reiterates that the case made against Dagang Net in relation to the imposition of the exclusivity clause is based on the prohibition under section 10(1) of the Act.

169. In any event, the Commission considers that section 10 of the Act is the prohibition section that ought not to be interpreted narrowly, as section 10(1) is non-exhaustive; whereas section 10(2) merely provides specific cases of abusive conduct. This interpretation is supported by the High Court of Malaya in the *MyEG*¹³⁰ which states the following:

*“Section 10(1) of Act 712 provides that an abuse of dominant position by an enterprise is prohibited. What amounts to abuse of dominant position includes those acts specified in paras. (a) to (g) of subsection 10(2) ...”*¹³¹

170. As such, the Commission takes the position that the imposition of the exclusivity clause is a conduct within the ambit of the prohibition under section 10(1) of the Act. Consequently, the argument by Dagang Net that section 10(2)(c) of the Act does not prohibit exclusivity clause is a red herring.

¹³⁰ Application for Judicial Review No: WA-25-81-03/2018.

¹³¹ Application for Judicial Review No: WA-25-81-03/2018, at paragraph 47.

B. DOMINANCE

171. The purpose of section 10 of the Act is not to prevent enterprise from competing on merits. The dominant position referred to in section 10 relates to a position of economic strength enjoyed by an enterprise that enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave, to an appreciable extent, independently of its competitors, its customers and ultimately of its consumers.¹³²

B.1 MARKET DEFINITION

172. The definition of the relevant product or geographic market in the context of the application of section 10 is necessary when assessing whether an enterprise has a dominant position and whether that dominant position enables it to prevent effective competition from being maintained on the relevant market.¹³³ Where liability has been established, market definition will facilitate the Commission in determining the turnover of the enterprise for the relevant product market and the geographical market affected by the infringement and, therefore, the appropriate penalty amount.¹³⁴

¹³² Case 27/76 *United Brands and United Brands Continental v Commission*, at paragraph 65; and Case T-201/04 *Microsoft v Commission*, at paragraph 229.

¹³³ Paragraph 2.1 of the MyCC's Guidelines on Chapter 2 Prohibition: Abuse of Dominant Position; and Paragraph 1.6 of the MyCC's Guidelines on Market Definition.

¹³⁴ Paragraph 1.2 of the MyCC's Guidelines on Market Definition.

173. The concept of relevant market 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 substitutability between all the products or services under investigation which form part of the same market.¹³⁵

B.2 APPLICATION IN THE PRESENT CASE

Arguments by Dagang Net

174. Dagang Net contends that the Commission erred in defining the relevant market as the Commission included not only the NSW market, but also the upcoming uCustoms system market in the Commission's market definition.

175. Dagang Net further claims that the uCustoms system market was a hypothetical market as it has yet to officially take off and therefore Dagang Net's alleged infringement of abuse of dominant position must be pegged to NSW only.

¹³⁵ Case 85/76 *Hoffmann-La Roche v Commission*, EU:C:1979:36, at paragraph 28; and Case C-179/16 *F. Hoffmann-La Roche and Others*, EU:C:2018:25, at paragraph 51.

The Commission's Findings

176. The Commission is of the view that the relevant market in the instant case is the provision of trade facilitation services in Malaysia (“relevant market”).¹³⁶
177. Dagang Net is the sole service provider in the provision of trade facilitation¹³⁷ services under the NSW. Dagang Net, as the sole trade facilitation service provider, operates at the upstream level; whilst Rank Alpha and Wynet, as software providers for submission of trade facilitation data to the SMK via the NSW, operate at the downstream level of the relevant market. The upcoming uCustoms system is the related market that will replace the NSW at a later date.
178. The Commission is of the view that the NSW-SMK system and the uCustoms system are interrelated. Notwithstanding the fact that the uCustoms system is yet to be in operation, both the NSW-SMK system and the uCustoms system serve as platforms for end users to submit trade declarations to RMC. Therefore, the NSW-SMK system and the uCustoms system can be said to be of the same market, that is, the provision of trade facilitation services. It is evident from the available

¹³⁶ Agreement between the Government of Malaysia and Dagang Net dated 1.3.2005; and uCustoms Introduction Slides retrieved from <http://www.customs.gov.my/en/uc/Documents/OtherReferences/awarenessdeck/Slaid%20Pengenalan%20uCustoms.pdf>.

¹³⁷ Agreement between the Government of Malaysia and Dagang Net dated 1.3.2005; Minutes of Meeting between MOF, MITI and the Commission dated 3.3.2016; and Statement of Mohammad Haizam Bin Hashim of RMC recorded on 17.4.2017.

evidence obtained in the course of the investigation that the NSW-SMK system will be replaced by the uCustoms system.¹³⁸

179. The Commission is of the opinion that the uCustoms system will inevitably come into operation sometime in the near future as evident from the various documentation capturing its development and progress. Therefore, it is not a hypothetical market.¹³⁹

180. Accordingly, the argument raised by Dagang Net that the uCustoms system market was a hypothetical market is without merit.

C. DEFINITION OF DOMINANCE

181. Section 2 of the Act defines “dominant position” as:

“a situation in which one or more enterprises possess such significant power in a market to adjust prices or outputs or trading terms, without effective constraint from competitors or potential competitors.”

182. The existence of a dominant position derives in general from a combination of several factors.¹⁴⁰ These factors are not necessarily

¹³⁸ Part C of Statement of Mohammad Haizam bin Hashim of RMC recorded on 17.4.2017; Paragraph 27 of Statement of Jane Lim Juck Noi of Rank Alpha recorded on 25.10.2016; Newsletter by RMC issued on July 2014; and Paragraph 16 of Statement Mohd Nor Fauzi bin Abdul Kayum of Edaran IT recorded on 6.10.2017.

¹³⁹ RMC’s Latest News & Announcement created at 7.3.2019 titled “List of Registered Organisations for the uCustoms”; RMC’s Latest News & Announcement created at 1.3.2019 titled “*Keperluan Pendaftaran* (External Users”) *Dalam Sistem uCustoms*; and RMC’s Latest News & Announcement created at 20.12.2019 titled “*Notis Pemakluman Helpdesk uCustoms bermula 23 Disember 2019*”.

¹⁴⁰ Paragraph 1.5 of the MyCC’s Guidelines on Chapter 2 Prohibition: Abuse of Dominant Position.

determinative.¹⁴¹ One important factor is the existence of large market shares. The Commission considers a market share above 60% an indication of the existence of a dominant position in the relevant market.¹⁴²

183. An enterprise with a 100% market share or a monopoly is likely to occupy a dominant position because there is absence of competitive constraints.¹⁴³ A monopoly is the economic equivalent of the legal concept of absolute dominance.
184. A monopoly is a market in which there is a single producer or provider of a product or service for which no close substitutes exist and where there is no likelihood of entry by other potential producer or provider.
185. Other important factors when assessing dominance are the existence of barriers to entry or expansion and the existence of countervailing buyer power, preventing either potential competitors from having access to the market or actual ones from expanding their activities on the market.¹⁴⁴ Such barriers may result from a number of factors including network externalities that would entail additional cost for attracting new customers¹⁴⁵ and switching costs incurred by customers.

¹⁴¹ Case 27/76 *United Brands and United Brands Continental v Commission*, at paragraph 66.

¹⁴² Paragraph 2.14 of the MyCC's Guidelines on Chapter 2 Prohibition: Abuse of Dominant Position; Case C-85/76 *Hoffman-La Roche v Commission* (1979) ECR 461, at paragraphs 39 and 41; and Case T-65/98 *Van den Berg Foods v Commission*, at paragraph 154.

¹⁴³ Paragraph 2.17 of the MyCC's Guidelines on Chapter 2 Prohibition: Abuse of Dominant Position.

¹⁴⁴ Paragraph 2.20 of the MyCC's Guidelines on Chapter 2 Prohibition: Abuse of Dominant Position.

¹⁴⁵ Case 27/76 *United Brands and United Brands Continental v Commission*, at paragraphs 91 and 122.

186. The economic strength of Dagang Net as a monopoly is further strengthened by the existence of various barriers to entry and the lack of countervailing buyer power in the relevant market, preventing either potential competitors from having access to the market or actual ones from expanding their activities on the market.¹⁴⁶

C.1 APPLICATION TO THE PRESENT CASE

Arguments by Dagang Net

187. Dagang Net argues that the Commission fails to recognise that the Act does not regulate a firm with monopoly power. Dagang Net asserts:

- (i) Dagang Net as a monopolist in the NSW cannot be equated as having a dominant position within the meaning of section 2 of the Act; and
- (ii) Dagang Net is not in a dominant position as defined under section 10(1) of the Act given that Dagang Net does not have any competitors in the NSW.

¹⁴⁶ Paragraph 2.20 of the MyCC's Guidelines on Chapter 2 Prohibition: Abuse of Dominant Position; Case 27/76 *United Brands and United Brands Continental v Commission*, at paragraph 122; and Case 85/76 *Hoffman-La Roche v Commission*, at paragraph 48.

188. Dagang Net contends that the Commission cannot rely on the principles in *Hoffman La Roche v Commission* as Dagang Net is a monopolist without competitors.

189. Dagang Net cites the case of *Labuan Ferry Corp Sdn. Bhd.*¹⁴⁷ (“Labuan Ferry”) to support its argument that a monopolist cannot be equated with an enterprise in a dominant position. In the case of *Labuan Ferry*, Labuan Ferry Corp Sdn. Bhd. was granted a concession. The Court of Appeal stated the following:

“[60] An enterprise that is in a “dominant position” within the meaning of section 10(1) of the Act is not to be equated with a monopoly, which involves no competition at all to begin with. This takes the monopoly of essential products or services outside the purview of the Act.

*[61] Therefore the Competition Act, which is aimed at regulating conduct among competitors, has nothing to do with the common law doctrine of prime necessity which, we must reiterate, is concerned with the obligation by monopoly suppliers of essential products and services to supply the products and services in consideration for fair and reasonable payments, and not with the process of competition.”*¹⁴⁸

¹⁴⁷ *Labuan Ferry Corp Sdn. Bhd. v Chin Mui Kien (trading under the name and style of Econ Focus Enterprise) & Ors. and Other Appeals* [2018] 3 MLJ 256.

¹⁴⁸ *Labuan Ferry Corp Sdn. Bhd. v Chin Mui Kien (trading under the name and style of Econ Focus Enterprise) & Ors. and Other Appeals* [2018] 3 MLJ 256.

The Commission's Findings

190. The Commission considers the arguments raised by Dagang Net. The Commission maintains that Dagang Net holds a dominant position within the meaning of section 2 of the Act. The Act regulates the behaviour of enterprises, not its form or structure.¹⁴⁹
191. Dagang Net does not contest the Commission's finding that it is the sole concession holder in the NSW-SMK market and thus holds 100% market share.
192. With regards to the position of a legal monopoly, the Commission refers to the opinion of Advocate General Jacobs in *Dusseldorp and Others v Minister Van Volkshuisvevsting, Ruimtelijke Ordening En Milieubeheer*¹⁵⁰ which stated:
- "...a legal monopoly upon an undertaking in respect of a substantial part of the common market, that undertaking will be in a dominant position within the meaning of Article 86..."*¹⁵¹
193. The Commission also refers to the decided cases of *General Motors Continental NV*¹⁵², *Telemarketing (CBEM) SA*¹⁵³, and *Hofner and*

¹⁴⁹ The Annotated Statutes of Malaysia, Competition Act 2010, Issue 169 by Adlan Abd Razak, page 153, published by LexisNexis.

¹⁵⁰ Case C-203/96, Opinion of AG Jacobs in *Dusseldorp and Others v Minister Van Volkshuisvevsting, Ruimtelijke Ordening En Milieubeheer*, I-4077.

¹⁵¹ Case C-203/96, Opinion of AG Jacobs in *Dusseldorp and Others v Minister Van Volkshuisvevsting, Ruimtelijke Ordening En Milieubeheer*, I-4077, at paragraph 100.

¹⁵² Case 26/75 *General Motors Continental NV*, at paragraph 9.

¹⁵³ Case 311/84 *Telemarketing (CBEM) SA*, at paragraph 16.

*Macrotron*¹⁵⁴ wherein the European Courts have well established that an enterprise vested with a legal monopoly may be regarded as occupying a dominant position within the meaning of Article 102 of the Treaty for the Functioning of the European Union (“TFEU”).

194. The Commission also make reference to the position taken by the High Court of Malaya in the case of *MyEG*.¹⁵⁵ The High Court has affirmed the findings of the Competition Appeal Tribunal (“CAT”) that a concession holder is in a dominant position within the ambit of section 2 of the Act.¹⁵⁶

“[51] The CAT has made a finding that MyEG are in dominant position within the ambit of section 2, as can be seen from paragraph [25] of the CAT’s Decision, which reads:

*“[25] It is not disputed that **MyEG as the sole enterprise given by KDN/JIM for the renewal of PLKS is in dominant position in the upstream market. By virtue of MyEG and MyEG Commerce being a single entity, MyEG 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.**”*

[52] Having considered the facts in this case, I agree with the Decision of the CAT that MyEG hold the dominant positions in both the upstream and

¹⁵⁴ C-41/90 *Klaus Hofner and Fritz Elser v Macrotron GmbH*, at paragraph 28.

¹⁵⁵ Application for Judicial Review No: WA-25-81-03/2018.

¹⁵⁶ Application for Judicial Review No: WA-25-81-03/2018.

downstream market. As such, there is nothing illegal nor irrational about this finding.” (emphasis added)

195. Accordingly, the Commission views Dagang Net as a legal monopoly occupying a dominant position within the meaning section 2 of the Act.
196. The Commission considers that there is indeed a high barrier to entry in the provision of trade facilitation services, as any enterprise wishing to partake in the said market would first have to submit their proposal, is subject to the procurement process of the RMC, and be approved as a service provider in the said market. The Commission emphasises that during the period of appointment of the service providers via its respective appointment agreements, no other enterprise may partake, as a service provider in that particular market, save for, further appointment by the RMC.
197. The requirement of applicable expertise and capabilities creates barriers to entry.¹⁵⁷
198. The Commission considers that there is insufficient bargaining strength of the end users to exert effective competitive constraint in the relevant market. The end users do not possess the ability to switch to other service providers in the NSW-SMK system as Dagang Net is the sole service provider.

¹⁵⁷ Paragraph 14 of Statement of Mohd Nor Fauzi bin Abdul Kayum of Edaran IT recorded on 6.10.2017.

199. Although in the uCustoms system, the end users may make trade declaration submission directly to the RMC, however, the Commission views this as an ineffective competition constraint on Dagang Net. The reason is that the end users are more likely to use software providers that they are familiar with.¹⁵⁸ Additionally, the option of making direct trade declaration submissions to the RMC may only be favourable to the end user with small amounts of trade declarations.¹⁵⁹ Hence, the Commission finds there is insufficient countervailing buyer power to offset Dagang Net's market power in the relevant market.
200. The Commission is of the view that the absence of competitors does not invalidate nor negate the finding that an enterprise is in a dominant position.¹⁶⁰
201. The Commission rejects the argument by Dagang Net that a monopoly cannot be equated to a dominant position.
202. The finding of the Court of Appeal in *Labuan Ferry* which was referred to by Dagang Net was in relation to the issue of whether the Competition Act 2010, Contracts Act 1950 and Merchant Shipping Ordinance 1952 have the effect of excluding the application of the common law doctrine of prime necessity.

¹⁵⁸ Paragraph 15 of Statement of Alwyn Hoa Chee Keong of Wynet recorded on 13.10.2017; and Paragraph 16 of Statement of Dato' Wong Kam Yin of DNEX recorded on 18.9.2017.

¹⁵⁹ Paragraph 11 of Statement of Alwyn Hoa Chee Keong of Wynet recorded on 12.10.2016.

¹⁶⁰ Case 311/84 *Telemarketing (CBEM) SA*, at paragraph 16.

203. The Commission disagrees with Dagang Net's understanding of the decision in *Labuan Ferry* as it is apparent that the Court clearly made a finding that a monopoly holds a dominant position within the meaning of section 2 of the Act.

204. The case of *Labuan Ferry*¹⁶¹ states the following:

“[45] To directly or indirectly impose unfair selling price or other unfair trading condition on any supplier or customer is an abuse of dominant position within the meaning of section 10(1) of the Competition Act and is prohibited. We do not think it can be disputed that by having monopoly of the ferry service between Menumbok and Labuan, Labuan Ferry was in a dominant position within the meaning of section 2 of the Competition Act.” (emphasis added)

205. Further, the Commission maintains the view that the Act applies to monopolists as evident from the High Court decision of *MyEG*.¹⁶² As such, it is the finding of the Commission that the Act applies to Dagang Net as a sole concession holder and a monopoly in the NSW market.

206. Accordingly, the Commission makes a further finding that Dagang Net holds a dominant position within the meaning of section 2 of the Act.

¹⁶¹ *Labuan Ferry Corp Sdn. Bhd. v Chin Mui Kien (trading under the name and style of Econ Focus Enterprise) & Ors. and Other Appeals* [2018] 3 MLJ 256.

¹⁶² Application for Judicial Review No: WA-25-81-03/2018.

D. ABUSE

207. Once it has been decided that an enterprise has a dominant position in a relevant market, it is necessary to further consider what constitutes an abuse of that position.
208. The concept of abuse is an objective one relating to the behaviour of an enterprise in a dominant position which as such to influence the structure of a market. The abusive conduct of the dominant enterprise resulted in the weakening of competition which hinders the maintenance of the existing degree of competition or the growth of that competition in the market.¹⁶³
209. We think it is relevant and worth to mention here that Article 102 of TFEU prohibits abusive conduct by companies that have a dominant position on a particular market. This is akin to section 10 of the Act.
210. A dominant enterprise has a special responsibility not to impair, by conduct falling outside the scope of competition on the merits, genuine undistorted competition in the market.¹⁶⁴ It follows from the nature of the obligations that, in specific circumstances, an enterprise in a dominant position may be deprived of the right to adopt a course of conduct or take measures which are not in themselves abuses and

¹⁶³ Case C-549/10 P *Tomra v Commission*, at paragraph 17; and Case C-457/10 P *AstraZeneca v Commission*, at paragraph 74 and Case AT.40099 *Google Android*, at paragraph 728.

¹⁶⁴ Case 322/81 *Nederlandsche Banden Industrie Michelin v Commission*, at paragraph 57; Case T-228/97 *Irish Sugar v Commission*, at paragraph 112; Case C-209/10 *Post Danmark A/S v Konkurrenceradet*, at paragraph 23; and Case C-457/10 P *AstraZeneca v Commission*, at paragraph 770.

which could even be unobjectionable if adopted or taken by non-dominant enterprises.¹⁶⁵

211. The actual scope of special responsibility imposed on a dominant enterprise must be considered in the light of the specific circumstances of each case, which show that competition has been weakened. It follows that certain conduct on markets, other than the dominated markets, having effects either on the dominated markets or on the non-dominated markets themselves can be categorised as abusive.¹⁶⁶

212. The sort of abuses of dominant position are not limited to conduct specified in section 10(2) of the Act. Section 10 of the Act does not only prohibit practices that may cause damage to consumers directly but also practices that may cause harm to consumers through their impact on competition.¹⁶⁷

D.1 PROHIBITION ON EXCLUSIVE DEALING

213. An exclusive dealing arrangement between a dominant enterprise and a downstream enterprise can foreclose the market.¹⁶⁸

¹⁶⁵ Case 322/81 *Netherlandsche Banden Industrie Michelin v Commission*, at paragraph 57; and Case T-111/96 *ITT Promedia v Commission* [1998], at paragraph 139.

¹⁶⁶ Case C-333/94 *P Tetra Pak v Commission*, at paragraphs 24 and 25; and Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB*, at paragraph 26.

¹⁶⁷ Case 6/72 *Europemballage and Continental Can v Commission*, at paragraph 26.

¹⁶⁸ Paragraph 3.21 of the MyCC's Guidelines on Chapter 2 Prohibition: Abuse of Dominant Position.

214. In *Hoffman La Roche*¹⁶⁹, the European Commission found that the fact that customers are bound by an exclusive or preferential purchasing commitment in favour of Roche for all or for a very large proportion of their requirement, either as a result of an express obligation of exclusivity or fidelity rebates or other means, constitutes an abusive conduct of an enterprise occupying a dominant position, as this hampers the freedom of choice and equality of treatment of purchasers and restricts competition between manufacturers in the common markets.

215. The Commission may assess whether exclusive dealing arrangements foreclose a significant part of the market, and thereby limits the ability of competitors to compete on a case-by-case basis.¹⁷⁰

216. The harmful effect of an exclusivity clause was further deliberated by the European Commission in *Hoffman La Roche* as follows¹⁷¹:

“The fact of agreeing with purchasers that they will buy all or a very large proportion of their requirements from only one source by its very nature removes all freedom of choice from purchasers in their selection of sources of supply, and ties them to one supplier.

The agreement in question has the further effect of interfering with competition between vitamin manufacturers. The exclusivity established by

¹⁶⁹ European Commission Decision (IV/29.020 — *Vitamins*), paragraphs 22 and 22(a).

¹⁷⁰ Paragraph 3.21 of the MyCC’s Guidelines on Chapter 2 Prohibition: Abuse of Dominant Position.

¹⁷¹ European Commission Decision (IV/29.020 — *Vitamins*), at paragraph 24.

*Roche with its customers denies any access to these customers by other vitamin manufacturers.”*¹⁷²

217. The case of *Hoffman La Roche*¹⁷³ describes the harms of exclusive dealing arrangements by an enterprise occupying a dominant position, such as exclusivity clauses that carry a two-fold effect to the players in the affected market, namely, to its customer and its competitor.¹⁷⁴
218. In *Van den Bergh Foods v Commission*,¹⁷⁵ the European Commission found that when an economic operator who holds a dominant position in the market concludes an exclusive supply agreement it constitutes an unacceptable barrier to entry into the market and impairs the effective competitive structure of the market. It was further acknowledged by the European Commission that the effect of such an agreement was the same as that of any other measure taken by a dominant supplier that excludes its competitors from dealing with that retailer¹⁷⁶.
219. The European Commission took cognizance of the fact that, although the concept of abuse is an objective one, it was found that the

¹⁷² European Commission Decision (IV/29.020 — *Vitamins*), at paragraph 24.

¹⁷³ Case 85/76 *Hoffmann-La Roche v Commission*.

¹⁷⁴ Case 85/76 *Hoffmann-La Roche v Commission*, at paragraph 90.

¹⁷⁵ Case Numbers: IV/34.073, IV/34.395 and IV/35.436 *Van den Bergh Foods Limited*; and Case C-552/03, *Unilever Bestfoods v Commission*.

¹⁷⁶ Case Numbers: IV/34.073, IV/34.395 and IV/35.436 *Van den Bergh Foods Limited*, at paragraph 265.

dominant undertaking was not only aware of the exclusionary effect produced by the said agreement but had indeed targeted it.¹⁷⁷

220. The harmful effects of the exclusivity in *Van den Bergh* were captured by the European Commission in that case as follows:

*“The exclusivity resulting from the inducement not only harms HB’s competitors in the relevant market by making market penetration and expansion more difficult, but is also contrary to the interest of the retailers and ultimately the consumers, in that the former are prevented from exercising their freedom of choice in the products they may stock as well as in how they maximise outlet space efficiency, and the latter as to which products they may purchase. HB therefore abuses its dominant position within the meaning of Article 86.”*¹⁷⁸

D.2 APPLICATION TO THE PRESENT CASE

221. Since, at least, 25.3.2015 Dagang Net had imposed exclusivity clause that prevents software providers from providing similar services for the upcoming uCustoms system.

222. Dagang Net did not supply the end users of software providers with the requisite electronic mailboxes for the purposes of trade facilitation on the NSW-SMK system. This is the corollary of the software providers’ refusal of the exclusivity arrangement by Dagang Net.

¹⁷⁷ Case Numbers: IV/34.073, IV/34.395 and IV/35.436 *Van den Bergh Foods Limited*, at paragraphs 264 and 265.

¹⁷⁸ Case Numbers: IV/34.073, IV/34.395 and IV/35.436 *Van den Bergh Foods Limited*, at paragraph 266.

223. The Commission concludes that the imposition of the exclusivity clause constitutes an abuse of Dagang Net's dominant position in the relevant market.

Arguments by Dagang Net

224. Dagang Net contends that the Commission did not make an examination of the factual and economic evidence submitted by Dagang Net.

225. Dagang Net argues that the uCustoms system has yet to commence and as such it is a hypothetical scenario. There is no finding put forward by the Commission that there is anti-competitive effect on the imposition of the exclusivity clause. Therefore, the Commission's provisional findings on the imposition of the exclusivity clause by Dagang Net is premature, speculative and baseless.

226. Dagang Net raises the argument that the Commission had failed to obtain full understanding of the uCustoms system.

227. Dagang Net contends that the Commission had made reference to unreliable individuals in coming to its conclusion. Dagang Net argues that the Commission cannot rely on informal discussions as stated in **Table 5** for the Commission's consideration and deliberation in its decision.

228. Dagang Net argues that the Commission had relied and made inferences based on circumstantial evidence, namely, Dagang Net's financial projections, the investment house research projections and internal meeting minutes, in determining that the exclusivity clause is abusive.

229. Dagang Net asserts the following:

- (i) the uCustoms system will run concurrently with NSW-SMK system; and
- (ii) a similar electronic mailbox system (such as the one in the NSW-SMK system) would be adopted into the uCustoms system.

230. Dagang Net submits that if a similar electronic mailbox system is used in the uCustoms system, there may be security and technical risks as well as integrity issues in relation to software providers, when connected to more than one service provider; as well as in relation to end users, when connected to more than one software provider at the same time.¹⁷⁹

231. It is submitted that the existing technical protocols and specifications are exclusive to Dagang Net.

¹⁷⁹ Paragraphs 9 and 10 of Statement of Wan Ahmad Syatibi bin Wan Abd Manan of Dagang Net recorded on 27.9.2017.

232. Dagang Net submits that the introduction of the exclusivity clause is a matter within its discretion based on its duties and obligation to ensure the security, stability and integrity of NSW-SMK system under the Concession Agreement.
233. Dagang Net argues that the software providers are permitted to engage with other service providers, including Edaran Trade, as long as the software providers develop another version of the software to be used with the other service providers.¹⁸⁰ Consequently, Dagang Net claims there is no barrier to entry for Edaran Trade to compete in the uCustoms system.
234. Dagang Net raises the argument that at all material times, Rank Alpha's end users were still allowed to submit their respective Customs declarations through the NSW-SMK system.
235. Dagang Net maintains the position that it was willing to negotiate the imposition of exclusivity clause as evident from its agreement with Digital System (Malaysia) Sdn. Bhd. (DSM) dated 27.10.2017 which did not contain an exclusivity clause.
236. Dagang Net raises the argument that the exclusivity clause was removed as early as April 2017 before the Commission's Proposed Decision was issued.

¹⁸⁰ Paragraph 12 of Statement of Wan Ahmad Syatibi bin Wan Abd Manan of Dagang Net recorded on 27.9.2017; Paragraph 10 of Statement of Dato' Wong Kam Yin of DNEX recorded on 18.9.2017; and Paragraph 10 of Statement of Datuk Samsul bin Husin of Dagang Net recorded on 5.6.2017.

237. Dagang Net contends that, in any event, the cessation of Rank Alpha as Dagang Net's authorised software provider was on Rank Alpha's own volition, and was not caused by the inclusion of the exclusivity clause.

The Commission's Findings on Exclusivity

238. The Commission refers to the exclusivity clause that was imposed by Dagang Net in its MCPA on the software providers. The exact wording of the exclusivity clause is reproduced as below:

"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"

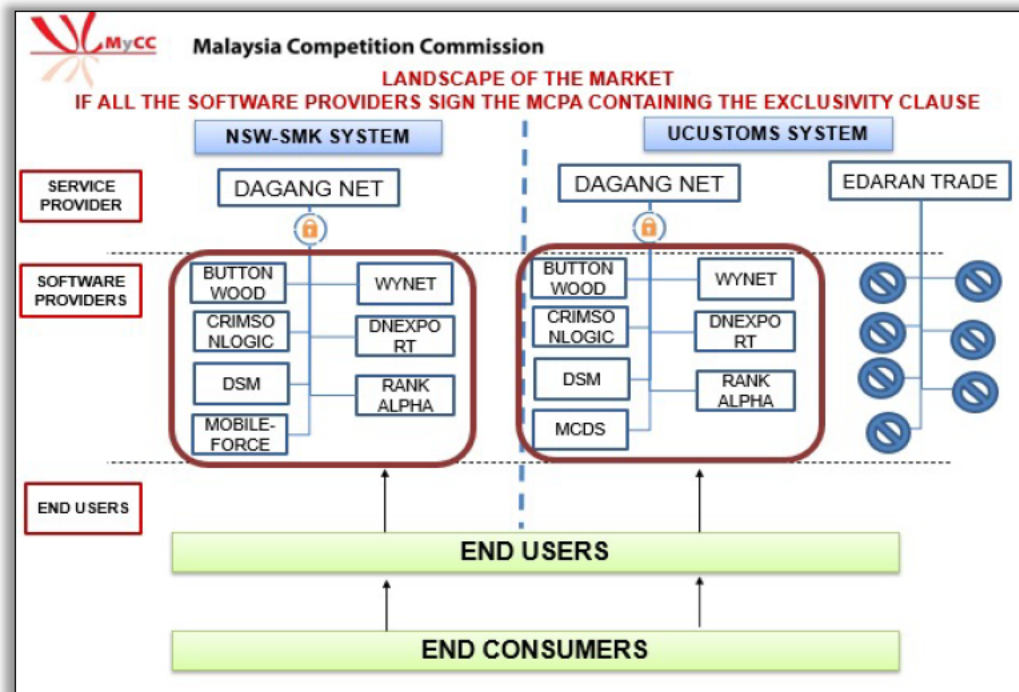
239. The Commission would like to stress that the imposition of above exclusivity clause would have the following adverse effect and consequences:

- (i) The exclusivity clause takes into effect during the tenure of the agreement;

- (ii) The exclusivity clause prevents the software providers from engaging with any other service providers in the uCustoms system market; and
- (iii) The exclusivity clause prevents the software providers from providing similar services to the end user in the uCustoms system market.

240. Now, on the hypothesis that *all* the software providers were to sign the MCPA with Dagang Net during the tenure of the NSW-SMK system, this would effectively mean that other service providers would be prevented from competing with Dagang Net. This is because service providers would not have access to software providers in the uCustoms system. The exclusivity arrangement by Dagang Net, therefore, has disincentivised competition; whilst in the counterfactual, Edaran Trade or any other service provider would have the ability to compete in the market for the provision of trade facilitation services. **Diagram 4** below depicts the landscape of the market if all the software providers were to sign the MCPA containing the exclusivity clause imposed during the tenure of NSW-SMK system.

Diagram 4: Landscape of the market if all the software providers signed the MCPA containing the exclusivity clause during the tenure of the NSW-SMK system



241. The Commission's opinion on the effect of the exclusivity clause is echoed by the Head of Legal and Contract Administration Department of Dagang NeXchange Bhd., who drafted the MCPA. He states the following:

"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."*¹⁸¹

242. In relation to the uCustoms system market, the Commission is unable to accept the argument advanced by Dagang Net that the exclusivity clause has yet to take effect as the uCustoms system market is not yet operational. The Commission is of the view that although the market is yet to be in full operation, the exclusivity clause has indeed borne its effect on the software providers upon signing the MCPA throughout the tenure of agreement.
243. The Commission refers to the case of *IMS Health*¹⁸² where the European Court recognises that the conduct of an enterprise occupying a dominant position in one market may be abusive to another market wherein there is potential consumer demand.
244. Dagang Net's conduct is capable of having significant effects of preventing, restricting or distorting competition in the upcoming uCustoms system market, specifically at the upstream service provider level of the market. Dagang Net's conduct would create barriers to entry for its competitor and potentially strengthen Dagang Net's position in the uCustoms market.

¹⁸¹ Paragraph 21 of Statement of Samsuri bin Ishak of DNEX recorded on 25.9.2017.

¹⁸² Case C-418/01 *IMS Health*, at paragraphs 37, 38, 44 and 52.

245. If all the software providers were to sign the MCPA with Dagang Net during the tenure of NSW-SMK system, other service providers would not have any access to any software providers in the uCustoms system. Without the exclusivity arrangement, other service providers would have had the ability to compete in the market for the provision of trade facilitation services.
246. The Commission makes the inference that, in view of the upcoming uCustoms market, Dagang Net, via the imposition of the exclusivity clause, had the intention of retaining its current market share in the NSW-SMK market; as such a clause would have had the potential effect of ensuring that all software providers would be exclusive solely to Dagang Net, leaving Edaran Trade at a competitive disadvantage when entering the uCustoms market.
247. Dagang Net's minutes of meeting dated 8.4.2013,¹⁸³ clearly depicts that Dagang Net was indeed aware of the possibility of losing its *de jure* monopoly with the entry of competitors into the market, when its concession with the Government for the NSW ends and the uCustoms system becomes operational.
248. The Commission emphasises that the said minutes had indicated that Dagang Net was aware of the impending implementation of the uCustoms system. The excerpts of the minutes of the meeting are reproduced as below:

¹⁸³ Item 2.1 of the Minutes of Meeting of Dagang Net entitled "Notes on discussion on Extension of NSW and Strategy Post uCustoms" dated 8.4.2013.

“2.1 Extension of Contract

i. ...

ii. Company to adopt the strategy of “extension of agreement for period until full completion of uCustoms”. To prepare the Company for competitive environment when additional service providers are appointed by the Government.”

249. Additionally, the Commission refers to the minutes of meeting dated 15.4.2013¹⁸⁴ wherein Dagang Net had internally discussed their strategy to engage with the working level at the Ministry of Finance to find out the Government’s position with regard to the appointment of service provider in the uCustoms system.

250. The Commission also refers to Dagang Net’s 2015 Annual Operation slide presentation¹⁸⁵ which was presented to its board on 2.12.2014, wherein, Dagang Net had forecasted that its revenue for 2015 would be at RM74.1 million as compared to its revenue of RM 74.3 million in 2014. This represented a gross profit value of 81% as compared to the previous year’s 86%, and after-tax profit margin of 22% as compared to 25% the previous year.

251. The above figures were accompanied by Dagang Net’s key assumption that there would be “no extension of (its) NSW contract beyond September 2016.” Furthermore, the same slide presentation

¹⁸⁴ Item 2 of the Minutes of Meeting of Dagang Net entitled “Notes on discussion on Extension of NSW and Strategy Post uCustoms” dated 15.4.2013.

¹⁸⁵ Dagang Net 2015 Annual Operating Plan Slides at page 8.

noted that “(there may be a) Drop in Market share by 30% with introduction of uCustoms (in) Q3 2015 and by 50% post 2016”.

252. The Commissions further refers to the research finding of local investment houses¹⁸⁶ that indicates that Dagang Net would potentially lose a significant amount of its revenue when it loses its *de jure* monopoly in the NSW-SMK when the uCustoms system becomes operational. The research finding projected that DNEX would lose 30% of its revenue, following the entry of new competitors into the uCustoms market.¹⁸⁷
253. Accordingly, the Commission is of the view that there is no reasonable commercial justification in the imposition of the exclusivity clause in the MCPA on the software providers during the NSW-SMK period. The purpose was merely to foreclose the market for the provision of the trade facilitation services and for Dagang Net to retain its current market share in view of the upcoming uCustoms system.
254. It is pertinent to note that the role of software providers will be carried over from the current NSW-SMK system once the uCustoms system

¹⁸⁶ Report, “Dagang Nexchange Berhad, Expecting a Strong 2H17” by TA Securities dated 28.9.2017; Report, “Dagang Nexchange Bhd, International Play in the Making” by Kenanga Research & Investment dated 12.6.2014; Report, “Dagang NeXchange, New Ventures Beginning to Pay Off” by CIMB Research dated 22.6.2017; Report, “Dagang Nexchange, Better Times Ahead” by CIMB Research dated 22.8.2017; Report, “Dagang Nexchange, Maiden Foray Into Downstream Retail Oil & Gas” by CIMB Research dated 6.7.2017; and, Report, “Dagang NeXchange, Transformation In Progress” by BIMB Securities dated 4.10.2017.

¹⁸⁷ Report, “Dagang Nexchange Bhd, Growing Strong” by TA Securities dated 25.5.2017 at page 5; and Report, “Dagang NeXchange, New Ventures Beginning to Pay Off” by CIMB Research dated 22.6.2017 at page 9.

becomes operational in the future as the former will be replaced by the latter.

255. The Commission dismisses the argument by Dagang Net that the exclusivity clause did not completely prevent the software providers from engaging any other service providers in the uCustoms market. The wording of the exclusivity clause prohibits the software providers from providing similar service to the end users in the uCustoms market. Hence, the Commission makes the finding that the exclusivity clause is worded to prevent and restrict the software providers from engaging any other service providers.
256. In this regard, the Commission takes note that in the uCustoms system, it is the Government's policy for there to be two or more service providers in the uCustoms system. The Commission is of the opinion that Dagang Net's conduct may jeopardize the intention of RMC to stimulate competition in the uCustoms system. RMC's aspiration of having more than one service provider is crucial as it will avoid the risk of the Government relying only on one single entity in the provision of trade facilitation services.
257. The Commission takes cognizance of the aspiration behind the uCustoms system, and that is to open the market; for, the presence of competition in the market would bring greater product diversity and promotes the emergence of new services. In this context, as a result of competition, the end users will benefit from having variety of options

in terms of value-added services and competitive cost in utilising the trade facilitation services.

258. The Commission refers to the case of *AstraZeneca v Commission*¹⁸⁸ whereby the European Court of Justice (“ECJ”) had stated that a dominant firm must not eliminate a competitor other than by the method that come within the scope of competition on the merits. The Commission finds the exclusivity clause in the MCPA imposed on the software providers does not amount to reasonable commercial justification.

259. The Commission considers Dagang Net’s claim that it had no knowledge of the objection by Rank Alpha and Wynet to the exclusivity clause irrelevant. For the purposes of establishing abuse, the fact that Rank Alpha’s and Wynet’s objections were not known by Dagang Net is immaterial.¹⁸⁹

260. The Commission concludes that the exclusivity clause imposed by Dagang Net is capable of having anti-competitive effect in the provision of trade facilitation services in Malaysia.

261. The Commission concludes that Dagang Net as the incumbent, holds a special responsibility not to behave in such a way as to distort the competition in the provision of trade facilitation services. The

¹⁸⁸ Case C-457/10 *P AstraZeneca v Commission*, at paragraphs 75, 76 and 93.

¹⁸⁹ Case C-552/03, *Unilever Bestfoods v Commission*, at paragraph 129.

Commission reiterates that the abusive conduct of Dagang Net had the effect of significantly preventing, restricting or distorting the competition in the relevant market.

D.3 PROHIBITION ON REFUSAL TO SUPPLY

262. Section 10(2)(c) of the Act states that an enterprise may abuse its dominant position when it refuses to supply to a particular enterprise or group or category of enterprises.
263. As a general proposition, enterprises are free to decide with whom to deal. However, there are circumstances in which it may be an abuse of a dominant position for an enterprise to refuse to deal with would-be customers.
264. In *Commercial Solvents v Commission*,¹⁹⁰ where the ECJ upheld that it was an abuse to refuse to supply an existing customer which would, as a result, be eliminated from the downstream market.
265. The concept of refusal to supply covers a broad range of practices, such as to supply products to existing or new customers, to license intellectual property rights or to grant access to an essential facility or a network.¹⁹¹ The Commission will take into account of the difficult trade-off involved in forcing supply, which leads to a short-term

¹⁹⁰ Joined Cases 6 and 7/73 *Commercial Solvents v Commission*.

¹⁹¹ Paragraph 3.26 of the MyCC's Guidelines on Chapter 2 Prohibition: Abuse of Dominant Position.

increase in competition but which may harm longer term incentives for innovation and investment.

D.4 APPLICATION TO THE PRESENT CASE

Arguments by Dagang Net

266. Dagang Net submits that the refusal to supply the electronic mailboxes to the end users of unauthorised software providers is a necessary measure to comply with Dagang Net's obligation and duties under the Concession Agreement¹⁹² that is to ensure stability of the NSW-SMK system.
267. Dagang Net further submits that the signing of the MCPA is necessary in order for the Dagang Net to ensure that the software providers connected to the NSW-SMK system meet Dagang Net's obligations under the Concession Agreement.
268. Dagang Net further submits that its denial of additional mailboxes to Titimas Logistics or any other end users of unauthorised software providers is justified due to technical and security risks that could affect Dagang Net's obligation to keep 99.8% uptime of the running of the NSW-SMK system as required under the Concession Agreement.

¹⁹²Agreement between Government of Malaysia and Dagang Net dated 19.11.2009.

269. Dagang Net submits that the transactions carried out by the end users of Rank Alpha and Wynet were susceptible to the technical and security risks that resulted in technical glitches, crashes and compromise of data integrity to the NSW-SMK system¹⁹³ as follows:

- (i) Duplication of the declarations transmitted to the NSW-SMK system;
- (ii) Corrupted file, due to the non-compliance with UN/EDIFACT format, transmitted to the NSW-SMK system;
- (iii) Wrong value to be entered in the computation of the 'Total Amount Payable' in the NSW-SMK system; and
- (iv) Uncertified messages transmitted to the NSW-SMK system.

270. Moreover, it is submitted that the Commission had failed to demonstrate that there were requests made by other end users of Rank Alpha and Wynet for additional electronic mailboxes. Additionally, Dagang Net contends that there were no complaints received from end users in relation to the refusal of electronic mailboxes.¹⁹⁴

271. In support of its argument, Dagang Net refers to the case of *Contact Software v Commission*,¹⁹⁵ wherein Dagang Net contends that the supply of electronic mailboxes is not indispensable as follows:

¹⁹³Email Correspondence from Wan Ahmad Syatibi bin Wan Abd Manan of Dagang Net to the Commission dated 8.6.2017.

¹⁹⁴ Paragraph 8 of Statement of Paul Seo Tet Chong of FMFF and SFFLA recorded on 28.2.2017.

¹⁹⁵ Case EUECJ T-751/15 *Contact Software v Commission* (Judgement) [2017].

- (i) Dagang Net still allows the existing end users of Rank Alpha to make declarations and transactions; and
- (ii) There is no need for additional mailboxes with the existence of the SAC.

272. Dagang Net claims it did not deny the declarations and transmissions of existing end users of Rank Alpha and Wynet to the NSW-SMK system despite the technical and security risks.

273. Dagang Net argues that the refusal to supply electronic mailboxes to the end users of unauthorised software is a preventive measure on the part of Dagang Net to minimise the known existing technical and security risks and to avoid an increase of transmissions by the said end users.

274. Dagang Net also argues that there was no need for additional electronic mailboxes for the existing end users with several branches as the existing end users were able to submit their declarations for their other branches through the same existing electronic mailboxes by using the SAC. This reduced the need for additional electronic mailboxes.

275. Dagang Net submits that any harm arising out of the refusal was self-induced by Rank Alpha and Wynet. Dagang Net submits that it provided key updates and carried out message certification processes, but Rank Alpha and Wynet ultimately chose not to join and become authorised software providers.

276. In relation to the PDK 2017 certification, Dagang Net contends that Rank Alpha was invited for the certification held on 27 and 28 March 2017. However, Rank Alpha participated only after Dagang Net had agreed not to impose any relevant fees.
277. Additionally, Dagang Net submits that it continued to provide the relevant support in relation to operational matters and relevant updates through Dagang Net's Customer Careline Department to the end users of Rank Alpha and Wynet.¹⁹⁶
278. Dagang Net submits that the refusal to supply electronic mailboxes to the new end users did not cause harm. The new end users are able to exercise their choice as to whether or not to use the authorised software providers and subsequently to be provided with the electronic mailboxes by Dagang Net.
279. Based on the aforementioned arguments, Dagang Net submits that the refusal to supply electronic mailboxes leads to no harm as there is no foreclosure to software providers and therefore is reasonably justified.

¹⁹⁶ Paragraph 19 of Statement of Wan Ahmad Syatibi bin Wan Abd Manan of Dagang Net recorded on 27.9.2017.

The Commission's Findings

280. Upon thorough deliberation on the evidence and submission made by Dagang Net through its written and oral representations, the Commission concludes that Dagang Net's refusal to supply the electronic mailboxes does not constitute an abuse of its dominant position due to the insignificant effect to the relevant market as deliberated in **Paragraphs 281 to 299** below.

E. EFFECT ON COMPETITION IN THE RELEVANT MARKET

281. By virtue of section 3 of the Act, the section 10 prohibition applies to conduct that has an effect on competition on any market in Malaysia.

282. Concerning the effects of the dominant enterprise's conduct, while they must not be of a purely hypothetical nature, they do not necessarily have to be concrete.¹⁹⁷ It is sufficient that the conduct tends to restrict competition or is capable of having that effect.¹⁹⁸ The Commission is not therefore, required to demonstrate that a particular practice has actual anti-competitive effects.¹⁹⁹

¹⁹⁷ Case C-52/09 *TeliaSonera Sverige*, at paragraph 64; and Case T-336/07 *Telefónica and Telefónica de España v Commission*, at paragraph 268; Case C-295/12 P *Telefónica and Telefónica de España v Commission*, at paragraph 124; Case T-398/07 *Spain v Commission*, at paragraph 90; Case C-457/10 P *AstraZeneca v Commission*, at paragraph 112; and Case C-23/14 *Post Danmark A/S v Konkurrencerådet*, at paragraph 65 and Case AT.40099 *Google Android*, at paragraph 733.

¹⁹⁸ Case C-549/10 P *Tomra Systems and Others v Commission*, at paragraph 68.

¹⁹⁹ Case T-336/07 *Telefónica and Telefónica de España v Commission*, at paragraph 273.

283. In *Clearstream Banking AG v Commission*²⁰⁰ in the European Communities, the General Court held:

*“in order to find the existence of an abuse (within the meaning of Article 102 of the Treaty for the Functioning of the European Union (TFEU)), the refusal of the service (or product) in question must be likely to eliminate all competition on the market on the part of the person requesting the service, such refusal must not be objectively justified and the service must in itself be indispensable to carry on that person’s business...”*²⁰¹ (emphasis added)

284. This is similarly applied in European jurisprudence. In *British Airways*, the ECJ held that:

*“...there is nothing to prevent discrimination between [competitors] who are in a relationship of competition from being regarded as being abusive as soon as the behaviour of the undertaking in a dominant position tends, having regard to the whole of the circumstances of the case, to lead to a distortion of competition between [competitors]. In such a situation, it cannot be required in addition that proof be adduced of an actual quantifiable deterioration in the competitive position of the [competitors] taken individually”.*²⁰² (emphasis added)

285. Customers and users should have the opportunity to benefit from whatever degree of competition is possible on the market and

²⁰⁰ Case T-301/04 *Clearstream Banking AG v Commission*, at paragraph 147.

²⁰¹ Case T-301/04 *Clearstream Banking AG v Commission*, at paragraph 147.

²⁰² Case C-95/04 *P British Airways v Commission* [2007] ECR I-2331, at paragraph 145; and Case C-549/10 *P Tomra Systems and Others v Commission* [2012] 4 CMLR 27.

competitors should be able to compete on the merits for the entire market and not just for a part of it.²⁰³

E.1 APPLICATION TO THE PRESENT CASE

Arguments by Dagang Net in relation to Effect of Exclusive Dealing

286. Dagang Net contends that the Commission had failed to adduce sufficient evidence to support its finding that the imposition of the exclusivity clause had carried anti-competitive effect. In this regard, the sample test conducted by the Commission is insufficient and inadequate to show that there was anti-competitive effect as only 6 end users out of the 32 end users had moved from Rank Alpha and Wynet to other software providers.
287. Dagang Net submits that the Commission had failed to consider or rebut Dagang Net's "technical justification" on the imposition of the exclusivity clause as provided by Jasbendarjit Kaur, the Chief Technology Officer of Dagang Net.²⁰⁴
288. Dagang Net contends that the Commission had heavily relied on the statement made by Mohd Nor Fauzi of Edaran Trade who did not possess any technical qualification and was a former employee of Dagang Net. As such, Dagang Net asserts that the statement given

²⁰³ Case C-549/10 P *Tomra Systems and Others v Commission*, EU:C:2012:221, at paragraph 42.

²⁰⁴ Paragraphs 11, 12 and 13 of Statement by Jasbendarjit Kaur of Dagang Net recorded on 12.9.2017.

by Mohd Nor Fauzi was biased and unreliable to discredit Dagang Net's "technical justification" for the imposition of the exclusivity clause.

289. Dagang Net raises the argument that the Commission had erred in making its provisional finding that there was an abuse on the conduct of Dagang Net. Dagang Net also claims that the Commission relied on "a per se based" rule on the "potential barrier to entry" in the uCustoms system stemming from the exclusivity clause instead of "an effect-based" rule.
290. It further argues that there is neither conclusive nor direct evidence to show that the exclusivity clause would result in any loss to any party or cause Edaran Trade to be eliminated as a competitor presently or in the future uCustoms system. In support of its first argument, Dagang Net made reference to the cases of *Microsoft*, *Deutsche Telekom AG v Commission* and *Konkurrenservet v TeliaSonera* to support its argument on the requirement to demonstrate anti-competitive effects.
291. Dagang Net contends that its conduct did not result in the elimination of all competition as provided for in the case of *Clearstream Banking AG*²⁰⁵. Dagang Net argues that there was no barrier to entry that caused Edaran Trade to be eliminated as a competitor in the market. Dagang Net adds that the software providers were only be required to

²⁰⁵ Case T-301/04 *Clearstream Banking AG v Commission of the European Communities* [2009] ECR II-3155, at paragraph 147.

have a version of the software that would be specifically meant for the different service.

292. Dagang Net argues that the uCustoms system has yet to commence and as such it is a hypothetical scenario. There is no finding put forward by the Commission that there is anti-competitive effect caused by the imposition of the exclusivity clause. Therefore, the Commission's provisional findings on the imposition of the exclusivity clause by Dagang Net is premature, speculative and baseless.
293. Dagang Net contends that the Commission failed to adduce evidence to suggest that Dagang Net had intended to foreclose the market through the imposition of the exclusivity clause into the MCPA. Dagang Net also argues that the Commission had failed to conduct a counterfactual assessment on the imposition of the exclusivity clause.

The Commission's Findings

294. The Commission maintains, at all times, that the section 10 of the Act is an effect-based prohibition.
295. The Commission hereby rejects the argument by Dagang Net that the Commission had taken a *per se* approach in dealing with Dagang Net's conduct. Consequently, the Commission maintains that there is harmful effect to competition arising from Dagang Net's conduct as deliberated in the paragraphs above in **Part 2: D.1 and Part 2: D.2.**

Insignificant Effect to the Relevant Market due to the Refusal to Supply

296. The Commission observes that the end users of Rank Alpha and Wynet were still able to transact within the NSW-SMK system. Although Rank Alpha and Wynet did not obtain revenue from software sales, the Commission notes that Rank Alpha and Wynet were not foreclosed from the market. Rank Alpha and Wynet were able to sustain revenue from maintenance fees.
297. Similarly, the Commission observes that the end users were able to engage other available software providers, even though the end users were unable to choose Rank Alpha and Wynet.
298. Taking into consideration of the facts aforementioned, the Commission finds that there was no sufficient evidence to show that the refusal to supply had caused significant harm to competition in the market for trade facilitation services.
299. For those reasons set out above, the Commission finds that there is no infringement by Dagang Net under section 10(2)(c) of the Act for the refusal to supply the electronic mailboxes.

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F. SECTION 10(3) OF THE ACT – REASONABLE COMMERCIAL JUSTIFICATION

300. The Commission is of the view that Dagang Net's argument, that there would be risks arising from NSW-SMK system running concurrently with uCustoms system, was based on mere assumption. Based on the statements obtained, we find that there was no material issue arising from the fact that the software providers would be connected to two service providers.²⁰⁶ In any event, the Commission takes the position that Dagang Net ought to have consulted RMC instead of acting on its own assumption that there would be technical and security risks.
301. The Commission is of the opinion that it is trite law that it is not the duty of an enterprise occupying a dominant position to take steps on its own initiative to eliminate products that it may regard as dangerous or inferior of quality to its own products.²⁰⁷ Applying this principle to the present case, the Commission takes the position that it is not the responsibility of Dagang Net to eliminate Edaran Trade from having access to the software providers, which Dagang Net regard as dangerous due to the uncertainties of the uCustoms system.

²⁰⁶ Paragraphs 17 and 18 of Statement of Mohd Nor Fauzi bin Abdul Kayum of Edaran IT recorded on 6.10.2017; Paragraphs 8 and 9 of Statement of Kelvin Tiong Chin Hock of Rank Alpha recorded on 26.10.2017; and Paragraphs 9, 10, and 11 of Statement of Alywn Hoa Chee Keong of Wynet recorded on 13.10.2017.

²⁰⁷ Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC (2009/C 45/02), at paragraph 29; Case T-30/89 *Hilti v Commission*, at paragraph 118; and Case T-83/91 *Tetra Pak II*, at paragraph 138.

302. Dagang Net further submits that the Commission had failed to consider Dagang Net's "technical justification" on the imposition of the exclusivity clause as provided by the Chief Technology Officer of Dagang Net.²⁰⁸ Dagang Net submits that there was a necessity to take preventive steps to avoid technical or security risks to the existing NSW-SMK due to the uncertainties of the uCustoms system, through the imposition of the exclusivity clause to its software providers.
303. Dagang Net argues that it is uncertain as to the working environment of the uCustoms system as well as the projected launch of uCustoms system during the live-span of NSW-SMK system.
304. In furtherance to the above, Dagang Net makes the following assumptions:
- (i) the uCustoms system will run concurrently with NSW-SMK system; and
 - (ii) a similar mailbox system (such as the one in the NSW-SMK system) would be adopted in the uCustoms system.
305. Dagang Net submits that if the uCustoms system were to co-exist with the NSW-SMK system, there would be a need to determine the requirements under the uCustoms system before Dagang Net can recertify the software to be connected to uCustoms system.

²⁰⁸ Paragraphs 11, 12 and 13 of Statement by Jasbendarjit Kaur of Dagang Net recorded on dated 12.9.2017.

306. In any event, Dagang Net contends that its abovementioned assumptions are well founded in the light of the statement of Mazwin Binti Muhamad Yusof of RMC to the effect that the uCustoms system would likely utilize a mailbox system similar to the NSW-SMK system.
307. Dagang Net further submits that if a similar mailbox system were to be used in the uCustoms system, there may be security and technical risks as well as integrity issues in relation to software providers when connected to more than one service providers at the same time. Additionally, Dagang Net claims that there would be similar risks in relation to end users when connected to more than one software providers at the same time.
308. The Commission is of the view that, even if there are technical and security risks arising from the concurrent running of the NSW-SMK system and uCustoms system, those risks need to be highlighted by Dagang Net to RMC as the relevant authority.
309. In this regard, the Commission finds that Dagang Net had not provided sufficient evidence to prove that it had taken steps to enhance its security system to address the risks – if at all they are any and not mere assumptions, and the Commission reiterates its position as mentioned earlier that the so-called risks are mere assumptions – prior resorting to the imposition of the exclusivity clause which had an exclusionary effect on the competition for the provision of trade facilitation services. Further, on the issue of technical protocols and specifications being shared with the other service providers in the

uCustoms system, the Commission is of the view that there are less restrictive clauses options available to Dagang Net to protect its proprietary interests such as non-disclosure agreements, copyright clauses and confidentiality clauses.

310. The Commission finds support in its view in the European case of *NAVEWA-ANSEAU*,²⁰⁹ wherein the judgment of the European Commission states the following:

“66. ...A possible limitation of the application of the rules on competition can be envisaged only in the event that the undertaking concerned has no other technically and economically feasible means of performing its particular tasks.

67. In the case in point, the establishment of discriminatory conditions for the authorization of machines imported by importers other than sole importers was not necessary, let alone indispensable, to enable the companies which are members of ANSEAU to perform the task assigned to them. The fact of making it possible for importers other than sole importers to obtain labels on non-discriminatory terms, direct from ANSEAU, could not in any case have obstructed the performance of that task...”

311. Based on the foregoing paragraphs, the Commission concludes that Dagang Net has failed to satisfy the requirement of reasonable commercial justification under section 10(3) of the Act.

²⁰⁹European Commission Decision (IV/29.995 — *NAVEWA-ANSEAU*).

G. THE REMOVAL OF THE EXCLUSIVITY CLAUSE

312. The Commission takes note, as earlier mentioned above in **Part 1:D**, that the exclusivity clause was removed from the respective MCPAs, via Supplemental Agreements²¹⁰, and from the respective draft MCPAs provided to Rank Alpha²¹¹ and Wynet²¹².
313. The Commission also observes that, since the removal of the exclusivity clause, till to-date, the NSW-SMK system was up and running without any technical problem, thereby demonstrating that there was no actual need for the exclusivity clause to be put in place.
314. The Commission makes a finding that Dagang Net had failed to demonstrate and substantiate its argument that there would be technical and security risks without the imposition of the exclusivity clause, that would ultimately affect Dagang Net's obligation for 99.8% uptime as provided under the Concession Agreement.
315. The Commission finds that despite the removal of the exclusivity clause in 2017, Dagang Net failed to furnish any evidence to support its contention that Dagang Net was unable to fulfil its obligation under the Concession Agreement.

²¹⁰ Supplemental Agreement between Dagang Net and Buttonwood dated 2.11.2017; Supplemental Agreement between Dagang Net and DNEXPORT dated 15.11.2017; Supplemental Agreement between Dagang Net and Crimsonlogic dated 30.10.2017; and Supplemental Agreement between Dagang Net and MCDS dated 2.11.2017.

²¹¹ Draft Agreement between Dagang Net and Rank Alpha.

²¹² Agreement between Dagang Net and Wynet dated 1.8.2017.

316. The Commission considers that the removal of the exclusivity clause does not warrant the exoneration of Dagang Net from liability as the removal does not nullify the harm caused by the imposition of the exclusivity clause.
317. With regards to the cases relied on by Dagang Net,²¹³ the Commission considers that these cases were in fact in relation to settlement arrangement made between the enterprises and competition authorities. Whereas in the case at hand, there was no undertaking offered by Dagang Net to the Commission prior to the Decision.
318. In any event, the Commission takes the view that despite the fact that Dagang Net had ceased its abusive conduct by removing the exclusivity clause, it is a matter of public interest for the Commission to make a determination over the abusive conduct by Dagang Net.²¹⁴
319. The Commission is also of the view that there is a need for the Commission to make a decision over the abusive conduct of Dagang Net as without the Commission's decision, there is a real danger of resumption on the part of Dagang Net.²¹⁵
320. The cessation of an infringement prior to the adoption of a decision by the Commission does not in itself constitute a restriction to the

²¹³ *Undertaking signed between the Giga Shipping Nexus Mega and the Commission; Commitment from investigation into Asia Pacific Breweries CCCS media release; and Commitment from Investigation into Coca Cola Singapore Beverages CCCS media release.*

²¹⁴ Case 7/82 GVL v Commission, at paragraphs 24 and 27.

²¹⁵ Case 7/82 GVL v Commission, at paragraphs 24 and 27.

Commission's exercise of its powers to find and penalise an infringement of the competition rules. The Commission's power to impose penalties is in no way affected by the fact that the conduct constituting the infringement has ceased and can no longer have detrimental effects.²¹⁶

321. Accordingly, the argument that the Commission should not take any action against Dagang Net as the exclusivity clause has been removed, is hereby dismissed.

H. EXCLUSION UNDER SECTION 13(1) OF THE ACT AND LIMB (C) OF THE SECOND SCHEDULE

322. Section 13(1) of the Act is to be read with the Second Schedule of the same. The terms “general economic interest” or “revenue-producing monopoly” mentioned in limb (c) of the Second Schedule are not defined under the Act. The Commission makes reference to the Office of Fair Trading Guidelines on Services of General Economic Interest²¹⁷ (“the OFT Guidelines”) which provides clarification on the exclusions of services of general economic interest and revenue-producing monopoly.

²¹⁶ Case 41/69 *ACF Chemiefarma v Commission*, at paragraph 175.

²¹⁷ Services of General Economic Interest Exclusion: OFT 421, published on 1 December 2004 by the Office of Fair Trading, United Kingdom.

323. In the OFT Guidelines, it is stated that in order to invoke the exclusion of an entity having the character of a revenue-producing monopoly, it must fulfil the following:

- (a) must be an enterprise;
- (b) enterprise must have its principal objective of raising revenue for the state through the provision of a particular service;
- (c) enterprise granted with exclusive rights to provide the service; and
- (d) enterprise must show that the application of the prohibitions of the Act would obstruct the performance in law or in fact, of the particular task assigned to it.

324. Moreover, Article 106(2) of the Treaty for the Functioning of the European Union (“TFEU”) states the following:

“Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.”

325. It is trite law that it is not enough in itself that the enterprise performs that service; it must have been entrusted with that performance which will mean that it is under certain obligations.²¹⁸

Arguments Raised by Dagang Net

326. Dagang Net argues that the prohibitions under Part II of the Act is not be applicable to Dagang Net as Dagang Net fulfils the criteria laid down in section 13(1) read together with limb (c) of the Second Schedule to the Act.

327. Dagang Net argues that it fulfils the conditions laid down in the OFT Guidelines by virtue of the provisions under the Concession Agreement.

328. Dagang Net submits that it is an enterprise that has the principal objective of raising revenue for the Government, as the services provided by Dagang Net in the NSW-SMK system enables the RMC to collect duty payments on behalf of the Government. Dagang Net further argues that its obligation to run and manage the NSW-SMK system is essentially to collect Customs duties on behalf of the Customs.

²¹⁸ Case C-203/96, Opinion of AG Jacobs in *Dusseldorp and Others v Minister Van Volkshuisvesting, Ruimtelijke Ordening En Milieubeheer*, I-4077, at paragraphs 103 and 107.

329. Dagang Net argues that if the imposition of the exclusivity clause is found to be abusive, this would obstruct Dagang Net's performance under the Concession Agreement as Dagang Net is unable to prevent the security and technical risks as contended in length in its arguments.

The Commission's Findings

330. The Commission notes that during the course of the written and oral representations, Dagang Net had constantly changed its position in applying the exclusionary provisions: at one instance, it represented that Dagang Net was an enterprise rendering "services of general economic interest"; but the next instance it submitted that Dagang Net was "having the character of a revenue-producing monopoly".
331. Subsequently, Dagang Net, in its most recent representation on 29.7.2019, both oral and in writing, clarified to the Commission that it was applying for the exclusion of an enterprise "having the character of a revenue-producing monopoly".
332. Upon careful consideration of the relevant facts of this case, the Commission is of the view that Dagang Net does not satisfy the criteria of an enterprise "having the character of a revenue-producing monopoly".

333. The Commission finds that Dagang Net does not have as in its principal objective, the raising of revenue for the Government. Instead, under the Concession Agreement, Dagang Net is obligated to enable end users to forward customs declarations for which monthly and transaction charges are imposed on these end users; and to enable fund transfers of payment duties to the RMC.²¹⁹
334. Additionally, the Government pays Dagang Net annually for their services including, among others, the provision of customs declarations.
335. The Commission takes the view that the imposition of the exclusivity clause went beyond what is necessary, to fulfil Dagang Net's obligations under the Concession Agreement. The Commission relies on the "principle of proportionality" as applied in *Air Inter v Commission*²²⁰ and *NAVAWE-ANSEAU*,²²¹ that when there is a choice between several appropriate measures, the least onerous measure should be adopted.
336. Accordingly, it is the finding of the Commission that the arguments put forward by Dagang Net on the applicability of section 13(1) read together with limb (c) of the Second Schedule to the Act are without merits and therefore must be dismissed.

²¹⁹ Agreement between Government of Malaysia and Dagang Net dated 1.3.2005; and Agreement between Government of Malaysia and Dagang Net dated 19.11.2009.

²²⁰ Case T-260/94 *Air Inter v Commission*, at paragraph 144.

²²¹ European Commission Decision (IV/29.995 — *NAVEWA-ANSEAU*), at paragraph 66.

I. BURDEN AND STANDARD OF PROOF

337. It is trite law that the Commission bears the burden of proving that an infringement under section 10 of the Act has been committed. The standard of proof to be applied is the civil standard which is on the balance of probabilities.

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

Discretion to rely on any available Evidence

339. The Commission relies on the principles laid down in *Argos*²²², wherein the Commission will look at the available evidence as whole when deliberating its decision in a case.

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

²²² *Argos Ltd & Anor. v Office of Fair Trading* [2004] CAT 24, at paragraph 311.

rejects the argument put forth by Dagang Net that the Commission cannot rely on circumstantial evidence in the formulation of its case.

341. The Commission in response to the argument that Dagang Net's financial projections, the investment house research projections and Dagang Net's internal meeting minutes are circumstantial evidence, takes the view that the said documents are direct evidence.

342. The Commission maintains its inference from the above said minutes of meeting, financial projections and investment house research as to the intention of the dominant enterprise for its abusive conduct.²²³

343. It is relevant to take into account facts arising before 1.1.2012 for the purpose of shedding light on the facts and matters in issue on and before the date.

344. The Commission had obtained several statements from industry experts in order to gather information on connectivity in relation to technical and security risks, particularly, in a situation where one software would be connected to two service providers in the uCustoms system²²⁴. The reliability of evidence obtained from these witnesses has been dealt with in **Part 1: F.1**. The Commission is

²²³ Case Numbers: IV/34.073, IV/34.395 and IV/35.436 *Van den Bergh Foods Limited*, at paragraph 265.

²²⁴ Paragraphs 17 and 18 of Statement of Mohd Nor Fauzi bin Abdul Kayum of Edaran IT recorded on 6.10.2017; Paragraphs 8 and 9 of Statement of Kelvin Tiong Chin Hock of Rank Alpha recorded on 26.10.2017; and Paragraphs 9, 10, and 11 of Statement of Alywn Hoa Chee Keong of Wynet recorded on 13.10.2017.

empowered to take statements from any person believed to be acquainted with the facts and circumstances of the case.

345. In applying the *Solvent*²²⁵ case together with *Microsoft*,²²⁶ the Commission is of the view that the burden of rebutting the Commission's finding such as providing evidence from independent experts or the uCustoms system developer rests on Dagang Net. Dagang Net did not provide evidence to support its argument on reasonable commercial justification.
346. Referring to *British Airways v Commission*²²⁷ and *Tomra Systems and Others v Commission*,²²⁸ the Commission considers that the sampling size of the end users is not a critical factor because it is not necessary for the Commission to carry out a detailed assessment as the Commission is only required to prove the likelihood of harm. Therefore, the Commission makes a finding that the sampling size is sufficient to show that the abusive conduct of Dagang Net was likely to, or capable of having the effect of restricting competition in the provision of trade facilitation service.
347. The Commission wishes to add that the interviews undertaken by the Commission are not biased since the Commission considers the end users as affected parties for using the unauthorised software from Rank Alpha and Wynet. The Commission maintains that the

²²⁵ Joined Cases 6 and 7/73 *Commercial Solvents v Commission*, at paragraphs 12, 16 and 17.

²²⁶ Case T-201/04 *Microsoft v Commission*, at paragraphs 688 and 698.

²²⁷ Case C-95/04 P *British Airways v Commission*, at paragraph 145.

²²⁸ Case C-549/10 *Tomra Systems and Others v Commission*, at paragraph 68.

statements taken from the said end users are corroborated by other evidence.

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PART 3: THE COMMISSION'S DECISION

A. DIRECTIONS UPON A FINDING OF INFRINGEMENT

348. In light of the nature of the infringement of the Act, and taking into consideration all evidence obtained throughout the investigations described above, the Commission hereby issues this Decision pursuant to section 40 of the Act against Dagang Net for the imposition of the exclusivity clause in breach of section 10(1) of the Act.

349. Section 40(1) of the Act provides that where the Commission determines there is an infringement of a prohibition, in this case, the section 10 prohibition, the Commission may direct the infringing enterprise, as the Commission considers appropriate, to bring the said infringement to an end.

350. Accordingly, the Commission hereby directs Dagang Net to undertake the following:

- (i) To cease and desist, and to 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; and
- (ii) To enrol directors and senior management executives of Dagang Net into a competition law compliance program and training at their own expense within 3 months of the

issuance of the Decision. Dagang Net is required to submit monthly progress of the enrolment.

B. GENERAL POINTS ON FINANCIAL PENALTIES

351. The Commission is empowered under section 40(1)(c) of the Act to impose a financial penalty on Dagang Net who is found to have infringed a prohibition under Part II of the Act. The penalty, however, shall not exceed 10% of the worldwide turnover of Dagang Net over the period during which the infringement had taken place.

C. GENERAL ARGUMENTS ON FINANCIAL PENALTY RAISED BY DAGANG NET

352. Dagang Net submits that the Commission, in the Proposed Decision, had erred in determining a penalty that is fair and just under the circumstances, in that the Commission had failed to take into consideration of the following factors:

- (i) Dagang Net had provided full cooperation and disclosure throughout the Commission's investigation;
- (ii) Dagang Net had removed the exclusivity clause from all agreements with the software providers before the Commission concluded its investigation;

- (iii) Rank Alpha is not genuine in its complaint as it still refused to become an authorised software provider despite Dagang Net's invitation; and
- (iv) Dagang Net as a concessionaire has duties and obligations owed to the Government.

353. Dagang Net further submits that the Commission did not consider the absence of harm to Edaran Trade as the uCustoms system has not yet been implemented.

354. The Commission considers the arguments put forward by Dagang Net and henceforth will address the submissions in the following paragraphs.

355. The Commission addresses Dagang Net's arguments in the succeeding paragraphs.

D. METHODOLOGY FOR COMPUTING QUANTUM OF PENALTIES

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

- (a) The seriousness (gravity) of the infringement;
- (b) Turnover of the market involved;

- (c) Duration of infringement;
- (d) Impact of infringement;
- (e) Degree of fault (negligence or intention);
- (f) Role of the enterprise in infringement;
- (g) Recidivism;
- (h) Existence of a compliance programme; and
- (i) Level of financial penalties imposed on similar cases.²²⁹

357. In calculating financial penalties for Dagang Net, the Commission begins by setting a base figure, which is worked out by, firstly, determining the relevant turnover of Dagang Net. Secondly, having determined the relevant turnover, the Commission then will take a proportion of the relevant turnover during the period of infringement (how this proportion is determined will be explained later). This base figure is then adjusted after taking into account various factors such as deterrence, aggravating and mitigating considerations in order to arrive at the ultimate value of financial penalty.

D.1 SERIOUSNESS OF THE INFRINGEMENT

358. With regard to the seriousness of the infringement in question, the Commission takes into account the nature of the infringement and the size of the relevant geographical market.

²²⁹ Paragraph 3.2 of the Commission Guidelines on Financial Penalty.

359. The seriousness of the infringement may depend on the nature of the infringement and this shall be taken into consideration when determining the proportion of the relevant turnover of Dagang Net in the calculation of the financial penalties.

D.2 RELEVANT TURNOVER

360. The relevant turnover used to determine the starting point is the enterprise's turnover in the relevant product markets and the relevant geographic market affected by the infringement.

361. The Commission identifies the relevant product market and geographic market affected by Dagang Net's conduct as stated in **Part 2: B.2** above. The Commission finds that the relevant product market in this case is no wider than the scope discussed in **Part 2: B.2**. The relevant geographic market for the focal product is no wider than the geographical location of Malaysia.

362. In calculating the financial penalty of the relevant market, the Commission utilizes the financial data that has been submitted by Dagang Net under section 18 Notice dated 13.4.2017.²³⁰

363. The Commission takes note that the submission of the information in relation to the monthly revenue of the relevant market is from 29.10.2015 up to 31.10.2017.

²³⁰ Revenue information of Dagang Net.

364. Hence, the information that was available to the Commission is up to 31.10.2017. As the infringement had still continued from 29.10.2015 until 9.11.2017, the Commission considers the period of infringement as being until the 9.11.2017.
365. Due to the unavailability of data from 1.11.2017 to 9.11.2017, the Commission had used a proxy figure in deriving the value from the period of 1.11.2017 to 9.11.2017.
366. In determining the value of a proxy figure, the Commission has summed up the turnover from 1.1.2017 to 31.10. 2017²³¹ and divided the figure with 304 days (total number of days from 1.1.2017 to 31.10.2017). Therefore, the value of the proxy figure is RM [REDACTED]
367. The proxy figure is then multiplied by the number of days from 1.11.2017 to 9.11.2017 which is equal to 9 days. The total value for the period of 1.11.2017 to 9.11.2017 is RM [REDACTED]
368. Hence, Dagang Net's relevant turnover in the relevant market from 29.10.2015 until 9.11.2017 is RM [REDACTED]
369. In determining the base figure (that is to say, a proportion of the relevant turnover, deems appropriate) the Commission takes into account the seriousness of the infringement and the relevant turnover of the enterprise. Accordingly, the Commission decides that the

²³¹ Revenue information of Dagang Net.

starting point of computation of financial penalty ought to be fixed at 10% of Dagang Net's relevant turnover, that is, 10% of RM [REDACTED] which brings us to the next figure of RM [REDACTED]. Thus, we have a base figure of RM [REDACTED]

D.3 DURATION OF INFRINGEMENT

370. Dagang Net was involved in the infringement from 29.10.2015 to 9.11.2017.

D.4 AGGRAVATING FACTORS

371. The Commission will consider the presence of aggravating factors and will make adjustments accordingly when assessing the amount of financial penalty.²³² In relation to this case, the Commission does not find any aggravating factors to be present.

D.5 MITIGATING FACTORS

372. The Commission will consider the presence of mitigating factors, if any, and will make adjustments accordingly when assessing the amount of financial penalty²³³.

²³² Paragraph 3.4 of the MyCC Guidelines on Financial Penalties.

²³³ Paragraph 3.5 of the MyCC Guidelines on Financial Penalties.

373. In the present case, the Commission considers the removal of the exclusivity clause by Dagang Net during the course of investigation to be a mitigating factor. The Commission refers to the EU Commission Fining Guidelines which states that the European Commission would consider a reduction in the financial penalty where there is a termination of the infringement conduct by the infringing enterprise.²³⁴ Similarly, in the case of *PO/Michelin*²³⁵ the termination of the infringing conduct by the infringing enterprise during the course of the investigation had warranted a reduction of financial penalty up to 20% from the base figure.
374. Having referred to the principle above, the Commission, in applying its discretion, grants a reduction of 25% from the base figure of RM [REDACTED]. This amounts to a reduction by a sum of RM [REDACTED].
375. The Commission considers that Dagang Net did not provide cooperation over and beyond the extent to which it was legally required. Furthermore, the Commission does not consider Dagang Net's duties and obligations to the Government as a mitigating factor. As such, there shall be no further mitigating adjustment to be made. The total financial penalty computed at this stage upon consideration of the mitigating factor and the reduction of 25% as mentioned in the

²³⁴ EU Guidelines on the Method of Setting Fines Imposed 2006 C210.02.

²³⁵ European Commission Decision COMP.E-2.36.041. *PO – Michelin*.

preceding paragraph is RM [REDACTED] (RM [REDACTED] – RM [REDACTED] = RM [REDACTED]).

D.6 VERIFICATION THAT THE FINANCIAL PENALTY IS NOT MORE THAN 10% OF DAGANG NET’S WORLDWIDE TURNOVER

376. The Commission is mindful that as a matter of law, the final amount of the financial penalty imposed shall not exceed 10% of the worldwide turnover of the enterprise over the period during which the infringement occurred (see section 40(4) of the Act). Thus, the Commission will do the necessary adjustment should the financial penalty to be imposed were found to exceed this prescribed statutory limit.
377. In calculating the worldwide turnover for the relevant period (that is, the period during which the infringement occurred), the Commission utilizes the financial data that has been submitted by Dagang Net under the section 18 Notice dated 13.4.2017.²³⁶
378. The Commission notes that the submission of the information in relation to the monthly revenue of the worldwide turnover is from 29.10.2015 up to 31.10.2017. The information as submitted for this period shows that the worldwide turnover for the said period is RM177,248,946.51. However, the period of infringement is from

²³⁶ Revenue information of Dagang Net.

29.10.2015 to 9.11.2017. Thus, we do not have the requisite data for the period from 1.11.2017 to 9.11.2017.

379. Due to the unavailability of data for the period from 1.11.2017 to 9.11.2017, the Commission uses a proxy figure in deriving the value for the period from 1.11.2017 to 9.11.2017.

380. In determining the value of the proxy figure, the Commission adds up the turnover value from 1.1.2017 to 31.10.2017²³⁷ and arrives at the sum of RM [REDACTED]. Then, we divide this sum by 304 days (that is, the total number of days from 1.1.2017 to 31.10.2017). Therefore, the value of proxy figure is RM [REDACTED]. (RM [REDACTED] divided by 304 = RM [REDACTED]).

381. The proxy figure of RM [REDACTED] is multiplied by the number of days from 1.11.2017 to 9.11.2017, that is to say by 9 days. Therefore, the total value of the worldwide turn over for the period from 1.11.2017 to 9.11.2017 is RM [REDACTED].

382. Hence, the worldwide turnover of Dagang Net from 29.10.2015 until 9.11.2017 is RM [REDACTED] (RM [REDACTED] + RM [REDACTED] = RM [REDACTED]).

383. As the value of the worldwide turnover of Dagang Net is RM [REDACTED], 10% of Dagang Net's worldwide turnover is RM [REDACTED].

²³⁷ Revenue information of Dagang Net.

384. Therefore, the financial penalty of RM12,878,094.97 does not exceed the maximum financial penalty that the Commission may impose in accordance with section 40(4) of the Act, that is, RM [REDACTED].

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PART 4: CONCLUSION ON FINANCIAL PENALTY

385. In conclusion, the Commission pursuant to Section 40(4) of the Act, imposes the following financial penalty to Dagang Net as shown in **Table 6** below:

Table 6: Financial Penalty

INFRINGEMENT PERIOD	FINANCIAL PENALTY
29.10.2015 - 9.11.2017	RM12,878,094.97

A. EXCEPTIONAL AND SPECIAL CIRCUMSTANCES

386. Under ordinary circumstances, the Commission is unlikely to consider external factors other than those mentioned in the Commission's Guidelines on Financial Penalties in computing financial penalty.

387. Nevertheless, the Commission views that the COVID-19 pandemic constitutes an unprecedented challenge with very severe socioeconomic consequences that may impair the sustainability of businesses. The Commission has taken the COVID-19 pandemic outbreak into consideration in the computation of financial penalty to be imposed on Dagang Net. Such consideration is applied at the Commission's discretion on a case-to-case basis.

388. Therefore, taking into account the impact of economic situation arising due to the outbreak of global COVID-19 pandemic, the Commission grants a reduction of 20% of the financial penalty imposed on the Dagang Net. Hence, the ultimate financial penalty that the Commission imposes on Dagang Net is **RM10,302,475.97**.

389. The ultimate financial penalty is listed in **Table 7** below:

Table 7: Ultimate Financial Penalty After Covid-19 Consideration

FINANCIAL PENALTY <u>AFTER</u> COVID-19 CONSIDERATION
RM10,302,475.97

390. In addition, Dagang Net is allowed to make the payment of the financial penalty by equal monthly instalments for up to 6-months to be calculated from the date of service of this Decision.

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

- (i) Dato' Seri Mohd Hishamuddin Md Yunus;
- (ii) Dato' Jagjit Singh a/l Bant Singh;
- (iii) Dr. Nasarudin Abdul Rahman;
- (iv) Datuk Tay Lee Ly;
- (v) Dato' Ir. Hj. Mohd Jamal Sulaiman;

- (vi) Dr. Nor Mazny Binti Abdul Majid; and
- (vii) Tuan Anil Abraham.

DATED: 16 FEBRUARY 2021

A handwritten signature in black ink, appearing to read 'Mohd Hisham', is written over a horizontal line. Below the signature is a dotted line.

CHAIRMAN

**DATO' SERI MOHD HISHAMUDIN
YUNUS**

APPENDIX A**KEY REPRESENTATIVES OF DAGANG NET, DAGANG NEXCHANGE
AND DNEXPORT INTERVIEWED BY THE COMMISSION**

ENTERPRISE	KEY PERSONNEL INTERVIEWED	DATE OF INTERVIEW	DESIGNATION
Dagang Net	Abdul Khalil Bin Abdullah	(i) 5.6.2017; (ii) and 14.9.2017.	Director of Stakeholder Management
	Asvinder Kaur A/P Asha Singh	(i) 5.6.2017; (ii) and 13.9.2017.	Senior Manager of Service Management
	Datuk Samsul Bin Husin	5.6.2017	Executive Chairman
	Jasbendarjit Kaur	(i) 14.7.2017; (ii) and 12.9.2017.	Chief Technology Officer
	Wan Ahmad Syatibi Bin Wan Abd Manan	(i) 5.6.2017; (ii) and 27.9.2017.	Chief Executive Officer
	Zahari Azar Bin Zainudin	5.6.2017	Senior Manager
	Zulkeflee Bin Sahni	(i) 7.6.2107; (ii) and 26.9.2017.	Manager for Channel Management Department

DNeX	Dato' Wong Kam Yin	(i) 5.6.2017; and (ii) 18.9.2017.	Executive Director
	Samsuri Bin Ishak	25.9.2017	Head of Legal and Contract Administration Department
DNeXPORT	Chong Yoke Ching	13.7.2017	Chief Executive Officer
	Zahari Bin Mohamed Yusoff	(i) 5.6.2017; and (ii) 13.7.2017.	Pre-Sales Consultant

APPENDIX B**REPRESENTATIVES FROM RELEVANT MARKET PARTICIPANTS AND
GOVERNMENT AGENCIES**

ENTERPRISE	KEY PERSONNEL INTERVIEWED	DATE OF INTERVIEW	DESIGNATION
SOFTWARE PROVIDERS			
Buttonwood smartLogistics	Tan Hee Bo	29.12.2016	Director
MCDS	David Ung Sing Ming	22.12.2016	Chief Executive Officer
Rank Alpha	Jane Lim Juck Noi	(i) 25.10.2016; and (ii) 2.11.2016.	Executive Director
	Kelvin Tiong Chin Hock	26.10.2017	Chief Executive Officer
Wynet	Alwyn Hoa Chee Keong	(i) 12.10.2016; (ii) 13.10.2017; and (iii) 17.10.2017.	Managing Director
SERVICE PROVIDER			
Edaran IT	Mohd Nor Fauzi Bin Abdul Kayum	(i) 28.4.2017; and (ii) 6.10.2017	Head of National Single Window and <i>Jabatan Kastam Diraja Malaysia Project</i>

ASSOCIATIONS			
AFAM	Francis Walter Culas	16.3.2017	Chairman
FMFF and SFFLA	Paul Seo Tet Chong	28.2.2017	Executive Secretary
GOVERNMENT AGENCIES			
RMC	Mohammad Haizam Bin Hashim	17.4.2017	<i>Penolong Pengarah Kanan II, Bahagian Projek uCustoms</i>
END USERS			
Airmarine	Tiara Natassah Ching	8.12.2016	Senior Executive Human Resources
Asia Intercity Logistics	Choo Kwong Hoo	24.11.2016	Finance and Administration Manager
Atwin Trading	Lee Sok Fong	12.1.2017	Director
Cave and Cellar	Soo Wai Siong	5.12.2016	Finance Manager
DNE Forwarding	Chua Soon Kiat	5.12.2016	Customer Service Manager

Freight Mark Logistics	Halim Bin Seman	6.12.2016	Operation Manager
Fullmark Manufacturing	Imylia Binti Ibrahim	11.1.2017	Shipping Officer
Geodis Wilson Freight	Yeap Chong Heang	25.11.2016	IT and eSolutions Manager
H.S. Haza	Wan Nasuha Natashah Binti Wan Mohd Zulkarnain	14.11.2016	Customs Documentation Officer
Infinity Logistics and Transport	Muhammad Afif Bin Zol Hairi	14.2.2017	Assistant Manager International Freight Forwarding Division
JAS Worldwide	Janet Christina Lopez A/P Victor Edmund Lopez	30.11.2016	Branch Manager, Air Freight
K&T Forwarding Agency	Amalina Binti A. Samad	10.1.2017	Clerk
LPB Logistics	Annie Lim Mei Li	14.2.2017	Operation Executive
Mitsui-Soko	Apparao A/L Durgiah	16.11.2016	Head of IT

MOL Logistics	Azrul Bin Jamaludin	13.11.2017	Executive Officer
Narita Shipping and Transport	Nur Melissa Binti Mohamed Duha	9.11.2017	Forwarding Clerk
PKT Logistics	Kow Choon Yen	21.12.2016	Manager of Import and Export
Priority Synergy	Lee Siok Mui	11.1.2017	General Manager
QEL Maritime	Poh Yet Chee	13.1.2017	Assistant Accountant
Siegwerk	Rohizad Binti Amat	9.1.2017	Assistant Manager
SP Brilliant Strategy	Lim Seok Hua	16.11.2016	General Manager
SW Freight Services	Mohd Sabri Bin Abdullah	18.11.2016	Director
Titimas Logistics	Yeoh Keng Yao	13.1.2017	Director
THI Logistics	Chang Kok Keong	29.11.2016	Deputy General Manager
TWP	Mohd. Fairuz Bin Abdullah	11.1.2017	Senior Executive Logistics Department
United Eastern Transportation	1. Diong Weng Bao; and	12.1.2017	Shipping Executive

	2. Rohaya Binti Md Taib.		Delivery Clerk
Utama Forwarding Agencies	Lim Geok Bee	6.2.2017	Customer Service Executive
Wangi Forwarding and Shipping	Ng Teck Guan	6.2.2017	Manager
Wira Logistics	Norizam Bin Mohd Shahib	29.12.2016	Senior Executive
XH Universal Forwarding	Noorashiken Binti Jubri	10.1.2017	Head of Forwarding
Zen Logistics	Shahbrin Bin Husin	14.2.2017	Operations Manager
ZFZ Logistics	Zulkifle Bin Yaakob	15.11.2016	Director

**MEETING WITH REPRESENTATIVES OF RELEVANT PARTIES AND
GOVERNMENT AGENCIES**

DATE OF MEETING	PARTIES	REPRESENTATIVES
13.4.2016	Edaran IT/ Edaran Trade	Mohd Nor Fauzi Bin Abdul Kayum
		Norlida Osman
17.1.2017	Edaran IT/ Edaran Trade	Mohd Nor Fauzi Bin Abdul Kayum
		Norlida Binti Osman
		Noorsuzamir Bin Nordin
20.11.2017	Dagang Net	Lim Kek Siang
		Wan Ahmad Syatibi Bin Wan Abd Manan
		Erna Binti Ismail
17.1.2017	Rank Alpha	Kelvin Tiong Chin Hock
17.1.2017	Wynet	Alwyn Hoa Chee Keong
20.3.2017	Wynet	Alwyn Hoa Chee Keong
23.3.2017	Rank Alpha	Jane Lim Juck Noi
		Shamala Krishnan

DATE OF MEETING	PARTIES	REPRESENTATIVES
3.3.2016	MOF	John Patrick Antonysamy
		Zainordin Bin Shahlal
		Noreen Haiza Binti Khairuddin
		Noor Azlina Binti Mat Saidi
	MITI	Jamilah Binti Hj. Hassan
		Ibrahim Helmi Abdullah
11.2.2016	RMC	Zaini Bin Md. Desa
		Mazuki Bin Md Taib
		Zabedah Binti Hussain
		Mazwin Binti Muhamad Yusof
		Mohamad Fazril Abdul Molof
		Akmal
11.9.2017	RMC	Zaidah Binti Mohd Noor
		Rozita Binti Amat
		Rohaidah Binti Mat Johor
		Radziah Binti Ahmad

DATE OF MEETING	PARTIES	REPRESENTATIVES
		Mohd Zuki Bin Mohd Zain
		Lim Yu Jian
		Mazwin Binti Muhamad
		Azizul Hakim Bin Shahrudin
		Mazlina Hanim Binti Abdul Razak
		Rafidah Binti Yasin
18.8.2017	MIDA	Masri Zohaini Idris
		Mohd Harun Elik
18.8.2017	RMC	Mazwin Binti Muhamad
22.3.2017	RMC	Mohd Nor Hisyam Bin Mohd Arshad