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**Malaysia Competition Commission**

**Case No.: 700-1/3/2/2018**

Competition Act 2010 [Act 712]

Decision of the Competition Commission

Malaysia Competition Commission

vs

1. Coca-Cola Bottlers (Malaysia) Sdn. Bhd.; and
2. Coca-Cola Refreshments Malaysia Sdn. Bhd.

Finding of Non-infringement under Section 39 of the Competition Act 2010

**23 SEPTEMBER 2019**

## GLOSSARY

**“Coca-Cola Bottlers”** means the Coca-Cola Bottlers (Malaysia) Sdn. Bhd.

**“Coca-Cola Refreshments”** means the Coca-Cola Refreshments Malaysia Sdn. Bhd.

**“EU”** means the European Union

**“ECJ”** means the European Court of Justice

**“Infringement Agreement/ Infringing Agreements”** means the Notice attached with a recommended retail price and recommended Consumer Price Issued by Coca-Cola

**“KPDNHEP”** mean the Ministry of Domestic Trade and Consumer Affairs of Malaysia

**“RPM”** means the Resale Price Maintenance

**“The Act”** means the Competition Act 2010

The following industry-specific terms appear in this Decision:

**“CSD”**      Carbonated Soft Drinks

**“RTD”**      Ready to Drink

**“SST”**      Sales & Service Tax



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## **PART 1: EXECUTIVE SUMMARY**

1. By this decision ("this Decision"), the Malaysia Competition Commission ("the Commission") has concluded that the enterprises listed at Part 2 below have not infringed the Chapter 1 Prohibition imposed by section 4 of the Competition Act 2010 ["the Chapter 1 Prohibition"] ("the Act") by participating in agreements and/or concerted practices which have the effect of preventing, restricting or distorting competition in the supply of carbonated soft drinks in the Peninsular Malaysia.
2. The investigation was conducted pursuant to a ministerial direction issued by the Ministry of Domestic Trade and Consumer Affairs ("KPDNHEP") in accordance with section 14(2) of the Act.

## **PART 2: FACTS OF THE CASE**

### **A. THE PARTIES**

3. The Commission commenced investigations against Coca-Cola Refreshments Malaysia Sdn. Bhd. [Company Registration Number: 929539-M] ("Coca-Cola Refreshments"). Coca-Cola Refreshments is a wholly subsidiary of Coca-Cola Bottlers (Malaysia) Sdn. Bhd. [Company Registration Number: 870252-H] (hereinafter individually be referred to "Party" or collectively as the "Parties").
4. Coca-Cola Refreshments is engaged in the business of investment, acquiring and/or carrying out the business as distributors, dealers, sellers, exporters, importers and/or vending of aerated water or



mineral water or other beverages. Coca-Cola Refreshments' registered business address is PT 486, Persiaran Teknologi 4, Techpark @ Enstek, Bandar Enstek, Negeri Sembilan, Malaysia.

5. Coca-Cola Bottlers is engaged in the business of manufacturing, distribution, dealing, agency, export, import and/or vending of aerated water, mineral waters and other beverages. Coca-Cola Bottlers' registered business address is PT 486, Persiaran Teknologi 4, Techpark @ Enstek, Bandar Enstek, Negeri Sembilan, Malaysia.
6. The business relationship between Coca-Cola Bottlers and Coca-Cola Refreshments is described in **Table 1** below:

ENTERPRISE	SHAREHOLDER
Coca-Cola Refreshments	Coca-Cola Bottlers (100%)

As Coca-Cola Bottlers holds 100% shares in Coca-Cola Refreshments; the latter is a fully owned subsidiary of the former.

## **B. BACKGROUND OF RELEVANT INDUSTRY**

### **B.1 DISTRIBUTION OF COCA-COLA PRODUCTS IN THE RELEVANT PERIOD IN MALAYSIA**

7. Coca-Cola Refreshments specialised in sales and distribution in Malaysia of finished products in the form of beverages purchased from Coca-Cola Bottlers, its parent company.



8. Coca-Cola Refreshments supplies its products to four categories of customers as follows:

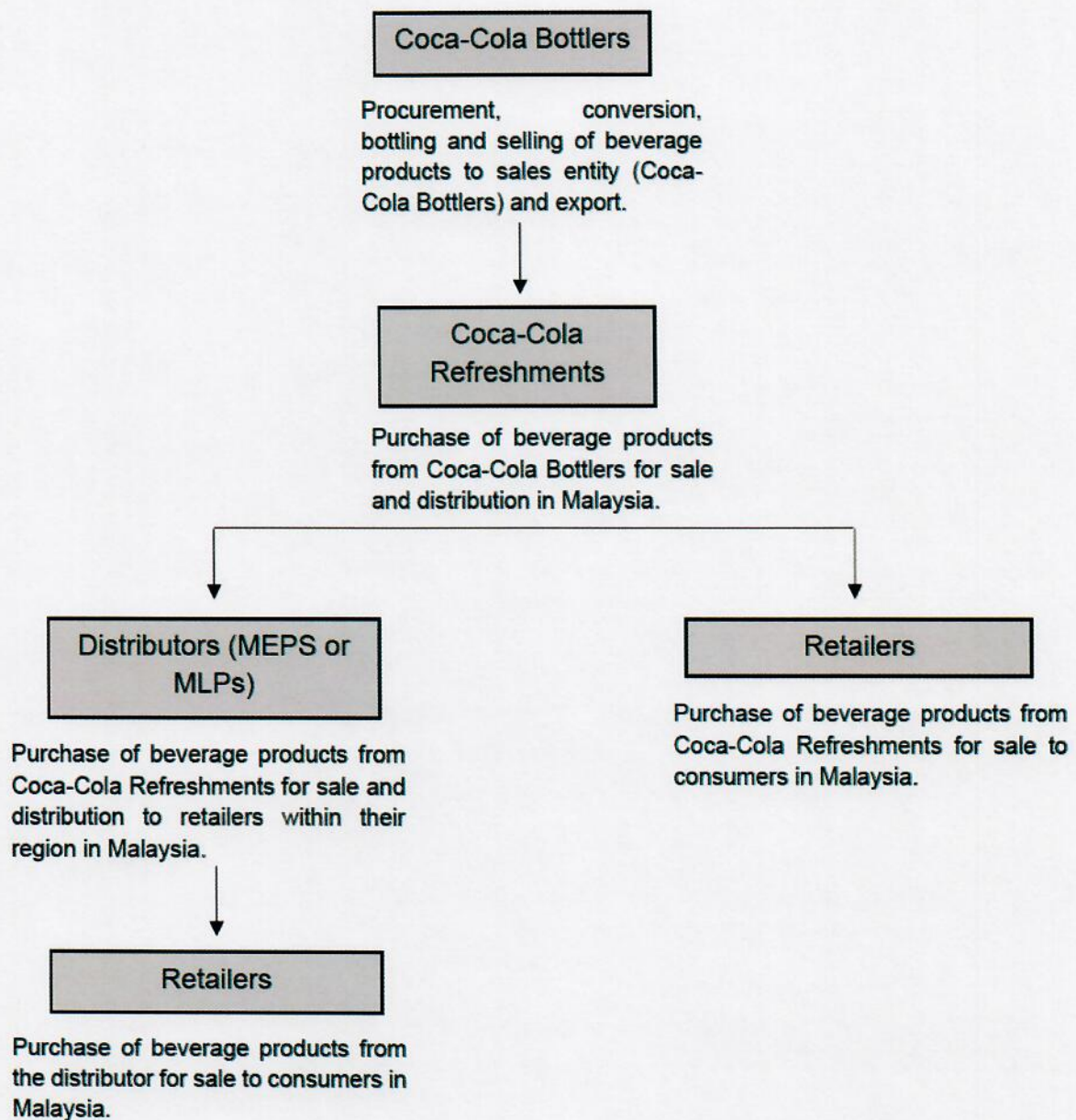
- (i) Supermarkets and hypermarkets;
- (ii) Convenience store;
- (iii) Distributors; and
- (iv) E-commerce.

9. Petrol stations and wholesalers are the examples of other categories of customers who purchase Coca-Cola Refreshments' products [REDACTED] from Coca-Cola Refreshments [REDACTED]

10. Coca-Cola Refreshments' distributors are either the Market Execution Partners ("MEP") or the Market Logistics Partners ("MLP"). [REDACTED]

[REDACTED]  
[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]  
[REDACTED]  
[REDACTED]

11. A diagram representation of the Coca-Cola Bottling Operations in Malaysia is set out in **Figure 1** below:



### **C. INVESTIGATION PROCEDURES AND PROCESS**

12. The Commission commenced formal investigations on 21.8.2018 under section 14(2) the Act, after finding reasonable grounds for suspecting that the Parties had infringed section 4(1) of the Act by restricting the price at which its resellers sold carbonated soft drinks to end consumers.



13. The Commission investigated whether the notices containing the recommended retail price ("RRP") and recommended consumer price ("RCP") issued by the Parties ("the Infringing Agreements") had amounted to an infringement under the Act.
14. The Commission issued a notice pursuant to a section 18(1)(a) and (b) of the Act to require the provision of information and/or documents and to provide statements to the Commission based on the information and documents requested or in relation to any queries made by the Commission's officers. The Commission had also issued notices to access records under section 20 of the Act to the Parties.

#### **C.1 ACCESS TO RECORDS**

15. On 30.8.2018, the Commission conducted a surprise raid at Coca-Cola Refreshments' premises pursuant to section 20 of the Act. During the inspection, the Commission issued notices under section 18 requesting information and documents in relation to the Infringing Agreements.
16. The Commission requested further clarifications from Coca-Cola Refreshments on 6.9.2018 and received Coca-Cola Refreshments' response on 7.9.2018. On 14.9.2018, Coca-Cola Refreshments submitted further documents and information pursuant to the notice dated 30.8.2018 issued under section 18 of the Act.

## **C.2 FIELD INVESTIGATION**

17. The Commission sought the assistance of the Enforcement Office of the Ministry of Domestic Trade and Consumer Affairs (“KPDNHEP”) to obtain market prices for selected Coca-Cola beverages retailed at supermarkets and hypermarkets within the Klang Valley.
18. Consequently, the Commission received pricing data consisting of market prices from various supermarkets and hypermarkets located in Cheras, Bandar Tun Razak, Seputeh, Titiwangsa, Bukit Bintang, Lembah Pantai, Segambut, Setiawangsa, Wangsa Maju, Batu Caves and Kepong.
19. Field investigations were carried out to verify the effectiveness of the RRP and RCP issued by Coca-Cola Refreshments on retail prices at the supermarkets and hypermarkets in Peninsular Malaysia.



### **PART 3: LEGAL AND ECONOMIC ASSESSMENT**

20. This section begins by setting out the economic and legal framework adopted by the Commission in considering the evidence obtained throughout the investigation. It then sets out the evidence relating to the agreement relied upon by the Commission, analyses the relevant evidence and states the inferences and conclusions drawn from the evidence.
21. In order to arrive at a finding of infringement under the Chapter I Prohibition in the present case, the Commission is required to establish that the Parties had entered into an agreement and/or engaged in concerted practice that has the object or effect of significantly preventing, restricting or distorting competition in the supply of carbonated drinks market in Peninsular Malaysia.

#### **A. THE CHAPTER 1 PROHIBITION**

22. Section 4 of the Act prohibits anti-competitive agreements between enterprises which have the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services in Malaysia or in any part of Malaysia. Section 4(1) of the Act reads as follows:

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



## **B. APPLICATION TO ENTERPRISES**

23. Section 2 of the Act defines “enterprises” as *“any entity carrying on commercial activities relating to goods or services, and for the purposes of the Act, a parent and subsidiary company shall be regarded as a single enterprise if, despite their separate legal entity, they form a single economic unit within which the subsidiaries do not enjoy real autonomy in determining their actions on the market.”* As such, the Commission found that the Parties fall within the definition of enterprises under section 2 of the Act as it carries on commercial activities relating to, amongst other things, the manufacturing and distribution of carbonated soft drinks.

### **B.1 WHEN TWO OR MORE ENTITIES FORM PART OF THE SAME ECONOMIC UNIT**

24. As provided in section 2 of the Act, a parent and its subsidiary company or companies which are under the control of a third company, form a single economic entity if the subsidiary has no real freedom to determine its course of action in the market and, although having a separate legal personality, enjoys no economic independence.
25. When one corporate legal entity is wholly owned by a second, separate corporate legal entity, the relationship between the two legal entities is described as being in a parent/subsidiary relationship, with the parent being the owner of the subsidiary.



26. The Courts of the European Union (“EU”) have recognised that while companies belonging to the same group may have distinct and separate natural or legal personalities, the term “enterprise” must be understood as designating an economic unit for the purpose of the subject matter of the agreement in question even if in law, that economic unit consists of several persons, natural or legal.<sup>1</sup>

27. In *Akzo Nobel*,<sup>2</sup> the European Court of Justice (“ECJ”) observed that the concept of an enterprise covers any entity engaged in an economic activity, regardless of its legal status and must be understood as designating an economic unit. It further states that —

“58. *It is clear from settled case-law that the conduct of a subsidiary may be imputed to the parent company in particular where, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the company (see, to that effect, Imperial Chemical Industries v Commission, paragraphs 132 and 133; Geigy v Commission, paragraph 44; Case 6/72 Europemballage and Continental Can v Commission [1973] ECR 215, paragraph 15; and Stora, paragraph 26), having regard in particular to the economic, organisational and legal links between those two legal entities (see, by analogy, Dansk Rørindustri and Others v Commission, paragraph 117, and ETI and Others, paragraph 49).*

59. *That is the case because, in such a situation, the parent company and its subsidiary form a single economic unit and therefore form a single undertaking for the purposes of the case-law mentioned in paragraphs*

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<sup>1</sup> Case 170/83 *Hydrotherm Gerätebau GmbH v Compact del Dott. Ing. Mario Andreoli & C. Sas.* [1984] ECR 2999, at [11]; and Case C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio v Compañía Española de Petróleos SA* [2006] ECR I-11987 at [40].

<sup>2</sup> Now known as the Court of Justice (as of 1 December 2009). For the purpose of this decision the Court of Justice will be referred to the ECJ.



54 and 55 of this judgment. Thus, the fact that a parent company and its subsidiary constitute a single undertaking within the meaning of Article 81 EC enables the Commission to address a decision imposing fines to the parent company, without having to establish the personal involvement of the latter in the infringement.”<sup>3</sup>

28. Under the EU competition law, when a parent company possesses 100% shareholding in a subsidiary, whether held directly or indirectly, the parent and subsidiary are treated as a single economic entity (“SEE”) unless proved otherwise.<sup>4</sup> The ECJ in *Akzo Nobel* stated that *“it follows from that caselaw...that it is for the parent company to put before the Court any evidence relating to the economic and legal organisational links between its subsidiary and itself which in its view are apt to demonstrate that they do not constitute a single economic entity.”*<sup>5</sup>
29. Additionally, the presumption of participation exists when it can be said that the *“parent company holds all or almost all of the capital in a subsidiary which has committed an infringement of the European Union competition rules.”*<sup>6</sup> The presumption arises because ownership gives the parent entity legal rights to intervene in the conduct of the subsidiary, and the presumption is that these rights are exercised.<sup>7</sup>
30. The EU Courts, in assessing parent-subsidiary relationships to determine whether a parent should be imputed with liability for the

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<sup>3</sup> Case C-97/08 P *Akzo Nobel NV v Commission* [2009] ECR I-8237.

<sup>4</sup> Case C-97/08 *Akzo Nobel v Commission* [2009] ECR I-08237, at paragraph 65. See also Case C-90/09P *General Química SA and Others v Commission* [2011] ECR I-I, at paragraph 39 to 42.

<sup>5</sup> Case C-97/08 *Akzo Nobel NV v Commission* [2009] ECR I-08237, at paragraph 65.

<sup>6</sup> Case C-508/11 P *Eni SpA v Commission*, at paragraph 47.

<sup>7</sup> Case C-97/08 *Akzo Nobel NV v Commission* [2009] ECR I-08237, at paragraph 73.



actions of its subsidiary, have evaluated whether the parent has exercised decisive influence over the subsidiary, such that they are an SEE.

31. In light of the above, as Coca-Cola Refreshments is a wholly owned subsidiary of Coca-Cola Bottlers, the Commission has made a legal presumption that Coca-Cola Bottlers exercised decisive influence over its subsidiaries and is therefore also liable for the conduct of its subsidiaries.

## **B.2 ATTRIBUTION OF LIABILITY**

32. Where an economic entity infringes competition rules, it follows, according to the principle of personal responsibility, for that entity to answer to the infringement.<sup>8</sup>
33. As set out at **paragraph 24 to 31** above, an SEE exists when separate legal entities enjoy no economic independence having regard, *inter alia*, to the economic, organisational and legal links between them. Where an SEE infringes competition law, liability for any infringement can be attributed to the SEE as a whole.<sup>9</sup>
34. In a parent-subsidiary relationships, liability can be imputed to the parent company even where the parent company does not directly participate in the infringement.<sup>10</sup> It is noteworthy that liability can be imputed to the parent company where a parent company may not be directly involved in the infringing acts and that it could have

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<sup>8</sup> Case C 49/92 P *Commission v Anic Partecipazioni* [1991] ECR I 4125 at paragraph 145.

<sup>9</sup> Case C-97/08 *Akzo Nobel NV v Commission* [2009] ECR I-08237 at paragraph 77.

<sup>10</sup> Case C-97/08 *Akzo Nobel NV v Commission* [2009] ECR I-08237 at paragraph 58.



influenced the policies and conduct of their subsidiaries but had failed to do so.

35. The EU Courts have decided that a presumption of an SEE arises where the parent company exercises “decisive influence” over the subsidiary, a parent company can be liable for the actions of its subsidiaries.<sup>11</sup>
36. In view of the above, two or more entities can be considered as an SEE in the light of the economic, legal and organisational links between them in relation to their activities which relate to the finding of infringement. In the case of a parent-subsidiary relationships, a parent company may be liable for the conduct of the subsidiary even where it did not participate in the infringement when the presumption of an SEE arises.
37. Applying the above principles, the economic entities subject to this Decision are Coca-Cola Bottlers and Coca-Cola Refreshments. As set out in Part 2 above, the Decision is addressed to and directed at Coca-Cola Bottlers and Coca-Cola Refreshments as the Commission attributes liability, on a joint and several basis, to both parent and subsidiaries for the conduct by Coca-Cola Refreshments.

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<sup>11</sup> Case C-97/08 *Akzo Nobel NV v Commission* [2009] ECR I-08237 at paragraph 58.



## **C. VERTICAL AGREEMENTS AND/OR CONCERTED PRACTICES**

### **C.1 GENERAL**

38. For the purpose of establishing a finding of infringement under section 4 of the Act, it has been established under the European Union law that it is not necessary to characterise the conduct in question, as exclusively an agreement or a concerted practice. This principle has been confirmed in the case of *Mastercard*:<sup>12</sup>

*"...it is settled case-law that, although Article 101 TFEU distinguishes between 'concerted practice', 'agreements between undertakings' and 'decisions by associations of undertakings', the aim is to have the prohibition of that article catch different forms of coordination between undertakings of their conduct on the market (...) and thus to prevent undertakings from being able to evade the rules on competition on account simply of the form in which they coordinate their conduct."*<sup>13</sup>

39. It is not, therefore, necessary for the Commission to come to a conclusion as to whether the conduct of the Parties should be specifically characterised as an agreement or as a concerted practice in order to demonstrate an infringement of the Chapter I Prohibition.

### **C.2 AGREEMENTS**

40. An agreement is formed when parties arrive at a consensus on the actions each party will, or will not, take. The term "agreement" is

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<sup>12</sup> See Case T-7/89 *SA Hercules Chemicals v Commission* [1991] ECR II-711.

<sup>13</sup> Case C-382/12 P, *MasterCard Inc. v. European Commission*, EU:C:2014:2201 at paragraph 63.



defined under section 2 of the Act as “*any form of contract, arrangement, or understanding, whether or not legally enforceable, between enterprises, and includes a decision by an association and concerted practices.*”<sup>14</sup>

41. The section 4 prohibition applies to both legally enforceable and non-enforceable agreements, whether written or verbal; and may be reached in person or by telephone, letters, e-mail or through any other means.<sup>15</sup>
42. An enterprise may be a party to an anti-competitive agreement where the purpose of its conduct, as coordinated with that of other enterprises, is to restrict competition on a specific relevant market.<sup>16</sup>
43. In *Bayer v Commission*<sup>17</sup> the General Court held that proof of an agreement must be founded upon the existence of the subjective element that characterises the very concept of the agreement, that is to say a concurrence of wills between enterprises on the implementation of a policy, the pursuit of an objective, or the adoption of a given line of conduct on the market.<sup>18</sup>
44. The key question is therefore, whether there has been “*a concurrence of wills between at least two parties, the form in which it is manifested being unimportant, so long as it constitutes the*

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<sup>14</sup> Section 2 of the Act.

<sup>15</sup> Paragraph 2.1 of the MyCC Guidelines on Chapter 1 Prohibition.

<sup>16</sup> Case T-99/04 *AC-Treuhand AG v Commission*, EU:T:2008:256 at paragraph 122.

<sup>17</sup> Case T-41/96, *Bayer AG v Commission*.

<sup>18</sup> Case T-41/96, *Bayer AG v Commission* [2002] ECR II-3383, para 173, aff'd on appeal Cases C-2 and 3/01P, *Bayer AG v Commission* [2004] ECR I-23.



*faithful expression of the parties' intention.*"<sup>19</sup> An agreement or concurrence of wills, may be established through either direct evidence or indirect evidence.

### C.3 CONCERTED PRACTICE

45. Section 4 prohibition also applies to concerted practices. Concerted practice exists, if parties, even if they do not enter into an agreement (either express or impliedly), "*knowingly substitute for the risks of competition, practical cooperation between them.*"<sup>20</sup> Section 2 of the Act defines "concerted practice" as follows:

*"concerted practice" means any form of coordination between enterprises which knowingly substitutes practical co-operation between them for the risks of competition, and includes any practice which involves direct or indirect contact or communication between enterprises, the object or effect of which is either –*

(a) *to influence the conduct of one or more enterprises in a market;*  
*or*

(b) *to disclose the course of conduct which an enterprise has decided to adopt or is contemplating to adopt in a market, in circumstances where such disclosure would.*

46. The Commission notes that "*concerted practices may take many different forms, and the courts have always been careful not to*

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<sup>19</sup> Case T-41/96 *Bayer AG v Commission*, EU:T:2000:242, paragraph 69 (upheld on appeal in Joined Cases C2/01 P and C-3/01 P *Bundesverband der Arzneimittel-Importeure eV and Commission v Bayer AG*, EU:C:2004:2, paragraphs 96–97).

<sup>20</sup> Case 48/69 *ICI v Commission* [1972] ECR 619 at paragraph 64; and *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, at paragraph 206 (iii).



*define or limit what may amount to a concerted practice for [the] purpose of determining whether there is consensus between the undertakings said to be party to a concerted practice.”<sup>21</sup>*

#### **C.4 VERTICAL RELATIONSHIP**

47. Section 2 of the Act defines “vertical agreement” as “*an agreement between enterprises each of which operates at a different level in the production or distribution chain.*”
48. Vertical agreements (between buyers and sellers at different stages of the production and distribution chain) are prohibited if they have an anti-competitive object or effect which is significant in the market.<sup>22</sup>
49. The Commission affirms in its Guidelines that an anti-competitive vertical agreement usually exists where one of the parties (either the buyer or seller, at different stages of the production and distribution chain) have sufficient market power to have some influence over the other party to the contract (which falls short of the significant market power required for the Chapter 2 Prohibition). In this case, a vertical agreement may reduce competition significantly in either the market in which the supplier upstream competes or the market in which the downstream buyer competes.
50. The Commission has described two types of vertical agreements in its guidelines; vertical price fixing and non-price vertical

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<sup>21</sup> Case *Argos Limited and Others v Office of Fair Trading* [2006] EWCA Civ 1318 at paragraph 22.

<sup>22</sup> Paragraph 3.2 of the MyCC Guidelines on Chapter 1 Prohibition.



agreements.<sup>23</sup> Vertical price restrictions limit the ability of companies in the business of reselling, to compete on price. Vertical non-price restrictions may be anti-competitive because they foreclose part of the market to competitors.<sup>24</sup>

51. The Commission has assessed the Notice issued by Coca-Cola Refreshments dated 9.7.2018 which had appended a product list with recommended retail price and recommended consumer price as a form of vertical agreement and/or concerted practice that is potentially anti-competitive.

## **C.5 RESALE PRICE MAINTENANCE**

52. The Commission considers that “resale price maintenance” (“RPM”) is a serious infringement of competition law.
53. The term RPM encompasses a number of price-related understandings between upstream and downstream firms. The most common variety involves a downstream buyer agreeing with an upstream supplier that it will not charge customers less than a certain price, for the upstream supplier’s product, leaving the retailers free to charge any price above the level.<sup>25</sup>
54. Under the RPM, resellers are required to comply with certain price conditions. In contrast, non-binding price recommendations by upstream firms are generally not considered to be RPM and are

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<sup>23</sup> Paragraph 3.13 of the MyCC Guidelines on Chapter 1 Prohibition.

<sup>24</sup> Paragraph 3.13 of the MyCC Guidelines on Chapter 1 Prohibition.

<sup>25</sup> Paragraph 3.15 of the MyCC Guidelines on Chapter 1 Prohibition.



permitted. Even when upstream firms advertise prices or print them directly on a product's packaging, that is typically not deemed to be RPM so long as the resellers remain free to set their respective prices.

55. The EU Court of Justice has confirmed that *"it is necessary to ascertain whether such a retail price is not, in reality, fixed by indirect or concealed means, such as the fixing of the margin of the [reseller], threats, intimidation, warnings, penalties or incentives."*<sup>26</sup> This would include, for example, threats to delay or suspend deliveries or to terminate supply in the event that the retailer does not observe a given price level. Other measures may include the withdrawal of credit facilities, prevailing on other dealers not to supply<sup>27</sup> and threatened legal action, pressuring telephone calls and letters.<sup>28</sup>
56. For the purpose of this Decision, the Commission has assessed whether the conduct of the Parties constitutes an agreement and/or concerted practice that would amount to RPM in breach of the section 4 prohibition in Section G below, under the heading entitled "Facts, Evidence and Analysis of The Evidence".

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<sup>26</sup> Case C-279/06 *CEPSA Estaciones de Servicio SA v LV Tobar e Hijos SL*, EU:C:2008:485 at paragraph 71. See also Case C-260/07 *Pedro IV Servicios SL v Total Espana SA*, EU:C:2009:215, at paragraph 80; and Commission Decision 2001/7/11/EC *Volkswagen* (COMP/F-2/36.693) [2001] OJ L262/4.

<sup>27</sup> Case 86/82 *Hasselblad (GB) Limited v Commission*, EU: C:1984:65.

<sup>28</sup> Commission Decision 2001/7/11/EC *Volkswagen* (COMP/F-2/36.693) [2001] OJ L262/4.



#### **D. OBJECT OR EFFECT OF SIGNIFICANTLY PREVENTING, RESTRICTING OR DISTORTING COMPETITION**

57. In accordance with the plain reading of section 4(1) of the Act, proof of “object” and “effect” are alternative and not cumulative requirements. Therefore, in accordance with the plain reading of the section, “object” and “effect” are read in the alternative and are not cumulative requirements.
58. For the purpose of analysing vertical agreements involving RPM, the Commission is required to carry out an analysis on the effect of the conduct in question on the relevant market.

#### **E. BURDEN AND STANDARD OF PROOF**

59. The Commission bears the burden of proving that an infringement under the Act has been committed. The standard of proof to be applied is the civil standard, commonly referred to as the balance of probabilities. This follows the structure of the Act, wherein, the decision by the Commission follows an administrative procedure, directions and financial penalties are enforceable by way of civil proceedings under section 42 of the Act by bringing proceedings before the High Court.
60. The civil standard for the burden of proof has likewise been affirmed in competition law cases decided in Singapore such as, *Pang’s Motor Trading v CCS*<sup>29</sup> at paragraph 33 and in the UK case of *Napp*

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<sup>29</sup> Case of *Pang’s Motor Trading v CCS* [2014] SGCA 1.



*Pharmaceutical v Director General of Fair Trade*<sup>30</sup> at paragraph 110. It is therefore trite that the Commission bears the burden of proving that the Parties have infringed the prohibition imposed by the Act; and the standard of proving infringement is a civil standard based on a balance of probabilities.

## **F. ASSESSMENT OF THE RELEVANT MARKET**

### **F.1 INTRODUCTION**

61. Market definition in the context of the prohibition in section 4 serves two purposes. Firstly, it provides, if necessary, the framework for assessing whether an agreement and/or concerted practice has a significant anti-competitive effect in a given market. Secondly, where liability has been established, the market definition serves to determine the worldwide turnover of the business of the enterprise for the purpose of calculating financial penalties.<sup>31</sup>
62. Central to market definition is the consideration of whether consumers can and are willing to readily resort to available substitute products from different suppliers at other locations in response to a hypothetical small but permanent relative price change.<sup>32</sup> Evidence on substitution from a number of different sources may be considered.<sup>33</sup>

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<sup>30</sup> Case of *Napp Pharmaceutical v Director General of Fair Trade* [2002] ECC 13.

<sup>31</sup> Paragraph 1.6 of the MyCC Guidelines on Market Definition.

<sup>32</sup> Paragraph 1.4 of the MyCC Guidelines on Market Definition.

<sup>33</sup> Paragraph 2.6 of the MyCC Guidelines on Market Definition.



63. The Commission's approach to market definition is set out in its Guidelines on Market Definition.<sup>34</sup> The Commission is not bound by market definitions adopted in its previous cases, or by decisions of other competition authorities. In applying the Guidelines, the Commission will consider the facts and circumstances of each case in totality.

## **F.2 THE RELEVANT PRODUCT MARKET**

64. The primary products in this case are "non-alcoholic-ready-to-drink" products sold to supermarkets and hypermarkets. However, the Commission narrows the product market to carbonated soft drinks ("CSD").
65. Other beverages such as sports drinks, fruit juice, ready to drink ("RTD") tea, vitamin water and mineral water are therefore deemed to be outside of the parameters of the relevant product market defined herein.
66. The CSD comprises of the following:
- (i) Cola-flavoured;
  - (ii) Orange-flavoured;
  - (iii) Lemon and/lime flavoured; and
  - (iv) Other fruit-flavoured CSD.

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<sup>34</sup> Paragraph 1.1 of the MyCC Guidelines on Market Definition.



67. The product market is defined based on the characteristics of the products and their intended use, which is distinguished from other beverages as CSD contains carbonation and possess a distinct taste.

### **F.3 THE RELEVANT GEOGRAPHIC MARKET**

68. The geographic scope of the investigation is limited to Peninsular Malaysia. However, for the purpose of the field investigation, the Team focused on prices charged by the supermarkets and hypermarkets in the Klang Valley in order to determine and establish whether the RRP and RCP issued by the Parties has the effect of significantly preventing, restricting or distorting competition in the supply of carbonated soft drinks.
69. Without prejudice to the Commission's discretion to adopt a wider or narrower definition in future cases, where further evidence becomes available; for the purpose of this Decision, the Commission is of the view that the relevant geographic market is in Peninsular Malaysia.

### **F.4 SIGNIFICANCE ON THE MARKET**

70. The Commission's Guidelines<sup>35</sup> state that both horizontal and vertical agreements are prohibited where they have an anti-competitive object or effect which is significant on the market.

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<sup>35</sup> Guidelines on Chapter 1 Prohibitions – Anti-competitive Agreements.



71. The Guidelines state as follows:

*“3.4. In general, “significant” means the agreements must have more than a trivial impact. It should be noted that impact would be assessed in relation to the identified relevant market. A good guide to the trivial impact of an anti-competitive agreement might be the combined market share of those participating in such an agreement. As a starting point and to provide greater certainty, the MyCC may use the following basis in assessing whether an anti-competitive effect is “significant.” This approach sets “safe harbours” for otherwise anti-competitive agreements or association decisions. In general, anti-competitive agreements will not be considered “significant” if:*

- the parties to the agreement are competitors who are in the same market and their combined market share of the relevant market does not exceed 20%;*
- the parties to the agreement are not competitors and all of the parties individually has less than 25% in any relevant market. For example, an exclusive distribution agreement between a wholesaler and a retailer neither of whom has more than 25% of the wholesale market or retail market.<sup>36</sup>”*

72. The Guidelines state that an anti-competitive agreement usually exists where one of the parties has sufficient market power in order to have influence over the other party or parties (as the case may be) to the contract. In that case, a vertical agreement may reduce competition significantly in either market in which the supplier upstream competes or the market in which the downstream buyer competes. This may suggest that the “significance test” as mentioned above should be carried out.

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<sup>36</sup> See paragraph 3.4 Guidelines on Chapter 1 Prohibitions – Anti-competitive Agreements.



73. In this regard, the Commission made reference to the market share as a starting point in order to assess whether the RRP and RCP; alleged to be anti-competitive in nature, had the capability to significantly prevent, restrict or distort competition in the supply of CSD in Peninsular Malaysia.
74. The Commission has carried out a market share analysis at the manufacturers' level for the relevant market. The total market share for CSD in Peninsular Malaysia as of July 2018 is described in **Table 2** and **Figure 2** below:

Brand	Value Share %	Volume Share %
Coca-Cola	████████	████████
F&N	████████	████████
Pepsi-Cola International	████████	████████
Others	██	████
<b>TOTAL</b>	<b>100</b>	<b>100</b>

**Table 2: Total Market Share for Carbonated Soft Drinks in Peninsular Malaysia in July 2018**



**Figure 2: Total Market Share for Carbonated Soft Drinks in Peninsular Malaysia in July 2018**



75. Based on **Table 2** above, it can be observed that the shares of the Parties' products in the CSD market is more than [REDACTED] [REDACTED] above the indicative threshold of 25% stipulated under the *MyCC Guidelines on Chapter 1 Prohibition: Anti-competitive Agreement*.
76. The above data reveals that the Parties possess the largest share in the CSD market in Peninsular Malaysia.

## **G. FACTS, EVIDENCE AND ANALYSIS OF THE EVIDENCE**

### **G.1 THE NOTICE**

77. The Commission received from the Minister of KPDNHEP, a notice issued by Coca-Cola Refreshments dated 9.7.2018 with an attachment containing a product list with recommended retail price ("RRP") and recommended consumer price ("RCP"). The Notice was issued by Coca-Cola Refreshments to targeted supermarkets and hypermarkets in Peninsular Malaysia regarding the Preliminary Pricing Update Effective 1.9.2018 (hereinafter referred as "the Notice").
78. Similar Notices were issued by Coca-Cola Refreshments to its customers on 9.7.2018, 18.7.2018, 13.8.2018 and 29.8.2018.
79. In view of the fact that a new legislation on sales and service tax was to be introduced on 1.9.2018, Coca-Cola Refreshments notified its customers of the price changes across their portfolio via the Notice.



80. The RRP and RCP attached to the Notice encompassed a wide scope of Coca-Cola Refreshments' portfolio such as carbonated drinks, sports drinks, fruit juice, RTD tea, vitamin water and mineral water.
81. Customers such as supermarkets and hypermarkets would typically request for a 2-month advanced notice in relation to any price changes. The effective date of the price change notification contained in the RRP and RCP attached to the Notice was 1.9.2018. The price list covered a wide scope of Coca-Cola Refreshments' portfolio such as carbonated drinks, sports drinks, fruit juice, RTD tea, vitamin water and mineral water.
82. The RRP indicated in the price list attached to the Notice is the price at which the customers are required to purchase products from Coca-Cola Refreshments and is not indicative of the retail price for which they will subsequently be sold. In this instance, the RRP issued is in relation to one case of the products (e.g. 12 or 24 units of the product).
83. The reasons why customers of Coca-Cola Refreshments typically request for a 2-month advanced notice in relation to price changes is to enable customers to update their internal systems so that orders made to Coca-Cola Refreshments are made on the basis of the applicable purchase price.
84. The RCP acts as a guide for the sale of a particular product to the end consumers. The RCP is arrived at by [REDACTED]  
[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]



[REDACTED]

## **G.2 AGREEMENTS AND PRACTICES IN THE OPERATION OF COCA-COLA REFRESHMENTS' DISTRIBUTION NETWORK**

### **G.2.1 AGREEMENTS WITH DISTRIBUTORS**

85. The Commission found that Coca-Cola Refreshments had entered into Distributor Agreements with distributors, both MEP and/or MLP. Clause 8(c) of the Distributor Agreement expressly stipulates that the RRP set out in Appendix 9 is a non-binding guidance, which serves merely as a reference.<sup>37</sup> In addition, the Distributor Agreement does not provide for any penalty whatsoever in the event the distributor fails to adhere or comply.

### **G.2.2 AGREEMENTS WITH CUSTOMERS**

86. The Commission further found that Coca-Cola Refreshments had entered into sale and marketing agreements with its customers, listing out incentives extended by Coca-Cola Refreshments to its customers. In some instances, in addition to the sale and marketing agreement, Coca-Cola Refreshments also required its customers to

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<sup>37</sup> [REDACTED]

[REDACTED]



enter into a Framework Agreement that spelt out the engagement protocols and the ordering process for Coca-Cola Refreshments' products.<sup>38</sup>

87. The Framework Agreements are generally signed where the customer is supplied directly by both Coca-Cola Refreshments and a distributor and by several distributors. The Commission notes that there were also various instances where the customers required their own template agreements to be used.<sup>39</sup>

### *Findings*

88. The Commission is satisfied that the agreements entered into with customers shows that Coca-Cola Refreshments did not fix the resale price of its products or impose a minimum resale price of its products on customers. The Commission views that such conduct does not amount in practice, to a fixed or minimum resale price as result of pressure from, or incentives offered, by any of the parties.

### **G.3 FINDINGS OF THE FIELD INVESTIGATION**

89. The field investigation had focused primarily on popular products of Coca-Cola Bottlers such as Coca-Cola, Coca-Cola Light, Sprite,

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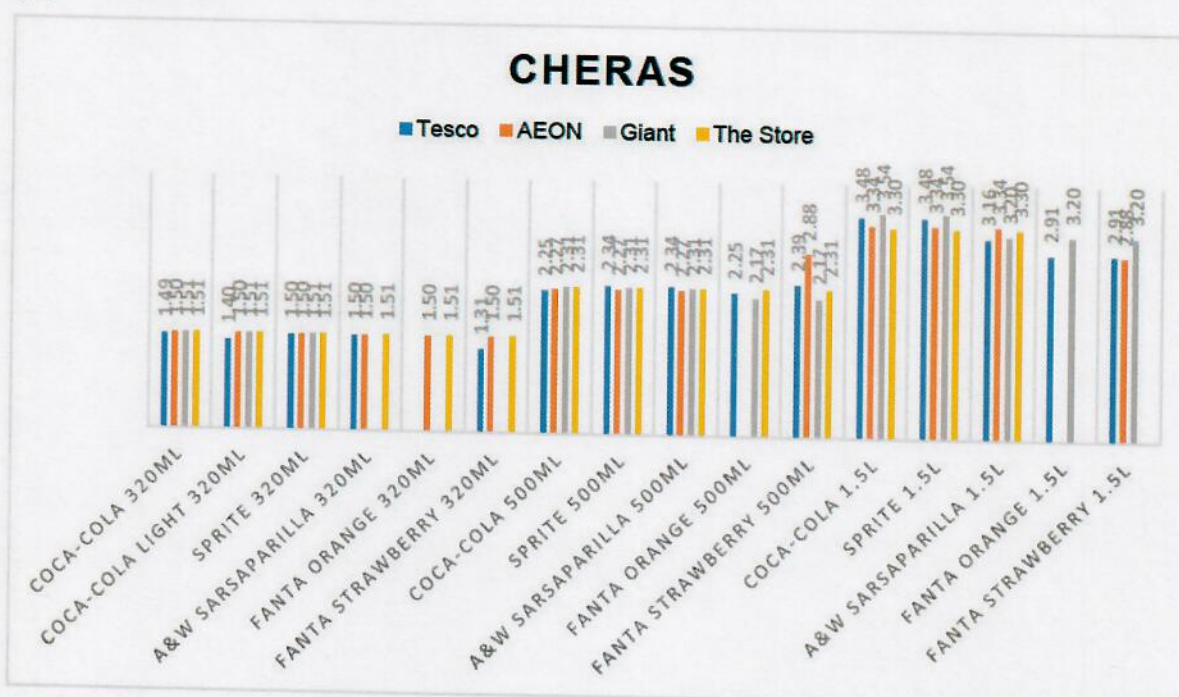
[REDACTED]



A&W Sarsaparilla, Fanta Orange and Fanta Strawberry for 320ML, 500ML and 1.5L respectively.

90. The findings of the field investigation for the popular Coca-Cola Bottlers products at the selected supermarkets and hypermarkets in the Klang Valley are illustrated as follows:

(a) Cheras



No	Product	RCP (RM)	Retailers Price Range (RM)
1.	Coca-Cola 320ML	█	1.49 to 1.51
2.	Coca-Cola Light 320ML	█	1.40 to 1.51
3.	Sprite 320ML	█	1.50 to 1.51
4.	A&W Sarsaparilla 320ML	█	1.50 to 1.51
5.	Fanta Orange 320ML	█	1.50 to 1.51
6.	Fanta Strawberry 320ML	█	1.31 to 1.51
7.	Coca-Cola 500ML	█	2.25 to 2.31



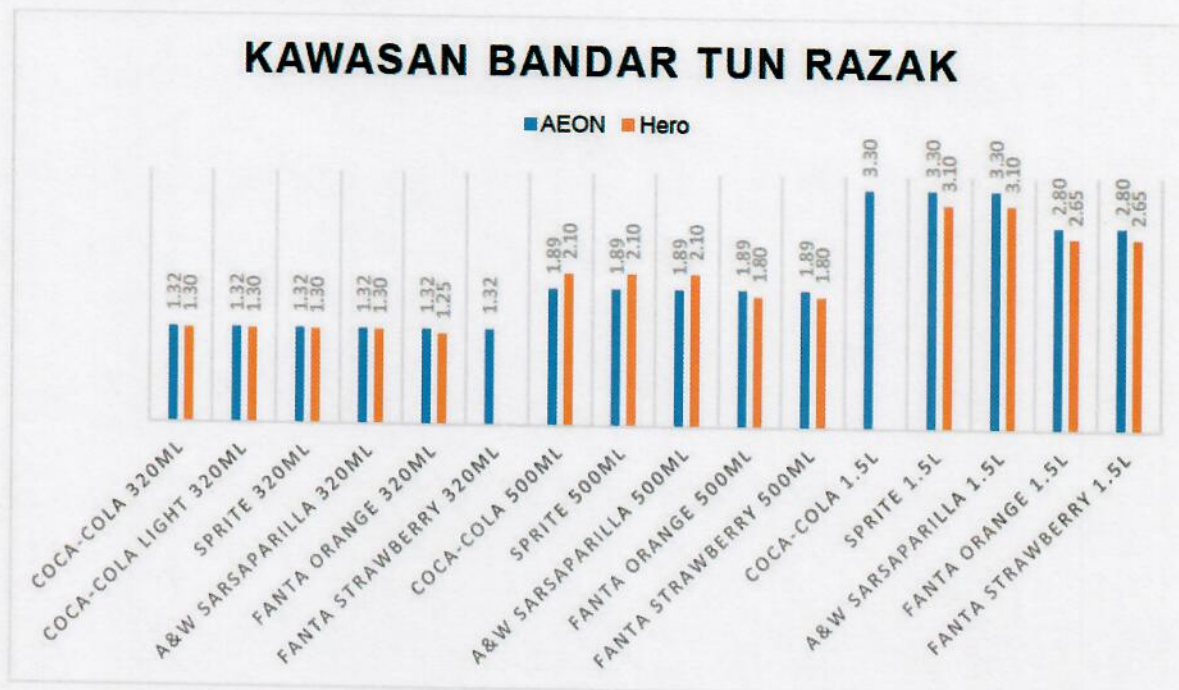
No	Product	RCP (RM)	Retailers Price Range (RM)
8.	Sprite 500ML	████	2.27 to 2.34
9.	A&W Sarsaparilla 500ML	████	2.27 to 2.34
10.	Fanta Orange 500ML	████	2.25 to 2.31
11.	Fanta Strawberry 500ML	████	2.17 to 2.88
12.	Coca-Cola 1.5L	████	3.30 to 3.54
13.	Sprite 1.5L	████	3.30 to 3.54
14.	A&W Sarsaparilla 1.5L	████	3.16 to 3.34
15.	Fanta Orange 1.5L	████	2.91 to 3.20
16.	Fanta Strawberry 1.5L	████	2.88 o 3.20

91. Based on the findings above, the Commission found that:

- (i) The prices charged by the supermarkets and hypermarkets for products above for 320ML ranged between RM1.31 and RM1.51; whilst the RCP issued by Coca-Cola is shown as ██████;
- (ii) The prices charged by the supermarkets and hypermarkets for products above for 500ML ranged between RM2.17 to RM2.88; and
- (iii) The prices charged by the supermarkets and hypermarkets for 1.5L products ranged from RM3.16 to RM3.34; whilst the RCP issued by Coca-Cola showed a figure of ██████



(b) Bandar Tun Razak



No	Product	RCP (RM)	Retailers Price Range (RM)
1.	Coca-Cola 320ML	█	1.30 to 1.32
2.	Coca-Cola Light 320ML	█	1.30 to 1.32
3.	Sprite 320ML	█	1.30 to 1.32
4.	A&W Sarsaparilla 320ML	█	1.30 to 1.32
5.	Fanta Orange 320ML	█	1.25 to 1.32
6.	Fanta Strawberry 320ML	█	1.32 to 1.32
7.	Coca-Cola 500ML	█	1.89 to 2.10
8.	Sprite 500ML	█	1.89 to 2.10
9.	A&W Sarsaparilla 500ML	█	1.89 to 2.10
10.	Fanta Orange 500ML	█	1.80 to 1.89
11.	Fanta Strawberry 500ML	█	1.80 to 1.89
12.	Coca-Cola 1.5L	█	3.30 to 3.30
13.	Sprite 1.5L	█	3.10 to 3.30
14.	A&W Sarsaparilla 1.5L	█	3.10 to 3.30



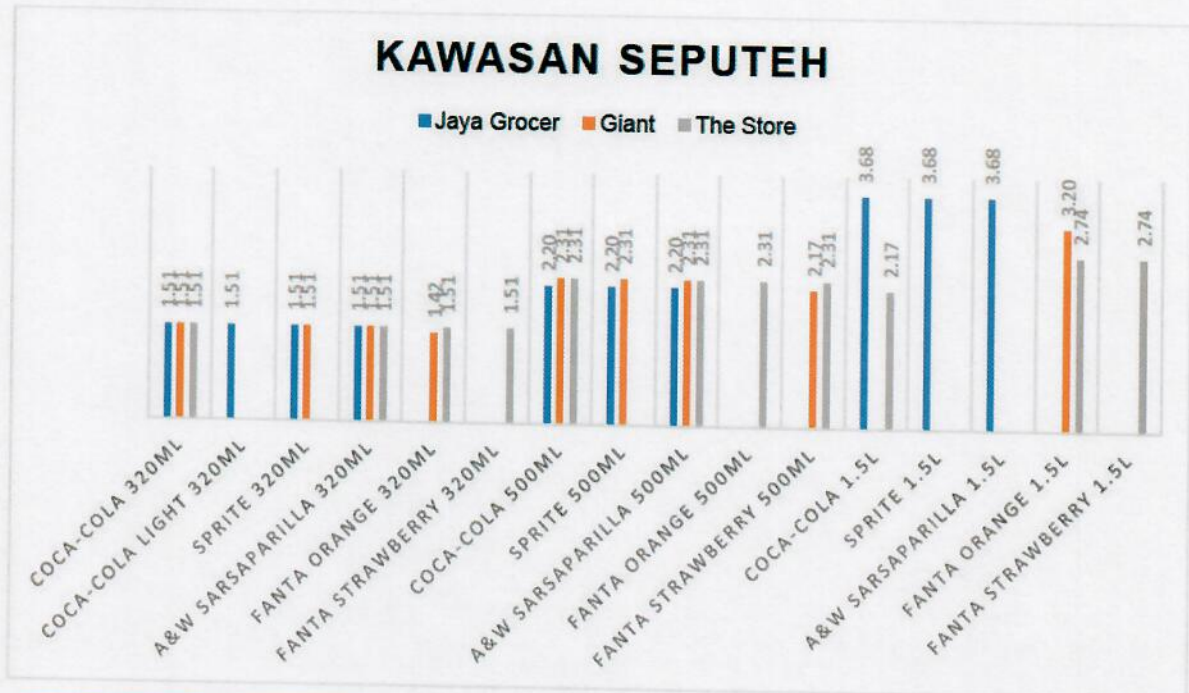
No	Product	RCP (RM)	Retailers Price Range (RM)
15.	Fanta Orange 1.5L	██████	2.65 to 2.80
16.	Fanta Strawberry 1.5L	██████	2.65 to 2.80

92. Based on the findings above, the Commission is satisfied that:

- (i) The prices charged by the supermarkets and hypermarkets for products above for 320ML ranged from RM1.25 to RM1.32; whilst the RCP is set at ██████;
- (ii) The prices charged by the supermarkets and hypermarkets for products above 320ML vary from RM1.25 to RM1.32; whereas the RCP is fixed at ██████; and
- (iii) The prices charged by the supermarkets and hypermarkets for products above for 1.5L ranged between RM3.10 and RM3.30; whilst the RCP issued by Coca-Cola is fixed at the price of ██████.



(c) Seputeh



No	Product	RCP (RM)	Retailers Price Range (RM)
1.	Coca-Cola 320ML	■	1.51 to 1.51
2.	Coca-Cola Light 320ML	■	1.51 to 1.51
3.	Sprite 320ML	■	1.51 to 1.51
4.	A&W Sarsaparilla 320ML	■	1.51 to 1.51
5.	Fanta Orange 320ML	■	1.42 to 1.51
6.	Fanta Strawberry 320ML	■	1.51 to 1.51
7.	Coca-Cola 500ML	■	2.20 to 2.31
8.	Sprite 500ML	■	2.20 to 2.31
9.	A&W Sarsaparilla 500ML	■	1.89 to 2.10
10.	Fanta Orange 500ML	■	2.31 to 2.31
11.	Fanta Strawberry 500ML	■	2.17 to 2.31
12.	Coca-Cola 1.5L	■	2.17 to 3.68
13.	Sprite 1.5L	■	3.68 to 3.68
14.	A&W Sarsaparilla 1.5L	■	3.68 to 3.68



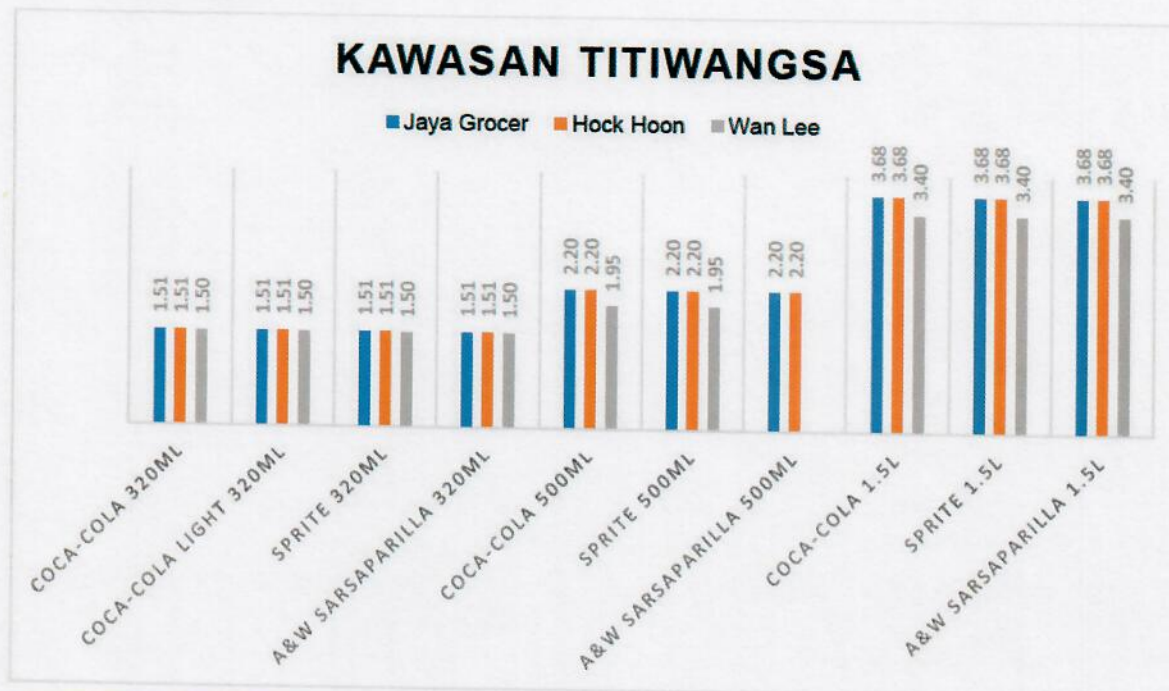
No	Product	RCP (RM)	Retailers Price Range (RM)
15.	Fanta Orange 1.5L	■	2.74 to 3.20
16.	Fanta Strawberry 1.5L	■	2.74 to 2.74

93. Based on the above analysis, the Commission made the following observation:

- (i) The prices charged by the supermarkets and hypermarkets for products above for 320ML products are kept within the range of RM1.42 to RM1.51; whereas Coca-Cola's RCP stipulates the price of ■;
- (ii) The prices charged by the supermarkets and hypermarkets for products above 500ML ranged from RM1.89 to RM2.10; and the RCP issued by Coca-Cola is ■ and
- (iii) The prices charged by the supermarkets and hypermarkets for products above for 1.5L range between RM2.17 and RM3.68; whilst the RCP issued by Coca-Cola is ■



(d) Titiwangsa



No	Product	RCP (RM)	Retailers Price Range (RM)
1.	Coca-Cola 320ML	█	1.50 to 1.51
2.	Coca-Cola Light 320ML	█	1.50 to 1.51
3.	Sprite 320ML	█	1.50 to 1.51
4.	A&W Sarsaparilla 320ML	█	1.50 to 1.51
5.	Coca-Cola 500ML	█	1.95 to 2.20
6.	Sprite 500ML	█	1.95 to 2.20
7.	A&W Sarsaparilla 500ML	█	2.20 to 2.20
8.	Coca-Cola 1.5L	█	3.40 to 3.68
9.	Sprite 1.5L	█	3.40 to 3.68
10.	A&W Sarsaparilla 1.5L	█	3.40 to 3.68

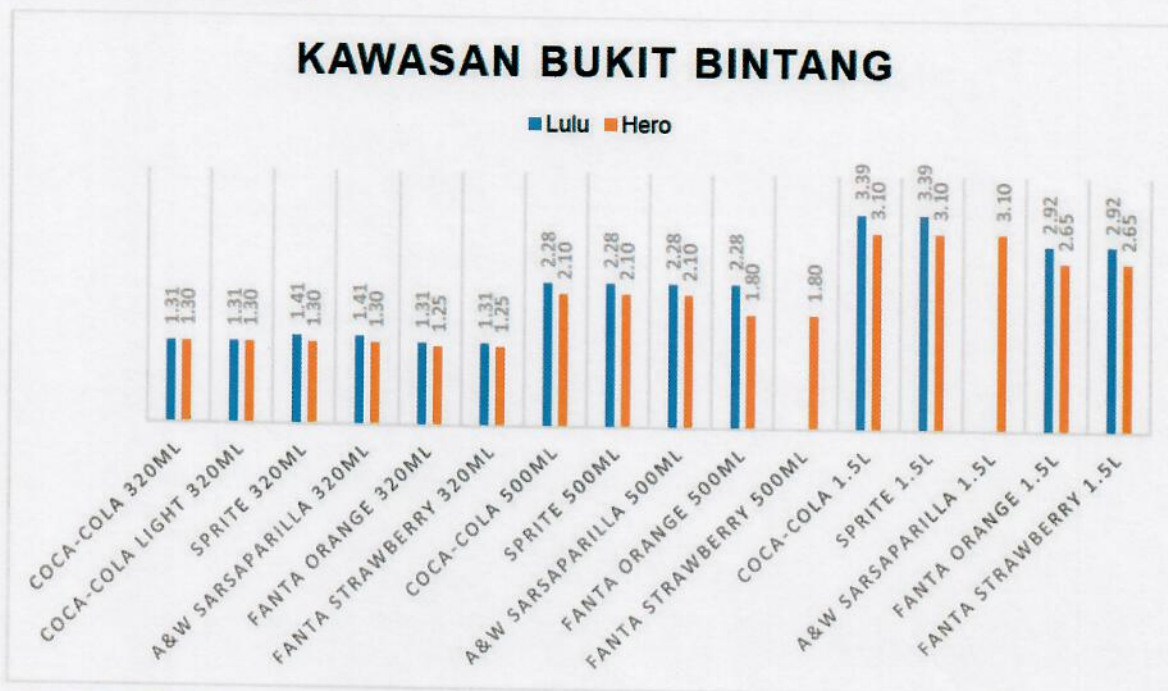


94. Based on the investigations, the Commission observed that:

- (i) The prices charged at supermarkets and hypermarkets for products above for 320ML ranged between RM1.50 and RM1.51; while the RCP issued by Coca-Cola is published at [REDACTED];
- (ii) The prices imposed by supermarkets and hypermarkets for products above 500ML are between RM1.95 and RM2.20; whereas the RCP issued by Coca-Cola is set at [REDACTED]; and
- (iii) The prices charged by the supermarkets and hypermarkets for products above 1.5L ranged between RM3.40 to RM3.68; and the RCP issued by Coca-Cola showed the figure of [REDACTED].



(e) Bukit Bintang



No	Product	RCP (RM)	Retailers Price Range (RM)
1.	Coca-Cola 320ML	■	1.30 to 1.31
2.	Coca-Cola Light 320ML	■	1.30 to 1.31
3.	Sprite 320ML	■	1.30 to 1.41
4.	A&W Sarsaparilla 320ML	■	1.30 to 1.41
5.	Fanta Orange 320ML	■	1.25 to 1.31
6.	Fanta Strawberry 320ML	■	1.25 to 1.31
7.	Coca-Cola 500ML	■	2.10 to 2.28
8.	Sprite 500ML	■	2.10 to 2.28
9.	A&W Sarsaparilla 500ML	■	2.10 to 2.28
10.	Fanta Orange 500ML	■	1.80 to 2.28
11.	Fanta Strawberry 500ML	■	1.80 to 1.80
12.	Coca-Cola 1.5L	■	3.10 to 3.39
13.	Sprite 1.5L	■	3.10 to 3.39
14.	A&W Sarsaparilla 1.5L	■	3.10 to 3.10



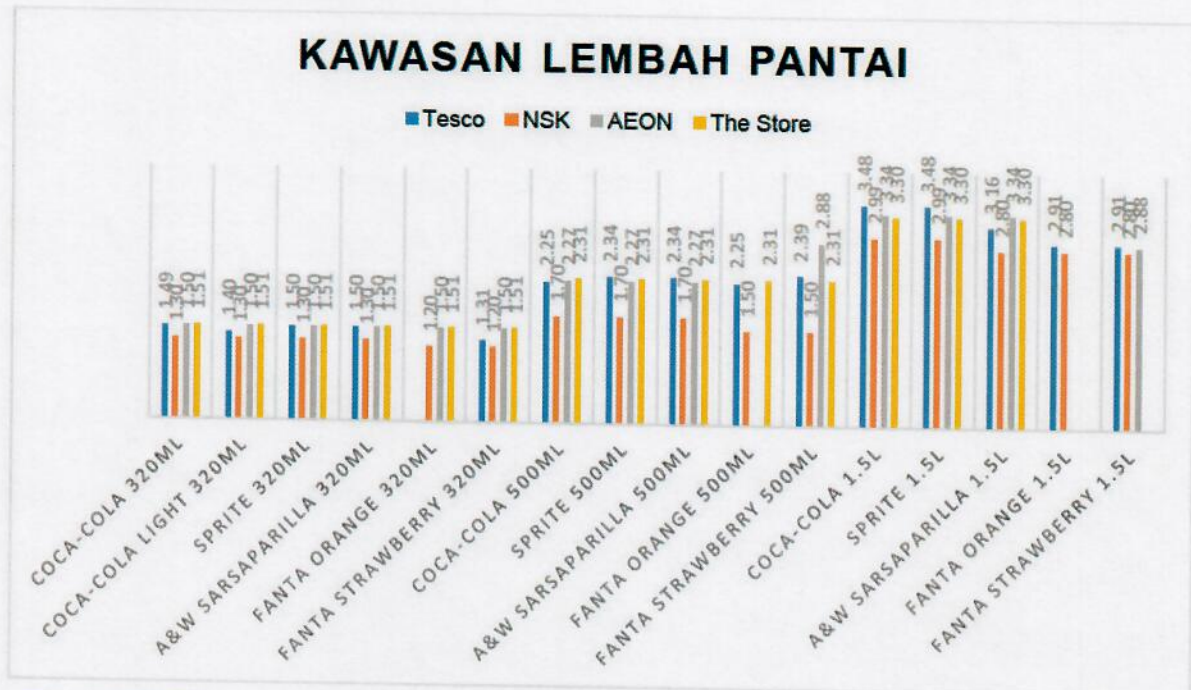
No	Product	RCP (RM)	Retailers Price Range (RM)
15.	Fanta Orange 1.5L	██████	2.65 to 2.92
16.	Fanta Strawberry 1.5L	██████	2.65 to 2.92

95. Based on the Commission's findings above, the following was observed:

- (i) The prices charged by the supermarkets and hypermarkets for products above 320ML ranged between RM1.25 and RM1.31; whilst the RCP issued by Coca-Cola is ██████
- (ii) The prices charged by the supermarket and hypermarkets for products above 500ML products ranged from RM1.80 to RM2.28; whereas the RCP issued by Coca-Cola showed the price ██████; and
- (iii) The prices charged by the supermarkets and hypermarkets for products above for 1.5L ranged between RM3.10 and RM3.39; whilst the RCP issued by Coca-Cola showed the figure of ██████.



(f) Lembah Pantai



No	Product	RCP (RM)	Retailers Price Range (RM)
1.	Coca-Cola 320ML	█	1.30 to 1.51
2.	Coca-Cola Light 320ML	█	1.30 to 1.51
3.	Sprite 320ML	█	1.30 to 1.51
4.	A&W Sarsaparilla 320ML	█	1.30 to 1.51
5.	Fanta Orange 320ML	█	1.20 to 1.51
6.	Fanta Strawberry 320ML	█	1.20 to 1.51
7.	Coca-Cola 500ML	█	1.70 to 2.31
8.	Sprite 500ML	█	1.70 to 2.31
9.	A&W Sarsaparilla 500ML	█	1.70 to 2.31
10.	Fanta Orange 500ML	█	1.50 to 2.31
11.	Fanta Strawberry 500ML	█	1.50 to 2.88
12.	Coca-Cola 1.5L	█	2.99 to 3.48
13.	Sprite 1.5L	█	2.99 to 3.48
14.	A&W Sarsaparilla 1.5L	█	2.80 to 3.34



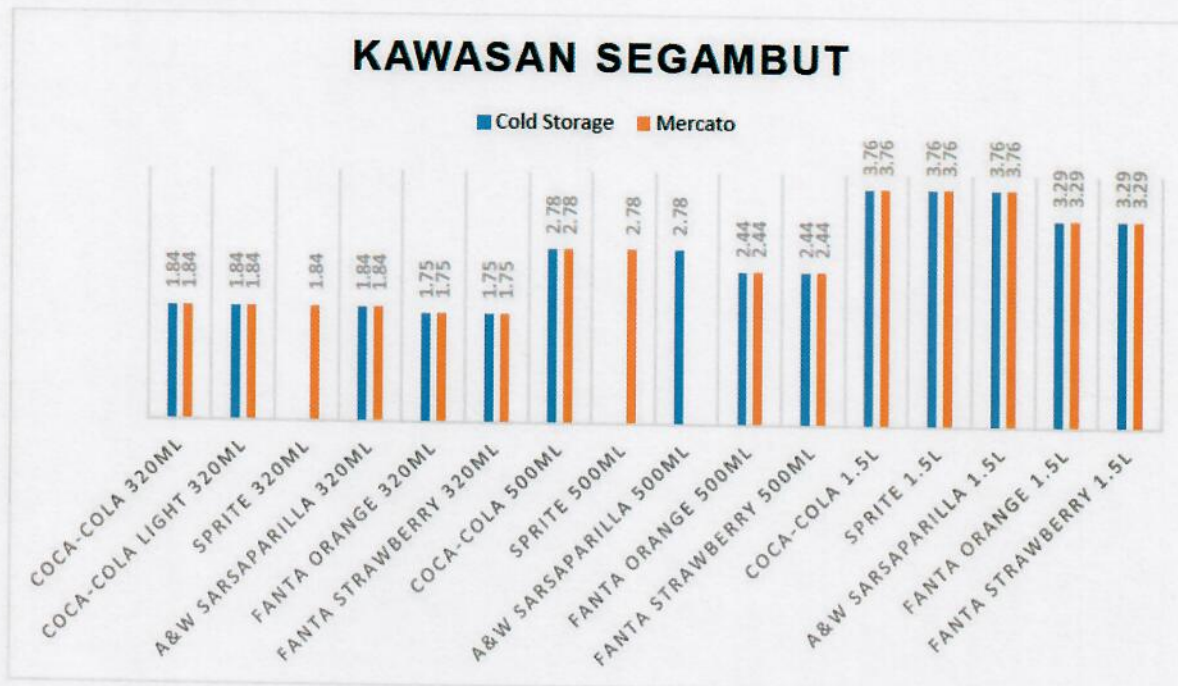
No	Product	RCP (RM)	Retailers Price Range (RM)
15.	Fanta Orange 1.5L	██████	2.80 to 2.91
16.	Fanta Strawberry 1.5L	██████	2.80 to 2.91

96. Based on the above, the Commission observed the following:

- (i) The prices charged by the supermarkets and hypermarkets for products above 320ML ranged between RM1.30 and RM1.51, whereas the RCP issued by Coca-Cola is ██████;
- (ii) The prices charged by the supermarkets and hypermarkets for products above 500ML ranged between RM1.50 and RM2.31; whilst the Coca-Cola's RCP stipulated a figure of ██████ and
- (iii) The prices charged by the supermarkets and hypermarkets for products above 500ML products range between RM1.50 and RM2.31 whereas the RCP issued by Coca-Cola is at ██████



(g) Segambut



No	Product	RCP (RM)	Retailers Price Range (RM)
1.	Coca-Cola 320ML	█	1.84 to 1.84
2.	Coca-Cola Light 320ML	█	1.84 to 1.84
3.	Sprite 320ML	█	1.84 to 1.84
4.	A&W Sarsaparilla 320ML	█	1.84 to 1.84
5.	Fanta Orange 320ML	█	1.75 to 1.75
6.	Fanta Strawberry 320ML	█	1.75 to 1.75
7.	Coca-Cola 500ML	█	2.78 to 2.78
8.	Sprite 500ML	█	2.78 to 2.78
9.	A&W Sarsaparilla 500ML	█	2.78 to 2.78
10.	Fanta Orange 500ML	█	2.44 to 2.44
11.	Fanta Strawberry 500ML	█	2.44 to 2.44
12.	Coca-Cola 1.5L	█	3.76 to 3.76
13.	Sprite 1.5L	█	3.76 to 3.76
14.	A&W Sarsaparilla 1.5L	█	3.76 to 3.76



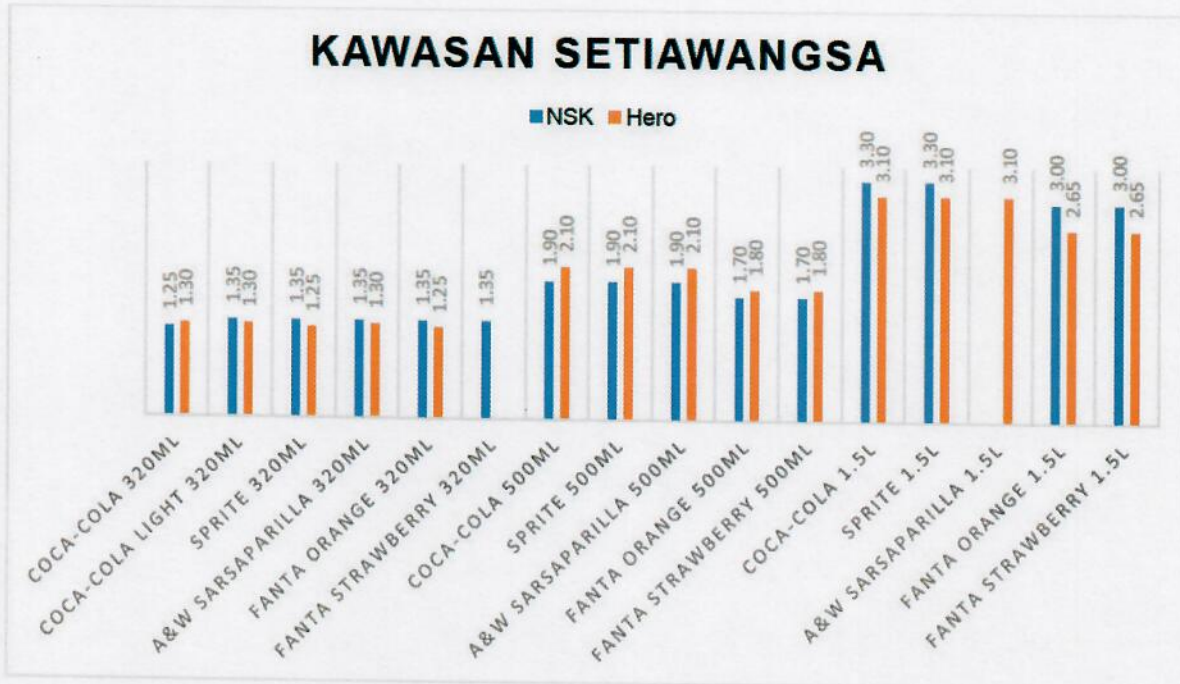
No	Product	RCP (RM)	Retailers Price Range (RM)
15.	Fanta Orange 1.5L	■	3.29 to 3.29
16.	Fanta Strawberry 1.5L	■	3.29 to 3.29

97. Based on the findings above, the Commission found the following:

- (i) The prices charged by the supermarkets and hypermarkets for products above for 320ML ranged between RM1.75 and RM1.84 whereas the RCP issued by Coca-Cola showed the figure of ■;
- (ii) The prices charged by supermarkets and hypermarkets for products above 500ML ranged from RM2.44 to RM2.78 and the RCP issued by Coca-Cola reveals a figure of ■; and
- (iii) The prices charged by the supermarkets and hypermarkets for products above 1.5L fell between the range of RM3.29 to RM3.76 whilst the RCP issued by Coca-Cola is ■



(h) Setiawangsa



No	Product	RCP (RM)	Retailers Price Range (RM)
1.	Coca-Cola 320ML		1.25 to 1.30
2.	Coca-Cola Light 320ML		1.30 to 1.35
3.	Sprite 320ML		1.25 to 1.35
4.	A&W Sarsaparilla 320ML		1.30 to 1.35
5.	Fanta Orange 320ML		1.25 to 1.35
6.	Fanta Strawberry 320ML		1.35 to 1.35
7.	Coca-Cola 500ML		1.90 to 2.10
8.	Sprite 500ML		1.90 to 2.10
9.	A&W Sarsaparilla 500ML		1.90 to 2.10
10.	Fanta Orange 500ML		1.90 to 2.10
11.	Fanta Strawberry 500ML		1.90 to 2.10
12.	Coca-Cola 1.5L		3.10 to 3.30
13.	Sprite 1.5L		3.10 to 3.30
14.	A&W Sarsaparilla 1.5L		3.10 to 3.10



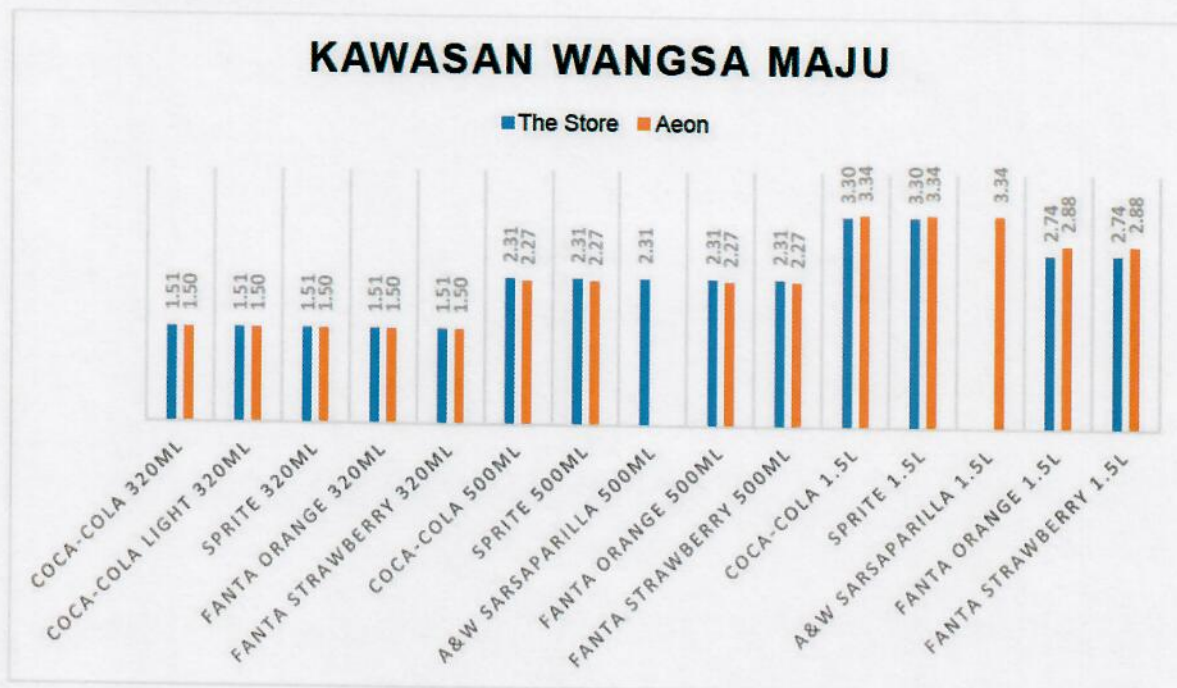
No	Product	RCP (RM)	Retailers Price Range (RM)
15.	Fanta Orange 1.5L	■	2.65 to 3.00
16.	Fanta Strawberry 1.5L	■	2.65 to 3.00

98. The Commission's analysis revealed that:

- (i) The prices charged by the supermarkets and hypermarkets for products above 320ML ranged from RM1.25 to RM1.35. Meanwhile the RCP issued by Coca-Cola is ■;
- (ii) The prices charged by the supermarkets and hypermarkets for products above 500ML ranged from RM1.90 to RM2.10 whereas the RCP issued by Coca-Cola is at ■; and
- (iii) The prices charged by the supermarkets and hypermarkets for products above 500ML ranged from RM1.90 to RM2.10 while the RCP issued by Coca-Cola shows a higher figure of ■.



(i) Wangsa Maju



No	Product	RCP (RM)	Retailers Price Range (RM)
1.	Coca-Cola 320ML	█	1.50 to 1.51
2.	Coca-Cola Light 320ML	█	1.50 to 1.51
3.	Sprite 320ML	█	1.50 to 1.51
4.	Fanta Orange 320ML	█	1.50 to 1.51
5.	Fanta Strawberry 320ML	█	1.50 to 1.51
6.	Coca-Cola 500ML	█	2.27 to 2.31
7.	Sprite 500ML	█	2.27 to 2.31
8.	A&W Sarsaparilla 500ML	█	2.31 to 2.31
9.	Fanta Orange 500ML	█	2.27 to 2.31
10.	Fanta Strawberry 500ML	█	2.27 to 2.31
11.	Coca-Cola 1.5L	█	3.30 to 3.34
12.	Sprite 1.5L	█	3.30 to 3.34
13.	A&W Sarsaparilla 1.5L	█	3.34 to 3.34
14.	Fanta Orange 1.5L	█	2.74 to 2.88



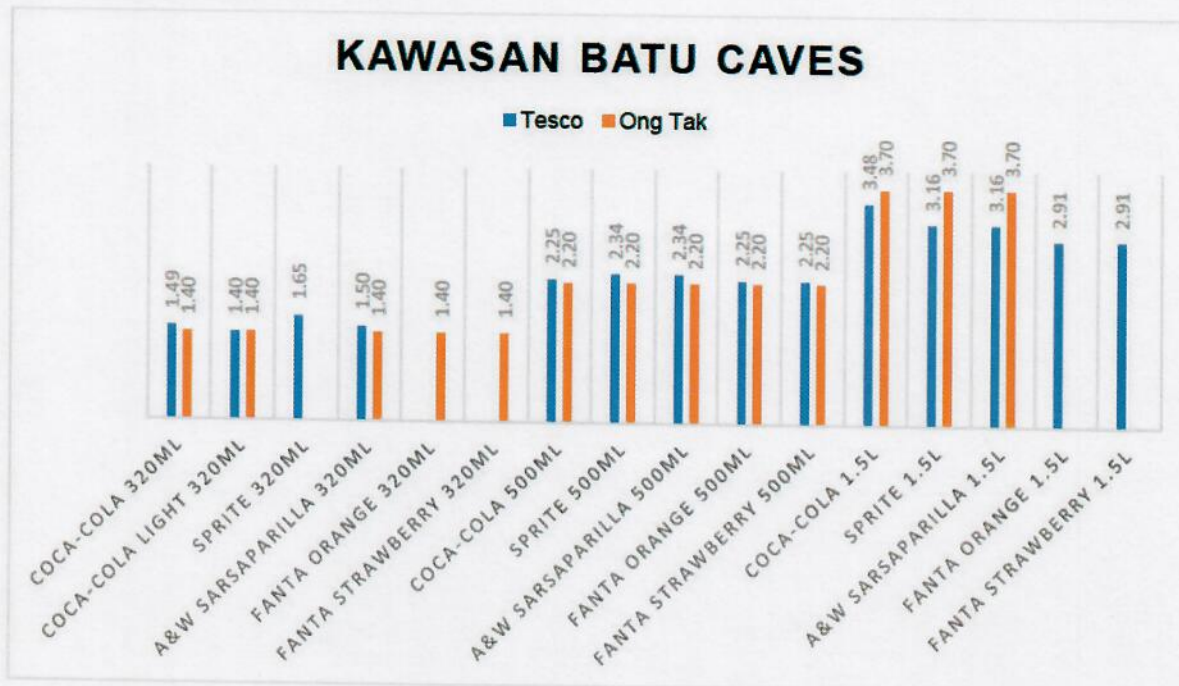
No	Product	RCP (RM)	Retailers Price Range (RM)
15.	Fanta Strawberry 1.5L	■	2.74 to 2.88

99. Based on the above findings, the Commission observed the following:

- (i) The prices charged by the supermarkets and hypermarkets for products above 320ML ranged between RM1.50 and RM1.51 whilst the RCP issued by Coca-Cola is ■
- (ii) The prices charged by the supermarkets and hypermarkets for products above 500ML ranged from RM2.27 to RM2.31. Meanwhile the RCP issued by Coca-Cola stood at ■ and
- (iii) The prices charged by the supermarkets and hypermarkets for products above 1.5L ranged between RM3.30 and RM3.54 whereas the RCP issued by Coca-Cola showed the figure of ■



(j) Batu Caves



No	Product	RCP (RM)	Retailers Price Range (RM)
1.	Coca-Cola 320ML	█	1.40 to 1.49
2.	Coca-Cola Light 320ML	█	1.40 to 1.40
3.	Sprite 320ML	█	1.65 to 1.65
4.	A&W Sarsaparilla 320ML	█	1.40 to 1.50
5.	Fanta Orange 320ML	█	1.40 to 1.40
6.	Fanta Strawberry 320ML	█	1.40 to 1.40
7.	Coca-Cola 500ML	█	2.20 to 2.25
8.	Sprite 500ML	█	2.20 to 2.35
9.	A&W Sarsaparilla 500ML	█	2.20 to 2.34
10.	Fanta Orange 500ML	█	2.20 to 2.25
11.	Fanta Strawberry 500ML	█	2.20 to 2.25
12.	Coca-Cola 1.5L	█	3.48 to 3.70
13.	Sprite 1.5L	█	3.16 to 3.70
14.	A&W Sarsaparilla 1.5L	█	3.16 to 3.70



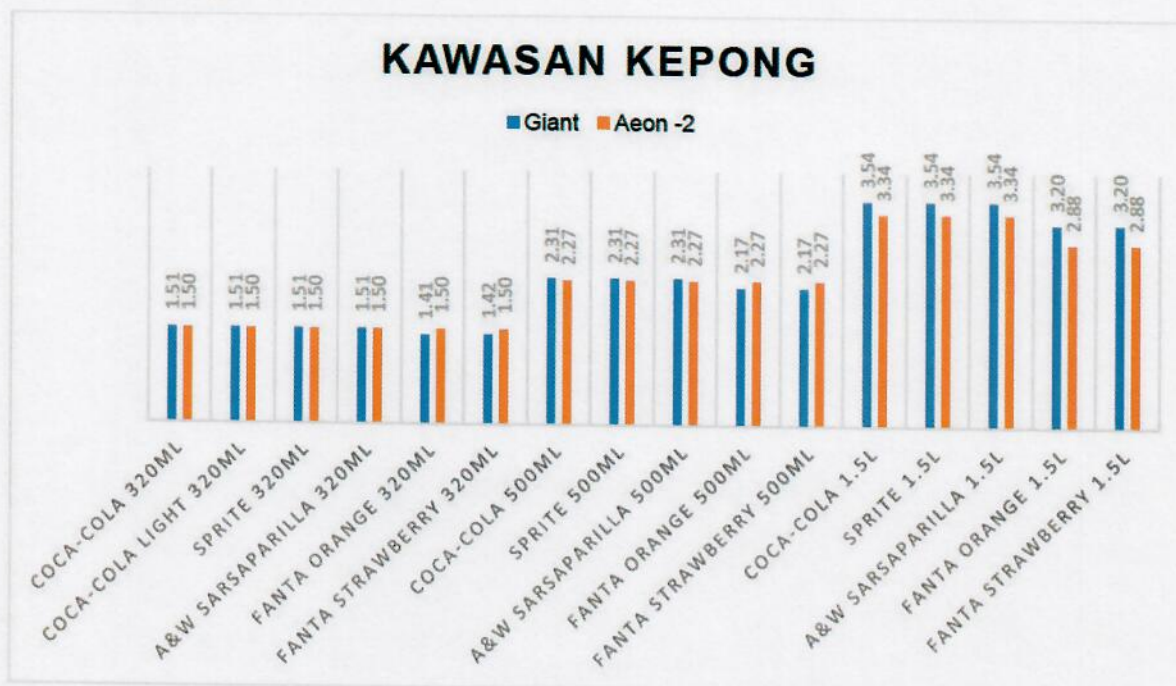
No	Product	RCP (RM)	Retailers Price Range (RM)
15.	Fanta Orange 1.5L	■	2.91 to 2.91
16.	Fanta Strawberry 1.5L	■	2.91 to 2.91

100. Based on the findings above, the Commission observed the following:

- (i) Prices charged by the supermarkets and hypermarkets for products above 320ML fell within the range of RM1.40 to RM1.50; and the RCP issued by Coca-Cola is ■;
- (ii) The prices charged by the supermarkets and hypermarkets for products above 500ML ranged from RM2.20 to RM2.25 whereas the RCP issued by Coca-Cola stood at ■; and
- (iii) The prices charged by the supermarkets and hypermarkets for products above 1.5L ranged from RM3.16 to RM3.70 meanwhile the RCP issued by Coca-Cola is ■



(k) Kepong



No	Product	RCP (RM)	Retailers Price Range (RM)
1.	Coca-Cola 320ML	█	1.50 to 1.51
2.	Coca-Cola Light 320ML	█	1.50 to 1.51
3.	Sprite 320ML	█	1.50 to 1.51
4.	A&W Sarsaparilla 320ML	█	1.50 to 1.51
5.	Fanta Orange 320ML	█	1.41 to 1.50
6.	Fanta Strawberry 320ML	█	1.42 to 1.50
7.	Coca-Cola 500ML	█	2.27 to 2.31
8.	Sprite 500ML	█	2.27 to 2.31
9.	A&W Sarsaparilla 500ML	█	2.27 to 2.31
10.	Fanta Orange 500ML	█	2.21 to 2.27
11.	Fanta Strawberry 500ML	█	2.21 to 2.27
12.	Coca-Cola 1.5L	█	3.34 to 3.54
13.	Sprite 1.5L	█	3.34 to 3.54
14.	A&W Sarsaparilla 1.5L	█	3.34 to 3.54



No	Product	RCP (RM)	Retailers Price Range (RM)
15.	Fanta Orange 1.5L	██████	2.91 to 2.91
16.	Fanta Strawberry 1.5L	██████	2.91 to 2.91

101. Based on finding above, the Commission observes the following:

- (i) The prices charged by the supermarkets and hypermarkets for products above 320ML ranged from RM1.41 to RM1.50. Meanwhile the RCP issued by Coca-Cola is ██████
- (ii) The prices charged by the supermarkets and hypermarkets for products above 500ML fell within the range of RM2.21 to RM1.89 whilst the RCP issued by Coca-Cola is ██████; and
- (iii) The prices charged by the supermarkets and hypermarkets for products above 1.5L ranged between RM3.34 and RM3.54 whilst the RCP issued by Coca-Cola stipulates the sum of ██████.

102. It is the Commission's finding, therefore, that the RCP issued by the Parties was not strictly adhered to by targeted supermarkets and hypermarkets and was not likely to cause a negative effect on the relevant market. The Infringing Agreements between the Parties and each customer did not restrict the supermarkets' and hypermarkets' ability to independently determine their respective retail prices for the Parties' product.



#### **G.4 EFFECTS OF SIGNIFICANTLY PREVENTING, RESTRICTING OR DISTORTING COMPETITION**

103. Despite having significant market share, upon assessing the effects of the RRP and RCP issued by the Parties in the relevant market as described in **paragraphs 61 and 63** the Commission is satisfied that the Parties did not restrict the ability of supermarkets and hypermarkets in Peninsular Malaysia, including their customers from determining their resale prices independently.
104. The Commission also found that the evidence gathered did not indicate that the Parties had induced the supermarkets and hypermarkets by way of incentives or promotional measures to encourage them to adhere strictly to the RRP and RCP.

#### **PART 3: NON-INFRINGEMENT DECISION**

##### **A. THE COMMISSION'S CONCLUSION ON EVIDENCE**

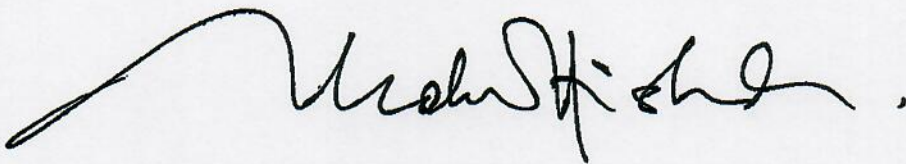

105. The imposition of the recommended resale price is not an infringement as it did not in practice result in a resale price maintenance as a result of pressure from, or incentives offered by the Parties.
106. Therefore, the Commission concludes that Coca-Cola Bottlers and Coca-Cola Refreshments, as an SEE, were not involved in the agreement and/or concerted practice which had the effect of significantly preventing, distorting and restricting competition in the market for CSD in Peninsular Malaysia.



107. This finding of non-infringement Decision was deliberate following Members of the Commission:

- (i) Dato' Seri Mohd Hishamudin Yunus, Chairman;
- (ii) Datuk Tay Lee Ly;
- (iii) Dato' Iskandar Halim Hj. Sulaiman;
- (iv) Dr. Nor Mazny Abdul Majid;
- (v) Dato' Jagjit Singh a/l Bant Singh;
- (vi) Tuan Mohd Hassan Ahmad; and
- (vii) Prof. Dr. Saadiah Mohamad.

**Dated: 23 SEPTEMBER 2019**

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**CHAIRMAN**

**YBHG. DATO' SERI MOHD HISHAMUDIN  
YUNUS**