**STRICTLY CONFIDENTIAL**

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**Malaysia Competition Commission**

**Case No. 700–2.1.3.2015**

Competition Act 2010 [Act 712]

Decision of the Competition Commission

Infringement of Section 4(1) read with Section 4(2)(a) and (3) of the Competition Act 2010

Competition Commission

v.

1. General Insurance Association of Malaysia ...PIAM
2. AIA Bhd.
3. AIG Malaysia Insurance Berhad
4. Allianz General Insurance Company (Malaysia) Berhad
5. AmGeneral Insurance Berhad
6. AXA Affin General Insurance Berhad
7. Berjaya Sompo Insurance Berhad
8. Chubb Insurance Malaysia Berhad
9. Etiqa General Insurance Berhad

10. Liberty Insurance Berhad
11. Lonpac Insurance Bhd.
12. MSIG Insurance (Malaysia) Bhd.
13. MPI Generali Insurans Berhad
14. Great Eastern General Insurance (Malaysia) Berhad
15. Pacific & Orient Insurance Co. Berhad
16. Progressive Insurance Bhd.
17. Prudential Assurance Malaysia Berhad
18. QBE Insurance (Malaysia) Berhad
19. RHB Insurance Berhad
20. The Pacific Insurance Berhad
21. Tokio Marine Insurans (Malaysia) Berhad
22. Tune Insurance Malaysia Berhad
23. Zurich General Insurance Malaysia Berhad ... The 22 Enterprise

**DATED: 14 SEPTEMBER 2020**

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

| TABLE OF CONTENTS | | | |
|---|---|---|---|
| **SUMMARY** | | | **1** |
| **PART 1: THE FACTS** | | | **3** |
| **A.** | **THE COMPLAINANT** | | **3** |
| **B.** | **THE PARTIES** | | **3** |
| | **B.1** | **GENERAL INSURANCE ASSOCIATION OF MALAYSIA ("PIAM")** | **3** |
| | **B.2** | **AIA BHD.** | **6** |
| | **B.3** | **AIG MALAYSIA INSURANCE BERHAD** | **7** |
| | **B.4** | **ALLIANZ GENERAL INSURANCE COMPANY (MALAYSIA) BERHAD** | **8** |
| | **B.5** | **AMGENERAL INSURANCE BERHAD** | **8** |
| | **B.6** | **AXA AFFIN GENERAL INSURANCE BERHAD** | **9** |
| | **B.7** | **BERJAYA SOMPO INSURANCE BERHAD** | **10** |
| | **B.8** | **CHUBB INSURANCE MALAYSIA BERHAD** | **11** |
| | **B.9** | **ETIQA GENERAL INSURANCE BERHAD** | **11** |
| | **B.10** | **LIBERTY INSURANCE BERHAD** | **12** |
| | **B.11** | **LONPAC INSURANCE BHD.** | **13** |
| | **B.12** | **MSIG INSURANCE (MALAYSIA) BHD.** | **14** |
| | **B.13** | **MPI GENERALI INSURANS BERHAD** | **14** |
| | **B.14** | **GREAT EASTERN GENERAL INSURANCE (MALAYSIA) BERHAD** | **15** |
| | **B.15** | **PACIFIC & ORIENT INSURANCE CO. BERHAD** | **16** |
| | **B.16** | **PROGRESSIVE INSURANCE BHD.** | **17** |
| | **B.17** | **PRUDENTIAL ASSURANCE MALAYSIA BERHAD** | **18** |

| TABLE OF CONTENTS | | | |
|---|---|---|---|

| TABLE OF CONTENTS | | | |
|---|---|---|---|

| TABLE OF CONTENTS | | | |
|---|---|---|---|
| | N.10 | REQUEST FOR SEPARATE ORAL REPRESENTATION SESSION BY THE COUNSEL FOR AMGENERAL, ALLIANZ, LIBERTY AND RHB INSURANCE | 169 |
| | N.11 | VIDEO PRESENTATION | 170 |
| O. | THE COMMISSION'S FINDINGS | | 170 |
| PART 4: THE COMMISSION'S DECISION | | | 171 |
| A. | DIRECTIONS UPON A FINDING OF INFRINGEMENT | | 171 |
| B. | GENERAL ARGUMENTS ON FINANCIAL PENALTY RAISED BY COUNSELS | | 172 |
| | B.1 | NO CORRELATION BETWEEN THE PROPOSED FINANCIAL PENALTY AND THE RELEVANT TURNOVER | 172 |
| | B.2 | WORLDWIDE TURNOVER AS THE MEASURE IN IMPOSING THE FINANCIAL PENALTY BY THE COMMISSION | 174 |
| | B.3 | EXCESSIVE PENALTY | 176 |
| | B.4 | BNM'S DIRECTIVE | 177 |
| C. | GENERAL POINTS ON FINANCIAL PENALTIES | | 181 |
| D. | METHODOLOGY FOR COMPUTING QUANTUM OF PENALTIES | | 181 |
| | D.1 | SERIOUSNESS OF THE INFRINGEMENT | 182 |
| | D.2 | RELEVANT TURNOVER AND THE BASE FIGURE | 183 |
| | D.3 | DURATION OF THE INFRINGEMENT | 184 |

| TABLE OF CONTENTS | | | |
|---|---|---|---|
| | D.4 | AGGRAVATING FACTORS | 184 |
| | D.5 | MITIGATING FACTORS | 184 |
| | D.6 | VERIFICATION THAT THE FINANCIAL PENALTY SHALL NOT EXCEED 10% OF WORLDWIDE TURNOVER | 185 |
| E. | FINANCIAL PENALTY FOR AIA | | 185 |
| F. | FINANCIAL PENALTY FOR AIG | | 187 |
| G. | FINANCIAL PENALTY FOR ALLIANZ | | 189 |
| H. | FINANCIAL PENALTY FOR AMGENERAL | | 191 |
| I. | FINANCIAL PENALTY FOR AXA AFFIN | | 193 |
| J. | FINANCIAL PENALTY FOR BERJAYA SOMPO | | 195 |
| K. | FINANCIAL PENALTY FOR CHUBB | | 197 |
| L. | FINANCIAL PENALTY FOR ETIQA | | 199 |
| M. | FINANCIAL PENALTY FOR LIBERTY | | 200 |
| N. | FINANCIAL PENALTY FOR LONPAC | | 202 |
| O. | FINANCIAL PENALTY FOR MSIG | | 204 |
| P. | FINANCIAL PENALTY FOR MPI GENERALI | | 206 |
| Q. | FINANCIAL PENALTY FOR GREAT EASTERN | | 208 |
| R. | FINANCIAL PENALTY FOR PACIFIC & ORIENT | | 210 |
| S. | FINANCIAL PENALTY FOR PROGRESSIVE INSURANCE | | 212 |
| T. | FINANCIAL PENALTY FOR PRUDENTIAL ASSURANCE | | 214 |
| U. | FINANCIAL PENALTY FOR QBE | | 217 |

| TABLE OF CONTENTS | | |
|---|---|---|

## SUMMARY

1. By this decision ("the Decision"), the Malaysia Competition Commission ("the Commission") has concluded that the enterprises listed at **paragraph 3** (individually described herein as "Party" and collectively described as the "Parties") have infringed the prohibition imposed by section 4 ("the section 4 prohibition") of the Competition Act 2010 ("the Act").

2. The Parties have infringed the section 4 prohibition by participating in an agreement which has, as its object, the prevention, restriction or distortion in relation to the market of parts trade and labour charges for PIAM Approved Repairers Scheme ("PARS") workshops from 1.1.2012 to 17.2.2017 ("the Relevant Period").

3. This Decision is addressed to the following Parties:

(i) General Insurance Association of Malaysia;
(ii) AIA Bhd.;
(iii) AIG Malaysia Insurance Berhad;
(iv) Allianz General Insurance Company (Malaysia) Berhad;
(v) AmGeneral Insurance Berhad;
(vi) AXA Affin General Insurance Berhad;
(vii) Berjaya Sompo Insurance Berhad;
(viii) Chubb Insurance Malaysia Berhad;
(ix) Etiqa General Insurance Berhad;
(x) Liberty Insurance Berhad;
(xi) Lonpac Insurance Bhd.;
(xii) MSIG Insurance (Malaysia) Bhd.;

(xiii) MPI Generali Insurans Berhad;

(xiv) Great Eastern General Insurance (Malaysia) Berhad;

(xv) Pacific & Orient Insurance Co. Berhad;

(xvi) Progressive Insurance Bhd.;

(xvii) Prudential Assurance Malaysia Berhad;

(xviii) QBE Insurance (Malaysia) Berhad;

(xix) RHB Insurance Berhad;

(xx) The Pacific Insurance Berhad;

(xxi) Tokio Marine Insurans (Malaysia) Berhad;

(xxii) Tune Insurance Malaysia Berhad; and

(xxiii) Zurich General Insurance Malaysia Berhad.

4. By this Decision also, the Commission hereby directs the Parties to cease their participation in the infringing conduct. The Commission, in addition, imposes on each of the Parties financial penalties ranging from RM137,918.45 to RM24,732,794.62; in all amounting to an aggregate quantum of penalty of RM173,655,300.00, for infringing the section 4 prohibition of the Act.

5. In view of the impact of unprecedented COVID-19 pandemic, the Commission grants a reduction of 25% of the financial penalty imposed on the Parties. Furthermore, the Commission also grant the Parties a moratorium period for the payment of the financial penalty up to 6-months and payment of the financial penalty by equal monthly instalment for up to 6 months.

## PART 1: THE FACTS

## A. THE COMPLAINANT

1. The Federation Automobile Workshops Owners' Association (PPM-014-14-12041990) ("FAWOAM") is a national association registered under the Societies Act 1966 (Revised 1987)[1] comprising 11 state associations and about 3000 workshops registered thereunder.[2] FAWOAM holds itself as the representative of PARS panel workshops and has at all times been accepted by Bank Negara Malaysia ("BNM") as serving that role.[3]

## B. THE PARTIES

## B.1 GENERAL INSURANCE ASSOCIATION OF MALAYSIA ("PIAM")

2. PIAM (PPM-006-14-22021982) is the national trade association of all licensed direct and reinsurance companies for general insurance in Malaysia. PIAM's business address is at 3rd Floor, Wisma PIAM, 150, Jalan Tun Sambanthan, 50470 Kuala Lumpur, Malaysia.[4]

3. PIAM was established in 1978 under the Insurance Act 1963 (Revised 1972)[5] and is required by law to be an association of all general insurers in accordance with section 22 of the Insurance Act

[1] Act 335.
[2]Paragraph 4 of Statement of Kong Wai Kwong of FAWOAM recorded on 7.11.2016.
[3]PIAM's Submission Paper to the Commission on the Standardised Labour Hourly Rate and Trade Discount on Spare Parts Prices for PARS Workshop dated 16.12.2016.
[4]Registrar of Societies PIAM.
[5] Repealed by the Insurance Act 1996 (Act 553).

1996.[6] The object of the establishment of PIAM is, *inter alia,* the promotion and representation of the interest of its members consistent with its constitution and the laws of Malaysia. Decisions of PIAM are executed via the issuance of Members' Circulars which, according to the constitution of PIAM ("PIAM's Constitution"), are binding on its members.[7]

4. In accordance with Article 9 of PIAM's Constitution, the management of PIAM is vested in a Management Committee consisting of 9 individuals all of whom are elected at an annual general meeting from the nominated representatives of member companies. These 9 individuals must minimally be a director of a company or employed by the company in a senior managerial position.

5. Under the Management Committee, 9 Sub-committees[8] have been established as follows:

(i) Accident, Health and Others;
(ii) Claims Management;
(iii) Distribution Management,
(iv) Education/Human Resources Development;
(v) Finance and Corporate Governance/Enterprise Risk Management;
(vi) Fire, Marine and Engineering;
(vii) Motor;

[6]PIAM's Submission Paper to the Commission on the Standardised Labour Hourly Rate and Trade Discount on Spare Parts Prices for PARS Workshop dated 16.12.2016.
[7]Articles 15 and 16A of PIAM's Constitution.
[8]Paragraph 2.1.3.1 of PIAM's Submission Paper to the Commission on the Standardised Labour Hourly Rate and Trade Discount on Spare Parts Prices for PARS Workshop dated 16.12.2016.

(viii) Public Relations/Corporate Social Responsibility; and

(ix) Regulatory and Industry Development.

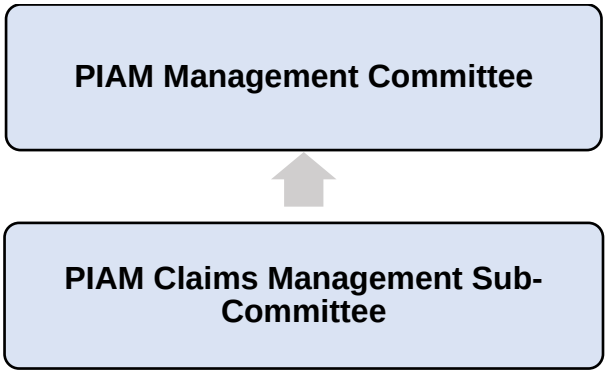
6. The subject matter of this Decision falls within the purview of the Claims Management Sub-committee.[9]

7. Except for the Chairman, each member of the Management Committee serves as a Convenor of a Sub-committee.[10]

8. Article 11(f) of PIAM's Constitution provides that the Management Committee shall have powers, *inter alia*, to appoint such other committees or sub-committees as may be deemed necessary.[11]

9. Accordingly, the Commission views PIAM's chain of command in terms of decision making ("Command of Decision") particularly in relation to motor claims, is described in ***Diagram 1*** below:

***Diagram 1*****:** PIAM's Command of Decision




[9]Paragraph 2.1.3.2 of PIAM's Submission Paper to the Commission on the Standardised Labour Hourly Rate and Trade Discount on Spare Parts Prices for PARS Workshop dated 16.12.2016.
[10]Paragraph 2.1.3.3 of PIAM's Submission Paper to the Commission on the Standardised Labour Hourly Rate and Trade Discount on Spare Parts Prices for PARS Workshop dated 16.12.2016.
[11]This Article read with paragraph 2 of the Statement of Chua Seck Guan of MSIG recorded on 25.11.2016.

10. The key personnel in PIAM at all material times are as follows:

(i) Chua Seck Guan, Chairman of Management Committee;
(ii) Kong Shu Yin, Deputy Chairman of Management Committee;
(iii) Loo Siew Mee, Deputy Convenor of PIAM;
(iv) Harminder Singh a/l Seva Singh, Member of PIAM Claims Management Sub-committee;
(v) Lim Chit Wan, Assistant General Manager of PIAM; and
(vi) Barani Devi Simon, Senior Executive of PIAM.

11. The following 22 Enterprises are registered as members of PIAM and are subjected to this Decision.

## B.2 AIA BERHAD

12. AIA Bhd. ("AIA") (Company Registration No.: 790895-D)[12] is a public limited company, limited by shares and is principally engaged in the business of underwriting of life insurance business including investment-linked business and all classes of general insurance business.[13] AIA has its principal business address at Level 29, Menara AIA, 99, Jalan Ampang, 50450 Kuala Lumpur, Wilayah Persekutuan, Malaysia.

13. Previously, AIA was known as "American International Assurance Bhd." However, on 17.06.2013 AIA had changed its name from "American International Assurance Bhd." to the present name.[14]

[12]Companies Commission of Malaysia search on AIA dated 19.09.2020.
[13]Companies Commission of Malaysia search on AIA dated 19.09.2020.
[14]Ibid.

14. The key management figures in AIA at the material time were as follows:

(i) Anusha Thavarajah, Chief Executive Officer; and
(ii) Simon Quah Seng Lee, Senior Manager.

## B.3 AIG MALAYSIA INSURANCE BERHAD

15. AIG Malaysia Insurance Berhad ("AIG") (Company Registration No.:795492-W)[15] is a public limited company, limited by shares and is principally engaged in the business of underwriting of all classes of general insurance. AIG has its principal business address at Level 16, 17 & 18, Menara Worldwide, 198, Jalan Bukit Bintang, 55100 Kuala Lumpur, Wilayah Persekutuan, Malaysia.

16. AIG was originally called "Chartis Malaysia Insurance Berhad", but on 25.9.2012, AIG had its name changed to AIG Malaysia Insurance Berhad.[16]

17. The key management figures in AIG at the material time were as follows:

(i) Antony Fook Weng Lee, Chief Executive Officer; and
(ii) Yew Sin Nam, Claim Technical Control Manager.

[15]Companies Commission of Malaysia search on AIG dated 19.09.2020.
[16]Ibid.

## B.4 ALLIANZ GENERAL INSURANCE COMPANY (MALAYSIA) BERHAD

18. Allianz General Insurance Company (Malaysia) Berhad ("Allianz") (Company Registration No.: 735426-V)[17] is a public limited company, limited by shares. Allianz is principally engaged in the business of investment holding. Allianz has its principal business address at Level 29, Menara Allianz Sentral, 203 Jalan Tun Sambanthan, 50470 Kuala Lumpur Sentral, Kuala Lumpur, Wilayah Persekutuan, Malaysia.

19. The key management figures in Allianz at the material time were as follows:

    (i) Zakri bin Mohd Khir, Chief Executive Officer; and
    (ii) Jayapragash a/l Amblavanar, Head of Claims.

## B.5 AMGENERAL INSURANCE BERHAD

20. AmGeneral Insurance Berhad ("AmGeneral") (Company Registration No.: 44191-P)[18] is a public limited company, limited by shares. AmGeneral is principally engaged in the business of underwriting of all classes of general insurance. AmGeneral has its principal business address at Level 15, Menara Shell, No. 211, Jalan Tun Sambanthan, 50470 Kuala Lumpur, Wilayah Persekutuan, Malaysia.

[17] Companies Commission of Malaysia search on Allianz dated 19.09.2020.
[18] Companies Commission of Malaysia search on AmGeneral dated 19.09.2020.

21. In September 2012, AmGeneral was formed through a combined business of two former entities, namely, AmG Insurance Berhad and Kurnia Insurance Malaysia Berhad with the acquisition of Kurnia Insurance by AmBank Group and Insurance Australia Group Pty. Ltd.[19]

22. The key management figures in AmGeneral at the material time were as follows:

    (i) Roberts Derek Llewellyn, Chief Executive Officer; and
    (ii) Khor Choo Hong, Vice President of the Claim Motor Property Damage.

## B.6 AXA AFFIN GENERAL INSURANCE BERHAD

23. AXA Affin General Insurance Berhad ("AXA Affin") (Company Registration No.: 23820-W)[20] is a public limited company, limited by shares. AXA Affin is principally engaged in the business of underwriting of all classes of general insurance. AXA Affin has its principal business address at Ground Floor, Wisma Boustead, 71, Jalan Raja Chulan, 50250 Kuala Lumpur, Wilayah Persekutuan, Malaysia.

24. Previously, AXA Affin was known as "AXA Affin Assurance Berhad". The change to its present name was effected on 3.3.2006.[21]

[19]Written Representation by AmGeneral Insurance Berhad (Vol. 1) dated 6.1.2017.
[20]Companies Commission of Malaysia search on AXA Affin dated 19.09.2020.
[21]Ibid.

25. The key management figures in AXA Affin at the material time were as follows:

(i) Emmanuel Jean Louis Nivet, Chief Executive Officer; and
(ii) Harry Khor Cheow Cheng, Head of Claims.

## B.7 BERJAYA SOMPO INSURANCE BERHAD

26. Berjaya Sompo Insurance Berhad ("Berjaya Sompo") (Company Registration No.: 62605-U)[22] is a public limited company, limited by shares. Berjaya Sompo is principally engaged in the business of underwriting of general insurance. Berjaya Sompo has its principal business address at 1-38-1 and 1-38-2, Menara Bangkok Bank, Laman Sentral Berjaya, 105, Jalan Ampang, 50450 Kuala Lumpur, Wilayah Persekutuan, Malaysia.

27. Previously, Berjaya Sompo was known as "Berjaya General Insurance Berhad". The change to its present name was effected on 9.2.2007.[23]

28. The key management figures in Berjaya Sompo at the material time were as follows:

(i) Loh Lye Ngok, Chief Executive Officer; and
(ii) Leong See Meng, Head of Claims.

[22]Companies Commission of Malaysia search on Berjaya Sompo dated 19.09.2020.
[23]Companies Commission of Malaysia search on Berjaya Sompo dated 19.09.2020.

## B.8 CHUBB INSURANCE MALAYSIA BERHAD

29. Chubb Insurance Malaysia Berhad ("Chubb") (Company Registration No.: 9827-A)[24] is public limited company, limited by shares and is principally engaged in the business of general insurance. Chubb has its principal business address at Wisma Chubb, 38, Jalan Sultan Ismail, 50250 Kuala Lumpur, Wilayah Persekutuan, Malaysia.

30. Previously, Chubb was known as "ACE Jerneh Insurance Berhad". However, on 10.6.2016, Chubb had the name changed to the present name.[25]

31. The key management figures in Chubb at the material time were as follows:

    (i) Stephen Barry Crouch, Chief Executive Officer and Country President;
    (ii) Yin Sau May, Head of Claims; and
    (iii) Yan Chee Keong, Head of Motor Claims.

## B.9 ETIQA GENERAL INSURANCE BERHAD

32. Etiqa General Insurance Berhad ("Etiqa") (Company Registration No.: 9557-T)[26] is a public limited company, limited by shares. Etiqa is principally engaged in the business of underwriting of general

[24]Companies Commission of Malaysia search on Chubb dated 19.09.2020.
[25]Ibid.
[26]Companies Commission of Malaysia search on Etiqa dated 19.09.2020.

insurance, life insurance and all investment-linked business. Etiqa has its principal business address at Ground Floor, Tower B & C, Dataran Maybank, No.1, Jalan Maarof, 59000 Kuala Lumpur, Wilayah Persekutuan, Malaysia.

33. Previously, Etiqa was known as “Etiqa Insurance Berhad”. However, on 1.1.2018, Etiqa had its name changed to its present name.[27]

34. The key management figures in Etiqa at the material time were as follows:

(i) Zaharudin bin Daud, Chief Executive Officer; and
(ii) Muhammad Azlan Noor bin Che Mat, Executive Vice President or Head of Claims.[28]

## B.10 LIBERTY INSURANCE BERHAD

35. Liberty Insurance Berhad (“Liberty”) (Company Registration No.:16688-K)[29] is a public limited company, limited by shares. Liberty is principally engaged in the business of general insurance. Liberty has its principal business address at Ground, 2nd, 6th. 7th, 8th, 9th & 10th Floor, Menara Liberty, 1008, Jalan Sultan Ismail, 50250 Kuala Lumpur, Wilayah Persekutuan, Malaysia.

[27]Companies Commission of Malaysia search on Etiqa dated 19.09.2020.
[28]Paragraph 22 of Statement of Muhammad Azlan Noor of Etiqa recorded on 10.10.2016.
[29]Companies Commission of Malaysia search on Liberty dated 19.09.2020.

36. Previously, Liberty was known as “Uni.Asia General Insurance Berhad”. The change to its present name was effected on 22.4.2015.[30]

37. The key management figures in Liberty at the material time were as follows:

    (i) Tan See Dip, Chief Executive Officer; and

    (ii) Loo Siew Mee, Head of Claims of Liberty.[31]

## B.11 LONPAC INSURANCE BHD.

38. Lonpac Insurance Bhd. (“Lonpac”) (Company Registration No.: 307414-T)[32] is a public limited company, limited by shares. Lonpac is principally engaged in the business of underwriting of general insurance. Lonpac has its principal business address at LG, 6th to 7th, 21st to 26th Floor, Bangunan Public Bank, 6, Jalan Sultan Sulaiman, 50000 Kuala Lumpur, Wilayah Persekutuan, Malaysia.

39. Previously, Lonpac was known as “Lonpac Bhd”. However, on 6.8.1998, Lonpac had its name changed to its present name.[33]

40. The key management figures in Lonpac at the material time were as follows:

    (i) Looi Kong Meng, Chief Executive Officer; and

    (ii) Voon Wing Chuan, Assistant General Manager Claims.

[30]Ibid.
[31]Loo Siew Mee left Liberty on 31.12.2016.
[32]Companies Commission of Malaysia search on Lonpac dated 19.09.2020.
[33]Companies Commission of Malaysia search on Lonpac dated 19.09.2020.

## B.12 MSIG INSURANCE (MALAYSIA) BHD.

41. MSIG Insurance (Malaysia) Bhd. ("MSIG") (Company Registration No.: 46983-W)[34] is a public limited company, limited by shares. MSIG is principally engaged in the business of underwriting of all classes of general insurance. MSIG has its principal business address at Level 15, Menara Hap Seng 2, Plaza Hap Seng, No.1, Jalan P. Ramlee, 50250 Kuala Lumpur, Malaysia.

42. Previously, MSIG was known as "Mitsui Sumitomo Insurance (Malaysia) Bhd.". The change of name to its present name was effected on 1.4.2008.[35]

43. The key management figures in MSIG at the material time were as follows:
    (i) Chua Seck Guan, Chief Executive Officer; and
    (ii) Harminder Singh a/l Seva Singh, Assistant Vice President for Motor Claims.

## B.13 MPI GENERALI INSURANS BERHAD

44. MPI Generali Insurans Berhad ("MPI Generali") (Company Registration No.: 14730-X)[36] is a public limited company, limited by shares. MPI Generali is principally engaged in the business of general insurance of all classes. MPI Generali has its principal business address at 8th Floor, Menara Multi-Purpose, Capital

[34]Companies Commission of Malaysia search on MSIG dated 19.09.2020.
[35]Companies Commission of Malaysia search on MSIG dated 19.09.2020.
[36]Companies Commission of Malaysia search on MPI Generali dated 19.09.2020.

Square, No.8. Jalan Munshi Abdullah, 50100 Kuala Lumpur, Wilayah Persekutuan, Malaysia.

45. Previously, MPI Generali was known as “Multi-Purpose Insurans Bhd.”. The change of name to its present name was effected on 15.7.2015.[37]

46. The key management figures in MPI Generali at the material time were as follows:

(i) Tan Chuan Li, Chief Executive Officer; and
(ii) Chan Yee Ngor, Head of Process Management.

## B.14 GREAT EASTERN GENERAL INSURANCE (MALAYSIA) BERHAD

47. Great Eastern General Insurance (Malaysia) Berhad (“Great Eastern”) (Company Registration No.: 102249-P)[38] is a public limited company, limited by shares. Great Eastern is principally engaged in the business of underwriting of general insurance. Great Eastern has its principal business address at Level 18, Menara Great Eastern, 303, Jalan Ampang, 50450 Kuala Lumpur, Wilayah Persekutuan, Malaysia.

[37]Ibid.
[38]Companies Commission of Malaysia search on Great Eastern dated 19.09.2020.

48. Previously, Great Eastern was known as “Overseas Assurance Corporation (Malaysia) Berhad”. The change to its present name was effected on 31.7.2017.[39]

49. The key management figures in Great Eastern at the material time were as follows:

(i) Ng Kok Kheng, Chief Executive Officer; and
(ii) Vijendran a/l Kathirgamanathan, Assistant Vice President, Claims Management Department (Motor).

## B.15 PACIFIC & ORIENT INSURANCE CO. BERHAD

50. Pacific & Orient Insurance Co. Berhad (“Pacific & Orient”) (Company Registration No.: 12557-W)[40] is a public limited company, limited by shares. Pacific & Orient is principally engaged in the business of general insurance. Pacific & Orient has its principal business address at 11th Floor, Wisma Bumi Raya, No.10, Jalan Raja Laut, 50350 Kuala Lumpur, Wilayah Persekutuan, Malaysia.

51. Previously, Pacific & Orient was known as “Pacific & Orient Insurance Co. Sdn. Bhd”. The change of name to its present name was effected on 27.12.1996.[41]

52. The key management figures in Pacific & Orient at the material time were as follows:

[39]Companies Commission of Malaysia search on Great Eastern dated 19.09.2020.
[40]Companies Commission of Malaysia search on Pacific & Orient dated 19.09.2020.
[41]Companies Commission of Malaysia search on Pacific & Orient dated 19.09.2020.

(i) Abdul Rahman bin Talib, Chief Executive Officer; and

(ii) Ng Siew Hua, Claims Manager.

## B.16 PROGRESSIVE INSURANCE BHD.

53. Progressive Insurance Bhd. ("Progressive Insurance") (Company Registration No.: 19002-P)[42] is a public limited company, limited by shares. Progressive Insurance is principally engaged in the business of general insurance. Progressive Insurance has its principal business address at 6th, 9th & 10th Floors, Menara BGI, Plaza Berjaya, No. 12, Jalan Imbi, 55100 Kuala Lumpur, Wilayah Persekutuan, Malaysia.

54. Previously, Progressive Insurance was known as "Progressive Insurance Sdn. Bhd". The change to its present name was effected on 30.5.1997.[43]

55. The key management figures in Progressive Insurance at the material time were as follows:

(i) Francis Lai @ Lai Vun Sen, Chief Executive Officer; and

(ii) Johari bin Nordin, Assistant General Manager (Claims/Risk Management).

[42]Companies Commission of Malaysia search on Progressive Insurance dated 19.09.2020.
[43]Ibid.

## B.17 PRUDENTIAL ASSURANCE MALAYSIA BERHAD

56. Prudential Assurance Malaysia Berhad ("Prudential Assurance") (Company Registration No.: 107655-U)[44] is a public limited company, limited by shares. Prudential Assurance is principally engaged in the business of life and general insurance as well as the investment of funds. Prudential Assurance has its principal business address at Tun Razak Exchange Headquarter Counter, Ground Floor, Menara Prudential, Persiaran TRX Barat, Tun Razak Exchange, 55188 Kuala Lumpur, Wilayah Persekutuan, Malaysia.

57. Previously, Prudential Assurance was known as "Berjaya Prudential Assurance Berhad". The change to its present name was effected on 3.7.1998.[45]

58. The key management figures in Prudential Assurance at the material time were as follows:

    (i) Gan Leong Hin, Chief Executive Officer; and
    (ii) Lai Wee Leng, Director of General Insurance Operations and Project Management, Marketing Division.

## B.18 QBE INSURANCE (MALAYSIA) BERHAD

59. QBE Insurance (Malaysia) Berhad ("QBE") (Company Registration No.: 161086-D)[46] is a public limited company, limited by share. QBE

[44]Companies Commission of Malaysia search on Prudential Assurance dated 19.09.2020.
[45]Ibid.
[46]Companies Commission of Malaysia search on QBE dated 19.09.2020.

is principally engaged in the business of underwriting of all classes of general insurance. QBE has its principal business address at No. 638, Level 6, Blok B1, Pusat Dagang Setia Jaya (Leisure Commerce Square, No. 9, Jalan PJS 8/9, Petaling Jaya, 46150 Selangor Darul Ehsan, Malaysia.

60. Previously, QBE was known as "QBE-MBF Insurans Berhad". The change to its present name was effected on 31.12.2004.[47]

61. The key management figures in QBE at the material time were as follows:

(i) Leordardo Perazzi Zanolini, Chief Executive Officer;[48] and
(ii) Hardev Singh a/l Mahindar Singh, Regional Claims Technical Specialist.

## B.19 RHB INSURANCE BERHAD

62. RHB Insurance Berhad ("RHB Insurance") (Company Registration No.: 38000-U)[49] is a public limited company, limited by shares. RHB Insurance is principally engaged in the business of underwriting of all classes of general insurance. RHB Insurance has its principal business address at Level 12, West Wing, The Icon, No. 1, Jalan 1/68F, Jalan Tun Razak, 55000 Kuala Lumpur, Wilayah Persekutuan Malaysia.

[47]Companies Commission of Malaysia search on QBE dated 19.09.2020.
[48]Leordardo Perazzi Zanolini left QBE on July 2017.
[49]Companies Commission of Malaysia search on RHB Insurance dated 19.09.2020.

63. Previously, RHB Insurance was known as “DCB Insurance Berhad”. The change to its present name was effected on 1.7.1997.[50]

64. The key management figures in RHB Insurance at the material time were as follows:

(i) Kong Shu Yin, Managing Director and Chief Executive Officer; and
(ii) Goh Eng Chun, Head of Motor Business.

## B.20 THE PACIFIC INSURANCE BERHAD

65. The Pacific Insurance Berhad (“Pacific Insurance”) (Company Registration No.: 91603-K)[51] is a public limited company, limited by shares. Pacific Insurance is principally engaged in the business of underwriting of general insurance. Pacific Insurance has its principal business address at 40-01, Q Sentral, 2A, Jalan Stesen Sentral 2, Kuala Lumpur Sentral, 50470 Kuala Lumpur, Wilayah Persekutuan, Malaysia.

66. Previously, Pacific Insurance was known as “The Pacific Netherlands Insurance Berhad”. The change to its present name was effected on 15.6.1995.[52]

67. The key management figures in Pacific Insurance at the material time were as follows:

[50]Companies Commission of Malaysia search on RHB Insurance dated 19.09.2020.
[51]Companies Commission of Malaysia search on Pacific Insurance dated 19.09.2020.
[52]Ibid.

(i) Athappan Gobinath Arvind, Chief Executive Officer; and

(ii) Cham Hock Seng, Claims Advisor.

## B.21 TOKIO MARINE INSURANS (MALAYSIA) BERHAD

68. Tokio Marine Insurans (Malaysia) Berhad ("Tokio Marine") (Company Registration No.: 149520-U)[53] is a public limited company, limited by shares. Tokio Marine is principally engaged in the business of underwriting of all classes of general insurance. Tokio Marine has its principal business address No. 61, 61-1 & No. 63, 63-1, Jalan KLJ 6, Taman Kota Laksamana Jaya, 75200 Melaka, Malaysia.

69. Previously, Tokio Marine was known as "The Wing On General Insurance Bhd". The change to its present name was effected on 28.8.1999.[54]

70. The key management figures in Tokio Marine at the material time were as follows:

(i) Saw Teow Yam, Chief Executive Officer; and

(ii) Vijayakumar a/l Selvarajah, Senior Manager (Claims).

[53]Companies Commission of Malaysia search on Tokio Marine dated 19.09.2020.
[54]Companies Commission of Malaysia search on Tokio Marine dated 19.09.2020.

## B.22 TUNE INSURANCE MALAYSIA BERHAD

71. Tune Insurance Malaysia Berhad ("Tune Insurance") (Company Registration No.: 30686-K)[55] a public limited company, limited by shares and is principally engaged in the business of underwriting of all classes of general insurance. Tune Insurance has its principal business address at Level 9, Wisma Tune, No.19, Lorong Dungun, Damansara Heights, 50490 Kuala Lumpur, Wilayah Persekutuan Malaysia.

72. Previously, Tune Insurance was known as "Oriental Capital Assurance Berhad". The change to its present name was effected on 21.9.2012.[56]

73. The key management figures in Tune Insurance at the material time were as follows:

    (i) Su Tieng Teck, Chief Executive Officer; and
    (ii) Chan Yoon Kong, the Head of Claims.

## B.23 ZURICH GENERAL INSURANCE MALAYSIA BERHAD

74. Zurich General Insurance Malaysia Berhad ("Zurich") (Company Registration No.: 1249516-V)[57] a public limited company, limited by shares and is principally engaged in the business of general insurance.

[55]Companies Commission of Malaysia search on Tune Insurance dated 19.09.2020.
[56]Companies Commission of Malaysia search on Tune Insurance dated 19.09.2020.
[57]Companies Commission of Malaysia search on Zurich dated 19.09.2020.

75. Zurich has its principal business address at Level 23A, Mercu 3, No. 3, Jalan Bangsar, KL Eco City, 59200, Kuala Lumpur, Wilayah Persekutuan, Malaysia.

76. The key management figures in Zurich at the material time were as follows:

(i) Philip Wallace Smith, Chief Executive Officer; and
(ii) Looi Siew Pek, Chief Claims Officer.

## C. BUSINESS AND INDUSTRY LANDSCAPE

77. In Malaysia, there are various types of motor insurance policies available. The common types are as follows:[58]

(i) Third party cover – this policy insures a person against claims for bodily injuries or death caused to other persons (known as the third party) as well as loss or damage to third party property caused by a person's vehicle.

(ii) Third party, fire and theft cover – this policy provides insurance against claims for third party bodily injury or death, third party property loss or damage, and loss or damage to a person's own vehicle due to accidental fire or theft.

(iii) Comprehensive cover – this policy provides the widest coverage which includes third party bodily injury and death,

[58]Information on Motor Insurance retrieved from *www.insuranceinfo.com.my* on 9.10.2017.

third party property loss or damage and loss or damage to a person's own vehicle due to accidental fire, theft or an accident.

78. Insurance coverage is provided by way of an indemnity insurance policy contract with the owners of motor vehicles. Generally, all repair costs arising from an insurance claim by either the owner or a third party are borne by the insurer, subject to the terms and conditions contained in the insurance policy.

79. Where an accident claim is made, the insurer will assess the cost of repairs required to be carried out by panel workshops which are generally known as PARS workshops. Insurers do not have direct dealings with the suppliers who supply motor vehicle spare parts to PARS workshops. Instead, PARS workshops deal directly with their respective spare parts suppliers and such arrangement would include the provision of trade discounts on the price of spare parts.

## C.1 THE MOTOR TARIFF IN MALAYSIA AT THE MATERIAL TIME

80. The general motor insurance industry in Malaysia is regulated by the Insurance Act 1996[59] ("IA") which was replaced by the Financial Services Act 2013[60] ("FSA") on 30.6.2013.

81. Motor tariffs are a set of fixed price lists created under the IA to streamline and control premium charges and the wordings of the insurance policy. The motor insurance premiums (including

[59]Act 553.
[60]Act 758.

contributions in the context of takaful) and the scope of coverage under motor insurance policies are determined by the Malaysian Motor Tariff[61] whereby the premiums which insurance companies are allowed to charge consumers are regulated by BNM. Insurance companies are not authorised to vary the premiums on insurance policies sold to their customers.

82. Section 144 of the IA states that "*No licensed general insurer or association of licensed general insurers shall adopt a tariff of premium rates, or a tariff of policy terms and conditions, for a description of general policy which is obligatorily applicable to licensed general insurers, except with the prior written approval of the Bank. Penalty: One million ringgit."* Notwithstanding the repeal of the IA 1996, this provision continues to remain in full force under section 275 of the FSA.

## C.2 CURRENT LANDSCAPE OF THE MOTOR TARIFF IN MALAYSIA

83. With effect from 1.7.2017, premium rates for motor comprehensive and motor third-party fire and theft cover insurance had been liberalised where premium pricing is determined by the insurers. Risk-Based Pricing system is being implemented by all insurance companies. The summary of the gradual implementation of the de-tariffication process is described as follows:

[61]The BNM's Financial Stability and Payment Systems Report 2010, at page 47.

(i) 1.7.2016: During the first year of implementation, insurance companies are allowed to offer new products or extensions to the scope of coverage of existing tariffed products.

(ii) 1.7.2017: Premium rates for Motor Comprehensive and Motor Third Party Fire and Theft products shall be determined by the market. Pricing of Third-Party coverage shall still be in accordance to the existing tariff.

(iii) 2019: The progress of the de-tariffication process is reviewed by assessing its impact on consumers and the industry before full liberalization takes place.

## C.3 THE PROCESS OF MAKING AN OWN DAMAGE CLAIM BY A VEHICLE OWNER AT THE MATERIAL TIME

84. In the event where a vehicle owner is involved in an accident, the vehicle owner will be required to lodge a police report and notify his or her insurance company in writing with full details of the accident as soon as possible. Where the vehicle owner fails to report the accident, the claim may be rejected wherein the vehicle owner will be liable for his or her own loss as well as any third-party claim made against him or her.[62]

85. The damaged vehicle will then have to be sent to a workshop approved by his or her insurance company.[63]

[62]Paragraph 6 of Statement of Dato' Too Peng Huat of FAWOAM recorded on 7.11.2016.
[63]Ibid.

86. If the vehicle owner is making a claim against his or her policy i.e. an own damage claim, the vehicle will have to be towed to a PARS workshop. There are about 30,000 car service workshops in Malaysia, of which, about 426 workshops are classified under PARS.[64]

## C.4 THE PROCESS OF ASSESSING AN OWN DAMAGE CLAIM BY AN INSURANCE COMPANY AT THE MATERIAL TIME

87. The insurance companies are bound to adhere to the Guideline on Claims Settlement Practices issued by BNM dated 3.7.2007. The Guideline acts as a minimum standard expected to be observed by the insurance companies in handling general insurance claims.[65] The following are the standards to be applied in assessing an own damage claim by the insurance company.

88. Upon receipt of the completed claim form and all the relevant documents, a licensed/in-house staff adjuster appointed by the insurance company will inspect the damaged vehicle within:

    (i) 7 working days at major towns; or
    (ii) 14 working days at other locations.[66]

89. The adjuster will then prepare the assessment report independently from the repairer's estimate and within 7 working days from the date of inspection, present the said report to the insurance company.[67]

[64]As of 16.11.2016, based on the List of PARS workshops provided by PIAM to the Commission on 21.11.2016.
[65]The Guideline on Claims Settlement issued by BNM dated 3.7.2007.
[66]Paragraph 6.1.1 of the Guideline on Claims Settlement issued by BNM dated 3.7.2007.
[67]Paragraph 6.1.2 of the Guideline on Claims Settlement issued by BNM dated 3.7.2007.

90. In the event where the insurance company fails to inspect the damaged vehicle during the 7 working days, the policy owner will have the liberty to appoint his or her own adjuster at the expense of the insurance company and proceed with repairs at any of the PARS workshops.[68]

91. According to the Associated Adjusters Sdn. Bhd. (30757-A), the adjuster will receive the assignment from the software houses,[69] described in greater detail below, which share the same database provided by the Motordata Research Consortium Sdn. Bhd. (352966-T) ("MRC").[70]

92. During a meeting between 2000 and 2001, BNM and PIAM agreed to separate the ownership for both software and database. MRC thereon became the party responsible to manage the database for motor vehicle parts and repair time, collect data from claims and satisfy the audit of software houses.[71]

93. MRC publishes the automotive part prices and generic repair times based on the Thatcham Parts System ("TPS") and Thatcham Repair Times System ("TRTS"). The TRTS sets the standard repair times for the removal and refitting of an undamaged part of a motor vehicle.[72]

[68]Paragraph 6.1.4 of the Guideline on Claims Settlement issued by BNM dated 3.7.2007.
[69]Paragraph 5 Statement of Abdul Aziz Mohamed Nor of Associated Adjusters recorded on 7.11.2016.
[70]Companies Commission of Malaysia search on MRC dated 4.11.2016.
[71]Paragraphs of 10, 11 and 12 Statement of Mohd Hairul Khaidzir bin Abdul Majid of MRC recorded on 4.11.2016.
[72]Paragraph of 14 Statement of Lee Geok Chin of MRC recorded on 4.11.2016.

94. In the process of estimating the cost of repair, the repairer must have relevant information pertaining to the part prices, TRTS, Opinion Times and miscellaneous costs, such as towing charges, valet service, etc. The Opinion Times is the suggested time required to remove, replace or repair a damaged part based on the knowledge and experience of the repairer. The times described in the Opinion Times is negotiable. The loss adjuster may change the Opinion Times but is not allowed to change the TRTS, unless they have technical justification for so doing. The TRTS should not be reviewed or changed unless the times are vehicle manufacturer model-specific times, known as "real times".[73]

95. BNM requires all insurance companies to refer to a scientific database for parts prices and labour rate. However, it is impractical to refer to the database without a front-end database.[74] There are 3 software houses in Malaysia, namely, Merimen Online Sdn. Bhd. (743374-X) ("Merimen Online"), Oneworks Sdn. Bhd. (223528-T) ("Oneworks") and PAC Total Solution Sdn. Bhd. (469868-W) ("PAC Total"). [75] All software houses provide online system for insurance industry. PIAM member insurance companies are required to implement this system whereby PARS workshops and non-PARS workshops as well as adjusters have access to the system.[76]

96. The Merimen System by Merimen Online is a customised system which will be designed according to the needs of a particular PIAM

[73]Paragraph of 16 Statement of Lee Geok Chin of MRC recorded on 4.11.2016.
[74]Paragraph 2 Statement of Lok Theng Hey of Merimen Online recorded on 4.11.2016.
[75]Paragraphs 11,12 and 20 Statement of Lok Theng Hey of Merimen Online Sdn. Bhd. recorded on 4.11.2016.
[76]Paragraph 5 Statement of Lok Theng Hey of Merimen Online recorded on 4.11.2016.

member insurance company.[77] The quantum of discounts on parts as well as the labour rates can either be hard-coded (fixed) in the system at the request of the insurance company.[78]

97. Nevertheless, the common practice is that the amount of discount on parts and labour rates are left blank and will be determined at the later stage upon the approval of the insurance company.[79] Commonly, the industry practice is for insurance companies to deduct 25% discount rate on parts prices.[80]

98. The insurance company reserves the right to require the policy owner (or workshop) to retain all replacement parts for re-inspection for a period of 28 days from the date of replacement.

99. Prior approval of BNM must be obtained by the insurance company for any arrangement or agreement involving pre-approved authorised repairs.

100. For minor claims of up to RM2,000.00 after excess, the insurance company may, within 3 working days from the date of receipt of notification of loss, request the policy owner in writing for an estimated cost of repairs.

[77]Paragraph 1 (e) Minutes of Meeting between the Commission and Merimen Online on 22.4.2016
[78]Paragraph 8 Statement of Lok Theng Hey of Merimen Online recorded on 4.11.2016.
[79]Paragraph 1 (e) Minutes of Meeting between the Commission and Merimen Online on 22.4.2016; and paragraph 8 Statement of Lok Theng Hey, the Chief Executive Officer of Merimen Online recorded on 4.11.2016.
[80]Paragraph 1 (e) Minutes of Meeting between the Commission and Merimen Online on 22.4.2016.

101. Within 3 working days from the receipt of the estimated cost of repairs, the insurance company may choose to inspect the vehicle, failing which:

(i) The policy owner shall be at liberty to proceed with the repair at any PARS workshops; and

(ii) Within 7 working days upon receipt of the estimated cost of repairs, an approval letter should be issued by the insurance company.

102. In the event the insurance company requires the vehicle to be inspected by an adjuster, the insurance company shall bear the adjuster fees.[81]

103. Within 7 working days of receipt of all documents, approval letters should be sent to the policy owner and workshop. The approval letter should itemise the estimated repair (spare parts prices/labour changes) via reference to the database of MRC and include a clear explanation on the scale of betterment, average clause and deduction of salvage, as well as options available to the policy owner, where applicable.[82]

104. Additionally, a second inspection of the vehicle shall be performed if required within 7 working days following the date of notice of the supplementary claim either from the policy owner or the repairer. Thereon, within 5 working days from the date of receipt of the

[81]Paragraph 6.3.3 of the Guideline on Claims Settlement issued by BNM dated 3.7.2016.
[82]Paragraph 6.4.2 of the Guideline on Claims Settlement issued by BNM dated 3.7.2016.

adjuster's supplementary report, the supplementary approval letter should be issued.[83]

105. Within the repair warranty period, the policy owner should be allowed to submit a report stating that he is dissatisfied with the repair works carried out ("unsatisfactory report"). The insurance company should then re-inspect the vehicle and ensure that it has been restored to its pre-accident condition.

106. The Guideline on Claims Settlement Practices did not in any way provide that the insurance companies should be involved in any form of price fixing arrangements.

## C.5 USAGE OF THE SOFTWARE HOUSE AT THE MATERIAL TIME

107. The Merimen Online system acts as a front-end system for processing motor insurance claims. Aside from insurance companies, PARS workshops and non-PARS workshops as well as adjusters have access to the system.[84]

108. Briefly, for accident claims, workshops will have to prepare the cost estimates to be submitted to insurance companies. Upon the completion of the adjuster's assessment on the damage, the insurance company will approve the claims and revert to the repairer whether or not to proceed with the repair works. If the repairer is not

[83]Paragraphs 6.5.1 and 6.5.2 of the Guideline on Claims Settlement issued by BNM dated 3.7.2016.
[84]Paragraph 5 of Statement of Lok Theng Hey of Merimen Online recorded on 4.11.2016.

satisfied with the quantum approved by the insurer, the repairer may make an appeal to the insurance company on the quantum.[85]

109. The repair cost, parts discount and labour rates may be disputed by both the insurer and the repairer.[86]

110. The common practice is that the discount on parts is pre-determined by the insurance company but may be changed by either the insurer or the repairer. However, some of the insurance companies insist that the parts trade discount is fixed and cannot be changed.[87]

## D. INVESTIGATION PROCEDURES AND PROCESS

111. On 1.4.2015, Dato' Too Peng Huat, on behalf of FAWOAM, approached the Commission with information pertaining to the alleged anti-competitive conduct between the Parties.

112. On 20.6.2016, the Commission commenced investigations under section 15(1) of the Act into the motor insurance industry to ascertain whether or not there had been an infringement of the section 4 prohibition under the Act.

113. During the course of the investigation, the Commission issued 112 notices pursuant to section 18(1)(a) and (b) of the Act requiring Parties to provide information and/or documents and to make statements to the Commission based on the information and

[85]Paragraph 6 of Statement of Lok Theng Hey of Merimen Online recorded on 4.11.2016.
[86]Paragraph 7 of Statement of Lok Theng Hey of Merimen Online recorded on 4.11.2016.
[87]Paragraph 8 of Statement of Lok Theng Hey of Merimen Online recorded on 4.11.2016.

documents requested or in relation to any queries made by the Commission officers.

114. In addition to the above, the Commission carried out interviews under section 18(1)(a) and (b) of the Act with the key representatives of the Parties. The interviews with the key representatives of the Parties are described in ***Annexe 1***.

115. The Commission also interviewed representatives from BNM, Associated Adjusters Sdn. Bhd., Century Independent Loss Adjusters Sdn. Bhd. (114182-W), Merimen Online, Oneworks, MRC and FAWOAM. The interviews with the respective representatives are described in ***Annexe 2***.

116. Additionally, the Commission issued a notice pursuant to section 16 of the Competition Commission Act ("CCA") 2010 to Prudential Assurance to collect information in the performance of the Commission's functions. The Commission had also made a visit to PIAM's premises to access their records pursuant to section 20 of the Act.

117. On 22.2.2017, the Commission proceeded to issue notices of the Proposed Decision pursuant to section 36 of the Act. From 20.3.2017 till 24.3.2017 and 17.4.2017, the documents in the Commission's files were made available to the Parties for inspection. Between 5.4.2017 and 26.4.2017, all the Parties submitted their respective written representations to the Commission. The Parties then requested for, and subsequently

made, oral representations to the Commission as described in the ***Table 3*** below:

***Table 3***: Oral Representation Sessions

| SESSION | DATE |
|---|---|
| First | (i) 16.10.2017; and<br>(ii) 17.10.2017 |
| Second | (i) 12.12.2017; and<br>(ii) 14.12.2017. |
| Third | (i) 29.1.2018; and<br>(ii) 31.1.2018 |
| Fourth | (i) 27.2.2018 |

118. However, due to the change of the Commission's Chairman on 5.9.2018, the Parties requested for *de novo* proceeding by way of oral representations before the Commission. The request was granted by the Commission on 14.11.2018. On 15.2.2019, RBB Economics ("RBB") submitted additional written representations.

119. Between 19.2.2019 to 18.6.2019, the Parties presented their oral representations to the Commission. During the oral representations, the Commission had also allowed RBB, Competition Consulting Asia and BNM to make representations. The Commission has considered their representations and shall be discussed hereafter in this Decision.

## PART 2: CONDUCT OF THE PARTIES

120. The Commission commenced investigations into this matter upon receiving FAWOAM's official complaint to the Commission alleging that PIAM members had fixed parts trade discounts and labour rates for PARS workshops as follows:

(i) Parts trade discounts of 25% for 6 models of vehicles namely, Proton, Perodua, Nissan, Toyota, Honda and Naza;
(ii) 15% parts trade discounts for Proton BLM; and
(iii) RM30 per hour for the repair labour rates.

121. The Commission's investigations revealed that several meetings led by PIAM had taken place between PIAM, FAWOAM and other related stakeholders which resulted in the agreement by PIAM members to fix the discount rate for parts trade and PARS workshop repair labour rates ("Infringing Agreement"). This is evidenced in writing in PIAM's decision via Members' Circular No. 132 dated 28.7.2011.[88]

122. The chronology of the relevant meetings and correspondences are as follows:

(i) On 3.8.2010, at the 3rd Meeting of PIAM Claims Management Sub-committee, attendees discussed PIAM's response to FAWOAM's announcement dated 25.7.2010. The announcement concerned the practice

[88]PIAM Members' Circular No.132 of 2011 dated 28.7.2011.

and imposition of spare parts trade discounts and labour rates. It was agreed that the practice varied between PIAM members.

(ii) On 3.8.2010, a meeting between BNM, PIAM, Malaysia Takaful Association (PPM-002-14-29112002) ("MTA") and MRC was held to discuss FAWOAM's announcement on the issue of motor repair costs. PIAM requested for additional time to gather information on the details of trade discounts granted to workshops by parts suppliers before reverting to BNM.

(iii) On 1.9.2010, a meeting facilitated by BNM and attended by PIAM, MTA, Association of Malaysian Adjusters ("AMA"), MRC and FAWOAM was held to discuss BNM's position that trade issues could be resolved by market players without BNM's intervention unless there was a market conduct that was detrimental to consumers and industry images. During the meeting, it was agreed that the practice of imposing blanket parts discounts between 25% and 30% was unreasonable, inefficient and ineffective.

(iv) On 24.9.2010, the 285th PIAM Management Committee was held where PIAM had set up a Task Force to conduct an analysis on the impact of the Act and the Personal Data Protection Act 2010 ("PDPA") on the insurance industry.

(v) On 29.9.2010, the attendees of the 4th Meeting of PIAM Claims Management Sub-committee agreed to seek clarification on the issues raised by FAWOAM.

(vi) On 2.11.2010, a meeting between PIAM Claims Management Sub-committee, PARS Review Group and FAWOAM was held to discuss FAWOAM's proposal to introduce "Transparency PARS 4M Programme" wherein any revision of rates would have to be reflective of the grading or category of any particular workshop. At this meeting, PIAM conceded that discounts should be reflective of actual applicable trade discounts enabled through the adoption of information and communication technology tools.

(vii) On 21.12.2010, a meeting called by BNM was attended by PIAM, MTA, AMLA, MRC and FAWOAM where the issue raised by FAWOAM that the imposition of parts trade discounts was wide-spread as evidenced by 20 actual cases of such occurrences was discussed. FAWOAM suggested the capping of trade discounts.

(viii) On 21.1.2011, at the 287th PIAM Management Committee meeting, the committee was updated on feedback obtained from a survey conducted on members. The Task Force had met with Dr. Cheah Chee Wah, the consultant from the Ministry of Domestic Trade and Consumer Affairs who was involved in the drafting of the Act, to obtain inputs on the effects of the Act on the insurance industry.

(ix) At the 6th Meeting of PIAM Claims Management Sub-committee held on 9.2.2011, the attendees were reminded of BNM's advice for PIAM and FAWOAM to discuss and revert with a final outcome/solution. FAWOAM submitted its proposal on "Workshop Transformation and Grading Program".

(x) On 3.3.2011, a meeting between PIAM Claims Management Sub-committee, PARS Review Group and FAWOAM was held to discuss PIAM's offer on discounts and labour rates.

(xi) The 288th PIAM Management Committee convened on 8.3.2011 and was updated on the discussion by PIAM's Claims Management Sub-committee held on 3.3.2011 on the recommended offer of parts trade discounts and labour rates to FAWOAM.

(xii) On 11.3.2011, PIAM circulated a Members' Circular No. 37 of 2011 via its Circular Distribution System ("CDS") to obtain members' views on the recommended offer to FAWOAM on parts trade discounts and labour rates.

(xiii) On 14.4.2011, the 7th Meeting of PIAM Claims Management Sub-committee was held to discuss members' consensus to the recommendations contained in Members' Circular No. 37 of 2011 and the issuance of an official notification to FAWOAM on the subject.

(xiv) The 8th Meeting of PIAM Claims Management Sub-committee on 6.5.2011 discussed FAWOAM's rejection of PIAM's latest offer and also documented PIAM's insistence to maintain the 3.3.2011 offer. Attendees of this meeting agreed that a study on labour rates must be carried out by members' panel adjusters.

(xv) On 10.5.2011, at the 289th PIAM Management Committee Meeting, the attendees discussed PIAM's offer and FAWOAM's counter offer in relation to parts discounts and labour rates. The Committee reiterated that unless FAWOAM was able to raise a compelling argument on this issue at an upcoming meeting with PIAM Claims Management Sub-committee, PIAM's original offer to FAWOAM would be maintained.

(xvi) In a letter dated 14.6.2011, BNM informed PIAM to resolve issues with FAWOAM amicably, failing which BNM may consider expanding the scope of the Financial Mediation Bureau.

(xvii) On 17.6.2011, a meeting between PIAM Claims Management Sub-committee and FAWOAM was held but no consensus was reached between the parties on the issue of parts trade discounts and labour rates.

(xviii) On 24.6.2011, PIAM issued Members' Circular No. 109 of 2011 seeking members' views on the initial proposal made to FAWOAM as well as PIAM's position in relation

to FAWOAM's response and counter offer. All 27 companies rejected FAWOAM's proposal.

(xix) In BNM's letter to PIAM dated 4.7.2011, BNM stated that PIAM and FAWOAM are required to conclude negotiations by 15.7.2011 and to conclude the review of Thatcham Repair Times by 18.7.2011.

(xx) On 18.7.2011, a meeting between PIAM Claims Management Sub-committee and FAWOAM was held, resulting in a consensus between FAWOAM and PIAM on behalf of its members on the issue of parts trade discounts and labour rates.

(xxi) FAWOAM issued an e-mail to PIAM on 25.7.2011 suggesting amendments to the minutes of the 18.7.2011 meeting to include the parties' agreement that the parts trade discounts and labour rates are subject to review the following year.

(xxii) On 26.7.2011, at the 10th Meeting of PIAM Claims Management Sub-committee, members were briefed on the outcome of the 18.7.2011 meeting and the effective date of the implementation of the parts trade discounts and labour rates on 1.8.2011.

(xxiii) On 28.7.2011, PIAM issued Members' Circular No. 132 of 2011 documenting PIAM members' consensus and agreement on parts trade discounts and labour rates

after the successful discussions held on 18.7.2011 and which were supported by 26 members of PIAM.[89]

(xxiv) On 13.9.2011, at a meeting by the PIAM Task Force on the Study of the Act and PDPA held on 13.9.2011, Mohd Aidil Tupari, a representative from the Commission and Dr. Cheah Chee Wah provided input to PIAM on the steps required to be taken to address the implications of the Act and PDPA 2010 on the industry.

(xxv) At the 293rd PIAM Management Committee Meeting held on 10.1.2012, BNM confirmed that it had conducted discussions with the Commission in relation to the Act. PIAM confirmed that it had submitted queries to the Commission on the issue of tariffs and whether a block exemption was required.

(xxvi) At the 294th PIAM Management Committee Meeting held on 13.3.2012, the attendees discussed and circulated the outcome of the legal review by PIAM's solicitors, Messrs. Wong and Partners which noted that many aspects of PIAM's business practices may not be in compliance with the Act and the possibility of the industry resorting to applications to the Commission for a block exemption.

[89]The Commission takes note that some of the enterprises who responded and supported the decision vide the Members' Circulars No. 37 of 2011 and/or Members' Circular No. 109 of 2011 ceased to exist.

(xxvii) The 295th PIAM Management Committee held on 17.5.2012 discussed Etiqa's purported decision to distance itself from PIAM's rules on rates, fees charges and other trading conditions vide letter dated 6.4.2012.

(xxviii) PIAM's solicitors Messrs. Wong and Partners notified the Commission vide letter dated 23.5.2012 of PIAM's intention to apply for a block exemption in relation to its core agreements and practices within the next 5 months. The letter confirmed that the Task Force set up will conduct market studies.

(xxix) On 29.11.2012, Messrs. Wong & Partners issued another letter to the Commission requesting for a grace period until 31.1.2013 to apply for the said block exemption.

(xxx) On 28.2.2013, Messrs. Wong & Partners officially notified the Commission vide a letter that PIAM had engaged with BNM on its compliance roadmap.

(xxxi) At the meeting between the PIAM Claims Management Sub-committee and FAWOAM on 17.4.2013, PIAM informed FAWOAM that effective 1.1.2012, PIAM would no longer dictate the applicable trade discounts on members. PIAM members and workshops would be required to decide on applicable parts trade discounts.

(xxxii) On 10.12.2014, BNM inquired with PIAM on the applicability of Members' Circular No. 132 of 2011. On 15.12.2014, PIAM confirmed that Members' Circular No. 132 of 2011 was still in effect.

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## PART 3: LEGAL AND ECONOMIC ASSESSMENT

123. This section begins by setting out the legal and economic framework in which the Commission relies upon in considering the evidence in this case. It then sets out the evidence relating to the Infringing Agreement on which the Commission relies upon. Thereafter, it analyses the evidence and states the inferences, findings and conclusions that the Commission draws from the evidence.

## A. APPLICATION OF COMPETITION ACT 2010

*Arguments by the Parties*

124. The learned counsel for Prudential argued as follows:

(i) In the event the Commission has a sound legal basis to conclude that the response given by Prudential to PIAM Members' Circulars No. 109 and/or No.132 of 2011 was anti-competitive, these had all occurred in 2011, when the Act was not in force;

(ii) The Proposed Decision disclosed no evidence of any infringement of the Act by Prudential or PIAM in respect of matters occurring from 1.1.2012 (the date of the Act coming into force); and

(iii) In the event the Commission takes the view that the mere fact that PIAM Members' Circular No. 132 of 2011 has not been revoked means Prudential has infringed section 4(3) of the Act

post 1.1.2012, the Commission should take note that PIAM would not be able to do as the Parties will need to abide by its sector regulator, BNM's very clear directive not to dismantle the arrangement to fix the parts trade discount and labour rate but to do so gradually when pre-conditions for effective competition in the motor repairs market met.[90]

## A.1. APPLICATION TO THE PRESENT CASE

*The Commission Findings*

125. The Act came into force on 1.1.2012. The objective of the Act is to promote economic development by promoting and protecting the process of competition and thereby protecting the interests of consumers and to provide for matters connected therewith. The preamble of the Act also recognises that the process of competition encourages efficiency, innovation and entrepreneurship, which promotes competitive prices, improvement in the quality of products and services and wider choices for consumers.

126. On the issue of the applicability of the Act in relation to anti-competitive conduct of enterprises committed prior to the coming into force of the Act, the Competition Appeal Tribunal of the United Kingdom in *Napp Pharmaceutical Holdings Limited and Subsidiaries v Director General of Fair Trading (Napp 4)*[91] held that:

[90] Paragraph 2 of BNM's letter to the Commission dated 13.2.2017.
[91] [2002] CAT 1.

> "*217. We observe, first, that the events described in this Decision cover the period before, and the period after, 1 March 2000 when the Act came into force. It goes without saying that there can be no infringement of the Chapter 1 and Chapter II prohibitions on any date earlier than 1 March 2000, notwithstanding that the Act received Royal Assent on 9 November 1998. Nonetheless, in a case such as the present it is impossible to understand the situation as it was during the period of alleged infringement – in this case the 13-month period from 1 March 2000 to 30 March 2001 – without also understanding how the situation arose as a result of facts arising before 1 March 2000. In our view it is relevant to take facts arising before 1 March 2000 into account for the purpose, but only for the purpose, of throwing light on facts and matters in issue on and after that date."*[92]

127. Relying on *Napp Pharmaceutical*, the Commission in response to the above argument, takes the view that when a case involves longstanding or continuous infringement of the Act and the anti-competitive conduct over the period both before and after the coming into force of the Act, there can be no infringement of the anti-competitive prohibition of the Act before 1.1.2012. However, since it will be impossible to understand the circumstances surrounding the anti-competitive agreement or conduct without having an appreciation and understanding of how the agreement or conduct arose, it is relevant to take into account facts arising before 1.1.2012 but only for the purpose of shedding light on the facts and matters in issue on and before the date.

128. PIAM Members' Circular No. 132 of 2011 that fixed the parts trade discounts and labour rates was adopted by the members of PIAM

[92] *Napp Pharmaceutical Holdings Limited and Subsidiaries v Director General of Fair Trading (Napp 4)* [2002] CAT 1, at paragraph 217.

on 28.7.2011. At the material time, the Act had yet to come into force.

129. The Commission, however, having considered the entirety of relevant meetings and correspondences that had taken place, particularly, the 294th PIAM Management Committee Meeting held on 13.3.2012, wherein the attendees had discussed and circulated the outcome of the legal review by PIAM's solicitors, Messrs. Wong and Partners which noted that many aspects of PIAM's business practices may not be in compliance with the Act and the possibility of the industry resorting to applications to the Commission for a block exemption.

130. Furthermore, the Commission having considered that on 10.12.2014, BNM inquired with PIAM on the applicability of the Members' Circular No. 132 of 2011 and subsequently on 15.12.2014, PIAM confirmed that the Members' Circular No. 132 of 2011 was still in effect.

131. Consequently, the Commission makes the finding that the Infringing Agreement by the Parties is still in effect post implementation of the Act. Accordingly, the said argument raised by the learned counsel is unfounded and is hereby dismissed.

## B. THE SECTION 4 PROHIBITION

132. Under section 4(1) of the Act, 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.

133. Under section 4(2)(a) of the Act, without prejudice to the generality of subsection (1), a horizontal agreement between enterprises which has the object of price fixing is deemed to have the object significantly preventing, restricting, or distorting competition in any market for goods or services.

134. Under section 4(3) of the Act, any enterprise which is a party to an agreement which is prohibited under section 4(1) read with section 4(2) shall be liable for infringement of the prohibition.

## B.1 APPLICATION OF SECTION 4 PROHIBITION TO PARTIES

### B.1.1 THE CONCEPT OF ENTERPRISE

135. Section 2 of the Act defines "enterprise" to mean "*any entity carrying on commercial activities relating to goods or services…"* The concept of an "enterprise" in section 2 of the Act covers any entity capable of carrying on commercial activities.

136. Under the European jurisprudence, "undertaking" of the Treaty on the Function of the European Union ("TFEU") is *in pari materia* with

section 2 “enterprise”. The European Court of Justice has said that the expression “undertaking” refers to:

> *“any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed.”*[93]

137. The notion of an enterprise focuses on the nature of the activity carried out by the entity concerned rather than its legal identity. The characteristic features economic activity appears to be:

(i) the offering of goods or services on a market;
(ii) where that activity “could, at least in principle, be carried on by a private undertaking in order to make profits”.[94]

## B.2 ASSOCIATION OF ENTERPRISES

138. An association of enterprises is widely construed under European competition law.[95] The fact that an association acts in the interest of its members, who are enterprises, is sufficient to hold that an establishment is an association of enterprises[96] for the purpose of the section 4 prohibition.

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[93]Case-41/90 *Hofner and Elser v Macrotron GmbH* [1991] ECR I-1979, at paragraph 21.
[94]Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751, Jacobs AG, at paragraph 311.
[95]Case C-250/92 *Gøttrup-Klim Grovvareforening and Others v DankLandbrugs Grovvaresel-skab AmbA* [1994] ECR I-5641; Case123/83 *BNIC v Clair* [1985] ECR 39; Case C-309/99 *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-577, at paragraphs 50 and 64; C-382/12 P *Mastercard and Others v Commission*, at paragraph 62.
[96]C-45/85 *Verband der Sachversicher v Commission*, at paragraph 29; Joined Cases T-217/03 and T-136/94 *FNCBV and Others v Commission*, at paragraph 54; T-136/94 *Eurofer v Commission*, at paragraph 110; Case IV/34.983 Commission Decision of 5.6.1996, Fennex, at paragraph 31.

139. An association of enterprises may itself be held liable for an infringement of the section 4 prohibition either because it has adopted an anti-competitive decision or because it has itself entered into an anti-competitive agreement or concerted practice.[97]

140. In circumstances where an association of enterprises and its members have participated in the same infringement, the competition authority may address its infringement decision to either the association, its relevant members or to both. In *Cimenteries,*[98] the European Court of First Instance stated that:

> *"485…normal practice for the Commission, where it finds that an association of undertakings and its members have participated in the same infringement, to impose a fine either on the undertakings which are members of that association of undertakings or on the association of undertakings…If, for particular reasons, such as those mentioned in recital 65, paragraph 8, of the contested decision, it intends to fine both the association of undertakings and the member undertakings of that association, it must make that intention clear in the SO [Statement of Objection] or in a supplement thereto".*[99]

141. Article 101(1)[100] of the TFEU is applicable to the decisions of trade association. This principle has been affirmed in *BNIC v Clair.*[101]

142. An association that simply makes recommendation to its members will not escape the application of Article 101(1) of TFEU. Even

[97]Case IV/31.371 Commission Decision of 10.7.1986, *Roofing Fel*t, at paragraph 102; Case C-246/86 *Belasco v Commission*; OJ 1994 L/116 Commission Decision of 16.2.1994 *Steel Beams*; Cases IV/33.126 and 33.322 Commission Decision of 30.11.1994, *Cement*, upheld on appeal in Judgment in T-25/95 ECR *Cimenteries CBR v Commission*, at paragraphs 1325 to 1328.
[98]T-25/95 ECR *Cimenteries CBR v Commission*.
[99]T-25/95 ECR *Cimenteries CBR v Commission*, at paragraph 485.
[100]For avoidance of doubt, Article 101(1) is pari materia with section 4 of the Act.
[101]Case 123/85 *BNIC v Clair*.

though the recommendation has no binding effect it will be prohibited if in reality the recommendation is intended or is likely to have the effect of determining the members conduct. Thus, in *NV IAZ International Belgium v Commission*,[102] a recommendation made by an association of water supply enterprises that its members should not connect "unauthorised" appliances (without a conformity label supplied by another Belgian trade association) to the main systems was held to be a binding decision capable of restricting competition within the meaning of Article 101(1) of the TFEU.

## B.3 APPLICATION TO THE PRESENT CASE

143. Each of the 22 Enterprises carries on commercial activities relating to, among other things, the business of underwriting of motor insurance. Each of the 22 Enterprises are therefore "enterprises" within the meaning of the Act.

144. The learned counsel for PIAM, raised the issue that PIAM is not an enterprise and therefore, no decision can be made against PIAM for breach of any of the provisions of the Act, as section 4(2)(a) only applies to horizontal agreements between the 22 Enterprises.

145. In light of the facts set out in **Part 1: B.1**, the Commission concludes that PIAM was formed, and operated throughout the Relevant Period, among other things, to act in the interest of its members and, in particular, to promote the establishment of a sound insurance structure in Malaysia. It is not disputed that PIAM is the national

[102]Joined Cases 96 to 102, 104, 105, 108 and 110/82 *NV IAZ International Belgium v Commission*.

trade association of all licensed direct and reinsurance companies for general insurance in Malaysia.

146. Given the Commission's findings that the 22 Enterprises are enterprises, the Commission therefore concludes that for the purpose of section 4 prohibition, PIAM was an association of enterprises throughout the Relevant Period. The decision of PIAM will be discussed in **Part 3: C.**

## C. AGREEMENT

147. An agreement is formed when parties arrive at a consensus on the actions each party will, or will not, take. The term "agreement" is 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*."[103]

148. As mentioned above, the section 4 prohibition applies not only to an agreement between enterprises, but also a decision by an association of enterprises. In *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten*, Advocate General Leger stated that the concept:

> "*seeks to prevent undertakings from being able to evade the rules on competition on account simply of the form in which they co-ordinate their conduct on the market. To ensure that this principle is effective, Article [101 (1)] covers not only direct methods of co-ordinating conduct*

[103]Section 2 of the Act.

*between undertakings (agreements and concerted practices) but also institutionalised forms of co-operation, that is to say, situations in which economic operators act through a collective structure of a common body."*[104]

149. Additionally, in *Re Roofing Felt Cartel: BELASCO v Commission*[105]*,* an agreement was discovered between members of Belasco (Societe Cooperative des Asphalteurs Belges), intended to ensure control of the Belgian roofing market. The parties had agreed, amongst other things, to adopt a common price list and minimum selling prices for roofing felt, to set quotas for sales on the Belgian market and to advertise jointly their "Belasco" products. The agreement was implemented by resolutions passed at the general meeting of Belasco.

150. The section 4 prohibition applies to both legally enforceable and non-enforceable agreements, whether written or verbal. An agreement may be arrived at in person or by telephone, letters, e-mail or through any other means.[106] An agreement may also consist of either an isolated act or a series of acts or a course of conduct.[107] Such agreements between enterprises may be said to exist when parties adhere to a common plan which limit their individual commercial conduct by determining the lines of their joint action or abstention from action on the market.[108]

[104]Case C-309/99 [2002] ECR I-577.
[105]Case 246/86 [1989] ECR 2117.
[106]Paragraph 2.1 of the MyCC Guidelines on Chapter 1 Prohibition (Anti-Competitive Agreements).
[107]C-49/92P *Commission v Anic Partecipazioni*, at paragraph 81.
[108]AT.40018 *Car Battery Recycling* C (2017) 900 final, at paragraph 186.

151. The form of the agreement is irrelevant. An agreement may even be implied from the participants' behaviour. For an agreement to exist, it is "*sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way*.[109]

152. According to case-law, an agreement may be regarded as having a restrictive object even if it does not have the restriction of competition as its sole aim but also pursues other legitimate objectives.[110] Where an agreement has an anti-competitive object, it does not cease to be characterised as such, merely because it also has an alternative lawful purpose. Moreover, it is not necessary for the Commission to establish that the parties have the subjective intention of restricting competition when entering into the agreement.[111]

## C.1 APPLICATION TO THE PRESENT CASE

*Arguments by the Parties*

153. The facts described in **Part 2** demonstrates that the meetings, surveys, prior circulars and correspondence listed in **paragraph 122** above led to the issuance of Members' Circular No. 132 of 2011 by PIAM on 28.7.2011. The Commission is satisfied that the Parties have come to an agreement on the parts trade discount and labour

[109]Case T-7/89 *SA Hercules Chemicals v Commission* [1991] ECR II-1711, at paragraph 256.
[110]Case C-551/03 P *General Motors v Commission* [2006] ECR I-3173, at paragraph 64.
[111]Joined cases 29/83 and 30/83 *Compagnie Royale Asturienne des Mines SA and Rheinzink GmbH v Commission of the European Communities* at paragraph 26.

rates for PARS workshops via the Members' Circular No. 132 of 2011.

154. Learned counsel for PIAM argued that the conduct of seeking members' views through Members' Circulars No.37 and 109 of 2011 is not by itself an agreement. The learned counsel added that members making their unilateral views known to PIAM for purposes of PIAM's negotiation with FAWOAM is also not an agreement and the Members' Circular No. 132 of 2011 is merely a directive to implement and therefore cannot be construed as an agreement under section 2 of the Act.

155. Other learned counsels also argued that:

(a) Members' Circular No. 132 of 2011 is a mere notification to the insurers with regards to the terms of the agreement, namely the parts trade discount and the minimum hourly labour rates which benefited the repairers;

(b) Members' Circular No. 132 of 2011 came into place pursuant to a directive by BNM to resolve the long-standing dispute between PIAM and FAWOAM for the benefit of the end consumers;

(c) Members' Circular No. 132 of 2011 read together with Members' Circulars No. 37 and No. 109 of 2011 demonstrates that Members' Circular No. 132 is the result of a negotiation process between PIAM and FAWOAM; and

(d) That the word “agreement” in section 2 of the Act was not intended to exclude voluntariness or to enact a strict liability provision. BNM’s intervention and its directives had in effect removed the element of “voluntariness”. The absence of voluntariness on the part of the 22 Enterprises in entering into or following the FAWOAM-PIAM arrangement would therefore mean that there can be no “agreement” under section 4 of the Act.

*The Commission’s Findings*

156. Referring to the arguments raised by the learned counsel, the Commission is of the view that the Members’ Circular No. 132 of 2011 is an agreement which reflects the Parties’ joint intention to conduct themselves in the market in a specific way.

157. The existence of pressure does not affect the existence of an agreement for the purpose of section 4.[112] If such pressure is exerted, the European General Court[113] held, that the unwilling undertaking should raise its complaint that the agreement is entered into under pressure.

158. Therefore, regardless of the reasonings raised by the counsels such as “to resolve the long-standing dispute between PIAM and FAWOAM for the benefit of the end consumers”, the Commission finds that the anti-competitive conduct presents all the

[112]*BMW Belgium*, OJ 1978 L46/33, 41, on appeal Cases 32/78 and 36 to 82/78, *BMW v Commission* [1979] ECR 2435, EU:C:1979:191, at paragraphs 35-37.
[113]Case T-141/89 *Tréfileurope v Commission (‘Polypropylene’)* [1995] ECR II-791, EU:T:1995:62, paragraph 58; and Case T-59/99 *Ventouris Group Enterprises v Commission (‘Greek Ferries’)* [2003] ECR II-5257, EU:T: 2003: 334, at paragraph 90.

characteristics of an agreement within the meaning of section 4 of the Act.

159. The argument raised by learned counsel in relation to BNM's directive will be discussed hereinafter.

## C.2 AGREEMENT BY TRADE ASSOCIATION

160. The definition of "agreement" covers a "decision of an association". In *Felt Roofing, S. C. Belasco and Others v Commission of the European Communities*[114], the Cooperative Association of Belgian Asphalters ("Belasco") in deciding a matter related to an agreement between the members which contained several provisions, including the adoption of a common price list and minimum selling prices for roofing felt supplied in Belgium, the setting of quotas for sale in the Belgian market and penalties for breaches of the agreement. Consequently, the European Commission in its 1986 decision, held that the agreement, together with the measures taken by the members and the Belasco under it to give effect to and supplement the agreement, formed a set of agreements and/or decisions by an association of enterprises which had the object and/or effect of restricting competition.[115]

161. An association that simply makes recommendation to its members will not escape the application of Article 101(1) of TFEU. Even if the recommendation has no binding effect, it will be prohibited if in reality the recommendation is intended or likely to have the effect of

[114]Case 246/86 *Felt Roofing*, *S. C. Belasco and Others v Commission of the European Communities*.
[115]Case 246/86 *Felt Roofing*, S. C*. Belasco and Others v Commission of the European Communities*, at paragraph 7.

determining the members' conduct. Thus, in *NV IAZ International Belgium v Commission*[116], a recommendation made by an association of water supply undertakings that its members should not connect "unauthorised" appliances (without a conformity label supplied by another Belgian trade association) to the main systems was held to be a binding decision capable of restricting competition within the meaning of Article 101(1) of TFEU.

## C.3 APPLICATION TO THE PRESENT CASE

*The Commission's Findings*

162. Regardless of the Parties' view whether the PIAM's decision is mere recommendation or non-binding, the Commission is of the view that PIAM's decision via its Claims Management Sub-committee and the Management Committee in fixing the parts trade discount at 25% for the 6 vehicles makes, namely, Proton, Perodua, Nissan, Toyota, Honda and Naza and 15% for Proton Saga BLM model as well as the labour rates at RM30.00 per hour is regarded as decision by an association which constitutes an agreement under the Act.

163. Therefore, the argument raised by PIAM's learned counsel that no action can be taken against PIAM for breach of any provision of the Act merely on the basis that PIAM is not an enterprise, is unfounded and is hereby dismissed.

[116]Joined Cases 96 to 102, 104, 105, 108 and 110/82 *NV IAZ International Belgium v Commission* ECLI:EU:C:1983:310.

## D. PARTY TO AN AGREEMENT

164. For the purposes of making a finding that an enterprise is a party to an agreement, it is sufficient for the Commission to show that the enterprise concerned participated in meetings at which the agreement was concluded, without manifestly opposing them or publicly distancing itself from what was discussed or agreed.[117] This is because a party which tacitly approves of an unlawful initiative, without publicly distancing itself from its content or reporting it to the administrative authorities, encourages the continuation of the infringement and compromises its discovery.[118]

165. The Commission's Guidelines on Chapter 1 Prohibition (Anti-Competitive Agreements) states as follows:

> *"2.2 An agreement could also be found whereby competitors attending a business lunch listen to a proposal for a price increase without objection. On the same note, competitors should avoid meetings or other forms of communication with competitors particularly when price is likely to be discussed.* ***Mere presence with competitors at an industry association meeting where an anti-competitive decision was made may be sufficient to be later implicated as a party to that agreement.****"*[119] [Emphasis added]

166. The purported anti-competitive agreement would still be caught under the section 4 prohibition even if an enterprise did not possess

[117]Case C-291/98P *Sarrio v Commission* [2000] ECR I-9991, at paragraph 50.
[118]Joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 and C-213/02 P *Dansk Rørindustri and Others v Commission*, at paragraphs 142 and 143; C-194/14 P *AC-Treuhand v Commission*, at paragraph 31 and C-70/12P *Quinn Barlo v Commission*, at paragraph 29.
[119]Paragraph 2.2 of the MyCC Guidelines on Chapter 1 Prohibition (Anti-Competitive Agreements).

the intention to implement or adhere to the terms of the agreement. An agreement may exist even if it is never implemented.[120]

167. In the case of *French Beer*[121], the European Commission affirmed the same as follows:

> *"(64) The fact that (i) some details of the armistice agreement were to be negotiated at a later stage and that (ii) the agreement was never implemented (which is also evident from the Brasseries Kronenbourg in-house presentation entitled "Preliminary objectives 1997-1999") and (iii) consideration of the motives of the author of the memo describing the armistice do not in any way affect the existence of an agreement. Furthermore, Danone and Brasseries Kronenbourg do not dispute the fact that the discussions held on 21 March 1996 resulted in an "armistice."*

## D.1 EXCLUSION OF LIABILITY THROUGH PUBLIC DISTANCING

168. The concept of public distancing intervenes in cartel cases and allows an enterprise that has attended anti-competitive meetings to evade liability by showing that it had "publicly distanced itself" from any such anti-competitive discussions.

169. Parties to the agreement may show varying degrees of commitment. The fact that a party may have played only a limited part in setting up an agreement, or may not be fully committed to its

[120]Case COMP/C.37.750/B2 – *Brasseries Kronenbourg, Brasseries Heineken (French Beer)*, European Commission decision of 29.9.2004, at paragraph 64.
[121]Case COMP/C.37.750/B2 – *Brasseries Kronenbourg, Brasseries Heinenken*.

implementation, or may have participated only under pressure from other parties, does not mean that it is not party to the agreement.[122]

170. In *Westfalen Gassen Nederland BV v Commission*[123], the European Court of First Instance clarified that the notion of public distancing as a means of excluding liability should be interpreted narrowly. Otherwise, it would be impossible to prevent infringements of competition law committed by cartels if it were to be accepted that enterprises may attend such meetings with impunity.

171. Where an enterprise participates in meetings between competitors with an anti-competitive object and does not publicly distance itself from what had occurred and the agreement reached at the meeting, the enterprise may be found to be liable for the agreement.[124]

## D.2 SELECTIVE IMPLEMENTATION OR DISCRETION IN APPLYING THE ANTI-COMPETITIVE AGREEMENT DOES NOT EQUATE TO PUBLIC DISTANCING

172. The Commission had always taken the approach that selective implementation by an enterprise does not mean that it is not a party to an anti-competitive agreement.

173. In *Re Polypropylene*[125], the European Commission held that the fact that on some occasion producers might not have maintained their initial resolve and gave concessions to customers in terms of pricing

[122]Case T-25/95 ECR *Cimenteries CBR v Commission*, at paragraphs 1389 and 2557.
[123]Case T-303/02 ECLI: EU:T: 2006: 374.
[124]Case T-202/98 and T-207/98 *Tate & Lyle plc v Commission* at paragraph 58.
[125]Case 86/398 *Re Polypropylene* [1986] OJ L230/1, at paragraph 85.

which undermined the price initiatives agreed upon earlier does not preclude an unlawful agreement from having been reached.

174. Without publicly distancing themselves from the content of an unlawful initiative or reporting it to the Commission, members of the cartel effectively compromise the discovery of the cartel and encourage its continuation.

## D.3 APPLICATION TO THE PRESENT CASE

*Arguments by the Parties*

175. The learned counsels for the Parties raised the argument that the 22 Enterprises, by selectively imposing and applying the agreed rates at their own discretion, does not amount to a horizontal price fixing agreement. The counsels added that if the element of discretion exists on their part, then there can be no horizontal agreement to price fix.

176. The counsels submitted that the Commission is aware that the insurers were selectively imposing and applying the agreed rates, at their own discretion. As such, there can be no price fixing agreement between the insurers if both the parts trade discount and labour rates were applied by the 22 Enterprises at their own discretion.

177. The learned counsel for Prudential Assurance submitted that its client had neither discussed nor coordinated with the 22 Enterprises before providing its response. The counsel further argued that it is

evident that the Commission is aware that the 22 Enterprises had applied the Members' Circular No. 132 of 2011 on a case-by-case basis or did not apply the same as a default rate. The learned counsel raised the issue that the latter group of insurers applied the agreed rate at their discretion, and a discretionary right implied that there is no agreement between the 22 Enterprises and therefore there is no horizontal agreement. The learned counsel then referred to *Commission v Bayer*[126] which raised the argument that concurrence of wills is a requirement in a horizontal agreement. The counsel also argued that Prudential Assurance merely played a passive role in the agreement.

178. The learned counsels raised the point that the Parties had only agreed to FAWOAM's request to cap the maximum discount which the insurers could obtain from their repairers for spare parts and pay minimum labour rates to repairers to repair vehicles. The learned counsels raised the issue that repair costs were assessed on a case-by-case basis whereby the actual amount payable for labour in relation to motor repairs was subject to the length of time required for repairs to be carried out. It was further stated that for Berjaya Sompo, the parts trade discount was defaulted in the Merimen System but may be changed at the behest of the repairers.

*The Commission's Findings*

179. Referring to the arguments raised by counsel for PIAM, the Commission views that the conduct and behaviour of the Parties

[126]Joined Cases C-2/01P and C-03/11 *Bundesverband der Arzneimittel-Importeure eV and Commission of the European Communities v Bayer AG* ECLI:EU:C:2004:2.

amounted to an agreement. A party who participated in an anti-competitive agreement is not relieved of liability for it merely because it did not implement or fully abide by the agreement. This principle is affirmed in the case of *Re Polypropylene.*[127]

180. In the present case, notwithstanding the fact that not all Parties had attended the meetings where the parts trade discount and labour rates were discussed, the receipt of the Members' Circular No. 132 of 2011 dated 28.7.2011 containing the prospective parts trade discount and labour rates enabled all 22 Enterprises to eliminate in advance any uncertainty about the future conduct of the Parties and to take into account the information disclosed in determining the policy which they intended to follow on the market.

181. Having considered all the evidence, the facts and the arguments raised by learned counsels in this case, the Commission is satisfied that there clearly exists an agreement involving the Parties which culminated in the issuance of Members' Circular No. 132 of 2011. These series of negotiations, correspondences, meetings and the issuance of the circular are cogent evidence of conduct that fall within the ambit of section 4 of the Act. The issue of whether such conduct was a result of a directive by BNM will be dealt in the later paragraphs.

182. The Commission found for a fact that the Parties had not raised the issue of public distancing on their own volition nor did the Parties claim to not possess intention to follow through with the price fixing

[127]Case 86/398 *Re Polypropylene* [1986] OJ L230/1, at paragraph 85.

agreements. The Parties shall therefore be responsible for their participation in the Infringing Agreement.

183. In coming to its decision, the Commission had also referred to the case of *Car Battery Recycling*[128], where the Parties did not always apply identical prices and at times, did not always adhere to the agreement reached but the European Commission nevertheless found that the parties had contravened the proviso of Article 101(1) of the TFEU.

184. It further states that the fact that an undertaking did not take part in all aspects of the anti-competitive conduct or that it merely played a minor role, does not alter nor invalidate the finding relating to its participation in the conduct as a whole, instead it is only to be taken into account, if, and when it comes to the issue of determination of the financial penalty.[129]

185. It is the Commission's view that the arguments that selective implementation and/or discretion in applying the agreement on the part of the 22 Enterprises, does not in any way alter, invalidate nor nullify the findings of the Commission that the Parties had engaged in an anti-competitive agreement.

[128]Case AT.40018 *Car Battery Recycling C* (2017) 900 final.
[129]Case AT.40018 *Car Battery Recycling C* (2017), at paragraph 228.

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

186. Section 4(1) of the Act states that "*a horizontal or vertical agreement between enterprises is prohibited insofar as the agreement has the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services*." In accordance with the plain reading of the section, by reason of the presence of the word "or" in the subsection (1), the Commission interprets the words "object" and "effect" as being in the alternative and are not cumulative requirements. Thus, for the purpose of applying section 4(2) of the Act, it is sufficient for the Commission to establish the object or objects of the anti-competitive agreements.

187. It follows, therefore, that where it is established that an agreement has the object of significantly preventing, restricting or distorting competition, it is unnecessary for the Commission to further prove that the agreement would have an anti-competitive effect in order to establish a finding of infringement of section 4 prohibition.

188. The Commission's Guidelines on Chapter 1 Prohibition (Anti-Competitive Agreements) states the following:

> *"2.13…If the "object" of an agreement is highly likely to have a significant anti-competitive effect, then the MyCC may find the agreement to have an anti-competitive "object".*
>
> *2.14 Once anti-competitive "object" is shown, then the MyCC does not need to examine the anti-competitive effect of the agreement.*

…

3.25…In these situations, the agreements are deemed to "have the object of significantly, preventing, restricting or distorting competition in any market for goods or services."

189. With regards to the deeming provision provided under subsection 4(2) of the Act, in the recent judgment of the judicial review of *Competition Commission v Competition Appeal Tribunal & Ors.*[130], the High Court of Kuala Lumpur held that:

> *"[85] Subsection 4(2)(b) as alluded to earlier, inter-alia states that a horizontal agreement between enterprises which has the object to share market is deemed to have the object of significantly preventing, restricting or distorting competition in any market for goods or services.*
>
> *[86] On this issue of deeming provision, subsection 4(2) is an express statutory provision and a presumption of law enacted by Parliament to assist the Commission in carrying out its duty to prove an infringement of subsection 4(1). It is obligatory to invoke this deeming provision if the prerequisite fact has been established. In the present case, the prerequisite fact is that the agreement has the object to share market."*

190. Similarly, it is well established in European jurisprudence that where an agreement has the object to restrict competition, it is unnecessary to prove that it will produce anti-competitive effects.[131] Further, the European Court of Justice has held that in order to find

[130]Application for Judicial Review No: WA-25-82-05/2016 *Competition Commission v Competition Appeal Tribunal & Ors.*
[131]Case 56/65 *Société Technique Minière v Maschinenbau Ulm* [1966] ECR235, page 249; Case T-148/89 *Tréfilunion v Commission* ECLI:EU: T:1995:68, paragraph 79; Case 123/83 *BNIC v Clair* ECLI:EU:C:1985:33, at paragraph 22; Cases 56 & 58/64 *Consten and Grundig v Commission* ECLI:EU:C:1966:4, at page 342.

a restriction of competition by object, it is not necessary to establish that final consumers are deprived of the advantages of effective competition in terms of supply of price.[132]

## E.1 APPLICATION TO THE PRESENT CASE

*Arguments by the Parties*

191. The learned counsel for PIAM submitted that the alleged agreement does not have any anti-competitive object as there is no harm to consumers in terms of higher prices, lower quality or reduced choices of services in the market. As such, the learned counsel contended that the "by object" requirement has not been satisfied by the Commission. The learned counsel further submitted that the Members' Circular No. 132 of 2011 is not anti-competitive by object and the Commission has erred by adopting a superficial, by object approach, in arriving at the conclusion on the object of Members' Circular No. 132 of 2011, without examining its effects.

192. Learned counsels also raised the following arguments:

(i) The Commission had failed to ascertain whether the object of the alleged agreement is to distort competition and/or to maximise profit of the insurance companies.

[132]Cases C-501/06P *GlaxoSmithKline Services v Commission* [2009] ECR I-9291, EU:C:2009:610, at paragraph 63; Case T-655/11 *FSL v Commission* EU:T:2015:383, at paragraph 537; Case T-180/15 *Icap v Commission* EU:T:2017:795, at paragraph 53.

(ii) The object of the agreement was to prevent retaliatory measures as publicly threatened by FAWOAM against consumers and the purpose of the circular was to prevent insurers from paying lower than a certain amount.

(iii) The Commission failed to furnish its theory of harm.

*The Commission's Findings*

193. The Commission's key consideration is whether the object of the decision, in whatever form, is to influence the conduct or coordinate the activity of the members. In this case, the attempt by insurers to control claims costs particularly spare parts costs by fixing the trade discount as well as the labour rates for repairs enhances the ability of the insurers to use their negotiating and bargaining strength to reduce claims cost as repairers are in no position to reject the approved costs due to their reliance on the insurers.

194. The Commission is of the view that the conduct of PIAM Members in fixing the parts trade discounts and hourly labour rates through Members' Circular No. 132 of 2011 constitutes a restriction by object. The conduct in question, by its nature, is injurious to the proper functioning of competition as it is artificially limiting the commercial negotiations between the individual insurers and repairers from independently determining the parts trade discounts and labour rates for motor repair services. Consequently, this agreement removes uncertainty between the Parties on their future conduct on the market.

195. The Commission is therefore satisfied that the Infringing Agreement between the Parties has its object to fix the parts trade discounts and labour rates with the object to restrict, prevent and distort the market of parts trade discounts and labour rates for PARS workshops throughout the country.

## F. SECTION 4(2)(a) OF THE ACT – HORIZONTAL PRICE FIXING AGREEMENT

196. Section 4(2)(a) of the Act refers to horizontal agreements that "fix, directly or indirectly, a purchase or selling price or any other trading conditions" as an example of an anti-competitive conduct. Price is the main instrument of competition in most markets. In *Steel Abrasives*[133], the European Commission said that "*price-fixing shields cartel members from price competition and transfers wealth from consumers to the conspiring undertakings*."[134] [emphasis added]

197. There are multiple methods in which prices can be fixed in addition to the setting of the prices itself. This may include fixing the elements from the price such as the amount of rebates.[135] In 2016, the United Kingdom Competition and Market Authority ("CMA") issued an infringement decision against Trot Ltd and GB Eye Ltd for colluding on the market for online sales of posters and frames. In this case,[136] both companies agreed not to undercut each other's prices for

[133]Case AT.39792 *Steel Abrasives*, dated 25 May 2016.
[134]Case AT.39792 *Steel Abrasives*, dated 25 May 2016, at paragraph 139.
[135]Case 240/82 *Stichting Sigarettenindustrie and Others v Commission* [1985] ECR 3831, EU:C:1985:488.
[136]Case 50223 *Online Sales of Posters and Frames* dated 12.8.2016.

posters and frames sold on Amazon Marketplace in the United Kingdom. The agreement in question was put in place using an automated repricing software that adjusted each manufacturer's prices automatically to ensure they did not undercut each other. CMA concluded that agreeing with a competing business not to undercut each other's prices is a form of cartel and is illegal under competition law.

## F.1 APPLICATION TO THE PRESENT CASE

*Arguments Raised by the Parties*

198. It is not disputed that the 22 Enterprises are carrying out commercial activities and operating at the same level of the production chain, which is, the sale and provision of motor insurance coverage. The 22 Enterprises are therefore in a horizontal relationship with each other.

199. One of the learned counsels argued strenuously that the Infringing Agreement does not represent an anti-competitive agreement by object because there is no horizontal agreement. There exists, instead, a hybrid vertical-horizontal agreement, that is to say, a horizontal agreement between PIAM members as well as a vertical agreement due to FAWOAM's involvement. The learned counsel also raised the argument that the deeming provision under section 4(2) of the Act should only apply to a purely horizontal agreement.

200. The learned counsel for Etiqa, MSIG and Pacific Insurance submitted that the Infringing Agreement is a joint purchasing

agreement and is therefore not a horizontal agreement by object. Other learned counsels adopted similar arguments and added that the alleged agreement should be viewed as a vertical agreement between FAWOAM and PIAM.

201. The counsels further argued that, even if the alleged agreement is viewed as a horizontal agreement, it cannot be read in isolation to the vertical agreement. Without the vertical agreement, there would have been nothing to communicate to the members of PIAM and thus the Members' Circular No. 132 of 2011 would not exist. Consequently, the counsels submitted that the presumption under section 4(2)(a) of the Act does not apply as the Commission is required to carry out an effect and object analysis of the Infringing Agreement.

202. The learned counsel for Prudential Assurance, argued that there is no horizontal agreement as there was no concurrence of wills and Prudential Assurance had only provided its response to the second survey via PIAM Members' Circular No. 109 of 2011 which was purely administrative. The learned counsel further submitted that the alleged agreement is a vertical agreement, and therefore, the presumption of section 4(2)(a) of the Act does not apply. Consequently, the Commission must therefore prove the anti-competitive effects of the Infringing Agreement.

203. The learned counsel for Berjaya Sompo, Lonpac, MPI Generali, Progressive Insurance, Tokio Marine and Tune Insurance, argued that there is no horizontal agreement, but even if there was one, the agreement did not have the object to fix prices. The learned counsel

argued that the agreement is of a vertical nature entered into between the insurers and repairers through PIAM and FAWOAM.

204. The learned counsel for AmGeneral, Allianz, Liberty and RHB Insurance submitted that there is no horizontal agreement or vertical agreement based on the facts of the case. The learned counsel further submitted that any argument suggesting that there exists a vertical agreement is misconceived. The counsel thereon submitted that no agreement exists between FAWOAM and the 22 Enterprises. The 22 Enterprises did not deal with FAWOAM in relation to the parts trade discount and labour rates and in any event, FAWOAM is not an enterprise.

205. Moreover, the learned counsel for AmGeneral, Allianz, Liberty and RHB Insurance submitted that since neither PIAM nor FAWOAM are "enterprises" nor do they "operate on any level of the production or distribution chain", the definition of "vertical agreement" in the Act cannot be satisfied. In support of this argument, the learned counsel relied on *Gemosz.*[137] In this case, the association of repairers (GEMOSZ) and the repairers were held to have formed a cartel in relation to the fixing labour rates while the insurers (acting individually) were held to only have entered into vertical agreements with the repairers and not horizontal agreement with other insurers.

[137]Case C-32/11, *Allianz Hungária Biztosító Zrt. and Others v Gazdasági Versenyhivatal* EU:C:2013:160.

*The Commission's Findings*

206. The Commission has taken into consideration the arguments raised by the learned counsels. The Commission maintains and asserts that the Commission's case against the Parties is in relation to the conduct of engaging and participating in an anti-competitive horizontal agreement under section 4(2)(a) for the fixing of parts trade discounts and labour rates by the Parties for PARS workshops. The Commission is fully mindful that its investigation reveals that PIAM and the 22 Enterprises had entered into an agreement vide the issuance of its circulars particularly Members' Circular No. 132 of 2011 which has the object to fix the parts trade discounts and labour rates.

207. The Commission reiterates that the parties concerned in the anti-competitive agreement are the 22 Enterprises as evident from the 22 Enterprises supporting the decision of the PIAM Management Committee in the PIAM Members' Circular No. 132 of 2011. Thereon, the possibilities of competitive prices were eliminated by the Infringing Agreement and it is the Commission's findings that FAWOAM was not involved in the issuance of the said Circular.

208. The Commission is satisfied that at the 10th Meeting of Claims Management Sub-committee on 26.7.2011, the following discussion took place:

> *"6. Federation of Automobile Workshop Owners Association of Malaysia (FAWOAM) – Parts Trade Discounts and Labour Rates Per Hour.*

*…*

*The Convenor briefed on the outcome of the meeting FAWOAM on 18th July 2011 for information of those members who did not attend the meeting. It was advised that the agreements on parts trade discount and labour rates will take effect from 1st August 2011. PIAM will notify its members and at the same time FAWOAM and AMLA accordingly. The Secretariat was requested to also inform member companies of the issue raised by FAWOAM at the meeting in regard to betterment and lump sum claim repair approval (item no.4(a) of the minutes under b) above refers)."*

209. The Commission also finds that the Members' Circular No. 132 of 2011 states the following:

*"**Parts Trade Discounts***

*25% for the six (6) vehicle makes namely Proton, Perodua, Nissan, Toyota, Honda, Naza and 15% for Proton Saga Base Line Model (BLM). 26 members – in support, 1 member – the discount should not limited to 25% only.*

***Labour Rates***

*RM30 per hour but open for member companies to apply either Thatcham Repair Times or Opinion Times as currently practice pending review of Thatcham Repair Times.*

*25 members – in support, 2 members – to maintain RM25 per hour."*

210. The Commission has also considered the fact that the minutes of meeting held between PIAM Claims Management Sub-committee and FAWOAM on 14.5.2013 states the following:

*"i) <u>Parts Pricing Discount and Labour Rate</u>*

*…*

*To this, the Sub-committee advised FAWOAM that in view of the Competition Act effective 1st January 2012, it is up to insurers and the workshops to decide the trade discount applicable (cannot fix rates). As such, PIAM will be abstaining on this issue – will not dictate to its members. It was further advised that the PIAM circular issued to PIAM members merely serve as a guideline to insurance companies.*

*FAWOAM had no problem accepting the clarification."*

211. The relevant paragraphs of the Submission Paper by PIAM to the Commission on Standardised Labour Hourly Rate and Trade Discount on Spare Parts Prices for PARS Workshops dated 16.12.2016 reads as follows:

*"<u>PIAM's action post 14.5.2013</u>*

*5.24. We acknowledge that the PIAM's Management Committee should probably have engaged with BNM following the Management Committee's meeting on 14.5.2013 to obtain further instructions. We are unable to explain why BNM was not engaged other than to say that there was an omission on our part.*

*…*

*<u>Insurers' Action post 14.5.2013</u>*

*5.30. The minutes of the Management Committee's meeting of 14.5.2013 would likely have caused some confusion amongst our members. They would presumably have expected a further Circular to give instructions on the previous Circular No. 132 of 2011. Although the minutes were circulated, they do not have the same effect as a Circular. Under the PIAM Constitution, a Circular is equivalent to a Resolution Binding. Minutes of meetings only serve to disseminate information."*

212. Dato' Too Peng Huat in his statement to the Commission as President of the FAWOAM stated as follows:

> *"In 2013, FAWOAM had informed its members that the agreement on the parts discount and labour hourly rate has been annulled. The practice of 25% parts discount and RM30.00 labour hourly rate should have ceased. Afterwards, FAWOAM had informed Mr. Tan Eng Leong, the Technical Advisor of PIAM that the parts discount and labour hourly rate agreement has been terminated. Mr. Tan Eng Leong replied that it was up to the insurance companies to continue applying the parts discount and labour hourly rate practice. In practice, the insurance companies still applying the 25% parts discount and RM30.00 labour hourly rate.*
>
> *In fact, some FAWOAM workshops had contacted the insurance companies to inform them in relation to the termination of the parts discount and labor hourly rate practice. However, the insurance companies had ignored the FAWOAM's notification and stated that PIAM has not informed them on the annulment of the practice."*[138]

213. Additionally, Kong Wai Kwong of FAWOAM in his statement to the Commission states as follows:

> *"Referring to the Notice entitled 'Trade Discounts on Parts Prices and Labour Rates' issued by FAWOAM to all FAWOAM member workshops on 4 July 2013, this was to inform the FAWOAM member workshops that the agreement on parts discount and labour rates was no longer valid. FAWOAM had requested PIAM through Mr. Tan Eng Leong, the then Technical Advisor of PIAM to notify all the insurance companies regarding the termination of the agreement. But, Mr. Tan Eng Leong responded that it was up to the insurance companies whether to remain*

[138]Paragraphs 13 and 14 of Statement of Dato' Too Peng Huat of FAWOAM recorded on 7.11.2016.

*with the practice or to scrap it off. Several FAWOAM member workshops had consulted insurance companies about the termination of the agreement. The responses received were PIAM never inform the insurance companies about the termination of the agreement. Nevertheless, in practice, the insurance companies still persistent in the implementation of the agreed parts discount and labour hourly rate."*[139]

214. The letter issued by FAWOAM to its members dated 4.7.2013 reads as follows:

> *"Members are advised that ALL trade discounts agreed (between 15%-25% for parts), together with the labour rate of RM30.00 per hour* ***SHOULD NOT BE*** *applied into your repair estimates or approvals.*
>
> *Members are hereby advised to determine and negotiate diligently with your perspective Loss Adjusters and Insurers on the trade discounts to be applied on to your repair estimates and/or approvals.*
>
> *The labour rate of RM30.00 per hour currently offered is also* ***NOT APPLICABLE****; and the Association recommends that you determine your own respective labour cost in consultation with your accountants or financial advisers.*
>
> *Please note that the Malaysia Competition Act which came into effect since January 2012 does not allow our trade associations to set or recommend a set of rates or pricings for goods or services sold."*

215. On the other hand, the Commission has also considered the fact that PIAM had issued an email to BNM on 15.12.2014 titled Parts

[139]Paragraph 11 of Statement of Kong Wai Kwong of FAWOAM recorded on 7.11.2016.

Trade Discount – Members' Circular No. 132 of 2011 states as follows:

> *"Dear Azlinda,*
>
> *Our tele-conversation last week on the above matter refers.*
> *Please be advised that the parts discount as stated in the PIAM Members' Circular No.132 of 2011 dated 28 July 2011 is still applicable for PARS workshop. For franchise, the discount varies from Company to Company."*

216. Accordingly, the Commission is of the view that PIAM had communicated to its members the outcome of the discussion between PIAM and FAWOAM in the 10th PIAM Claims Management Sub-Committee Meeting. Subsequently, Members' Circular No. 132 of 2011 was issued and the recommendation by the Claims Management Sub-committee on Parts Trade Discounts and Labour Rates was supported by the majority of the 22 Enterprises.

217. The minutes of the meeting between PIAM Claims Management Sub-committee dated 20.4.2010 reads as follows:

> *"6. <u>Non-Transparency on E-Claim System</u>*
>
> *FAWOAM enquired whether MRC could request the software houses to produce or add on an adjusters' report to show the recommended cost of repairs for purposes of transparency.*
>
> *FAWOAM was advised that adjusters findings is not final and is not binding on insurers. It is subject to insurers approval.*

*Normally insurers when approving the claims would show all the details. As such, should repairers disagree with the part prices, they should sort out the matter with the relevant insurance company.*

*However, FAWOAM could raise to PIAM for assistance but only if the issue cannot be resolved (dead end) with the insurance company concerned."*[140]

218. Accordingly, it is the Commission's finding that the 22 Enterprises being the insurers have the final say in the approval of the cost of PARS repairs. It is important to note that this finding demonstrates that the Parties possess the bargaining power in determining what would be the quantum that the 22 Enterprises were willing to pay and conversely, the amount that may be imposed by repairers. The fact that the parts trade discount and the labour rate are determined by the 22 Enterprises clearly indicate that the same methodology for computing the quantum or figure will be imposed on PARS workshops.

219. The Commission is of the view that the elements of a vertical arrangement arising from the earlier negotiations between PIAM and FAWOAM do not in any way negate or dilute the fact that there was in fact a clear horizontal agreement or concerted practice as evident by Members' Circular No. 132 of 2011 between PIAM members who are in fact competitors operating in the same market. It does not preclude the finding of a horizontal agreement which has

[140]Item 6, page 3 of the minutes of PIAM Claims Management Sub-committee meeting dated 20.4.2010.

its object or effect the prevention, restriction or distortion of competition.

220. Additionally, on 4.7.2013, FAWOAM had issued a notice to all its members stating that the Infringing Agreement is no longer applicable and that its members ought to determine its repair estimates independently.[141] Furthermore, FAWOAM stated that this is in line with the Act.[142] The Commission therefore, takes the stand that FAWOAM had publicly distanced themselves from the Infringing Agreement.

221. Accordingly, the arguments by the learned counsels that the alleged agreement is a vertical or a hybrid between a horizontal and vertical agreement by the 22 Enterprises are hereby dismissed.

## F.2 SECTION 4(2): NON-PROHIBITION CLAUSE

222. The learned counsel for PIAM submitted that section 4(2)(a) does not contain a prohibition and that the provision is merely a deeming provision. The learned counsel further submitted that the classification of the infringement in the Proposed Decision is erroneous as the infringement has not been properly identified.

[141]Notice issued by FAWOAM to its members on Trade Discounts on Parts Prices and Labour Rates dated 4.7.2013.
[142]Ibid.

223. The learned counsels for the 22 Enterprises argued that:

(i) section 4(2)(a) of the Act is not a prohibition section but merely an evidential provision. They further submit that the prohibition is instead found in section 4(1) of the Act;

(ii) the Commission had wrongfully relied on section 4(2)(a) of the Act. They further argue that section 4(2)(a) does not create an infringement or give rise to the prohibition but is rather a deeming provision that creates a rebuttable presumption; and

(iii) the Commission's Proposed Decision is flawed as it refers to a prohibition in section 4(2)(a) of the Act whilst there is no prohibition under section 4(2)(a).

*The Commission's Findings*

224. The contentions raised by the learned counsels that section 4(2)(a) is not a prohibition, does not in any way affect the Commission's findings by virtue of the fact that the infringement in question is a by-object infringement.

225. The Commission through its various decisions[143] had in the past consistently found that horizontal agreements between enterprises as envisaged in section 4(2) subsection (a) until subsection (d) to

[143]*Finding of Infringement under section 40 of the Competition Act 2010 – 15 Members of the Sibu Confectionery and Bakery Association Case; Finding of Infringement under section 40 of the Competition Act 2010 – 24 Ice Manufacturers Case; Finding of Infringement under section 40 of the Competition Act 2010 – Infringement of section 4(2)(a) of the Competition Act 2010 by Cameron Highlands Floriculturist Association; and Finding of Infringement under section 40 of the Competition Act 2010 – Infringement of section 4(2)(b) of the Competition Act 2010 by the Malaysian Airlines System Berhad, AirAsia Berhad and AirAsia X Berhad.*

be prohibited horizontal agreements that are deemed to have the object of significantly preventing, restricting, or distorting competition in any market for goods or services.

226. With regards to the deeming provision under subsection 4(2) of the Act, in the recent judgement of the judicial review of *Competition Commission v Competition Appeal Tribunal & Ors.,* the High Court of Kuala Lumpur held that:

> *"[85] Subsection 4(2)(b) as alluded to earlier, inter-alia states that a horizontal agreement between enterprises which has the object to share market is deemed to have the object of significantly preventing, restricting or distorting competition in any market for goods or services.*
>
> *[86] On this issue of deeming provision, subsection 4(2) is an express statutory provision and a presumption of law enacted by Parliament to assist the Commission in carrying out its duty to prove an infringement of subsection 4(1). It is obligatory to invoke this deeming provision if the prerequisite fact has been established. In the present case, the prerequisite fact is that the agreement has the object to share market."*[144]

227. After considering all the arguments by the learned counsels, the Commission finds that the infringement by the Parties is clearly and unequivocally premised on section 4(2)(a) which provides that an agreement with the object to fix, directly or indirectly, a purchase or selling price or any other trading conditions is deemed to have the object to significantly prevent, restrict or distort competition in the relevant market.

[144]Application for Judicial Review No: WA-25-82-05/2016 *Competition Commission v Competition Appeal Tribunal & Ors.*

228. It is evident from the submissions of counsels that the Parties fully appreciate and understand the allegation made against them in the Commission's Proposed Decision. This is further evident from the submissions provided by the 22 Enterprises in contending that even if it can be established that there was an agreement between insurance companies to fix prices, the exclusion under section 13 of the Act provides that the prohibition contained in section 4(1) does not apply. Therefore, any contention that the Parties are unable to appreciate the Commission's case made against them is hereby dismissed.

229. References to infringement under section 4(2)(a) does not in any way prejudice the interest and the defence of the Parties because the alleged infringement clearly specifies the conduct of the fixing of parts trade discount and labour rates for PARS workshops by PIAM and its members.

230. Throughout the Proposed Decision and in this Decision, the Infringing Agreement, that is the subject matter of investigation has consistently been maintained. Therefore, the arguments put forth by the counsels are accordingly rejected.

## G. EXCEPTION UNDER SECTION 3(4)(a) OF THE ACT

231. Section 3(1) and (2) provides that the Act is applicable to any commercial activity transacted both within and outside of Malaysia if they have an effect on competition in any market in Malaysia.

232. On the other hand, Section 3(3), Section 3(4) of the Act provide for the non-application of the Act whilst Section 13 describe the exclusions. Commercial activities under the Act by virtue of Section 3(4)(a) of the Act means any activity of a commercial nature but excluding "*any activity, directly or indirectly in the exercise of governmental authority*."

233. The term "*any activity, directly or indirectly in the exercise of governmental authority*" is not defined in the Act. The term "exercise of governmental authority" is taken from the World Trade Organisation (Article 1:3(c)) of the General Agreements on Trade in Services which defines this term as "*any activity which is supplied neither on a commercial basis nor in competition with one or more suppliers*."[145]

234. However, acts which are considered as governmental authority was illustrated by the court in the case of *Hii Yii Ann v Deputy Commissioner of Taxation of the Commonwealth of Australia & Ors.*[146], where it was held as follows:

[145]The Annotated Statutes of Malaysia, Competition Act 2010 (Act 712) [Reissue], Issue 169, Lexis Nexis.
[146][2017] 10 CLJ 743.

*"[71] The acts of D1 and D2 were clearly not "commercial" as they are plainly a discharge of functions by the Australian Tax Office (ATO) which is a statutory body carrying out its obligations of administering the taxation laws of Australia. In my view, the character of ATO's function (i.e., tax assessment and collection and determination of tax residency) and the nature of acts flowing from a discharge of that function, cannot in any sense be classified as "commercial". I am impelled to this view because the ATO's discharge of tax functions was something which a private person was not capable of doing, and thus does not have any private law content or character to bring the present matter under the heading of acta jure gestionis (commercial).*

*[74] … In my view, the actions of D1 and D2 are a clear and obvious manifestation of a discharge of functions by the Australian Tax Office (ATO), which is a statutory body tasked with the obligation of administering the taxation laws of Australia. The character of that function (i.e., tax assessment and collection and determination of tax residency) and the nature of acts flowing from a discharge of that function, are not "commercial" activities… As such, the acts of the defendants (ATO) in carrying out their duties under the relevant taxation laws of Australia undoubtedly fall within the category of governmental authority rather than those of a commercial or private action. The actions of the defendants visa- vis the plaintiff, are plainly governmental acts, acta jure imperii, which attract sovereign immunity."*

235. Jacobson J. in *Australian Competition and Consumer Commission v Malaysian Airline System Berhad*[147] stated as follows:

*"[165] In Garuda, I came to the view that, while the ambit of governmental functions may be difficult to define, governmental functions have a public character and depend upon their characteristics as part of the machinery of the state: Garuda at [91]- [95]."*

[147][2010] FCA 757.

236. Since the term “government” in the Interpretations Act 1948 and 1967 refers to “the Government of Malaysia”, it is the Commission’s view that to satisfy the requirement of the exception provided by section 3(4)(a) of the Act, an entity carrying out any activity, directly or indirectly in the exercise of governmental authority must be part of the machinery of the Government of Malaysia and is acting pursuant to a statutory authority in discharging the function that is entrusted to them.

237. For an entity to carry out any activity directly or indirectly in the exercise of governmental authority for the purposes of section 3(4)(a) of the Act, it is the Commission’s view that the entity must be an entity that has been exclusively delegated by the Government of Malaysia to carry out certain activities based on public interest or social objectives.

238. A clear example of an entity carrying out any activity, directly or indirectly in the exercise of governmental authority is BNM. The BNM was formed through the Central Bank of Malaysia Act 2009 (“CBMA”) with the principle objective to promote monetary stability and financial stability conducive to the sustainable growth of the Malaysian economy. The BNM is the regulator for the insurance market by virtue of the IA which was repealed and superseded by the FSA. The BNM’s regulatory power over the insurance market in Malaysia is not disputed.

239. Under the CBMA, BNM by virtue of section 95 is given wide powers to issue guidelines, by-laws, circulars, standards and notices as and when it considers necessary and expedient. Section 201 of the now

repealed IA on the other hand provides BNM with the power to issue guidelines, circulars or notices relating to the conduct of the business and affairs of *inter alia* insurance companies. Section 261 of the FSA meanwhile provides for the power for BNM to issue standards, codes, specifications, notices, requirements, directions or measures in such manner as BNM thinks appropriate and shall be valid for all purposes.

## G.1 APPLICATION IN THE PRESENT CASE

*The Parties' Submissions*

240. The learned counsel for PIAM argued that the fixing of parts trade discounts and labour rates for PARS workshops was the result of BNM's authority and mandate over the Parties and therefore, falls within the scope of the term 'direct exercise of governmental authority' and is exempted from the application of the Act by virtue of section 3(4)(a). The learned counsel also submitted that BNM acted through PIAM when BNM required all insurers to address the dispute in the market for motor repairs. PIAM therefore falls within the scope of 'indirect exercise of governmental authority' since PIAM is "BNM's vehicle"[148] to secure actions from the insurers and PIAM's act of securing the fixing of parts trade discount and labour rates is thus a discharge of BNM's governmental authority.

241. Learned counsels for the Parties further submitted that pursuant to section 22(3) of the IA, BNM possesses the power to direct PIAM

[148] PIAM's Written Representation at paragraph 65, page 18 dated 25.4.2017.

and its members to take or to refrain from taking such actions as BNM may specify. Pursuant to this, BNM has given a direction to PIAM to fix the parts trade discounts and labour rates for PARS workshops.

242. Learned counsels for the 22 Enterprises submitted that BNM is empowered by the IA, CBMA and FSA with governmental authority to direct PIAM and the 22 Enterprises to resolve any conflicts which may impair the insurance industry and therefore, BNM through its letters to PIAM, has given its directive instructing the Parties to resolve the issue of parts trade discount and labour rates with FAWOAM. As such, counsels argued that the direction given by BNM to PIAM are thus issued by BNM in the exercise of its governmental authority.

243. It was further submitted by the learned counsels for PIAM and the 22 Enterprises that BNM as the regulator for the insurance sector exercises its governmental authority through guidelines and circulars issued pursuant to the CBMA and the IA.

244. It was argued that BNM indirectly exercised its governmental authority as the regulator of the general insurance market through the issuance of letters addressed to PIAM whenever BNM requires the insurance companies to address issues facing the general insurance market. The counsels relied on the case of *A&A Equity Sdn. Bhd. v Transnational Insurance Brokers (M) Sdn. Bhd. & Ors.* [2006] 7 MLJ 268 to argue that the court has recognises the fact that BNM's act of issuing direction through letters to insurance companies are regularly performed within its statutory function.

245. The learned counsels further argued that BNM's letters to PIAM dated 4.6.2010, 14.6.2011 and 4.7.2011 to settle the dispute pertaining to the parts trade discount and labour rates between PIAM and FAWOAM amounts to a directive because BNM had considered expanding the scope of the Financial Mediation Bureau to award policy owners with compensation for indirect financial losses due to unreasonable delays in claims settlement arising from disputes between the insurers and the workshops. The Parties submitted that this directive backed by threats of allowing the Financial Mediation Bureau to award compensation to policy holders was made pursuant to BNM's direct or indirect exercise of governmental authority over PIAM and is thus exempted from the application of the Act by virtue of section 3(4)(a).[149]

246. Relying on the cases of *Public Prosecutor v Dato' Seri Anwar Ibrahim (No.3)*[150] and *Dato' Seri Anwar Ibrahim v Public Prosecutor*[151], the counsels for the 22 Enterprises submitted that communication from the authority is a 'direction' if the party receiving the communication felt compelled to obey such direction and that directions maybe communicated in the form of a request, suggestion, instruction or in any other manner so long as that there is a compulsion to obey it.

247. Counsels also argued that BNM through its letter directed the Parties to fix the parts trade discount and labour rates for PARS workshop and such direction was given pursuant to section 22(3) of

[149]Paragraph 3.18 of PIAM Submission Paper dated 16.12.2016.
[150][1999] 2 MLJ 1 at paragraph 122.
[151][2000] 2 MLJ 486 at paragraph 511.

the IA. Reference is made by the counsels to the case of *A&A Equity Sdn. Bhd. v Transnational Insurance Brokers (M) Sdn. Bhd. & Ors.*[152] which held that BNM's act of giving direction through letters to insurance companies was performed within BNM's statutory function.

248. In *A&A Equity Sdn. Bhd. v Transnational Insurance Brokers (M) Sdn. Bhd. & Ors.*[153], BNM issued a directive through a letter on *Skim Pampasan Pekerja Asing* ("SPPA") to insurance brokers pursuant to section 59(2) of the IA. The letter was issued by BNM with the approval of the Minister of Finance. Legal action was taken by A&A Equity on the grounds that BNM did not possess the power to issue such a directive. It was held by the High Court that BNM is an official body with a statutory function to perform, and there is a common law presumption that all its official acts including the act of giving such directions to insurance companies have been regularly performed.

*The Commission's Findings*

<u>Chronology of Correspondence between PIAM and BNM</u>

249. BNM's letter to PIAM dated 18.11.2008 ***(Attached as Annexe 3)*** which was referred to the Commission by the counsel for PIAM in its written submission dated 16.12.2016 reads as follows:

[152][2006] 7 MLJ 268.
[153][2006] 7 MLJ 268.

**"*Imposition of Trade Discount on Spare Parts Prices***

*We refer to the above matter.*

*2. BNM has received complaints from repairers that some insurers have applied unreasonable trade discount on spare parts price to repair vehicles. Such discounting inevitably impairs the quality of repair work and cause delays in claim settlement as repairers' margin erodes and disputes arise to reach an agreed repair sum.*

*3. …*

*4. In this regard, Persatuan Insurans Am Malaysia (PIAM) is advised to remind its members to be more judicious in applying trade discounts to spare parts prices and be guided by the assessment of licensed adjuster whenever required. This is to ensure fair and equitable basis in claims handling to protect the interest of policy owners and the public.*

*Sekian."*

250. BNM's letter to PIAM dated 4.6.2010 ***(Attached as Annexe 4)*** reads as follows:

***"Issues Raised by the Federation of Automobile Workshop Owners Association of Malaysia***

*We refer to …*

*2. Bank Negara Malaysia (the Bank) is of the view that the issues raised by FAWOAM relates to the commercial relationship and trade issues between PIAM's Approved Repairers Scheme (PARS) workshops and the insurers, and as such, it should be resolved by the two parties concerned. Based on the minutes of the meeting, the Bank would like to see a greater show of*

*commitment on the part of the insurers to engage with PARS workshops in providing satisfactory clarifications and/or solutions to the issues raised by them, specifically, amongst others, the following issues: -*

*(i) Standardization of labour rate*

- *PIAM should be able to determine whether there is a basis for PARS workshops' complaint on low labour rate paid by insurers by assessing the available information in the MRC database.*
- *PIAM to assess on the reasonableness of PARS workshops' request for a higher rate and whether there is a need to introduce standardized labour rate for PARS workshops.*

*(ii) Unfair trade discount on spare parts prices.*

- *PIAM to look into the complaint of unreasonable application of trade discounts on spare parts prices by its members. We understand that information on the current practice on application of trade discounts by insurers is also available in the MRC database.*
- *As mentioned in the Bank's letter dated 18 November 2008 to PIAM, insurers should be more judicious in applying trade discounts to spare parts prices and be guided by the assessment of licensed adjuster whenever required.*

*(iii) …*

*4. In the interest of the motor insurance industry, PIAM should be proactive in addressing issues which would contribute towards the improvement of claims and repair practices and develop good working relationships with all stakeholders.*

*5. Please update the Bank on the progress of the matter.*

*Sekian."*

251. The Minutes of Meeting dated 1.9.2010 between BNM with PIAM, MTA, AMLA, MRC and FAWOAM on the "Recent Announcement by FAWOAM on Motor Repair Costs" reads as follows:

*"Meeting with PIAM, MTA, AMLA, MRC and FAWOAM on the Recent Announcement by FAWOAM on Motor Repair Costs*

| ***ITEM*** | ***SUBJECT*** | ***ISSUES DISCUSSED / DECISIONS*** | ***NEXT STEP*** | ***BY WHOM*** |
|---|---|---|---|---|
| *1.* | ***Bank Negara Malaysia's position*** | • *The Chairman welcomed the representative from the motor insurance industry to the meeting which was organised to facilitate discussion on issues raised by FAWOAM.*<br><br>• *The Chairman clarified that trade issues should rightfully be resolved by the market players without the Bank's intervention. The Bank would only intervene if trade issues were not resolved effectively resulting in inappropriate market conduct detrimental to consumers and image of the regulated industry.*<br>• *…"* | | |

252. BNM's letter to PIAM dated 14.6.2011 ***(Attached as Annexe 5)*** is reproduced as follows:

***"Parts Trade Discount and Labour Rate per Hour"***

*We refer to…*

*2. We note that PIAM and FAWOAM will be meeting on 17 June 2011 to discuss and disagree on the following issues:*

*(i) The maximum trade discount to be imposed for Proton and Perodua models including Proton Saga BLM models. We note that FAWOAM is agreeable with PIAM's proposal to fix the trade discount for Toyota, Honda, Nissan, Kia and Hyundai models at 25%; and*

*(ii) The minimum labour hour rate and the application of Thatcham Times System and Opinion Time for parts replacement and repair work.*

*3. As you are aware, the trade discount and labour rate issues have been raised at the first meeting between the various parties facilitated by the Bank on 1 September 2010. Since resolution to these issues would contribute to improvement in claims settlement practices, the Bank would like to urge PIAM to resolve these issues amicably and expediently. In this regard, kindly inform the Bank on the final agreement between PIAM and FAWOAM on the above issues by 30 June 2011.*

*4. If the above issues are not resolved expediently with FAWOAM, the Bank may consider expanding the scope of the Financial Mediation Bureau to award policy owners' indirect financial losses due to unreasonable delay in claims settlement arising from disputes between the insurers and the panel workshop.*

*Sekian."*

253. BNM's letter to PIAM dated 4.7.2011 ***(Attached as Annexe 6)*** states:

***"Parts Trade Discount and Labour Rates***

*We refer to…*

*2. As you are aware, the parts trade discounts and labour rate issues have protracted since September 2010 and the Bank had informed PIAM to reach a final agreement on the issues by 30 June 2011. However, we note that PIAM and FAWOAM have not yet to resolve these issues, thus resulting in unreasonable delay in claims settlement arising from disputes between insurers and panel workshops. Therefore, PIAM and FAWOAM are required to conclude the negotiation on parts trade discounts and labour rate latest by 15 July 2011.*

*3. …*

*4. … Kindly inform the Bank on the final agreement between PIAM and FAWOAM on trade discounts and labour rate…*

*Sekian."*

254. Distinguishing the facts of the *A&A Equity* case with the current case at hand, the Commission finds that the letter issued by BNM in *A&A Equity* was a letter that was issued by BNM with the approval of the Minister of Finance pursuant to section 59(2) of the IA. Learned counsels for the Parties on the other hand argued that the letters were issued by BNM to the Parties pursuant to section 22(3) of the IA. Section 22 of the IA reads as follows:

***"Membership of Association***

***22.*** *(1) No licensee shall carry on its licensed business unless it is a member of an association of –*

***...***

*(b) general insurers for general insurance business;*

*The constituent documents of which have been approved by the Bank.*

*(2) No amendment shall be made to the constituent documents of an association without the prior written approval of the Bank.*
*Penalty: Five hundred thousand ringgit. Default penalty.*

*(3) The Bank may direct an association to take, or refrain from taking, such action as it may specify."*

255. The marginal note to section 22 of the IA reads and this section only deals with "Membership of Association". Thus, the Commission in interpreting the provision of section 22 takes the view that the IA merely confers upon BNM the power to issue direction to an association under section 22(3) of the IA insofar as they are limited to matters relating to the Constitution and membership of the association. Therefore, BNM has no power to issue a direction to PIAM to fix the parts trade discounts and labour rates under section 22(3) of the IA.

256. If Parliament had intended for BNM wide powers to impose any direction to associations, Parliament would have enacted a provision similar to section 201 of the IA to specifically grant BNM wide powers to give any direction to the association of life insurers,

association of general insurance, association of insurance brokers and association of adjusters.

257. Even on the hypothesis that BNM has the power to issue a directive pursuant to section 22(3) of the IA, the Commission takes the position that the letters relied upon by the Parties do not amount to a directive. The Commission is satisfied that the letters dated 4.6.2010, 14.6.2011 and 4.7.2011 were not issued by BNM to PIAM pursuant to the IA or the CBMA. The letters are merely letters from BNM urging both PIAM and FAWOAM to resolve the issue of parts trade discount and labour rates for PARS workshops. The Commission would go so far as to say that even if a direction was issued by BNM in its letters to PIAM, the direction was merely for PIAM to settle its issues with FAWOAM amicably and expediently and not a direction for PIAM and its members to fix the parts trade discount and labour rates for PARS workshops.

258. By looking at the letters and minutes of meetings listed above in its entirety, it is clear that BNM as per its letter to PIAM dated 18.11.2008 was fully aware, since 2008, of the fact of the dispute on parts trade discounts between PIAM and FAWOAM. Following FAWOAM's complaint, BNM had, in 2008, advised PIAM to remind its members to be more judicious in applying the spare parts price. In 2010, as stated in its letter dated 4.6.2010, BNM took the position that the issue facing PIAM and FAWOAM relates to their commercial relationship and that trade issues between the PARS workshop and the insurance companies ought to be resolved amongst themselves.

259. The minutes of the meeting held on 1.9.2010, states that the meeting was organised by BNM to facilitate discussions between PIAM and FAWOAM on the issues raised by FAWOAM. The Chairman of the meeting also reiterated BNM's position that the trade issues between the workshops and the repairers should rightfully be resolved by the market players without BNM's intervention.

260. In its letter to PIAM dated 14.6.2011, BNM again urged PIAM to resolve the issue of parts trade discount and labour rates with FAWOAM amicably and expediently. BNM also required PIAM to update the BNM on the conclusion of the issues between PIAM and FAWOAM by 30.6.2011. Finally, BNM on 4.7.2011 required both PIAM and FAWOAM to conclude negotiations on parts trade discount and labour rates by 15.7.2011. PIAM and its members then proceeded to adopt the Members' Circular No. 132 of 2011 which had fixed the parts trade discount and labour rates on 28.7.2011.

261. Based on the correspondences between PIAM and BNM from 2010 to 2011, the BNM viewed that the issue between the concerned Parties was to be resolved amicably as it was a commercial matters and trade issue. Acting pursuant to its role as the regulator of the insurance market, BNM on 1.9.2010 proceeded to hold a meeting with the representatives from both PIAM and FAWOAM on the issue at hand. This finding is further supported by BNM's letter to the Commission dated 1.7.2015 ***(Attached as Annexe 7)*** which is reproduced as follows:

*"**Motor Parts Trade Discounts and Labour Rate***

*We refer to the meeting held on 3 June 2015 between Bank Negara Malaysia (the Bank) and Malaysia Competition Commission (MyCC) on the above.*

*2. As informed during the meeting, the parts trade discounts and labour rate currently adopted by insurers were based on an agreement reached between Persatuan Insurans Am Malaysia (PIAM) and the Federation of Automobile Workshop Owners Association of Malaysia (FAWOAM) in July 2011, following the Bank's facilitation to assist in resolving the prolonged dispute between the two parties.*

***Background***

*3. …*

*4. FAWOAM had in early 2010, highlighted to the Bank, among others, its dissatisfaction over the imposition of unreasonable trade discounts…paid to PIAM Approved Repairers Scheme (PARS) Workshop. As these issues involve commercial and trade relationship between PARS workshops and insurers, PIAM was requested to find an amicable solution to these issues together with the relevant stakeholders. However, an agreement could not be reached and FAWOAM's dissatisfaction was published in the newspapers in July 2010. Copies of the press articles are attached for MyCC's reference.*

***Meetings between various stakeholders***

*5. Arising from the above, the Bank had stepped in to facilitate two meetings attended by PIAM, the Malaysia Takaful Association (MTA), the Association of Malaysian Loss Adjusters (AMLA), MRC (attended one meeting) and FAWOAM on 1 September and 21 December 2010…*

*6. PIAM had subsequently issued a member's circular on 28 July 2011 following FAWOAM's agreement on the parts trade discounts and labour rates at a meeting held on 18 July 2011…*

*7. The issues on unreasonable trade discounts on parts prices and low labour rate were raised again by FAWOAM following several months of implementation. FAWOAM was advised by the Bank to engage with PIAM to resolve the matter amicably as the issues relate to the commercial relationship and trade issues between PARS workshop and the insurers.*

***Protecting consumer interest***

*8. …*

*Sekian."*

262. The role played by BNM throughout the entire process of negotiation was merely to act as a facilitator between PIAM and FAWOAM. BNM acting pursuant to its mandate as the regulator of the insurance market had discharged its duties by monitoring the settlement and negotiation process between PIAM and FAWOAM. This can clearly be seen when BNM took note of the meeting between PIAM and FAWOAM and requested for updates from PIAM regarding the outcome of its negotiation with FAWOAM.

<u>BNM's Afterthought</u>

263. Acting pursuant to the Memorandum of Understanding between BNM and the Commission dated 5.6.2014, the Commission began engaging with BNM on the imposition of the parts trade discounts and labour rates by PIAM on PARS workshop since 3.6.2015, as

evidenced from the letter by BNM to the Commission dated 1.7.2015 quoted in **paragraph 261** above. Subsequently, the Commission vide letter dated 21.7.2016 informed BNM that the Commission is currently investigating the conduct of general insurance providers, in respect of the fixing of parts trade discounts and labour rates.

264. BNM in its reply letter to the Commission dated 11.8.2016 ***(Attached as Annexe 8)***, took note of the Commission's investigation on the complaint relating to the fixing of parts trade discounts and labour rates involving PIAM and all the licensed general insurers. In the same letter, BNM provided to the Commission with the details of the contact officer from BNM duly assigned to deal with the Commission in its investigation.

265. In response to BNM's letter dated 20.4.2016 ***(Attached as Annexe 9)***, the Commission's reply letter dated 21.7.2016 ***(Attached as Annexe 10)*** is reproduced below:

> *"**INVESTIGATION ON MOTOR PARTS TRADE DISCOUNTS AND FIXED LABOUR RATE**.*
>
> ---
>
> *Reference is made to the above matter and your letter dated 20 April 2016.*
>
> *2. The Competition Commission ("Commission") has initiated an investigation on a complaint received from Mr. Too Peng Huat, the President of Federation of Automobile Workshop Owners' Association of Malaysia (FAWOAM) on 1 April 2015. The complaint is in relation to an allegation of fixing parts trade discounts and labour rate for the General Insurance Association of Malaysia ("PIAM") Approved Scheme*

*Workshop ("PARS") in respect of six (6) vehicle makes namely Proton, Produa, Nissan, Toyota, Honda and Naza.*

*3. The parties who are subject to the investigation are the PIAM and all current licensed insurance and reinsurance companies for general insurance in Malaysia.*

*4. ...*

*5. The Commission is currently conducting an in-depth investigation on this matter. Therefore, the Commission would greatly appreciate BNM's response in regard to the above soonest."*

266. On 12.1.2017, the Commission received a letter from BNM, which *inter alia* states that the fixing of the parts trade discounts and labour rates for PARS workshops by PIAM and its members was the result of a directive by BNM. The relevant parts of the letter are extracted below: ***(Attached as Annexe 11)***

*"**Motor Repairs and Fair Settlement Practices***

*Following the last meeting held between the Malaysia Competition Commission (MyCC) and Bank Negara Malaysia (the Bank) on 10 November 2016, we wish to apprise Y.Bhg Tan Sri of recent developments to assist MyCC in concluding its investigation on the above matter.*

*2. We have recently been informed by Persatuan Insurans Am Malaysia (PIAM) that following a meeting convened by the investigation team of MyCC with the chief executive officers of insurance companies late last year, the investigation team expects to finalise its report which will be submitted to the members of the Commission in mid-January 2017. We have also been separately advised by external auditors of insurance companies that developments in the investigation by MyCC may delay the finalisation of the*

*audited financial statements of insurance companies or may call for their qualification.*

*3. We have, through several letters and meetings with MyCC, provided the context of the industry agreement which observes specified parameters for trade discounts of motor parts prices and labour rates for repairs of motor vehicles. To further assist MyCC on this matter, we recap below the salient developments leading and pursuant to the agreement: -*

- *In addressing the needs of the motoring public for efficiency and quality service in vehicle repairs, the agreement was a result of the Bank's direction for PIAM and FAWOAM to develop a solution to the dispute that occurred regularly between members of both association..."*

267. On 13.2.2017, BNM again issued a further letter to the Commission reiterating its position that the fixing of the parts trade discounts and labour rates was the result of BNM's directive to PIAM. It is to be noted that the Proposed Decision was issued by the Commission on 22.2.2017. The relevant parts of BNM's letter to the Commission dated 13.2.2017 ***(Attached as Annexe 12)*** is as follows:

"***Malaysia Competition Commission's (MyCC) Investigation on Persatuan Insurans Am Malaysia (PIAM) and General Insurers***

*The Bank wishes to record its thanks to MyCC for consulting with Bank Negara Malaysia (the Bank) on 6 February 2017 and providing the Bank an opportunity to share the implications of MyCC's proposed action against PIAM and the general insurers. As agreed at the meeting, we wish to convey to the Commission the Bank's proposal for a concrete and expedient resolution to this matter.*

*2. The Bank has through several letters and meetings with MyCC provided the context of the industry agreement which observes specified parameters for trade discounts of motor parts prices and labour rates for repair of motor vehicles. We have also expressed the need for a smooth transition towards liberalisation of the motor tariffs which can only be achieved with the Bank's intervention through directives or in facilitating the discussions between PIAM and FAWOAM. The industry agreement is therefore the direct outcome of a directive of the Bank...*

*3. ...*

*Sekian, terima kasih."*

268. Based on the correspondence between BNM and the Commission since July 2015, there is clear evidence to show that BNM has been duly notified and has full knowledge of the Commission's investigation into the conduct of fixing of the parts trade discount and labour rates for PARS workshops by PIAM and its members. From the meetings and correspondence between the Commission and BNM between 2015 and 2016, it is also apparent that BNM viewed the issues between PIAM and FAWOAM as the issues concerned the "commercial and trade relationship" between FAWOAM and the insurers which ought to be resolved by the parties without BNM's intervention.

269. Even though, BNM has the knowledge of the Commission's investigation against the Parties, BNM has never taken the position, prior its letter to the Commission dated 12.1.2017 and 13.2.2017, that the fixing of the parts of the parts trade discounts and labour rates was the result of BNM's directive to PIAM. If there was indeed any direction given by BNM to the Parties to fix the parts trade

discount and labour rates over PARS workshops, BNM had every opportunity to notify the Commission during the initial stages of investigations or at the very least, whilst investigations were still ongoing and not after BNM had been informed of the outcome of investigation since by then, investigation was completed and a Proposed Decision was about to be issued by the Commission.

270. It is therefore cognizable from the evidence that no direction to fix the parts trade discounts and labour rates over PARS workshops was ever given by BNM to PIAM and its members. If a direction to fix the parts trade discounts and labour rates was indeed issued by BNM to PIAM, it should have been made clear to the Commission at the outset of the Commission's investigation, and not as an afterthought after the Commission has concluded its investigation.

271. Be that as it may, it is clear that price fixing agreements involving the Parties fall within the jurisdiction of the Commission. Learned counsels for the Parties, in relying on section 124(1) of the FSA argue that their conduct of fixing the parts trade discounts and labour rates over PARS workshop falls within the jurisdiction of BNM and thus is excluded from the application of the Act. Section 124(1) of the FSA states as follows:

> *"Prohibited business conduct*
>
> ***124.*** *(1) A financial service provider shall not engage in any prohibited business conduct set out in Schedule 7."*

272. In any event, section 124(5) of the FSA clearly provides as follows:

> *"Prohibited business conduct*
>
> ***124.****(1) …*
>
> *(5) In relation to any complaint from an aggrieved person involving the prohibited business conduct set out in paragraph 5 and 6 of Schedule 7, the Bank shall refer such complaint to the Competition Commission."*

273. Paragraph 6 of Schedule 7 to the FSA reads as follows:

> *SCHEDULE 7*
> *[Subsection 124(1)]*
> *LIST OF PROHIBITED BUSINESS CONDUCT*
>
> *…*
>
> *6. Colluding with any other person to fix or control the features or terms of any financial service or product to the detriment of any financial consumer except for any tariff or premium rates or policy terms which have been approved by the Bank."*

274. It is not stated in the FSA or the Act that the Commission is only permitted to investigate anti-competitive behaviour of insurance companies with the prior approval of BNM. It is clear from the wordings of section 124(5) read together with paragraph 6 of Schedule 7 of the FSA that conduct that amounts to an agreement to fix or control the features or terms of any financial service or product to the detriment of the financial consumer should be referred to the Commission.

Whether the PIAM is proxy to BNM

275. The Commission has also considered the arguments raised by learned counsel on whether PIAM was acting as proxy to BNM in the general insurance market, performing an activity directly or indirectly in the exercise of governmental authority exempted by section 3(4)(a) of the Act when it proceeded to negotiate the fixing of the parts trade discounts and labour rates for PARS workshops between its members with FAWOAM.

276. It is therefore important to consider, whether PIAM can be considered to be a part of the machinery of the Government of Malaysia for it to directly or indirectly carry out any activity in the exercise of governmental authority. With respect, it is our view that it is far-fetched for the Parties to assert that PIAM acted directly or indirectly in the performance of governmental authority.

277. The learned counsel for PIAM submitted that PIAM is an association of general insurers that was established in 1978 under the IA and is required by law to be an association of the general insurers pursuant to section 22 of the IA. The Commission views the argument that PIAM is an association that was established pursuant to the IA is without merit as there is nothing in the IA which provides for the establishment of PIAM.

278. PIAM was established in 1978 before the IA was enacted. It is clear that PIAM is not an association established pursuant to any insurance related legislation. PIAM is only an association of general insurers established in 1978 registered with the Registrar of Society

("ROS") pursuant to Societies Act 1966. PIAM's members by virtue of section 22(1) of the IA comprises companies holding the requisite licence granted by BNM to carry out the business of general insurance in Malaysia.

279. Learned counsels of the Parties argued that PIAM falls within the scope of "indirect exercise of governmental authority" since PIAM is BNM's vehicle to secure the actions from insurers and thus, PIAM is a proxy regulator of BNM in the general insurance market. The Commission is fully mindful that PIAM is not an association that came into existence by virtue of any legislation. PIAM has its own Constitution of which the terms are not dictated or mandated by any statute but has been approved by BNM pursuant to section 22(1) of the IA.

280. The Commission is mindful that PIAM is not mandated by any law to act as the proxy regulator on behalf of the government. A very clear example of an association that is empowered to act as a proxy regulator to the government is the Fisherman's Association ("NEKMAT"). NEKMAT is an association of fishermen established under the Fisherman's Association Act 1971 ("FAA"). The objective for the creation of NEKMAT is specifically provided by section 5 of the FAA. NEKMAT is subjected to the supervising authority of officers appointed by the Minister of Agriculture by virtue of section 9 of FAA. Section 12 of the FAA specifically provides for the composition of the management of NEKMAT and also specifically provides for the powers and functions of NEKMAT.

281. In contrast to NEKMAT, PIAM is not a creature of statute nor are the terms of PIAM's Constitution made pursuant to the dictates of any insurance-related legislation. As for the Constitution of PIAM, it was merely approved by BNM as required under section 22(1) of the IA. Unlike NEKMAT, PIAM does not come under the direct supervising authority of BNM or other ministries within the machinery of the Malaysian Government as there is nothing in the CBMA and IA that accords BNM or the Ministry of Finance the power to supervise PIAM's conduct.

282. Article 25 of PIAM's Constitution reads as follows:

> *"**25. AMENDMENT OF CONSTITUTION***
>
> *… The amendments shall not come into force without prior approval of the Bank and the Registrar of Society."*

283. Upon perusal of PIAM's Constitution, it is evident that there are only two instances that are specified in PIAM's Constitution in which BNM's approval is required for conduct undertaken by PIAM. Firstly, when PIAM is desirous of implementing any tariff, rules, regulations, by-laws and tariff policy and secondly, when PIAM is amending its Constitution. In all other aspects, PIAM and its members are free to decide their own conduct in accordance with their Constitution.

284. The power of PIAM and its members to adopt circulars can be found in Article 16 of PIAM's Constitution which reads as follows:

***16. <u>DECISIONS BY CIRCULAR</u>***

*A. It shall be competent for the Management Committee to submit any proposals other than those specified hereunder, to Members by publication in a circular. Any objection must be submitted to the Secretary within 14 days from the date of the circular. If there is no objection the Management Committee shall further notify Members stating the proposals to be a decision of the Association. Any such decision shall then be deemed to be Resolution Binding…*

285. Upon reading of the Article 16(A) of PIAM's Constitution, the Commission is satisfied that PIAM and its members are free to decide on any proposal which they may decide to adopt by way of issuance of a circular. No consent or approval from BNM is required before they can adopt a decision by circular.

286. If Parliament had intended for PIAM to be BNM's proxy regulator over the general insurance markets, Parliament would have enacted a law similar to the FAA, or PIAM would have been expressly appointed as BNM's proxy over the general insurance market. Based on its Constitution, it is clear that PIAM is not a proxy of BNM. PIAM is instead merely a trade association that acts as BNM's eyes and ears over the general insurance market.

287. For an entity to be considered to be part of the machinery of the government, the entity must be under the control of the government. What amounts to control exercised by the government over entities claiming to be agencies of the government was the central issue in

the case of *Australian Competition and Consumer Commission v Malaysian Airlines System Berhad and Another.*[154]

288. The Australian Competition and Consumer Commission ("ACCC") had filed proceedings in the Federal Court of Australia alleging that the respondents, Malaysian Airline System Berhad ("MAS") and Malaysia Airlines Cargo Sdn. Bhd. ("MAS Cargo") had entered into price fixing arrangements in relation to fuel surcharges in contravention of the Trade Practices Act 1974. The respondents then applied for the proceeding to be set aside on the basis that they were agencies or instruments of the Government of Malaysia and immune from the jurisdiction of the Australian court. The Court found that, the Malaysian Government did not directly own shares in MAS, but indirectly held shares in MAS through three government-linked investment companies.

289. Jacobson. J held that, with reference made to *Australia Competition and Consumer Commission v P.T. Garuda Indonesia Ltd,*[155] an agency or instrumentality of the state is one which is subject to the necessary degree of control and which performs governmental functions. Hence, Jacobson J. was of the view that for MAS to be considered as an agency of the Government of Malaysia, the Malaysian Government must have the necessary degree of control over MAS. For the Malaysian Government to have the necessary degree of control over MAS, it must be shown that the Malaysian Government must have day-to-day control over MAS. There was no evidence that the Malaysian Government had day-to-day control

[154][2010] FCA 757.
[155][2010] FCA 551.

over MAS. There was also no evidence that the Malaysian Government controlled the composition of the Board or that the Board was accustomed to act in accordance with the Government's directions since the Articles of Association of MAS also provides for the business of MAS to be managed by its directors.

290. The application made by MAS was rejected by the court as the Malaysian Government did not have the necessary degree of control over MAS since the Malaysian Government only had an indirect ability to exercise control over MAS through the government linked company, which it did not exercise.

291. Guided by the case of *Australian Competition and Consumer Commission v Malaysian Airline System Berhad and Another*[156], it is the Commission's view that for PIAM to be considered a proxy of BNM in the general insurance market, BNM must possess the necessary degree of control over PIAM. The Parties have failed to establish as a matter of fact that BNM has the necessary degree of control over PIAM. It is also not established that BNM has day-to-day control over the affairs of PIAM. It is therefore the Commission's finding that PIAM as an association is not under the control of the Malaysian Government.

292. The Parties submitted that they were induced to fix the parts trade discounts and labour rates by both BNM and FAWOAM. It was argued that the Parties felt compelled to fixing the parts trade discount and labour rates when BNM issued letters backed by the

[156][2010] FCA 757.

threat to expand the scope of the Financial Mediation Bureau to award policy owners' compensation for indirect financial losses due to unreasonable delays in claims settlement arising from disputes between the insurers and workshops.

293. The Parties further argued that they were compelled into fixing the parts trade discount and labour rates when BNM imposed a deadline for PIAM and FAWOAM to settle their trade dispute. The inducement from FAWOAM to fix the parts trade discounts and labour rates on the other hand was given through FAWOAM's conduct in the meetings held between PIAM and FAWOAM.

294. It is the Commission's finding that PIAM nevertheless acted on their own initiative when they agreed to fix the parts trade discount and labour rates for PARS workshops. This can be seen in PIAM's act of issuing the Members' Circular No. 37 of 2011 and Members' Circular No. 109 of 2011 seeking its members' approval and support for the parts trade discounts and labour rate recommended by PIAM' Claims Management Sub-Committee Meeting. The members' approval for the fixing of the parts trade discount and labour rates for PARS workshops subsequently culminated in the Members' Circular No. 132 of 2011.

295. As decided in *Hii Yii Ann v Deputy Commissioner of Taxation of the Commonwealth of Australia & Ors.*[157] for an entity to perform tasks assigned by the government it must be shown that the tasks are assigned by the government and is a legal obligation.

[157][2017] 10 CLJ 743.

296. The power to enact laws with respect to finance is vested in the Parliament. Parliament enacted the CBMA in order to make BNM the Central Bank of Malaysia (section 4 of the CBMA) and the banker and financial agent of the Government of Malaysia (section 69 of the CBMA). BNM is required by the CBMA to act under the direction of the Minister of Finance who is charged with the responsibility for the finance of the nation.

297. Based on the reasoning above, it is clear that one of the functions of the Government is to regulate the financial sector. The Government of Malaysia does so through the Ministry of Finance and BNM. BNM is the regulator of the general insurance market by virtue of FSA and IA. The Government of Malaysia had never, at any material time, given any mandate to PIAM to regulate the general insurance market.

298. Based on the facts derived from the correspondence between BNM and PIAM, PIAM as an association of general insurers is not a regulator of the general insurance market. Instead, PIAM merely acts as a bridge or link between BNM and the general insurance companies. This is evident from the conduct of BNM when BNM issued a letter addressed to PIAM after receiving FAWOAM's complaints on the conduct of the insurance companies.

299. Referring to the case *Hii Yii Ann*, the Commission takes the view that PIAM is not a statutory body and therefore was not discharging its statutory functions in deciding the parts trade discount and labour rates. Furthermore, the parts trade discount and labour rates are commercial activities. Therefore, the Infringing Agreement by

PIAM and the 22 Enterprises does not fall within the exclusion of section 3(4)(a) of the Act.

300. PIAM is only empowered by its Constitution to take disciplinary action against its members who breach any of PIAM's articles, tariffs, rules, regulations, agreements and by-laws. There is nothing in the law or in the PIAM's Constitution which allows it to enact coercive rules binding on the public generally for which the offenders might be punished.

301. After considering the learned counsels' submissions, the Commission is of the opinion that the Parties are not part of the machinery of the Government nor was PIAM exclusively delegated by the Government of Malaysia to act as BNM's proxy. It is the Commission's finding that the Parties are not performing any activity, directly or indirectly in the exercise of governmental authority when it proceeded to fix the parts trade discounts and labour rates for PARS workshops.

302. The Commission is therefore of the view that the Infringing Agreement is not exempted from the application of the Act by virtue of section 3(4)(a).

## H. EXCEPTION UNDER SECTION 3(4)(b) OF THE ACT

303. An enterprise is said to be operating on the basis of the principle of solidarity when benefits are available to individuals not by reference to their economic contributions but in accordance with their needs.

304. In deciding whether the degree of solidarity precludes economic activity, the case law considers the freedom of the scheme to determine the level of contribution and benefits payable.[158] In *Poucet v Assurance Générales de France*[159] the European Court of Justice concluded that the French regional social security offices administering sickness and maternity insurance schemes to self-employed persons were not acting as enterprises. In *Poucet,* the benefits payable was identical for all recipients, contributions were proportionate to income, the pension rights were not proportionate to the contributions made and schemes that were in surplus helped to finance those which had financial difficulties; the schemes were based on the principle of solidarity.

305. Additionally, in the case of *Cisal di Battistello Venanzio & C. Sas v Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro (INAIL)*,[160] the European Court of Justice, held that an institution providing compulsory insurance cover for accidents at work and occupational diseases was doing so on the basis of solidarity, did not carry out an economic activity for the purposes of competition law. The INAIL's activities are subject to the state supervision and is based on solidarity between healthy workers and those who had suffered accidents during the course of work.

[158]Case C-205/03 *FENIN Federación Espaňola de Empresad de Tecnologia Sanitaria v Commission of the European Communities* ECR I-6295.
[159]Cases C-159/91 and C-160/91 ECR I-637.
[160]Case C-218/00 *Cisal di Battistello Venanzio & C. Sas v Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro (INAIL)* ECR I-691.

## H.1 APPLICATION TO THE PRESENT CASE

306. The learned counsel for PIAM submits that the activities leading up to the fixing of parts trade discount and labour rates for PARS workshops is based on the "principle of solidarity". The learned counsel referred to the opinion of Advocate General Fennelly in *Sodermare v Regione Lombardia*[161] which defines solidarity as "an inherently uncommercial act of involuntary subsidisation of one social group of another".[162]

307. Learned counsels for the 22 Enterprises contend that:

(i) The principle of solidarity exists in the fixing of parts trade discount and labour rates for PARS workshops as in the case of *Poucet and Pistre.*[163]

(ii) The Commission failed to take note that Prudential Assurance and other PIAM members as well as takaful operators in Malaysia who participated in the Malaysian Motor Insurance Pool ("MMIP") arrangement facilitated by BNM to act as the motor insurer of last resort for high risk vehicles. The MMIP did not have starting funds and any loss is to be shared equally amongst the parties. Therefore, the said MMIP is not to be considered a commercial activity as it is carried out under the principle of solidarity.

[161]Case C-70/5 [1997] ECR I-3395.
[162]Ibid, paragraph 29.
[163]Cases C-159/91 and C-160/91 *Poucet et Pistre v Assurances Generales de France* [1993] ECR I-637.

(iii) The fixing of parts trade discount and labour rates for PARS workshops and the events leading up to it are a manifestation of BNM's authority resulting in a redistribution of income with a view of preserving the systemic integrity of the motor insurance industry.

(iv) The six BNM directives culminating in the fixing of parts trade discount and labour rates over PARS workshops therefore play a social function founded on the principle of solidarity.

308. The Commission was of the view that the fixing of parts trade discount and labour rates over PARS workshops is neither conducted on the principle of solidarity nor that the principle enunciated in *Poucet and Pistre* applies in the present case.

309. Applying the principle in both *FENIN* and *Cisal v INAIL*, the principle of solidarity is not applicable to the Parties. The fixing of the parts trade discount and labour rates is not an "inherently uncommercial act of voluntary subsidization of one social group by another" and is therefore not excluded under section 3(4)(b) of the Act.

310. The Commission views that issue of the MMIP is irrelevant to the present case. The fixing of parts trade discounts and labour rates over PARS workshops do not relate to the MMIP scheme. The MMIP is a high-risk insurance pool that runs collectively by the insurance industry under the orders from regulators and represents a minor non-business arrangement within the commercial activities of the 22 Enterprises and takaful operators.

311. Having considered the facts and the law, the Commission is of the opinion that the conduct of the Parties is not exempted from the application of the Act by virtue of section 3(4)(b).

## I. EXCEPTION UNDER SECTION 3(4)(c) OF THE ACT

312. The European jurisprudence has established that where an entity conducts an activity which is not economic in nature then the acquisition of goods or services necessary in order for that entity to carry out that activity is also not considered to be an economic activity as it is ancillary to the activity in question.

313. In *FENIN*[164], organisations forming part of the Spanish health service purchased medical goods and equipment for the purpose of providing free healthcare services. These purchases are funded from social security contributions and other State funding whereby services are provided free of charge to members on the basis of universal cover. It followed that, since the provision of healthcare in this case is not considered to be economic in nature, the acquisition of the goods and services were likewise not considered to be an economic activity.

## I.1 APPLICATION IN THE PRESENT CASE

314. Learned counsel for the 22 Enterprises contended that:

(i) The fixing of parts trade discount and labour rates for PARS workshops is not a commercial activity falling under section

[164]Case C-205/03 *FENIN Federación Espaňola de Empresad de Tecnologia Sanitaria v Commission of the European Communities* ECR I-6295.

3(4)(c) of the Act which states “any purchase of goods or services…”. It is further contended that the fixing of parts trade discount and labour rates for PARS workshops is a purchase of service but these purchases are not performed for the purposes of offering goods and services.

(ii) The 22 Enterprises argued that they are not involved in economic activity involving the purchase of goods or services. The purchases of repair services work are not for the purpose of offering the sale of insurance policies to the consumers which in essence is a contract of indemnity by which the insurer undertakes the risk of loss to the policy holder. Thus, the purchase of repair service by insurers is not connected in any way with the offering of an insurance policy.

315. In distinguishing whether an activity is economic or non-economic in nature, the Commission relies on the European Commission’s opinion titled, “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions” in relation to the services of general interest, including social services of general interest: a new European commitment [165] whereby it is stated that, “*The answer cannot be given a priori and requires a case-by-case analysis*…”

316. In determining whether an activity is an economic or non-economic activity, the European Court of Justice in *Pavel Pavlov and Others*

[165]COM (2007) 725 final, at paragraph 2.1.

*v Stichting Pensioenfonds Medische Specialisten*[166] held that "*any activity consisting in offering goods and services on a given market is an economic activity…*"[167]

317. Jacobs AG in his opinion on the case of *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* stated that "…*the basic test is therefore whether the entity in question is engaged in an activity which could, at least in principle, be carried on by a private undertaking in order to make profits.*"[168]

318. In *FENIN*[169]*,* the European Court of Justice in confirming the judgment of the Court of First Instance, decided that as long as the supply of the final service is not considered to be an economic activity, the purchasing of goods and services necessary to supply the said service was also not considered to be an economic activity. The finding of the Court of First Instance on this point is explained at paragraph 36, of its judgment which states:

> *"… it is the activity consisting in offering goods and services on a given market that is the characteristic feature of an economic activity […] not the business of purchasing, as such […] it would be incorrect, when determining the nature of that subsequent activity, to dissociate the activity of purchasing goods from the subsequent use to which they are put. The nature of the purchasing activity must therefore be determined according to whether or not the subsequent use of the purchased goods amounts to an economic activity*."[170]

[166]Joined Cases C-180-184/98 ECR I-6497.
[167]Ibid, at paragraph 75.
[168]Opinion of Mr. Jacobs–Case C-97/96, Joined Cases C-116/97 and C-119/97 and Case C-219/97, at paragraph 311.
[169]Case C-205/03 P ECR I-6319.
[170]Case T-319/99 ECR II-360.

319. The finding of the Court of First Instance was endorsed by the European Court of Justice in its judgment as follows:

> *"26…The Court of First Instance rightly deduced, in paragraph 36 of the judgement under appeal, that there is no need to dissociate the activity of purchasing goods from the subsequent use to which they are put in order to determine the nature of that purchasing activity, and that the nature of the purchasing activity must be determined according to whether or not the subsequent use of the purchased goods amounts to an economic activity."*[171]

320. It is not disputed that the sale of insurance policies are activities meant for the purpose of offering goods and servings as part an economic activity. Applying the principle in *FENIN*, the activity of purchasing spare parts and labour is an integral part of a general motor insurance service. In order to fulfil its obligations to the policy holder in the event of a claim, it is common business practice for insurers to have in place service level arrangements with appointed workshops.

321. In light of the above, the activity of purchasing of spare parts cannot be viewed in isolation but must be considered in the context of the sale of insurance policies. We therefore view the activity of purchasing of spare parts and labour as an economic activity under the Act.

322. Consequently, the arguments put forward by the counsels for the Parties on the applicability of section 3(4)(c) of the Act are

[171]Case C-205/03 P ECR I-6319, at paragraph 26.

dismissed. The conduct of the Parties is therefore not exempted from the application of the Act by virtue of section 3(4)(c).

## J. EXCEPTION UNDER SECTION 13(1) OF THE ACT

323. The term "compliance with legislative requirement" is not defined in the Act. However, acts that amount to an agreement or conduct carried out in compliance with legislative requirement is illustrated by the High Court of Kuala Lumpur in the case of *Petroliam Nasional Bhd. v Perwaja Steel Sdn. Bhd.*[172] where it was held that:

> *"[85] …it appears to this court that it is clear that the plaintiff has complied with government directives in fixing a price for the supply of dry gas to the defendant. The entire business of the plaintiff is regulated inter alia by the Petroleum Development Act 1974. It is subject to the control and direction of the Prime Minister who may from time to time issue such direction as he may deem fit…*
>
> *[86] It would therefore appear that the plaintiff is excluded from the application of Part II of the Competition Act 2010 by virtue of the second schedule of the Act. The issue of an alleged contravention of the Competition Act 2010 therefore does not arise…"* [173]

324. Under the European competition law, competition rules in TFEU does not apply to enterprises that are compelled by national legislation to behave in a particular way.[174] According to the

[172][2013] 8 CLJ 391.
[173][2013] 8 CLJ 391, at paragraphs 85 and 86.
[174]Case E-29/15 *Sorpa BS v The Icelandic Competition Authority (Sankeppniseftirlitið)*; Case C-52/09 *Konkurrensverrketk v Teliasonera Sverige AB*; Case C-280/08 P *Deutsche Telekom AG v European Commission*; Case T-513/93 *Consiglio Nazionale degli Spedizionieri Doganali (CNSD) v Commission*; and the Opinion of Advocate General Jacobs in Case C-264/01 *AOK Bundesverband and Others v Ichthyol-Gesellschaft Cordes, Hermani & Co. and Others.*

European Court in the cases cited above, when an enterprise is compelled by national legislation to behave in an anti-competitive manner, that conduct is not attributable to the enterprise since their conduct was dictated by the law and the enterprise has no autonomy to determine their conduct in the market. Where the defence of state compulsion or state action is applicable, the enterprise will not be liable for infringing the competition rules as anti-competitive conduct is not attributable to the autonomous conduct of the enterprise.

325. In the event an enterprise has autonomous power to determine their own conduct in the market and are not mandated by the law to behave in a particular manner, the enterprise will be liable for infringing the competition rules if their conduct amounts to an anti-competitive conduct.

## J.1 APPLICATION IN THE PRESENT CASE

326. In determining whether the conduct of the Parties in fixing the parts trade discount and labour rates on PARS workshop is exempted from the Act by virtue of section 13(1) read together with limb (a) of the Second Schedule to the Act, the Commission is guided by the approach of the European Courts in determining whether the state action defence[175] is applicable.

327. The Commission stands guided by the approach taken by the European Court in determining the applicability of the state action defence to an enterprise. It is evident that to succeed in raising the

[175]For the avoidance of doubt, the state action defence is principally equivalent to exemption provided under section 3(4)(a) of the Act.

exemption under section 13(1) read with limb (a) of the Second Schedule to the Act, an enterprise must first establish that there was an order or a direction that was given by the authority to the enterprise to comply with a particular legislative requirement. The Commission takes the view that this is not the case.

328. Secondly, in any event, section 22 of the IA does not confer BNM with the power to regulate parts trade discount and labour rates. In any case, if it is a direction from BNM, the direction must relate to a specific legislative requirement under an Act of Parliament. The Commission takes the view that for the Parties to successfully avail themselves of the defence under section 13(1) read with limb (a) of the Second Schedule of the Act, what was done by the Parties must be directly pursuant to a legislative requirement, which, in our view, is not the case here. If at all, what was done by the Parties was merely to give effect to the directive, if at all it was a directive (we say it is not), issued by an executive authority, namely, BNM. Further, we are of the view that the 3 letters by BNM to PIAM are not directives but in law are merely advisory in nature. The enterprise must show that it does not have autonomy in determining their conduct in the market in the light of the legislative requirement that was imposed upon them by the authority.

329. Further, the present case before the Commission can be distinguished from the facts of *Petroliam Nasional Bhd. v Perwaja Steel Sdn. Bhd.*[176] The applicability of the Petroleum Development Act 1974 is excluded under section 3(3) read together with the First

[176][2013] 8 CLJ 391.

Schedule of the Act. In any event, we reiterate our position that BNM is not conferred with such power.

*(a) What did BNM require the Parties to do?*

330. It is the considered opinion of the Commission that BNM's letters dated 4.6.2010, 14.6.2011 and 4.7.2011 to PIAM are merely letters urging both PIAM and FAWOAM to resolve their ongoing trade and commercial dispute. The letters do not contain any form of "direction" to fix the parts trade discount and labour rates for PARS workshops. BNM has never at any time, given any "direction" to PIAM or its members to fix the parts trade discount and labour rates for PARS workshops.

331. By adopting Members' Circular No. 132 of 2011, the conduct of the Parties in proceeding to fix the parts trade discount and labour rates cannot be construed as an activity which was required of them by BNM.

*(b) Do the Parties have autonomy in determining their conduct of fixing the parts trade discount and labour rates over PARS?*

332. It has been established in **Part 2** above, that the Parties have autonomy in determining their conduct in the market when they proceeded to fix the parts trade discounts and labour rates. Such autonomy is evident from PIAM's ability to arrange meetings with FAWOAM during the Claims Sub-committee Meetings for the purpose of negotiations and this ability was not influenced by any third party including BNM.

333. The Parties' capacity to act autonomously in the market in relation to the fixing of the parts trade discount and labour rate can also be seen through PIAM's act of issuing Members' Circular No. 37 of 2011 and Members' Circular No. 109 of 2011 seeking its members' approval for the fixing of the parts trade discount and labour rate.

334. The Commission is therefore satisfied that the conduct of the Parties in fixing the parts trade discount and labour rates was not the result of their compliance to legislative requirement in the form of directives given by BNM via their letters to PIAM and in the meetings conducted between BNM, PIAM and FAWOAM. The arguments put forward by the counsels for the Parties and BNM on the applicability of section 13(1) read together with limb (a) of the Second Schedule to the Act are therefore dismissed. Thereon, the Commission is of the view that the conduct of the Parties is not exempted from the application of the Act by virtue of section 13(1) of the Act.

## K. RELIEF OF LIABILITY UNDER SECTION 5 OF THE ACT

335. Agreements which satisfy the criteria set out in section 5 could claim exemption from the Section 4 prohibition. The requirements stipulated under section 5 must be cumulatively met.[177] In the event any one of the requisite ingredients contained in section 5 is not proven, relief of liability shall not be considered.

[177]Paragraph 5.1 MyCC Guidelines on Chapter 1 Prohibition (Anti-Competitive Agreements); Joined Cases T-185/00, T-216/00, T-299/00 and T-300/00 *Métropole télévision SA (M6)* ECR II–3805, at paragraph 86; Case T-17/93*, Matra Hachette SA* ECR [1994] II-595 at paragraph 85; Joined Cases 43/82 and 63/82 *Vereniging Ter Bevordering Van Het Vlaamse Boekwezen, VBVB, and Vereniging ter Bevorderingn van de Belangen des Boekhandels, VBBB, v Commission for the European Communities* at paragraph 61; and T-213/00 *CMA CGM and Others v Commission of the European Communities* [2003] ECR II, at paragraph 226.

336. It is for the parties intending to rely on section 5 to adduce the necessary evidence that the criteria for exemption have been met. The Commission will consider evidence adduced by the Parties when assessing whether the criteria in section 5 of the Act is satisfied.

337. For section 5 to apply, the pro-competitive effects flowing from the agreement must outweigh its anti-competitive effects, thus it is essential to verify what is the causal link or nexus between the agreement and the alleged pro-competitive benefits and what is the value of these benefits. This process requires the balancing of any negative and positive effects of the agreement by conducting a counterfactual assessment to verify the claimed efficiencies by the Parties. It is however pertinent to note that this assessment process does not require the Commission to obtain further evidence in order to rebut the alleged pro-competitive benefits.

## K.1 APPLICATION TO THE PRESENT CASE

338. The learned counsels for the Parties and BNM argue that in the present case, the conditions for relief of liability under section 5 have been fulfilled. The learned counsels agree to adopt the submission of RBB entitled "*Proposed Decision of the Malaysian Competition Commission against PIAM and its members – Independent Economic Assessment*" dated 24.4.2017 ("RBB Report") which states that there are pro-competitive benefits arising from the Infringing Agreement.

339. In considering the conditions contained in section 5(a), the Commission shall refer to technological, efficiency or social benefits allegedly provided by the anti-competitive agreement. The Commission is not obliged to further investigate or validate the evidence because the burden rests on the Parties to show that the anti-competitive agreement is indeed contributing in terms of the technological, efficiency or social benefits as provided under section 5(a).

340. RBB in its report contend as follows:

> "*By increasing the incentive for repairers to participate in the PARS, the Alleged Agreement has served to increase the number of approved workshops undertaking insurance repairs. This has benefitted consumers by increasing access to repairs, both in terms of choice and convenience. While, for the reasons set out above, the Alleged Agreement did not and could not bring about anticompetitive effect, such that there is no need for PIAM to demonstrate offsetting benefits, it is nonetheless the case that consumers benefited from the presence of the Alleged Agreement via the impact on approved repairer numbers…*[178]
>
> *By establishing standardised terms of repairs, the Alleged Agreement was intended in part of reduce the scope for disputes between insurers and repairers, and hence delays in approving the claim before repairs are completed. In this way the Alleged Agreement gives rise to a benefit to consumers relative to the situation that would otherwise prevail…*[179]
>
> *Insofar as the Alleged Agreement reduced delays this would represent a consumer benefit deriving from the Alleged Agreement. If the Alleged Agreement did indeed serve to generate such benefits for consumers*

[178]Paragraph 5.2.2 RBB Report dated 24.4.2017.
[179]Paragraph 5.2.3 RBB Report dated 24.4.2017.

*this should have an impact on consumer satisfaction, as measured by the number of customer complaints received."*[180]

341. Furthermore, the RBB Report highlights the justification for the second requirement under paragraph 5(b) as follows:

*"…BNM specifically referred to FAWOAM's requests to standardize labour rates and trade discounts, or to set a minimum labour rate and maximum trade discount. This was additionally highlighted by the clear intention of BNM to take measures if the parties would not be able to reach an agreement. It is also illustrated by the fact that FAWOAM publicly addressed all insurers collectively as the culprits of the harm repairers intend to inflict on consumers if its concerns were not addressed.*

*Moreover, the original dispute arose from FAWOAM's view that labour rates were too low and discounts demanded by insurers too high.*

*A solution to this concern required an increase in labour rates and a cut in discounts. However, no individual insurer would likely to have chosen to increase its own costs in order to realize an individual solution. Thus, a collective industry response was required to address FAWOAM's concerns and meet BNM's demands for a resolution to the dispute*."[181]

342. For third requirement under paragraph 5(c), the RBB Report submits as follows:

*"The MyCC has not identified a clear theory of harm, nor made any attempt to investigation or measure detriment to competition. For the reason set out section 3 above, given the economic and market context of the Alleged Agreement there is little or no scope for detriment to arise.*

[180]Paragraph 5.2.4 RBB Report dated 24.4.2017.
[181]Paragraph 5.3 of RBB Report dated 24.4.2017.

*Against this, section 4 sets out clear evidence of well-defined and measurable consumer benefits arising from the Alleged Agreement. As such, it follows that the benefits exceed any potential harm, and so that the Alleged Agreement is proportionate*."[182]

343. The RBB Report states in relation to the fourth and final requirement of relief of liability under section 5(d) of the Act that the Infringing Agreement does not allow the Parties concerned to eliminate competition completely in respect of a substantial part of the goods or services. The following excerpts are reproduced as follows:

*"There are two areas in which the Alleged Agreement could in principle allow PIAM and the insurers to lessen competition: within the downstream market in which insurers supply policies to consumers and/or within the upstream market in which insurers procure repair services from workshops.*

*The former possibility would relate to the hypothesis that the Alleged Agreement represented a suppliers' cartel that served to increase the price of and/or reduce the supply of insurance tariffs. As explained in Section 3.4 the prevailing BNM regulatory regime would prevent competition within that market from being materially affected, much less eliminated.*

*The second possibility would relate to the hypothesis that the Alleged Agreement represented a buyers' cartel, which could be anticompetitive if it served either to obscure a supplier cartel or to restrict output as a by-product of insurers seeking lower repair costs. As explained in Section 3.6, neither of these mechanisms applies to the Alleged Agreement, which was unable to influence insurance policy supply and served, as demonstrated in Section 4, to increase (rather than decrease) payments*

[182]Paragraph 5.4 of RBB Report dated 24.4.2017.

*to repairers. Consequently, it follows that competition in insurers' procurement of repair services was not lessened, much less eliminated."* [183]

*The Commission's Findings*

344. The Commission does not agree with RBB and the learned counsels' submissions on the first requirement of the section 5. The Parties, in the absence of sufficient empirical data and analysis cannot claim credit for the benefits. The Commission finds that the claimed benefits can arise from a number of reasons.

345. The Commission, among others find based on RBB's analysis of MRC claims data had showed that after the Infringing Agreement in August 2011, the number are volatile and had increased dramatically between early 2012 and 2015. In light of these facts, the Commission considers that the Infringing Agreement is not the sole and direct factor that contributes to the reduction in turnaround time.

346. Furthermore, the Commission also finds that the existence of the Merimen system as a platform for negotiation between individual PARS workshop and the insurers to agree on the parts trade discount and labour rates individually had potentially contributed to a lower turnaround time and effectively reduce delays.

347. The Commission also took note of the existence of the National Automotive Policy 2014[184] ("NAP 2014") where the Government of

[183]Paragraph 5.5 of RBB Report dated 24.4.2017.
[184]National Automotive Policy 2014 (NAP 2014) retrieved from www.maa.org.my/pdf/NAP_2014_policy.pdf on 28.9.2019.

Malaysia had injected investments into the automotive industry between RM700 million to RM5 billion in 2012, the sales of passenger and commercial vehicles had increased by 3.9% in 2013 from the figure in 2012. Further, the government had provided financial assistance in terms of soft loans amounting to RM2.95 billion for the period of 2014 until 2020 for components and spare parts manufacturers and funding amounting to RM100 million for the period of 2014 till 2020 for human capital development programmes for component and spare parts manufacturers and technology.

348. Additionally, local car manufacturers such as PROTON, PERODUA and MODENAS had made significant investments and had contributed to the development of the domestic automotive industry. As a result, more than 500 components and spare parts manufacturers were established providing more than 180,000 employment opportunities. Thereon, PROTON, PERODUA and MODENAS also provided an additional 30,000 employment opportunities. In light of these facts, the Commission considers that the Infringing Agreement is not the sole and direct factor that contributes to the growth of workshops including PARS workshops.

349. Although the RBB Report stated that the Infringing Agreement had reduced delays in turnaround time, however upon perusal of the submission by RBB, the Commission finds that there were no details were provided by RBB as to the exact nature of the complaints received and assessed by BNM in RBB's submission. As such, the evidence provided by the Parties is insufficient to show that the claimed efficiencies stemmed from the Infringing Agreement.

350. It is pertinent to emphasize that the requirement under section 5 must be proven conjunctively and in descending order. Henceforth, since the Commission views that the benefits were not derived directly from the restrictive agreement, the Commission thereon is not obliged to evaluate the condition under section 5(b), (c) and (d).

351. Based on the preceding paragraphs, the Commission views that there is no apparent direct identifiable causal link between the efficiency claims and the restrictive agreement. The agreement therefore cannot be considered the sole factor for producing the claimed efficiency benefits. The section 5 arguments put forth by the Parties do not hold water and the Parties had failed to discharge the burden of proving to the Commission that the Infringing Agreement is entitled to be relieved from infringement under the Act.

## L. BURDEN AND STANDARD OF PROOF

352. It is trite law that the Commission bears the burden of proving that a section 4 infringement under the Act has been committed. The standard of proof to be applied is the civil standard which is on the balance of probabilities.

353. 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.

354. The civil burden of proof has likewise been affirmed in competition law cases decided in Singapore, namely, *Pang's Motor Trading v CCS*[185] where it was held the Competition Commission bears the burden of proving that the parties have infringed the prohibition imposed by the competition law.

355. Given the nature of the evidence of anti-competitive conduct in a case concerning anti-competitive agreement such as that found in this Decision, it is sufficient if the body of evidence, viewed as a whole, proves that an infringement of the section 4 prohibition has occurred on a balance of probabilities. Such evidence would consist of direct, circumstantial evidence, and inferences from the established facts. The Competition Appeal Tribunal in *JJB Sports PLC, Allsports Limited v Office of Fair Trading*[186] referring to the principles set pointed out in *Claymore Dairies* as follows:

> *"cartels are by their nature hidden and secret; little or nothing may be committed to writing. In our view even aa single item of evidence, or wholly circumstantial evidence…"*[187]

356. In *Aalborg Portland AS v Commission*[188]*,* the European Court of Justice stated:

> *"55. Since the prohibition on participating in anti-competitive agreements and the penalties which offenders may incur are well known, it is normal for the activities which those practices and those agreements entail to take place in a clandestine fashion, for meetings to be held in secret,*

[185]Pang's Motor Trading v CCS [2014] SGCAB 1, at paragraph 33.
[186][2004] CAT 17.
[187][2004] CAT 17, at paragraph 206.
[188]Joined Cases C-204/00 P and C-211/00 P.

*most frequently in a non-member country, and for the associated documentation to be reduced to a minimum.*

*56. Even if the Commission discovers evidence explicitly showing unlawful conduct between traders, such as the minutes of a meeting, it will normally be only fragmentary and sparse, so that it is often necessary to reconstitute certain details by deduction.*

*57. In most cases, the existence of an anticompetitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules."*

## L.1 APPLICATION TO THE PRESENT CASE

357. The Commission is of the view that the Commission is not only bound by Malaysian cases. The Commission may refer to persuasive authorities of competition law cases from other jurisdiction such as the United Kingdom, European Union, the United States of America, Australia and Singapore for the purposes of interpreting of the Act.

358. This view taken by the Commission is supported by the following Hansard excerpts at the second reading of the Competition Bill in the Dewan Rakyat on 20.4.2010:

*6. "Tuan Yang Di-Pertua, Kementerian telah meneliti dan menjalankan kajian mengenai Undang-undang Persaingan yang diamalkan di negara-negara termasuk di* ***United Kingdom, Australia, Kesatuan Eropah, Amerika Syarikat dan Singapura****. Di mana amalan-amalan*

*terbaik di peringkat antarabangsa ini telah* ***dijadikan rujukan untuk dimasukkan di dalam rang undang-undang ini.*** *Akan tetapi, pada masa yang sama Kementerian tetap mengutamakan ciri-ciri dan keperluan ekonomi negara secara spesifik atau lebih terperinci dengan konsep ekonomi negara yang kecil dan terbuka."*[189] *[emphasis added]*

359. Relying on the above-mentioned authorities in Singapore, United Kingdom, and the European Union, the Commission bears the burden of proving that the Parties have infringed section 4 prohibition of the Act.

360. The Commission is of the view that the standard of proving an infringement under section 4 of the Act is that of a civil standard. It is on a balance of probabilities.[190] In any event, it was not disputed by the Parties that the standard of proof required to prove an infringement under section 4 of the Act is that of a balance of probabilities.

361. Given the nature of the evidence of anti-competitive agreement such as that found in this Decision, it is sufficient if the body of evidence, viewed as a whole, proves that an infringement of section 4 prohibition had occurred on a balance of probabilities. Such evidence consisted of direct evidence, circumstantial evidence, and inferences from the established facts.

[189]Penyata Rasmi Dewan Rakyat, Parlimen Kedua Belas Penggal Ketiga, Sesi 20.4.2010, Bil. 22 halaman 129-130.
[190]Paragraphs 105 to 109 [2004] CAT 17.

## M. THE RELEVANT MARKET

362. Market definition in the context of section 4 prohibition serves two purposes. Firstly, it provides, if necessary, the framework for assessing whether an agreement has a significant anti-competitive effect in a market. Secondly, where liability has been established, the market definition facilitates the determination of the relevant turnover of the business of the enterprise for the purpose of calculating financial penalties.[191]

363. The term "market" is defined in section 2 of the Act as:

> *"a market in Malaysia or in any part of Malaysia, and when used in relation to any goods or services, includes a market for those goods or services and other goods and services that are substitutable for, or otherwise competitive with, the first-mentioned goods and services."*[192]

364. In the present case, a market definition is unnecessary for the purpose of establishing effect in a market for a "by object" infringement under section 4(2) of the Act because the case at hand concerns agreement that involve the fixing of prices between the Parties which deemed to have the object of significantly preventing, restricting, or distorting competition.

365. Nonetheless, the Commission has, for the purpose of computing the penalty, defined the market for the focal product related to the agreement as the relevant market. The relevant product market is the market of parts trade and labour for PARS workshops by PIAM.

[191]Paragraph 1.6 of MyCC Guidelines on Market Definition.
[192]Section 2 of the Act.

## N. ISSUES RAISED IN RELATION TO PROCEDURAL AND OTHER MATTERS

### N.1 PRIVILEGED INFORMATION

366. The learned counsels for the Parties raised the issues of privileged information pertaining to the Minutes of PIAM 294th Management Committee Meeting dated 13.3.2012.

367. The learned counsel for PIAM argued:

"*219. The Commission has obtained, referred to and/or relied on legally privileged communication and information in making its findings in the Proposed Decision. This is contrary to Section 22 of the Act and contrary to established principles. Such legally privileged information, views, opinions, advice, statements and/or facts, etc., including those relating to or arising directly or indirectly from any statement, document and/or information of or from Messrs. Wong & Partners, whether arising directly or indirectly from any statement, document and/or information of a Messrs. Wong & Partners as may reproduced or reiterated in other documents or statements ("Privileged Information") should never have been referred to nor relied on.*

*220. Legal privilege over all Privileged Information has never been waived. These include, but are not limited to:*

*220.1 Statements made in paragraphs 250, 251, 252, 253, 254, 728, 729, 730 and 732 of the Proposed Decision; and*

*220.2 The Minutes of PIAM's 294th Management Committee meeting of 13.03.2012 and in particular Section 2.2. of the said Minutes*.

*221. It is trite law in Malaysia that such privilege would only be waived if expressly done. The phrase 'once privileged, always privileged' is apt for the present circumstances.*

*222. PIAM has through its solicitors, requested for all Privileged Information to be disregarded and expunged from the Proposed Decision and the Commission's records.*

*223. In any event, such views and/or opinion of legal counsel are nothing more than a view/opinion and cannot be relied on as a <u>fact</u> establishing a breach of the Act."*

368. In Berjaya Sompo's written representation, the counsel raised the following argument:

> "*30. In the Proposed Decision, MyCC on several occasions referred to Wong & Partners letters to the MyCC and the contemplated block exemption application and at paragraph 728 MyCC quoted "**Based on the Preliminary Competition Law Compliance Review Report from PIAM's counsels, Messrs. Wong & Partners, it was noted that many aspects of PIAM's activities may not be in compliance particularly in relation to discussions on industry pricing, discounts, rebates, price changes, profit margins, insurance contract terms and conditions etc."** The letters from Wong & Partners are legally privileged and should therefore be expunged and should not be referred to by MyCC in the Proposed Decision. Reference in this regard is made to PIAM's counsel, Shanti Kandiah's letter to the MyCC dated April 3, 2017 officially requesting for such privileged information to be expunged and disregarded from the Proposed Decision and removed from the MyCC's records*."

369. The issues on privileged information are therefore summarised as follows:

(i) Whether there exists legal professional privilege on the communications between PIAM and Messrs. Wong and Partners evidenced in the Preliminary Competition Law Compliance Review Report;

(ii) Whether the legal professional privilege extends to a situation where the information was discussed in a meeting in the absence of the solicitor and without referring to the legal opinion;

(iii) Whether the letters by Messrs. Wong and Partners dated 23.5.2012, 29.11.2012 and 28.2.2013 addressed to the Commission explaining their client's position are legally privileged; and

(iv) Arising from para (iii), the Commission will consider whether from the act of issuing the 3 letters by Messrs. Wong and Partners to PIAM, the Parties have in law waived their right to legal privilege and to rebut the argument that the Minutes of Meeting of PIAM's 294th Management Committee Meeting dated 13.3.2012 is a privileged document.

370. The Commission takes note of the guidelines contained in the International Competition Network ("ICN") which recommends that competition agencies should respect applicable legal privileges that are recognized in their jurisdiction during the course of

investigations and should have policies in place regarding the handling of privileged information.[193]

371. In addition, parties and third parties should not be required to disclose information that is subject to applicable legal privileges within the competition agency's jurisdiction. The parties and third parties should be required to identify and describe materials withheld on the basis of legal privilege to allow the competition agency to access such claims. The Commission is satisfied that ample opportunity had been provided to the Parties for this purpose.

372. Under common law, legal professional privilege can take one of two forms, namely, legal advice privilege and litigation privilege. Legal advice privilege protects confidential communications passing between a lawyer and client (or agent of the client) for the purpose of providing or obtaining legal advice, whether or not litigation is contemplated. It does not protect communications between the lawyer and third parties, unless those third parties were acting as the client's agent at the time.

373. The law on legal privilege on professional communications is stated under section 126 of the Evidence Act 1950 ("EA") and section 22 of the Act. Section 126 reads as follows:

> *"**Professional communications***
> *126. (1) No advocate shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate by*

[193]ICN, Guidance on Investigative Process, retrieved from http://internationalcompetitionnetwork.org/uploads/library/doc1028.pdf on 28.9.2019.

*or on behalf of his clients, or to state the contents as or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment."*

374. Section 22 of the Act reads as follows:

*"22. (1) No person shall be required, under any provision of this Part, to produce or disclose any communication between a professional legal advisor and his client which would be protected from disclosure in accordance with section 126 of the Evidence Act 1950.*

*(2) Where –*

*(a) the Commission makes a requirement under section 18 of an advocate and solicitor in respect of any information or document; and*

*(b) the information or document contains a privileged communication made by or on behalf of or to the advocate and solicitor in his capacity as an advocate and solicitor,*

*the advocate and solicitor is entitled to refuse to comply with the requirements unless the person to whom or by or on behalf of whom the communication was made or, if the person is a body corporate that is under receivership or is in the course of being wound up, the receiver or the liquidator, as the case may be, agrees to the advocate and solicitor complying with the requirement, but where the advocate and solicitor so refuses to comply with the requirement, the advocate and solicitor shall forthwith furnish in writing to the Commission, the name and address of the person to whom or by whom the communication was made."*

375. Section 126 of the EA protects legal professional privilege only in so far as it restrains an advocate and solicitor from disclosing any communications made to him by his client (or advice given by him to his client) in the course of and for the purpose of employment as an advocate and solicitor without the client's express consent. This rule is supplemented by section 22 of the Act, a later legislation, which merely accords the advocate and solicitor the right to refuse disclosure of privileged communications or legal advice provided to the client.

376. In *Protasco Bhd. v PT Anglo Slavic Utama & Ors.*[194] it was held as follows:

> *"[18] The position with respect to legal professional privilege in Malaysia is even clearer as this privilege has been codified in the Evidence Act 1950 by ss 126-129 of the same. The case of Dato' Au Ba Chi & Ors. v Koh Keng Kheng & Ors. [1989] 3 MLJ 445 deals with these provisions where it is said:*
>
> *'As regards professional communications, the rule is now well settled that where a barrister or solicitor is professionally employed by a client, all communication which passes between them in the course and for the purpose of that employment are so far privileged, that the legal adviser, when called as a witness, cannot be permitted to disclose them whether they be in the form of title deeds, wills, documents, or other papers delivered, or statements made, to him, or of letters, entries, or statements, written or made by him in that capacity, and this even though third persons were present. (See Sarkar on Evidence (10th Ed.) p 1080.)*

[194][2016] 7 MLJ 523, at paragraphs 18 to 20.

*Section 126 also says that the legal adviser shall not be permitted at any time to disclose professional communications. It is said that a communication once privileged is 'always privileged' (per Cockburn CJ in Bullock v Corry (1878) 3 QBD 356).*

*'Unless with his client's express consent', appearing in s 126. The privilege is that of a client; he may expressly waive the privilege under s 126 or impliedly under the latter part of s 128 by calling the barrister, pleader, etc, as witness and questioning him on matters which, but for such question, he would not be at liberty to disclose. But he does not lose the privilege if he gives evidence in the suit either at his instance or at the instance of the opposite party. (Sarkar on Evidence (10th Ed) p 1082.)"*

*[19] The Federal Court in the case of Dato' Anthony See Teow Guan v See Teow Chuan & Anor [2009] 3 MLJ 14 also said:*

*Hence, I hold that the legal professional privilege under s 126 of the Act is absolute and it remains so until waived by the privilege holder, i.e. the client.*

*[20] Therefore it is clear that both under common law and also the position in Malaysia, legal professional privilege is:*

*(a) absolute;*
*(b) protected from public interest consideration; and*
*(c) waived only by the clients. "*

377. In the Singapore case of *ARX v Comptroller of Income Tax*,[195] the High Court of Singapore was required to determine whether the "advice" possessed the pre-requisites necessary for privilege to be

[195][2016] SGHC 56.

claimed. The Court held that the party claiming privilege bore the burden of proving the 3 pre-conditions of privilege namely:

(i) That the advice must have been rendered by a legal professional;

(ii) The legal professional was acting as legal advisor when he/she provided the advice; and

(iii) The communications must have been made in confidence. There can be no privilege without confidentiality (*HT SRT v Wee Shuo Woon*[196]).

378. The relevant principles on legal privilege is also illustrated in the case of *Dato' Anthony See Teow Guan v See Teow Chuan & Anor*[197] as follows:

> *"[33] So also is the position in India. In Mandesan v State of Kerala 1995 Cri LJ 61, the notion that in the absence of 'express consent' there could be loss of privilege by a failure to object or by waiver or acquiescence on the part of the client was advocated. In that case, the advocate had already given evidence of the communication between him and the client and no objection had been raised on the part of the client but the High Court ruled that such communication was inadmissible under s 126. Thomas J said at p. 62:*
>
> *... But failure to raise objection would not remove the lid of confidentiality attached to such communication between the advocate and his client. The privilege embodied in s 126 of the Evidence Act is not liable to melt*

[196][2016] 2 SLR 442.
[197][2009] 3 MLJ 14.

*down on the principle of waiver or acquiescence. This can be more understood from s 128 of the Act which says that by giving evidence, a party shall not be deemed to have consented to such disclosure as is mentioned in s 126. It is only when the party calls such advocates as a witness that the party shall be deemed to have consented to such disclosure, that too only if he questions the witness about it. Section 126 uses strong language in imposing the prohibition. No advocate 'shall at any time be permitted' to disclose such communication 'unless with his client's express consent'. A failure on the part of the client to claim privilege cannot be stretched to the extent of amounting to 'express consent' envisaged in the provision (Bhagwani v Decoram AIR 1933 Sind 47).*

*[34] Thus, the common law rule of waiver by implication or imputation is not recognised by the cases under either the Malaysian, Singapore or Indian Evidence Act.*

*[35] It was common ground that the client was the company KJCF and not the directors. Since KJCF was the client of the advocate, the privilege holder was KJCF and not the advocate (see Minter v Priest [1930] AC 558 at p. 579) of the individual directors. It is for KJCF whether to waive it and convey the consent to the advocate when called to give evidence. Augustine Paul J (now FCJ) in Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No. 3) [1999] 2 MLJ 1 at p. 179:*

*As the privilege is that of the client, he may expressly waive it under s 126 or impliedly under s 128 of the Evidence Act 1950 by calling the advocate as his witness.*

*...*

*[41] These questions arose as a result of the finding of the Court of Appeal which ruled that the privilege was lost by disclosure to 'third parties'. The court said at p 311 para 52:*

*The conduct of the defendant (appellant) in expressly waiving the privilege by disclosing and publishing the legal opinion to third parties is illustrative of the principle of express waiver.*

*By 'third parties' the Court of Appeal was evidently referring to the Chairman of the Board of Directors, the Directors, the Financial Controller of KJCF and the two external auditors (Yap and Chew of Ernst & Young) because they were the persons to whom the legal opinion was disclosed.*

*[42] I agree with the appellant that the Court of Appeal had failed to appreciate that the privilege holder is a corporation and that KJCF as an artificial entity has to function through its human agencies. This usually would be its principal officials whether they are the directors or the top management personnel of the company or its professional advisers. Thus, both the respondents and the appellant, as the directors of KJCF, would be entitled to see and have custody of any legal opinion obtained by KJCF…*

*Discovery under O 24 of the RHC: Question (9)*

*[55] Thus, the mere placement of the privileged document in Part 1 is not fatal and does not amount to waiver of privilege."*

379. Applying the legal principles above, it is clear that the Preliminary Competition Law Compliance Review Report from PIAM's counsel, Messrs. Wong and Partners satisfies the requirement of professional privilege. Therefore, for the purpose of this Decision, the Commission does not take it into account.

380. The argument by learned counsel that the Commission had taken into consideration privileged information contained in the Minutes of

294th PIAM Management Committee Meeting dated 13.3.2012 is without merit. Upon being served with the section 20 and section 18 notices dated 6.9.2016 and 9.9.2016 respectively, PIAM had (vide a letter dated 15.9.2016) delivered to the Commission among others, the Minutes of PIAM's 294th Management Committee Meeting of 13.3.2012 (the said Minutes of Meeting).

381. It should be noted that PIAM's solicitors, Messrs. Wong and Partners were not present at this meeting to render any form of legal advice on the matter in discussion. In addition, the said Minutes of Meeting discussed the advice and feedback from Messrs. Wong and Partners contained in the Preliminary Competition Law Compliance Review Report whereby it was noted that many aspects of PIAM's activities may not be in compliance with the newly enacted Competition Act 2010. The said Minutes of Meeting also documented the discussion that some of the provisions in the Inter-Company Agreement and PIAM's Constitution Agreement and PIAM's Constitution are similarly affected. During the meeting it was also agreed that feedback from Messrs. Wong and Partners be circulated to member companies for their information.[198]

382. The party relying on the principle of legal privilege must establish as a matter of fact that the communication that took place at the 294th PIAM Management Committee Meeting on 13.3.2012 was in fact communication between solicitor and client. The evidence before the Commission shows that PIAM's solicitors were not present to offer any legal advice or to deliver a presentation on the advice

[198]Paragraph 2.2. sub-paragraph v, page 4 of the Minutes of the 294th PIAM Management Committee Meeting held on 13.3.2012.

contained in the Preliminary Competition Law Compliance Review Report at the 294th PIAM Management Committee Meeting on 13.3.2012.

383. The Minutes of Meeting merely describes the discussions between PIAM Management Committee. The meeting captured the discussions and feedback between the attendees on the implications of the Preliminary Competition Law Compliance Review Report by Messrs. Wong and Partners that noted that many aspects of PIAM's activities may not be in compliance with the Act, particularly industry pricing, discounts, rebates, price changes, profit margins, insurance contract terms among others and the suggestion that a study of the practices adopted by other countries to be carried out as well as the possibility of the industry having to resort to an application for block exemption with the Commission.

384. In view of the above, the said Minutes of Meeting of PIAM's 294th Management Committee held on 13.3.2012 does not satisfy the test of legal professional privilege in that it is not legal advice communicated between solicitor and client but merely a discussion between members of the Committee.

385. On the third issue, the Commission will consider whether the letters from Messrs. Wong and Partners to the Commission dated 23.5.2012, 29.11.2012 and 28.2.2013 are privileged solicitor-client communication. The Commission found that the first letter from Messrs. Wong and Partners dated 23.5.2012 **(Attached as Annexe 13)** was a request by PIAM for a grace period of 5 months to put forward a formal application for block exemption for certain of its

core agreements and practices which it believed were in contravention of the Act when it came into effect on 1.1.2012.

386. The second letter from Messrs. Wong and Partners to the Commission dated 29.11.2012 **(Attached as Annexe 14)** was in essence a request for further extension of time till 31.1.2013 to submit the intended application for block exemption. The intent of this letter is consistent with the first letter, in that PIAM was fully aware of the implications of the Act and that a block exemption application was thus contemplated. It is worthwhile noting that no such application has been filed to the Commission by PIAM till to-date.

387. The third letter from Messrs. Wong and Partners dated 28.2.2013 **(Attached as Annexe 15)** whereby PIAM officially notified the Commission that PIAM had held discussions with BNM on its proposed compliance roadmap and that PIAM would be holding a market industry meeting in order to consider the proposed compliance roadmap in view of feedback provided by BNM.

388. It is clear that the 3 letters from Messrs. Wong and Partners dated 23.5.2012, 29.11.2012 and 28.2.2013 cannot be construed to be communication between solicitor and client as they were addressed to the Commission and not to PIAM. Moreover, it has already been established that the Minutes of PIAM's 294$^{th}$ Management Committee Meeting did not fulfil the criteria of a privileged communication.

389. The argument raised by counsel that both the Minutes of PIAM's 294th Management Committee meeting and the 3 letters from Messrs. Wong and Partners are protected by legal privilege is hereby dismissed on the following grounds:

(i) At all material times Messrs. Wong and Partners acted as PIAM's counsel in relation to the Commission's investigations and was at liberty to invoke section 126 of the EA so as not to disclose and/or release the said Minutes of Meeting to the Commission. By virtue of section 126 of the EA, PIAM's counsel can be taken to have been aware that, notwithstanding any provision of the Act, including section 22, have no legal obligation to release the said Minutes of Meeting to the Commission;

(ii) PIAM through their solicitors, voluntarily and intentionally released the same to the Commission upon service of section 20 and section 18 notices of the Act; which are legitimate processes available to the Commission; and

(iii) The present case before the Commission can be distinguished from the facts of *Dato' Anthony See*'s case. The communication via letters from Messrs. Wong and Partners to the Commission on 3 occasions, namely, 23.5.2012, 29.11.2012 and 28.2.2013 were to notify the Commission the fact that PIAM's practices may not be in compliance with the Act, hence there was intention to apply for block exemption.

## N.2 MEMORANDUM OF UNDERSTANDING ("MOU") BETWEEN BNM AND THE COMMISSION DATED 5.6.2014.

390. Learned counsels for the Parties raised the issue relating to the signed MOU dated 5.6.2014 between BNM and the Commission. The counsels argue that the MOU is relevant by virtue of the fact that BNM's Guidelines on Prohibited Business Conduct issued pursuant to the FSA makes specific reference to the MOU for the purposes of determining whether a financial service provider ("FSP") is engaging in collusive practices which includes price fixing.

391. During an oral representation session on 19.2.2019, the Commission made its decision to disclose the MOU to the Parties. BNM did not object to this disclosure.

## N.3 PRIOR ENGAGEMENT WITH PIAM

392. On 13.9.2011, Mohd Aidil Tupari together with Dr. Cheah Chee Wah, attended the Meeting of PIAM Task Force on Study on the Competition Act 2010 and PDPA. The objective of this meeting is to provide input on the steps required to be taken by PIAM to address the specific concerns of the general insurance industry and to provide insights on the implication of the Act, the current applicable regulations in the market as well as the operations of the general insurance business among members of PIAM, as duly recorded in the minutes of the said meeting.

393. Further, Mohd Aidil Tupari and Dr. Cheah Chee Wah had advised PIAM that the rules and regulations issued by PIAM may be

regarded as anti-competitive agreements and therefore be subjected to the Act and also that certain collaborative, strategic or exclusive arrangements that are currently in place may be construed as anti-competitive if they are deemed to restricts competition.

*Arguments Raised by the Parties*

394. The learned counsel for PIAM raised the issue that the Proposed Decision had taken into consideration prior engagements in the form of meetings and discussions between PIAM and the Commission officers on PIAM's business activities and practices and whether they were in accordance with the Act.

395. The learned counsels object to the fact that in the Proposed Decision, the Commission had taken into account the evidence of one Mohd Aidil Tupari, a former Commission officer and Dr. Cheah Chee Wah, a consultant for the Ministry of Domestic Trade and Consumer Affairs, pursuant to a meeting with PIAM on 13.9.2011 in coming to its decision on the Infringing Agreement.

*The Commission's Findings*

396. The Commission is of the view that the said meeting is relevant and material to the facts surrounding the Infringing Agreement as it indicates that the Commission had duly advised if not advocated to PIAM and its members regarding the Act.

397. In this regard, the Commission had also advised PIAM that any type of directive on standard pricing leading to anti-competitive behaviour would not be allowed. Therefore, PIAM was advised to ensure that its members comply with the Act and it was suggested that all rules, requirements and arrangements be reviewed to ensure that any anti-competitive elements are removed.

398. After considering the arguments put forth by learned counsels the Commission finds that this evidence is relevant to show that PIAM is fully aware of their possible anti-competitive practices.

## N.4 BLOCK EXEMPTION

399. The chronology of the relevant meetings and correspondences are as follows:

(i) On 13.3.2012, the Parties had highlighted the possibility of the industry having to resort to applications for block exemptions.[199]

(ii) On 17.3.2012, the Parties had highlighted the approach to be adopted by PIAM to seek a block exemption would be for the lawyers to write to the Commission stating PIAM's position on the matter and to allow time to identify those areas which are anti-competitive. The lawyers would also submit a roadmap on the steps to be taken by the industry in complying with the

[199]Paragraph 2.2, sub-paragraph v) of the Minutes of 294th PIAM Management Committee Meeting dated 13.3.2012.

Act and areas where block exemptions from the Commission would be required.[200]

(iii) On 23.5.2012, PIAM stated that it was desirous of applying for a block exemption under section 8 of the Act for certain of its core agreements and practices which it believed will qualify for relief under section 5 of the Act. Furthermore, the letter had further requested for the Commission to allow time for PIAM to resolve its issues and put forward a formal application for a block exemption as an interim relief measure. PIAM would also endeavour to submit the application within 5 months from the date of the letter.[201]

(iv) On 29.11.2012, PIAM had requested for an extension of the grace period to 31.1.2013 to allow PIAM to complete its review. PIAM stated that it would consider its next course of action which, if necessary, may include an application for exemption from the Commission.[202]

(v) On 28.2.2013, PIAM stated that it would consider its next course of action, if necessary, may include an application for exemption from the Commission.[203]

400. Learned counsels had objected to the inferences by the Commission that PIAM in applying for block exemptions were aware that some of its practices were not in compliance with the Act.

[200]Paragraph 2.5, sub-paragraph 2.5.5 Minutes of 295th PIAM Management Committee Meeting dated 17.5.2012.
[201]Page 1 Letter from Messrs. Wong & Partners to the Commission dated 23.5.2012.
[202]Page 1 Letter from Messrs. Wong & Partners to the Commission dated 29.11.2012.
[203]Page 1 Letter from Messrs. Wong & Partners to the Commission dated 28.2.2013.

401. Having heard and considered the submission in relation to the intended application for block exemption, the Commission hereby dismiss the argument and accordingly find that the evidence relating to PIAM's intention to apply for block exemption is relevant to show that PIAM is fully aware of the implications of competition law and is also aware of the legal measures required to overcome such anti-competitive practices in their respective operations.

402. Having heard and considered the submission in relation to the intended application for block exemption, the Commission hereby dismiss the learned counsels' objection. Accordingly, the Commission finds that the evidence relating to PIAM's intention to apply for block exemption is relevant to show that PIAM is fully aware of the implications of competition law and is also aware that of its respective operations are not in compliance with the Act.

## N.5 CONFLICT OF INTEREST

403. Learned counsel for the 22 Enterprises raised the issue that penalties and fines collected from infringements under the Act would form part of the Commission's funds by virtue of section 27 of the CCA. This, it is alleged, would place the Commission in a position of conflict of interest to act impartially. The Commission does not find any merit in this argument as it acted independently and impartial in carrying out its duties and functions in accordance with the CCA.

404. Moreover, the Commission is empowered by section 17(2)(b) of CCA which grants the Commission power to impose remedial relief

including a financial penalty if it finds that there is an infringement of prohibition in Part II of the Act.

405. The objectives of imposing financial penalty are to reflect the seriousness of the infringement and to deter anti-competitive practices.[204]

## N.6 OTHER ISSUES OR SUBMISSION

406. Numerous issues were raised by the Parties. The Commission had considered all of them. Amongst the procedural issues raised by the learned counsels which had been duly considered by the Commission are as described below.

407. The learned counsels argued that the Proposed Decision must be complete and must allow for a full examination of the Commission's reasoning so that the affected parties would be able to comment on the Proposed Decision on an informed basis.

408. Thereon, the learned counsels submitted that the Commission cannot improve on its reasoning or raise new matters or arguments but is obliged to take into account all arguments and submissions. In addition, the learned counsels pleaded that all relevant considerations brought to the Commission's attention at any stage of their deliberations, including matters that are or ought to be within the Commission's knowledge or within the Commission's ability to find out, must be regard in its entirety.

[204] The MyCC Guidelines on Financial Penalties.

409. In dismissing this argument, the Commission relies on the case of *Car Battery Recycling*,[205] whereby the European Commission had found that several enterprises had participated in conduct that breached Article 101(1) of TFEU in the lead recycling sector in Belgium, Germany, France and the Netherlands from 23.9.2009 until 26.9.2012. At the point of issuance of the said decision, the European Commission had omitted to indicate the value of purchases for the purpose of the computation of fines to be imposed. The European Commission then went on to correct its decision by issuing a Correcting Decision on the same case on 6.4.2017.

410. Also, the European General Court held in *Infineon Technologies AG v European Commission*[206] that the European Commission was permitted in its final decision to take into account the responses of the enterprises to the statement of objections.[207] The European General Court had deliberated that the European Commission is empowered to accept or reject the arguments of the enterprises, and to carry out its own assessment of the facts in order to either abandon such complaints as were unfounded or to supplement and redraft its arguments, both in fact and in law, in support of the complaints which it maintained. The European General Court had further deliberated that there would be a breach of the right of defence if the European Commission, in its final decision alleged the enterprises had committed breaches other than those referred to in the statement of objections or took into consideration different facts.

[205]Case AT. 40018.
[206]T-758/14 ECLI:EU:T:2016:737.
[207]Statement of objections is akin to the Commission's Proposed Decision pursuant to section 36 of the Act.

411. It is noteworthy that the Commission is not asserting the Parties of acts of infringement other than that is stated in the Proposed Decision wherein the Parties were found to have infringed section 4(2)(a) of the Act for fixing the parts trade discount and the labour rates and are therefore liable under section 4(3) of the Act. The Commission is not considering a different set of facts other than facts that's already stated in the Proposed Decision. Whether the section of the Act ought to be cited in the general form of section 4(1) or the specific proviso of section 4(2), does not change or alter the allegation made against the Parties.

412. The Parties fully understand the case made against them in the Proposed Decision and are not in any way prejudiced by references made to section 4(2) in the Proposed Decision as clearly demonstrated in the arguments raised in their respective written and oral representations.

413. In addition, based on the plain and ordinary interpretation of sections 36, 37 and 40 of the Act, the purpose of the written and oral submissions is to allow the Commission to consider the arguments and defences put forth by the Parties, respond to the same and incorporate all issues considered into this Decision.

414. Learned counsel's argument that there was no evidence as to what documents the Commission had considered in arriving at the Proposed Decision is hereby dismissed as the Proposed Decision stipulates what documents had been considered. Copies of the documents referred to in the Proposed Decision were provided and duly served on their respective counsels.

415. The learned counsel also raised concerns in relation to the validity of the proceedings and decision by the Commission. At the time of issuance of the Proposed Decision, quorum of the Commission that deliberated the decision against the Parties were as follows:

(i) Tan Sri Dato' Sri Siti Norma Yaakob;
(ii) Tan Sri Datuk Dr. Rebecca Fatima Sta Maria
(iii) Prof. Dato' Dr. S. Sothi Rachagan;
(iv) Dato' Basaruddin Sadali;
(v) Dato' Ahmad Hisham Kamaruddin;
(vi) Dato' Dr. Gan Khuan Poh;
(vii) Datuk Seri Dr. Rahamat Bivi Yusoff;
(viii) Prof. Dr. Zakariah Abdul Rashid;
(ix) Tuan Ragunath Kesavan; and
(x) Puan Normazli Abdul Rahim.

416. In 2018, in light of the change of government, the former Chairman and several members had ceased to become members of the Commission. Subsequently, the current Chairman was appointed together with the current members of the Commission.

417. The learned counsels for the Parties had requested for a *de novo* oral representation session. The Commission had allowed *de novo* oral representation sessions to be held. The *de novo* oral representation sessions were held on 19, 20, 21 February 2019, 13 May 2019, and 17 and 18 June 2019 which was deliberated by the following members of the Commission:

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

418. As such, in light of the foregoing, the Commission finds no merits for the learned counsels' argument as the change of members of Commission is beyond the control of the Commission. Nevertheless, considering that *de novo* proceeding was granted, the right of the Parties to be heard had been adhered to by the Commission.

419. The learned counsel further contended that there was no proper access to the Commission's files. The Commission takes the view that the learned counsels' argument that there was no proper access to the Commission's files is without merit as the Commission had invited the learned counsels to the Commission's office to access the Commission's files wherein the learned counsels were provided with sufficient time to access documents in the Commission's files. The Commission had provided the Parties access to the Commission's files starting from 20.3.2017 till 24.3.2017 and 17.4.2017.

420. The Commission is of the view that learned counsels had been provided with beyond sufficient time to access documents in the Commission's file and hence it cannot be said that it had not been given proper access to the Commission's file.

421. The Commission takes the view that the Parties has at all material times been provided with the relevant evidence and the relevant evidence are accordingly attached to this Decision.

422. Reference is also made to Article 27(2) of TFEU which provides that the right of defence in a hearing shall be fully respected during the European Commission's proceedings, including the right to have access to the Commission's file. Article 27(2) of TFEU makes clear that there is no right of access to confidential information, nor to internal documents of the European Commission, the National Competition Authorities and correspondences within the European Competition Network.

423. Article 27(3) of TFEU provides that the Commission may hear third parties with sufficient interest in the proceedings. The Commission had invited counsels for the Parties to attend to the Commission's office to access the Commission's file, save for access to confidential information.

424. In light of the foregoing, the Commission is of the view that the Parties were allowed to inspect the Commission's files within reasonable time and therefore the argument contended by the learned counsels is hereby dismissed.

## N.7 SECTION 124 OF THE FSA

425. The learned counsel for Allianz, AmGeneral and RHB Insurance argued as follows:

*"151. We contend under the FSA, any (in this case alleged) collusion between insurers is not prohibited unless there is some demonstrate detriment to financial consumers under Malaysian law.*

*162. Even if FAWAOM – PIAM Arrangement may have the propensity to infringe the CA 2010 (which is denied), it is clear that the CA 2010 is the general legislation which "promotes economic development by promoting and protecting the process of competition whilst the FSA is a specific legislation which specifically "provides for the regulation and supervision of financial institution", including the insurers and insurance industry.*

*163. In this regard, Para 6 Schedule 7 FSA is a specific provision governing the horizontal restraints on competition in respect of financial service providers including insurers and financial consumers.*

*164. By virtue of the application of the maxim specialia generalibus derogant (i.e. special provisions derogate from general), Section 124 FSA and Paragraph 6 Schedule 7 FSA prevail over Section 4 CA 2010…"*

426. The above arguments are without merit for the following reasons:

(i) An application of one of the basic principles of statutory interpretation known as *"Generalia specialibus non derogant"* which means that universal things do not distract from specific things. This proposition of law says that when a matter falls under any specific provision, then it must be governed by that

provision and not by the general provision. The general provisions must submit to the specific provisions of law;

(ii) Section 4 of the Act is a specific law which provides specific provisions on competition law infringements whilst section 124 of the FSA is a general law which provides a general provision regarding competition law. In the event of any conflict between the interpretation between section 4 of the Act and section 124 of the FSA, section 4 of the Act shall prevail as it provides a more specific provision on competition law as compared to the latter which only provides a general provision regarding potential infringements of competition law; and

(iii) Following from item (2) above, the counsel had evidently misinterpreted the provision of the FSA that a plain and ordinary reading of section 124 read in particular with Schedule 7 (paragraph 6) merely demonstrates that the Act has provided that the Commission has express jurisdiction over any complaint by an aggrieved person involving the prohibited business conduct of "*colluding with any person to fix or control the features or terms of any financial service or product to the detriment of any financial consumer; except for any tariff or premium rates or policy terms which have been approved by the Bank."* Policy has been duly defined in the FSA to mean "insurance policy".

## N.8 FAWOAM IS NOT A CREDIBLE COMPLAINANT

427. The learned counsel for the Parties argued that FAWOAM is not a credible or bona-fide complainant.

428. The Commission accepts FAWOAM as the complainant notwithstanding the fact it was involved in the subject matter. FAWOAM was entitled to make this complaint and the Commission finds no merits in the submissions as investigation is carried out independently. In any event, the lodging of a complaint only triggers the initiation of an investigation.

429. After carrying out the investigation, the Commission finds that there are merits in the complaint made by FAWOAM and the Commission's investigation resulted in the issuance of the Proposed Decision against the Parties.

## N.9 ETIQA INSURANCE'S POSITION

430. The learned counsels objected to the Commission's reliance on the contents of Etiqa Insurance's letter dated 6.4.2012[208] which had purportedly stated its decision to distance itself from PIAM's rules on fixing of rates, fees, charges and other trading conditions and trade association's activities which would involve exchange of sensitive business information such as information on current and future products or services, fees and trading conditions.

[208] Letter from Etiqa Insurance to PIAM dated 6.4.2012.

431. The Commission, having perused this letter and Minutes of the 295th Management Committee Meeting of PIAM, find it to be relevant to show that Etiqa Insurance was trying to distance itself from PIAM's activities even though subsequently Etiqa Insurance did not act in accordance with the letter. Despite the letter and Minutes of the 295th Management Committee Meeting of PIAM, the Parties had actually continued to participate in the Infringing Agreement. Based on other evidence as well, this forms a factual situation on which the Commission relies to prove that the Infringing Agreement has continued.

## N.10 REQUEST FOR SEPARATE ORAL REPRESENTATIONS BY THE COUNSEL FOR AMGENERAL, ALLIANZ, LIBERTY AND RHB INSURANCE

432. The learned counsel for AmGeneral, Allianz, Liberty and RHB Insurance had requested to hold their oral representation in a closed proceeding to the exclusion of counsels for PIAM and the other enterprises. The request by the learned counsel was granted on 29.1.2018, on the basis that the enterprises represented by the counsel were entitled not to disclose their counsel's legal strategy or confidential information such as financial figures and company turnover with PIAM and/or the other enterprises' financial figures.

## N.11 VIDEO PRESENTATION

433. The Parties were also allowed to present a video[209] that claimed to be crucial with the objective of showing the actual state of the car repair industry in Malaysia and in essence to justify that the actions of the Parties' do not constitute a section 4 prohibition. The Commission had viewed the said video and the Commission takes the view that the video is irrelevant to the present case. Accordingly, the Commission maintains that the Parties had engaged and participated in the Infringing Agreement.

## O. THE COMMISSION'S FINDINGS

434. Having considered in totality the written submissions and the oral representations, the Commission finds that the Parties have infringed the prohibitions laid down in section 4 of the Act in that the Parties had entered into an agreement to fix the price of parts trade discounts and labour rates for PARS workshops. The Commission therefore makes a decision of infringement pursuant to section 40 of the Act.

[209] Transcript of PIAM Closed OR session made by Shearn Delamore on 19.02.2019.

## PART 4: THE COMMISSION'S DECISION

### A. DIRECTIONS UPON A FINDING OF INFRINGEMENT

435. 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 the Parties for entering into agreements in breach of section 4(1) read with section 4(2) and section 4(3) of the Act.

436. Section 40(1) of the Act provides that where the Commission has made a decision that an agreement has infringed the section 4 prohibition, the Commission may give the infringing enterprises such directions as it considers appropriate to bring the infringement to an end.

437. Accordingly, the Commission hereby directs the Parties to undertake the following:

(a) To cease and desist from implementing the agreed parts trade discount for 6 vehicle makes, namely, Proton, Perodua, Nissan, Toyota, Honda and Naza and the hourly labour rate for PARS workshops with immediate effect; and

(b) The future parts trade discount rate and the hourly labour rate for PARS workshops are to be determined independently by the 22 Enterprises.

## B. GENERAL ARGUMENTS ON FINANCIAL PENALTY RAISED BY COUNSELS

438. Counsels for the Parties raised the following issues in relation to financial penalty.

## B.1 NO CORRELATION BETWEEN THE PROPOSED FINANCIAL PENALTY AND THE RELEVANT TURNOVER

439. The learned counsel for AmGeneral, Allianz, Liberty and RHB Insurance in its written representation dated 25.4.2017 argue that there is no direct correlation between the proposed fine and the actual repairs done at PARS workshops on the 6 makes over the Relevant Period.[210] In the Proposed Decision, the Commission had considered the turnover from sales of motor insurance premium for 6 car makes as the relevant turnover.

440. The learned counsel argued that in *Cheil Jedang Corporation v Commission,*[211] the proportion of turnover derived from the goods in respect of which infringement was committed is likely to give a fair indication of the scale of the infringement on the relevant market.[212] In particular, the learned counsel is argued that the turnover of the products identified as the subject of a restrictive practice constitutes

[210]Written Representation of AmGeneral, Part 5, page 6, at paragraph 26 dated 25.4.2017; Written Representation of Allianz, Part 5, Page 6, at paragraph 26 dated 25.4.2017; Written Representation of Liberty, Part 5, Page 6, at paragraph 26 dated 25.4.2017; and Written Representation of RHB Insurance, Part 5, Page 6, at paragraph 26 dated 25.4.2017.
[211]Case T/220/00 ECLI:EU:T:2003:193.
[212]Paragraph 27 of Written Representation of AmGeneral, page 6, dated 25.4.2017; Paragraph 27 Written Representation of Allianz, page 6, dated 25.4.2017; Paragraph 27 Written Representation of Liberty, Page 6, dated 25.4.2017; and Paragraph 27 Written Representation of RHB Insurance, page 6, dated 25.4.2017.

an objective criterion which gives a proper measure of the harm which that practice causes to normal competition.[213]

441. The learned counsel also argued that in *Parker Pen v Commission,*[214] the Court of First Instance found that the decision by the European Commission did not take into account the fact that the turnover accounted for by the products to which the infringement relates was relatively low in comparison with the turnover resulting from Parker's total sales. Accordingly, the Court of First Instance overruled the fine imposed by the European Commission.[215]

442. The Commission takes note the argument by the counsel as the above with regards to there is no direct correlation between the proposed financial penalty and the actual repairs done at PARS workshops on the 6 makes over the Relevant Period.

443. The Commission refers to the approach adopted in the case of *Car Battery Recycling*,[216] where the value of purchases by each enterprise of the products concerned was used rather than value of sales given that the infringement related to the purchase price. Therefore, it would not be possible to use the value of sales of recycled lead as the proxy figure.[217]

[213]Paragraph 27 Written Representation of AmGeneral, page 6, dated 25.4.2017; Paragraph 27 Written Representation of Allianz, page 6, dated 25.4.2017; at Paragraph 27 Written Representation of Liberty, page 6, dated 25.4.2017; and Paragraph 27 Written Representation of RHB Insurance, page 6, dated 25.4.2017.
[214]Case T-77/92 *Parker Pen Ltd v Commission of the European Communities*.
[215]Case T-77/92 *Parker Pen Ltd v Commission of the European Communities*, at paragraph 94.
[216]COMP-40018 *Car Battery Recycling*.
[217]Ibid, at paragraph 298.

444. Based on the above argument by the learned counsels and as well as the case law on point, the Commission agrees that the relevant turnover ought to be based on the value of purchase ("claim value") of repair services by PARS workshops in relation to 6 vehicle makes in Malaysia.

445. This is because the relevant product market which are parts trade and labour, are components of the cost for the 22 Enterprises. The Commission took cognisance that the 22 Enterprises do not sell any parts and labour to their customers.

446. Thereon, the Commission will compute the value of the purchases based on the data submitted through the Merimen System pursuant to the section 18 notices dated 30.11.2016. The Commission takes note that Merimen data was taken during the course of the investigation. The Commission is of the view that the usage of this data would not be prejudicial to the Parties as it is readily accessible by the Parties at all material times.

## B.2 WORLDWIDE TURNOVER AS THE MEASURE IN IMPOSING FINANCIAL PENALTY BY THE COMMISSION

447. The learned counsels for Etiqa, MSIG, QBE, Pacific Insurance and Chubb argued that the Commission has erred in having regard to worldwide turnover as a measure against which financial penalties are to be imposed.[218]

[218]Paragraph 165 of Written Representation of Etiqa dated 25.4.2017; Paragraph 165 of Written Representation of MSIG dated 25.4.2017; Paragraph 165 of Written Representation of QBE dated 25.4.2017; Paragraph 165 of Written Representation of Pacific Insurance dated 25.4.2017.

448. The learned counsels argued that according to section 3(2) of the Act, the application of the Act to commercial activity transacted outside Malaysia is confined only to such commercial activity transacted outside Malaysia which has an effect on competition in a market in Malaysia. Hence, the worldwide turnover is justified where the alleged infringing conduct occurs outside Malaysia has effects on the market in Malaysia.

449. Referring to the arguments raised by the learned counsels, initially, the Commission, in its Proposed Decision, derived the value of the financial penalty based on the 22 Enterprises' turnover generated from the sales from comprehensive motor insurance premium for the 6 vehicle makes.

450. The Commission is of the view that the counsels had misconstrued the meaning of worldwide turnover. Section 40(4) provides that the financial penalty must not exceed 10 per cent of the enterprise's worldwide turnover in the period of infringement. This is a quantifiable and statutory maximum ceiling for financial penalty to be imposed by the Commission.

451. Therefore, the argument raised by the learned counsels that there is no reasonable justification for the Commission to adopt the worldwide turnover as a measure for financial penalty is unfounded and dismissed.

## B.3 EXCESSIVE PENALTY

452. The learned counsel for AIA, AIG, AXA and Zurich submitted that the starting-point for calculation of the financial penalty did not take into account any mitigating factors which resulted in excessive financial penalty, not in line with the trend of fines decided in the European Union.

453. The learned counsel further argued that the European jurisdiction did not impose its first fine until seven years after the introduction of competition law to Europe. In the *ACF Chemiefarma NV*,[219] the European Commission's first decision involving a cartel, a total fine of 500,000 units of account was imposed on all companies involved in a cartel. Learned counsel also argues that in *Sugar Cartel Case*[220] the highest fine ever imposed by the European Commission on a single undertaking only represented 1% of the infringing enterprise's turnover in the sugar market.

454. The counsel further argued that the European Commission only revised its fining policy by increasing the severity of its fines after 17 years of the introduction of the competition law in Europe as seen in the case of *Pioneer Hi-Fi Equipment*.[221] Up until the *Pioneer* case, the fines imposed by the European Commission stayed consistently below that of the enterprise's worldwide turnover.

[219]Case 41/69 *ACF Chemiefarma NV v Commission of the European Communities*.
[220]Case IV/26 918 *European sugar industry* OJ L 140/17, 26/05/1973, Commission decision of 2.1.1973.
[221]80/256/EEC Commission Decision of 14 December 1979 relating to a proceeding under Article 85 of the EEC Treaty (IV/29.595 - *Pioneer Hi-Fi Equipment*) OJ L 60.

455. In addition, it is argued, that the Cartel Statistics Paper published by the European Commission dated 31.12.2014 shows that more than 50% of the fines imposed by the European Commission on infringing undertakings in cartel cases in the last 9 years fell in the range of 0 to 0.99% of their global turnover. The learned counsel urged the Commission to consider the starting-point for computation of financial penalty to be reduced to properly reflect the fining trends in the European Union.

456. The Commission takes note of the above submissions. The Commissions finds that the value of proposed financial penalty in the Proposed Decision is not excessive. The value of the proposed financial penalty for each Party is less than 1% of the worldwide turnover.

457. Nevertheless, the Commission in determining the value of financial penalty upon considering the seriousness of infringement, deterrent, aggravating and mitigating factors has discretion in so far as the penalty imposed does not exceed the ceiling prescribed in section 40(4) of the Act.

## B.4 BNM DIRECTIVE

458. The learned counsels for AmGeneral, Allianz, RHB Insurance, Etiqa, MSIG, QBE, Pacific Insurance, AIA, AIG, AXA Affin, Zurich, Chubb, Great Eastern and Prudential Assurance argued that in the event liability has been established, the alleged directive of BNM which resulted in the Parties entering into the Infringing Agreement

should be considered to be a mitigating factor in the calculation of financial penalty.

459. The learned counsel for AmGeneral, Allianz, Liberty and RHB Insurance further argued that the value of the financial penalty should be reduced up to 30% as decided in the case *French Beef*[222] due to the forceful intervention of the French Minister for Agriculture. The Commission may also reduce the value of financial penalty up to 60% as decided in the case of *Bananas*[223] wherein the European Commission having found that the enterprises coordinated the setting of the quotation prices for imported bananas, took into account the specific regulatory regime in the banana sector as a mitigating factor.

460. The Commission may also consider imposing a symbolic fine to the Parties as decided in the case of *Raw Tobacco.*[224] In this case, the European Commission imposed, having found that there was a horizontal agreement between the raw tobacco producers in fixing the price bracket for each raw tobacco variety, imposed a symbolic fine of EUR1000 due to the regulatory framework prevailing at that point in time.

461. In the alternative, the learned counsel submitted that Commission may choose not to impose any financial penalty as seen in the case of *CNSD.*[225] In this case, *CNSD* had infringed Article 85(1) of European Economic Community Treaty by setting the tariff rates for

[222]COMP/C.38.279/F3.
[223]COMP/39188.
[224]COMP/C.38.238/B.2.
[225]93/438/EEC: Commission Decision of 30 June 1993 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/33.407-CNSD).

services provided by custom agents, was ordered to end their infringement but no fine was imposed because the conduct was approved by a ministerial decree.

462. The Commission takes note of the submission by the counsels in relation to BNM's facilitation in the discussions leading to the Infringing Agreement as a of the mitigating factor. The present case before the Commission can be distinguished from the facts of *French Beef*, *Bananas*, *Raw Tobacco* and *CNSD*. The Commission is of the view that the learned counsels had selectively chosen bits and pieces of these cases and did not reveal the entirety of the relevant facts of the cases for the proper deliberation by the Commission. As discussed in **Part 3: G,** BNM had not issued any direction for the Parties to fix the parts trade discount and labour rates for PARS workshop.

463. In *French Beef*[226], two slaughterers and four farmers' federations had taken part in the anti-competitive agreement to set a minimum price for some categories of beef and to suspend or, at the very least, limit imports of all types of beef into France. As the slaughterers' federation were coerced by the Minister of Agriculture to sign the anti-competitive agreement, the Commission has decided to grant a 30% reduction in the financial penalty to the slaughterers.[227] However, this reduction in fine did not apply to the farmers' federation.

[226]COMP/C.38.279/F3.
[227]COMP/C.38.279/F3, at paragraph 173-178.

464. In *Raw Tobacco*[228], a symbolic fine was imposed on the producers because the standard "cultivation contracts" negotiated between 1995 and 1998 stipulated that all producer representatives would negotiate jointly with each individual processor, the price schedules and the additional conditions relating to the sale of tobacco. The Agriculture Ministry approved the price schedules that had been previously negotiated jointly by all the producer representatives and the 4 processors. [229] In the same case, the Court had imposed a hefty fine on the raw tobacco processors.[230]

465. In the *Bananas*[231] case, the European Commission reduced the financial penalty for all Parties due to the presence of a specific regulatory regime in which the import of Bananas was regulated under Council Regulation (EEC) No. 404/93.[232] In the context of present case, the Commission views that there is no specific regulatory regime with regards to repair services by PARS workshops in relation to the 6 vehicle makes (i.e. Proton, Perodua, Nissan, Toyota, Honda and Naza) in Malaysia.

466. In *CNSD,*[233] the Minister of Finance approved the tariff and fixed the date of its coming into force as the day following its publication in the Italian Official Journal on 20.7.1988. In this case, the European Commission further elaborated that CNSD enjoys autonomous power to grant such derogations which are not subject to ministerial approval and are therefore not published in the Official Journal. In

[228]COMP/C.38.238/B.2 *Raw Tobacco Spain*.
[229]COMP/C.38.238/B.2 *Raw Tobacco Spain*, at paragraph 425-431.
[230]Ibid.
[231]COMP/39188 – *Bananas*.
[232]COMP/39188 – *Bananas*, at paragraph 36 and 467.
[233]Case IV/33.407 – *CNSD* (1993), at paragraphs 24, 25 and 27.

the context of the present case, the Commission finds that there is no legal obligation compelling the Parties to enter into the Infringing Agreement. The Commission finds that the Parties had autonomy when the Parties proceeded with the fixing of the parts trade discount and labour rates for the PARS workshops which BNM did not "direct" them to do so.

467. It is the Commission's view that BNM directive is not a mitigating factor in the present case.

## C. GENERAL POINTS ON FINANCIAL PENALTIES

468. The Commission is empowered under section 40(1)(c) of the Act to impose a financial penalty on an enterprise which is found to have infringed a prohibition under Part II of the Act and such penalty shall not exceed 10% of the worldwide turnover of the Parties over the period during which the infringement had taken place.

## D. METHODOLOGY FOR COMPUTING QUANTUM OF PENALTIES

469. 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.[234]

470. In calculating financial penalties for each of the Parties, the Commission begins by setting a base figure, which is worked out by taking 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

471. The Commission considers that the seriousness of the infringement should be taken into account in setting the base figure.

472. With regards to the seriousness of the infringement in question, the Commission will take into account the nature of the infringement and the size of the relevant market. The European Commission has adopted a similar methodology.[235]

473. The Commission considers the agreement regarding the fixing of parts trade discount and labour rates for PARS workshops by the Parties, which have the object of prevention, restriction or distortion

[234]Paragraph 3.2 of MyCC Guidelines on Financial Penalties.
[235]Case T-39/06 *Transcatab v Commission* at paragraph 36.

of competition, to be, by nature, a very serious infringement of the Act.

## D.2 RELEVANT TURNOVER AND THE BASE FIGURE

474. The relevant turnover used to determine the base figure is the enterprise's turnover in the relevant product market and the relevant geographic market affected by the infringement. The Commission considers the relevant service and geographic market affected by the Parties' conduct in **Part 3:M** above.

475. For the purpose of computing financial penalty, the Commission relies on the data on claim value submitted by Merimen Online pursuant to the section 18 notices dated 30.11.2016.

476. The base figure of the financial penalty is calculated by taking into account the relevant turnover of the enterprise and the seriousness of the infringement.

477. In this regard, the Commission views price-fixing arrangements to be the most heinous of all anti-competitive conduct and ought therefore to be dealt with sternly by the Commission. In the case of *Verizon Communications v Law Offices of Curtis V. Trinko,*[236] Judge Scalia described cartels as the "supreme evil of antitrust."

478. As such, it is reasonable for the Commission to take an appropriate proportion of the Parties' relevant turnover as the base figure in

[236] *Verizon Communications v Law Offices of Curtis V. Trinko*, 540 U.S. 398, 408 (2004).

determining the financial penalty, in order to reflect the seriousness of the Infringing Agreement.

479. In light of the aforesaid, the Commission views that the base figure of the financial penalty ought to be 10% of each of the Parties' relevant turnover.

## D.3 DURATION OF INFRINGEMENT

480. The Parties were involved in the infringement from 1.1.2012 till 17.2.2017.

## D.4 AGGRAVATING FACTORS

481. The Commission will consider the presence of aggravating factors and makes upward adjustments when assessing the amount of financial penalty.[237] However, in the present case, we find none.

## D.5 MITIGATING FACTORS

482. The Commission will consider the presence of mitigating factors and accordingly make downward adjustment to the penalty.

483. In the present case, the Commission considers the non-defaulted rates for the parts trade discount and labour rates on the Merimen System database by the Parties to be a mitigating factor.

[237]Paragraph 3.2 of MyCC Guidelines on Financial Penalties.

484. The Commission further considers the minor role played by the enterprises in the infringement to be a mitigating factor. Additionally, the Commission takes into account whether the enterprise had put in place an appropriate competition law compliance programme in its organisation.

## D.6 VERIFICATION THAT THE FINANCIAL PENALTY SHALL NOT EXCEED 10% OF WORLDWIDE TURNOVER

485. The final amount of the financial penalty shall not exceed 10% of the worldwide turnover of each of the Parties throughout the Relevant Period. The Commission will adjust the financial penalty where necessary if the financial penalty value exceeds the maximum percentage permitted under section 40(4) of the Act.

## E. FINANCIAL PENALTY FOR AIA

486. AIA was involved in an infringement with the object of preventing, distorting and restricting competition in the market for parts trade and labour for PARS workshops.

487. For the purpose of computing financial penalty, the Commission relies on data submitted by Merimen Online pursuant to section 18 notice dated 30.11.2016.[238] The Commission takes note that the submitted claim value was for the period between 1.1.2012 and 30.11.2016. As a result, the information that is available to the Commission is up to 30.11.2016.

[238]Received document from Merimen Online dated 16.12.2016 pursuant to section 18 Notice issued by the Commission dated 30.11.2016.

488. Due to the unavailability of data from 1.12.2016 till 17.2.2017, the Commission uses a proxy figure in computation of the financial penalty for the said period. In order to determine the value of the proxy figure, the Commission combines the claim value from 1.1.2016 to 30.11.2016 and divides the figure with 335 days. Next, the proxy figure is multiplied by the number of days of each month to derive the monthly claim value for period of 1.12.2016 to 17.2017.

489. AIA's worldwide turnover throughout the Relevant Period is RM[redacted].[239] AIA's relevant turnover based on the claim value between 1.1.2012 and 17.2.2017 is RM[redacted].

490. This base figure in calculating the financial penalty for AIA is fixed at [redacted]% of the relevant turnover which amounts to RM[redacted]. This base figure is lower than the value of proposed financial penalty. Therefore, the Commission takes this figure as the base figure.

491. The Commission takes note that AIA had defaulted the rates for parts trade discount and labour rates in the Merimen System database. Therefore, there is no mitigating adjustment made due to this factor.

492. The Commission considers that AIA did not provide cooperation over and beyond the extent to which it was legally required to. Therefore, there shall be no mitigating adjustment made.

[239]Information provided by AIA pursuant to the section 18 Notice issued by the Commission dated 11.11.2016.

493. The financial penalty of RM[redacted] does not exceed the maximum financial penalty that the Commission can impose in accordance with section 40(4) of the Act, i.e., RM[redacted].

494. Accordingly, the Commission concludes that a financial penalty of RM[redacted] is to be imposed on AIA.

## F. FINANCIAL PENALTY FOR AIG

495. AIG was involved in an infringement with the object of preventing, distorting and restricting competition in the market for parts trade and labour for PARS workshops.

496. For the purpose of computing financial penalty, the Commission relies on data submitted by Merimen Online pursuant to section 18 notice dated 30.11.2016.[240] The Commission takes note that the submitted claim value was for the period between 1.1.2012 till 30.11.2016. As a result, the information that is available to the Commission is up to 30.11.2016.

497. Due to the unavailability of data from 1.12.2016 till 17.2.2017, the Commission uses a proxy figure in computation of the financial penalty for the said period. In order to determine the value of the proxy figure, the Commission combines the claim value from 1.1.2016 to 30.11.2016 and divides the figure with 335 days which are total days from 1 January until 30 November 2016. Next, the proxy figure is multiplied by the number of days of each month to

[240]Received document from Merimen Online dated 16.12.2016 pursuant to section 18 Notice issued by the Commission dated 30.11.2016.

derive the monthly claim value for the period of 1.12.2016 to 17.2.2017.

498. AIG's worldwide turnover throughout the Relevant Period is RM[redacted].[241] AIG's relevant turnover based on the claim value between 1.1.2012 and 17.2.2017 is RM[redacted].

499. The base figure in calculating financial penalty for AIG is fixed at [redacted]% of the relevant turnover which amounts to RM[redacted]. This figure is higher than the proposed financial penalty. Consequently, the Commission takes the proposed financial penalty as the base figure which is RM[redacted].

500. The Commission takes note that AIG had not defaulted the rates for parts trade discount and labour rate in the Merimen System database. Therefore, the Commission considers this as a mitigating factor and hereby adjusts the penalty downward by [redacted]% from the base figure from the base figure of RM[redacted] which is RM[redacted]. The total financial penalty computed at this stage, after considering the mitigating factor, is RM[redacted].

501. The Commission considers that AIG did not provide cooperation over and beyond the extent to which it was legally required to. Therefore, there shall be no further mitigating adjustment made.

[241]Information provided by AIG pursuant to the section 18 Notice issued by the Commission dated 11.11.2016.

502. The financial penalty of RM[redacted] does not exceed the maximum financial penalty that the Commission can impose in accordance with section 40(4) of the Act, i.e., RM[redacted].

503. Accordingly, the Commission concludes that a financial penalty of RM[redacted] is to be imposed on AIG.

## G. FINANCIAL PENALTY FOR ALLIANZ

504. Allianz was involved in an infringement with the object of preventing, distorting and restricting competition in the market for parts trade and labour for PARS workshops.

505. For the purpose of computing financial penalty, the Commission relies on data submitted by Merimen Online pursuant to section 18 notice dated 30.11.2016.[242] The Commission takes note that the submitted claim value was for the period between 1.1.2012 and 30.11.2016. As a result, the information that is available to the Commission is up to 30.11.2016.

506. Due to the unavailability of data from 1.12.2016 till 17.2.2017, the Commission uses a proxy figure in computation of the financial penalty for the said period. In order to determine the value of the proxy figure, the Commission combines the claim value from 1.1.2016 to 30.11.2016 and divides the figure with 335 days which are total days from 1 January until 30 November 2016. Next, the proxy figure is multiplied by the number of days of each month to

[242]Received document from Merimen Online dated 16.12.2016 pursuant to section 18 Notice issued by the Commission dated 30.11.2016.

derive the monthly claim value for the period of 1.12.2016 to 17.2.2017.

507. Allianz's worldwide turnover throughout the Relevant Period is RM[redacted][243] Allianz's relevant turnover based on the claim value between 1.1.2012 and 17.2.2017 is RM[redacted].

508. The base figure in calculating the financial penalty for Allianz is fixed at [redacted]% of the relevant turnover which amounts to RM[redacted]. This figure is higher than the proposed financial penalty. Consequently, the Commission takes the proposed financial penalty as the base figure which is RM[redacted].

509. The Commission takes note that Allianz has competition law compliance programme in place. Therefore, the Commission considers this as a mitigating factor and hereby adjusts the penalty downward by [redacted]% from the base figure from the base figure of RM[redacted] which is RM[redacted]. The total financial penalty computed at this stage, after considering the mitigating factor, is RM[redacted].

510. The Commission considers that Allianz did not provide cooperation over and beyond the extent to which it was legally required to. Therefore, there shall be no further mitigating adjustment made.

[243]Information provided by Allianz pursuant to the section 18 Notice issued by the Commission dated 11.11.2016.

511. The financial penalty of RM[redacted]. does not exceed the maximum financial penalty that the Commission can impose in accordance with section 40(4) of the Act, i.e., RM[redacted].

512. Accordingly, the Commission concludes that a financial penalty of RM[redacted] is to be imposed on Allianz.

## H. FINANCIAL PENALTY FOR AMGENERAL

513. AmGeneral was involved in an infringement with the object of preventing, distorting and restricting competition in the market for parts trade and labour for PARS workshops.

514. For the purpose of computing financial penalty, the Commission relies on data submitted by Merimen Online pursuant to section 18 notice dated 30.11.2016.[244] The Commission takes note that the submitted claim value was for the period between 1.1.2012 and 30.11.2016. As a result, the information that is available to the Commission is up to 30.11.2016.

515. Due to the unavailability of data from 1.12.2016 till 17.2.2017, the Commission uses a proxy figure in computation of the financial penalty for the said period. In order to determine the value of the proxy figure, the Commission combines the claim value from 1.1.2016 to 30.11.2016 and divides the figure with 335 days which are total days from 1 January until 30 November 2016. Next, the

[244]Received document from Merimen Online dated 16.12.2016 pursuant to section 18 Notice issued by the Commission dated 30.11.2016.

proxy figure is multiplied by the number of days of each month to derive the monthly claim value for period of 1.12.2016 to 17.2.2017.

516. AmGeneral's worldwide turnover throughout the Relevant Period is RM [redacted].[245] AmGeneral's relevant turnover based on the claim value between 1.1.2012 and 17.2.2017 is RM[redacted].

517. The base figure in calculating the financial penalty for AmGeneral is fixed at [redacted]% of the relevant turnover which amounts to RM[redacted]. This base figure is lower than the value of proposed financial penalty. Therefore, the Commission takes this figure as the base figure.

518. The Commission takes note that AmGeneral has competition law compliance programme in place. Therefore, the Commission considers this as a mitigating factor and hereby adjusts the penalty downward by [redacted]% from the base figure of RM[redacted] which is RM[redacted]. The total financial penalty computed at this stage, after considering the mitigating factor, is RM[redacted].

519. The Commission considers that AmGeneral did not provide cooperation over and beyond the extent to which it was legally required to. Therefore, there shall be no further mitigating adjustment made.

[245]Information provided by AmGeneral pursuant to the section 18 Notice issued by the Commission dated 11.11.2016.

520. The financial penalty of RM[redacted] does not exceed the maximum financial penalty that the Commission can impose in accordance with section 40(4) of the Act, i.e., RM[redacted].

521. Accordingly, the Commission concludes that a financial penalty of RM[redacted] is to be imposed on AmGeneral.

## I. FINANCIAL PENALTY FOR AXA AFFIN

522. AXA Affin was involved in an infringement with the object of preventing, distorting and restricting competition in the market for parts trade and labour for PARS workshops.

523. For the purpose of computing financial penalty, the Commission relies on data submitted by Merimen Online pursuant to section 18 notice dated 30.11.2016.[246] The Commission takes note that the submitted claim value was for the period between 1.1.2012 and 30.11.2016. As a result, the information that is available to the Commission is up to 30.11.2016.

524. Due to the unavailability of data from 1.12.2016 till 17.2.2017, the Commission uses a proxy figure in computation of the financial penalty for the said period. In order to determine the value of the proxy figure, the Commission combines the claim value from 1.1.2016 to 30.11.2016 and divides the figure with 335 days which are total days from 1 January until 30 November 2016. Next, the

[246]Received document from Merimen Online dated 16.12.2016 pursuant to section 18 Notice issued by the Commission dated 30.11.2016.

proxy figure is multiplied by the number of days of each month to derive the monthly claim value for period of 1.12.2016 to 17.2.2017.

525. AXA Affin's turnover throughout the Relevant Period is RM[redacted].[247] AXA Affin's relevant turnover based on the claim value between 1.1.2012 and 17.2.2017 is RM[redacted].

526. The base figure in calculating the financial penalty for AXA Affin is fixed at [redacted]% of the relevant turnover which amounts to RM[redacted]. This figure is higher than the proposed financial penalty. Consequently, the Commission takes the proposed financial penalty as the base figure which is RM[redacted].

527. The Commission takes note that AXA Affin had not defaulted the rates for parts trade discount and labour rate in the Merimen System database. Therefore, the Commission considers this as a mitigating factor and hereby adjusts the penalty downward by [redacted]% from the base figure from the base figure of RM[redacted] which is RM[redacted]. The total financial penalty computed at this stage, after considering the mitigating factor, is RM[redacted].

528. The Commission considers that AXA Affin did not provide cooperation over and beyond the extent to which it was legally required to. Therefore, there shall be no further mitigating adjustment made.

[247]Information provided by AXA Affin pursuant to the section 18 Notice issued by the Commission dated 11.11.2016.

529. The financial penalty of RM[redacted] does not exceed the maximum financial penalty that the Commission can impose in accordance with section 40(4) of the Act, i.e., RM[redacted].

530. Accordingly, the Commission concludes that a financial penalty of RM[redacted] is to be imposed on AXA Affin.

## J. FINANCIAL PENALTY FOR BERJAYA SOMPO

531. Berjaya Sompo was involved in an infringement with the object of preventing, distorting and restricting competition in the market for parts trade and labour for PARS workshops.

532. For the purpose of computing financial penalty, the Commission relies on data submitted by Merimen Online pursuant to section 18 notice dated 30.11.2016.[248] The Commission takes note that the submitted claim value was for the period between 1.1.2012 and 30.11.2016. As a result, the information that is available to the Commission is up to 30.11.2016.

533. Due to the unavailability of data from 1.12.2016 till 17.2.2017, the Commission uses a proxy figure in computation of the financial penalty for the said period. In order to determine the value of the proxy figure, the Commission combines the claim value from 1.1.2016 to 30.11.2016 and divides the figure with 335 days which are total days from 1 January until 30 November 2016. Next, the

[248]Received document from Merimen Online dated 16.12.2016 pursuant to section 18 Notice issued by the Commission dated 30.11.2016.

proxy figure is multiplied by the number of days of each month to derive the monthly claim value for period of 1.12.2016 to 17.2.2017.

534. Berjaya Sompo's turnover throughout the Relevant Period is RM[redacted].[249] Berjaya Sompo's relevant turnover based on the claim value between 1.1.2012 and 17.2.2017 is RM[redacted].

535. The base figure in calculating the financial penalty for Berjaya Sompo is fixed at [redacted]% of the relevant turnover which amounts to RM[redacted]. This figure is higher than the proposed financial penalty. Consequently, the Commission takes the proposed financial penalty as the base figure which is RM[redacted].

536. The Commission takes note that Berjaya Sompo had defaulted the rates for parts trade discount and labour rates in the Merimen System database. Therefore, there is no mitigating adjustment made due to this factor.

537. The Commission considers that Berjaya Sompo did not provide cooperation over and beyond the extent to which it was legally required to. Therefore, there shall be no mitigating adjustment made.

538. The financial penalty of RM[redacted] does not exceed the maximum financial penalty that the Commission can impose in accordance with section 40(4) of the Act, i.e., RM[redacted].

[249]Information provided by Berjaya Sompo pursuant to the section 18 Notice issued by the Commission dated 11.11.2016.

539. Accordingly, the Commission concludes that a financial penalty of RM[redacted] is to be imposed on Berjaya Sompo.

## K. FINANCIAL PENALTY FOR CHUBB

540. Chubb was involved in an infringement with the object of preventing, distorting and restricting competition in the market for parts trade and labour for PARS workshops.

541. For the purpose of computing financial penalty, the Commission relies on data submitted by Merimen Online pursuant to section 18 notice dated 30.11.2016.[250] The Commission takes note that the submitted claim value was for the period between 1.1.2012 and 30.11.2016. As a result, the information that is available to the Commission is up to 30.11.2016.

542. Due to the unavailability of data from 1.12.2016 till 17.2.2017, the Commission uses a proxy figure in computation of the financial penalty for the said period. In order to determine the value of the proxy figure, the Commission combines the claim value from 1.1.2016 to 30.11.2016 and divides the figure with 335 days which are total days from 1 January until 30 November 2016. Next, the proxy figure is multiplied by the number of days of each month to derive the monthly claim value for period of 1.12.2016 to 17.2.2017.

[250]Received document from Merimen Online dated 16.12.2016 pursuant to section 18 Notice issued by the Commission dated 30.11.2016.

543. Chubb's turnover throughout the Relevant Period is RM[redacted].[251] Chubb's relevant turnover based on the claim value between 1.1.2012 and 17.2.2017 is RM[redacted].

544. The base figure in calculating the financial penalty for Chubb is fixed at [redacted]% of the relevant turnover which amounts to RM[redacted]. This figure is higher than the proposed financial penalty. Consequently, the Commission takes the proposed financial penalty as the base figure which is RM[redacted].

545. The Commission takes note that Chubb had defaulted the rates for parts trade discount and labour rates in the Merimen System database. Therefore, there is no mitigating adjustment made due to this factor.

546. The Commission considers that Chubb did not provide cooperation over and beyond the extent to which it was legally required to. Therefore, there shall be no mitigating adjustment made.

547. The financial penalty of RM[redacted] does not exceed the maximum financial penalty that the Commission can impose in accordance with section 40(4) of the Act, i.e., RM[redacted].

548. Accordingly, the Commission concludes that a financial penalty of RM[redacted] is to be imposed on Chubb.

[251]Information provided by Chubb pursuant to the section 18 Notice issued by the Commission dated 11.11.2016.

## L. FINANCIAL PENALTY FOR ETIQA

549. Etiqa was involved in an infringement with the object of preventing, distorting and restricting competition in the market for parts trade and labour for PARS workshops.

550. For the purpose of computing financial penalty, the Commission relies on data submitted by Merimen Online pursuant to section 18 notice dated 30.11.2016.[252] The Commission takes note that the submitted claim value was for the period between 1.1.2012 and 30.11.2016. As a result, the information that is available to the Commission is up to 30.11.2016.

551. Due to the unavailability of data from 1.12.2016 till 17.2.2017, the Commission uses a proxy figure in computation of the financial penalty for the said period. In order to determine the value of the proxy figure, the Commission combines the claim value from 1.1.2016 to 30.11.2016 and divides the figure with 335 days which are total days from 1 January until 30 November 2016. Next, the proxy figure is multiplied by the number of days of each month to derive the monthly claim value for period of 1.12.2016 to 17.2.2017.

552. Etiqa's turnover throughout the Relevant Period is RM[redacted].[253] Etiqa's relevant turnover based on the claim value between 1.1.2012 and 17.2.2017 is RM[redacted].

[252]Received document from Merimen Online dated 16.12.2016 pursuant to section 18 Notice issued by the Commission dated 30.11.2016.
[253]Information provided by Etiqa pursuant to the section 18 Notice issued by the Commission dated 11.11.2016.

553. The base figure in calculating the financial penalty for Etiqa is fixed at [redacted]% of the relevant turnover which amounts to RM[redacted]. This figure is higher than the proposed financial penalty. Consequently, the Commission takes the proposed financial penalty as the base figure which is RM[redacted].

554. The Commission takes note that Etiqa had defaulted the rates for parts trade discount and labour rates in the Merimen System database. Therefore, there is no mitigating adjustment made due to this factor.

555. The Commission considers that Etiqa did not provide cooperation over and beyond the extent to which it was legally required to. Therefore, there shall be no mitigating adjustment made.

556. The financial penalty of RM[redacted] does not exceed the maximum financial penalty that the Commission can impose in accordance with section 40(4) of the Act, i.e., RM[redacted].

557. Accordingly, the Commission concludes that a financial penalty of RM[redacted]. is to be imposed on Etiqa.

## M. FINANCIAL PENALTY FOR LIBERTY

558. Liberty was involved in an infringement with the object of preventing, distorting and restricting competition in the market for parts trade and labour for PARS workshops.

559. For the purpose of computing financial penalty, the Commission relies on data submitted by Merimen Online pursuant to section 18 notice dated 30.11.2016.[254] The Commission takes note that the submitted claim value was for the period between 1.1.2012 and 30.11.2016. As a result, the information that is available to the Commission is up to 30.11.2016.

560. Due to the unavailability of data from 1.12.2016 till 17.2.2017, the Commission uses a proxy figure in computation of the financial penalty for the said period. In order to determine the value of the proxy figure, the Commission combines the claim value from 1.1.2016 to 30.11.2016 and divides the figure with 335 days which are total days from 1 January until 30 November 2016. Next, the proxy figure is multiplied by the number of days of each month to derive the monthly claim value for period of 1.12.2016 to 17.2.2017.

561. Liberty's turnover throughout the Relevant Period is RM[redacted].[255] Liberty's relevant turnover based on the claim value between 1.1.2012 and 17.2.2017 is RM[redacted].

562. The base figure in calculating the financial penalty for Liberty is fixed at [redacted]% of the relevant turnover which amounts to RM[redacted]. This figure is higher than the proposed financial penalty. Consequently, the Commission takes the proposed financial penalty as the base figure which is RM[redacted].

[254]Received document from Merimen Online dated 16.12.2016 pursuant to section 18 Notice issued by the Commission dated 30.11.2016.
[255]Information provided by Liberty pursuant to the section 18 Notice issued by the Commission dated 11.11.2016.

563. The Commission takes note that Liberty has competition law compliance program in place. Therefore, the Commission considers this as a mitigating factor and hereby adjusts the penalty downward by [redacted]% from the base figure of RM[redacted]. The total financial penalty computed at this stage, after considering the mitigating factor, is RM[redacted].

564. The Commission takes note that Liberty had defaulted the rates for parts trade discount and labour rates in the Merimen System database. Therefore, there is no further mitigating adjustment made due to this factor.

565. The Commission considers that Liberty did not provide cooperation over and beyond the extent to which it was legally required to. Therefore, there shall be no mitigating adjustment made.

566. The financial penalty of RM[redacted] does not exceed the maximum financial penalty that the Commission can impose in accordance with section 40(4) of the Act, i.e., RM[redacted].

567. Accordingly, the Commission concludes that a financial penalty of RM[redacted] is to be imposed on Liberty.

## N. FINANCIAL PENALTY FOR LONPAC

568. Lonpac was involved in an infringement with the object of preventing, distorting and restricting competition in the market for parts trade and labour for PARS workshops.

569. For the purpose of computing financial penalty, the Commission relies on data submitted by Merimen Online pursuant to section 18 notice dated 30.11.2016.[256] The Commission takes note that the submitted claim value was for the period between 1.1.2012 and 30.11.2016. As a result, the information that is available to the Commission is up to 30.11.2016.

570. Due to the unavailability of data from 1.12.2016 till 17.2.2017, the Commission uses a proxy figure in computation of the financial penalty for the said period. In order to determine the value of the proxy figure, the Commission combines the claim value from 1.1.2016 to 30.11.2016 and divides the figure with 335 days which are total days from 1 January until 30 November 2016. Next, the proxy figure is multiplied by the number of days of each month to derive the monthly claim value for period of 1.12.2016 to 17.2.2017.

571. Lonpac's worldwide turnover throughout the period of infringement is RM[redacted].[257] Lonpac's relevant turnover based on the claim value between 1.1.2012 and 17.2.2017 is RM[redacted].

572. The base figure in calculating the financial penalty for Lonpac is fixed at [redacted]% of the relevant turnover which amounts to RM[redacted]. This figure is higher than the proposed financial penalty. Consequently, the Commission takes the proposed financial penalty as the base figure which is RM[redacted].

[256]Received document from Merimen Online dated 16.12.2016 pursuant to section 18 Notice issued by the Commission dated 30.11.2016.
[257]Information provided by Lonpac pursuant to the section 18 Notice issued by the Commission dated 11.11.2016.

573. The Commission takes note that Lonpac had not defaulted the rates for parts trade discount and labour rate in the Merimen System database. Therefore, the Commission considers this as a mitigating factor and hereby adjusts the penalty downward by [redacted]% from the base figure of RM[redacted] which is RM[redacted]. The total financial penalty computed at this stage, after considering the mitigating factor, is RM[redacted].

574. The Commission considers that Lonpac did not provide cooperation over and beyond the extent to which it was legally required to. Therefore, there shall be no further mitigating adjustment made.

575. The financial penalty of RM[redacted] does not exceed the maximum financial penalty that the Commission can impose in accordance with section 40(4) of the Act, i.e., RM[redacted].

576. Accordingly, the Commission concludes that a financial penalty of RM[redacted] is to be imposed on Lonpac.

## O. FINANCIAL PENALTY FOR MSIG

577. MSIG was involved in an infringement with the object of preventing, distorting and restricting competition in the market for parts trade and labour for PARS workshops.

578. For the purpose of computing financial penalty, the Commission relies on data submitted by Merimen Online pursuant to section 18

notice dated 30.11.2016.[258] The Commission takes note that the submitted claim value was for the period between 1.1.2012 and 30.11.2016. As a result, the information that is available to the Commission is up to 30.11.2016.

579. Due to the unavailability of data from 1.12.2016 till 17.2.2017, the Commission uses a proxy figure in computation of the financial penalty for the said period. In order to determine the value of the proxy figure, the Commission combines the claim value from 1.1.2016 to 30.11.2016 and divides the figure with 335 days which are total days from 1 January until 30 November 2016. Next, the proxy figure is multiplied by the number of days of each month to derive the monthly claim value for period of 1.12.2016 to 17.2.2017.

580. MSIG's worldwide turnover throughout the period of infringement is RM[redacted].[259] MSIG's relevant turnover based on the claim value between 1.1.2012 and 17.2.2017 is RM[redacted].

581. The base figure in calculating the financial penalty for MSIG is fixed at [redacted]% of the relevant turnover which amounts to RM[redacted]. This figure is higher than the proposed financial penalty. Consequently, the Commission takes the proposed financial penalty as the base figure which is RM[redacted].

582. The Commission takes note that MSIG had not defaulted the rates for parts trade discount and labour rate in the Merimen System

[258]Received document from Merimen Online dated 16.12.2016 pursuant to section 18 Notice issued by the Commission dated 30.11.2016.
[259]Information provided by MSIG pursuant to the section 18 Notice issued by the Commission dated 11.11.2016.

database. Therefore, the Commission considers this as a mitigating factor and hereby adjusts the penalty downward by [redacted]% from the base figure of RM[redacted] which is RM[redacted]. The total financial penalty computed at this stage, after considering the mitigating factor, is RM[redacted].

583. The Commission considers that MSIG did not provide cooperation over and beyond the extent to which it was legally required to. Therefore, there shall be no further mitigating adjustment made.

584. The financial penalty of RM[redacted] does not exceed the maximum financial penalty that the Commission can impose in accordance with section 40(4) of the Act, i.e., RM[redacted].

585. Accordingly, the Commission concludes that a financial penalty of RM[redacted] is to be imposed on MSIG.

## P. FINANCIAL PENALTY FOR MPI GENERALI

586. MPI Generali was involved in an infringement with the object of preventing, distorting and restricting competition in the market for parts trade and labour for PARS workshops.

587. For the purpose of computing financial penalty, the Commission relies on data submitted by Merimen Online pursuant to section 18 notice dated 30.11.2016.[260] The Commission takes note that the submitted claim value was for the period between 1.1.2012 and

[260]Received document from Merimen Online dated 16.12.2016 pursuant to section 18 Notice issued by the Commission dated 30.11.2016.

30.11.2016. As a result, the information that is available to the Commission is up to 30.11.2016.

588. Due to the unavailability of data from 1.12.2016 till 17.2.2017, the Commission uses a proxy figure in computation of the financial penalty for the said period. In order to determine the value of the proxy figure, the Commission combines the claim value from 1.1.2016 to 30.11.2016 and divides the figure with 335 days which are total days from 1 January until 30 November 2016. Next, the proxy figure is multiplied by the number of days of each month to derive the monthly claim value for period of 1.12.2016 to 17.2.2017.

589. MPI Generali's worldwide turnover throughout the period of infringement is RM[redacted].[261] MPI Generali's relevant turnover based on the claim value between 1.1.2012 and 17.2.2017 is RM[redacted].

590. The base figure in calculating the financial penalty for MPI Generali is fixed at [redacted]% of the relevant turnover which amounts to RM[redacted]. This base figure is lower than the value of proposed financial penalty. Therefore, the Commission takes this figure as the base figure.

591. The Commission takes note that MPI Generali had not defaulted the rates for parts trade discount and labour rate in the Merimen System database. Therefore, the Commission considers this as a mitigating factor and hereby adjusts the penalty downward by [redacted]% from the

[261]Information provided by MPI Generali pursuant to the section 18 Notice issued by the Commission dated 11.11.2016.

base figure of RM[redacted] which is RM[redacted]. The total financial penalty computed at this stage, after considering the mitigating factor, is RM[redacted].

592. The Commission considers that MPI Generali did not provide cooperation over and beyond the extent to which it was legally required to. Therefore, there shall be no further mitigating adjustment made.

593. The financial penalty of RM[redacted] does not exceed the maximum financial penalty that the Commission can impose in accordance with section 40(4) of the Act, i.e., RM[redacted].

594. Accordingly, the Commission concludes that a financial penalty of RM[redacted] is to be imposed on MPI Generali.

## Q. FINANCIAL PENALTY FOR GREAT EASTERN

595. Great Eastern was involved in an infringement with the object of preventing, distorting and restricting competition in the market for parts trade and labour for PARS workshops.

596. For the purpose of computing financial penalty, the Commission relies on data submitted by Merimen Online pursuant to section 18 notice dated 30.11.2016.[262] The Commission takes note that the submitted claim value was for the period between 1.1.2012 and

[262]Received document from Merimen Online dated 16.12.2016 pursuant to section 18 Notice issued by the Commission dated 30.11.2016.

30.11.2016. As a result, the information that is available to the Commission is up to 30.11.2016.

597. Due to the unavailability of data from 1.12.2016 till 17.2.2017, the Commission uses a proxy figure in computation of the financial penalty for the said period. In order to determine the value of the proxy figure, the Commission combines the claim value from 1.1.2016 to 30.11.2016 and divides the figure with 335 days which are total days from 1 January until 30 November 2016. Next, the proxy figure is multiplied by the number of days of each month to derive the monthly claim value for period of 1.12.2016 to 17.2.2017.

598. Great Eastern's worldwide turnover throughout the period of infringement is RM[redacted].[263] Great Eastern's relevant turnover based on the claim value between 1.1.2012 and 17.2.2017 is RM[redacted].

599. The base figure in calculating the financial penalty for Great Eastern is fixed at [redacted]% of the relevant turnover which amounts to RM[redacted]. This figure is higher than the proposed financial penalty. Consequently, the Commission takes the proposed financial as the base figure which is RM[redacted].

600. The Commission takes note that Great Eastern has competition law compliance programme in place. Therefore, the Commission considers this as a mitigating factor and hereby adjusts the penalty downward by [redacted]% from the base figure of RM[redacted] which is

[263]Information provided by Great Eastern pursuant to the section 18 Notice issued by the Commission dated 11.11.2016.

RM[redacted]. The total financial penalty computed at this stage, after considering the mitigating factor, is RM[redacted].

601. The Commission takes note that Great Eastern had not defaulted the rates for parts trade discount and labour rate in the Merimen System database. Therefore, the Commission considers this as a mitigating factor and hereby adjusts the penalty downward by [redacted]% from the base figure of RM[redacted] which is RM[redacted]. The total financial penalty computed at this stage, after considering the mitigating factors, is RM[redacted].

602. The Commission considers that Great Eastern did not provide cooperation over and beyond the extent to which it was legally required to. Therefore, there shall be no further mitigating adjustment made.

603. The financial penalty of RM[redacted] does not exceed the maximum financial penalty that the Commission can impose in accordance with section 40(4) of the Act, i.e., RM[redacted].

604. Accordingly, the Commission concludes that a financial penalty of RM[redacted] is to be imposed on Great Eastern.

## R. FINANCIAL PENALTY FOR PACIFIC & ORIENT

605. Pacific & Orient was involved in an infringement with the object of preventing, distorting and restricting competition in the market for parts trade and labour for PARS workshops.

606. For the purpose of computing financial penalty, the Commission relies on data submitted by Merimen Online pursuant to section 18 notice dated 30.11.2016.[264] The Commission takes note that the submitted claim value was for the period between 1.1.2012 and 30.11.2016. As a result, the information that is available to the Commission is up to 30.11.2016.

607. Due to the unavailability of data from 1.12.2016 till 17.2.2017, the Commission uses a proxy figure in computation of the financial penalty for the said period. In order to determine the value of the proxy figure, the Commission combines the claim value from 1.1.2016 to 30.11.2016 and divides the figure with 335 days which are total days from 1 January until 30 November 2016. Next, the proxy figure is multiplied by the number of days of each month to derive the monthly claim value for period of 1.12.2016 to 17.2.2017.

608. Pacific & Orient's worldwide turnover throughout the period of infringement is RM[redacted].[265] Pacific & Orient's relevant turnover based on the claim value between 1.1.2012 and 17.2.2017 is RM[redacted].

609. The base figure in calculating the financial penalty for Pacific & Orient is fixed at [redacted]% of the relevant turnover which amounts to RM[redacted]. This figure is higher than the proposed financial penalty. Consequently, the Commission takes the proposed financial penalty as the base figure which is RM[redacted].

[264]Received document from Merimen Online dated 16.12.2016 pursuant to section 18 Notice issued by the Commission dated 30.11.2016.
[265]Information provided by Pacific & Orient pursuant to the section 18 Notice issued by the Commission dated 11.11.2016.

610. The Commission takes note that Pacific & Orient had defaulted the rates for parts trade discount and labour rates in the Merimen System database. Therefore, there is no mitigating adjustment made due to this factor.

611. The Commission considers that Pacific & Orient did not provide cooperation over and beyond the extent to which it was legally required to. Therefore, there shall be no mitigating adjustment made.

612. The financial penalty of RM[redacted] does not exceed the maximum financial penalty that the Commission can impose in accordance with section 40(4) of the Act, i.e., RM[redacted].

613. Accordingly, the Commission concludes that a financial penalty of RM[redacted] is to be imposed on Pacific & Orient.

## S. FINANCIAL PENALTY FOR PROGRESSIVE INSURANCE

614. Progressive Insurance was involved in an infringement with the object of preventing, distorting and restricting competition in the market for parts trade and labour for PARS workshops.

615. For the purpose of computing financial penalty, the Commission relies on data which submitted by Merimen Online pursuant to section 18 notice dated 30.11.2016.[266] The Commission takes note that the submitted claim value was for the period between 1.1.2012

[266]Received document from Merimen Online dated 16.12.2016 pursuant to section 18 Notice issued by the Commission dated 30.11.2016.

and 30.11.2016. As a result, the information that is available to the Commission is up to 30.11.2016.

616. Due to the unavailability of data from 1.12.2016 till 17.2.2017, the Commission uses a proxy figure in computation of the financial penalty for the said period. In order to determine the value of the proxy figure, the Commission combines the claim value from 1.1.2016 to 30.11.2016 and divides the figure with 335 days which are total days from 1 January until 30 November 2016. Next, the proxy figure is multiplied by the number of days of each month to derive the monthly claim value for period of 1.12.2016 to 17.2.2017.

617. Progressive Insurance's worldwide turnover throughout the Relevant Period is RM[redacted].[267] Progressive Insurance's relevant turnover based on the claim value between 1.1.2012 and 17.2.2017 is RM[redacted].

618. The base figure in calculating financial penalty for Progressive Insurance's fixed at [redacted]% of the relevant turnover which amounts to RM[redacted]. This figure is higher than the proposed financial penalty. Consequently, the Commission takes the proposed financial penalty as the base figure which is RM[redacted].

619. The Commission takes note that Progressive Insurance had not defaulted the parts trade discount and labour rate in the Merimen System database. Therefore, the Commission considers this as a mitigating factor and hereby adjusts the penalty downward by [redacted]%

[267]Information provided by Progressive Insurance pursuant to the section 18 Notice issued by the Commission dated 11.11.2016.

from the base figure from the base figure of RM[redacted] which is RM [redacted]. The total financial penalty computed at this stage, after considering the mitigating factor, is RM[redacted].

620. The Commission considers that Progressive Insurance did not provide cooperation over and beyond the extent to which it was legally required to. Therefore, there shall be no further mitigating adjustment made.

621. The financial penalty of RM[redacted] does not exceed the maximum financial penalty that the Commission can impose in accordance with section 40(4) of the Act, i.e., RM[redacted].

622. Accordingly, the Commission concludes that a financial penalty of RM[redacted] is to be imposed on Progressive Insurance.

## T. FINANCIAL PENALTY FOR PRUDENTIAL ASSURANCE

623. Prudential Assurance was involved in an infringement with the object of preventing, distorting and restricting competition in the market for parts trade and labour for PARS workshops.

624. For the purpose of computing financial penalty, the Commission relies on data submitted by Merimen Online pursuant to section 18 notice dated 30.11.2016.[268] The Commission takes note that the submitted claim value was for the period between 1.1.2012 and

[268]Received document from Merimen Online dated 16.12.2016 pursuant to section 18 Notice issued by the Commission dated 30.11.2016.

30.11.2016. As a result, the information that is available to the Commission is up to 30.11.2016.

625. Due to the unavailability of data from 1.12.2016 till 17.2.2017, the Commission uses a proxy figure in computation of the financial penalty for the said period. In order to determine the value of the proxy figure, the Commission combines the claim value from 1.1.2016 to 30.11.2016 and divides the figure with 335 days which are total days from 1 January until 30 November 2016. Next, the proxy figure is multiplied by the number of days of each month to derive the monthly claim value for period of 1.12.2016 to 17.2.2017.

626. Prudential Assurance's worldwide turnover throughout the period of infringement is RM[redacted].[269] Prudential Assurance's relevant turnover based on the claim value between 1.1.2012 and 17.2.2017 is RM[redacted].

627. The base figure in calculating the financial penalty for Prudential Assurance is fixed at [redacted]% of the relevant turnover which amounts to RM[redacted]. This figure is higher than the proposed financial penalty. Consequently, the Commission takes the proposed financial penalty as the base figure which is RM[redacted].

628. The Commission takes note that Prudential Assurance has competition law compliance programme in place. Therefore, the Commission considers this as a mitigating factor and hereby adjusts

[269]Information provided by Prudential Assurance pursuant to the section 18 Notice issued by the Commission dated 11.11.2016.

the penalty downward by [redacted]% from the base figure of RM[redacted] which is RM[redacted]. The total financial penalty computed at this stage, after considering the mitigating factor, is RM[redacted].

629. The Commission takes note that Prudential Assurance had not defaulted the rates for parts trade discount and labour rate in the Merimen System database. Therefore, the Commission considers this as a mitigating factor and hereby adjusts the penalty downward by [redacted]% from the base figure of RM[redacted] which is RM[redacted]. The total financial penalty computed at this stage, after considering the mitigating factors, is RM[redacted].

630. The Commission considers that Prudential Assurance did not provide cooperation over and beyond the extent to which it was legally required to. Therefore, the Commission considers this as a mitigating factor and hereby adjusts the penalty downward by [redacted]% from the base figure of RM[redacted]. The total financial penalty computed at this stage, after considering the mitigating factors, is RM[redacted].

631. The financial penalty of RM[redacted] does not exceed the maximum financial penalty that the Commission can impose in accordance with section 40(4) of the Act, i.e., RM[redacted].

632. Accordingly, the Commission concludes that a financial penalty of RM[redacted] is to be imposed on Prudential Assurance.

## U. FINANCIAL PENALTY FOR QBE

633. QBE was involved in an infringement with the object of preventing, distorting and restricting competition in the market for parts trade and labour for PARS workshops.

634. For the purpose of computing financial penalty, the Commission relies on data submitted by Merimen Online pursuant to section 18 notice dated 30.11.2016.[270] The Commission takes note that the submitted claim value was for the period between 1.1.2012 and 30.11.2016. As a result, the information that is available to the Commission is up to 30.11.2016.

635. Due to the unavailability of data from 1.12.2016 till 17.2.2017, the Commission uses a proxy figure in computation of the financial penalty for the said period. In order to determine the value of the proxy figure, the Commission combines the claim value from 1.1.2016 to 30.11.2016 and divides the figure with 335 days which are total days from 1 January until 30 November 2016. Next, the proxy figure is multiplied by the number of days of each month to derive the monthly claim value for the period of 1.12.2016 to 17.2.2017.

636. QBE's worldwide turnover throughout the period of infringement is RM[redacted].[271] QBE's relevant turnover based on the claim value between 1.1.2012 and 17.2.2017 is RM[redacted].

[270]Received document from Merimen Online dated 16.12.2016 pursuant to section 18 Notice issued by the Commission dated 30.11.2016.
[271]Information provided by QBE pursuant to the section 18 Notice issued by the Commission dated 11.11.2016.

637. The base figure in calculating the financial penalty for QBE is fixed at [redacted]% of the relevant turnover which amounts to RM[redacted]. This figure is higher than the proposed financial penalty. Consequently, the Commission takes the proposed financial penalty as the base figure which is RM[redacted].

638. The Commission takes note that QBE had defaulted the rates for parts trade discount and labour rates in the Merimen System database. Therefore, there is no mitigating adjustment made due to this factor.

639. The Commission considers that QBE did not provide cooperation over and beyond the extent to which it was legally required to. Therefore, there shall be no mitigating adjustment made.

640. The financial penalty of RM[redacted] does not exceed the maximum financial penalty that the Commission can impose in accordance with section 40(4) of the Act, i.e., RM[redacted].

641. Accordingly, the Commission concludes that a financial penalty of RM[redacted] is to be imposed on QBE.

## V. FINANCIAL PENALTY FOR RHB INSURANCE

642. RHB Insurance was involved in an infringement with the object of preventing, distorting and restricting competition in the market for parts trade and labour for PARS workshops.

643. For the purpose of computing financial penalty, the Commission relies on data submitted by Merimen Online pursuant to section 18 notice dated 30.11.2016.[272] The Commission takes note that the submitted claim value was for the period between 1.1.2012 and 30.11.2016. As a result, the information that is available to the Commission is up to 30.11.2016.

644. Due to the unavailability of data from 1.12.2016 till 17.2.2017, the Commission uses a proxy figure in computation of the financial penalty for the said period. In order to determine the value of the proxy figure, the Commission combines the claim value from 1.1.2016 to 30.11.2016 and divides the figure with 335 days which are total days from 1 January until 30 November 2016. Next, the proxy figure is multiplied by the number of days of each month to derive the monthly claim value for the period of 1.12.2016 to 17.2.2017.

645. RHB Insurance's worldwide turnover throughout the period of infringement is RM[redacted].[273] RHB Insurance's relevant turnover based on the claim value between 1.1.2012 and 17.2.2017 is RM[redacted].

646. The base figure in calculating the financial penalty for RHB Insurance is fixed at [redacted]% of the relevant turnover which amounts to RM[redacted]. This figure is higher than the proposed financial

[272]Received document from Merimen Online dated 16.12.2016 pursuant to section 18 Notice issued by the Commission dated 30.11.2016.
[273]Information provided by RHB Insurance pursuant to the section 18 Notice issued by the Commission dated 11.11.2016.

penalty. Consequently, the Commission takes the proposed financial penalty as the base figure which is RM[redacted].

647. The Commission takes note that RHB Insurance had defaulted the parts trade discount and labour rates in the Merimen System database. Therefore, there is no mitigating adjustment made due to this factor.

648. The Commission considers that RHB Insurance did not provide cooperation over and beyond the extent to which it was legally required to. Therefore, there shall be no mitigating adjustment made.

649. The financial penalty of RM[redacted] does not exceed the maximum financial penalty that the Commission can impose in accordance with section 40(4) of the Act, i.e., RM[redacted].

650. Accordingly, the Commission concludes that a financial penalty of RM[redacted] is to be imposed on RHB Insurance.

## W. FINANCIAL PENALTY FOR PACIFIC INSURANCE

651. Pacific Insurance was involved in an infringement with the object of preventing, distorting and restricting competition in the market for parts trade and labour for PARS workshops.

652. For the purpose of computing financial penalty, the Commission relies on data submitted by Merimen Online pursuant to section 18

notice dated 30.11.2016.[274] The Commission takes note that the submitted claim value for panel workshop was for the period between 1.1.2012 and 30.11.2016. As a result, the information that is available to the Commission is up to 30.11.2016.

653. Due to the unavailability of data from 1.12.2016 till 17.2.2017, the Commission uses a proxy figure in computation of the financial penalty for the said period. In order to determine the value of the proxy figure, the Commission combines the claim value from 1.1.2016 to 30.11.2016 and divides the figure with 335 days which are total days from 1 January until 30 November 2016. Next, the proxy figure is multiplied by the number of days of each month to derive the monthly claim value for period of 1.12.2016 to 17.2.2017.

654. Pacific Insurance's worldwide turnover throughout the Relevant Period is RM[redacted].[275] Pacific Insurance's relevant turnover based on the claim value between 1.1.2012 and 17.2.2017 is RM[redacted].

655. The base figure in calculating financial penalty for Pacific Insurance's fixed at [redacted]% of the relevant turnover which amounts to RM[redacted]. This figure is higher than the proposed financial penalty. Consequently, the Commission takes the proposed financial penalty as the base figure which is RM[redacted].

[274]Received document from Merimen Online dated 16.12.2016 pursuant to section 18 Notice issued by the Commission dated 30.11.2016.
[275]Information provided by Pacific Insurance pursuant to the section 18 Notice issued by the Commission dated 11.11.2016.

656. The Commission takes note that Pacific Insurance had not defaulted the parts trade discount and labour rate in the Merimen System database. Therefore, the Commission considers this as a mitigating factor and hereby adjusts the penalty downward by [redacted]% from the base figure from the base figure of RM[redacted] which is RM[redacted]. The total financial penalty computed at this stage, after considering the mitigating factor, is RM[redacted].

657. The Commission considers that Pacific Insurance did not provide cooperation over and beyond the extent to which it was legally required to. Therefore, there shall be no further mitigating adjustment made.

658. The financial penalty of RM[redacted] does not exceed the maximum financial penalty that the Commission can impose in accordance with section 40(4) of the Act, i.e., RM[redacted].

659. Accordingly, the Commission concludes that a financial penalty of RM[redacted] is to be imposed on Pacific Insurance.

## X. FINANCIAL PENALTY FOR TOKIO MARINE

660. Tokio Marine was involved in an infringement with the object of preventing, distorting and restricting competition in the market for parts trade and labour for PARS workshops.

661. For the purpose of computing financial penalty, the Commission relies on data submitted by Merimen Online pursuant to section 18

notice dated 30.11.2016.[276] The Commission takes note that the submitted claim value was for the period between 1.1.2012 and 30.11.2016. As a result, the information that is available to the Commission is up to 30.11.2016.

662. Due to the unavailability of data from 1.12.2016 till 17.2.2017, the Commission uses a proxy figure in computation of the financial penalty for the said period. In order to determine the value of the proxy figure, the Commission combines the claim value from 1.1.2016 to 30.11.2016 and divides the figure with 335 days which are total days from 1 January until 30 November 2016. Next, the proxy figure is multiplied by the number of days of each month to derive the monthly claim value for the period between 1.12.2016 and 17.2.2017.

663. Tokio Marine's worldwide turnover throughout the Relevant Period is RM[redacted].[277] Tokio Marine's relevant turnover based on the claim value between 1.1.2012 and 17.2.2017 is RM[redacted].

664. The base figure in calculating financial penalty for Tokio Marine's fixed at [redacted]% of the relevant turnover which amounts to RM[redacted]. This figure is higher than the proposed financial penalty. Consequently, the Commission takes the proposed financial penalty as the base figure which is RM[redacted].

[276]Received document from Merimen Online dated 16.12.2016 pursuant to section 18 Notice issued by the Commission dated 30.11.2016.
[277]Information provided by Tokio Marine pursuant to the section 18 Notice issued by the Commission dated 11.11.2016.

665. The Commission takes note that Tokio Marine had not defaulted the parts trade discount and labour rates in the Merimen System database. Therefore, the Commission considers this as a mitigating factor and hereby adjusts the penalty downward by [redacted]% from the base figure from the base figure of RM[redacted]. The total financial penalty computed at this stage, after considering the mitigating factor, is RM[redacted].

666. The Commission considers that Tokio Marine did not provide cooperation over and beyond the extent to which it was legally required to. Therefore, there shall be no further mitigating adjustment made.

667. The financial penalty of RM[redacted] does not exceed the maximum financial penalty that the Commission can impose in accordance with section 40(4) of the Act, i.e., RM[redacted].

668. Accordingly, the Commission concludes that a financial penalty of RM[redacted] is to be imposed on Tokio Marine.

## Y. FINANCIAL PENALTY FOR TUNE INSURANCE

669. Tune Insurance was involved in an infringement with the object of preventing, distorting and restricting competition in the market for parts trade and labour for PARS workshops.

670. For the purpose of computing financial penalty, the Commission relies on data submitted by Merimen Online pursuant to section 18

notice dated 30.11.2016.[278] The Commission takes note that the submitted claim value was for the period between 1.1.2012 and 30.11.2016. As a result, the information that is available to the Commission is up to 30.11.2016.

671. Due to the unavailability of data from 1.12.2016 till 17.2.2017, the Commission uses a proxy figure in computation of the financial penalty for the said period. In order to determine the value of the proxy figure, the Commission combines the claim value from 1.1.2016 to 30.11.2016 and divides the figure with 335 days. Next, the proxy figure is multiplied by the number of days of each month to derive the monthly claim value for the period of 1.12.2016 to 17.2.2017.

672. Tune Insurance's worldwide turnover throughout the Relevant Period is RM[redacted].[279] Tune Insurance's relevant turnover based on the claim value between 1.1.2012 and 17.2.2017 is RM[redacted].

673. The base figure in calculating financial penalty for Tune Insurance's fixed at [redacted]% of the relevant turnover which amounts to RM[redacted]. This figure is higher than the proposed financial penalty. Consequently, the Commission takes the proposed financial penalty as the base figure which is RM[redacted].

[278]Received document from Merimen Online dated 16.12.2016 pursuant to section 18 Notice issued by the Commission dated 30.11.2016.
[279]Information provided by Tune Insurance pursuant to the section 18 Notice issued by the Commission dated 11.11.2016.

674. The Commission takes note that Tune Insurance had not defaulted the rates for parts trade discount and labour rate in the Merimen System database. Therefore, the Commission considers this as a mitigating factor and hereby adjusts the penalty downward by [redacted]% from the base figure of RM[redacted] which is RM[redacted]. The total financial penalty computed at this stage, after considering the mitigating factor, is RM[redacted].

675. The Commission considers that Tune Insurance did not provide cooperation over and beyond the extent to which it was legally required to. Therefore, there shall be no further mitigating adjustment made.

676. The financial penalty of RM[redacted] does not exceed the maximum financial penalty that the Commission can impose in accordance with section 40(4) of the Act, i.e., RM[redacted].

677. Accordingly, the Commission concludes that a financial penalty of RM[redacted] is to be imposed on Tune Insurance.

## Z. FINANCIAL PENALTY FOR ZURICH

678. Zurich was involved in an infringement with the object of preventing, distorting and restricting competition in the market for parts trade and labour for PARS workshops.

679. For the purpose of computing financial penalty, the Commission relies on data submitted by Merimen Online pursuant to section 18

notice dated 30.11.2016.[280] The Commission takes note that the submitted claim value was for the period between 1.1.2012 and 30.11.2016. As a result, the information that is available to the Commission is up to 30.11.2016.

680. Due to the unavailability of data from 1.12.2016 till 17.2.2017, the Commission uses a proxy figure in computation of the financial penalty for the said period. In order to determine the value of the proxy figure, the Commission combines the claim value from 1.1.2016 to 30.11.2016 and divides the figure with 335 days which are total days from 1 January until 30 November 2016. Next, the proxy figure is multiplied by the number of days of each month to derive the monthly claim value for the period of 1.12.2016 to 17.2.2017.

681. Zurich's worldwide turnover throughout the Relevant Period is RM[redacted].[281] Zurich's relevant turnover based on the claim value between 1.1.2012 and 17.2.2017 is RM[redacted].

682. The base figure in calculating financial penalty for Zurich's fixed at [redacted]% of the relevant turnover which amounts to RM[redacted]. This figure is higher than the proposed financial penalty. Consequently, the Commission takes the proposed financial penalty as the base figure which is RM[redacted].

[280]Received document from Merimen Online dated 16.12.2016 pursuant to section 18 Notice issued by the Commission dated 30.11.2016.
[281]Information provided by Zurich pursuant to the section 18 Notice issued by the Commission dated 11.11.2016.

683. The Commission takes note that Zurich had not defaulted the rates for parts trade discount and labour rate in the Merimen System database. Therefore, the Commission considers this as a mitigating factor and hereby adjusts the penalty downward by [redacted]% from the base figure from the base figure of RM[redacted] which is RM[redacted]. The total financial penalty computed at this stage, after considering the mitigating factor, is RM[redacted].

684. The Commission considers that Zurich did not provide cooperation over and beyond the extent to which it was legally required to. Therefore, there shall be no further mitigating adjustment made.

685. The financial penalty of RM[redacted] does not exceed the maximum financial penalty that the Commission can impose in accordance with section 40(4) of the Act, i.e., RM[redacted].

686. Accordingly, the Commission concludes that a financial penalty of RM[redacted] is to be imposed on Zurich.

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## PART 5: CONCLUSION ON FINANCIAL PENALTY

687. In conclusion, the Commission pursuant to section 40(4) of the Act, imposes the following financial penalties on the Parties as shown in ***Table 4*** below:

***Table 4***: List of Financial Penalty

| NO. | PARTY | FINANCIAL PENALTY |
|---|---|---|
| 1. | AIA | RM1,837,453.12 |
| 2. | AIG | RM5,576,149.86 |
| 3. | Allianz | RM24,732,794.62 |
| 4. | AmGeneral | RM18,284,759.00 |
| 5. | AXA Affin | RM16,099,289.00 |
| 6. | Berjaya Sompo | RM10,784,489.38 |
| 7. | Chubb | RM5,624,894.37 |
| 8. | Etiqa | RM5,080,436.39 |
| 9. | Liberty | RM10,821,331.07 |
| 10. | Lonpac | RM7,886,372.76 |
| 11. | MSIG | RM21,439,350.19 |
| 12. | MPI Generali | RM641,854.43 |
| 13. | Great Eastern | RM2,508,333.75 |
| 14. | Pacific & Orient | RM2,108,452.33 |
| 15. | Progressive Insurance | RM1,301,105.52 |
| 16. | Prudential Assurance | RM137,918.45 |
| 17. | QBE | RM484,645.86 |
| 18. | RHB Insurance | RM5,573,361.53 |
| 19. | Pacific Insurance | RM2,191,444.51 |
| 20. | Tokio Marine | RM19,558,690.78 |

| NO. | PARTY | FINANCIAL PENALTY |
|---|---|---|
| 21. | Tune Insurance | RM3,428,103.36 |
| 22. | Zurich | RM7,554,069.33 |

## A. EXCEPTIONAL AND SPECIAL CIRCUMSTANCES

687. 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 the financial penalty.

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

689. 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 25%** of the financial penalty imposed on the Parties; and

690. The financial penalties are listed in ***Table 5*** below.

***Table 5:*** Financial Penalties

| NO. | PARTY | FINANCIAL PENALTY BEFORE COVID-19 CONSIDERATION | FINANCIAL PENALTY AFTER COVID-19 CONSIDERATION |
|---|---|---|---|
| 1. | AIA | RM1,837,453.12 | RM1,378,089.84 |
| 2. | AIG | RM5,576,149.86 | RM4,182,112.40 |
| 3. | Allianz | RM24,732,794.62 | RM18,549,595.97 |
| 4. | AmGeneral | RM18,284,759.00 | RM13,713,569.25 |
| 5. | AXA Affin | RM16,099,289.00 | RM12,074,466.75 |
| 6. | Berjaya Sompo | RM10,784,489.38 | RM8,088,367.03 |
| 7. | Chubb | RM5,624,894.37 | RM4,218,670.78 |
| 8. | Etiqa | RM5,080,436.39 | RM3,810,327.29 |
| 9. | Liberty | RM10,821,331.07 | RM8,115,998.31 |
| 10. | Lonpac | RM7,886,372.76 | RM5,914,779.57 |
| 11. | MSIG | RM21,439,350.19 | RM16,079,512.64 |
| 12. | MPI Generali | RM641,854.43 | RM481,390.83 |
| 13. | Great Eastern | RM2,508,333.75 | RM1,881,250.31 |
| 14. | Pacific & Orient | RM2,108,452.33 | RM1,581,339.25 |
| 15. | Progressive Insurance | RM1,301,105.52 | RM975,829.14 |
| 16. | Prudential Assurance | RM137,918.45 | RM103,438.84 |
| 17. | QBE | RM484,645.86 | RM363,484.40 |
| 18. | RHB Insurance | RM5,573,361.53 | RM4,180,021.15 |
| 19. | Pacific Insurance | RM2,191,444.51 | RM1,643,583.38 |
| 20. | Tokio Marine | RM19,558,690.78 | RM14,669,018.09 |
| 21. | Tune Insurance | RM3,428,103.36 | RM2,571,077.52 |
| 22. | Zurich | RM7,554,069.33 | RM5,665,552.00 |

691. In addition, the Commission grants the Parties:

a) a moratorium period for the payment of the financial penalty up to 6-months, to be calculated from the service date of this Decision; and

b) at the end of the moratorium period, the Parties are allowed to make the payment of the financial penalty by equal monthly instalment for up to 6-months.

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

(i) Dato' Seri Mohd Hishamudin Yunus, Chairman;
(ii) Dato' Iskandar Halim Hj. Sulaiman;
(iii) Datuk Tay Lee Ly;
(iv) Dr. Nor Mazny Abdul Majid;
(v) Dato' Jagjit Singh a/l Bant Singh;
(vi) Dr. Nasarudin Abdul Rahman;
(vii) Dato' Ir. Hj. Mohd Jamal Sulaiman; and
(viii) Dr. Madeline Berma.

**DATED: 14 SEPTEMBER 2020**

**.....**

**CHAIRMAN**

**DATO' SERI MOHD HISHAMUDIN YUNUS**

**ANNEXE 1**

## LIST OF KEY REPRESENTATIVES OF THE PARTIES INTERVIEWED BY THE COMMISSION

| NO. | NAME | ENTERPRISE | DATE OF INTERVIEW |
|---|---|---|---|
| 1. | Tan Chuan Li | MPI Generali | 4.10.2016 |
| 2. | Chan Yee Ngor | MPI Generali | 4.10.2016 |
| 3. | Leordardo Perazzi Zanolini | QBE | 5.10.2016 |
| 4. | Hardev Singh a/l Mahindar Singh | QBE | 5.10.2016 |
| 5. | Stephen Barry Crouch | Chubb | 6.10.2016 |
| 6. | Yan Chee Keong | Chubb | 6.10.2016 |
| 7. | Yin Sau May | Chubb | 6.10.2016 |
| 8. | Athappan Gobinath Arvind | Pacific Insurance | 7.10.2016 |
| 9. | Cham Hock Seng | Pacific Insurance | 7.10.2016 |

| NO. | NAME | ENTERPRISE | DATE OF INTERVIEW |
|---|---|---|---|
| 10. | Chua Seck Guan | MSIG | 2.10.2016 |
| 11. | Harminder Singh a/l Seva Singh | MSIG | 10.11.2016 |
| 12. | Zaharudin bin Daud | Etiqa | 10.11.2016 |
| 13. | Muhammad Azlan Noor bin Che Mat | Etiqa | 10.11.2016 |
| 14. | Tan See Dip | Liberty | 14.10.2016 |
| 15. | Loo Siew Mee | Liberty | 4.10.2016 |
| 16. | Kong Shu Yin | RHB Insurance | 12.10.2016 |
| 17. | Goh Eng Chun | RHB Insurance | 6.10.2016 |
| 18. | Loh Lye Ngok | Berjaya Sompo | 21.10.2016 |
| 19. | Leong See Meng | Berjaya Sompo | 5.10.2016 |
| 20. | Abdul Rahman bin Talib | Pacific & Orient | 7.10.2016 |
| 21. | Ng Siew Hua | Pacific & Orient | 7.10.2016 |

| NO. | NAME | ENTERPRISE | DATE OF INTERVIEW |
|---|---|---|---|
| 22. | Zakri bin Mohd Khir | Allianz | 31.10.2016 |
| 23. | Jayapragash a/l Amblavanar | Allianz | 31.10.2016 |
| 24. | Antony Fook Weng Lee | AIG | 31.10.2016 |
| 25. | Yew Sin Nam | AIG | 31.10.2016 |
| 26. | Emmanuel Jean Louis Nivet | AXA Affin | 1.11.2016 |
| 27. | Harry Khor Cheow Cheng | AXA Affin | 1.11.2016 |
| 28. | Anusha Thavarajah | AIA | 31.10.2016 |
| 29. | Simon Quah Seng Lee | AIA | 31.10.2016 |
| 30. | Looi Kong Meng | Lonpac | 1.11.2016 |
| 31. | Voon Wing Chuan | Lonpac | 1.11.2016 |
| 32. | Francis Lai @ Lai Vun Sen | Progressive Insurance | 2.11.2016 |
| 33. | Johari bin Nordin | Progressive Insurance | 2.11.2016 |

| NO. | NAME | ENTERPRISE | DATE OF INTERVIEW |
|---|---|---|---|
| 34. | Philip Wallace Smith | Zurich | 3.11.2016 |
| 35. | Looi Siew Pek | Zurich | 3.11.2016 |
| 36. | Su Tieng Teck | Tune Insurance | 3.11.2016 |
| 37. | Chan Yoon Kong | Tune Insurance Berhad | 3.11.2016 |
| 38. | Ng Kok Kheng | Great Eastern | 8.11.2016 |
| 39. | Vijendran a/l Kathirgamanathan | Great Eastern | 8.11.2016 |
| 40. | Vijayakumar a/l Selvarajah | Tokio Marine | 9.11.2016 |
| 41. | Saw Teow Yam | Tokio Marine | 9.11.2016 |
| 42. | Roberts Derek Llewellyn | AmGeneral | 1.11.2016 |
| 43. | Khor Choo Hong | AmGeneral | 1.11.2016 |
| 44. | Gan Leong Hin | Prudential Assurance | 21.11.2016 |
| 45. | Lai Wee Leng | Prudential Assurance | 21.11.2016 |

**ANNEXE 2**

## LIST OF REPRESENTATIVES INTERVIEWED BY THE COMMISSION

| NO. | NAME | ENTERPRISE | DATE OF INTERVIEW |
|---|---|---|---|
| 1. | Phen Yee Kang | Oneworks Sdn. Bhd. | 4.11.2016 |
| 2. | Lok Theng Hey | Merimen Online Sdn. Bhd. | 4.11.2016 |
| 3. | Abdul Aziz bin Mohamed Nor | Associated Adjusters Sdn. Bhd. | 7.11.2016 |
| 4. | Jankins a/l Selina Lazer Pereira | Associated Adjusters Sdn. Bhd. | 7.11.2016 |
| 5. | Kathiravan a/l Balakrishnan | Associated Adjusters Sdn. Bhd. | 15.11.2016 |
| 6. | Lee Geok Chin | MRC | 4.11.2016 |
| 7. | Mohd Hairul Khaidzir bin Abdul Majid | MRC | 4.11.2016 |
| 8. | Abdul Razak Abdul Rahman | Century Independent Loss Adjusters Sdn. Bhd. | 7.11.2016 |

| NO. | NAME | ENTERPRISE | DATE OF INTERVIEW |
|---|---|---|---|
| 9. | Foo Chee Hooi | Century Independent Loss Adjusters Sdn. Bhd. | 7.11.2016 |
| 10. | Dato' Too Peng Huat | FAWOAM | 7.11.2016 |
| 11. | Kong Wai Kwong | FAWOAM | 7.11.2016 |
| 12. | Azlinda Arshad | BNM | 29.9.2016 |
| 13. | Kong Shu Yin | PIAM | 30.11.2016 |
| 14. | Chua Seck Guan | PIAM | 25.11.2016 |
| 15. | Loo Siew Mee | PIAM | 25.11.2016 |
| 16. | Harminder Singh a/l Seva Singh | PIAM | 22.11.2016 |
| 17. | Lim Chit Wan | PIAM | 15.11.2016 |
| 18. | Barani Devi Simon | PIAM | 15.11.2016 |

# BNM's letter to PIAM dated 18.11.2008

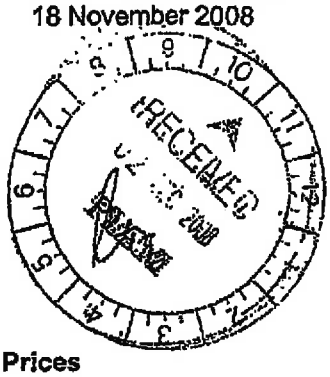
**BANK NEGARA MALAYSIA**
CENTRAL BANK OF MALAYSIA

Telefon 60(3) 2698-8044
Faksimili 60(3) 2691-4086 / 2693-4051
Web www.bnm.gov.my

Jalan Dato' Onn
50480 Kuala Lumpur
Malaysia

Bilangan Kami : JKAP7500/COM/1/2/2

18 November 2008




Encik Lim Chia Fook
Pengarah Eksekutif
Persatuan Insurans Am Malaysia
Tingkat 3, Wisma PIAM
150, Jalan Tun Sambanthan
50470 Kuala Lumpur

Tuan,

**Imposition of Trade Discounts on Spare Parts Prices**

We refer to the above matter.

2. Bank Negara Malaysia has received complaints from repairers that some insurers have applied unreasonable trade discounts on spare parts prices to repair vehicles. Such discounting inevitably impair the quality of repair work and cause delays in claim settlement as repairers' margin erodes and disputes arise to reach an agreed repair sum.

3. As you are aware, JPI/GPI 14 - Guideline on Claims Settlement Practices requires insurers, among others, to refer to the centralised database for motor repairs estimation of Motordata Research Consortium Sdn. Bhd. (MRC) for all own damage motor claims processing. In addition, claims approval should be itemised by each part used, its price and labour time required.

4. In this regard, Persatuan Insurans Am Malaysia (PIAM) is advised to remind its members to be more judicious in applying trade discounts to spare parts prices and be guided by the assessment of licensed adjuster whenever required. This is to ensure fair and equitable basis in claims handling to protect the interest of policy owners and the public.

Sekian.

Yang benar,

(Koid Swee Lian)
Pengarah

s.k. Pengarah, Jabatan Pembangunan Sektor Kewangan
Pengarah, Jabatan Komunikasi Korporat

Jabatan Konsumer dan Amalan Pasaran

# BNM's letter to PIAM dated 4.6.2010

Appendix 9

BANK NEGARA MALAYSIA
CENTRAL BANK OF MALAYSIA

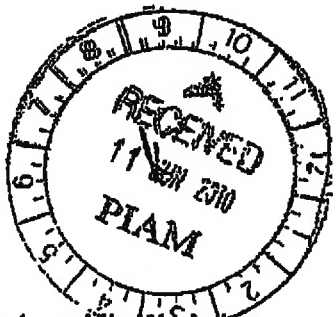
Telefon 60(3) 2698-8044
Faksimili 60(3) 2691-4086 / 2693-4051
Web www.bnm.gov.my

Jalan Dato' Onn
50480 Kuala Lumpur
Malaysia

Bilangan Kami :
JKAP7500/POL/4/2/4/11

4 Jun 2010

Encik Hashim Harun
Pengerusi
Persatuan Insurans Am Malaysia
Tingkat 3, Wisma PIAM
150, Jalan Tun Sambanthan
50470 Kuala Lumpur




Tuan,

**Issues Raised by the Federation of Automobile Workshop Owners Association of Malaysia**

We refer to the minutes of the meeting between the Federation of Automobile Workshop Owners Association of Malaysia (FAWOAM), Persatuan Insurans Am Malaysia (PIAM), Malaysian Takaful Association, the Association of Malaysian Loss Adjusters and Motordata Research Consortium Sdn. Bhd. (MRC) on 20 April 2010, and the attached letter from FAWOAM dated 24 May 2010 on the above.

2. Bank Negara Malaysia (the Bank) is of the view that the issues raised by FAWOAM relate to the commercial relationship and trade issues between the PIAM Approved Repairers Scheme (PARS) workshops and the insurers, and as such, it should be resolved by the two parties concerned. Based on the minutes of the meeting, the Bank would like to see a greater show of commitment on the part of the insurers to engage with PARS workshops in providing satisfactory clarifications and / or solutions to the issues raised by them, specifically, amongst others, the following issues:-

(i) Standardization of labour rate
- PIAM should be able to determine whether there is a basis for PARS workshops' complaint on the low labour rate paid by insurers by assessing the available information in the MRC database.
- PIAM to assess on the reasonableness of PARS workshops' request for a higher rate and whether there is a need to introduce standardized labour rate for PARS workshops.

(ii) Unfair trade discount on spare parts prices
- PIAM to look into the complaint of unreasonable application of trade discounts on spare parts prices by its members. We understand that information on the current practice on application of trade discounts by insurers is also available in the MRC database.
- Any unjustified application of high trade discounts may force the workshops to source for non-genuine spare parts for actual repair, which

would inevitably impair the quality of repair work and cause delays in claim settlement, to the detriment of the consumers.

- As mentioned in the Bank's letter dated 18 November 2008 to PIAM, insurers should be more judicious in applying trade discounts to spare parts prices and be guided by the assessment of licensed adjuster whenever required.

(iii) New PARS eligibility requirements may reduce number of workshops

- PIAM to assess the impact of the new requirement relating to minimum total working area on the existing PARS workshops i.e. how many of the existing PARS workshops are currently able to fulfill this requirement. PIAM must ensure that the new requirements would not result in a reduction in the number of PARS workshops, thus affecting the consumers' accessibility to PARS workshops, especially when efforts are being undertaken to encourage third party claimants to also use the services of PARS workshops.

4. In the interest of the motor insurance industry, PIAM should be proactive in addressing issues which would contribute towards the improvement of claims and repair practices and develop good working relationships with all stakeholders.

5. Please update the Bank on the progress of the matter.

Sekian.

Yang benar,

(Koid Swee Lian)
Pengarah
Jabatan Konsumer dan Amalan Pasaran

nayl/ud/dmm

# BNM's letter to PIAM dated 14.6.2011

**BANK NEGARA MALAYSIA**
CENTRAL BANK OF MALAYSIA

Telefon 60(3) 2698-8044
Faksimili 60(3) 2691-4066 / 2693-4051
Web www.bnm.gov.my

Jalan Dato' Onn
50480 Kuala Lumpur
Malaysia

**TERHAD**

Bilangan Kami : JKAP7500/POL/4/2/4/11
14 Jun 2011

Encik Lim Chia Fook
Pengarah Eksekutif
Persatuan Insurans Am Malaysia
Tingkat 3, Wisma PIAM
150, Jalan Tun Sambanthan
50470 Kuala Lumpur

Tuan,

**Parts Trade Discounts and Labour Rate per hour**

We refer to Persatuan Insurans Am Malaysia (PIAM)'s letter to the Federation of Automobile Workshop Owners Association of Malaysia (FAWOAM) dated 7 June 2011 and various other correspondences between PIAM and FAWOAM on the above.

2. We note that PIAM and FAWOAM will be meeting on 17 June 2011 to discuss and agree on the following issues:-

(I) the maximum trade discount to be imposed for Proton and Perodua models including Proton Saga BLM models. We note that FAWOAM is agreeable with PIAM's proposal to fix the trade discount for Toyota, Honda, Nisan, Kia and Hyundai models at maximum 25%; and

(II) the minimum labour hour rate and the application of Thatcham Times System and Opinion Time for parts replacement and repair work.

3. As you are aware, the trade discount and labour rate issues have been raised at the first meeting between the various parties facilitated by Bank Negara Malaysia (the Bank) on 1 September 2010. Since resolution to these issues would contribute to improvement in claims settlement practices, the Bank would like to urge PIAM to resolve these issues amicably and expediently. In this regard, kindly inform the Bank on the final agreement between PIAM and FAWOAM on the above issues by 30 June 2011.

4. If the above issues are not resolved expediently with FAWOAM, the Bank may consider expanding the scope of the Financial Mediation Bureau to award policy owners indirect financial losses due to unreasonable delay in claims settlement arising from disputes between the insurer and the panel workshop.

Sekian.

RECEIVED
15 JUN 2011
PIAM

Yang benar,

(Kold Swee Lian)
Pengarah

nay/ud
s-PIAM-fawoam-13062011

**TERHAD**

Jabatan Koneumer dan Amalan Pasaran

# BNM's letter to PIAM dated 4.7.2011

Appendix 19

BANK NEGARA MALAYSIA
CENTRAL BANK OF MALAYSIA

Telefon 60(3) 2693-8044
Faksimili 60(3) 2691-4086 / 2693-4051
Web www.bnm.gov.my

Jalan Dato' Onn
50480 Kuala Lumpur
Malaysia

TERHAD

Bilangan Kami: JKAP7500/POL/4/2/4/11

4 Julai 2011

Encik Lim Chia Fook
Pengarah Eksekutif
Persatuan Insurans Am Malaysia
Tingkat 3, Wisma PIAM
150, Jalan Tun Sambanthan
50470 Kuala Lumpur

PIAM

Tuan,

**Parts Trade Discounts and Labour Rates**

We refer to Bank Negara Malaysia's (the Bank) letter to Persatuan Insurans Am Malaysia (PIAM) dated 14 June 2011 and PIAM Members' Circular No: 109 of 2011 dated 24 June 2011 on the above.

2. As you are aware, the parts trade discounts and labour rate issues have protracted since September 2010 and the Bank had informed PIAM to reach a final agreement on the issues by 30 June 2011. However, we note that PIAM and the Federation of Automobile Workshop Owners Association of Malaysia (FAWOAM) have yet to resolve these issues, thus resulting in unreasonable delay in claims settlement arising from disputes between insurers and panel workshops. Therefore, PIAM and FAWOAM are required to conclude the negotiations on parts trade discounts and labour rate latest by 15 July 2011.

3. We take note of PIAM's proposal to set up a Committee comprising members from PIAM, FAWOAM, the Association of Malaysian Loss Adjuster and Motordata Research Consortium to review the Thatcham Repair Times (TRT) and ascertain suitable benchmark for the local environment. The acceptance of TRT by the various stakeholders as the standard for labour hour would minimize disputes on claims amount and expedite settlement of motor claims.

4. Kindly inform the Bank on the final agreement between PIAM and FAWOAM on trade discounts and labour rate as well as the timeline for completion of the review of TRT by 18 July 2011.

Sekian.

Yang benar,

(Kold Swee Lian)
Pengarah

93/84/7 :

TERHAD

Jabatan Konsumer dan Amalan Pasaran

**BNM's letter to the Commission dated 1.7.2015**

BANK NEGARA MALAYSIA
CENTRAL BANK OF MALAYSIA

Telefon 60(3) 2698-8044
Faksimili 60(3) 2691-4086 / 2693-4051
Web www.bnm.gov.my

Jalan Dato' Onn
50480 Kuala Lumpur
Malaysia

**SULIT**

Bilangan Kami : JKAP7500/POL/5/1/1/4

1 Julai 2015

Encik Iskandar Ismail
Pengarah
Bahagian Penguatkuasaan
Suruhanjaya Persaingan Malaysia
Tingkat 15, Menara SSM@Sentral
No. 7, Jalan Stesen Sentral 5
50623 Kuala Lumpur

Tuan,

**Motor Parts Trade Discounts and Labour Rate**

We refer to the meeting held on 3 June 2015 between Bank Negara Malaysia (the Bank) and Malaysia Competition Commission (MyCC) on the above.

2. As informed during the meeting, the parts trade discounts and labour rate currently adopted by insurers were based on an agreement reached between Persatuan Insurans Am Malaysia (PIAM) and the Federation of Automobile Workshop Owners Association of Malaysia (FAWOAM) in July 2011, following the Bank's facilitation to assist in resolving the prolonged dispute between the two parties.

**Background**

3. Under the Guidelines on Claims Settlement Practices issued by the Bank, insurers and their panel workshops are required to refer to the centralised database for motor repairs estimations i.e. Motordata Research Consortium (MRC) database for all own damage motor claims processing. The requirement to use a common reference of parts prices and repair times by insurers, adjusters and repairers is important to reduce the significant variation and subjectivity in assessing repair costs and also to expedite the motor claims settlement process. The MRC database stores the list price of new franchise and Original Equipment Manufacturer (OEM) parts. In assessing claims, insurers in practice, reduce the parts prices taking into account the trade discounts received by repairers on these parts prices to reflect the actual cost of repairs. This in turn contributes towards containing premiums charged for motor insurance which would be higher if claims costs were to be artificially inflated.

4. FAWOAM had in early 2010, highlighted to the Bank, among others, its dissatisfaction over the imposition of unreasonable trade discounts of 25% - 30% on franchise parts prices by insurers and the low labour rate of RM20 to RM25 per hour paid to PIAM Approved Repairers Scheme (PARS) workshops. As these issues involve commercial and trade relationship between PARS workshops and insurers, PIAM was requested to find an amicable solution to these issues together with the relevant stakeholders. However, an agreement could not be reached and FAWOAM's dissatisfaction was published in the newspapers in July 2010. Copies of the press articles are attached for MyCC's reference.

**Meetings between various stakeholders**

5. Arising from the above, the Bank had stepped in to facilitate two meetings attended by PIAM, the Malaysia Takaful Association (MTA), the Association of Malaysian Loss Adjusters (AMLA), MRC (attended one meeting) and FAWOAM on 1 September and 21 December 2010. Following FAWOAM's proposal at the meeting on 21 December 2010 that a cap should be imposed on the trade discounts to allow some profit margin to the workshops, PIAM agreed to consider introducing a maximum trade discount of 20% as a guide for six vehicle models. The minutes of the meetings are attached for MyCC's reference.

6. PIAM had subsequently issued a member's circular on 28 July 2011 following FAWOAM's agreement on the parts trade discounts and labour rates at a meeting held on 18 July 2011. A trade discount rate of 25% was set for parts for six vehicle makes (i.e. Proton, Perodua, Nissan, Toyota, Honda and Naza) and 15% for Proton Saga BLM. In circumstances which render the purchase urgent, repairers may purchase the parts at a lower trade discount rate, i.e. lower than 25% based on the merits of the case and to be verified by adjusters. The circular also states that the repair labour hourly rate for PARS workshops is RM30.

7. The issues on unreasonable trade discounts on parts prices and low labour rate were raised again by FAWOAM following several months of implementation. FAWOAM was advised by the Bank to engage with PIAM to resolve the matter amicably as the issues relate to the commercial relationship and trade issues between PARS workshops and the insurers.

**Protecting consumer interest**

8. The protracted dispute between both the parties had resulted in unreasonable delay in claims settlement and impacted the interest of consumers. The adoption of the agreed parts trade discounts and labour rate by the industry and repairers was intended to alleviate such delays. The implications of dismantling these arrangements would therefore have to be carefully weighed in ensuring that the earlier problems do not resurface as a failure of insurers and repairers to agree on a reasonable basis for estimating repair costs would ultimately harm consumers who will experience inordinate delays and inconveniences in getting their vehicles repaired, or

as a result of repairs that may not conform to safety standards. In line with paragraphs 7.5 and 7.6 of the Memorandum of Understanding between the Bank and MyCC, kindly share with the Bank, MyCC's preliminary assessment of the issues and the proposed actions contemplated in order for the Bank and MyCC to evaluate and manage any implications that may arise, including those highlighted above.

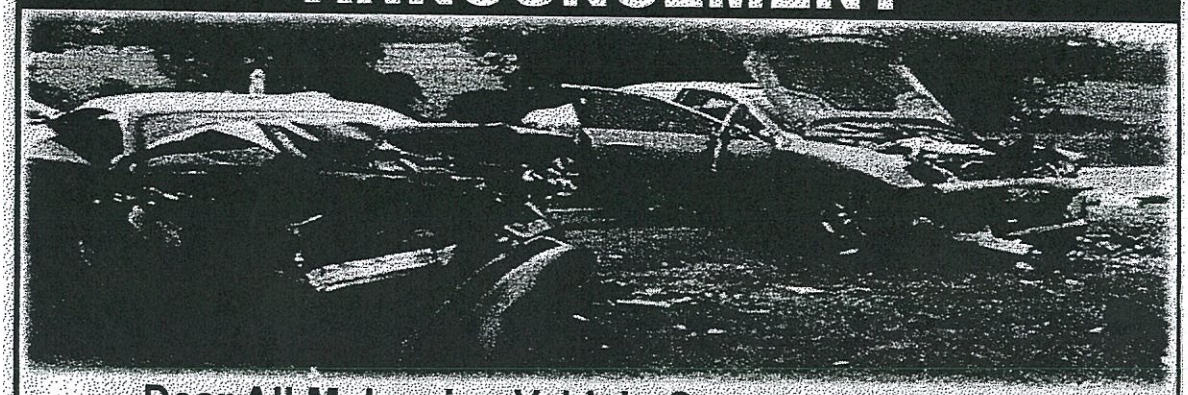
Sekian.

Yang benar,

(Suhaimi Ali)
Pengarah
Jabatan Konsumer dan Amalan Pasaran

104/10/8 AA/UD/KKY/CMK

# ANNOUNCEMENT



## Dear All Malaysian Vehicle Owners and Drivers,

FAWOAM wishes to inform you that due to the unacceptable trade practices by the Motor Insurance Companies, have burdened and strangled the repair industries to keep moving forward. The association had taken all the initiatives and efforts in trying to resolve the issues with the related Government Agencies and Insurance Companies, but unfortunately all these attempts have failed!

In view of this, the FAWOAM members and PIAM Approved Repairers Scheme (PARS) workshops are taking the stand to defend their basic rights and livelihoods and are forced to declare their rights and action as below:-

### PARS WORKSHOPS' RIGHTS & ACTIONS (PARS RULES 7-11)

1. The workshops will deem the insurance companies are requesting for non-OEM parts, if any trade discount imposed by them is more than 10%.
2. The workshops will only start the car repair works after receiving the insurance's supplementary and final approval.
3. The workshops will opt for cash repair if the approval from insurance companies do not following the "FAWOAM COLLISION REPAIR INDUSTRY GUIDE TO RETAIL CHARGES 2009".
4. The workshops will charge customers the variance or repair costs not paid by insurance companies if the approval from the insurance companies do not follow the "FAWOAM COLLISION REPAIR INDUSTRY GUIDE TO RETAIL CHARGES 2009".
5. The workshops will either release the after - repair car to customer only after having received the insurance cheque payment or collected a 10% deposit from customer on insurance's final approval amount. The deposit will be refund to customer once full settlement of the payment is received from insurance companies.
6. The workshops have the right to revert and opt for cash repairs.

**COLLISION REPAIR INDUSTRY GUIDE TO RETAIL CHARGES 2009**

| Collision Repair Description | Recommended Retail Charges |
|---|---|
| Collision Repair Labour Rate:- 1200 cc below | RM40.00 / RM50.00 per hour |
| Collision Repair Labour Rate:- 1300 cc to 1500cc, Lori 4 Ton below | RM40.00 / RM50.00 per hour |
| Collision Repair Labour Rate (Prestige) 1600cc to 1800cc, Lori 5 Ton above | RM50.00 / RM60.00 per hour |
| Collision Repair Labour Rate (Upper Prestige) 2000cc to 2500cc | RM60.00 / RM70.00 per hour |
| Collision Repair Labour Rate (Super Prestige) COV, SUV, MPV, Luxury | RM80.00 / RM120.00 per hour |
| Parts supplied at manufacturers list price * | maximum discount 10% |
| Mechanical Labour Rate | RM40.00 per hour |
| Auto Electrical Labour Rate | RM50.00 per hour |
| Smart Repairs Labour Rate | RM40.00 per hour |
| Estimate / Assessment Charge | RM50.00 per hour |
| Environmental Charge (per repair) | RM20.00 per case |
| Storage Charge (Secure) | RM10.00 per day |
| Air Conditioning Recharge ** | RM85.00 per recharge |
| Steering Geo / 2 or 4 Wheel Alignment Check ** | RM30.00 / RM50.00 |
| Valet (after major acc damage) - / wash & vacuum | RM20.00 |

| Collision Repair Description | Recommended Retail Charges |
|---|---|
| Delivery and Collection To Dealer or Customer | RM40.00 |
| Towing - Town (Remove vehicle from site) Day / Night [Tow Truck] | RM80.00 / RM120.00 (first 20km) |
| Towing - Town (Remove vehicle from site) Day / Night [Carriage Truck] | RM100.00 / RM150.00 (first 20km) |
| Towing - Highway (Remove vehicle from site) Day / Night [Tow Truck] | RM120.00 / RM200.00 (first 20km) |
| Towing - Highway (Remove vehicle from site) Day / Night [Carriage Truck] | RM150.00 / RM220.00 (first 20km) |
| External Report, Photo & Documentation Fees | RM150.00 |
| Specialty works (Reset ECU, TCU, ABS, SRS, IMMB) | RM85.00 or specialty fee + 15% |
| JPJ Technical Application | RM150.00 |
| Puspakom Inspection & Agent fees | RM150.00 |
| Windscreen Bonding Kit (small) + Labour | RM40.00 + RM150.00 |
| Windscreen Bonding Kit (large) + Labour | RM80.00 + RM200.00 |
| Corrosion Protection material (small / large) | RM60.00 / RM100.00 |

Common Market Practices
1) Manufacturing List Price - Less 10% Trade Discount * - Franchise Parts
2) Manufacturing List Price - Less 11% above Trade Discount * - Non Franchise Parts
(Non Franchise Parts : OEM / non OEM / serviceable parts)

*Federation Of Automobile Workshop Owners Association Of Malaysia (FAWOAM)*
*"Moving Forward to a Better Motor Insurance Claim Repair Industry"*

Thursday July 29, 2010

# Customers will lose out, say workshops

By IZATUN SHARI
newsdesk@thestar.com.my

PETALING JAYA: A feud between car repair workshops and insurance companies over repair costs is likely to jeopardise customers following a threat by workshops to use only non-original spare parts.

The move by the Federation of Automobile Workshop Owners Association Malaysia (FAWOAM) came about as it accuses motor insurance companies of deducting sometimes up to 30% in settling claims for repair costs.

Their refusal to use Original Equipment Manufacturer (OEM) parts could depreciate the resale value of the vehicle, besides compromising consumer safety.

However, FAWOAM president Kong Wai Kwong acknowledged that only some motor insurance companies were declaring a cut of between 20% and 30% for OEM parts.

"The workshops buy original parts at 20% discount from suppliers but some motor insurance companies would slash 30% from their repair claims. So even before the workshops start the repair works, they have already registered a 10% loss.

"For example, a BMW OEM part is only offered at a 0.7% discount but insurance companies impose a 20% deduction," he said, adding that this meant that the workshops would have to bear the high costs of those spare parts.

Insurance companies, he said, should follow the price list of OEM parts which was outlined in the Motordata Research Consortium database.

On Sunday, FAWOAM took out newspaper advertisements to say that non-OEM parts would be used if insurance firms impose more than a 10% cut.

Kong said the association raised the problem in March with Bank Negara and was told to discuss it with General Insurance Association of Malaysia (PIAM).

PIAM executive director Lim Chia Fook confirmed it met with FAWOAM in April, during which it had requested the association to provide supporting data on the issue.

There had been no response to date, he said.

| | | | |
|---|---|---|---|
| **Date** | 1 September 2010 | Meeting with PIAM, MTA, AMLA, MRC and FAWOAM on the Recent Announcement by FAWOAM on Motor Repair Costs | **Chairperson :** Encik Abu Hassan Alshari Yahaya |
| **Time** | 2.30 p.m. – 4.50 p.m. | | |
| **Venue** | Bilik Bunga Raya, 18A | | |

| | | | |
|---|---|---|---|
| **Present** | **Bank Negara Malaysia (the Bank)**<br>Datin Mokhzidah Mokhtar<br>Puan Junaidah Mohd. Said<br>Puan Uma Devi<br>Cik Oon Bee Chin<br>Puan Nurul Asyikin Hj. Yusof | **Persatuan Insurans Am Malaysia (PIAM)**<br>Encik Hashim Harun, Chairman<br>Encik Wong Kim Teck, Convernor, Claims Subcommittee<br>Encik Sabri Ismail, Head of PARS Review Group<br>Encik Lim Chia Fook, Executive Director<br>Encik Tan Eng Leong, Technical Advisor<br><br>**Malaysian Takaful Association (MTA)**<br>Encik Azli Munani, Head of Secretariat<br>Encik Huszaidey Thamby Hussain, Secretariat Member<br><br>**The Federation of Automobile Workshop Owners Association of Malaysia (FAWOAM)**<br>Encik Kong Wai Kwong, President<br>Encik Daniel Loh, Secretary General<br>Encik Galvin Tai Chin Chong, Selangor Representative | **Association of Malaysian Loss Adjusters (AMLA)**<br>Encik Lee Thim Fook, Chairman<br>Encik Tan Ah Chuan, MC member<br><br>**Motordata Research Consortium (MRC)**<br>Cik Diana Lee, General Manager<br>Encik Mohd. Hairul, Head of Database<br>Encik Khiew Wai Lam, IT and Audit Division |

| Item | Subject | Issues Discussed / Decisions | Next Step | By Whom |
|---|---|---|---|---|
| 1. | **Bank Negara Malaysia's position** | • The Chairman welcomed the representatives from the motor insurance industry to the meeting which was organized to facilitate discussion on issues raised by FAWOAM.<br>• The Chairman clarified that trade issues should rightfully be resolved by the market players without the Bank's intervention. The Bank would only intervene if trade issues were not resolved effectively resulting in inappropriate market conduct detrimental to consumers and image of the regulated industry.<br>• The Bank reminded the industry on the need to manage all stakeholders appropriately in order to progress well and create confidence in the market. | | |
| 2. | **Avenue for PARS workshops to complaint** | • The meeting noted that although it was the individual insurer's decision to appoint its panel repairers based on its own terms and conditions, PIAM, as the industry association, should play a role in determining the appropriate standards to be observed by its members when dealing with the workshops. In this regard, | PIAM and FAWOAM to work together to resolve complaints on motor repair industry | PIAM & FAWOAM |

| Item | Subject | Issues Discussed / Decisions | Next Step | By Whom |
|---|---|---|---|---|
| | | PIAM should make available the appropriate avenue for workshops to lodge complaints or issues against individual insurers.<br>• In order for PIAM to be able to take action against its members, complaints received should be specific and not based on general allegations. In this regard, FAWOAM agreed to work with PIAM in forwarding specific complaints by its members.<br>• FAWOAM was also urged to notify PIAM the name of insurers who had abandoned their total loss vehicles in workshops, so that appropriate actions can be taken against these insurers.<br>• Equally important is the role of FAWOAM to regulate and set standards for its members as well as take actions against any misconduct of its members e.g. using non-original parts in actual repairs although approval was given for franchise parts. | | |
| 3. | **Imposition of unreasonable trade discounts on franchise part prices** | • The meeting agreed that imposition of part prices discount of 25%-30% across the board was unreasonable as the discount should be based on factors such as different franchise holders, channel of distribution and market conditions.<br>• The meeting however took note that such practices were not an industry norm and were confined to only a few insurers. Therefore, PIAM agreed to take action against these members.<br>• The meeting also agreed that a fixed standardised discount rate across the board would not be efficient and effective for the repair industry as it was not reflective of the conditions and developments in the market. | | PIAM |
| 4. | **Standardization of claims approval reporting** | • FAWOAM raised its concerns that the lack of transparency in the current claims approval reporting may result in action being taken against the workshops for breach of the Consumer Protection (Workshops Information Disclosure) Regulations 2002. According to FAWOAM, there were two cases where workshops have been penalised by the relevant regulator for failure to disclose the parts installed for the repair were new, second-hand or reconditioned.<br>• FAWOAM also highlighted on the failure of insurers to adhere to the Thatcham Time System (TTS) provided in the database in approving labour time. There were cases where some insurers failed to itemize approval for labour time and applied lump sum figure instead. | MRC to standardize claims approval reporting of the three software providers by end November 2010. | MRC |

| Item | Subject | Issues Discussed / Decisions | Next Step | |
|---|---|---|---|---|
| | | • The meeting was informed that the MRC database could provide specifications on the types of parts to be used, based on the parts serial number. Nevertheless, problems may arise when prices were adjusted by insurers to take into account the discount on part prices.<br>• In this regard, to improve transparency when adjustments to repair costs were made by insurers, the claims approval reporting format would be standardized between the three software providers.<br>• The meeting also noted that although the TTS provided standard labour times, the system also allowed for opinion times to be incorporated to reflect the real labour time for a repair work. In this regard, all adjusters and claims staff should be encouraged to undergo TTS training to improve their understanding of the system. | | |
| 5. | **Labour Rates** | • The meeting agreed that there is a need for PARS workshops to improve their standards of repair work before they could enjoy similar rates as franchise workshops.<br>• In this regard, both FAWOAM and PIAM agreed to work together to establish the criteria for tiering of workshops so that appropriate labour rate could be paid according to the tier. | PIAM and FAWOAM to work together on criteria for tiering of workshops | PIAM & FAWOAM |
| 6. | **Media Campaign by FAWOAM** | • The meeting agreed that since FAWOAM and PIAM have committed to work together on the issues and based on good faith, FAWOAM would put on hold its advertisement and campaign against insurers. | | |
| **Prepared by: Nurul Asyikin Haji Yusof** | | | **Date:** 7 September 2010 | |

nay/ud/dmm - Minutes-meeting with PIAM & FAWOAM-01092010

**BNM's letter to the Commission dated 11.8.2016**

**BANK NEGARA MALAYSIA**
CENTRAL BANK OF MALAYSIA

Telefon 60(3) 2698-8044
Faksimili 60(3) 2691-4086 / 2693-4051
Web www.bnm.gov.my

Jalan Dato' Onn
50480 Kuala Lumpur
Malaysia

**SULIT**

Bilangan Kami : JKAP7500/POL/5/1/1/4

11 Ogos 2016


YBhg. Dato' Abu Samah bin Shabudin
Ketua Pegawai Eksekutif
Suruhanjaya Persaingan Malaysia
Tingkat 15, Menara SSM@Sentral
No. 7, Jalan Stesen Sentral 5
50623 Kuala Lumpur

YBhg. Dato',

**Investigation on Motor Parts Trade Discounts and Fixed Labour Rate**

We refer to Suruhanjaya Persaingan Malaysia's (MyCC) letter dated 21 July 2016 on the above.

2. We take note that MyCC has initiated an investigation on a complaint relating to fixing parts trade discounts and labour rate involving Persatuan Insurans Am Malaysia (PIAM) and all licensed general insurers. In this regard, the contact officer from Bank Negara Malaysia (the Bank) to deal with MyCC on this matter is:-

- Name: Puan Nurul Asyikin Hj. Yusof
- Designation: Senior Supervisor
- Tel. No.: 26988044 ext. 8540
- Email address: nasyikin@bnm.gov.my

3. In line with the Memorandum of Understanding between the Bank and MyCC, kindly share with the Bank, MyCC's preliminary assessment of the issues and the proposed actions contemplated in order for the Bank and MyCC to evaluate and manage any implications that may arise.

Sekian.

Yang benar,

(Shahariah Othman)
Pengarah

84/67/2 AA/UD/CMK

**SULIT**

**BNM's letter to the Commission dated 20.4.2016**

**BANK NEGARA MALAYSIA**
CENTRAL BANK OF MALAYSIA

Telefon 60(3) 2698-8044
Faksimili 60(3) 2691-4086 / 2693-4051
Web www.bnm.gov.my

Jalan Dato' Onn
50480 Kuala Lumpur
Malaysia

**SULIT**

Bilangan Kami : JKAP7500/COM/1/25

20 April 2016

Encik Iskandar Ismail
Pengarah
Bahagian Penguatkuasaan
Suruhanjaya Persaingan Malaysia
Tingkat 15, Menara SSM@Sentral
No. 7, Jalan Stesen Sentral 5
50623 Kuala Lumpur

Tuan,

**Motor Parts Trade Discounts and Labour Rate**

We refer to Bank Negara Malaysia's (the Bank) letter dated 1 July 2015 to Suruhanjaya Persaingan Malaysia (MyCC) on the above.

2. We would appreciate it if MyCC can update the Bank on the status of the motor parts trade discounts and labour rate issues.

Sekian.

Yang benar,

(Suhaimi Ali)
Pengarah

26/88/0 AA/UD/CMK

**SULIT**

MyCC

DATO' ABU SAMAH BIN SHABUDIN
CHIEF EXECUTIVE OFFICER

Your Ref : JKAP7500/COM/1/25
Our Ref. : MyCC (ED)700-2/1/003/2015
Date : 21 July 2016

Puan Sahariah Othman
Director Consumer and Market Conduct
Central Bank of Malaysia
Jalan Dato' Onn
**50480 KUALA LUMPUR**

**BY COURIER & EMAIL**

Dear Puan Sahariah,

**INVESTIGATION ON MOTOR PARTS TRADE DISCOUNTS AND FIXED LABOUR RATE**

Reference is made to the above matter and your letter dated 20 April 2016.

2. The Competition Commission ("Commission") has initiated an investigation on a complaint received from Mr. Too Peng Huat, the President of Federation of Automobile Workshop Owners' Association of Malaysia ("FAWOAM") on 1 April 2015. The complaint is in relation to an allegation of fixing parts trade discounts and labour rate for the General Insurance Association of Malaysia ("PIAM") Approved Scheme Workshops ("PARS") in respect of six (6) vehicle makes namely Proton, Perodua, Nissan, Toyota, Honda and Naza.

3. The parties who are subject to the investigation are the PIAM and all current licensed insurance and reinsurance companies for general insurance in Malaysia (See list of Target Enterprises in Appendix A).

Suruhanjaya Persaingan Malaysia
Malaysia Competition Commission (MyCC)

4. In line with the Memorandum of Understanding between the Commission and Bank Negara Malaysia ("BNM") and the importance of this matter, the Commission proposes that BNM appoint one officer to act as a contact point between the Commission and BNM to update BNM on the progress of the investigation. It is also proposed that the same officer will assist the Commission in getting the cooperation of the Target Enterprises and other relevant enterprises particularly with obtaining information and/or data relevant to the investigation.

5. The Commission is currently conducting an in-depth investigation on this matter. Therefore, the Commission would greatly appreciate BNM's response in regard to the above soonest.

6. Please do not hesitate to contact my officer, Encik Iskandar Ismail at iskandar@mycc.gov.my, or by telephone at 03-2273 2277 should you have any further queries regarding the same.

Thank you.

**" PROMOTING COMPETITION, PROTECTING YOU "**

**(DATO' ABU SAMAH BIN SHABUDIN)**

## Appendix A

1) General Insurance Association of Malaysia (PIAM)
2) AIA Insurance Berhad
3) Ace Jerneh Insurance Berhad
4) AIG Insurance Berhad
5) Allianz Insurance Berhad
6) Kurnia Insurance Berhad
7) AXA Affin General Insurance Berhad
8) Berjaya Sompo Insurance Berhad
9) Etiqa Insurance Berhad
10) Overseas Assurance Corporation Berhad
11) Liberty Insurance Berhad
12) Lonpac Insurance Berhad
13) MSIG Insurance Berhad
14) MPI Generali Insurans Berhad
15) Pacific Insurance Berhad
16) Progressive Insurance Berhad
17) Prudential Assurance Berhad
18) Pacific and Orient Insurance Berhad
19) QBE Insurance Berhad
20) RHB Insurance Berhad
21) Tokio Marine Insurance Berhad
22) Tune Insurance Berhad
23) Zurich Insurance Berhad
24) Asia Capital Reinsurance Sdn. Bhd.
25) Hannover Reinsurance Berhad
26) Malaysian Reinsurance Berhad
27) Munich Reinsurance Berhad
28) Swiss Reinsurance Berhad
29) Toa Reinsurance Berhad

**BNM's letter to the Commission dated 12.1.2017**

BANK NEGARA MALAYSIA
CENTRAL BANK OF MALAYSIA

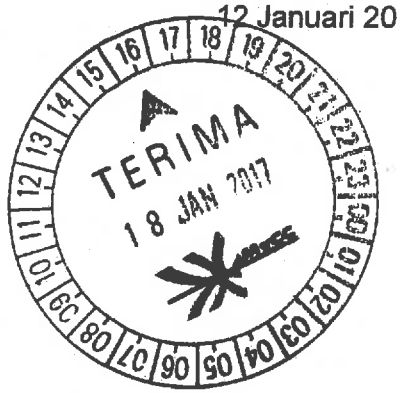
Telefon 60(3) 2604-0648
Faksimili 60(3) 2604-0350
Web www.bnm.gov.my
E-mel arg@bnm.gov.my

Jalan Dato' Onn
50480 Kuala Lumpur
Malaysia

*Abdul Rasheed Ghaffour*
*Timbalan Gabenor*

7201/CO/02/02/32/JMS/AA/ISM

12 Januari 2017




Y. Bhg. Tan Sri Dato' Seri Siti Norma Yaakob
Chairman
Malaysia Competition Commission
Level 15, Menara SSM @Sentral,
7 Jalan Stesen Sentral 5,
Kuala Lumpur Sentral,
50623 Kuala Lumpur

Y. Bhg. Tan Sri,

**Motor Repairs and Fair Settlement Practices**

Following the last meeting held between the Malaysia Competition Commission (MyCC) and Bank Negara Malaysia (the Bank) on 10 November 2016, we wish to apprise Y.Bhg Tan Sri of recent developments to assist MyCC in concluding its investigations on the above matter.

2. We have recently been informed by Persatuan Insurans Am Malaysia (PIAM) that following a meeting convened by the investigating team of MyCC with the chief executive officers of insurance companies late last year, the investigation team expects to finalise its report which will be submitted to the members of the Commission in mid-January 2017. We have also been separately advised by external auditors of insurance companies that developments in the investigations by MyCC may delay the finalisation of the audited financial statements of insurance companies, or may call for their qualification.

3. We have, through several letters and meetings with MyCC, provided the context of the industry agreement which observes specified parameters for trade discounts of motor parts prices and labour rates for repairs of motor vehicles. To further assist MyCC on this matter, we recap below the salient developments leading and pursuant to the agreement:

- In addressing the needs of the motoring public for efficiency and quality service in vehicle repairs, the agreement was a result of the Bank's direction for PIAM and the Federation of Automobile Workshop Owners Association of Malaysia (FAWOAM) to develop a solution to the disputes that occurred regularly between members of both associations. These disputes had adversely affected the motoring public due to protracted delays in claims settlements, risks of public endangerment due to sub-standard motor repairs, and significant inconvenience to vehicle owners who had to either advance or top up payments to workshops, or wait lengthy periods in order to get vehicles repaired. The relevant communications between the Bank and industry are enclosed for Y. Bhg. Tan Sri's reference.

- The agreement was reached after extended discussions between PIAM and FAWOAM. Details of the arrangement were mutually agreed between PIAM and FAWOAM.

- The agreement reflected prevailing circumstances in which the preconditions for a fully competitive market for motor insurance and motor repairs were not in place. In particular, motor insurance premiums were and continue by law to be regulated under a tariff, and mechanisms for greater transparency in prices of motor parts and labour costs remain under-developed. These conditions are currently being addressed as part of the ongoing, carefully sequenced reforms being implemented by the Bank in the motor insurance sector, including the phased liberalisation of the tariff and strengthened arrangements to support more informed pricing and claims settlement practices.

- The agreement has served to improve the efficiency of motor claims settlements and quality of repairs, including through the use of genuine parts in repairs. This can be observed from a significant reduction in complaints on motor claims and repairs based on data compiled by the Bank, as shown below:

| Type of complaint | 2011 | 2016 | As at Oct 2016 |
|---|---|---|---|
| **Unsatisfactory repair works** | 22 | 18 | 5 |
| **Delay in claims processing/payment** | 309 | 134 | 103 |
| **Dispute/dissatisfaction of claims amount** | 200 | 191 | 113 |

- Any changes to the arrangements, will need to consider the necessary conditions for effective competition, which the ongoing reforms outlined above are meant to facilitate. This is to avoid the risk of inefficiencies in the motor repair market giving rise to sharp adjustments in motor premiums that are being progressively liberalised, thus affecting the public at large.

4. Ensuring the smooth transition towards the liberalisation of the motor tariffs which will take effect on 1 July 2017 remains an important priority of the Bank in promoting a sustainable motor insurance market and conditions for effective competition. In accordance with the Memorandum of Understanding between the Bank and MyCC, we stand ready to collaborate and assist MyCC on this matter and in this regard, we wish to request for a discussion on the proposed course of action that may be considered by MyCC.

Sekian, terima kasih.

Yang benar,

(Abdul Rasheed Ghaffour)

**BNM's letter to the Commission dated 13.2.2017**

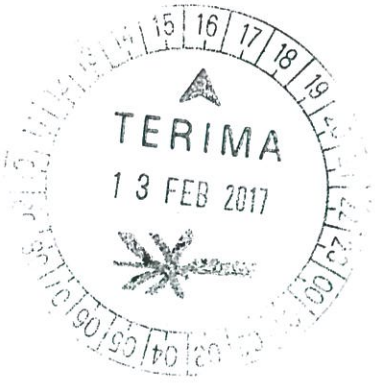
BANK NEGARA MALAYSIA
CENTRAL BANK OF MALAYSIA

Telefon 60(3) 2604-0648
Faksimili 60(3) 2604-0350
Web www.bnm.gov.my
E-mel arg@bnm.gov.my

Jalan Dato' Onn
50480 Kuala Lumpur
Malaysia

*Abdul Rasheed Ghaffour*
*Timbalan Gabenor*

13 Februari 2017




Y. Bhg. Tan Sri Dato' Seri Siti Norma Yaakob
Chairman
Malaysia Competition Commission
Level 15, Menara SSM @Sentral
7 Jalan Stesen Sentral 5
Kuala Lumpur Sentral
50623 Kuala Lumpur

Y. Bhg. Tan Sri,

**Malaysia Competition Commission's (MyCC) Investigation on Persatuan Insurans Am Malaysia (PIAM) and General Insurers**

The Bank wishes to record its thanks to MyCC for consulting with Bank Negara Malaysia (the Bank) on 6 February 2017 and providing the Bank an opportunity to share the implications of MyCC's proposed action against PIAM and the general insurers. As agreed at the meeting, we wish to convey to the Commission the Bank's proposal for a concrete and expedient resolution to this matter.

2. The Bank has through several letters and meetings with MyCC provided the context of the industry agreement which observes specified parameters for trade discounts of motor parts prices and labour rates for repair of motor vehicles. We have also expressed the need for a smooth transition towards liberalisation of the motor tariffs which can only be achieved with the Bank's intervention through directives or in facilitating the discussions between PIAM and FAWOAM. The industry agreement is therefore the direct outcome of a directive of the Bank. Nevertheless, we have assured MyCC that the Bank expects that the industry will eventually transition to a competitive market for motor repairs when the conditions for effective competition are met. Until then, it is imperative that the Bank's directive to PIAM continues to exist to avoid the risk of inefficiencies in the motor repair market which will give rise to sharp adjustments in motor premiums and thus affect the public at large.

3. As the regulator for the financial sector, the Bank achieves its regulatory and supervisory outcomes by various means which are not limited to the issuance of guidelines, circulars or letters. The Bank also as an approach, provides flexibility to its licensees to implement its requirements, while ensuring that the regulatory

objectives are met. This may be reflected in principles of conduct laid out by the Bank that insurers must comply with, or specific outcomes that insurers must deliver. The Bank will then review the practices of insurers and determine if they meet the Bank's requirements and intended outcomes. In fact, the memorandum of understanding between the Bank and MyCC recognises that conduct expressly permitted or required by the laws administered by the Bank should be excluded from the scope of the Competition Act 2010. We would view this as the basis for MyCC to recognize the various methods used by the Bank to achieve its regulatory outcomes. In this case, the Bank issued a letter directing PIAM to resolve the matter expeditiously, and continued to participate in subsequent discussions between the parties. It is clear that the Bank would have intervened further had the final outcome not been acceptable to the satisfaction of the Bank.

4. In our view, the finding of an infringement against PIAM and the general insurers would be contrary to a clear regulatory outcome intended by the Bank to protect consumers. This position would be untenable for the Bank and the industry at large as it would introduce significant uncertainty over the Bank's statutory responsibility to regulate and supervise the insurance industry – both in this instance and other areas of industry practice which are a direct consequence of the Bank's regulatory objectives. In addition, a finding of infringement would seriously undermine current efforts of the Bank, working with numerous stakeholders in Government and industry, to secure an orderly transition for the motor insurance industry from a tariffed regime to a more competitive and sustainable market. In a worse-case scenario, measures already taken may have to be rolled back, and the tariff retained indefinitely. The ramifications of this would be far reaching, including for the workshops whose complaint is at the centre of MyCC's investigations. This is due to continuing pressures that will mount for the industry to contain costs within premiums set under the tariff. We firmly believe the public interests are best served by continued progress on the motor reforms, and would suggest that the evolution of a more competitive motor insurance market also promotes the public interests advanced by MyCC as the competition authority.

5. For the reasons set out above, we are of the view that a practical solution to this matter should be explored. In this regard, MyCC should consider accepting a section 43 Undertaking from PIAM and the general insurers without making any finding of infringement or imposition of penalty. The Undertaking will set out the following:

(i) PIAM and the general insurers undertake to review and modify the arrangement to take into account revised inputs on motor parts prices and labour rates since the arrangement was established.

(ii) PIAM and the general insurers additionally undertake to establish an effective arrangement for resolving disputes on motor claims settlements between general insurers and workshops that is independent and transparent to all parties.

(iii) PIAM and the general insurers further undertake to gradually dismantle the arrangement to fix the motor parts trade discounts and labour rate, the timing and sequence of which will be guided by a determination, in consultation with Bank Negara Malaysia, that pre-conditions for effective competition in the motor repairs market are met. For this purpose, PIAM and the general insurers agree to submit a plan, with the preconditions identified, to MyCC for gradually dismantling the arrangement by no later than a specified date; and

The Bank stands ready to facilitate the negotiation and provision of the Undertaking and thereafter agrees to monitor compliance with the Undertaking to ensure that it meets MyCC's requirements.

6. The Bank would like to add that work to develop the preconditions referred to in paragraph 5(iii) above has already been identified within the scope of broader reforms that are being pursued in the motor insurance sector. This includes, but are not limited to, initiatives that will be taken to:

(i) enhance the existing pricing database to reflect the range of discounts in the purchase of spare parts;
(ii) improve service level arrangements between individual insurers and repairers through transparent agreements that set out agreed terms, discounts and standards of service quality; and
(iii) improve disclosures on claims assessments by adjusters and actual costs of parts incurred by repairers.

7. It is the Bank's position that the acceptance of a section 43 Undertaking by MyCC would address the concerns of all interested parties:

(i) For MyCC - The Undertaking will be published and as such be subject to public scrutiny. MyCC's mandate of protecting the process of competition is preserved as the specific undertakings would clearly lay out a path to achieve competition without undermining MyCC's overriding consumer welfare aim which in this case, would be to avoid inordinate delays in claims settlements and risks of disorderly market conditions leading to higher motor premiums for all consumers.
(ii) For the Bank – The implementation of critical reforms in the motor insurance sector can continue to proceed with the goal of creating a more competitive and sustainable motor insurance market, ultimately benefitting consumers. Uncertainty over the statutory responsibility of the Bank to regulate and supervise the insurance industry, and its discretion to discharge this responsibility using a range of methods and tools that it deems to be most efficient and effective, would be avoided.
(iii) For workshops and the industry – A workable arrangement is achieved with no disruption to the motor repair market. Orderly market conditions are also preserved.

(iv) For the public – Efficient motor claims settlements and quality of repairs are preserved. Over the longer term, the reforms in the motor insurance sector will preserve affordable access to motor insurance protection.

8. If a finding of infringement is made by MyCC and contested by PIAM and the insurers, the Bank will be compelled to affirm that the insurers acted in compliance with a directive which was issued with the primary aim of protecting the interests of claimants and the public at large. As conceded at our meeting on 6 February 2017, it is in both the interests of MyCC and BNM to avoid an open and public display of disagreement between two regulators which would call into question the efficacy of regulatory arrangements that would only be to the detriment of public and investor confidence.

9. We hope that the Commission will give serious consideration to the Bank's proposal in order to achieve an optimal and practical outcome to the matter.

Sekian, terima kasih.

Yang benar,

(Abdul Rasheed Ghaffour)

# Letter from Messrs. Wong & Partners to the Commission dated 23.5.2012

**ANNEXE 13**

WONG & PARTNERS

MEMBER FIRM OF BAKER & MCKENZIE INTERNATIONAL

Wong & Partners
Advocates & Solicitors

Level 21, The Gardens South Tower
Mid Valley City, Lingkaran Syed Putra
Kuala Lumpur 59200
Malaysia

Tel: +60 3 2298 7888
Fax: +60 3 2282 2669
www.wongpartners.com

23 May 2012

Y.Bhg. Tan Sri Dato' Seri Siti Norma Yaakob
Chairman
The Malaysian Competition Commission (MyCC)
Level 3, Wisma Glomac 3,
SS7/19, Kelana Jaya,
Petaling Jaya,
47301 Selangor.

Ref AGN/CCE/ 78255802-241657

By Hand

I/We hereby acknowledge receipt of the above stated document(s)

Name: PIAM

Date : 6/6/12

Dear Y.Bhg.Tan Sri,

**Compliance with the Malaysian Competition Act 2010**

Following the introduction of the Malaysian Competition Act 2010 ("**Act**"), we, acting for Persatuan Insurans Am Malaysia ("**PIAM**"), the association for the general insurers in Malaysia established pursuant to the Insurance Act 1996 ("**IA**"), have conducted a compliance review of the activities and practices of PIAM in relation to the Act.

Following our initial review, to ensure that PIAM will be in full compliance with the Act, PIAM is prepared to adjust certain practices which have been strongly entrenched in the Malaysian general insurance market for decades. PIAM has already set up a Task Force specifically for this purpose, and is holding meetings amongst its members and stakeholders to design the compliance roadmap to address the key problematic areas and consider and agree on long term solutions for PIAM. However, whilst PIAM is keen to move towards full compliance as soon as possible, due to the role of PIAM in the general insurance market pursuant to the IA and its legal obligations to comply with BNM's directions, the issues are complex and cannot be immediately resolved. As a matter of illustration, PIAM is unable to amend the Constitution of PIAM without the approval of BNM under Section 22(2) of IA, and thus is unable to take unilateral steps on its own accord.

PIAM is also desirous of applying for a block exemption under Section 8 of the Act for certain of its core agreements and practices which it believes will qualify for relief under Section 5 of the Act. To ensure that a proper application for a block exemption can be made, the Task Force is also in the midst of conducting further market studies and economic analyses and collecting supporting information from its members.

In view of the above, we hereby sincerely request MyCC to allow time for PIAM to resolve the issues abovementioned and put forward a formal application for block exemption as an interim relief measure. PIAM will endeavour to submit the said formal application within five (5) months from the date of this letter.

Your understanding and consideration will be much appreciated.

Thank you.

Yours Faithfully,

**Andre Gan**
Partner
Andre.Gan@wongpartners.com
+603 2298 7828

# Letter from Messrs. Wong & Partners to the Commission dated 29.11.2012

WONG & PARTNERS

MEMBER FIRM OF BAKER & MCKENZIE INTERNATIONAL

Wong & Partners
Advocates & Solicitors

Level 21, The Gardens South Tower
Mid Valley City, Lingkaran Syed Putra
Kuala Lumpur 59200
Malaysia

Tel: +60 3 2298 7888
Fax: +60 3 2282 2669
www.wongpartners.com

29 November 2012

Y.Bhg. Tan Sri Dato' Seri Siti Norma Yaakob
Chairman
The Malaysian Competition Commission (MyCC)
Level 15, Menara SSM@Sentral,
No.7 Jalan Stesen Sentral 5,
Kuala Lumpur Sentral,
50623 Kuala Lumpur.

Ref: AGN/CJE/ 78255882-241657/kuldms 1096057

By Hand


Dear Y.Bhg.Tan Sri,

**Re: Compliance with the Malaysian Competition Act 2010 - Extension of Time**

We refer to our letter dated 23 May 2012 to the Malaysian Competition Commission ("**MyCC**") wherein we, on behalf of the Persatuan Insurans Am Malaysia ("**PIAM**") had requested for a grace period of five (5) months to allow PIAM to review its current rules and policies in view of the coming effect of the Competition Act 2010.

We wish to advise that PIAM is currently still in the midst of conducting market studies and economic analysis in connection with its review. Further, PIAM has provided full cooperation to the main regulator of the insurance sector, namely Bank Negara Malaysia ("**BNM**") in the industry-wide study conducted by BNM and is currently waiting for further direction from BNM. Hence, we have instruction from PIAM to submit this letter to request for an extension of the grace period to 31 January 2013 to allow PIAM to complete its review. Thereafter, PIAM will consider its next course of action which, if necessary, may include an application for exemption from MyCC.

Your understanding and consideration will be much appreciated.

Thank you.

Yours Faithfully,

**Andre Gan**
**Partner**
andre.gan@wongpartners.com
+603 2298 7828

# Letter from Messrs. Wong & Partners to the Commission dated 28.2.2013

WONG & PARTNERS

Wong & Partners
Advocates & Solicitors

Level 21, The Gardens South Tower
Mid Valley City, Lingkaran Syed Putra
Kuala Lumpur 59200
Malaysia

Tel: +60 3 2298 7888
Fax: +60 3 2282 2669
www.wongpartners.com

28 February 2013

Y.Bhg. Tan Sri Dato' Seri Siti Norma Yaakob
Chairman
The Malaysian Competition Commission (MyCC)
Level 15, Menara SSM@Sentral,
No.7 Jalan Stesen Sentral 5,
Kuala Lumpur Sentral,
50623 Kuala Lumpur.

Ref: AGN/CJE/ 78255882-241657/kuldms 1170083

By Hand

Dear Y.Bhg.Tan Sri,

**Re: Compliance with the Malaysian Competition Act 2010 - Extension of Time**

We refer to our letters dated 23 May 2012 and 29 November 2012 to the Malaysian Competition Commission ("**MyCC**") wherein we, on behalf of the Persatuan Insurans Am Malaysia ("**PIAM**") had requested for a grace period until 31 January 2013 to allow PIAM to review its current rules and policies in view of the coming effect of the Competition Act 2010.

PIAM has consulted with Bank Negara Malaysia ("BNM") on its proposed compliance roadmap and had received BNM's feedback on 22nd February 2013. PIAM now needs to hold a market meeting to consider and verify the proposed compliance roadmap. Hence, we have instruction from PIAM to submit this letter to request for an extension of the grace period to 31 May 2013. Thereafter, PIAM will consider its next course of action which, if necessary, may include an application for exemption from MyCC.

Your understanding and consideration will be much appreciated.

Thank you.

Yours Faithfully,

**Andre Gan**
Partner
Andre.Gan@wongpartners.com
+603 2298 7828

I/We hereby acknowledge receipt of the above stated document(s)

Name: [illegible]
Date : 04/03/13