Competition Appeal No 1 of 2014

Between

(1) Nachi-Fujikoshi Corporation
(2) Nachi Singapore Private Limited

... *Appellants*

And

Competition Commission of Singapore

... *Respondent*

ADDENDUM

Nachi-Fujikoshi Corporation and another
v
Competition Commission of Singapore

[2016] SGCAB 1

Competition Appeal Board — Competition Appeal No 1 of 2014
Goh Joon Seng, G P Selvam, Tan Tee Jim, SC

8 January 2016

G P Selvam:

1 For the purposes of this addendum, I will adopt all definitions and abbreviations used in the main judgment.

2 Before I proceed to make certain observations which form the subject-matter of this addendum, I would like to make clear certain matters. The first is that I wholeheartedly agree with the main decision concerning the appeal and the orders made therein; and the matters to be discussed in this addendum do not affect the merits of the issues raised in the appeal. The second is that although this addendum concerns a particular procedure adopted by the CCS which I find to be inappropriate, no injustice has been eventuated upon the Appellants, or any other Parties affected by the ID. In any event, any such inappropriateness was not complained of by the Appellants. They, or any of the other Parties, should not rely on this addendum in any attempt to re-open any matters dealt with conclusively by the ID and the main decision in this appeal. Finally, the views herein are strictly my own and not those of the other two members of the Board, who I believe do not endorse these views. With

these fundamental premises established, I will proceed to address the substantive matters in this addendum.

3 As has been noted in the main decision (at [32]), the main concern of the CCS regarding the Relevant Financial Year Issue relates to its practice of proposing the financial penalty to be imposed upon the ID in the PID. This would mean that the PID not only includes a proposal to make a decision on infringement as required under s 68(1) of the Act, but also includes a proposal as to the financial penalties to be imposed upon a finding of infringement as required under reg 13 of the Regulations. The CCS argued before us that if it was required to use updated financial figures, then it would have to issue a fresh PID reflecting a proposed financial penalty calculated using those updated figures. As we have held in the main decision, this was not a proper basis for refusing to use the most recent financial figures available to the CCS.

4 But herein lies a separate problem which relates to the appropriateness of including in the PID a proposal as to the financial penalties to be imposed. Section 68 of the Act and reg 7 of the Regulations clearly do not contemplate the inclusion of any such proposal in the PID. In fact, it is made clear under s 69(1) of the Act that directions concerning matters such as financial penalties, which are set out under s 69(2), are only to be made *upon a finding of infringement* in the ID and *not prior* to the ID. As s 69(1) is not set out in the main decision, I shall set it out here:

> **Enforcement of decision of Commission**
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> **69.**—(1) Where the Commission has made a decision that —
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> (*a*) any agreement has infringed the section 34 prohibition;
>
> (*b*) any conduct has infringed the section 47 prohibition;

> (*c*) any anticipated merger, if carried into effect, will infringe the section 54 prohibition; or
>
> (*d*) any merger has infringed the section 54 prohibition,
>
> the Commission may give to such person as it thinks appropriate such directions as it considers appropriate to bring the infringement or the circumstances referred to in paragraph (*c*) to an end and, where necessary, requiring that person to take such action as is specified in the direction to remedy, mitigate or eliminate any adverse effects of such infringement or circumstances and to prevent the recurrence of such infringement or circumstances.

5 Any such directions can only be made "[w]here the [CCS] has made a decision [that an infringement under the Act has taken place]". It follows that the CCS is only to consider the making of further directions under s 69(1) after issuing the ID, especially since any power to issue such directions can only arise upon the issuance of the ID. Upon this basis, the issuance of the PID in the present case which also includes the proposed financial penalty will not cohere with the procedure set out in the Act, which clearly delimits the consideration of matters concerning financial penalty to the period of time after the issuance of the ID.

6 In my view, the wording of the Act makes clear that directions concerning financial penalties are only to be considered after the issuance of the ID, and to permit the issuance of proposed financial penalties prior to the ID will require one to turn a blind eye to the express wording of the Act.

7 But my observation does not rest solely on the wording of the Act. There are greater considerations of fairness and justice that underlie my view that the issuance of a proposed financial penalty before the ID is inappropriate. In my view, it must be recognised that the CCS is a quasi-judicial body that exercises a disciplinary function. Its orders and directions have significant

impacts on the parties affected. But at the same time, it is placed in an unenviable position of playing the roles of investigator, prosecutor and arbiter of the matter. While such a multi-faceted function that may involve potential conflicts of interest is authorised by statute and required by the nature of competition law, the CCS is nonetheless bound by the rigours dictated by the rules of natural justice, fairness and good faith which are the primary components of the rule against prejudgment.

8 I will like it to be made clear that I am in no way suggesting that the CCS has actually or apparently prejudged any matter, and that I am certain that the CCS approaches every case with a neutral and impartial mind open to persuasion. My point is simply that the issuance of a proposed financial penalty prior to the ID, as a matter of appearance, might raise some eyebrows in relation to prejudgment; and as far as the CCS is already in a statutorily designed position of conflict of interest, it must do its utmost to avoid raising any further doubts as to its judicial qualities. To put its judicious character in question by prematurely issuing a proposed financial penalty, against the express wording of the Act no less, is unnecessary and unwarranted in the circumstances. The importance of appearing just and manifesting open mindedness cannot be overstated.

9 For these reasons, I find that the issuance of the proposed financial penalties in the PID prior to the ID to be an inappropriate part of the procedure adopted by the CCS. But as I have noted earlier, this did not cause any prejudice to the Appellants or any of the other Parties, as they do not dispute the infringement. The Appellants are only concerned with the calculation of the financial penalties and in this regard, they have succeeded partially in this appeal in relation to the Relevant Financial Year issue. Ultimately, this

addendum is written with the future conduct of matters by the CCS in mind. And if parliament's intention is really for the CCS to be able to issue proposed financial penalties prior to the ID, then appropriate legislative amendments or clarifications will be necessary.

Dated this 8 January 2016

G P Selvam
Member
