IN THE COMPETITION APPEAL BOARD OF THE REPUBLIC OF SINGAPORE

[2017] SGCAB 1

Appeal No 1 of 2016

In the matter of Notice of Infringement Decision issued by the Competition Commission of Singapore on infringement of section 34 of the Competition Act (Cap 50B, 2006 Rev Ed) in relation to the distribution of individual life insurance products in Singapore, CCS 500/300/13, 17 March 2016

Between

IPP Financial Advisers Pte Ltd

... *Appellant*

And

Competition Commission of Singapore

... *Respondent*

DECISION

[Competition Law] — [Anti-competitive agreements] — [Financial penalties]

TABLE OF CONTENTS

IPP Financial Advisers Pte Ltd
v
Competition Commission of Singapore

[2017] SGCAB 1

Competition Appeal Board — Appeal No 1 of 2016
Goh Joon Seng, Manu Bhaskaran and Hong Tuck Kun
21 February; 29 March; 26 April 2017

29 June 2017 Judgment reserved.

Introduction

1 This is an appeal by IPP Financial Advisers Pte Ltd ("the Appellant") against the financial penalty imposed pursuant to an infringement decision issued by the Competition Commission of Singapore ("CCS"). The CCS found that the Appellant, together with nine other financial advisers, had participated in an agreement and/or concerted practice with the object of pressurising iFAST Corporation Ltd ("iFAST") to withdraw its marketing of individual life insurance products with a significant commission rebate to policyholders. This agreement and/or concerted practice was found to be in contravention of s 34 of the Competition Act (Cap 50B, 2006 Rev Ed). At the heart of this appeal lie several specific challenges to the application of a framework used by the CCS in determining the appropriate amount of penalty to be imposed in such cases.

2 After hearing the parties, we reserved our judgment. We now deliver our decision.

Background facts

3 The background facts have been set out in considerable detail in the infringement decision. We adopt the facts described therein and outline only the most salient facts here. The Appellant is a limited private company registered in Singapore. It is a licensed financial adviser under the Financial Advisers Act (Cap 110, 2007 Rev Ed) and a member of the Association of Financial Advisers (Singapore) ("AFA").[1] It provides financial planning services and distributes the investment and insurance products of multiple insurance companies, including those of Manulife (Singapore) Pte Ltd, NTUC Income Insurance Co-operative Limited and Tokio Marine Life Insurance Singapore Ltd (collectively "the Insurers"). Financial advisers such as the Appellant receive commissions from the insurance companies when they successfully sell the company's products. After the Monetary Authority of Singapore lifted its prohibition on commission rebates in 2002, financial advisers may now choose to pass on part of their received commissions to policyholders in the form of rebates that offset the cost of the policyholders' insurance products.[2]

4 iFAST is both a securities dealer and a financial adviser, although it was not a member of the AFA at the material time. It operates an online business-to-consumer platform, Fundsupermart.com ("the Fundsupermart website"),[3] as well as an online business-to-business ("B2B") platform, on which financial advisers like the Appellant use to market some of their investment products.[4]

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1 Infringement decision at [10]

2 Infringement decision at [16]

3 Infringement decision at [18]-[19]

4 Infringement decision at [21] and Transcript day 1, p 32 lines 1-13

5 On 30 April 2013, iFAST began to market the Insurers' individual life insurance products on the Fundsupermart website, with an offer of 50% commission rebate to policyholders ("the Fundsupermart Offer"). In other words, it offered to pass on half the commission it received from the Insurers to its policyholders.[5] Initially, policyholders were told (in the Frequently Asked Questions section of the Fundsupermart website) that they would receive the rebates for "as long as the policy pays commissions", which iFAST estimated to be between three and six years.[6] According to Mr Lim Chung Chun ("Mr Lim"), the Chief Executive officer ("CEO") of iFAST, its intention on first launch was to market the Fundsupermart Offer "permanently".[7] However, just three days afterwards, in the early afternoon of 3 May 2013, iFAST limited the Fundsupermart Offer to one month. Later in the afternoon on the same day, it withdrew the offer altogether with immediate effect.[8]

6 On 28 August 2013, the CCS commenced an investigation into this withdrawal under s 62 of the Competition Act. Evidence gathered by the CCS showed that eight financial advisers, all of which were part of the AFA, met for an AFA Management Committee meeting on 2 May 2013. During this meeting, the Fundsupermart Offer, said to be marketed "online at a discount", was discussed and several members expressed concerns about it. Mr Vincent Ee Soon Teck ("Mr Ee") of Financial Alliance Pte Ltd ("Financial Alliance") was appointed to contact iFAST and the Insurers to "voice [the AFA's] unhappiness

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5 Infringement decision at [26]

6 Respondent's Bundle of Authorities and Documents ("RBOAD") vol 7 Tab 34 p 3 of 5; Transcript day 1, p 28 lines 3-29

7 Transcript day 1, p 32 line 31 – p 33 line 5

8 Infringement decision at [29]

regarding this issue" and to ask iFAST and the Insurers to remove the Fundsupermart Offer from their websites. Mr Ee did so over email in the evening of 2 May 2013, expressing his disturbance and disappointment with the introduction of the Fundsupermart Offer. He highlighted that iFAST had "quietly entered into direct competition with the [financial advisers] industry on life insurance". He told iFAST to "please do something before it [is] too late".[9]

7 At about noon the next day (3 May 2013), Mr Lim replied and apologised for the "concerns" caused to the financial advisers. He offered to limit the Fundsupermart Offer to one month, until the end of May 2013. Mr Ee labelled this proposal "totally unacceptable" and requested that iFAST withdraw the Fundsupermart Offer immediately. iFAST acceded to this demand and completely withdrew the offer later that day.[10]

8 Although the Appellant was not present at the AFA Management Committee meeting, the then-CEO of the Appellant, Mr Shelton Chellappah ("Mr Chellappah"), sent several emails to Mr Ee expressing agreement with and "full support" for his actions. Mr Chellappah also separately contacted iFAST and the Insurers on 3 May 2013 expressing deep disquiet about the Fundsupermart Offer. Further, two of the Appellant's directors, Mr Albert Lam and Mr Tan Lye Poh, communicated with iFAST to ask it to remove the Fundsupermart Offer. They also asked iFAST to consider whether the life insurance business was worth so much unhappiness from the other financial advisers, which were iFAST's partners in its B2B business.[11] On 4 May 2013,

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9 RBOAD vol 7 Tab 39

10 RBOAD vol 7 Tab 39

11 Infringement decision at [139] – [148]

one of the Insurers emailed Mr Chellappah to ascertain if he was aware of the withdrawal of the Fundsupermart Offer by then. Mr Chellappah answered in the affirmative and observed that "[the Appellant had] exerted considerable pressure to get this outcome".[12]

The infringement decision

9 After conducting its investigations, the CCS found that a total of ten financial advisers had engaged in the agreement and/or concerted practice. It sent each of the financial advisers a notice of its proposed infringement decision on 28 May 2015 and invited the parties to make representations. After considering the representations from each of the parties, the CCS issued an infringement decision on 17 March 2016, holding that the parties had infringed s 34 of the Competition Act by their participation in an agreement and/or concerted practice which had the object of collectively pressurising iFAST into withdrawing the Fundsupermart Offer. Section 34 of the Competition Act states:

> **Agreements, etc., preventing, restricting or distorting competition**
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> 34. —(1) Subject to section 35, agreements between undertakings, decisions by associations of undertakings or concerted practices which have as their object or effect the prevention, restriction or distortion of competition within Singapore are prohibited unless they are exempt in accordance with the provisions of this Part.
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> (2) For the purposes of subsection (1), agreements, decisions or concerted practices may, in particular, have the object or effect of preventing, restricting or distorting competition within Singapore if they —
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> > (*a*) directly or indirectly fix purchase or selling prices or any other trading conditions;

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12 Infringement decision at [144]

> (*b*) limit or control production, markets, technical development or investment;
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> (*c*) share markets or sources of supply;
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> (*d*) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
>
> (*e*) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

The agreement and/or concerted practice in question prevented, restricted or distorted competition in the market for the distribution of the Insurers' individual life insurance products in Singapore and was by its very nature injurious to the proper functioning of normal competition.[13]

10 The CCS imposed the following financial penalties on the financial advisers:

Party	**Financial Penalty (S$)**
Professional Investment Advisory Services Pte Ltd ("PIAS")	405,114
The Appellant	239,851
Financial Alliance	137,524
Avallis Financial Pte Ltd	54,788

13 Infringement decision at [4]

Promiseland Independent Pte Ltd	31,305
Cornerstone Planners Pte Ltd	13,781
RAY Alliance Financial Advisers Pte Ltd	11,939
Frontier Wealth Management Pte Ltd	5,000
JPARA Solutions Pte Ltd	5,000
WYNNES Financial Advisers Pte Ltd	5,000
Total	**909,302**

11 In deciding the appropriate financial penalty to be imposed on the parties (including the Appellant), the CCS applied the framework outlined in the *CCS Guidelines on the Appropriate Amount of Penalty* ("*Penalty Guidelines*"). The CCS first noted that the twin objectives of imposing any financial penalty are to (a) reflect the seriousness of the infringement and (b) to deter undertakings from engaging in anti-competitive practices. The CCS then used the following five-step framework to calculate the financial penalty to be imposed:[14]

(a) Step 1: Consider the seriousness of the infringement and the relevant turnover in the product and geographic markets affected by the infringement in the undertaking's last business year to determine the

14 Infringement decision at [274]

base amount of financial penalty. This is calculated by applying a starting percentage rate to the undertaking's relevant turnover;

(b) Step 2: Adjust for the duration of the infringement;

(c) Step 3: Adjust for other relevant factors such as deterrent value;

(d) Step 4: Adjust for any other aggravating and mitigating factors;

(e) Step 5: Adjust to ensure that the statutory maximum penalty is not exceeded.

12 With regard to Step 1, the CCS stated that the relevant turnover would be the entire turnover of the Appellant in the last business year preceding the infringement decision for the distribution of the Insurers' relevant individual life insurance products in Singapore. If the turnover for the last business year was not available, the figures used would be the one immediately preceding it. In the Appellant's case, the financial figures for Financial Year ("FY") 2015 (the year preceding the infringement decision) were not available and thus the turnover for FY 2014 (ending 31 December 2014) was used instead. This amounted to S$[xxx]. In respect of the specific submission by some of the parties, including the Appellant, that the relevant turnover should not include the turnover derived from policies in force before FY 2014, the CCS stressed that it was each party's *entire* turnover that was used and that the relevant turnover was not necessarily equivalent to the turnover obtained directly as a result of the infringing conduct.[15]

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15 Infringement decision at [280]-[281]

13 Having regard to the nature of the infringement, the nature of the product, the structure of the market, the market shares of the parties, as well as the potential effect of the infringement on customers, competitors and third parties, the CCS fixed the starting point at [xxx]% of the relevant turnover for each of the parties. For the Appellant, this yielded a base financial penalty of S$[xxx] (being [xxx]% of S$[xxx]).[16]

14 As for the duration of the infringement in Step 2, the CCS noted that the agreement and/or concerted practice lasted for only two days, from 2 to 3 May 2013. Notwithstanding the short duration of the agreement and/or concerted practice, the CCS was of the view that (a) the effects of the infringement were much longer lasting than the actual period during which the agreement and/or concerted practice took place and (b) an infringement over a part of a year may in any case be treated as a full year for the purpose of calculating the duration of an infringement. Hence, it imposed a duration multiplier of one for a full year.[17]

15 In Step 3 of the analysis, the CCS found that the amount of penalty imposed on the Appellant was sufficient to act as an effective deterrent to the Appellant and did not consider it necessary to adjust the quantum at that stage.[18]

16 When considering the aggravating and mitigating factors in Step 4, the CCS took into account the degree of cooperation rendered by the Appellant and reduced the penalty by [xxx]% to S$239,851. In relation to the parties'

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16 Infringement decision at [351]

17 Infringement decision at [295]-[300]

18 Infringement decision at [355]

submission that they operate in a high turnover, low margin industry, the CCS said it had already taken the nature of the product and industry into account when fixing the starting percentage for penalty calculations.[19]

17 Finally, under s 69(2)(*d*) read with s 69(4) of the Competition Act, where an agreement has been held to infringe the section 34 prohibition, the maximum penalty that can be imposed is 10% of the turnover of the business of the undertaking in Singapore for each year of infringement, up to a maximum of three years. In the Appellant's case, the maximum financial penalty that can be imposed was not exceeded and no adjustments were made.[20] Thus, the final penalty imposed on the Appellant remained at S$239,851.

The appeal

18 On 16 May 2016, the Appellant filed a Notice of Appeal against the infringement decision *only* on the issue of the quantum of financial penalty imposed, on the grounds that it is too high or has not accurately or adequately taken into account the circumstances of the case.[21] The Notice of Appeal was drafted with the input of its legal counsel. After the Notice of Appeal was drafted, the Appellant chose to discharge its legal counsel, citing its inability to afford the high legal costs.[22] It participated in the rest of the appeal (including the hearing) through its authorised representatives.

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19 Infringement decision at [353] and [302]

20 Infringement decision at [307] and [356]

21 Notice of Appeal para 4

22 Appellant's opening statement p 3; Appellant's written statement para 54

19 The Appellant contends that the penalty imposed should be substantially reduced to between S$[xxx] and S$[xxx].[23] There are four main arguments advanced by the Appellant in its Notice of Appeal, which are closely mirrored in its closing submissions. These are that:

(a) The relevant turnover used to calculate the base financial penalty should only include new policies and not existing policies entered into before FY 2014;

(b) The starting percentage of [xxx]% imposed is too high;

(c) The duration of the infringement should be rounded down to one month with a duration multiplier of 0.083; and

(d) The CCS failed to consider mitigating factors such as the Appellant operating in a high turnover, low profit industry and the genuine uncertainty as to whether there had been an infringement of the Competition Act.

We will deal with each of these issues in turn in our decision.

Preliminary issue on the scope of this appeal

20 Before turning to the four substantive issues, we first consider an important preliminary issue regarding the scope of this appeal. We earlier noted (at [18] above) that the Appellant had, in its Notice of Appeal, stated that the appeal was "only on the issue of quantum". However, during one of the case management conferences on 7 February 2017, the Appellant's authorised

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[23] Notice of Appeal at para 69

representatives expressed some dissatisfaction with the CCS' finding of liability (that is, its finding that s 34 of the Competition Act had been infringed) as well. We then reminded the Appellant that the hearing of the appeal should be confined to what it had raised in its grounds of appeal, namely, the quantum of penalty imposed only.[24] It appeared from the beginning of the Appellant's opening statement that it had heeded our reminder.[25] However, later in the opening statement,[26] during the hearing of the appeal,[27] as well as in its closing submissions,[28] the Appellant continued to challenge the merits of the infringement decision with regard to liability.

21 We note that at the point of filing its Notice of Appeal, the Appellant had made a deliberate choice only to appeal against the quantum of the penalty imposed, even though it could have challenged the merits of the decision on liability as well (see s 71(1) and s 71(3) of the Competition Act). Indeed, the Appellant's decision to focus solely on the quantum of financial penalty must have been made with the benefit of legal advice at that time. If the Appellant changed its mind and subsequently wished to challenge the merits of the finding on liability as well, it should have taken either of two routes. First, it could have applied to amend its Notice of Appeal under Regulation 11(1) of the Competition (Appeals) Regulations (Cap 50B, Rg 5, 2006 Rev Ed) to include a fresh substantive ground of appeal challenging the merits of the finding on

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24 Minutes of Case Management Conference on 7 February 2017 p 3 para (f) under the heading "Procedure for the appeal".

25 Appellant's opening statement p 2 para 1.

26 Appellant's opening statement p 5 para 5, p 6

27 Transcript day 1, p 2 lines 15-17; p 4 line 14 – p 6 line 21

28 Appellant's written statement paras 12-22; Appellant's closing submissions paras 84-95

liability. Alternatively, it could have sought permission from the Competition Appeal Board ("the Board") during the hearing of the appeal to raise or rely on a ground of appeal which was not stated in the Notice of Appeal: see Regulation 8(3) of the Competition (Appeals) Regulations, which states:

> **Notice of appeal**
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> **8.** – (3) An appellant shall not raise or rely on any ground of appeal which is not stated in the notice of appeal during the hearing of the appeal *except with the permission of the Board.*
>
> [emphasis added]

See also *Re Price-fixing in Modelling Services: Bees Work Casting Pte Ltd, Diva Models (S) Pte Ltd, Impact Models Studio and Looque Models Singapore Pte Ltd* [2013] SGCAB 1 ("*Bees Work Appeal*") at [112], in which such permission was sought from and allowed by the Board.

22 Neither of these two courses of action were adopted in the present case. Instead, the Appellant had simply proceeded to raise issues relating to the merits of the finding of infringement without regard to the boundaries of its Notice of Appeal. In these circumstances, we consider it entirely inappropriate for us to deal with the issues on the merits of the infringement decision raised by the Appellant, not only because the raising of these issues was procedurally improper, but also because to do so would be manifestly unfair to the CCS, which had always proceeded – legitimately – on the basis that the Appellant was only challenging the quantum of the penalty imposed. We therefore proceed in the rest of this decision to deal only with the issues raised in relation to the appropriateness of the financial penalty imposed.

Observations on the *Penalty Guidelines*

23 Having defined the scope of this appeal, we turn now to set out some observations on the *Penalty Guidelines*. This was relied upon by the CCS in arriving at the financial penalty imposed on the Appellant and all of the Appellant's contentions at their core centre on the proper application of the *Penalty Guidelines*.

24 We begin with the decision of the United Kingdom ("UK") Competition Appeal Tribunal ("CAT") in *Argos Limited and another v Office of Fair Trading* [2005] CAT 13 ("*Argos (CAT)*"). The CAT in that case commented on the *Director General of Fair Trading's Guidance as to the Appropriate Amount of a Penalty* (OFT 423, March 2000), the predecessor of the current *OFT's Guidance as to the Appropriate Amount of a Penalty* (OFT 423, September 2012) ("*OFT Guidelines*"), both of which are *in pari materia* to our *Penalty Guidelines*. It observed (at [168]) that the guidance was not to be construed "as if it were a statute". In the same vein, we also recognise that the *Penalty Guidelines* is exactly what its name suggests: guiding principles that do not have the force of law. This much was conceded by counsel for the CCS at the hearing of the appeal.[29] Thus, the Board is not bound by the *Penalty Guidelines* and has full jurisdiction to assess the penalty to be imposed.

25 Be that as it may, it is certainly not the case, as the Appellant argues, that because the *Penalty Guidelines* do not have the force of law, they simply *do not apply* to its case.[30] Instead, the Board will still have regard to the *Penalty Guidelines* where appropriate in reaching its conclusion, unless it is shown that

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29 Transcript day 1, p 16 lines 26-29

30 Appellant's written statement para 28

the *Penalty Guidelines* are wrong or that the CCS has erroneously applied it: see *Re Price Fixing in Bus Services from Singapore to Malaysia and Southern Thailand: Konsortium Express and Tours Pte Ltd, Five Stars Tours Pte Ltd, GR Travel Pte Ltd and Gunung Travel Pte Ltd* [2011] SGCAB 1 ("*Konsortium Appeal*") at [144].

26 Ultimately, the focus of the Board is on whether the *overall penalty* imposed is appropriate for the infringement in question, in light of the twin objectives of punishment and deterrence. This means that it is the overall justice and proportionality of the penalty that should be considered; as a corollary, there ought not to be a minute examination of the individual steps applied under the *Penalty Guidelines* in minute detail: see *Argos (CAT)* at [172]. The imposition of the financial penalty is not a scientific exercise, nor is it capable of being reduced to a "mechanical calculation according to a predetermined mathematical formula". Instead, while the *Penalty Guidelines* provide an objective basis upon which calculations of financial penalty should be carried out, the practical application of the framework requires some measure of subjective judgment depending on the precise factual matrix of an individual case: see *Argos (CAT)* at [171]. In this regard, we consider that a margin of appreciation should be granted to the CCS in its determinations on the imposition of financial penalties as long as we are satisfied, on the whole, that the penalty imposed is just and proportionate. These principles in *Argos (CAT)* were endorsed by the Board in *Konsortium Appeal* at [177].

27 In the present case, in order to assess the appropriateness of the overall financial penalty imposed by the CCS on the Appellant, we will deal with the four specific contentions put forth by the Appellant (see [19] above), to which we now turn.

Relevant turnover

The parties' submissions

28 The Appellant's first contention is that the CCS erred in using the Appellant's *entire* turnover for FY 2014 in Step 1 of the *Penalty Guidelines*, which includes both the turnover generated from its new business in FY 2014, as well as recurring revenue from policies existing before FY 2014. The Appellant argues that the financial penalty should be based only on the *new business* that the Appellant received in FY 2014. In this way, the penalty imposed would have a direct relationship with the benefit that the Appellant received for its anti-competitive behaviour. On the contrary, the recurring revenue from the Appellant's prior existing policies would not have been impacted by the entry of the Fundsupermart Offer: it is unlikely that policyholders would terminate their existing policies when faced with lower cost alternatives such as the Fundsupermart Offer. This is because there are financial and non-financial consequences of an early termination of an insurance policy, which may outweigh the short term inducement from the commission rebates.[31] Thus, since the revenue contributed by its new business constitutes only around [xxx]% of its entire turnover for FY 2014, the turnover that should be used is S$[xxx].

29 The CCS makes four arguments in response. First, it extensively refers to the case law from local and overseas jurisdictions to show that the unanimous position in this regard is that the turnover used in Step 1 of the *Penalty Guidelines* analysis is the entire turnover derived from the relevant product and

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31 Notice of Appeal paras 11-15; Appellant's written statement paras 29-35

geographic markets affected by the infringement; it is not limited to revenue generated from new products or customers in a particular year, or to revenue directly impacted by the infringement.[32] Second, the CCS is of the view that both the Appellant's new *and existing* policies would have been subjected to greater competition from iFAST if the Fundsupermart Offer had not been withdrawn.[33] Third, the Appellant's suggestion of adopting a relevant turnover that consists only of the revenue directly impacted by the infringing conduct is untenable, inaccurate and gives rise to uncertainty.[34] Finally, the policy objectives of the imposition of financial penalties is deterrence and punishment; this is not linked to the disgorgement of gains obtained from the Appellant's illicit conduct.[35]

Our decision

30 The Appellant's arguments hinge on the notion that it should only be penalised for the turnover derived from its anti-competitive conduct. We disagree with this proposition for two reasons. First, it is contrary to the established case law in this regard. Second, it cannot be correct as a matter of public policy.

The case law

31 Most fundamentally, we are persuaded that the Appellant's suggested approach is contrary to the weight of the case authorities not only in Singapore but also in the UK and the European Union, upon which our competition law

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32 Respondent's closing submissions para 20

33 Respondent's closing submissions para 47

34 Respondent's closing submissions para 51

35 Respondent's closing submissions para 61

and policy are largely based. We begin with the relevant portion of our own *Penalty Guidelines*, which states, at paragraph 2.1, that the financial penalty imposed by the CCS will be calculated taking into account

> ...the turnover of the business of the undertaking in Singapore for the relevant product and relevant geographic markets affected by the infringement in the undertaking's last business year.

32 In determining the relevant product market that is "affected by" the proved infringement, the Court of Appeal in the English case of *Argos Limited and another v Office of Fair Trading and another appeal* [2006] EWCA Civ 1318 at [173] agreed with the CAT that a broad view should be taken; there ought not be an exact application of principles required for a formal market analysis, nor should the turnover in question be limited to sales of the very products or services which are the direct subject of the anti-competitive practice. In the present case, the undisputed product and geographic market affected by the infringement is the distribution of the Insurers' relevant individual life insurance products in Singapore. The market is not further subdivided based on the year that the insurance policies were entered into. This is for good reason, as even the policies entered into before FY 2014 could not have been categorically immune from the impact of the entry of the Fundsupermart Offer marketed with an attractive commission rebate covering about half the cost of the insurance policy for at least three to six years. A pre-existing policyholder might have well found it worthwhile to make the switch on a balance of considerations, both financial and non-financial.

33 Further, it is clear from a plain reading of paragraph 2.1 of the *Penalty Guidelines* that it is the *entire* turnover of the Appellant in the relevant product and geographic market that should be considered. Paragraph 2.1 does not refer to only a part of the turnover in the defined market that is impacted by the anti-

competitive conduct. This is also the approach taken by the Board in previous decisions, which uniformly applied paragraph 2.1 of the *Penalty Guidelines*: see for example, *Konsortium Appeal* at [182]; *Re Price Fixing in Bus Services from Singapore to Malaysia and Southern Thailand: Transtar Travel Pte Ltd and Regent Star Travel Pte Ltd* [2011] SGCAB 3 ("*Transtar Appeal*") at [85] and *Bees Work Appeal* at [126]. For example, in *Transtar Appeal*, the CCS found, among other things, that there was an agreement among various coach operators in Singapore to fix the prices of the fuel and insurance ("FIC") surcharge of express bus services from Singapore to Malaysia and Southern Thailand. The appellants contended that because only the FIC surcharge (and not the entire bus ticket price) was fixed, the turnover that should be used to calculate the base financial penalty in Step 1 of the *Penalty Guidelines* should only include the revenue obtained from the sale of the FIC coupons. The Board (at [96]) rejected this argument, holding that there was no separate product market for the FIC coupons and that the sale of each FIC coupon was intrinsically tied to the sale of the bus tickets. Thus, the Board held that the relevant turnover was that derived from the sale of one-way tickets for express bus services from Singapore to Malaysia and Southern Thailand *as a whole*.

34 We turn to the approach in other jurisdictions. Point 13 of the *European Commission's Guidelines on the Method of Setting Fines* ("*EC Guidelines*") provides as follows:

> In determining the basic amount of the fine to be imposed, the Commission will take the value of the undertaking's sale of goods or services to which the infringement *directly or indirectly* relates in the relevant geographic area within the [European Economic Area]. It will normally take the sales made by the undertaking during the last full business year of its participation in the infringement...
>
> [emphasis added]

35 In *Team Relocations v Commission* (Case C-444/11) [2013] ECR I-000, the appellants were found to have participated in a cartel in the international removal services sector in Belgium through price fixing, customer sharing, and manipulating the procedure for the submission of tenders. The appellants claimed that the Commission was only authorised to calculate the amount of the fine on the basis of the turnover *to which the infringement is actually related* and not on the basis of the *entire turnover* achieved in the relevant market. The European Court of Justice disagreed and upheld the General Court's decision that the relevant turnover was not limited to the international removals *actually affected* by the infringement. It reasoned (at [74]–[78]) that the penalty determined was based on the volume of sales, which provided an appropriate proxy to reflect the economic significance of the infringement and the size of the undertaking's contribution to the infringement; it would be contrary to that goal if the concept applied only to the turnover achieved by the sales which were actually affected by the cartel. If that were the case, there would be a risk that the economic significance of the infringement would be artificially minimised, as the secrecy of cartel operations may mean that there is only a limited amount of direct evidence of sales actually affected by the cartel. In such a case, the fine imposed would bear no actual relation to the scope of application of the cartel. The result would be that parties to the cartel would have an incentive to be covert in their operations. This is obviously undesirable.

36 In the UK, the relevant provision is paragraph 2.7 of *OFT Guidelines*, which is *in pari materia* with paragraph 2.1 of our *Penalty Guidelines*. It states:

> The relevant turnover is the turnover of the undertaking in the relevant product market and relevant geographic market affected by the infringement in the undertaking's last business year.

37 The point that the relevant turnover is not limited to the turnover directly affected by the infringement is perhaps most starkly demonstrated in the UK cases in which the infringements took place *after* the last business year. In *Argos (CAT)* at [181], the CAT gives an example of an undertaking that is guilty of an infringement between March and September 2004, *after* the last FY which ended on 31 December 2003. Even in that case, the relevant turnover is that for the whole of FY 2003. In that example, there is no obvious connection between "the relevant turnover" (in the preceding FY) and the turnover derived from the infringement, since the latter took place over a shorter period and at a later date than the end of the last FY.

38 This was also the case in *Umbro Holdings Limited v Office of Fair Trading and other appeals* [2005] CAT 13 ("*Umbro*"). In that case, the infringement committed by Allsports Limited occurred between April and October 2000, but the Office of Fair Trading ("OFT") had based its calculation on the FY ending 31 January 2000. Similarly, the infringement by Manchester United plc occurred from about 1 August 2000 to 1 October 2000, but the relevant turnover used was based on the FY ending 31 July 2000. In such cases, the infringements could not have had any effect on the turnover of the FY selected. While the CAT recognised that such a calculation might contain "an arbitrary element", the question that it was concerned with was whether the overall penalty resulting from the totality of the calculation is appropriate to the infringement in question.

39 In the present case, since the Appellant does not dispute the defined product and geographic markets, there is no reason for us to depart from it (see *Re Price-fixing in Modelling Services: Ave Management Pte Ltd* [2013] SGCAB 3 ("*Ave Appeal*") at [133]). On analogy with the *Transtar Appeal*, the individual life insurance policies existing before FY 2014 do not form a market

of their own but constitute part of the market for the distribution of Insurers' individual life insurance products in Singapore. The relevant turnover includes the business from *all* the policies in force in FY 2014.

40 In any event, it is impossible to ascertain with precision the turnover that is actually affected by the infringement in the present case. In this regard, even the CCS has found it difficult to quantify the effects of the infringement.[36] As we have earlier alluded to, the impact of the infringement is not necessarily restricted to the new policies entered into in FY 2014, as the Appellant suggests.

Policy

41 We also consider the approach of using the entire turnover of the last available FY to be correct as a matter of policy. The indisputable objectives of the imposing of any financial penalty are to reflect the seriousness of the infringement and to deter both the undertakings in question and other like-minded undertakings from engaging in similar anti-competitive practices: see paragraph 1.7 of the *Penalty Guidelines*, see also *Australian Competition and Consumer Commission v McMahon Services Pty Ltd* [2004] FCA 1425 ("*McMahon*") at [14].

42 We first observe that anti-competitive practices are generally covert and difficult to detect, and there is a real potential for large profits to be made for an indefinite period until the conduct is exposed. In that light, if the penalty imposed were insignificant, the undertaking in question, as well as other undertakings tempted to engage in similar anti-competitive practices, may be prepared to simply factor the risk of a low penalty into its pricing structure as

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[36] Infringement decision at [289].

part of its "business cost". The penalty would no longer have its intended deterrent effect; this would be inimical to the aim of ensuring that the anti-competitive conduct does not recur. Instead, a sufficiently high penalty must be imposed so that an undertaking, acting rationally and in its own interest, will not be prepared to treat the risk of the penalty as part of its business cost: see *McMahon* at [15]. It follows from this that the object of financial penalties cannot, as the Appellant essentially suggests, be based on a disgorgement of the gains received from the infringing conduct, assuming that such gains can even be calculated with certainty in the first place (see [40] above).

43 We further observe that under s 69(2)(*d*) read with s 69(4) of the Competition Act, a maximum of only 10% of the relevant turnover may be imposed as a financial penalty. If the relevant turnover were to consist only of the revenue derived from the business that is directly affected by the infringement, any penalty would be grossly inadequate because the undertaking would effectively be allowed to retain at least 90% of its gains from its anti-competitive conduct. This is contrary to both the objectives of punishment and deterrence.

44 For these reasons, we are satisfied that the relevant turnover in Step 1 of the *Penalty Guidelines* is the *entire turnover* derived from the relevant product and geographic markets in the FY. We thus dismiss the Appellant's contentions to the contrary.

Starting percentage

The parties' submissions

45 The Appellant contends that the starting percentage of [xxx]% of the relevant turnover imposed by the CCS is too high given the fleeting nature of

the conduct in question. It argues that a starting percentage of [xxx]% to [xxx]% would amply serve as a deterrent, especially because the precedents that were used by the CCS in imposing this starting percentage were price-fixing and bid-rigging decisions, which had no application to the present context in which the Appellant (and others) pressured a potential competitor to cease offering a competing insurance product.[37]

46 The CCS argues, on the other hand, that the starting percentage of [xxx]% is appropriate taking into account factors such as the nature of the infringement and the impact of the infringement on the relevant market in Singapore.[38] It also takes the position that the exclusion of a competing offer is analogous to bid rigging.[39] Further, even though the infringement is one by object rather than effect (that is, the very nature of the agreement amounts to a restriction on competition), the starting percentage of [xxx]% imposed is very low compared to the starting percentages imposed in previous cases for price fixing and bid-rigging, where the mean starting percentage was [xxx]%.[40]

Our decision

47 We agree in principle with the Appellant's primary argument that its conduct was less serious than the price-fixing and bid-rigging offences, which are identified as among the "most serious infringements of competition law": *Penalty Guidelines* at paragraph 1.7. We do not think that the Appellant's conduct in the present case can be said to be analogous to bid-rigging. Bid-

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37 Notice of Appeal para 16; Appellant's written statement para 36.

38 Respondent's closing submissions para 21

39 Respondent's closing submissions para 21.

40 Respondent's closing submissions para 72.

rigging involves collusion or cooperation between tenderers which hinders the process of identifying the most competitive bid. It includes cover-bidding, bid-suppression, bid-rotation, and market-sharing agreements: *Collusive Tendering (Bid-Rigging) for Termite Treatment/ Control Services by Certain Pest Control Operators in Singapore* [2008] SGCCS 1 (*"Pest Control"*) at [58] and [60]. Bid-rigging (as well as price-fixing) involves an agreement which determines or assists in determining the price that will actually be charged to the consumer (see *Kier Group plc and others v Office of Fair Trading* [2011] CAT 3 (*"Kier"*) at [94]), thus suspending the normal conditions of competition in the market. However, the exclusion of a competitor from the market simply removes a more competitively priced option for consumers. We are cognisant that this naturally means that the market price of the goods and/or services would be higher as a result. But this is quite different from the market price being intentionally fixed in the process; instead, the exclusion of a competitor offering a lower price does not preclude the retention of free competition *among the remaining players* in the market. Thus, we would hesitate to classify the Appellant's conduct in the same category as the most serious price-fixing and bid-rigging offences. In our judgment, this infringement would not attract a starting percentage that is at the highest end of the spectrum.

48 As we have already observed at [43] above, under s 69(2)(*d*) read with s 69(4) of the Competition Act, the maximum financial penalty that may be imposed is 10% of the relevant turnover. In this regard, the starting percentage of [xxx]% imposed on the appellant is already at the lower end of the spectrum. The CCS also noted that this starting point was "relatively low". This takes into account the *comparatively* lower degree of severity of the Appellant's conduct as compared to the "hardcore" anti-competitive practices outlined above, which would, in our minds, certainly have attracted higher starting percentages.

49 Be that as it may, we do not mean to discount in any way the undeniable gravity of the infringement and the adverse effect it has on competition. This is evident from the fact that the infringement restricts competition *by object*. This means that the nature of the conduct is such as to reveal a sufficient degree of harm to competition without examining its consequences on the market. The goal of the e-mails (outlined at [6]–[8] above) by the members of the AFA, including the Appellant, was to pressure iFAST to *immediately* withdraw the Fundsupermart Offer for an indefinite period. The result was that the Fundsupermart Offer, originally slated to be made available "permanently" (see [5] above), was withdrawn with remarkable speed and never reintroduced. It was only in August 2015, more than two years after the infringing conduct, that iFAST re-launched life insurance products in a modified form.[41]

50 For these reasons, the starting percentage imposed by the CCS at [xxx]% of the Appellant's relevant turnover is neither excessive nor unjustified in light of the nature of the Appellant's conduct.

Duration multiplier

The parties' submissions

51 The Appellant's next contention is that the duration multiplier used at Step 2 of the *Penalty Guidelines* should have been 0.083 (rather than one), reflecting a minimal infringement period of one month, instead of a full year. It argues that because the Fundsupermart Offer had already been limited to a one-month period by the time the Appellant participated in the agreement, it would be unreasonable for the Appellant to be penalised for a full year. In fact, the

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[41] Infringement decision at [299].

actual conduct only took place over a span of two days through several emails.[42] Further, the Appellant asserts that its conduct was not causative of the withdrawal of the Fundsupermart Offer or iFAST's lack of re-entry into the market.[43] Instead, iFAST knew that its conduct in introducing the Fundsupermart offer was wrong in light of its previous assurances to the Appellant that it would not compete with the Appellant in the life insurance business.[44]

52 The CCS points to paragraph 2.8 of the *Penalty Guidelines* which provides that an infringement over a part of a year may be treated as a full year for the purpose of calculating the duration of infringement. In addition, the CCS also considered the lasting impact of the Appellant's conduct, which went far beyond the actual period during which the conduct was carried out. Finally, the CCS maintains that the Appellant should not be given the benefit of having achieved the swift and successful implementation of the agreement.[45]

Our decision

53 A useful starting point is the UK CAT decision in *Umbro*. In that case, several undertakings were found to have engaged in horizontal and vertical price-fixing agreements in relation to certain football replica shirts. The appellants argued that since the duration of their infringements was less than a year, a duration multiplier of for example, 0.5, should have been applied in the calculation of financial penalties. The CAT acknowledged that the fact that an

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42 Appellant's written statement paras 38-40

43 Notice of Appeal paras 19-31

44 Notice of Appeal paras 32-45

45 Respondent's closing submissions para 22

infringement was of a relatively short duration *may* at some point in the assessment of a penalty, depending on the circumstances, be taken into account, for example, as a mitigating factor (at [181]). However, it did not accept that there should in effect be built into Step 2 of the *OFT Guidance* an automatic rule that agreements of less than one year should attract a multiplier of less than one. This was for three reasons (at [182]). First, such a rule would be unduly mechanistic. Second, an important element of the infringement committed was the fact that the agreement was made in the first place, rather than how long it lasted. Third, an agreement of short duration of a serious nature might be a more serious infringement than one which lasted longer but had less serious effects. In other words, the duration of an infringement may not be an appropriate proxy or accurate indicator of the severity of the conduct. The relevant question, said the CAT, was instead whether there were any grounds for reducing the amount of penalties imposed, having regard to duration, but without applying a mathematical formula (at [183]).

54 With this approach in mind, we turn to examine three examples in the case law:

(a) In *Umbro* itself, the CAT declined to reduce the duration multiplier to below a full year because the anti-competitive agreements were made at key junctures and affected key events in the football calendar. The relatively short duration of the infringement was only because the tournaments and launches were themselves limited in time (at [187]). Further, the periods of infringement constituted about nine months in aggregate, which were considerable (at [190]).

(b) In *Sepia Logistics Limited v Office of Fair Trading* [2007] CAT 13 ("*Sepia*"), it was undisputed that the duration of the infringement was

short, lasting for only 15 days. However, the CAT noted (at [89]) that the principal reason for the short duration of the infringement was the timely intervention of the OFT. The conduct in fact amounted to a serious attempt to distort the market and the objective of the parties was to produce a long-term impact on competition in that market. Thus, the penalty should not be reduced simply because the agreement was discovered at an early stage (at [90]).

(c) In the local *Pest Control* case, the CCS (at [376]) did not make a downward adjustment of the duration multiplier even though the bid-rigging agreements lasted for "*significantly less* than one year" [emphasis added]. It noted that the anti-competitive effects of the infringing conduct were irreversible.

55 We agree with the CAT in *Umbro* that the short duration of a particular infringement may be relevant in the determination of financial penalties, insofar as to do so would further the objectives of competition law by encouraging undertakings to terminate their infringing conduct as soon as possible. We recognise that in general, the longer the duration of a particular infringing conduct, the more significant the potential impact on the market and the state of competition.

56 In our judgment, the short duration of the infringement may be relevant in at least two ways (a) as a mitigating factor (in Step 4 of the analysis under our *Penalty Guidelines*) and/or (b) to reduce the value of the duration multiplier used. The focus of the Appellant's contention is on point (b).

57 The *Penalty Guidelines* (at paragraph 2.8) states that an infringement over part of a year *may* be treated as a full year for the purpose of calculating

the duration of the infringement. But the language of this provision is clearly discretionary. It cannot be that an infringement over part of a year would *invariably* be treated as an infringement for a full year. If that were the case, there would be absolutely no incentive for undertakings to terminate their infringing conduct quickly, since the duration multiplier would be the same regardless of whether an infringement lasted for an entire year or only part of that year. The undertaking is then likely to take the risk of continuing with the infringing conduct for up to a full year, in the hope of reaping greater illicit profits while avoiding detection. Instead, we are of the view that the duration multiplier for infringements of less than a year in duration *may* be decreased to less than one where there is evidence of genuine contrition and a desire to terminate the infringing conduct as soon as is practicable. Where, however, the short duration of the infringement is a result of, for example, the limited time in which the product that is the subject of the infringement is put on offer (*Umbro*) or the timely intervention of the regulatory authorities (*Sepia*), this cannot be credited to the undertakings in the form of a reduced duration multiplier.

58 On a related note, we also do not find the mathematical approach urged upon us by the Appellant attractive. The assessment of an appropriate duration multiplier is necessarily a fact-specific inquiry that must be determined on a case-by-case basis and cannot be reduced to a mere arithmetic exercise.

59 In the present case, we are cognisant of the fact that the agreement took place over a short span of two days and several emails. We are, however, not convinced that the duration multiplier should be decreased to less than one, still less to 0.083 as suggested by the Appellant. Looking at the infringing conduct in context, the objective of the parties to the agreement was clearly to pressure iFAST to withdraw the Fundsupermart Offer and to "stop the project

immediately" [emphasis added].[46] They were not even satisfied with iFAST's proposal to limit the Fundsupermart Offer to one month, stating that this suggestion was "totally unacceptable" and requesting that iFAST "[pull] the offer out immediately" because "the consequence of leaving [the Fundsupermart Offer] open for a month is unimaginable".[47] The parties' main concern was to remove the "direct competition with the [financial advisors] industry on life insurance", because the offering of the large commission rebates in particular was "hitting a large segment of [their] business".[48] In this context, the parties had to act swiftly to avoid any further damage to their business. The agreement came to an end within such a short period of time only because of the prompt manner in which the objective of the agreement came to fruition when iFAST acceded to their requests. That being the case, there was simply no need for the parties to continue with their infringing conduct. We agree with the CCS that the short duration of the infringement should thus not be credited to the Appellant; we would otherwise be rewarding it for its fast and effective implementation of the agreement.

60 We are also unpersuaded by the Appellant's argument to downplay the effect of its conduct on the state of competition. In particular, the assertion that its conduct was not causative of the withdrawal of the Fundsupermart Offer or of iFAST's lack of re-entry into the market was unsupportable on the evidence before us. We first note that the relationship between iFAST and the Appellant (as well as the other financial advisers) has been described as that of service-

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46 Infringement decision at [127].

47 RBOAD vol 7 Tab 39

48 Infringement decision at [125] and [148].

provider and client.[49] As stated at [4] above, the financial advisers were users of iFAST's B2B platform. It is clear that the pressure from the financial advisers – as iFAST's clients – was a material consideration in iFAST's decision to withdraw the Fundsupermart Offer. Indeed, when asked why iFAST decided to withdraw the Fundsupermart Offer within a short period after its introduction, Mr Lim stated in his witness statement that this was because there was "a lot of angry reactions from players in the insurance industry".[50] During investigations, Mr Lim also admitted that the withdrawal of the Fundsupermart Offer was due to "backlash" and "negative reaction" in the industry, and that the email from Mr Ee on behalf of the AFA was "one of the considerations" in making the decision.[51] He also candidly admitted the same during cross-examination:[52]

Q	Between 12.09 [pm] and 4.45 [pm] [on 3 May 2013], why did you remove the offer?
A	We removed our offer because the negative and emotional reaction from the industry was, er, far stronger than, er, we anticipated, than I had personally anticipated, and, er, yeah, we felt that, er, we should, er, remove the offer.
Chairman	So what you are saying is it's pressure from the industry, from---from---
Witness	There has been pressure from the industry as a whole, yes. There has been unhappiness from the industry as a whole.

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49 Witness statement of Mr Lim dated 23 September 2016 Q1 A1

50 Witness statement of Mr Lim dated 23 September 2016 Q2 A2

51 Infringement decision at [166] and [167].

52 Transcript day 1, p 35 lines 19-26

61 When directly questioned on the pressure asserted by the Appellant in particular, Mr Lim sought to downplay the Appellant's involvement in the process:[53]

Q	Was there pressure from IPP during this period?
A	Erm, there's no direct pressure from IPP during this period, erm, from my personal perspective. Er, I did get some---I did get some, er, feedback from my business data member of staff that many advisers had been unhappy. Exactly, er, who and---who gave that impression, I don't know, but I do know that the industry as a whole has been, erm, unhappy. So that's what I meant by saying that, er, there has been, er, some pressure from the industry as a whole for us to stop.
Q	...[On] 3rd May [2013], about 4.00pm...Somebody called you. Somebody asked you to consider whether the life insurance business is really worth so [much] unhappiness from high-class business partners. Do you recall there was such a telephone call?
A	Yes.
...	
Q	...And do you recall what...you have taken away from the conversation...?
A	The---the takeaway from the conversation was...about the state of the unhappiness in the industry as a whole, er, and saying that people are unhappy and emotional...so he did ask me whether...it's worthwhile for us to continue with the---the business...
...	
Chairman	In other words, they...were accusing you of undercutting them.
A	Er, I think the industry as a whole, er, sort of felt that way... [the call was just to describe] to me how he [saw] what's happening in the

[53] Transcript day 1, p 35 line 27 – p 37 line 28.

> industry...I think he---he spoke in a manner that, er, is...like, erm, a friend or contact, er, giving feedback about what's happening. It's not in a threatening tone.
>
> ...
>
> Q So that had impact on your decision that you made at 4.45?
>
> A I think the call itself, you know, erm, I take it as er---as actually a call that perhaps, er, provided me with er, additional information about what's happening in the industry. Erm, so the decision was made on the basis of all the different information that I have gathered during the few days.

62 While Mr Lim insisted that iFAST's decision to withdraw the Fundsupermart Offer was due to the pressure from the industry "as a whole", we find it very difficult to believe that the emails and conversations that Mr Lim had with the Appellant's representatives did not contribute to the pressure felt and to iFAST's decision. After all, the Appellant is one of the players in the financial advisers industry, as well as the third or fourth largest client of iFAST's B2B platform. The Appellant is even accredited for iFAST's growth over the years.[54] In our judgment, it is clear that iFAST was worried that its B2B business would be affected by the backlash from the financial advisers, including the Appellant, which must have been the key reason for and directly causative of its move to withdraw the offer from the market with immediate effect for an indefinite period.

63 Further, we are of the view that the Appellant's conduct also had a causative effect on iFAST's lack of re-entry into the life insurance market until August 2015, where the products were re-introduced only in a modified form.

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54 Transcript day 1, p 32 lines 14-16; p 58 lines 14-17

Mr Lim said that the reaction from the financial advisers to this new offer was "muted" mainly because iFAST had "pre-notified" many of its B2B clients about the re-introduction ahead of time. It is clear to us that iFAST was keen to avoid the negative reaction from the financial advisers after the previous episode in 2013. The result is that the market never returned to the state of competition that would have existed had the Fundsupermart Offer not been withdrawn. In other words, the effects of the agreement were irreversible, just as in the *Pest Control* case.

64 In light of the foregoing, we see no reason to decrease the duration multiplier of one that was adopted by the CCS.

Mitigating factors

The parties' submissions

65 There are two main mitigating factors that the Appellant asserts the CCS had failed to take into account in determining the financial penalty imposed. The first is that it operates in a high turnover, low profit industry. A large proportion of the commissions it receives from the Insurers (which form part of its turnover) consists of "monies passed through" to third parties, namely, their appointed representatives and advisory groups that market and sell the insurance products to consumers. Consequently, its actual profit margin in FY 2014 was less than [xxx]%. To impose a penalty of [xxx]% of its relevant turnover would thus be disproportionate.[55] The Appellant seeks to demonstrate that this is an industry-wide phenomenon by exhibiting a table comparing its own gross

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55 Appellant's written statement paras 43-47

revenue and net profits with those of two "similar" financial advisory companies, PIAS and Financial Alliance.[56]

66 Second, the Appellant takes the position that there was genuine uncertainty as to whether its conduct constituted an infringement of the Competition Act. It asserts that there have been no reported cases of the same kind in Singapore previously,[57] and that its conduct was at the most unintentional, circumstantial and accidental. It would have pursued the same course of action independently, there was no real time for planning or active collusion on the Appellant's part and its actions were reactive as opposed to pro-active. Its intent was merely to respond to the adverse behaviour of a business partner (iFAST) in a potential breach of an agreement not to compete in the life insurance business.[58] Overall, it argues that a further discount of [xxx]% on the penalty is merited.

67 The CCS maintains that it has properly considered the mitigating factors in the Appellant's case when it reduced the financial penalty by [xxx]% at this stage. It further contends that the Appellant has not demonstrated that it operates in a high turnover, low margin industry within the meaning of the applicable case law. The Appellant in fact had actual knowledge of the objective of the infringing conduct and had actively engaged in the conduct to successfully achieve that objective. The nature of the infringement and the structure and condition of the market had already been taken into consideration by the CCS when it decided on the relatively low starting percentage of [xxx]%.[59]

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56 Appellant's written statement Annex G

57 Notice of Appeal para 64

58 Appellant's written statement para 50

59 Respondent's closing submissions para 23

Our decision on whether the Appellant operates in a high turnover, low margin industry

68 It is well-established that the fact that an undertaking operates in a high turnover, low margin industry can be taken into account in assessing whether the overall penalty imposed on it is excessive or disproportionate. In so doing, profitability does not replace turnover as the basis for determining the financial significance of an undertaking and the appropriate penalty to be imposed. Instead, having regard to the low margins, the absolute turnover of an undertaking may cease to be a useful indicator of an undertaking's economic presence and/or financial strength, and a penalty based on a percentage of that turnover can be disproportionately high compared to an undertaking operating in an industry where margins are typically higher: *Tomlinson Group Limited and another v Office of Fair Trading* [2011] CAT 7 ("*Tomlinson*") at [131], [133] and [164]; *Barrett Estate Services Limited and another v Office of Fair Trading* [2011] CAT 9 ("*Barrett*") at [64]. This thus needs to be taken into account and the penalty adjusted appropriately to ensure that the ultimate penalty is a proportionate and sufficient punishment and deterrent: *Kier* at [172].

69 In *Kier*, *Tomlinson* and *Barrett*, the CAT held that the construction sector was an example of a high turnover, low margins industry, as a large proportion of the payments obtained by construction companies from their clients were paid over to the various subcontractors that had worked on the site. In *Bees Work Appeal* (at [135] and [137]) and *Ave Appeal* (at [140]), the Board accepted that the high turnover and low margin characteristic of the modelling agencies industry was a factor that should have been taken into account by the CCS in determining the appropriateness of the penalty imposed. In those cases, there was evidence that a large share of the turnover received by the appellants

consisted of "monies passed through" in the form of payments made to the models and their modelling agencies.

70 We observe that the focus of these decisions was on the amount of "monies passed through" to third parties. The undertaking must demonstrate that the nature of the industry is such that a significant proportion of the gross revenue earned is not retained but passed on to other independent parties. We agree with the CCS that other business costs that affect an undertaking's profit margins, such as the administrative and operational expenses incurred, should not be considered in the determination, because this would lead to the perverse result of penalising the more efficient undertakings that have lower overheads: see *Barrett* at [63], cited in *Pang's Motor Trading v Competition Commission of Singapore* [2014] SGCAB 1 ("*Motor Vehicle Appeal*") at [52].

71 In the present case, the Appellant relies on the financial data of PIAS, Financial Alliance and its own data to argue that the "monies passed through" to third parties are consistently high across the industry, with an average of about [xxx]% of their gross revenue being passed on. These figures are set out in the table below:[60]

The Appellant					
FY	**2011**	**2012**	**2013**	**2014**	**Average**
Gross revenue	[xxx]	[xxx]	[xxx]	[xxx]	
Other income	[xxx]	[xxx]	[xxx]	[xxx]	

60 Appellant's written statement Annex G

Cost of services	[xxx]	[xxx]	[xxx]	[xxx]	
Other expenses	[xxx]	[xxx]	[xxx]	[xxx]	
Net profit after tax	[xxx]	[xxx]	[xxx]	[xxx]	
Cost of services vs Gross Revenue	[xxx]%	[xxx]%	[xxx]%	[xxx]%	[xxx]%
Net profits vs Gross Revenue	[xxx]%	[xxx]%	[xxx]%	[xxx]%	

PIAS					
FY	**2011**	**2012**	**2013**	**2014**	**Average**
Gross revenue	[xxx]	[xxx]	[xxx]	[xxx]	
Other income	[xxx]	[xxx]	[xxx]	[xxx]	

Cost of services	[xxx]	[xxx]	[xxx]	[xxx]	
Other expenses	[xxx]	[xxx]	[xxx]	[xxx]	
Net profit after tax	[xxx]	[xxx]	[xxx]	[xxx]	
Cost of services vs Gross Revenue	[xxx]%	[xxx]%	[xxx]%	[xxx]%	[xxx]%
Net profits vs Gross Revenue	[xxx]%	[xxx]%	[xxx]%	[xxx]%	

Financial Alliance					
FY	**2011**	**2012**	**2013**	**2014**	**Average**
Gross revenue	[xxx]	[xxx]	[xxx]	[xxx]	
Other income	[xxx]	[xxx]	[xxx]	[xxx]	

Cost of services	[xxx]	[xxx]	[xxx]	[xxx]	
Other expenses	[xxx]	[xxx]	[xxx]	[xxx]	
Net profit after tax	[xxx]	[xxx]	[xxx]	[xxx]	
Cost of services vs Gross Revenue	[xxx]%	[xxx]%	[xxx]%	[xxx]%	[xxx]%
Net profits vs Gross Revenue	[xxx]%	[xxx]%	[xxx]%	[xxx]%	

72 While it appears from the face of these financial figures that about [xxx] of the gross revenue consist of "monies passed through" to third parties, the amount may be overstated. A closer examination of the financial statements of the Appellant reveals that the "cost of services" do not comprise entirely of monies passed through to its appointed representatives and advisory groups. Instead, about [xxx]% of the cost of services constitute the "partners' share of profits",[61] which are distributed to the partners and not passed on to third parties.

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61 Notice of Appeal Annex C p 29

73 Second, we are not convinced that the financial advisory industry *as a whole* is one that has consistently experienced high turnovers and low margins. The tables above show substantial variability in the net profit margins of the three financial advisory companies (see *Motor Vehicle Appeal* at [55]). For example, PIAS' net profit margin as a percentage of its gross revenue in FY 2014 is more than [xxx] times that of the Appellant, even though PIAS' proportion of cost of services is higher. This can be attributed to its lower operational costs (labelled as "other expenses"), as well as the higher amount of "other income" received as compared to the Appellant. Further, even the Appellant's own net profit margins across the years are unstable. For example, its net profits in FY 2011, FY 2012 and FY 2013 were about [xxx]%, [xxx]% and [xxx]% that in FY 2014 respectively. Consequently, we agree with the CCS that the Appellant has failed to demonstrate that it operates in a high turnover, low margin industry.

Our decision on whether there was genuine uncertainty about an infringement of the Competition Act

74 We also do not accept the Appellant's contention that there was genuine uncertainty as to whether its conduct was anti-competitive. Insofar as the Appellant is arguing that its involvement is unintentional and reactive rather than proactive, this could not possibly have been the case. It is clear to us that the Appellant had intentionally participated in the agreement by *independently* putting pressure on iFAST above and beyond Mr Ee's emails (see [8] above). In particular, in an email thread with the subject "Registering our protest", Mr Chellappah sent an email to Mr Lim in these terms:

> Dear [Mr Lim]
>
> We are extremely upset and disturbed by this posting in the Fundsupermart.

> We have always seen IFAST as our business partner and not as a business competitor
>
> We disagree, even if you do it as a promotion for one month and then take it down. The damage for the whole advisory business and its integrity will be very severe.

75 Mr Chellappah then forwarded this email to Mr Ee for his information and stated that the latter had "[the Appellant's] full support". In response, Mr Ee conveyed his gratitude to Mr Chellappah for sending the email.[62] During the investigations, Mr Chellappah stated that the Appellant was "deeply disturbed" by the launch of the Fundsupermart Offer especially because of the commission rebates offered, and that "iFAST being a competitor in the life insurance market was hitting a large segment of [the Appellant's] business". It is evident that the Appellant's conduct was deliberate and proactive, aimed at what it saw as a legitimate protection of its own interest.

76 While we were not pointed to any precedent case authority that involved the same type of conduct, we agree with the CCS that there was nonetheless no uncertainty that the Appellant's conduct was in breach of s 34 of the Competition Act (see [9] above). The object of the Appellant's infringing conduct was clearly to prevent the entry of a new competitor into the market for individual life insurance products in Singapore, and to prevent the competitor from providing a cheaper alternative product that would affect its own business. This is injurious to competition by its very nature as it would result in "the prevention, restriction or distortion of competition in the relevant market".

77 The present case can be distinguished from the UK case of *Kier*, which involved the practice of "simple" cover pricing in a tender. In cover pricing

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62 RBOAD vol 7 Tab 37

cases, Company A, which does not wish to win the contract but also does not want to indicate its lack of interest to the client for fear of being excluded from other tender lists, seeks a cover price from Company B. Company B is seeking to win the contract and will already have reached a view on its own tender price. The cover price that Company B provides to Company A (which Company A submits) will be sufficiently high to ensure that Company A does not win the tender. The practice of simple cover pricing was widely regarded as legitimate, and the practice was long-standing, widespread and endemic throughout the industry (at [103]). The textbooks and other material had also given the impression that cover pricing is a normal and acceptable practice when an invitee did not wish to win the work (at [104]). The CAT therefore considered that this had an impact on the seriousness of the infringements in question and provided significantly more mitigation than had been recognised by the OFT (at [107]). In the present case, however, the Appellant has not provided any evidence that there is similar uncertainty as to the legitimacy of its action.

Costs

78 Finally, we turn to the issue of costs and interests payable. Regulation 30 of the Competition (Appeals) Regulations provides:

> **Costs**
>
> **30.**—(1) The Board may, in relation to any appeal proceedings, award costs in its discretion.
>
> ...

79 We adopt for our purposes the well-established principles cited by the Board in previous cases (see *Transtar Appeal* at [113]; *Bees Work Appeal* at [169] and *Ave Appeal* at [163]), which affirmed the guiding principles in relation to costs in *Independent Media Support Limited v Office of Communication* [2008] CAT 27 at [6]. We note that an appropriate starting point for an award

of costs is that a party that can fairly be identified as a winning party should ordinarily be entitled to recover its costs from the losing party. Since the Appellant has been unsuccessful in the appeal, we order that the Appellant pay to the CCS the costs of these proceedings.

Interests

80 Regulation 31 of the Competition (Appeals) Regulations states:

> **Interest**
>
> **31**.—(1) If the Board imposes, confirms or varies any financial penalty, the Board may, in addition, order that interest be paid on the amount of any such penalty from such date, not being a date earlier than the date upon which the notice of appeal was lodged in accordance with regulations 7 and 8, and at such rate as the Board considers appropriate.
>
> (2) Unless the Board otherwise directs, the rate of interest shall not exceed the rate prescribed in the Rules of Court (Cap. 322, R 5) in respect of judgment debts.
>
> (3) Any interest ordered to be paid under paragraph (1) shall form part of the penalty payable and be enforced according to section 85 of the Act.

81 Under O 42 r 12 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) read with *Practice Direction No 1 of 2007- Interest on Judgments, Costs and under Order 30 Rule 6(2)*, the applicable rate of interest is 5.33% per annum. We therefore impose an interest of 5.33% per annum on the financial penalty payable from the date of this decision to the date of payment.

Conclusion

82 For the above reasons, we dismiss the appeal. The Appellant is ordered to pay to the CCS (a) the financial penalty of S$239,851; (b) costs (including disbursements) for the appeal to be agreed, failing which parties are to file their respective submissions within 21 days from the date of this decision on the

quantum thereof for the Board's adjudication; and (c) interest on the financial penalty at the rate of 5.33% per annum from the date of this decision to the date of payment.

Goh Joon Seng
Chairman

Manu Bhaskaran
Member

Hong Tuck Kun
Member

The appellant in person (by its authorised representatives Wee Tiong Howe, Tay Huai Eng, Tan Lye Poh and Tan Ee Ping Cindy); Lee Cheow Han, Candice Lee, Cindy Chang, Lee Wan Yi and Tham Chang Xian (Competition Commission of Singapore) for the respondent.