IN THE COMPETITION APPEAL BOARD OF THE REPUBLIC OF SINGAPORE

Appeal No. 3 of 2012

In the matter of Case No. CCS 500/002/09 - Notice of Infringement Decision issued by the Competition Commission of Singapore on Price-Fixing in Modelling Services, 23 November 2011:

Between

Ave Management Pte Ltd

... Appellant

And

The Competition Commission of Singapore

... Respondent

DECISION

Dated this 10th day of April 2013

INDEX

I. INTRODUCTION

1. On 23 November 2011, the Competition Commission of Singapore ("**CCS**"), having conducted investigations on the operations of certain modelling agencies in Singapore and their association, Association of Modelling Industry Professionals ("**AMIP**"), issued and handed down its infringement decision (the "**ID**") holding that 11 modelling agencies had infringed section 34 of the Competition Act (Cap. 50B, 2006 Rev Ed) (the "**Act**") by engaging in price-fixing of the rates of modelling services in Singapore.

2. In the ID, the CCS found that the 11 modelling agencies, under the front of the AMIP, met, discussed and agreed to a price-fixing agreement on the rates for providing modelling services for the period from 2005 to 17 July 2009.

3. The CCS imposed penalties on each of the 10 modelling agencies (save for Mannequin Studio Pte Ltd who was entitled to rely on the Competition (Transitional Provisions for Section 34 Prohibition) Regulations, as it had ceased to be a member of the AMIP with effect from 2 June 2006). The CCS did not issue an order or direction to the modelling agencies to terminate the price-fixing arrangements, as that had already ceased.

4. In the ID, the CCS imposed a financial penalty of $132,315 on, among others, Ave Management Pte Ltd (the "**Appellant**" or "**Ave**"). Against the ID, the Appellant appealed to the Competition Appeal Board (the "**Board**") under section 71 of the Act. It filed its Notice of Appeal on 25 January 2012 appealing only against the quantum of the financial penalty imposed on it.

5. Similarly, in a separate appeal jointly filed by Bees Work Casting Pte Ltd ("**Bees Work**"), Diva Models (S) Pte Ltd ("**Diva**"), Impact Models Studio ("**Impact**") and Looque Models Singapore Pte Ltd ("**Looque**"), they also appealed only against the quantum of the financial penalties imposed on them. The other 6 modelling agencies did not file any appeal against the ID.

6. At the hearing, Ave called its director and shareholder, Mr Tan Chuan Do ("**Mr Tan**"), to give evidence. Mr Tan testified that Ave's business model was different from that of the other modelling agencies.

II. RELEVANT BACKGROUND FACTS

7. Ave is a modelling agency, and was a member of the AMIP from the AMIP's inception.

8. Ave is an exempt private limited company and an agent for artistes, athletes, models and other performers. Mr Tan is its director and shareholder, and Ave was represented on the Executive Committee of AMIP by its senior booker, Jimmy Lim: ID at [295].

9. As early as 16 December 2004, the modelling agencies started discussions on the rates for modelling services. This led to the meeting on 26 January 2005 where the modelling agencies agreed to form the AMIP and discussed and agreed on the commission rates for models. After further discussions, the modelling agencies also agreed on the rates for fashion shows for normal, lingerie, swimwear, principal, trunk, hair shows, ushering, mingling, outfits changes, fitting and show casting rates. At the meeting held on 26 January 2005, the modelling agencies (including the Appellant) discussed and agreed on the name of the association and also discussed and agreed on commission rates for models. Subsequently, the AMIP members acted on the agreed rates and caused some unhappiness among some clients: ID at [62]-[66].

10. On 23 February 2005, the AMIP's President, Calvin Cheng, told members to recommend a smaller increase in rates so that the market can accept the increase and clients will not lodge a price-fixing complaint against the AMIP under the Act: ID at [67]. Further discussions on the rates to be implemented ensued, and Calvin Cheng informed the AMIP members that the AMIP would not send a joint letter to members'

clients informing them of the rates but advised each of them to send out an individual letter to the clients informing them of the rates: ID at [68]-[73].

11. At a 9 March 2005 meeting of AMIP members, it was agreed that the modelling agencies will charge the same rates for the Singapore Fashion Festival show and to charge a higher rate ($400) for all fashion shows from 1 May 2005. It was also recorded in the minutes that the talent and modelling agencies were taking steps to finalise model and talent rates for print advertisements and television commercials, and to introduce these rates guidelines from 1 May 2005: ID at [74].

12. The modelling agencies continued their discussion via email correspondence on rates for other modelling services, including whether to give package discounts for shows, minimal rates for international fashion shows, wedding shows and normal editorials: ID at [75]-[78]. A letter was subsequently sent to editors of 59 magazines advising them of AMIP's recommended editorial rates from 1 May 2005: ID at [79]-[81].

13. At another meeting on 27 April 2005, the AMIP members agreed on the rates for specified modelling services, including print advertorials, and these rates were informed to the clients and posted on AMIP's website. On 12 May 2005, the AMIP members reached an agreement on the talent rate for normal fashion shows: ID at [84]. There were also discussions to agree on rates for talents and models, rates applicable to local magazine publishers for modelling services and rates for specific events. The AMIP members prepared comprehensive confidential rates (such as the "Child and Talent Rate Sheet") which were not published on the AMIP website, and provided price guidelines for advertorials, events, product launches and loading fee rates for different media, for adult and child models and talents: ID at [82] - [100].

14. Even after the section 34 prohibition of the Act came into force on 1 January 2006, the AMIP members continued with their discussions and agreement on the rates until 17 July 2009 when the CCS commenced investigations: ID at [101]-[111].

15. The interviews by the CCS with the various representatives from the AMIP members also reveal that the AMIP was set up to standardise rates, prevent price undercutting, and to raise and fix model rates offered to the clients so that the AMIP members would be in a better bargaining position vis-a-vis the clients, and that there was a general understanding between AMIP members to follow the AMIP's rates: ID at [112], [120]-[124], [132], [135], [138], [146], [148]-[151], [162], [168], [171]. The interviews further show that AMIP members were advised to substitute the AMIP logos on the AMIP rate sheets with their own logos to prevent accusations of price-fixing: ID at [153].

16. Calvin Cheng was also interviewed, and he said that AMIP members agreed on the AMIP rates for transparency reasons, and that all the AMIP members were involved in the making of the rates. Calvin Cheng said that AMIP members were not price-fixing but had agreed to ask clients to pay AMIP rates, and succeeded in getting clients to pay more for specified modelling services : ID at [170]-[172]. According to one of the AMIP's members' personnel, Calvin Cheng had informed AMIP members about the Act coming into force and that they should not be price fixing but should use words like "recommended rates" and "guidelines", and that the decision to increase rates was led by Calvin Cheng: ID at [192]-[193].

III. DECISION OF THE CCS

17. The CCS found that on the evidence, there was a single continuous agreement or concerted practice to fix the rates for the entire range of modelling services between the modelling agencies from early 2005 to 17 July 2009, which has the object of

restricting, preventing or distorting competition in the Singapore market in breach of section 34 of the Act.

18. The CCS found that discussion on raising the rates for modelling services among the modelling agencies started from 2004. The CCS found that the common objective of the parties to raise the modelling rates together was formed from about 17 December 2004 and to have the agreement on the rates coming into effect on 1 January 2005. The AMIP was later formally set up on 3 February 2005. The intent among the modelling agencies was to collectively raise the rates gradually over time, instead of an immediate drastic increase, so as not to attract too much attention or complaints. The rates for most if not all types of modelling services was agreed upon from 2005 to 17 July 2009: ID at [203]-[205].

19. According to the CCS, the meetings, correspondence and contacts between the parties from 2004 to about 17 July 2009 continued to further the overall plan to agree upon the rates for most, if not all, types of modelling services. The infringing conduct started with an agreement to hold rates firm, and the modelling agencies then agreed to adhere to a minimum fee or rate schedule, and to eliminate or reduce discounts. There was also a later agreement to adhere to price discounts in specific circumstances: ID at [206]. The CCS considers this as a single infringement which manifested itself in a series of anti-competitive activities throughout the period of operation of the cartel: ID at [207].

20. The CCS further found that the evidence shows that the infringing anti-competitive conduct was one of price-fixing and not of price recommendations, contrary to the assertions by some of the parties, and that price-fixing can involve either fixing the price or components of a price such as a discount or setting of a minimum price. The underlying motivation of forming the AMIP was to agree upon rates to be charged for modelling services, and these agreed rates were compiled and circulated among the

AMIP members, and kept secret from non-AMIP members. Such conduct serves to eliminate any uncertainty on their competitors' pricing and stem undercutting. There was clear implementation, discussion on enforcement and some initial degree of enforcement of the agreement: ID at [210]. The further actions initiated by Calvin Cheng (not to use AMIP rates documents but to "individualise" the quotation) after the Act was in force were found by the CCS to be attempts to mask the fact that the infringing conduct was in reality one of price-fixing: ID at [211]. Calvin Cheng was held to have played a central role in coordinating the actions of AMIP members, including speaking to non-AMIP member about undercutting and directing the individual AMIP members to use their own letterheads and tailor rate sheets to make it look like their own rates when quoted to the clients: ID at [213(h)].

21. The CCS found that the AMIP did not play a separate or significant role in facilitating and administering the agreement, and was essentially a front for its individual members to coordinate on and collectively raise rates for modelling services. Consequently, the CCS does not find the AMIP to be a party to the infringing conduct: ID at [224].

22. Once it is shown that the AMIP's members' agreement or concerted practice has the object of preventing, restricting or distorting competition, it is unnecessary for the CCS to show what the actual effect was: ID at [227]. Nonetheless, the CCS found that there is evidence that the agreement had an effect on non-AMIP members who had to charge fees that converge around those agreed rates, and that Calvin Cheng had sought assurances from non-AMIP members that they would not undercut AMIP rates: ID at [228]-[229].

23. Calvin Cheng had claimed that AMIP members had less than [XX%] of the market shares for modelling services, but the CCS' investigations revealed that the estimated market share of the 11 modelling agencies is about [XX%] which is higher than the

[XX%] market share threshold levels mentioned in paragraph 2.19 of the CCS Guidelines on the section 34 prohibition.

24. In any case, price-fixing agreements will have an appreciable adverse effect on competition, even if the market share of the parties to the infringing agreement is below the threshold level and even if the parties to such agreements are small and medium enterprises: see [2.20] of CCS Guidelines on the section 34 prohibition: ID at [231].

25. The CCS's conclusions on its findings are set out at [233] to [235] of the ID as follows:

> *"233 CCS is satisfied that there is sufficient evidence in paragraphs 62-201 to find that the Parties listed in paragraph 1, infringed the section 34 prohibition by entering into an agreement to fix prices, manifesting in the different unlawful agreements and unlawful concerted practices from at least mid-2005 to 17 July 2009.*
>
> *234 CCS therefore makes a decision that the Parties have infringed the section 34 prohibition, and imposes penalties on the Parties, for the duration that they were parties to the agreement / concerted practice.*
>
> *235 The section 34 prohibition came into force on 1 January 2006. Although the agreement was made before 31 July 2005, CCS' analysis of the evidence (above) shows that the agreement continued in operation **after** 1 July 2006, in other words after the expiry of the transitional period provided for under the Competition (transitional Provisions for Section 34 Prohibition) Regulations. Therefore CCS does not consider that the said Regulations apply for the Parties for whom CCS intends to impose a financial penalty."*

IV. PENALTIES

26. As the 11 modelling agencies infringed the section 34 prohibition by entering into an agreement or concerted practice to fix prices of modelling services for the period from 2005 to 17 July 2009, the CCS decided to impose penalties on them for the duration of the infringement. As the single continuous agreement was terminated on 17 July 2009 and the AMIP was largely disbanded, the CCS did not issue any directions in relation to the single continuous agreement: ID at [239].

27. In imposing a financial penalty, the CCS considers sections 69(2)(d) and 69(3) of the Act. Under section 69(2)(d) of the Act, among other things, where the decision of the CCS is that an agreement has infringed the section 34 prohibition, the decision of the CCS may include a direction to pay to the CCS such financial penalty in respect of the infringement as the CCS may determine. Under section 69(3), for the purpose of section 69(2)(d), i.e. in considering the imposition of a penalty, the CCS may impose a financial penalty "*only if it is satisfied that the infringement has been committed intentionally or negligently*". As established in the *Re Certain Pest Control Operators in Singapore* [2008] SGCCS 1 at [355], the *Express Bus Operators Case* [2009] SGCCS 2 at [445], and the *Electrical Works Case* [2010] SGCCS 4 at [282], the circumstances in which CCS might find that an infringement has been committed intentionally include the following: ID at [242]:

a. the agreement has as its object the restriction of competition;
b. the undertaking in question is aware that its actions will be, or are reasonably likely to be, restrictive of competition but still wants, or is prepared, to carry them out; or
c. the undertaking could not have been unaware that its agreement or conduct would have the effect of restricting competition, even if it did not know that it would infringe the section 34 prohibition.

28. The CCS further holds that ignorance or a mistake of law is no bar to a finding of intentional infringement under the Act. The CCS is likely to find that an infringement of the section 34 prohibition has been committed negligently, where an undertaking ought to have known that its agreement or conduct would result in a restriction or distortion of competition. The CCS takes the view that price fixing arrangements are serious infringements of the section 34 prohibition, which have as their object the restriction of competition, and are likely to have been, by their very nature, committed intentionally: ID at [243]-[246].

Calculations of Penalties

29. The CCS refers to its Guidelines on the Appropriate Amount of Penalty ("**Penalty Guidelines**"). Paragraph 2.1 of the Penalty Guidelines lists the factors to take into account in calculating the amount of financial penalty to be imposed. At [249]-[250] of the ID, the CCS says that it will take into consideration the following:

a. the seriousness of the infringement;
b. the turnover of the business of the undertaking in Singapore for the relevant product and geographic markets affected by the infringement in the undertaking's last business year;
c. the duration of the infringement;
d. other relevant factors, for e.g., deterrent value; and
e. any further aggravating and mitigating factors.

These are also the factors taken into account by the EC and the Office of Fair Trading ("**OFT**")

30. The approach taken by the CCS is to start with a base figure, which is calculated by taking a percentage or proportion of the relevant sales or turnover, applying a multiplier for the duration of infringement and then adjusting that figure to take into

account other relevant factors such as deterrence, aggravating and mitigating considerations: ID at [251].

(i) Seriousness of the infringement

31. The CCS considers that cartel cases involving, among others, price-fixing are especially serious infringements and should normally attract a percentage of the relevant turnover that is on the higher end. However, the actual percentage that the CCS will assign varies depending on the circumstances of each case: ID at [252].

32. Here, it involves price-fixing of the modelling services provided by the modelling agencies. The higher the combined market share of the infringing parties, the greater the potential to cause damage to the affected market. Further, a high market share figure generally indicates a more stable agreement or concerted practice as third parties find it more difficult to undercut and possibly undermine the incumbents. These factors affect the base amount: ID at [253]-[254].

33. In calculating the market share of the infringing parties, the CCS had sent section 63 notices to various undertakings. Thereafter, adjustments were made based on the responses received, and the CCS assesses the market share of the 10 modelling agencies that had infringed section 34 of the Act to be [XX%]: ID at [255].

34. The CCS also considered the effect of the price-fixing agreement on clients, competitors and third parties, and found that this prevented the modelling agencies from passing on to clients any benefits resulting from competition. In fact, the price of modelling services for a fashion show increased by 60% from 2005 to 2009 as a result of the price-fixing agreement: ID at [256]-[260].

35. Having regard to all the circumstances, including the seriousness of the infringement, the nature of the product, the structure of the market, the market share of the infringing

parties, and the effect of the infringements on clients, competitors and third parties, the CCS applies a starting point percentage of [XX%] of the relevant turnover for each of the Parties: ID at [261]-[265]. Initially in the Provisional Infringement Decision ("**PID**") issued in May 2011 by the CCS pursuant to Regulation 7 of the Competition Regulations 2007, the CCS proposed a starting percentage of [XX%]. Subsequently, after taking into consideration the circumstances of the case, including the nature of the industry and the representations made by the Appellants in response to the PID about the nature of the industry, the CCS reduced the starting percentage to [XX%].

(ii) Relevant turnover

36. As stated above, in determining the penalty, the base figure adopted is a percentage of the turnover of the business of the undertaking for the relevant product in the relevant geographical markets affected by the infringement. The CCS determines that the relevant product is the supply of the whole range of modeling services, without differentiation between various types of modeling services or assignments, and the relevant geographical market is Singapore. Hence for the purpose of assessing the penalty, the relevant product and geographical markets are the sale and provision of modelling services in Singapore: ID [267].

37. The relevant turnover for the purpose of determining the penalty is the turnover of the undertaking in the last business year, and the last business year is the business year preceding the date on which the decision of the CCS is taken, or if figures are not available for that business year, the one immediately preceding it: ID at [266]. The term "Business Year" means the period of more than 6 months in respect of which an undertaking publishes accounts or, if no such accounts have been published for the period, prepares account: see [3] of the Penalty Guidelines.

38. In determining this issue, the CCS considered the legal and economic relationships between the modelling agency, the models and the mother agency (if any) as well as

the relationships between the agency and its clients, so as to determine the crux of the transaction for the relevant product market. The CCS found that the modelling agency looks to its clients for payment for services rendered, and bears the risk of non-payment. There is no contractual relationship between the model and the client. The modelling agencies source and build their own portfolio of models and talents, and offer this portfolio in order to secure bookings and jobs. The agency bears the risk of signing up a model/talent that is unable to fulfill bookings and jobs secured by the agency. The risks are higher where foreign models are involved, as the agency will have to fly the model over, house him/her and pay him/her an allowance: ID at [273].

39. The agencies are also involved and responsible for the management and development of its models. Where the agency is the mother agency for the model, the agency invests more resources in grooming the model and planning his/her career. Hence, the costs of sourcing and signing up a model or talent, whether locally-based or from overseas, are business costs that the agency has to incur in order to provide the services to its clients: ID at [274].

40. Thus, the CCS took the view that the modelling agencies are the central actors in the provision of modelling services in Singapore. Clients who are looking for modelling services would contract with the modelling agencies, and hold the agencies responsible for providing the services contracted for. The modelling agencies are not acting as mere intermediaries for the models or mother agents, unlike the recruitment agencies. For these reasons, the CCS determines that relevant turnover should not exclude amounts received by the modelling agencies for the model or the model's foreign mother agent: ID at [276].

(iii) Duration of the infringement

41. With regard to the duration of an infringement, the Penalty Guidelines provide that the amount of financial penalty to be imposed will depend on the duration of the

infringement. After calculating the base penalty sum, the CCS considers whether this sum should be adjusted to take into account the duration of the infringement: ID at [277]. In the view of the CCS, the duration to which the Parties infringed the section 34 prohibition will depend on when they became a party to the single continuous price-fixing agreement and when they ceased being a party to the same agreement.

42. The CCS considers that where an infringement that lasted for more than 1 year the penalty be multiplied by the number of years of the infringement. Although under [2.7] of the Penalty Guidelines an infringement over a part of a year may be treated as a full year for the purpose of calculating the duration of an infringement, the CCS has decided, in this case, to round down the relevant periods to the nearest month: ID at [277]-[279].

43. Under section 69(4) of the Act, the final amount of the financial penalty imposed on each party shall not exceed 10% of the total turnover of the business of such party in Singapore for each year of infringement, up to a maximum of 3 years: ID at [280].

(iv) Aggravating and mitigating factors

44. The CCS will consider the presence of aggravating or mitigating factors and make adjustments when assessing the amount of financial penalties: ID at [282]. Penalty Guidelines at [2.10]-[2.13]. Generally, the involvement of directors or senior management is an aggravating factor, so is the role of an undertaking as a leader/instigator. The CCS does not consider that a merely passive or follower role in an infringement is not sufficient to justify a reduction in penalty. However, the CCS does consider that cooperation which enables the enforcement process to be concluded more effectively and speedily as a mitigating factor: ID at [283]-[285].

(v) Other relevant factors

45. The CCS turns to consider other relevant factors. It may also adjust the penalty to achieve policy objectives, such as deterrence against price-fixing: ID at [286]-[287]. It refers to the Board's decision in *Transtar Travel and Anor v. CCS,* Appeal No. 3 of 2009, where the Board revised the financial penalty against the party, Regent Star, to $10,000 to achieve objective of the deterrence.

46. Where a party is unable or unwilling to provide CCS with information to determine its relevant turnover, CCS will consider the turnover of other parties in considering the appropriate penalty to impose: ID at [289].

47. While the financial position of the parties and their ability to pay is a relevant consideration in the assessment of financial penalties on a case by case basis, the CCS considers that cartelists should generally not rely on their economic difficulties and those of the market in seeking a reduction of the penalties imposed: ID at [290].

48. Relying on a series of appeal cases in the United Kingdom concerning the construction industry where the United Kingdom Competition Appeal Tribunal ("**CAT**") gave regard to the high turnover but low margins of the construction industry and overall proportionality in determining the adjustment of penalties, the Appellants submitted in their written representations that the modelling industry in Singapore is a "high turnover but low profit" industry, and that this characteristic should be considered in the determination of appropriate penalties: ID at [291].

49. The CCS notes that the mere finding of an adverse financial situation is not sufficient reason to justify a reduction in financial penalties since the recognition of such an obligation would have the effect of conferring an unfair competitive advantage on the undertakings well adapted to the conditions of the market: ID at [292].

50. Here, the CCS notes that it is not evident that the businesses of the infringing parties are entirely unprofitable, as all the parties recorded positive gross profit. The CCS also notes that most if not all of the shareholders are also directors, or alternatively sole proprietors or partners of the relevant infringing party, and therefore there may not be a strong incentive for the undertaking to declare profits and dividends on profits for external shareholders: ID at [294].

V. PENALTY IMPOSED ON THE APPELLANT

51. The Appellant's relevant turnover after adjustment for the financial year ending 31 December 2009 was [$XXX].

52. The Appellant put forth a number of arguments in its written representations to the CCS and asked for an adjustment in relevant turnover.

53. First, the Appellant argued that the relevant turnover should exclude amounts received by the Appellant for and on behalf of the models and foreign "mother" agencies. This was rejected by CCS: ID at [302].

54. Second, the Appellant argued that the following are outside the relevant geographic market: (a) photo shoots, advertorials, editorials that were shot or filmed outside Singapore, (b) where the job is for an overseas client. The CCS took the view that the provision of modelling services to Singapore-based clients falls within the relevant geographic market, regardless of where the photo shoot or filming occurred. However, the CCS agreed that services provided to an overseas client would be excluded from the relevant geographic market. As a result, the CCS reduced the Appellant's relevant turnover by [$XXX], which is the amount it attributed to modelling services that fall outside the relevant geographic market: ID at [303]-[304].

55. Third, the Appellant submitted that certain services that it provides are "non-modelling" or modelling services that are not affected by the infringement and hence

the relevant revenue from such services should be excluded from its relevant turnover. In particular, the Appellant contended that services which serve a collateral purpose besides modelling and "super" models who commandeer their own rates, should be excluded from its relevant turnover. The Appellant submitted that the focal product should only take into account the Appellant's modelling services which were affected or had benefitted from the AMIP rates: ID at [305].

56. The CCS rejected these arguments on the basis that it is not necessary to delineate the product market into specific types of modelling services. Further, the modelling services provided in relation to "super" models also fall within the focal product, would have a benchmarking effect, and hence should be included for the purposes of determining the relevant turnover. It cited the Board's decision in *Konsortium Express & Ors v. CCS, Appeals Nos. 1 & 2 of 2009* ("***Konsortium***") and *Transtar Travel & Anor v. CCS, Appeal No. 3 of 2009* ("***Transtar***"), where the Board rejected the argument that the turnover from premium coaches should be excluded from the relevant turnover since the "infringing" fares were only for the lowest class of buses: ID at [306].

57. The CCS found that the relevant turnover of the Appellant for modelling services for the financial year ending 31 December 2009 was [$XXX]. The CCS held that it analysed its findings regarding the seriousness of the infringement and fixed the starting point for Ave at [XX%] of the relevant turnover, arriving at a base amount for Ave in the sum of [$XXX]: ID at [296]-[297].

58. As the Appellant was a party to the single continuous price-fixing agreement from 1 January 2006 to 17 July 2009, a multiplier of 3.5 was applied and the financial penalty was arrived at in the sum of [$XXX]: ID at [298].

59. The CCS increased the penalty by [XX%] on account of the involvement of the Appellant's shareholder and director, Mr Tan. The Appellant argued that its director and shareholder, Mr Tan, did not actively participate in the entire duration of the infringement and hence the Appellant should not suffer the aggravating factor uplift for the entire duration of the infringement. The Appellant also argued that its involvement in the infringement lasted only until 11 April 2007 as it had ceased any meaningful activity as a member of AMIP by then: ID at [307].

60. The CCS however rejected these arguments as the Appellant's head booker, Jimmy Lim, had continued to represent the Appellant at the AMIP meetings and discussions. The CCS also took the view that Jimmy Lim had the ostensible authority and general responsibility to make decisions on behalf of the Appellant in relation to rates and bookings. As such, the CCS found that the senior management of the Appellant was continuously involved in the meetings and discussions and thus the Appellant should attract the aggravating factor for the duration of the infringement. Further, the CCS also found that the Appellant failed to publicly distance itself from the infringing conduct: ID at [307].

61. Nonetheless, the CCS reduced the penalty by [XX%] for the cooperation extended by Ave during the investigation. As a result, the penalty was reduced by [XX%] to $132,315 after taking into account these aggravating and mitigating factors: ID at [308].

62. CCS is mindful that the financial penalty should be commensurate with the financial position of the undertaking, and is of the view that the figure reached is a significant sum to act as an effective deterrent and did not make any further adjustments: ID at [300].

63. The financial penalty also does not exceed the maximum financial penalty that CCS can impose in accordance with s 69(4) of the Act, i.e. [$XXX]: ID at [301].

VI. THE APPEAL AND ISSUES ARISING

64. The Appellant is not appealing against the liability found by the CCS in the ID. The Appellant is appealing only against the CCS's determination of the financial penalty. The Appellant's main ground of appeal is that, overall, the penalty imposed is excessive, disproportionate and hence unfair. It seeks an order to reduce the amount of the financial penalty.

65. By the Notice of Appeal, the Appellant sets out mainly two grounds of appeal. First, it contends that in the ID the CCS made several errors of fact, and the errors of fact complained of relate to the following factual matters:

(a) The Appellant's business model;
(b) The contractual relationships between the client, the Appellant and the model;
(c) The management and development of the models;
(d) The costs and risks of sourcing and signing up of the models;
(e) The risk of non-payment that is borne by the Appellant.

66. Next, the Appellant contends that the CCS made an error of law in the ID, namely: in the interpretation and application of the decision of the CAT in *(1) Hays PLC (2) Hays Specialist Recruitment Limited (3) Hays Specialist Recruitment (Holdings) Limited v Office of the Fair Trading* [2011] CAT 8 (the "***Hays* case**").

67. Thus, the issues arising in this appeal are the following:

(A) whether the CCS in the ID made the several errors of fact as averred by the Appellant in the Notice of Appeal; and
(B) whether the CCS in the ID made an error of law in the interpretation and application of the *Hays* case as contended by the Appellant.

VII. ISSUE (A): Whether the CCS has made the several errors of fact

The Appellant's Contentions on Issue (A)

68. The Appellant complains that in the ID. the CCS makes a general assumption that all the parties have generally similar business operations and/or practices. The Appellant refers to [272] to [276] of the ID where, according to the Appellant, the CCS states its view of practices of the parties in general and does not seek to distinguish the practice of each individual party. The Appellant's practice and business model is not similar to or identical with the practices of the other modelling agencies as set out by the CCS in the ID.

(a) Error of Fact: The Appellant's Business Model

69. The Appellant explains that the modelling agencies within the industry are typically engaged in two principal forms of business relationships with models:

(a) "Mother" agency relationships: This relationship arises where the modelling agency has scouted or discovered a model and remains the "mother" agent of the model on a worldwide basis, irrespective of the jurisdiction within which the model may be physically located at any time and for any engagement. In such situation, in respect of the engagements where the model is represented by the mother agency, the mother agency typically receives from the model a [XX%] commission on fees earned by the model. Where the model wishes to procure engagements in a foreign jurisdiction, the mother agent will then assist the model to procure representative agency relationships with local modeling agencies in the relevant foreign jurisdiction. In respect of overseas engagements where the model will be represented by a local modelling agency, the mother agency will typically receive from the model a commission between [XX%] and [XX%] of the fees earned by the model.

(b) Representative agency relationships: In this relationship, the modelling agency is merely acting as the local agent to represent the model within the specified territory only. In respect of engagements where the model is represented by a local modelling agency, the local model agency typically receives from the model a [XX%] commission on fees earned by the model.

70. The Appellant says that in respect of the Appellant's business operations, its business is in the representation of the "high end" models who are typically engaged in fashion-related engagements. As such, a large majority of the models who meet the Appellant's business requirements are foreign models. As a result, the mother agency relationships (where the Appellant is the "mother" agent of a model who is usually is a local model) represent less than [XX%] of is engagements. On the other hand, its representation relationships with foreign models make up the majority of the Appellant's engagements, about [XX%].

71. The Appellant asserts that in the usual course of business, clients would approach the Appellant with a specific purpose and/or list of requirements based on their proposed engagements, and the Appellant would offer available models, who would be suitable for the clients' purpose and requirements. Upon the model being chosen and upon the model accepting the engagement, the Appellant would communicate the acceptance to the client for and on behalf of the model, thereby forming a valid and binding contract between the model and the client.

72. The Appellant concedes that it maintain a website of its portfolio of models, primarily for the purpose of profiling the Appellant as niche modelling agency. The Appellant is required to send out a model's e-card (an electronic version of the model's composite card displaying the model's representative pictures and basic statistics), when he or she first arrives, as part of its obligations as agent for the model via emails to various clients who may require models regularly. The primary purpose of this is not to

promote the model to secure bookings or jobs; its primary purpose is to inform such clients of the existence and availability of the model in Singapore.

(b) Error of Fact: Contractual Relationships between the Client, the Appellant and the Model

73. The CCS's position in the ID is that there was no contractual relationship between the model and the client. At [272], [273] and [276] of the ID, the CCS says that the modelling agencies are not mere intermediaries, but are responsible entities for modelling services rendered to clients, that the contractual relationship is between the client and the modelling agency, that there is no contractual relationship between the client and the model, and that the modelling agencies are central figures in the provision of modelling services. The Appellant challenges these findings and asserts that in all its representations within its business, the contractual relationships established are:

(a) an agency relationship between the model and the Appellant; and
(b) a contract for services between the model and the client.

74. The Appellant, however, concedes that within the modelling industry, it may be possible for a modelling agency to contract directly with a client and provide full production of an engagement, i.e. looking for suitable models or talents, location, photographers, video crew, equipment and post-production services and other related resources required for the engagement. But the Appellant asserts that it does not have full production capabilities. Instead, the Appellant says that it acts as an agent for the model and assists to secure contracts of engagement between the model and the client directly, for the provision of services from the model to the client. In support, the Appellant produced some contracts which actually had been entered. In such case, the client directly controls, supervises and directs the models during the engagement and the Appellant is only responsible for putting forward possible models who match the clients' requirements. The Appellant contends that in such circumstances, the models

are not employees of the Appellant; nor are they sub-contractors of the Appellant. The express terms of these contracts clearly provide that the model is responsible for the rendering of services required for the engagement and that the Appellant's role is to act as agent and to receive payment on their behalf.

75. In particular, the Appellant relies on the following contracts which it produces through the affidavit of Mr Tan:

a. the Model/Talent Agreement dated 16 January 2009 between [X X X X X X X X] and [X X X X X X X X] and the Model/Talent Agreement dated 16 January 2009 between [X X X X X X X X] and [X X X X X X X X] which contain a clause stating that the model acknowledges that the Appellant is authorised to act as the model's agent in all matters relating to the agreements, including receipt of all sums payable. This clause also states that any obligation of [X X X X X X X X] to make payment shall be discharged by payment being made to the Appellant;

b. the various Talent Release Agreements between [X X X X X X X X] and [X X X X X X X X]which provide that the models agree to render services as a performer in the relevant production and to accept compensation as stated in the agreement for their services rendered;

c. the Talent Contract between [X X X X X X X X] and [X X X X X X X X] dated 11 December 2010 which provides that the model may be subject to a "replacement cost" incurred by [X X X X X X X X] if the model does not turn up or is late for the shoot;

d. the [X X X X X X X X] which also provide that the model has to keep [X X X X X X X X] fully indemnified in respect of all actions, claims, demands or expenses which may be suffered or incurred by the company in consequence of any breach of the undertakings in the agreement;

e. the Talent Release agreement between [X X X X X X X X] and [X X X X X X X X] and that between [X X X X X X X X] and [X X X X X X X X] which also contain similar provisions.

76. Based on the evidence produced, the Appellant contends that there is a direct contractual relationship between the model and the client, and that the CCS is factually mistaken in taking the position that there is no contractual relationship between the model and the client.

77. The Appellant advances two further alternative arguments. First, even if there is any contractual relationship between the client and the Appellant, it would at best be one based on an implied contract between the client and the Appellant for the arrangement and procurement of a contract for services between the model and the client. Secondly, even if the client and the Appellant had a direct contractual relationship, the Appellant would be in the same position as the employment or recruitment agency in the *Hays* case, since it would still have to "pass through" the modelling fees to the model and the mother agency commissions to the mother agent after deducting its commission.

(c) Error of fact: Management and Development of Models

78. The Appellant says that it does not actively manage or develop its models, but it may play a more active advisory role for the models in the Appellant's portfolio. This covers only a handful of models. For models of whom the Appellant is the "mother" agency, the Appellant acknowledges that it may occasionally advise the model to go to an overseas location. In such instance, the Appellant will liaise with the relevant local modelling agencies to procure a local representative agency relationship for the model and the local modelling agency will be responsible for making arrangements to bring the model into the country. The Appellant however does not pay or incur any costs in procuring such overseas representation for its models. In such situations, the model fully bears the costs of such arrangements to an overseas location.

79. The Appellant acknowledges that being a "mother" agent does involve a greater advisory role, usually in terms of providing advice and guidance to a model depending on his or her own career goals. However, the Appellant does not enroll its models in any formalised training or grooming; nor does it incur any such costs in this regard. On the basis of what it says, the Appellant says it only manages and develops a small proportion of the models it represents.

(d) Error of Fact: Costs and Risks of sourcing and signing up of a model are borne by the Appellant

80. The Appellant refers to a statement made by CCS at [273] of the ID where it says that the agency bears the risk of signing up model or talent who is unable to fulfil the booking and jobs secured by the agency and that this risk is even greater where foreign models are involved. The Appellant says that this statement of the CCS does not apply to the Appellant. The Appellant does not usually secure bookings or jobs for model prior to agreeing to represent the model, except in exceptional circumstances. These exceptional circumstances are (i) where the clients already identifies the model whom they wish to engage due to prior working experience; or (ii) the model is internationally renowned and the Appellant's role is to liaise with the mother agent to arrange for the model to be brought to Singapore and to procure that the model enters into contract for services with the clients.

81. The Appellant also states that based on various requests received from "mother" agents, the Appellant reviews the models' test pictures and/or videos and decides before deciding to represent the models. Any travelling and accommodation expenses, if incurred by the models selected by the Appellant, would be reimbursed by the models. Once the models have entered into contracts for services with the clients the Appellant is not responsible for the performance of the models. On the basis of these facts, the Appellant contends that there is no inherent risk borne by the Appellant.

82. One of the obligations of the Appellant as agent for the model is to procure the clients' payment of fees upon the completion of the engagements. If a client does not pay the fees due, the model will not be paid for the engagement and the Appellant will not receive the [XX%] commission from the model. The Appellant acknowledges that this is an inherent credit risk that is part and parcel of its agency relationship with the model.

83. The Appellant further says that the statement of the CCS made at [274] of the ID to the effect that the costs of sourcing and signing up the model or talent are business costs that the agency has to incur in order to provide the services to its clients does not apply to the Appellant's model. The Appellant asserts that there are no costs of sourcing or signing up of a model to the Appellant, save for usual operating costs.

(e) Error of Fact: Risk of non-payment is borne by the Appellant

84. The Appellant refers to [273] of the ID where the CCS says that the modelling agency looks to its clients for payment for the services rendered and bear the risk of non-payment. On this statement, the Appellant contends that it looks to the clients for payment for services as an agent acting on behalf of the model, the principal to whom the payment is owed. The credit risk it bears is the loss of the commission but it does not bear the credit risk as regards the payment of the models. The Appellant accepts that there are some occasions where the foreign models are given an advance on their fees, when they are leaving Singapore, these are exceptional cases, where the foreign models have established a good working record with the Appellant, and where the fees are not paid by the clients the advance represent a debt due to the Appellant and will be set off against the fees to be collected from the clients for and on behalf of the models.

85. In support of what the Appellant contends, the Appellant highlights the following passage from CAT's decision in *Hays case* at [48]:

> "*It is true that the agency bears the credit risk as regards the payment of temporary workers, a risk that the agency which it does not have as regards permanent workers. But that does not alter the essential nature of the agency's business or its relations with its clients . . .*"

The Appellant relies on this passage as applicable here "*regardless of the degree of the credit risk*" borne by the agency. The Appellant further contends that in the case of the Appellant's business, the Appellant does not bear the credit risk as regards payment of the models and is "*akin to the degree of risk*" borne by recruitment agencies in respect of the business of placement of permanent workers in *Hays* case.

Contentions of the CCS on Issue (A)

86. The Appellant claims that its business model is different from that of the other Parties, as it has a higher ratio of foreign models in its portfolio, and a lower portion of its business as a mother agent. The CCS contends that even if this is the case, it does not affect the CCS's analysis of the facts in this case, as the modelling services industry itself makes no such distinction between foreign and locally sourced models or mother agency and local agency representation, and the rates charged for modelling services also do not make such a distinction.

87. As for the copies of the contracts between the Appellant's models and clients that the Appellant now produces on the basis of which the Appellant seeks to argue that the contractual relationship was between the models and the clients, the CCS contends that these were not submitted to the CCS during the investigations or the representations stage. At the investigations and representations stage, the only contracts submitted to the CCS were those between the model and the Appellant, which make reference to the contracts between the Appellant and the client, and not the client and the model. This was also admitted by Mr Tan when he gave evidence in court.

88. Reverting to the present case, the CCS contends that the relevant product market is the supply of modelling services by the modelling agencies. There is no further sub-market of foreign or local models, and models for whom the agency is a "mother agent" and those for whom the agency is not a "mother agent" but a representative agency. Further, with reference to the Appellant's assertion that it almost always provides foreign models who are sourced through foreign model's "mother agent" in the model's home country, and therefore it is only an agent for the model and the "mother agent", and "passes through" the model's fees and mother agent's commission, the CCS contends that the modelling services industry, as a whole, makes no distinction between foreign-sourced models and local or locally-based models and clients would only specify their requirements for the job. The CCS relies on the rates which were fixed to show that there is no distinction made between the two types of models.

89. The CCS contends that the facts show that the Appellant, and not the model, is the "central actor" in the provision of modelling services in Singapore. The CCS asserts that the Appellant receives a number of requests from foreign mother agencies and it decides whether to accept their foreign models or not as part of its portfolio. The Appellant enters into an exclusive and fixed term agency with the foreign model for a period of 2 to 3 years. The Appellant maintains a website of its portfolio of models. In the course of business, the clients would approach the Appellant with specific purpose and requirements based on the proposed engagements and the Appellant would offer available models who the Appellant judges would be most suitable for the clients for their consideration.

90. The CCS also asserts that terms of the job and the rates payable are negotiated by the Appellant and the client. The model is not involved in such negotiations at all and the model's fee and mother agent's fee where applicable are components within the modelling fee that is charged by the Appellant to the client.

91. In any case, regardless of the contractual relationship, the CCS submits that this does not detract from the Appellant being a "central actor" in the provision of the modelling services in Singapore. The CCS relies on the following:

a. The Appellant receives requests from foreign agencies and decides whether they wish to accept their foreign models as part of its portfolio.

b. The Appellant enters into an exclusive and fixed term agency agreement with the foreign models for a 2 to 3 year period. The model is held to strict confidence over his/her pay and contract terms, and cannot accept any job offers or contracts from any third parties, unless made through the Appellant.

c. The Appellant maintains a portfolio of models on its website, and send clients regular updates. The Appellant would ensure that the model is presented in his/her best capacity by providing training or coaching to prepare them for auditions and casting.

d. The clients would approach the Appellant for models for a specific purpose and/or models which meet a certain list of requirements. The Appellant would then offer to the client the available models which it judges as being most suitable for the client's purpose and requirements. The client then decides if the Appellant's offer is suitable.

e. The terms of a job and rates payable by the client are negotiated by the Appellant without the model's involvement. The model's fee and any mother agency fee are components included within the modelling fee charged by the Appellant to the client.

f. The Appellant has the right to terminate its contract with the model if it receives complaints over the model's conduct or performance.

g. The model is required to give the Appellant, without any deduction, any monies paid to him/her by any client.

h. In the case of foreign models, the Appellant would, for the duration of its "exclusive" agreements with its models, having flown them in and put them up in accommodation, have to ensure that they are booked for jobs. In fact, the

Appellant had said in its oral representations that the situation may also be loss making if it picked the wrong model.

92. The CCS does not accept that the facts in this case are similar to or fall squarely within those facts in the *Hay* case. In particular, in the *Hay* case, the wages of the construction workers were set by the construction firm (the client) and the recruitment agencies (the infringing parties) had no control or influence over the wages set and paid by the construction firm and therefore did not fix the wages. Further, in the *Hay* case, the recruitment agency supplied both temporary and permanent workers. In the case of permanent worker, apart from paying the recruitment agency a fee for its recruitment services, the construction firm paid the permanent workers their wages direct and the relationship between the construction firm and the permanent workers is a direct one. For the temporary worker, the recruitment agency billed the client for the entire sum of fees and wages and the workers' wages and was responsible for paying the wages of the temporary workers.

93. The CCS also does not accept that the Appellant's contention that in the case of foreign models, the risk that the Appellant bears is similar to that of the recruitment agency in the *Hays* case. In such case, the Appellant would, for the duration of its "exclusive" agreements with its models, have flown the models in and put them up in accommodation, have to ensure that its models are booked for jobs. The CCS also does not accept the Appellant's characterisation of its business as one where it simply "*acts as an agent for the model and assists to secure contracts of engagements between the model and client directly for the provision of services from the model to client*".

94. From the facts that are available the CCS contends that its observations that, the Appellant (like the other infringing parties) is a "central figure" is a reasonable conclusion to be drawn, notwithstanding the Appellant's model mix.

95. At [52] of the RC, the CCS concludes as follows:

> *"Therefore, to accept the Appellant's submission that they operated on a different business model from the other modeling agencies would be to create an incongruent distinction between the undisputed market definition and further sub-markets in the calculation of financial penalties, that which the CAT was loath to do in the Hays case."*

The Board's Decision on Issue (A)

96. On this factual issue, the Appellant seeks to show that the facts here are on all fours with those stated in the *Hays* case and that its business model is different from those of the other infringing parties. On this point, on the material produced, the Board accepts the submission of the CCS that the Appellant's business model is not significantly different from those of the other infringing parties.

97. A significant factor that points towards the Appellant being a "central actor", is the undisputed fact that the Appellant is the entity that negotiates the terms of the model's engagement and the rate of the models with the clients directly, and decides on the final rate to be charged to the clients. Further, the Appellant decides which models are to be included as part of its portfolio and which models are to be put forward to the clients.

98. As for the relationship between the Appellant and the model, the model will typically enter into an exclusive fixed term arrangement with the Appellant, and during that period, the model is to refer to the Appellant all enquiries and offers for the model's services. Further, in the event that the model is paid directly by the client, the model is obliged to pay such fee to the Appellant without deduction. The Appellant also can terminate the contract with its model at any time if it receives complaints over the model's conduct or performance. In some contracts, the model is only paid the fees he/she had earned before he/she leaves Singapore. All these facts suggest that that the Appellant is more than a mere "intermediary" for the models.

99. As to the Appellant's contention that it is not involved in the management and development of models as the other agencies and that its role as a mother agent is but [XX%] of its business, the Appellant in its written representations actually gave evidence of models who were "*scouted, managed and groomed*" by the Appellant. In any case, this is not a significant factor, as no distinction is made in the relevant product market between the mother agency and local agency representation. Neither is there any distinction made between foreign or local models.

100. Further, the Appellant also bears the costs and risks of sourcing and signing up the foreign models, and if these models are not booked for jobs and they would be unable to repay the Appellant the costs of their travel and accommodation. The Appellant also bears the risks of non-payment where the models are unable to repay other advances granted to them by the Appellant or where the clients do not pay the models.

101. With regard to the copies of the contracts produced by the Appellant, the Board notes the following:

a. In the contract between the model and the Appellant, specific reference was made to the model having to carry out his / her obligations in accordance with this contract and "*the contract so made between the [Appellant] and its client or customer*".
b. The Appellant exhibited a sample confirmation which suggests that the contract is between the Appellant and the clients.
c. If the model fails to complete his/her engagement with the clients, the model is responsible to pay a 100% cancellation fee to the Appellant.
d. If the client pays the model the fees directly, the model is to pay the entire fees to the Appellant without any deductions.

102. Further, before the Board, when cross-examined by counsel for the CCS, Mr Tan admitted that most of the contracts were between the Appellant and the client, and only

a few were between the model and the client. In view of this, it could not be said that the business model of the Appellant is that different from the other infringing parties in that there is no direct contractual relationship between the Appellant and the clients.

103. In any case, regardless of whether there is a direct contractual relationship between the Appellant and the clients, what is uncontroverted is that the fee that is fixed by the Appellant is the entire fee charged to the client, and not just the commission rate received by the Appellant. In the circumstances, even taking the Appellant's case at its highest that the contractual relationship is between the models and the clients and the Appellant is but an agent for the models, this should not affect the calculation of the relevant turnover.

VIII. ISSUE (B): Whether the CCS erred in law in the interpretation and application of the *Hays* case and in using the Appellant's gross turnover instead of net turnover as the starting point for calculating the financial penalty

The Appellant's Contentions on Issue (B)

104. The Appellant contends that the CSS erred in law in using the Appellant's gross turnover instead of net turnover as the starting point for calculating the financial penalty. Relying on the CAT's decision in the *Hays* case, the Appellant submits that relevant turnover should be based on the net turnover and not gross turnover.

105. In the *Hays* case, the issue that arose was whether the relevant turnover of a recruitment agency to be used for the purpose of calculating financial penalties should include the gross fees received by the recruitment agency, which included (a) the wages for the temporary workers which were paid out by the recruitment agency to the relevant workers, and (b) the fees paid to the agency for its services in procuring the workers. The OFT in its decision used the gross fees received by the recruitment agency as the relevant turnover, which included the wages of temporary workers that were paid by the agency's clients to the agency. However, such gross fees received by

the recruitment agency did not include the wages of permanent workers, which were paid to the workers directly by the client. The CAT disagreed with the OFT's decision and found that the "net fees" (i.e. excluding the amounts payable to the temporary workers) represented the relevant turnover to be used in the calculation of financial penalties, as the usage of gross fees (which only took into account wages of the temporary but not the permanent workers) would otherwise present a distorted view of the relative degree of involvement of the participants according to their particular mix of permanent and temporary workers.

106. The CAT relied on evidence from an analyst that net fees and not gross turnover was the measure in which all recruitment industry analysts used to assess the actual economic performance and activity carried out by the recruitment agencies since the salaries of the temporary workers are effectively "passed through" the recruitment agencies. Further, the CAT considered that the £43 million penalty imposed by the OFT in *Hays* case was too high in relation to the conduct and the impact of its infringement on the market.

107. The Appellant argues that the CAT's decision in *Hays* case should be similarly applied to its case, i.e. the modelling fees it received on behalf of its models and mother agents should not be included in its relevant turnover for the purposes of the calculation of its financial penalty. These fees are "pass through" fees, and the Appellant's gross turnover if such "pass through" fees were included, was 3 times that of its net turnover, which was not a proper reflection of its actual revenue from the provision of modelling services.

108. The Appellant relies on the following passage at [44] in *Hays* case:

> *"[T]he relevant turnover is used to reflect the effective scale of activity used to reflect the effective scale of activity of each undertaking, and thus where*

several undertakings are involved, to achieve the appropriate relationship between the penalties imposed on each of them".

109. The Appellant submits that the involvement of the Appellant and the risk that the Appellant undertook is similar to the involvement and the risk the recruitment agencies undertook in the *Hays* case, in relation to the provision of permanent workers to the construction industry as a recruitment agency. This is because the clients have direct contract for services with the models which is analogous to the recruitment agencies employment of permanent workers directly and paying their wages directly. Likewise, if the clients do not pay the permanent workers, the recruitment agencies would not be obliged to pay them either. Similarly, in the present case, if the clients do not pay the models, in no event would the Appellant be responsible for paying the models.

110. The Appellant concedes that it receives the modelling fees on behalf of the models as their agent. As the Appellant receives the modelling fees on behalf of the models as their agent, the Appellant is obliged to "pass through" to the models their modelling fees and mother agency commissions after setting off any commission due to the Appellant. The Appellant submits that this aspect of the relationship is similar to the situation of temporary workers in *Hays* case where the recruitment agencies received the service fees (including wages payable to the temporary workers) from the clients and paid the temporary workers' their wages directly.

111. The Appellant further submits that in the *Hays* case where the concept of net fees was used that was in relation to a situation where the temporary workers were directly employed by the recruitment agency, and the CAT acknowledged that the recruitment agency was obliged to pay wages to the temporary workers pursuant to law. Despite the direct contractual relationship between the recruitment agency and the temporary workers, the CAT still recognised that the wages were "passed through" to the temporary workers and that such wages were not recognised in the calculation of the relevant turnover.

112. The Appellant submits that the CCS arrives at its decision based on an erroneous finding of fact that the Appellant was not an intermediary but a responsible entity for modelling services rendered to clients. The Appellant contends that in fact it is a mere intermediary between its principal (the model) and the clients. The model is responsible for providing such services. To the extent that the Appellant is a "responsible entity" to the clients, the Appellant was responsible on behalf of the model.

113. Given that CAT held that the use of net fees would represent the correct measure to be used in determination of penalty, the Appellant submits that the same principle of net turnover should apply in the present situation.

114. The Appellant submits that a distinction should be drawn between the revenue derived by the modelling persons from modelling services and the revenue derived by the Appellant from such modelling services (which is the commission received by the Appellant from its models in consideration of the agency services it provides). This is also consistent with the FRS18 which provides that "*in an agency relationship, the gross inflows of economic benefits include amounts collected on behalf of the principal and which do not result in increases in equity for the entity. The amounts collected on behalf of the principal are not revenue. Instead, revenue is the amount of commission*". The Appellant contends that the CCS failed to appreciate that the business of the Appellant is to render services to the models, and its revenue is the commission it receives from the models.

115. The Appellant further contends that the CCS wrongly distinguished the *Hays* case on the basis that the recruitment agencies in the *Hays* case acted as middlemen when providing temporary workers to the construction industry, with minimal involvement and no business risk: ID at [273], and that here, the Appellant was not a mere

intermediary but in fact the responsible entity for modelling services rendered to its clients: ID at [273], [276].

116. First, the Appellant submits that the CAT recognised in the *Hays* case that the wages of the temporary workers were "passed through" to such workers and hence should not be included in calculating the relevant turnover. This was the position despite the fact the recruitment agencies would still be required under law to pay the temporary workers even if they were not paid by their clients. In the Appellant's case, there is no legal obligation on the Appellant to pay the models if the client does not pay, and the proposition that "pass through" fees should not be included in the relevant turnover applies with even greater force.

117. Second, the Appellant disagrees with the CCS' view that the Appellant is not a mere intermediary between the clients and models but instead is the responsible entity for providing modelling services to clients. This view is based on the errors of fact made by the CCS in relation to the Appellant's business model as well as the direct contractual relationship between the model and the client (dealt with earlier). The Appellant submits that to the extent that it is deemed to be the "responsible entity", it was merely responsible on behalf of the model as its agent and for communications between the client and the model.

118. Finally, the Appellant also relies on the CCS' decision in *Notice of Infringement Decision issued by the CCS in relation to the Fixing of monthly salaries of new Indonesian Foreign Domestic Workers in Singapore* ("***Employment Agencies Case***") (ABD Tab 2), whereby the CCS had imposed financial penalties on 16 employment agencies for price-fixing the placement fees which were calculated based on the salary of the foreign domestic worker. The relevant turnover excluded any wages of the foreign domestic worker, which were paid directly by the employers to the foreign domestic workers. Applying this principle to the facts here, the relevant turnover here

should exclude the fees paid to the models and the mother agency, and only include the commissions received by the Appellant.

The CCS's Contentions on Issue (B)

119. The CCS contends that it was correct in using the Appellant's gross turnover, and not net turnover, as the relevant turnover for the calculation of its financial penalty.

120. At the outset, the CCS highlighted that the imposition of a financial penalty is discretionary, and the appropriateness of the penalty will depend on the facts of the case. There is a margin of appreciation retained by the CCS, and "*the Board's primary task is to assess the justice of the overall penalty, rather than to consider in minute detail the individual steps applied by the [CCS], particularly as regards Step 1 (starting point) and Step 3 (adjustment for other factors)*": *Konsortium at* [177].

121. The CCS cites its Penalty Guidelines, which state that the relevant turnover to be used by the CCS for calculating penalties is the turnover of the business of the undertaking in Singapore for the relevant product and geographic markets affected by the infringement in the undertaking's last business year (Defence at p 6, CBD Annex 2 at [2.1] and [2.4]). In this regard, the relevant product and geographic market defined by the CCS in the ID is the sale and provision of modelling services by modelling agencies in Singapore: ID at [56]-[59].

122. The CCS also cites guidelines issued by the OFT and the EC, which adopt a similar approach in the calculation of penalties:

    a. The OFT's Guidance as to the appropriate amount of a penalty ("**OFT Penalty Guidelines**") states that the relevant turnover is the turnover of the undertaking in the relevant product and geographic market affected by the infringement in the undertaking's last business year;

b. The EC's Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 ("**EC Penalty Guidelines**") states that the basic amount of the fine will be set by reference to the value of sales. In determining this basic amount, the EC will take the value of the undertaking's sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area.

123. The CCS submits that the relevant product and geographic market here are the sale and provision of modelling services by the modelling agencies in Singapore. The infringing conduct in this case is the agreement to fix the entire rate charged for modelling services and not simply the commissions of the modelling agencies. The infringing parties (including the Appellant) did not operate by publishing their service fee to clients but rather the entire modelling rates (inclusive of any fees payable to the models and other agencies), which had been collectively fixed by the infringing parties. The CCS contends that the grouping of the fees due to the modelling agencies, the model, the foreign agency (where applicable) as one collective modelling rate, which was fixed by the modelling agencies, is in and of itself a reflection of the commercial reality, and the products so grouped and the relevant clients were accordingly affected by the infringement. Further, any increase in the price of a modelling service provided to the client will result in a corresponding increase in the fee that the modelling agency, the model and the mother agent will obtain. What was being fixed was not the commission received by the modelling agencies but the entire modelling rates charged to the client. Accordingly, the CCS submits that the relevant turnover in this case cannot be limited to a subset of the turnover derived from the infringing conduct, and the relevant turnover must comprise the revenue derived from the entire modelling rates charged by the modelling agencies to the clients.

124. The CCS further submits that the Appellant's argument for using the net fees as the relevant turnover is tantamount to a request for the Board to use the gross profits or the margins earned by the modelling agencies after deduction of the costs related to the

use of the models and payments to the mother agencies. The CCS submits that such an approach is incorrect and is akin to a profits-based approach for calculating penalties, which would unjustly punish more efficient undertakings since they enjoy higher profits, all things being equal.

125. The CCS also cited the CAT decision in *GF Tomlinson Group Limited and another v Office of Fair Trading* [2011] CAT 7 ("***Tomlinson* case**") in which the CAT agreed with the OFT that gross turnover should be used for calculations and rejected the appellants' submissions that their turnover net of subcontractor fees should be used. The CAT took the view that the net turnover approach would have an uneven effect on the undertakings depending on how far they relied on subcontractors and would also mean that a company that chooses to employ its own workforce would be disadvantaged (*Tomlinson* case at [134]). The CCS submits that this decision applies to the modelling services industry as well, as it is similar to other industries where work is subcontracted out.

The Board's Decision on Issue (B)

126. The Board held in *Transtar* at [85] and *Konsortium* at [182] that in assessing the relevant turnover, it will have regard to the turnover of the business of the undertaking for the relevant product in the geographic markets affected by the infringement in the undertaking's last business year: Penalty Guidelines at [2.1]; see also [2.7] of the OFT Penalty Guidelines.

127. The European Commission's Guidelines on the Method of Setting Fines (at [13]), which was cited with approval by the Board in *Konsortium* at [183], further provide:

> "*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 [Such will be the case for instance for horizontal price fixing arrangements on a given product, where the price of that product then serves as a basis*

for the price of higher or lower quality goods] ***relates*** *in the relevant geographic area with the EEA. It will normally take the sales made by the undertaking during the last full business year of its participation in the infringement.*"

128. In *Konsortium* (at [185]-[186]) and *Transtar* (at [96]-[98]), as the affected product market was the sale of express bus tickets, and not just the sale of fuel insurance charge ("**FIC**") coupons which were tagged onto the price of the bus ticket, the Board rejected the appellants' argument that the relevant turnover should be based only on the revenue derived from the sale of FIC coupons and not from the revenue derived from the sale of the bus tickets.

129. Here, the relevant market is defined as the sale and provision of the whole range of modelling services involving the use of modelling persons by modelling agencies in Singapore, without any differentiation between the various types of models, modelling services or assignments : ID at [47]-[58].

130. The Appellant contends that its relevant turnover to be used for calculating its financial penalty should be net of the revenue paid to the models, and relies on the decision of the CAT in the *Hays* case, as well as on the characteristics of its business model to support its argument. The Board is unable to accept this contention.

131. A review of the CAT's decision in *Hays* case shows that that case is clearly distinguishable from the present case. The use of net turnover as the basis for calculation of financial penalties was justified on the unique facts in the *Hays* case and cannot simply be transported here. The main characteristics of the relevant market that justified the use of the "net revenue" approach in *Hays* case to determine the recruitment agencies' relevant turnover are as follows:

a. The recruitment agencies were primarily involved in sourcing potential workers for the construction industry and in matching these workers to the specific

vacancies of their clients. The recruitment agencies supplied both the temporary and permanent workers to their clients.

b. The wages of the temporary workers that were passed through the recruitment agencies were set by the construction firms (i.e. the clients) and the recruitment agencies did not control or influence the level of wages paid by the construction firms.

c. In the case of the permanent workers, apart from paying the recruitment agency a fee for its recruitment services, the client pays the permanent workers their wages direct and the relationship between the client and the permanent workers is a direct one.

d. The workers supplied by the recruitment agency are under the control, supervision and direction of the clients and are paid a remuneration determined by the clients and not the agencies: *Hays* case at [48].

e. The workers were only engaged by the agencies upon the client agreeing to their engagement, i.e. the agencies would not keep a ready supply of temporary workers for their clients to choose from as and when they needed temporary workers: *Hays* case at [47].

f. The fees received by the recruitment agencies were clearly and separately recorded from the amounts that "were passed through" to the temporary workers: *Hays* case at [47].

g. The fees that were being fixed were not the wages but the target fees i.e. the fees paid by the construction firms to the recruitment agencies for the sourcing and matching of successful candidates.

h. Although there was one single market in the *Hays* case, the recruitment agencies have a different mix of permanent and temporary workers, and the use of gross turnover (which would include the wages of the temporary workers) would result in a distorted view of the participant's respective involvement depending on its mix of permanent or temporary workers.

132. In the present case, one salient distinction from the *Hays* case is that the fees of the models are negotiated and solely determined by the Appellant (as was also admitted by Mr Tan in his evidence before the Board), as compared to the wages of the workers that were determined by the clients i.e. the construction firms in the case of *Hays*. It is undisputed that the Appellant is the party that negotiates with the clients and sets the rates for the modeling services provided by its models (this was in fact admitted by the Appellant in its oral representations to the CCS, and also by Mr Tan in his evidence. Further, the rate that is being fixed by the Appellant comprises of the amount received by the models, their foreign mother agencies (where applicable) and the commission earned by the Appellant, as compared to the recruitment agencies in *Hays* case which fixed the "target fee" i.e. the fees payable by the construction firm to the recruitment agencies for the placement of workers. Here, the modelling agencies fix the entire rate charged to the clients for the sale and provision of modelling services in Singapore, and not only the commission rates payable to the models. There was also no difference in the manner in which the fees of foreign or local models were treated or the fees earned as a mother agency or local representative agency. Thus, clearly the facts in the case of *Hays* are dist*inguis*hable from the facts in the present case. In the opinion of the Board, the *Hays* case is not applicable here.

133. Considering that the relevant product and geographic market are defined as the sale and provision of modelling services (involving the use of modelling persons) by modelling agencies in Singapore, the relevant turnover must be the revenue derived from the entire price charged by the modelling agencies to the clients for the sale and provision of modelling services in Singapore. In the Notice of Appeal and the Appellant's written contentions, the Appellant does not dispute the definition of the product and geographic market, and there is no reason for the Board to deviate from this definition.

134. Further, given that the purpose of using the relevant turnover to calculate penalties is to assess the impact and effect of the infringement on the market (Penalty Guidelines

at [2.4]), the relevant turnover should be calculated based on the entire fees paid by the clients to the modelling agencies for the modelling services (which include the fees payable to the models and their foreign mother agents), as these were the amounts directly affected by the infringement.

135. The Appellant's reliance on the *Employment Agencies* case is also misplaced, as the relevant product and geographic market was defined there as the provision of placement services of new Indonesian foreign domestic workers in Singapore. The relevant turnover was thus rightly derived from the turnover from the provision of placement services, and did not include the wages of the foreign domestic workers.

136. The Board is of the opinion that the CCS was correct in using the Appellant's gross turnover as the starting point and not net turnover for the calculation of the financial penalty imposed on the Appellant.

IX. ADDITIONAL GROUNDS OF APPEAL

137. In the written submissions tendered before the Board on 6 September 2012, the Appellant raised three further additional grounds of appeal. The first ground is that the amounts paid to the models and mother agent are very significant, and this is an important factor which the CCS should have taken into account. The second ground is that the involvement of Mr Tan, a director and shareholder of the Appellant, in the infringing conduct should not be taken as an aggravating factor. The third is that there was much uncertainty as to whether there was a breach of section 34 of the Act.

(1) Significant amount paid to models and mother agencies

138. On the first ground, the Appellant relies on the two cases of *(1) Barrett Estate Services Ltd (2) Francis Construction Ltd v Office of Fair Trading* [2011] CAT 9 (the "***Barret case***") and *Tomlinson* case. Both cases dealt with calculation of penalties in construction cases. In both cases, the UK Competition Appeal Board ("CAT"), among

other things, laid down the proposition that where a significant proportion of a construction undertaking's turnover comprises moneys passed through to sub-contractors that "*is a factor that is relevant when considering the overall impact of the [penalty] on the [undertaking].*" In particular, the Appellant relies on the following passage at [134] of the CAT's decision which says:

> "...[*t*]*he fact that a significant proportion of a construction undertaking's turnover comprises monies paid over to the subcontractor is a factor which affects the extent to which turnover can be regarded as a useful indicator of economic presence in this market . . . it is a factor that is relevant when considering the overall impact of penalties on these undertakings.*"

139. The Appellant contends that both the *Barrett* case and *Tomlinson* case support the view that due to the nature of construction industry, large payments made to sub-contractors via the main contractors (i.e. "monies passed through") should be a factor to be taken into account in assessing the appropriate penalty to be imposed on infringing undertaking. Similarly, in the present case, a significant amount of monies passed through to the models and mother agencies and this should be an important factor which the CCS should take into account. It is contended that the "pass through" fees as the invoiced amounts are more than three times the level of the Appellant's turnover.

140. This contention advanced by the Appellant is similar, in substance, to that raised by the appellants in the Appeal No 2 of 2012, in which the 4 modelling agencies, namely: Bees Work Casting Pte Ltd, Diva Model (S) Pte Ltd, Impact Models Studio and Looque Models Singapore Pte Ltd, appeal against the decision of the CCS, which is being decided by the Board ("***Bee's Work* appeal"**). It is contended there that in view of the large part of the turnover that was paid to the models, which is about [XX%] to [XX%] of their revenues, and the low margin the modelling agencies received, the CCS should give consideration to this as a mitigating factor and adjust the penalties appropriately. The appellants in Bee's Work appeal rely on the cases of *Barrett* case

and *Tomlinson* case and also the case of *Kier Group Plc and others v Office of Fair Trading* [2011] CAT 9. The Board accepts this contention of the appellants in that case, and on the basis of the facts there, reduces the penalties imposed on those appellants by [XX%]. Likewise the Board in this case, on the basis of the facts here, reduces the penalty imposed on the Appellant by [XX%]. It is not necessary to repeat the same reasoning here. Suffice it to refer to [131] to [137] of Bee's Work appeal.

(2) Director's Involvement

141. The CCS at [299] of the ID considers the involvement of Mr Tan (who is a director and shareholder of the Appellant) in the infringements as an aggravating factor and increases the penalty by [XX%]. On this point, the Appellant relies on the recent decision of the Board in the case of *SISTIC. Com Pte Ltd v the Competition Commission* [2012] (the "***SISTIC* case**") on involvement of directors and senior management in an infringement of section 47 prohibition. In that case, it was held that it is not in every case that the involvement of the director or senior management would apply as an aggravating factor. There the Board said at [352] the following:

> *"352 The Board notes that involvement of directors or senior management is one of the aggravating factors provided in the CCS Guidelines on Appropriate Amount of Penalty. But the question is whether the CCS is justified in applying this as an aggravating factor in this case. It seems to the Board that usually, if not invariably, directors or members of senior management are involved in every case of an infringement of section 47 prohibition. But, in the opinion of the Board it does not follow that in every such case the involvement of the directors or senior management, which is stated as one of the factor in the guidelines should or would apply as an aggravating factor in increasing the financial penalty. On the basis of the facts in the present case, the Board is unable to find any ground for applying this factor. The Board takes the view that this is not a correct application of an aggravating factor stated in the guidelines."*

142. The Appellant submits that in the present case, the involvement of Mr Tan should not be considered as an aggravating factor. It asserts that beginning from 2006, Mr Tan became more involved in as a full time freelance photographer and was not an active manager of the business of the Appellant and delegated the day to day management of the business to its employees. He would only be involved in the business and consulted, when the employees encounter significant issues.

143. The question for consideration is whether what the Board decided in the *SISTIC* case is applicable in this case.

144. It is contended by the CCS that what was said by the Board in the above passage is only applicable on the facts of the case in *SISTIC* and is not applicable here. It is true that the Board in the above passage said that on "*the basis of the facts in the* [*SISTIC*] *case, the Board is unable to find any ground for applying this factor*", i.e. the aggravating factor relating to the involvement of the directors and /or members of the senior management.

145. The Board is of the opinion that the Board's decision on this point decided in the *SISTIC* case is equally applicable here and the CCS ought not to treat the involvement of Mr Tan as an aggravating factor and increase the rate of penalty by [XX%]. Accordingly, the Board decides that this increase of [XX%] of the penalty for the Appellant shall be disallowed.

(3) Uncertainty of Infringing Conduct

146. Lastly, the Appellant contends that there was genuine uncertainty on the part of the Appellant as to whether the price recommendation and related discussions between the parties amounted to an infringing conduct under the Act. It was pointed out that when the AMIP was first set up, the Act was not in force yet. The Appellant relies on discussions and emails between the Parties that many of them were not aware that the price recommendations or price guidelines would be infringing the Act. It is submitted that this uncertainty should be taken into account as a mitigating factor.

147. The Appellant asserts that it was only in August 2010 when the CCS issued its decision in respect of the Singapore Medical Association's Guidelines on fees ("**SMA Decision**"), and that was the first decision issued by the CCS in respect of price recommendations and the Appellant submits that the fact that price recommendations were prohibited under the Act was not "patently clear" on its own, until the SMA Decision was released which was a year after the setting up of AMIP.

148. It was also contended that there was little or no appreciable on competition or widespread detrimental effect to consumers.

149. The Board does not accept the Appellant's contention that there was any genuine uncertainty in the law. In any case, assuming that there was some degree of uncertainty, the Board is of the view that relevant factor for this mitigating circumstance had already been duly taken into account by the CCS. The CCS after considering the parties' representations, had reduced the starting percentage from [XX%] to [XX%], which was a relatively low starting percentage, considering that the infringing conduct was one of price-fixing which would be considered to have an appreciable effect on competition: see CCS Guidelines on s 34 Prohibition at [2.19] and [2.20]).

150. As for the contention that the actions of the infringing parties had no significant effect on clients, competitors and third parties, the Board needs only to turn to paragraph 2.20 of the section 34 prohibition Guidelines, which provides that an agreement involving, among others, price fixing "*will always have an appreciable adverse effect on competition*". As the CCS contends, and the Board agrees, the Appellants are not appealing against the finding of liability, and following what is laid down in the section 34 prohibition Guidelines, the price-fixing agreement or concerted practice among the infringing parties is considered to have an adverse effect on competition and it is not necessary for the CCS to demonstrate any appreciable adverse effect on competition.

General Observations

151. The Board notes the following general submissions of the CCS. The CCS submits that cartel cases involving price fixing are serious infringements and should normally attract a higher starting percentage of relevant turnover for the purposes of calculating financial penalties. The CCS points out that it had made a [XX%] downward adjustment of the starting point percentage from [XX%] to [XX%] after receiving written and oral representations from the infringing parties in response to the proposed ID.

152. As such, the CCS submits that the penalty of $132,315 imposed on the Appellant is not excessive, disproportionate or unfair. It further submits that the penalty of [$XXX] proposed by the Appellant, which is calculated based on net revenue (excluding amounts paid to models and foreign mother agencies), would have little deterrent effect. To illustrate this, the CCS submit that the 2009 accounts of the Appellant show that director fees totaling [$XXX] were paid to the Appellant's two directors (who are also the Appellant's only two shareholders). If these fees had not been paid, the Appellant would have made profits of [$XXX] in 2009. Given that the penalty that is being imposed is in respect of an infringement period of 3.5 years as compared to the director fees over one year of [$XXX], the CCS submits that any reduction of the penalty will allow the Appellant and other like-minded businesses to internalise such a penalty as a business cost, and there would be no deterrent effect.

X. FINAL DECISION OF THE BOARD ON PENALTY

153. The Board now turns to consider what adjustment should be made to the penalty imposed on Ave in the circumstances of this case. First, the Board would make a reduction of [XX%] by reason of high turnover and low margin for the reasons discussed at [138] to [140] above. This is a mitigating factor for which the Board is of

the opinion that [XX%] reduction of the penalty should be allowed. Secondly, the Board for the reasons given at [141] to [145] disallows the increase of [XX%] imposed by the CCS by reason of the involvement by Mr Tan in the infringement.

154. For the reasons given above, the Board decides that the penalty of $132,315 imposed by the CCS on the Appellant be adjusted and be reduced by [XX%] of [$XXX] (being $22,053) to $110,262.

155. In making these adjustments, the Board bears in mind the general observation made by the CCS and is of the opinion that the reduced amount of penalty would still have the deterrent effect.

XI. COSTS AND INTERESTS

The Appellant's contention on costs

156. The Appellant contends that costs should be awarded if it succeeds, but no costs should be awarded if the appeal is dismissed.

157. The Appellant cited the case of *Independent Media Support Limited v Office of Communications* [2008] CAT 27 at [6] (also referred to in *Transtar* at [113]) which set out the following guiding principles on costs:

a. There is no fixed rule as to the appropriate costs order; how the Tribunal's discretion will be exercised in any case will depend on the particular circumstances of the case;
b. It follows that there is no presumption under rule 55 (which is in *pari materia* to Regulation 30(1) of the Competition (Appeals) Regulations) that costs should be borne by the losing party;
c. Subject to the first principle, a legitimate starting point is that a party who can fairly be identified as a winning party should ordinarily be entitled to recover his costs from the losing party.

d. The starting point is, of course, subject to a consideration of whether the winning party has incurred costs in arguing issues on which he has lost, or has acted unreasonably in the proceedings;

e. Other relevant considerations include whether it was reasonable for the unsuccessful party to raise, pursue or contest a particular ground of appeal; the manner in which the parties pursued or defended the appeal and whether any award of costs may frustrate the objectives of the Act.

158. The Appellant also cited the case of *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 11 ("***Apex***") (at [26]), in which the CAT highlighted that:

a. An important factor in exercising our discretion as to whether to award costs is the effect which a costs order may have on an undertaking which also has to meet the impact of the penalty and its own costs.

b. This factor may be particularly relevant in the context of small undertakings which may be deterred from bringing reasonable appeals from decisions of the OFT.

c. A further relevant factor may be the extent of the potential costs exposure in relation to the amount of the penalty.

d. There is an evident public interest that potential appellants should not be unduly deterred from bringing an appeal by the risks of a costs order against them.

159. Based on these principles, the Appellant submits that it should be entitled to recover costs from the CCS should it succeed in this appeal. It further highlights the case of *GISC v. Director of Fair Trading* [2002] CAT 2 ("***GISC***") in which the CAT highlighted that "*the fact that a successful appellant has been put to expense in exercising his rights under the Act is a factor relevant to the exercise of our discretion, even though we accept that it is not necessarily a decisive factor*" (*GISC* at [49]). The Appellant urges the Board to consider the expense and time spent on the appeal which in its view would not have been necessary if the CCS had thoroughly analysed the

factual matrix and applied the case law soundly. The Appellant also submits that there is nothing in the conduct of its present appeal that would make it unfair for the Appellant to be awarded its costs.

160. The Appellant also urges the Board to exercise its discretion not to direct and/or order any costs or interests to its prejudice should it not be successful in its appeal. The Appellant cites the CAT's statements in *Apex* and urges the Board to consider that the Appellant is a small enterprise employing less than 10 personnel.

The CCS's contention on costs

161. The CCS also cites and relies on the decision of *Independent Media* which sets out the guiding principles on costs. The CCS however disagrees with the Appellant's submission that if the Appellant should fail entirely in its appeal, the Board should not order costs or interests to the prejudice of the Appellant. The CCS submits that costs should be left to the Board's discretion, depending on the merits of the arguments.

The Board's Decision on Costs

162. Regulation 30(1) of the Competition (Appeals) Regulations provides that the Board may, in relation to any appeal proceedings, award costs in its discretion.

163. In the its previous decisions, namely, *Transtar & Anor v CCS* (Appeal No 3 of 2009) and *SISTIC*, the Board respectfully followed and adopted the following principles on costs as laid down in the case of *Independent Media Support Limited v Office of Communications* [2008] CAT 27:

> "*(a) There is no fixed rule as to the appropriate costs order; how the Board's discretion will be exercised in any case will depend on the particular circumstances of the case*

(b) *It follows that there is no presumption under rule 55 (which is in pari materia to Regulation 30(1) of the Competition (Appeals) Regulations) that costs should be borne by the losing party;*

(c) *Subject to the first principle, a legitimate starting point is that a party who can fairly be identified as a winning party should ordinarily be entitled to recover his costs from the losing party;*

(d) *The starting point is, of course, subject to a consideration of whether the winning party has incurred costs in arguing issues on which he has lost, or has acted unreasonably in the proceedings;*

(e) *Other relevant considerations include whether it was reasonable for the unsuccessful party to raise, pursue or contest a particular ground of appeal; the manner in which the parties pursued or defended the appeal and whether any award of costs may frustrate the objectives of the Competition Act.*"

164. The Appellant succeeds in the appeal only in part, and there are various points of arguments where it fails. Having regard to all the circumstances of this case, the Board is of the opinion that a fair order as to costs is that each party should bear and pay its own costs. The Board so orders.

XII. INTEREST

165. On the question of interest, Regulation 31 of the Competition (Appeals) Regulations provides:

"***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."

166. Order 42 rule 12 of Rules of Court provides:

> "***Interest on judgment debts (O. 42, r.12)***
>
> *12. Except when it has been otherwise agreed between the parties, every judgment debt shall carry interest at the rate of 6% per annum or at such other rate as the Chief Justice may from time to time direct or at such other rate not exceeding the rate aforesaid as the Court directs, such interest to be calculated from the date of judgment until the judgment is satisfied:*
>
> *Provided that this rule shall not apply when an order has been made under section 43(1) or (2) of the Subordinate Courts Act (Chapter 321).*"

167. The Honourable the Chief Justice has directed that the default interest rate shall be 5.33% per annum with effect from 1 April 2007 until further notice: Paragraph 77 of the Supreme Court Practice Directions.

168. Relying on the Board's previous decisions to order the appellant to pay interest on the penalty at a rate of 5.33% from the date of the Board's decision to the date of payment, the CCS asks that the same orders be made.

169. In the previous cases of the *Coach Operators* and *SISTIC* case, the Board ordered the appellants there to pay interest on the penalty at the rate of 5.33% per annum from the date of the decision to the date of payment. Similarly in this case, the Board is of the view that the Appellants should pay interest at the same rate and accordingly orders that the Appellants pay interest on the penalty at the rate of 5.33% from the date of this decision to the date of payment.

XIII. ORDERS

170. For the reasons given above, the Board hereby allows the appeal on the financial penalty in part and orders that the financial penalty imposed on the Appellant be reduced to $110,262.

171. The Board hereby orders that the Appellant pay the amount of penalty aforesaid and pay interest thereon at the rate of 5.33% per annum from the date of this decision to the date of payment. The Board further orders that each party pay its own costs and expenses of or incidental to this appeal.

Dated this 10th day of April 2013

Thean Lip Ping Chairman	Goh Phai Cheng Member	Tan Kim Song Member	Foo Chee Peng Jane Member