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IN THE COMPETITION APPEAL BOARD OF THE REPUBLIC OF SINGAPORE

Appeal Nos. 1 and 2 of 2009

In the matter of Case No. CCS 500/003/08: Notice of Infringement Decision issued by the Competition Commission of Singapore, Price Fixing in Bus Services from Singapore to Malaysia and Southern Thailand, 3 November 2009

Between

1. **Konsortium Express and Tours Pte Ltd**
2. **Five Stars Tours Pte Ltd**
3. **GR Travel Pte Ltd**
4. **Gunung Travel Pte Ltd**

... Appellants

And

The Competition Commission of Singapore

... Respondent

DECISION

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I INTRODUCTION

1. On 3 November 2009, the Competition Commission of Singapore (the "**CCS**"), having conducted investigations on the operations of certain coach operators in Singapore and their association, the Express Bus Agencies Association ("**EBAA**"), between June 2008 and September 2009, issued and handed down its infringement decision (the "**ID**") holding that 16 coach operators and the EBAA had breached section 34 of the Competition Act (Cap. 50B, 2006 Rev Ed) (the "**Act**") by engaging in price-fixing of express bus or excursion bus services between Singapore and Malaysia or Southern Thailand, sold in Singapore, in the form of either standalone bus tickets or as part of

coach package tours. In the ID, the CCS found that the 16 coach operators entered into or reached the following agreements:

(a) agreement to fix a minimum selling price ("**MSP**") for the sale of one-way express bus tickets ("**MSP Agreement**");

(b) agreement to fix a fuel and insurance ("**FIC**") surcharge ("**FIC Agreement**").

2. The CCS ordered the coach operators and the EBAA to terminate the price-fixing arrangements with immediate effect and imposed financial penalties on each of them.

3. With respect to the abovenamed Appellants, the penalties imposed on them are as follows:

Party	**Period of Infringement – MSP Agreement**	**Period of Infringement – FIC Agreement**	**Financial Penalty (S$)**
Konsortium Express & Tours Pte Ltd ("**Konsortium**")	1 January 2006 to 24 July 2008	1 January 2006 to 24 July 2008	337,635
Five Stars Tours Pte Ltd ("**Five Stars**")	1 January 2006 to 24 July 2008	1 January 2006 to 24 July 2008	450,207
GR Travel Pte Ltd ("**GR Travel**")	1 January 2006 to 31 December 2007	1 January 2006 to 31 December 2007	52,432
Gunung Raya Travel Pte Ltd ("**Gunung Raya**")	1 January 2006 to 31 December 2007	1 January 2006 to 31 December 2007	76,668

4. Against the ID, the Appellants appealed to the Competition Appeal Board (the "**Board**") under section 71 of the Act, namely:

   (a) Konsortium filed its appeal in Appeal No 1 of 2009 on 28 December 2009, and

   (b) Five Stars, GR Travel and Gunung Raya filed their appeal in Appeal No 2 of 2009 on 30 December 2009.

5. In both the appeals, the Appellants appeal against liability and the quantum of financial penalty imposed on them respectively. In a separate appeal filed by two of the coach operators, Transtar Travel Pte Ltd ("**Transtar**") and Regent Star Travel Pte Ltd ("**Regent Star**") on 31 December 2009, namely, Appeal No. 3 of 2009, these operators appeal against only the quantum of financial penalties imposed. The other 10 coach operators and the EBAA did not file any appeal against the ID.

II RELEVANT BACKGROUND FACTS

6. The Appellants are in the business of operating express bus services between Singapore and Malaysia, and are members of the EBAA at various points in time. The Appellants are also in the business of providing coach package tours to Malaysia or Southern Thailand, and the prices of the bus tickets would be incorporated into the prices of the coach package tours

7. The EBAA was established in October 2003. Its membership is open to all express bus companies or appointed agencies registered with and authorised or approved by the Land Transport Authority Singapore ("**LTA**"). The Executive Committee of the EBAA ("**Exco**") originally comprised 11 members. This was reduced to 9 members from 11 October 2006. According to EBAA's press release made on 15 October 2007, the

EBAA members who operate express bus services commanded a total of 60% market share of the coach traffic between Singapore and Malaysia.

8. The Appellants have been members of the EBAA since the latter's inception. Further:

(a) Konsortium's director and shareholder, Joe Lim Ching Chwee ("**Joe Lim**"), was the President of the EBAA from October 2003 to 26 April 2006, and its other director and shareholder, Raymond Lim Cheng Tee ("**Raymond Lim**") was a member of the Exco from 26 April 2006 to 12 November 2008;

(b) Five Stars' director and shareholder, Lim Cheng Onn Johnny ("**Johnny Lim**") was a member of the Exco from October 2003 to 26 April 2006, and was the President of the EBAA from 26 April 2006 to 12 November 2008;

(c) GR Travel's director and shareholder, Lim Cheng Chuan Ken ("**Ken Lim**"), was a member of the Exco (Assistant Secretary) from October 2003 until 19 February 2008, when GR Travel's membership from EBAA was terminated; and

(d) Gunung Raya was represented by one Leong Lean Pong on the Exco from October 2003 until 6 April 2006. From 26 April 2006 to 12 November 2006, Lim Cheng Hoe Vincent ("**Vincent Lim**") was Gunung Raya's representative on the Exco.

9. Joe Lim, Raymond Lim, Johnny Lim, Ken Lim and Vincent Lim are brothers, and are indirect shareholders of three of the Appellants, Five Stars, GR Travel and Gunung Raya

10. The MSP was first raised at the 6th Exco meeting held on 20 April 2004 under an item titled "*Standardise selling price*", which was scheduled to be discussed at the next meeting. At the following Exco meeting on 6 October 2004, the issue of a MSP for express bus tickets was further discussed:

> "**f. Standardize selling fare for Express Bus Tickets**
>
> A minimum selling price is to be agreed by the members and thereafter in the event of any down sell due to promotional activities; a written notice is required to inform the association."

During the 8th Exco meeting held on 3 November 2004, the members were asked to submit their minimum selling price set by the LTA to the Secretary with a copy to Joe Lim, the then President before deciding on the MSP issue.

11. The next mention of the MSP was in the minutes of the 12th Exco meeting on 5 April 2005. Yap Chor Seng ("**Sebastian Yap**") of Regent Star proposed a recommendation to all members to increase their fares to a minimum of $25 for one-way express coach travel to Kuala Lumpur ("**KL**") to take effect from 1 June 2005 because of the increase in transport fares in Malaysia. This proposal was repeated by Sebastian Yap at the next Exco meeting on 4 May 2005; however, it was stated in the minutes that "*the decision still lies within the member itself and whether it is within their ability to do so*".

12. At the 14th Exco meeting on 1 June 2005, the Appellants, and six (6) other coach operators, namely, Alisan (Singapore) Pte Ltd ("**Alisan**"), Enjoy Holiday Tour Pte Ltd ("**Enjoy**"), Sri Maju Tours & Travel Pte Ltd ("**Sri Maju**"), Grassland Express &

Tours Pte Ltd ("**Grassland**"), Regent Star and Transtar agreed to the following fares as "*recommended Selling prices from Singapore to different destinations*":

Singapore to Melaka	$18
Singapore to KL	$25
Singapore to Ipoh	$33
Singapore to TaiPing	$35
Singapore to Butterworth	$37
Singapore to Penang	$38

13. At the same meeting, the following suggestion was made by Joe Lim:

> "that all EBAA members are to implement a coach tax (fuel + insurance) on all the tickets that they sold. This will bring in extra income for all members and also to EBAA. In addition, it will benefit the passenger because insurance will be included in the tax. The suggested selling price was at $2 per ticket. All members are supposed to decided [sic] whether they want the tax to be build [sic] in or paid as additional by the passenger and this is to be finalized by the next meeting".

14. At the 15th Exco meeting held on 6 July 2005, the rates for the coach tax at $2 for one-way journey and $3 for two-way were agreed. The relevant minutes stated the following:

> "As brought up in the previous meeting, all members agreed on the implementation of the coach tax when passengers purchase their coach tickets. It was emphasize [sic] that the implementation will increase revenue and decrease the burden for all members. It is currently set at $2 for one-way ticket and $3 for two-way ticket. However, EBAA is supposed to check with LTA and CASE in any case it would be violating any regulation set by the

government. The percentage that EBAA will be earning shall be discussed in the later part."

15. It was later agreed during the 16th Exco meeting on 7 September 2005 that the coach tax would be implemented on 1 November 2005, and that it would be renamed the fuel and insurance surcharge i.e. FIC, and launched officially at the Travel Malaysia exhibition.

16. On 5 October 2005, at 17th Exco meeting, the Exco agreed on the percentage earned by the EBAA from the sale of the FIC coupons. The minutes state:

> "As brought up in the previous meeting, all members agreed on the implementation of the coach tax when passengers purchase their coach tickets. It was emphasize [sic] that the implementation will increase revenue and decrease the burden for all members. It is currently set at $2 for one-way ticket and $3 for two-way ticket. It will start effect from 1st of November and EBAA will launch it officially during the "Travel Malaysia" exhibition. The ticket will be given the name, "F1C" (Fuel & Insurance Charge). EBAA is entitled to earn 25%; i.e. One-way: 50 cents and Two-way: 75 cents. From the revenue earned, EBAA will then pay the insurance company based on 30 cents and 50 cents respectively. The area of insured will cover up to Hatyai."

17. The implementation of the FIC at $2 for a one-way bus ticket and $3 for a two-way bus ticket with effect from 1 November 2005 by members of the EBAA was reported in the newspapers on 13 October 2005. The article described the escalating fuel cost and quoted Joe Lim as saying, in his capacity as the President of the EBAA and director of Konsortium, that he had no choice but to transfer part of the escalating fuel

costs to consumers as the companies were unable to bear the increasing fuel costs. It was further stated that the FIC would include an insurance fee that would provide passengers with insurance coverage for accidents as well as property loss occurring during the journey.

18. The FIC was not implemented by all EBAA members as at 1 November 2005. The President of the EBAA, Joe Lim sent an email on 2 November 2005 to the following members: Transtar, GR Travel and Five Star urging them to purchase the FIC coupons and to start implementing the FIC. This email was later forwarded to all the EBAA members on 4 November 2005. The first two paragraphs stated as follows:

> "Fuel & Insurance Charge (FIC) is a effort [sic] created by the association, the aim is to help the members to have some extra cash to offset the ever-high diesel that Malaysia is charging.
>
> Since last few meetings, all members has been [sic] **briefed and agreed** that FIC is going to implementing [sic] wef 1 Nov 2005, press conference and the recent Travel Malaysia 2005 has also mentioned about the issue and by now every public, coach-takers are fully aware that buses charge Fuel surcharge too, after the Air and Cruise transport."
>
> [Emphasis is original]

19. The 18th Exco meeting held on 9 November 2005 was attended by the Appellants (save for Gunung Raya), Alisan, Enjoy, Grassland, Sri Maju, Regent Star and Transtar. The minutes of the meeting recorded, among other things, the following:

> "a **Implementation of Coach Tax**

The implementation of the coach tax (FIC) has effectively commenced on the 1st November 2005. However, Joe brings up that there are some members who have yet to order the coupons. It was emphasize [sic] that the implementation will increase revenue and decrease burden for all members. All members should therefore, take action accordingly as the association serve [sic] as a platform for every member. .....

.....

b. Revised of fare

As agreed by all members, the following are the recommended selling prices from Singapore to different destinations after the implementation of the FIC:

Singapore to Melaka	> $20
Singapore to KL	> $27
Singapore to Ipoh	> $35
Singapore to Taiping	> $37
Singapore to Butterworth	> $39
Singapore to Penang	> $40"

20. As all the fares reflected an increase of $2 since June 2005, it appeared that the FIC was incorporated into the selling prices. Parties who had yet to order FIC coupons were urged to fax their orders as soon as possible, and it was emphasied during the meeting that "*the implementation will increase revenue and decrease burden for all members*". To aid in the implementation of the FIC, the EBAA also issued an authorisation letter explaining the FIC which was to "*defray the increased operational fuel costs*".

21. Subsequently, in a circular dated 4 March 2006 sent by Joe Lim to the other EBAA members, reference was made to the 20th Exco meeting on 2 March 2006 where the Exco had "*with 100 percent agreement*" decided to increase the MSP for the following one way express tickets:

"Singapore to Melaka	$22.00
Singapore to KL	$29.00
Singapore to Genting	$35.00
Singapore to Ipoh	$36.00
Singapore to Simpang/Taiping	$37.00
Singapore to Butterworth/Penang	$39.00"

It was also stated in the circular that these revised fares had incorporated the FIC and would take effect on 10 March 2006. The circular was sent to all the members including the Appellants and was expressed to be "*for their compliance and understanding*".

22. On 31 May 2006, Johnny Lim (then the President of EBAA) circulated a proposal to implement a rebate system based on the total value of FIC coupons purchased from EBAA by the members. Ken Lim proposed that the resolution for such a rebate system be circulated to all members for their approval. Accordingly, an email was sent seeking the members' approval or rejection of the resolution by 15 June 2006.

23. On 20 June 2006, a letter was sent to all EBAA members informing them that the Appellants, Alisan, Enjoy, Grassland, Sri Maju, Regent Star and Transtar had agreed to the resolution. The letter also set out a table of the purchases of one-way and two-way FIC coupons by the EBAA members as at 20 June 2006.

24. The minutes of the Exco meeting on 21 June 2006 recorded the agreement of the EBAA members to the rebate system. It was also recorded in the minutes under the item *"Resolution for FIC Rebate"* that one Michael Seng (Enjoy's representative) had expressed his unhappiness over the fact that some EBAA members (for instance, Alisan) had sold tickets below the MSP. In response, Yap Chor Hwee Elson (**"Elsan Yap"**), Transtar's representative on the EBAA, proposed a vote of no confidence for Alisan to be removed from the Exco. The Chairman of the EBAA, Johnny Lim, decided to allow Alisan to explain its position at the next meeting, failing which action would be taken against it. These minutes were circulated to the EBAA members, including Alisan's representative, on 10 August 2006. At the next Exco meeting on 15 August 2006, Alisan informed the Exco that it intended to quit the Exco and the EBAA due to a shortage of manpower and internal problems at Alisan.

25. After 15 August 2006, there were other discussions and Exco meetings but no reference was made in the minutes to the MSP Agreement. However, there was clear evidence of the FIC Agreement, as the spreadsheets of the purchases of the FIC coupons continued to be attached to the agenda for the Exco meetings.

26. On 2 October 2007, the Exco held a meeting and agreed to a revision of the FIC. Previously, the price of a FIC coupon for one-way tickets is $2 (including $0.50 which constituted the insurance cost paid by the member to the EBAA) and for two-way tickets is $3 (including $0.75 which constituted the insurance cost paid by the member to the EBAA). The EBAA itself paid to the insurance company the insurance cost of $0.30 for a one way ticket and $0.50 for a two-way ticket. After the Exco

meeting, various members of the Exco corresponded on the appropriate price increase for the FIC.

27. Just 10 days later, by an email dated 12 October 2007, it was proposed that the price of the FIC coupon be increased to $3 for one-way tickets (including $0.65 which was the insurance cost paid by the member to the EBAA) and $5 for two-way tickets (including $1.00 which was the insurance cost paid by the member to the EBAA). The EBAA in turn paid the insurance company the insurance cost of $0.40 for a one-way ticket and $0.65 to for two-way tickets.

28. On 15 October 2007, the EBAA issued a press release in which it was announced as follows:

> "In lieu of the rising fuel prices, EBAA has announced that with effect from 1st December 2007, there would be an increase in [FIC] surcharge from $ 2 to $3 for one-way tickets and from $3 to $5 for two way tickets departing from Singapore. This is applicable for all tickets purchased from its member companies. The FIC covers Fuel Surcharge and Insurance Protection to the customers as a value-add service. The travel insurance would provide additional benefits and increase in sum assured to the passengers."

29. This was followed by various emails and letters, and was reported in the press. On 21 November 2007, there was an AGM of the EBAA, and the minutes of that meeting recorded, among other things, the following:

"13(b) Revised FIC Surcharges The meeting noted that **the revised FIC surcharges shall be implemented with effect from 1 December 2007**. All EBAA members with Travel Agency (TA) permit are obligated to sell the FIC to their customers for all tour and coach bookings made at their sake counters.

14 Chairman requested all members to take advantage of the FIC to offset their operational and maintenance cost due to the increase in fuel prices. The FIC also provides comprehensive insurance protection and coverage to the customers."

[Emphasis added]

30. On 22 November 2007, an authorisation letter was sent from EBAA to the members stating that the FIC was to "*defray the increased operational fuels costs, with effect from 1st December 2007*".

31. There was a second revision of the FIC on 5 June 2008. Although there were no minutes of the Exco meeting, a circular dated 5 June 2008 was sent by the EBAA to its members. The relevant extracts of the circular are reproduced below whereby a higher FIC charge was imposed for travels to further destinations:

"In view of the increase in cost of diesel fuel pump price of RM$1.000 a litre as announced by the Malaysian authority.. [Exco] has conveyed a meeting on the same day ... and announced with immediate effect, there will be an increase in [FIC] surcharges to be collected from the passengers as follows:

Tier	From	To	Additional Cost	1-Way	Return	2-Way
1	SIN	Malacca	RM$150 > RM$10	$5	$4	$9
	SIN	KL	RM$250 > RM$17	$8	$5	$13
	SIN	Genting Highland	RM$330 > RM$20	$9	$5	$14
x2	SIN	Ipoh / Tg. Intan	RM$420 > RM$26	$10	-	-
	SIN	Taiping / Rantau	RM$550 > RM$34	$13	-	-
	SIN	Penang	RM$650 > RM$40	$14	-	-
	SIN	Alor Star / Hatyai	RM$740 > RM$47	$16	-	-

"

32. The details of the new FIC rates were published on the EBAA's website, and the FIC rebates spreadsheet compiled by the EBAA shows the purchase of the FIC coupons by the EBAA members after 5 June 2008.

33. Following the commencement of CCS's investigations in June 2008, the Exco had a meeting on 23 July 2008. The minutes stated:

> "12. In view of the ongoing investigation by CCS, the committee members has [sic] decided on the followings:
>
> (a) As a reminder to all members, the minimum selling prices of express bus tickets to various locations are merely recommended selling prices. Any decision to sell at the recommended price or otherwise is entirely at the discretion of the members, depending on the type of coach they operate and their respective costs structures.

(b) The committee recommended separating the sale of the [FIC] to members for their onward sale to customers:

(i) EBAA will continue to negotiate and obtain competitive insurance packages for sale to members. Members may determine the appropriate price, if any, to charge for such insurance when they set their respective express bus ticket prices for their onward sale to customers;

(ii) EBAA will no longer provide recommendation on fuel charges. Members are free to decide on their own whether they wish to impose a fuel charge on their customers and, if so, the appropriate quantum calculated based on their own individual cost structures.

13. As an interim before the new stock of printed coupons are ready to be issued, all existing coupons will be issued with stickers with the wordings "INSURANCE COUPON" to be pasted over the existing wordings "FUEL & INSURANCE CHARGE". These stickers will be issued to all members when the printed stickers are ready for collection."

34. This was followed by a circular dated 24 July 2008 sent by the EBAA to its members which sets out the decision made on 23 July 2008 during the Exco meeting:

"1. Please be informed that at the EBAA Committee meeting held on 23 July 2008, the committee members have decided as follows:

(a) As a reminder to all members, the minimum selling prices of express bus tickets to various locations are merely recommended selling prices. Any decision to sell at the recommended price or otherwise is entirely at the discretion of the members, depending on the type of coach they operate and their respective costs structures.

(b) The committee recommended separating the sale of the [FIC] to members for their onward sale to customers:

(i) EBAA will continue to negotiate and obtain competitive insurance packages for sale to members. Members may determine the appropriate price, if any, to charge for such insurance when they set their respective express bus ticket prices for their onward sale to customers.

(ii) EBAA will no longer provide recommendation on fuel charges. Members are free to decide on their own whether they wish to impose a fuel charge on their customers and, if so, the appropriate quantum calculated based on their own individual cost structures."

35. At various times from June 2008 to September 2009, as part of the CCS's investigations, the Appellants' representatives, EBAA's representatives and the representatives of the other EBAA members were interviewed by the CCS.

III DECISION OF THE CCS

36. The CCS found that there was an agreement reached on 1 June 2005 between the Appellants, Alisan, Enjoy, Grassland, Sri Maju, Regent Star and Transtar to fix the prices of the bus tickets i.e. the MSP Agreement. It held that the MSP Agreement was first concluded on 1 June 2005, and continued to 2006 and beyond 24 July 2008. The CCS noted that these 10 coach operators (save for Alisan who became a member in 2005) were members of the EBAA since its inception, and were all involved in the Exco meetings held on 1 June, 9 November 2005 and 2 March 2006 (ID at [161]-[178]).

37. The CCS also found that there was an agreement to fix the prices of the FIC between the Appellants and 12 other members of the EBAA, i.e. the FIC Agreement. It held that the FIC Agreement was first concluded on 6 July 2005 and was subsequently revised upwards twice on 1 December 2007 and 5 June 2008, and continued until 24 July 2008 when the EBAA sent the letter to its members (ID at [289]-[294], [349]-[372], [402]-[416]).

38. At paragraphs 436 and 437 of the ID, the CCS said as follows:

> "436. CCS is satisfied that there is sufficient evidence in paragraphs 100 to 433 above to find that the Parties listed at paragraph 1 above, infringed the section 34 prohibition by entering into agreement(s) and/or concerted practices to fix prices in respect of the separate infringements listed in paragraph 181 and 434 to 435 above. CCS therefore makes a decision that the Parties have infringed the section 34 prohibition and imposes penalties on the Parties [the 16

companies], listed at paragraph 1 above in respect of participation in the MSP agreement and the FIC agreement, as applicable. Although CCS has analysed the MSP and FIC agreements separately for the purpose of liability, as the FIC was incorporated into the MSP, CCS will, where parties were involved with both MSP and FIC agreements, consider both together and impose a single penalty.

437. On the basis of the evidence set out at paragraphs 100 to 433 above, CCS has considered the relevant duration for each of the infringements. The duration of an infringement is of importance in so far as it may have an impact on the penalty that may be imposed for that infringement. CCS considers that the MSP agreement commenced on or about 1 June 2005 and was continuing in operation as at 24 July 2008, whilst the FIC agreement commenced on or about 1 June 2005 and continued until 24 July 2008. Therefore, CCS considers that the duration of the MSP and FIC infringements are from 1 January 2006 until at least 24 July 2008 when the EBAA circulated the letter of 24 July 2008, see paragraph 170 and 416."

39. The CCS held that, as the MSP and FIC Agreements continued in operation after 1 July 2005, Regulation 3(2) of the Competition (Transitional Provisions for s 34 Prohibition) Regulations 2005 ("**Transitional Provisions**") does not apply, and the parties are not immune from penalties under the Act. The CCS directed that the parties terminate the MSP and FIC Agreements with immediate effect, and imposed on the parties financial penalties under section 69(2)(d) of the Act (ID at [438]-[439]).

40. In imposing the financial penalty, the CCS considered 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) of the Act, for the purpose of subsection (2)(d), i.e. in considering imposing a penalty, the CCS may impose a financial penalty "*only if it is satisfied that the infringement has been committed intentionally or negligently*". On this issue, the CCS considered the cases of *Vereniging van Samenwerkende Prijsregelende Organisation in de Bourwnijverheid (SPO) and Others v Commission of European Communities* (Case C-137/95) [1996] ECRI-1611; *Napp Pharmaceutical Holdings Limited and Subsidiaries v Director General of Fair Trading* [2002] CAT 1, [2002] Comp AR 13 at paragraphs 452 to 458 and the *Pest Control Case* which the CCS had decided in 2008. The CCS held that the circumstances in which CCS might find that an infringement has been committed intentionally include the following (ID at [444]-[445]):

> "(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."

41. The CCS further held that ignorance or a mistake of law is no bar to a finding of intentional infringement under the Act and that 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. It took 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 [446]).

42. The CCS held that by reason of the very nature of the agreements and/or concerted practices involving price fixing, each of the EBAA members, including the Appellants, must have been aware that the agreements and/or concerted practices in which they participated had the object of preventing, restricting or distorting competition. The CCS was therefore satisfied that each of the EBAA members including the Appellants intentionally infringed the section 34 prohibition (ID at [447]).

43. The CCS referred to its Penalty Guidelines. Paragraph 2 of the Penalty Guidelines provides that, in calculating the amount of financial penalty to be imposed, the CCS will take into consideration the following in calculating the appropriate level of fines (ID at [452]-[454]):

(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 European Commission ("**EC**") and the United Kingdom Office of Fair Trading ("**OFT**").

44. The principle is to start with a base figure, which is worked out 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 and aggravating and mitigating considerations (ID at [455]).

Seriousness of the infringement

45. The CCS considered that cartel cases involving price-fixing, bid-rigging, market sharing and limiting or controlling production or investment are especially serious infringements and should normally attract a percentage of the relevant turnover that is on the high end. However, the actual percentage that the CCS adopt will varies depending on the circumstances of the case (ID at [456]-[457]).

46. The subject matter of the MSP Agreement is the sale of one-way express bus tickets from Singapore to Malacca, Kuala Lumpur, Genting, Ipoh, Simpang/Taiping and Butterworth/Penang, while the subject matter of the FIC Agreement is the sale of one-way express bus tickets, two-way express bus tickets and coach package tours to Malaysia and Southern Thailand (ID at [458]).

47. The higher the combined market share of the infringing parties, the greater the potential to cause damage to the affected markets. Further, a high market share figure generally indicates a more stable agreement/concerted practice as third parties find it more difficult to undercut and possibly undermine the incumbents. These factors affect the base amount. In the present case, the CCS noted that according to the press release made on 15 October 2007, the EBAA members command 60% of market share of Singapore - Malaysia coach traffic (ID at [33], [459]). As for coach package tours, the CCS noted that there are no ridership statistics on the volume of passengers that the members of the EBAA carried (ID at [459]).

48. It is not practically feasible for the CCS to quantify the amount of loss caused to passengers as a result of the MSP and FIC Agreements due to the unavailability of the actual pricing information under the "counterfactual" scenario, i.e. the level at which the focal products would have been priced during the infringement period, had the members of the EBAA not engaged in fixing the MSP and FIC (ID at [461]).

49. Having regard to the nature of the focal products, the structure of the market, the market share of the EBAA members, the effect of the infringements on customers, competitors and third parties, the CCS considered it would be appropriate to fix the starting point percentage of the relevant turnover nearer the lower end. As such, the CCS considers that a starting point of [XXX]% of the relevant turnover for each of the EBAA members involved in the MSP and the FIC Agreements and a starting point of [XXX]% of the relevant turnover for each of the EBAA members involved in only the FIC Agreement is appropriate in the circumstances. In particular, the CCS noted that the implementation of the FIC Agreement was not done surreptitiously but publicised

to customers, and that the FIC Agreement involves price-fixing on a component of the total price of the bus tickets (ID at [462]).

Relevant turnover

50. The relevant turnover in the last business year would be considered when the CCS assessed the impact and effect of the infringement on the market, i.e. the last business year preceding the date on which the decision of the CCS was taken, or if figures were not available for that business year, the one immediately preceding it (ID at [463]).

51. For the purposes of calculating the penalties, CCS defined the relevant product and geographic markets to comprise the focal products and focal area only, i.e. the sale of express bus or excursion bus services between Singapore and Malaysia or Southern Thailand, sold in Singapore, in the form of either standalone bus tickets or as part of coach package tours (ID at [88]-[98], [464]).

52. As the Appellants are involved in both the MSP and the FIC Agreements, the relevant turnover applicable to the MSP Agreement would also form part of the turnover for the FIC Agreement. Therefore, for the EBAA members involved in both the MSP and the FIC Agreements, the CCS will impose only one penalty (ID at [466]-[467]).

53. As the price of coach package tours is made up of the aggregate of the cost of the bus ticket (two-way), FIC, accommodation, meals and tour guides, only the portion that is attributable to transportation and the FIC should form part of the relevant turnover (ID at [468]). The CCS adopted the lowest percentage i.e. 24% as a representative

percentage for all the EBAA members that sold coach package tours to which the FIC was charged. The CCS further discounted this percentage by rounding it down to 20%. Therefore, 20% of the turnover obtained from the sale of coach package tours will form part of the relevant turnover (ID at [468]-[471]).

Duration of the infringement

54. With regard to the duration of an infringement, the Penalty Guidelines provides that an infringement over a part of a year may be treated as a full year for the purpose of calculating the duration of an infringement. Therefore, where the EBAA members are liable to infringement for a period of less than 1 year, the CCS will consider the duration for the purposes of determining penalties as 1 year (ID at [490]). For parties whose duration was more than 1 year, the CCS will round down the duration to the nearest half year (ID at [493]).

55. The relevant period of infringement for Konsortium and Five Stars for the MSP and FIC Agreements was from 1 January 2006 (when the Act came into force) to 24 July 2008 while the period of infringement for GR Travel (who ceased business in January 2008) and Gunung Raya (whose operations were merged with Five Stars with effect from 1 January 2008) was from 1 January 2006 to 31 December 2007 (ID at [37]).

Other relevant factors

56. The CCS considered that the penalty may be adjusted as appropriate to achieve its policy objectives, particularly the deterrence of the EBAA members and other undertakings from engaging in anti-competitive practices, such as price fixing. The CCS considered that price fixing is one of the most serious infringements of the Act

and as such, penalties imposed should be sufficient to deter undertakings from engaging in price fixing (ID at [494]).

57. The CCS considered that, if the financial penalty imposed against any of the parties after the adjustment for duration has been taken into account is insufficient to meet the objective of deterrence, the CCS would adjust the penalty to meet the objective of deterrence (ID at [495]-[497]).

58. While the financial position of the parties and their ability to pay is a relevant consideration in the assessment of financial penalties, the CCS considered 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 [499]-[503]).

Aggravating and mitigating factors

59. The CSS will consider the presence of aggravating (such as involvement of directors or senior management) and/or mitigating factors, and make adjustments when assessing the amount of financial penalties (ID at [504]-[506]).

Penalties for the Appellants

Konsortium

60. Konsortium's relevant turnover is $[XXX]. As Konsortium was a party to the MSP and the FIC Agreements, the percentage of [XXX]% of the relevant turnover was applied, giving a starting point in the sum of $[XXX] (ID at [568]-[570]).

61. As Konsortium was involved in the infringements from 1 January 2006 until 24 July 2008, upon applying the multiplier of 2.5, the financial penalty of **$337,635** was arrived at (ID at [571]).

62. The CCS noted that Konsortium is one of the bigger players in the EBAA. It made a [XXX] $[XXX] in 2007. The CCS noted that the figure reached after adjustment for duration is a significant sum in relation to Konsortium because both the relevant turnover and the figure for the starting point represent an adequate proportion of Konsortium's total turnover in 2007. Accordingly, the figure is sufficient to act as an effective deterrent to Konsortium and other undertakings which may consider engaging in price-fixing agreements, and no further adjustments to the penalty would be made (ID at [572]).

63. The CCS also found there to be no need to adjust for aggravating and mitigating circumstances, as the aggravating factor of the involvement of senior management was cancelled out by the mitigating factor of the co-operation rendered by Konsortium and its representatives (ID at [573]).

64. The financial penalty also does not exceed the maximum financial penalty that the CCS can impose in accordance with s 69(4) of the Act, i.e. $[XXX] (ID at [574]).

Five Stars

65. Five Stars's relevant turnover is $[XXX]. As Five Stars was a party to the MSP and the FIC Agreements, the percentage of [XXX]% of the relevant turnover was applied, giving a starting point in the sum of $[XXX] (ID at [531]-[533]).

66. As Five Stars was involved in the infringements from 1 January 2006 until 24 July 2008, upon applying the multiplier of 2.5, the financial penalty of **$450,207** was arrived at (ID at [534]).

67. Five Stars made a [XXX] $[XXX] in 2007. The CCS noted that the figure reached after adjustment for duration is a significant sum in relation to Five Stars because both the relevant turnover and the figure for the starting point represent an adequate proportion of Five Stars's total turnover in 2007. Accordingly, the figure is sufficient to act as an effective deterrent to Five Stars and other undertakings which may consider engaging in price-fixing agreements, and no further adjustments to the penalty would be made (ID at [535]).

68. The CCS also found there to be no need to adjust for aggravating and mitigating circumstances, as the aggravating factor of the involvement of senior management was cancelled out by the mitigating factor of the co-operation rendered by Five Stars and its representatives (ID at [536]).

69. The financial penalty also does not exceed the maximum financial penalty that the CCS can impose in accordance with s 69(4) of the Act, i.e. $[XXX] (ID at [537]).

GR Travel

70. GR Travel's relevant turnover is $[XXX]. As GR Travel was a party to the MSP and the FIC Agreements, the percentage of [XXX]% of the relevant turnover was applied, giving a starting point in the sum of $[XXX] (ID at [540]-[542]).

71. As GR Travel was involved in the infringements from 1 January 2006 until 31 December 2007, upon applying the multiplier of 2, the financial penalty of **$52,432** was arrived at (ID at [543]).

72. GR Travel made a [XXX] $[XXX] in 2007. The CCS noted that the figure reached after adjustment for duration is a significant sum in relation to GR Travel because both the relevant turnover and the figure for the starting point represent an adequate proportion of GR Travel's total turnover in 2007. Accordingly, the figure is sufficient to act as an effective deterrent to Five Stars and other undertakings which may consider engaging in price-fixing agreements, and no further adjustments to the penalty would be made (ID at [544]).

73. The CCS also found there to be no need to adjust for aggravating and mitigating circumstances, as the aggravating factor of the involvement of senior management was cancelled out by the mitigating factor of the co-operation rendered by GR Travel and its representatives (ID at [545]).

74. The financial penalty also does not exceed the maximum financial penalty that the CCS can impose in accordance with s 69(4) of the Act, i.e. $[XXX] (ID at [546]).

Gunung Raya

75. Gunung Raya's relevant turnover is $[XXX]. As Gunung Raya was a party to the MSP and the FIC Agreements, the percentage of [XXX]% of the relevant turnover was applied, giving a starting point in the sum of $[XXX] (ID at [559]-[561]).

76. As Gunung Raya was involved in the infringements from 1 January 2006 until 31 December 2007, upon applying the multiplier of 2, the financial penalty of **$76,668** was arrived at (ID at [562]).

77. Gunung Raya made a [XXX] $[XXX] in 2007. The CCS noted that the figure reached after adjustment for duration is a significant sum in relation to Gunung Raya because both the relevant turnover and the figure for the starting point represent an adequate proportion of Gunung Raya's total turnover in 2007. Accordingly, the figure is sufficient to act as an effective deterrent to Gunung Raya and other undertakings which may consider engaging in price-fixing agreements, and no further adjustments to the penalty would be made (ID at [563]).

78. The CCS also found there to be no need to adjust for aggravating and mitigating circumstances, as the aggravating factor of the involvement of senior management was cancelled out by the mitigating factor of the co-operation rendered by Gunung Raya and its representatives (ID at [564]).

79. The financial penalty also does not exceed the maximum financial penalty that the CCS can impose in accordance with section 69(4) of the Act, i.e. $[XXX] (ID at [565]).

IV. THE APPELLANTS' CONTENTIONS

80. The Appellants challenge the CCS's findings on liability and the imposition of financial penalties, and seek an order to set aside the decision of the CCS and/or annul the financial penalties or at the very least, reduce the quantum of the financial penalties.

81. On the issue of liability, the Appellants advance the following contentions:

(a) First, while the Appellants accept that the MSP Agreement was entered into on 1 June 2005 or thereabouts, which was before the introduction of the competition law, there is no evidence of its continuation beyond 30 June 2006. As such, the Transitional Provisions applied to the MSP Agreement, such that no financial penalty could be imposed on the Appellants for their participation in the MSP Agreement. The burden is on the CCS to prove that the MSP Agreement continued beyond the transitional period and the CCS has failed to discharge the burden of proving that the MSP Agreement continued in force beyond 30 June 2006 and up to 24 July 2008. As regards the FIC Agreement, the Appellants admit that it was reached between members of the EBAA on 6 July 2005 and continued up to 24 July 2008.

(b) Secondly, the MSP and FIC Agreements are excluded from the application of section 34 of the Act as they fall within the exclusions in the Third Schedule of the Act, namely, paragraph 6(d) which exempts "*the supply of scheduled bus services by any person licensed and regulated under the Public Transport Council Act (Cap 259B)*". The FIC Agreement is also exempted under paragraph 8 for being a "*vertical agreement*" and under paragraph 9 for being an "*agreement with net economic benefit*".

(c) Third, the Appellants did not enter into the MSP and FIC Agreements intentionally or negligently, as the MSP Agreement was entered into at a time when competition laws were not introduced in Singapore.

82. On the financial penalties imposed, the Appellants contend that the CCS erred in defining the relevant market and consequently the relevant turnover. Not only did the CCS err in accepting that members of the EBAA had 60% of the market share, it failed to take note of the relatively small market share of the Appellants of only between [XXX]% and [XXX]%. The CCS also departed from the Penalty Guidelines by failing to consider all critical elements (such as the relevant mitigating factors) in arriving at the appropriate amount of penalty imposed.

V ISSUES ARISING IN THESE APPEALS

83. On the issue of liability, the issues before the Board in these appeals are as follows:

(A) Whether the CCS has discharged its burden of proving that the MSP Agreement concluded on 1 June 2005 continued beyond 30 June 2006 and up to 24 July 2008;

(B) Whether the Appellants have discharged their burden of proving that the MSP and the FIC Agreements fall within the exclusions in the Third Schedule of the Act; and

(C) Whether the MSP and the FIC Agreements were entered into intentionally or negligently.

84. On the question of financial penalties, the issue is whether the CCS acted correctly in determining the appropriate financial penalty.

VI. THE APPELLANTS' CONTENTIONS ON ISSUE (A): Whether the CCS has proved that the MSP Agreement existed beyond 30 June 2006 and up to 24 July 2008

85. There is no dispute that the burden of proof is on the CCS to establish, on a balance of probabilities, the existence and the duration of any alleged infringement. The question is whether on the evidence the CCS has discharged this burden of proof.

86. In contending that the CCS has failed to discharge the burden, the Appellants rely on the cases of *Dunlop Slazenger International Ltd v Commission of the European Communities*, 7 July 2004 ("*Dunlop Slazenger*") at [79] and *Peroxidos Organicos SA v Commission of the European Communities*, 16 November 2006 ("*Peroxidos*") at [51]. The Appellants also rely heavily on the case of *Degussa AG v Commission of the European Communities*, 5 April 2006 at [6] where there was the following statement: "*the mutual communication by the participants in a cartel of their intention to terminate it is not a condition of its cessation*", and contend that no positive steps need to be taken by them to put the MSP Agreement to an end – the Transitional Provisions also do not stipulate that any positive steps need to be taken. It is contended that in the circumstances, the MSP Agreement had simply lapsed with the passage of time.

87. It is further contended that it is not sufficient for the CCS to establish the existence of an infringing agreement; the CCS has to go further and show, on the basis of the evidence adduced, the duration of the said agreement. By simply assuming that the MSP Agreement continued beyond 30 June 2006 and into 24 July 2008, the CCS has ignored the costs increases that have occurred over the years, the varying type of coaches that have been used and the different rates that are charged for these coaches.

It also has ignored some of the interviewees' responses that the MSP Agreement terminated in 2006.

88. Although the Appellants accept that the MSP Agreement existed as at 1 June 2005, they contend that there was no evidence of its continued existence beyond 30 June 2006 (i.e. beyond the transitional period in Transitional Provisions). The Appellants accept that, according to the minutes of 21 June 2006, there was a complaint by a member (Mr Michael Seng of Enjoy) of the fact that some members of the EBAA, for instance, Alisan, had sold tickets below the MSP. However, it is contended that this is insufficient to enable CCS to discharge its burden of proof. There is no evidence of any follow up action taken against Alisan, and in such circumstances, any doubts must operate to the advantage of the Appellants: see *Coats Holdings Ltd and J&P Coats Ltd v Commission Case T-36/05 ("Needles Cartel")*, 12 September 2007.

89. The Appellants also accepted the reference to the MSP in the EBAA's letter of 24 July 2008, but in their submission that is insignificant, as this was simply a stop gap measure to enable the EBAA to review the status of matters and ascertain if there was indeed a MSP Agreement in place. The Appellants should not be held liable on just this one piece of evidence. The price lists that were circulated amongst the members also do not show that the MSP Agreement continued beyond 30 June 2006, but simply that the members shared their prices, which information any party could easily obtain by picking up a copy of the price list.

90. The Appellants further rely on the detailed minutes kept by the EBAA which they submit distinguishes this case from that of *JJB Sports PLC and Allsports Limited v*

Office of Fair Trading ("*JJB Sports*") at [928]-[930] and *Aalborg Portland v Commission,* 7 January 2004 at [70]. The Appellants submit that, where there were no records of the MSP Agreement in subsequent Exco minutes, the conclusion must be that there were no discussions on the MSP Agreement. This is further buttressed by the open manner in which the Appellants announced the imposition / revision of the FIC in the media; which was silent on the MSP Agreement.

91. The Appellants also take issue with the CCS's conclusion that the MSP Agreement merged into the FIC Agreement, as the agreements addressed different aspects of the business of the coach operators. Indeed, if there was such a merger, there could only be one infringement, i.e. the FIC Agreement.

92. Finally, the Appellant contended that if the MSP Agreement was deemed to have continued, other EBAA members (such as T&L and Luxury) who have knowledge of the MSP Agreement after they became EBAA members should also be taken to task.

93. In view of the above, the Appellants contend that the CCS has erred in law and on the facts in concluding that the MSP Agreement existed beyond 30 June 2006 and up to 24 July 2008. It follows from this that the Transitional Provisions applied to the MSP Agreement, such that no financial penalty could be imposed on the Appellants for their participation in the MSP Agreement prior to 30 June 2006.

VII. THE CCS'S CONTENTIONS ON ISSUE (A): Whether the CCS has proved that the MSP Agreement existed beyond 30 June 2006 and up to 24 July 2008

94. The CCS contends that on the totality of the documentary evidence (including minutes of meetings, circulars, emails) and statements, it has discharged its burden of

proving, on a balance of probabilities, that the MSP and the FIC Agreements existed beyond 30 June 2006 and up to 24 July 2008.

95. First, the MSP Agreement was discussed in at least 8 EBAA meetings from as early as 20 April 2004 to 2 March 2006. The minutes of the various Exco meetings show that the MSP was not a recommendation. For instance, the minutes of the Exco meeting on 6 October 2004 recorded, among other things, under the heading: "*Standardize selling price for Express Bus Tickets*" the following:

> "A minimum selling price is to be agreed by the members and thereafter in the event of any down sell due to promotional activities; a written notice is required to inform the association."

Following that, there was further discussion of the matter at the meetings held on 3 November 2004, 5 April and 4 May 2005, and the MSP was finally agreed on 1 June 2005. The minutes of the meeting in June 2005 recorded that members had agreed to "*recommended Selling prices from Singapore to different destinations*". Although there is use of the word "*recommended*", an express exception had to be made for a member to sell below the stated prices.

96. The MSP was introduced to prevent undercutting and price wars, and the only way to achieve this objective would be for the MSP to form a price floor that members would not breach. Pursuant to a meeting held on 2 March 2006, a circular dated 4 March 2006 which stated that "*the committee, with 100 percent agreement" had decided to increase the minimum selling price (MSP)*" for the respective destinations was sent to the EBAA members for their "*compliance and understanding*".

97. At the Exco meeting on 21 June 2006, when one member expressed his unhappiness about certain EBAA members selling below the MSP (for example, Alisan), another member proposed to have a vote of no confidence to remove Alisan from the Exco. Incoming members were also made aware of the existence of the MSP Agreement when they joined the EBAA. This must mean that the MSP Agreement continued to exist, and there was no announcement by the EBAA that the MSP Agreement had been terminated.

98. CCS pointed out that, in fact, the meeting of 21 June 2006 was merely 9 days before the end of the transitional period under the Transitional Provisions, and the minutes of meeting were forwarded to all EBAA members, including Alisan, on 10 August 2006.

99. The letter sent by EBAA to its members dated 24 July 2008, which was after the CCS had commenced its investigations, stating that "*as a reminder to all members, the [MSP] are merely recommended selling prices*" reinforces the existence of the MSP Agreement as it reminded the members of the status of the MSP Agreement. The comments by the EBAA members during the CCS's investigations that the MSP Agreement had ceased were self-serving as they were only given after investigations had begun.

100. Even if the MSP Agreement was a recommendation, the discussion amongst competitors of sensitive price matters in 2007 (whereby the EBAA members would fax their price lists to each other) would also thwart the usual competitive process that should have taken place.

101. Further, even if the Appellants did not strictly follow the MSP Agreement, case law has established that a party who participated in an anti-competitive agreement is not relieved of responsibility simply because it did not implement or fully abide by the agreement. The CCS submits that all that is needed on its part is to prove that the Appellants had entered into an agreement with the other infringing parties, which it has duly done.

102. Relying on the *JJB case* which cited the opinion of the Advocate General in SA *Musique Diffusion Francaise and Others v Commission of the European Communities* ("*Musique*"), the CCS contends that there is a presumption that the MSP Agreement continued to be in operation until the contrary is shown, and no such evidence has been produced by the Appellants:

> "... A concerted practice is capable of continuing in existence, even in the absence of active steps to implement it. Indeed, if the practice is sufficiently effective and widely known, it may require no action to secure its implementation. Cases may arise in which the absence of any evidence of measures taken to implement a concerted practice may suggest that the practice has come to an end. That, however, is a matter of evidence, which must depend upon the circumstances of the case ... It is perhaps of interest to observe the decision of the United States Court of Appeals in US v Stromberg and Others 268 F 2d. 256, in which it was held that a conspiracy, once established, is presumed to continue until the contrary is shown."

103. Hence, the CCS concludes that Regulation 3(1) of the Transitional Provisions which grants immunity from penalty to a party to an agreement made on or before 31 July

2005 does not apply, as Regulation 3(2) provides that Regulation 3(1) shall not apply to any infringement which occurs after the transitional period i.e. after 30 June 2006.

VIII BOARD'S DECISION ON ISSUE (A): Whether the CCS has proved that the MSP Agreement existed beyond 30 June 2006 and up to 24 July 2008

104. The parties are in agreement that the burden of proof is on the CCS to show, on a balance of probabilities, that the MSP Agreement existed beyond 30 June 2006 and up to 24 July 2008. The question is whether the CCS has discharged this burden. This question turns on the factual position existing at the material time.

105. The Board turns first to consider the Transitional Provisions. Regulation 1 of the Transitional Provisions specifically defines the "*transitional period*" as only the period from 1 January 2006 to 30 June 2006 (both dates inclusive). In line with the phased approach to the enforcement of competition law in Singapore, Regulation 3(1) of the Transitional Provisions provides that "*no penalty shall be imposed by the CCS on a party to an agreement made on or before 31st July 2005, for an infringement by the agreement of the section 34 prohibition*" during the period from 1 January 2006 to 30 June 2006. Set out below is the text of Regulation 3 (1):

> "3(1) No penalty shall be imposed by the Commission on a party to an agreement made on or before 31st July 2005, for an infringement by the agreement of section 34 prohibition-
>
> (a) during the transitional period;
>
> (b) .....
>
> (c) ....."

106. However, Regulation 3(2) of the Transitional Provisions provides that Regulation 3(1) of the Transitional Provisions does not apply to any infringement by any agreement of the section 34 prohibition which continues or occurs after 30 June 2006. Regulation 3(2) reads as follows:

> "Paragraph (1) does not apply to any infringement by any agreement of the section 34 prohibition which continues or occurs after the expiry of the applicable period referred to in paragraph (1)".

Therefore, in this case, under Regulation 3(2), if the MSP Agreement continued or existed after the expiry of the transitional period, Regulation 3(1) does not apply to relieve the Appellants from penalty under the Act. The question is whether the MSP Agreement existed after 30 June 2006.

107. The Board turns to consider and examine the relevant evidence adduced bearing on this question. The CCS has shown, and the Appellants do not dispute, that the MSP Agreement existed as at 1 June 2005. The minutes of the EBAA meetings show that the MSP was mentioned in at least 8 EBAA meetings from as early as 20 April 2004 to 2 March 2006. The Appellants also acknowledge that the MSP Agreement was first introduced to prevent undercutting and price wars, and sought to form a price floor that the EBAA members would not breach. The circular dated 4 March 2006 referred to the MSP "*with 100 percent agreement*" and was sent to the EBAA members for their "*compliance and understanding*". As such, as at 4 March 2006 (by which time the section 34 prohibition was already in effect), the MSP Agreement was clearly in existence.

108. Subsequent to this, the following events took place. During the Exco meeting of 21 June 2006, one of the members expressed unhappiness with some members, and in particular, the member Alisan, who did not comply with the MSP Agreement, Although there is no evidence of any sanction taken against Alisan after the meeting of 21 June 2006, sanctions were indeed recommended at that meeting for there to be a vote of no confidence to remove Alisan from the Exco. This is clearly an indication of the continued existence of the MSP Agreement as at 21 June 2006, by which time the section 34 prohibition had already been in effect for almost 6 months. Further, the minutes of the 21 June 2006 meeting were circulated to the EBAA members, including the non-compliant member, Alisan, on 10 August 2006, and there is no evidence to show that any member objected to the circulation of the minutes or the proposal for a vote of no confidence against Alisan.

109. Lastly, the minutes of the Exco meeting on 23 July 2008 and the circular dated 24 July 2008, are also significant and they reinforce the existence of the MSP Agreement. The minutes made a brief reference to the "*ongoing investigation of CCS*" and said, among other things, that as a reminder to all members, the minimum selling prices of express bus tickets to various locations were merely recommended selling prices and that any decision to sell at the recommended price or otherwise was to be entirely at the discretion of the members. Thereafter, a circular setting out what was stated in the minutes was sent out to members. It seems to the Board that as a matter of inference, if the MSP Agreement was no longer in existence, there would have been no need for the EBAA to remind the members that the MSP was merely a recommended selling price.

110. Having regard to the events referred to above, the Board finds totally unsustainable the contention of the Appellants that the MSP Agreement had lapsed by 30 June 2006. At any rate, it seems to the Board that, as a matter of evidential burden, as it has been established that the MSP Agreement existed as at 1 June 2005, there is a presumption that such agreement continued to be in existence, unless there are circumstances indicating to the contrary. In this case, not only was there no such circumstance, there were, on the contrary, circumstances indicating the continued existence of the MSP Agreement.

IX APPELLANTS' CONTENTIONS ON ISSUE (B): THE EXCLUSION IN THE THIRD SCHEDULE OF THE ACT

111. The Appellants rely on section 35 of the Act which provides:

> "35. The section 34 prohibition shall not apply to such matter as may be specified in the Third Schedule."

The Appellants contend that the MSP and FIC Agreements fall within paragraphs 6(1), 6(2)(d), 8 and 9 of the Third Schedule of the Act.

112. Paragraph 6(1) and (2)(d) of the Third Schedule of the Act provide as follows:

> "6(1) The section 34 prohibition and the section 47 prohibition shall not apply to any agreement or conduct which relates to any specified activity.
>
> (2) In this paragraph, "specified activity" means –
>
> (a) .....
>
> (b) .....

(c) .....

(d) the supply of scheduled bus services by any person licensed and regulated under the Public Transport Council Act (Cap. 259B);

(e) ....."

113. Relying on paragraph 6(1) read with paragraph 6(2)(d) of the Third Schedule of the Act, the Appellants contend that section 34 of the Act does not apply to any agreement or conduct which relates to the "supply *of scheduled bus services by any person licensed and regulated under the Public Transport Council Act (Cap 259B)*" (the "**PTC Act**").

114. The Appellants urge the Board to adopt a literal reading of paragraph 6(2)(d) of the Third Schedule of the Act and argue that the language of the provision is very clear and the exclusion applies where the PTC Act applies and not merely when the Public Transport Council ("**PTC**"), as an authority, regulates specifically or otherwise. It is contended that paragraph 6(2)(d) of the Third Schedule of the Act should be interpreted at the time when the exclusion was introduced, i.e. in 2004 (the Act was passed on 19 October 2004, gazetted on 19 November 2004, and came into force on 1 January 2005), and at that time, the PTC Act was applicable and PTC regulated the buses managed by the Appellants. The exemption in paragraph 6(2)(d) of the Third Schedule of the Act was deliberately framed to capture the regulating legislation (i.e. the PTC Act) and not the regulator (i.e. the PTC), and there is no indication to the contrary.

115. The Appellants also argue that the fact that the LTA took over the licensing of express buses from 1 January 2005 does not mean that the Appellants are no longer subject to regulation by the PTC. The Appellants contend that they continue to be regulated under the PTC Act, as there was no relevant legislation that suggests that such regulation ceased with effect from 1 January 2005.

116. Next, the Appellants rely on paragraph 9 of the Third Schedule to the Act to contend that the FIC Agreement provides net economic benefit. The Appellants submit that there is net economic benefit in the FIC Agreement, as it allowed members of the EBAA to purchase insurance at a better price, which was the original intention of the Appellants in deciding to implement a coach tax, thereby allowing the Appellants to offer an additional service to their passengers at a reasonable price. From the perspective of this small business community, this must be taken to promote economic progress (relying on the *Notification for Decision by Qantas Airways and British Airways of their Restated Joint Services Agreement CCS 400/002/06* ("*Qantas/British Airways Notification*") (tendered by the Appellants on 1 June 2010) as an analogy). Further, the Appellants argue that the FIC Agreement does not impose restrictions on competition as the coach operators are still able to compete on the prices of the bus tickets.

117. Lastly, the Appellants rely on paragraph 8 of the Third Schedule to the Act which provides that section 34 shall not apply to any "*vertical agreement*". The Appellants submit that the EBAA members have entered into a vertical agreement to purchase insurance coupons from the EBAA to resell to the customers.

X. CCS'S CONTENTIONS ON ISSUE (B): THE EXCLUSION IN THE THIRD SCHEDULE OF THE ACT

118. The CCS refers to Regulation 21 of the Competition Regulations 2007 which provides that any party who seeks to rely on the exclusions in the Third Schedule of the Act shall bear the burden of proving that the conditions therein set out have been met. In this respect, it is the contention of the CCS that the Appellants have failed to discharge their burden of proof.

119. First, with respect to paragraph 6(2)(d) of the Third Schedule of the Act, the CCS contends that the PTC had ceased issuing bus licenses for inter-state express bus services after 1 January 2005, and this was confirmed in a letter from PTC dated 17 February 2010 written in response to an enquiry from the CCS. The letter reads as follows:

> "Dear Mr Toh
>
> **REGULATION OF INTER-STATE BUS SERVICES**
>
> I refer to your letter ref. CCS/500/003/08, dated 12 February 2010.
>
> 2. In your letter your have asked the following questions:
>
> *(a) Whether PTC regulates or licences inter-state bus services including the services operated by the members of the EBAA; and (b) if PTC ceased to regulate or licence inter-state bus services, when this occurred?*
>
> 3. In response to your queries, the PTC no longer regulates or licences inter-state express bus services including the services operated by the members of he EBAA and the PTC ceased to regulate or licence such services on 1 January 2005.

4. If CCS requires any further clarification or additional information, please contact Mr Yeo Kok Ping at Yeo_Kok_Ping@ptc.gov.sg / 6846-3764."

120. Paragraph 6(2)(d) of the Third Schedule of the Act must relate to the "*supply of scheduled bus services*" whilst they are "*licensed*" and "*regulated*" under the PTC Act. The most obvious evidence would be the licences issued by the PTC from January 2006 to present, but this has not been produced by the Appellants. On the other hand, the CCS has produced evidence that the licences used by other inter-state coach operators were issued by the LTA's Registrar of Vehicles.

121. The Road Traffic (Public Service Vehicles) Rules also does not assist the Appellants' case, as the Rules only require PTC approval of the routes that an inter-state express bus travels if that express bus is registered in Singapore and the evidence is clear that the buses concerned are registered in Malaysia.

122. Second, as to the Appellants' contention that the FIC Agreement has net economic benefit, the Appellants have not discharged their burden of proof that the FIC Agreement was conceived as an "*insurance product*", and not primarily aimed at covering fuel cost or increases in fuel cost. There is documentary evidence as well as statements from the EBAA's members which conclusively showed that the FIC coupons also contained a fuel surcharge which would "*increase revenue and decrease the burden for all members*". As such, the price of the FIC coupons was significantly marked up when sold to consumers. On the evidence, the CCS concluded that the rising operation costs, mainly fuel costs, were the key reasons for the infringing

parties entering into the FIC Agreement, and it could not be said that there was any net economic benefit.

123. Third, the contention that the FIC Agreement is a vertical agreement, in that the EBAA purchased insurance in bulk from the insurance company and then sold it to the members, including the Appellants, with a guidance on the price at which the EBAA members should sell the FIC coupons, cannot stand. This is because the low cost of the insurance component relative to the price of the FIC shows that the primary objective is to address fuel costs. In this regard, the EBAA was never a supplier of fuel oil, and there cannot be a vertical agreement. Instead, when the Exco decided on the price of the FIC, this amounted to an agreement between them as competitors on a horizontal level, aimed at addressing the increased operational costs which they wanted to recoup from their customers, which was a decision each member should have undertaken on an independent basis.

XI. BOARD'S DECISION ON ISSUE (B): THE EXCLUSION IN THE THIRD SCHEDULE OF THE ACT

124. On this issue, under Regulation 21 of the Competition Regulations 2007, any undertaking claiming the benefit of any exclusion from section 34 prohibition has the burden to show that the conditions set out in the Third Schedule have been met. Regulation 21 provides as follows:

> "21. Any undertaking claiming the benefit of any-
>
> (a) exclusion from the section 34 prohibition or the section 47 prohibition specified in the Third Schedule to the Act;

(b) .....

(c) .....

shall bear the burden of proving that the conditions relating thereto have been satisfied."

125. At the hearing, the CCS produced a letter dated 17 February 2010 from the PTC, which says that the PTC had ceased issuing bus licenses for inter-state express bus services after 1 January 2005. The Appellants, on the other hand, were unable to produce any documentary evidence of previous licences issued by PTC to any of them or for that matter to any member of EBBA.

126. Despite not being able to show any evidence as to the entity which issues the licences to the Appellants from 2005 to 2007, the Appellants persist in their arguments that, as there is no legislation, which stipulates that the PTC ceases to regulate the Appellants, the Appellants are entitled to enjoy the benefits of the exclusions in the Third Schedule of the Act. In the Appellants' additional submissions, the Appellants went to the extent of arguing that so long as the PTC Act applies to the Appellants, it does not matter that the PTC has ceased to issue licences to the Appellants. Such arguments are clearly untenable, and are also contrary to the letters from the PTC dated 8 July 2010 (which were tendered to the Board after the hearing).

127. In PTC's letter dated 8 July 2010, the PTC clarified its 17 February 2010 letter by expressly stating that the Appellants (and other EBAA members) "*are not subject to the bus licensing regime, and were hence not regulated by the PTC in the period preceding 1 January 2005*". The PTC further stated that from 1 January 2005, the

transfer of licensing of inter-state bus services was affected because of the amendments to the Road Traffic (Public Service Vehicles) Rules, which required inter-state buses to posses both a Singapore Public Service Vehicle licence in addition to an ASEAN Public Service Vehicle licence. Both licences are issued by the LTA. The affected parties (which included the Appellants) were notified about the changes by a notice dated 5 November 2004 which was attached to the application form for a Singapore Public Service Vehicle licence. However, in the Appellants' letter dated 20 July 2010 to the CAB, all they stated was that they "*appear not to have kept records of the notice dated 5 November 2004*".

128. The evidence adduced before the Board by the CCS shows quite clearly that the LTA has taken over from PTC the role of regulating the Appellants with effect from 1 January 2005. The Road Traffic (Public Service Vehicles) (Amendment) Rules 2004 introduced a new Rule 6A with effect from 5 November 2004, which provides:

> "No licensee shall use his public service vehicle, or cause or permit his public service vehicle to be used, by any person for the operation of a scheduled service from Singapore to one or more destinations outside Singapore without the prior approval of the Registrar to do so"

129. In any case, the Appellants, by not providing any evidence, whether it be bus service licences or any regulations issued by the PTC pursuant to the PTC Act, which suggests that they are regulated by the PTC, has failed to discharged its burden of proving that the exclusion in the Third Schedule of the Act applies to them.

130. The Appellants' argument on the FIC Agreement being one of net economic benefit thereby falling under the exclusion in paragraph 9 of the Third Schedule of the Act, also cannot stand. Even if we accept the Appellants' contention that bulk insurance was an innovative and enterprising idea, the Appellants cannot run away from the fact that the costs of insurance constituted an extremely small portion of the FIC which was imposed on the customers. The Appellants in their arguments have not shown how the FIC Agreement can fall within paragraph 9 of the Third Schedule of the Act. Paragraph 9 of the Third Schedule of the Act is in the following terms:

> "9 The section 34 prohibition shall not apply to any agreement which contributes to -
>
> (a) improving production or distribution; or
>
> (b) promoting technical or economic progress,
>
> but which does not –
>
> (i) impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; or
>
> (ii) afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question."

131. It does not appear to us that the FIC Agreement falls within either limb (a) or (b) of paragraph 9 of the Third Schedule of the Act. It has not been shown to the Board how the FIC Agreement has contributed or is contributing in any way to either "*improving production or distribution*" or "*promoting technical or economic progress*".

132. Lastly, the Appellants rely on paragraph 8 of the Third Schedule of the Act, which provides as follows:

> "8 (1) The section 34 prohibition shall not apply to any vertical agreement, other than such vertical agreement as the Minister may by order specify.
>
> (2) In this paragraph, "vertical agreement" means any agreement entered into between 2 or more undertakings each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services and includes provisions contained in such agreements which relate to the assignment to the buyer or use by the buyer of intellectual property rights, provided that those provisions do not constitute the primary object of the agreement and are directly related to the use, sale or resale of goods or services by the buyer or its customers."

133. The Appellants argue that the FIC Agreement was a "*vertical agreement*", whereby the EBAA negotiated for bulk insurance, and sold such insurance to its members who sold it to their customers. This contention flies in the face of the evidence. It is apparent from the Exco minutes of 6 July 2005 that the fuel surcharge existed since 6 July 2005 and that this constituted a substantial component of the FIC, when the first revision was made on 1 December 2007 and also when the second revision was made

on 5 June 2008. As EBAA is not a producer / supplier of fuel, it could not be said that there was a vertical agreement.

134. Thus, on the issue of liability the Appellants fail. The Board finds that the Appellants had entered into the MSP and the FIC Agreements which contravene section 34 of the Act.

XII. WHETHER THE MSP AND FIC AGREEMENTS WERE ENTERED INTO INTENTIONALLY OR NEGLIGENTLY

135. Before turning to consider the penalty imposed on the parties, the Board needs to consider the relevant provisions of section 69 of the Act. Section 69(3) of the Act provides that a financial penalty can only be imposed if the CCS is satisfied that the infringement has been committed intentionally or negligently. Section 69(3) of the Act reads as follows:

> "For the purpose of subsection (2)(d) [i.e. imposing financial penalty], the Commission may impose a financial penalty only if it is satisfied that the infringement has been committed intentionally or negligently."

Arising from this provision, the question is whether the infringement has been committed by the Appellants intentionally or negligently.

XIII. THE APPELLANTS' CONTENTIONS ON ISSUE (C): WHETHER THE MSP AND THE FIC AGREEMENTS WERE ENTERED INTO INTENTIONALLY OR NEGLIGENTLY

136. The Appellants submit that, at no time, did they act intentionally or negligently in participating in the MSP Agreement. In the first place, the MSP and FIC Agreements were entered into at a time when competition laws were not introduced in Singapore. Neither were the Appellants aware that the object or effect of the Agreements in question could be viewed as a restriction of competition: see the EC Decision of *Luxembourg Brewers COMP/37.800/F3*, 5 December 2001, which held that an infringement will be regarded as being committed intentionally if the parties are aware that the object or effect of the act in question is to restrict competition. It is argued that the Appellants did not any time know, nor was it aware, that both the MSP and the FIC Agreements had the object or effect of restricting competition under the Act, since the substantive provisions of the Act were not in force at that time.

XIV. CCS'S CONTENTIONS ON ISSUE (C): WHETHER THE MSP AND THE FIC AGREEMENTS WERE ENTERED INTO INTENTIONALLY OR NEGLIGENTLY

137. CCS contends that, according to case law, the requirement on whether the infringement was committed "*intentionally or negligently*" is a "*threshold condition*"; once CCS is satisfied that the infringement was either intentional or negligent, the requirement was satisfied. CCS points out that ignorance or a mistake of law is not a defence.

138. CCS highlights that given that the evidence shows that the intent behind the MSP Agreement was that it would be used as a platform to standardise the selling prices of products that the infringing parties were selling in competition with each other, accompanied by the clear object which was to prevent the EBAA members themselves from undercutting each other and to prevent price wars from taking place, the Appellant must have known that its acts would have restricted or distorted competition, and this constituted intentional infringement.

139. The CCS relies on its Guidelines on Enforcement which provide the following guidance on how these phrases should (in the opinion of CCS) be construed:

> **"Intention"**
>
> 4.7 The circumstances in which the CCS might find that an infringement has been committed intentionally include the following:
>
> - the agreement or conduct has as its object the restriction of competition;
> - 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
> - 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 or 47 prohibition.
>
> 4.8 The intention (or negligence, referred to below) relates to the facts, not the law. Ignorance or a mistake of law (i.e. ignorance that the

relevant agreement or conduct is an infringement) is thus no bar to a finding of intentional infringement.

4.9 In establishing whether or not there is intention, the CCS may consider internal documents generated by the undertakings in question. The CCS may regard deliberate concealment of an agreement or practice by the parties as strong evidence of an intentional infringement. It may be inferred that an infringement has been committed intentionally where consequences giving rise to an infringement are plainly foreseeable from the pursuit of a particular policy by an undertaking.

Negligence

4.10 The CCS is likely to find that an infringement of the section 34 or 47 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."

140. Based on the CCS Guidelines on Enforcement, the CCS submits that the price fixing arrangements in this case are serious infringements of the section 34 prohibition, which have as their object the restriction of competition, and are likely to have been or by their very nature, committed intentionally (ID at [446]). The totality of the circumstances shows that the intention behind the MSP (i.e. the setting of a price floor) was to prevent undercutting and price wars – this was the clear intention of the Appellants as at 1 June 2005 when the MSP Agreement was first concluded. The continued discussions of the EBAA members of the MSP and FIC Agreements, both formally through the Exco meetings and informally, further evidence this clear

intention to restrict competition. In these circumstances, it could not be seriously contended that the infringements were not committed intentionally.

XV. THE BOARD'S DECISION ON ISSUE (C): WHETHER THE MSP AND THE FIC AGREEMENTS WERE ENTERED INTO INTENTIONALLY OR NEGLIGENTLY

141. The Act is silent on how the phrase "*intentionally or negligently*" in section 69(3) of the Act ought to be construed. In the case of *(1) Argos Limited (2) Littlewoods Limited v The Office of Fair Trading* [2005] CAT 13 ("*Argos*") at paragraph 221, the Competition Appeal Tribunal said:

> "221. The Tribunal has previously held that an infringement is committed intentionally for the purpose of section 36(3) of the Act [i.e. the English Competition Act 1998, which in substance is similar to section 69(3) of our Act] if the undertaking must have been aware, or could not have been unaware, that its conduct had the object or would have the effect of restricting competition. An infringement is committed negligently for the purposes of section 36(3) if the undertaking ought to have known that its conduct would result in a restriction or distortion of competition."

142. In the case *Luxembourg Brewers* COMP/37.800/F3, (5 December 2001), the Commission of EC said at paragraph 89:

> "(89) An infringement of the Community competition rules is regarded as being committed intentionally if the parties are aware that the object

> or effect of the act in question is to restrict competition. It is not essential that they should also be aware that they are infringing a provision of the Treaty."

143. The Board is alive to the fact that the MSP Agreement was entered into in or around June 2005, and that at that time there was no competition law in force in Singapore. However, as the evidence has shown, the MSP Agreement continued to have effect beyond 30 June 2006, which was the last day of the transitional period. Turning to the facts in this case, the Board finds that the parties, who participated in the MSP and the FIC Agreements must have been aware, or could not have been unaware, that the agreements had the object or would have the effect of restricting competition. At the very least, the parties ought to have known that such would be the case. The Board finds that the MSP and the FIC Agreements were entered into intentionally or negligently.

XVI FINANCIAL PENALTY

Penalty Guidelines

144. It is convenient at this juncture to say a word of the Penalty Guidelines published by the CCS pursuant to section 61(1) of the Act. In imposing a financial penalty, the CCS follows and applies the Penalty Guidelines. However, the Board is not bound by the Penalty Guidelines and has full jurisdiction to assess the penalty to be imposed: *Napp Pharmaceutical Holdings Limited v Director General of Fair Trading* [2002] CAT 1 at [497]-[500]. That said, the Board will have regard to the Penalty Guidelines where appropriate in reaching its conclusion, unless it is shown that the Penalty Guidelines are wrong or that the CCS has erroneously applied the Penalty Guidelines.

In *Argos* case (*supra*), the Competition Appeal Tribunal, in considering an appeal on penalty imposed by the OFT as a result of an infringement of the Chapter I prohibition of the United Kingdom Competition Act 1998, made the following observations on the OFT's guidance as to the appropriate amount of a penalty (**"OFT's Guidance"**):

> "168 We observe, first that the *Guidance* is what it says, namely guidance, and is not to be construed as if it were a statute. Secondly, as we have already held, the OFT has a margin of appreciation in applying the *Guidance*. Thirdly, whether or not the OFT correctly applied the *Guidance*, the Tribunal retains jurisdiction under Schedule 8, para 3(2) of the Act, to fix the penalty. In our view that jurisdiction applies even if the OFT has mistakenly applied the *Guidance*, or if the application of the Guidance produces a result that, in the Tribunal's view, does not properly reflect the justice of the case. The Tribunal, will however, take into account the *Guidance* when reaching its own conclusions as to what the penalty should be: *Napp*, cited above.
>
> 169 The *Guidance* is published with the laudable objective of providing an outline framework for the calculation of penalties by the OFT. In our view, however, it would not be appropriate to analyse each individual "Step" in arriving at the penalty in isolation from the other Steps."

145. The Penalty Guidelines set out the twin policy objectives as follows:

> "**Policy Objectives**
>
> 1.6 In imposing any financial penalty, the CCS has the following twin objectives:
>
> - to reflect the seriousness of the infringement, and
> - to deter undertakings from engaging in anti-competitive practices.
>
> 1.7 The imposition of a financial penalty is discretionary. The CCS will, where appropriate, impose financial penalties which are severe, particularly, in respect of cartel activities, for example, in price-fixing, market sharing, bid-rigging (collusive tendering) or, limiting or controlling production or investment arrangements, and serious abuses of a dominance as they are among the most serious infringements of competition law. This is aimed at deterring not only the infringing undertaking but also other like-minded undertakings which might be considering activities contrary to the section 34 prohibition or section 47 prohibition."

146. The Penalty Guidelines then sets out the factors which the CCS should take into account in imposing a financial penalty. Paragraph 2 thereof provides:

> "**2. Determining the Amount of Penalty**
>
> 2.1 A financial penalty imposed by the CCS under section 69 of the Act will be calculated taking into consideration the following:
>
> - the seriousness of the infringement;

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

147. This is similar to the five-step approach adopted by the OFT as set out in the OFT's Guidance issued by the OFT under the United Kingdom Competition Act 1998, upon which the Act is modelled. The five-step approach under the OFT's Penalty Guidance is as follows:

(a) Step 1 – Starting point (having regard to the seriousness of the infringement and the relevant turnover of the undertaking)

(b) Step 2 – Adjustment for duration

(c) Step 3 – Adjustment for other factors

(d) Step 4 – Adjustment for aggravating and mitigating factors

(e) Step 5 – Adjustment to prevent the maximum penalty being exceeded and to avoid double jeopardy

148. In assessing the seriousness of the infringements, paragraphs 2.3 and 2.4 of the Penalty Guidelines provide as follows:

> "2.3 … the CCS will consider a number of factors, including the nature of the product, the structure and condition of the market, the market share of the undertakings involved in the infringement, entry conditions and the effect on competitors and third parties. The

impact and effect of the infringement on the market, direct or indirect, will also be an important consideration.

2.4 In assessing the impact and effect of the infringement of the market, direct or indirect, the CCS will take into consideration, among other things, 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."

149. Paragraph 2.9 of Penalty Guidelines provides for other relevant factors which the CCS may consider, as appropriate, on a case by case basis, in adjusting the amount of the financial penalty imposed. Other considerations may include "*an objective estimate of any economic or financial benefit derived or is likely to be derived from the infringement by the infringing undertaking and any other special features of the case, including the size and financial position of the undertaking in question*".

150. Under paragraphs 2.10 to 2.12 of the Penalty Guidelines, in assessing the amount of financial penalty to be imposed, the CCS will consider any aggravating factors (which include the role of the undertaking as a leader / instigator of the infringement, involvement of directors or senior management, continuance of the infringement after the start of investigation, repeated infringements by the same undertaking or other undertakings in the same group, infringements which are committed intentionally rather than negligently) and mitigating factors (which include genuine uncertainty on the part of the undertaking as to whether the agreement or conduct constituted an infringement, termination of the infringement as soon as the CCS intervenes, co-

operation which enables the enforcement process to be concluded more effectively / speedily).

151. Section 69(4) of the Act provides that that amount of financial penalty shall not exceed 10% of the turnover of the business of the undertaking in Singapore for each year of infringement, up to a maximum of three years.

Determination of Financial Penalty by the CCS

152. The Board now turns to the financial penalty imposed by the CCS. In determining the amount of financial penalty to be imposed, the CCS follows the methodology adopted by the EC in the calculation of fines imposed pursuant to Article 23(2) of the Regulation No. 1/2003, and by the OFT in calculating the level of financial penalty imposed under section 36 of the Competition Act 1998. The CCS starts with a base figure by taking a percentage or proportion of the relevant sales or turnover, and applying a multiplier for the duration of infringement and then adjusting that figure to take into account other factors such as deterrence and aggravating and mitigating considerations.

153. The CCS fixes the starting point percentage of the relevant turnover nearer to the lower end, and considers a starting point of [XXX]% of the relevant turnover for each of the parties involved in the MSP and the FIC Agreements, and a starting point of [XXX]% of the relevant turnover for each of the parties involved in only the FIC Agreement.

154. For the purpose of calculating the relevant turnover and determining the penalties, the CCS considers, first, the relevant product market, and secondly, the relevant geographical market. On the relevant product, the CCS identifies the sale of one-way bus tickets from Singapore to Malacca, Kuala Lumpur, Genting, Ipoh, Simpang/Taiping and Butterworth/Penang as the subject matter of the MSP Agreement, and the sale of one-way express bus tickets, two-way express bus tickets and coach package tours to Malaysia or southern Thailand as the subject matter of the FIC Agreement. It designates these products as focal products and accepts that they overlap. The CCS considers that the relevant geographic market is Singapore, as customers travelling from Singapore to Malaysia and southern Thailand would typically buy their tickets from Singapore companies that operates express bus or excursion bus services. It therefore considers that the relevant product market is the sale of express bus or excursion bus services between Singapore and Malaysia or southern Thailand, sold in Singapore, in the form of either standalone bus tickets or as part of coach package tours.

155. The CCS considers that the turnover obtained from the sale of one-way express bus tickets to the destinations listed above also form part of the relevant turnover for the FIC Agreement, as the sale of any ticket affected by MSP Agreement was also subject to the FIC Agreement. Therefore, for the parties, and in this case, the Appellants, who were involved in both agreements, the CCS imposes only one penalty in respect of both agreements.

156. The CCS considers the entire turnover obtained from the sale of one-way and two-way express tickets, to which FIC was charged, form part of the relevant turnover. However, the CCS accepts that the price of coach package tours is made up, *inter alia*, of the aggregate of the cost of the coach ticket (return), FIC, accommodation, stated meals and tour guides. The CCS would in such case treat only a portion of the coach package tour price that is attributable to transportation and the FIC should form part of the relevant turnover. As the proportion of the price of coach package tours varies depending on various factors, the CCS takes a percentage of the price of the coach package as the relevant turnover. It compares the respective package prices of the coach operators and also the percentages of such package prices relating to bus transport, and adopt the lowest percentage, which is 24% as a representative percentage for all the parties, including the Appellants that sold coach tours. It further discounts the percentage and rounds it to 20%. The CCS treats this 20% of the turnover obtained from the sale of coach package tours as part of the turnover. Therefore, for the purpose of calculating the appropriate penalties for the Appellants, the CCS considers as the relevant turnover the turnover obtained in Singapore from the sale of one-way and two-way express bus tickets plus 20% from the sale of coach package tours.

Relevant Turnover of the Appellants

Penalty for Konsortium

157. Konsortium has been a member of the EBAA from its inception. On the basis of the financial statements for 2007 provided, as no financial statements for 2008 were produced, the CCS determines that Konsortium's relevant turnover is made up of S$[XXX], representing the turnover from the sale of express bus tickets, plus

S$[XXX], representing 20% of the turnover from the sale of coach package tours. On this basis, Konsortium's total relevant turnover is S$[XXX]. The CCS finds that Konsortium was a party to the MSP and the FIC Agreements from 1 January 2006 to 24 July 2008, i.e. 2 years, 6 months and 24 days, and applied a duration multiplier of 2.5. After adjustment for the duration and taking into account the aggravating and the mitigating factors, the CCS imposes a financial penalty of **S$337,635**.

Penalty for Five Stars

158. Five Stars has been a member of the EBAA from its inception. On the basis of the financial statements for 2007 provided, as no financial statements for 2008 were produced, the CCS finds that Five Stars' relevant turnover is made up of S$[XXX], representing turnover from the sale of express bus tickets, plus S$[XXX], representing 20% of the turnover from the sale of coach package tours. On this basis, Five Stars' total relevant turnover is S$[XXX]. The CCS finds that Five Stars was a party to the MSP and FIC Agreements from 1 January 2006 to 24 July 2008, i.e. 2 years, 6 months and 24 days, and applied a duration multiplier of 2.5 for Five Stars. After adjustment for the duration and taking into account the aggravating and the mitigating factors, the CCS imposes a financial penalty of **S$450,207**.

Penalty for GR Travel

159. GR Travel has been a member of the EBAA from its inception. The CCS finds that it participated in the MSP Agreement and the FIC Agreement. On the basis of the financial statements for 2007 provided, as no financial statements for 2008 were produced, the CCS finds that GR Travel's relevant turnover is made up of S$[XXX], representing turnover from the sale of express bus tickets, plus S$[XXX],

representing 20% of the turnover from the sale of coach package tours. On this basis, GR Travel's total relevant turnover is S$[XXX]. The CCS finds that GR Travel was a party to the MSP and the FIC Agreements from 1 January 2006 to 31 December 2007 i.e. 2 years, and applied a duration multiplier of 2 for GR Travel. After adjustment for the duration and taking into account the aggravating and mitigating factors, the CCS imposes a financial penalty of **S$52,432**.

Penalty for Gunung Raya

160. The CCS finds that Gunung Raya has been a member of EBAA from the inception of the EBAA and participated in both the MSP and the FIC Agreements. The CCS finds that Gunung Raya's relevant turnover is made up of S$[XXX] representing turnover from the sale of express bus tickets, plus S$[XXX] representing 20% of the turnover from the sale of coach package tours. On this basis, Gunung Raya's total relevant turnover is S$[XXX]. The CCS finds that Gunung Raya was a party to the MSP and FIC Agreements, from 1 January 2006 to 31 December 2007 i.e. 2 years and applied a duration multiplier of 2 for Gunung Raya. After adjustment for the duration and taking into account the aggravating and mitigating factors, the CCS imposes a financial penalty of **S$76,668**.

The Appellants' Contentions on the Financial Penalty

161. The Appellants contend that in determining the appropriate financial penalty, the CCS erred in defining the relevant market and consequently the relevant turnover. In particular, the CCS erred in its determination of the relevant market as the sale of express bus or excursion bus services between Singapore and Malaysia or Southern Thailand, sold in Singapore, in the form of either standalone bus tickets or as part of

coach package tours, and erred in dismissing various alternative transportation markets as viable alternatives.

162. The Appellants complain that the CCS erroneously confused the turnover figures in ascertaining the penalty chargeable for the MSP Agreement and that for the FIC Agreement. Specifically, in calculating the revenue base figure for the penalty to be imposed, the CCS simply took the turnover attributable to coach tickets and that attributable to 20% of the coach packages as the base and applied a percentage of either [XXX]% or [XXX]% depending on whether there was an infringement found in relation to the MSP Agreement or to the FIC Agreement or to both. This is wrong.

163. In the Appellants' submission, the CCS ought to have looked first at the turnover for coach tickets only, and then using the Origin-Destination approach which was adopted in the *Qantas/British Airways Notification*, the CCS ought to have identified the turnover on a route by route basis in determining the penalty to be imposed for an alleged violation of the MSP Agreement. This would have followed the correct market definition; i.e. the turnover derived from the sale of one-way tickets from Singapore to the 6 destinations should have been looked at. The relevant turnover should have been further reduced to take into account only the turnover from the sale of one-way tickets on 26-seater coaches on each of the relevant routes and not other coach types. The relevant turnover should also exclude the turnover from the sale of tickets on overnight coaches which are priced at much higher rates and those buses which are not 26-seater coaches.

164. Relying on the *Argos* case, the Appellants contend that for the purpose of the penalty, the specific product category needs to be taken into consideration thus making the penalties more reasonable and essentially just, fair and commensurate. In short, the right turnover to be used in calculating the penalty must be from the sale of one-way coach tickets from the 6 relevant routes, i.e. routes between Singapore and Malacca, Kuala Lumpur, Genting, Ipoh, Simpang and Butterworth/Penang, but excluding the turnover from the sale of tickets on snoozer coaches as such snoozer coaches only have 18 seats and the tickets are priced at much higher rates than the average coaches to any particular destination. These were the routes that the CCS identified as the routes to which the MSP Agreement applied. It is wrong for the CCS to take into account the revenue derived from snoozers or from other various other routes not subject to the MSP Agreement, as that would artificially inflate the turnover on which to base the penalty.

165. The Appellants admit that they do not record the sales of one-way tickets route by route but are able to provide ballpark figures in relation to the number of passengers each month, on each route whether they bought one-way or two-way tickets. On that basis the Appellants estimate the relevant turnover derived from the sale of coach tickets on each relevant route for year 2007 for the parties as follows:

(a) In the case of Konsortium, a total of [XXX] passengers travelled on the relevant routes on 26-seater coaches, and this amounts to an estimated turnover of S$[XXX];

(b) In the case of Five Stars, a total of [XXX] passengers travelled on the relevant routes, and this amounts to an estimated turnover of S$[XXX].

(c) In the case of GR Travel, a total of [XXX] passengers travelled on the relevant routes, and this amounts to an estimated turnover of S$[XXX].

(d) In the case of Gunung Raya, a total of [XXX] passengers travelled on the relevant routes, and this amounts to an estimated turnover of S$[XXX].

166. The CCS was also wrong to conclude that the EBAA members had 60% of the market share based on a press release from EBBA (ID at [33]) and failed to take into account the relatively small market share of each of the Appellants. The Appellants provide their respective market shares as follows:

(a) Konsortium carried approximately [XXX] passengers to all the routes they travelled, and not just the relevant routes, and this puts Konsortium's market share at only about [X]%.

(b) Five Stars carried approximately [XXX] passengers to all the routes they travelled, and not just the relevant routes, and this puts Konsortium's market share at only about [X]%.

(c) GR Travel carried approximately [XXX] passengers to all the routes they travelled, and not just the relevant routes, and this puts GR Travel's market share at only about [X]%.

(d) Gunung Raya carried approximately [XXX] passengers to all the routes they travelled, and not just the relevant routes, and this puts GR Travel's market share at only about [X]%.

167. Thus, the Appellants submit their respective relevant turnovers for the MSP Agreement is as follows:

(a) Taking into account of the relevant turnover of S$[XXX], the financial penalty imposed on Konsortium should be at the very most be S$[XXX].

(b) Taking into account of the relevant turnover of S$[XXX], the financial penalty imposed on Five Stars should be at the very most be S$[XXX].

(c) Taking into account of the relevant turnover of S$[XXX], the financial penalty imposed on GR Travel should be at the very most be S$[XXX].

(d) Taking into account of the relevant turnover of S$[XXX], the financial penalty imposed on Gunung Raya should be at the very most be S$[XXX].

In the above calculations, the Appellants applied the starting percentage of [XXX]% instead of [XXX]% of the relevant turnover for the MSP Agreement, and urged the Board to do the same.

168. As for the FIC coupons, the Appellants submit that the relevant turnover should be limited to the revenue derived from the sale of FIC coupons, and the revenue derived from the sale of FIC is distinct from the coach ticket revenue. Thus, the market share figure for the FIC could be easily determined. Taking this approach, the Appellants contend that only the turnover associated with FIC coupons should be looked at. The Appellants provide their respective turnovers as follows:

(a) Konsortium's turnover derived from the sales of the FIC coupons amounted to a total of S$[XXX]. Konsortium contends that this was provided to the CCS during the investigation. The financial penalty imposed on Konsortium should be S$[XXX].

(b) Five Stars purchased [XXX] one-way FIC coupons and [XXX] two-way FIC coupons in 2007. Thus, the turnover derived from these coupons by Five Stars amounted to a total S$[XXX] + S$[XXX] = S$[XXX]. The financial penalty imposed on Five Stars should be S$[XXX].

(c) GR Travel and Gunung Raya did not purchase any FIC coupons and therefore there can be no turnover attributable to the FIC Agreement for GR Travel and Gunung Raya.

169. In the event that the Board disagrees with the above submissions, the Appellants strongly urge the Board to reduce the starting percentage to [XXX]% instead of [XXX]%, given that these are SMEs, and that they have co-operated with the CCS in the investigation.

170. In conclusion, the Appellants placed emphasis on this being the first case being brought before the Board, and urged the Board to adopt a phased approach to the enforcement of the Act, in view of the relatively short history of competition law in Singapore.

CCS's contentions on the Financial Penalty

171. The CCS submits that in determining the appropriate financial penalty, the CCS did not err in defining the relevant market and consequently the relevant turnover for section 34 cases involving infringement such as price-fixing. Following the decision in *Argos* case, the CCS is not required to define the relevant market with the same rigour that would be expected in an abuse of dominance case. For the purposes of quantifying the penalties, it is sufficient for the CCS to show that there was a

reasonable basis for identifying a certain product market. The CCS has been reasonable in its definition of the relevant market on the basis of the narrowest market comprising the focal products only, which is the sale, in Singapore, of express bus or excursion bus services between Singapore and Malaysia or Southern Thailand, in the form of standalone bus tickets or part of coach package tours, and it was not necessary to adopt the Origin and Destination approach which is used in abuse of dominance or merger cases.

172. The CCS contends that in its determination of the relevant market, it has rightly considered the issue of whether there were substitutes as well as the market share of the infringing party. In any case, even if there were substitutes or the market share is low, this would only affect the starting percentage which in this case is at a very low starting point of [XXX]% (compared to [XXX]% in the *Pest Control* case).

173. The question of the relevant turnover is part of the process in arriving at the appropriate financial penalty, taking into account the need to reflect the seriousness of the infringement and deter undertakings from engaging in anti-competitive practices. The CCS has exercised its discretion to impose one penalty against the Appellants even though they were parties to both the MSP and the FIC Agreements. The CCS calculated the turnover applicable to the FIC Agreement, and did not separately calculate the turnover applicable to the MSP Agreement, and this was clearly beneficial to the Appellants.

174. The CCS also did not err in the calculation of the relevant turnover for the FIC Agreement. The turnover should not be limited to the sale of FIC coupons as relevant turnover is deemed as the turnover affected by the infringement, and not the specific portion of turnover derived from the infringing conduct. Further, there is no separate product market for the sale of FIC coupons, which is intrinsically tied to the sale of express bus tickets or coach package tours.

175. Further, the CCS contends that what must be borne in mind are the twin objectives behind the imposition of the penalties (punishment and deterrence). The focus should be primarily on whether the overall penalty imposed is appropriate for the infringements in question (this is in line with the position taken internationally in Australia, United Kingdom and the European Union); see *Argos* at [169]-[171]. With these principles in mind, the CCS submits that the computation of relevant turnover is not an end in itself but part of the process of arriving at an appropriate financial penalty in the circumstances to achieve the necessary deterrent effect to reflect the seriousness of the offence, especially in cases such as the present which involve price-fixing.

176. Finally, the CCS contends that if the Board were to accept the amounts proposed by the Appellants as financial penalties, there would clearly be no or little deterrent effect. In fact, the Appellant would simply treat such financial penalties as a business cost. Low penalties would also not deter like-minded undertakings in future from price-fixing, since these penalties are low enough to be factored as a business cost coupled with the fact that their anti-competitive activities may not be uncovered.

The Board's Decision on the Financial Penalty

177. The Board agrees with the views expressed by the Competition Appeal Tribunal at paragraphs 168 to 173 in *Argos*, and in particular at paragraph 172 which is reproduced below:

> "168. We observe, first that the *Guidance* is what it says, namely guidance, and is not to be construed as if it were a statute. Secondly, as we have already held, the OFT has a margin of appreciation in applying the *Guidance*. Thirdly, whether or not the OFT correctly applied the *Guidance*, the Tribunal retains jurisdiction under Schedule 8, para 3(2) of the Act, to fix the penalty. In our view that jurisdiction applies even if the OFT has mistakenly applied the *Guidance*, or if the application of the Guidance produces a result that, in the Tribunal's view, does not properly reflect the justice of the case. The Tribunal, will however, take into account the *Guidance* when reaching its own conclusions as to what the penalty should be: *Napp*, cited above.
>
> 169 The *Guidance* is published with the laudable objective of providing an outline framework for the calculation of penalties by the OFT. In our view, however, it would not be appropriate to analyse each individual "Step" in arriving at the penalty in isolation from the other Steps.
>
> 170. .....
>
> 171. .....
>
> 172. In our view in all those circumstances the Tribunal should focus primarily on whether the overall penalty is appropriate for the infringements in question. In our view, provided that the OFT has

> remained within its margin of appreciation in applying the Guidance, 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 OFT, particularly as regards Step 1 (starting point) and Step 3 (adjustment for other factors)."

178. From the Appellants' submissions, they do not take any real issue with the manner in which the CCS has assessed the seriousness of the infringements, by imposing a starting percentage point of [XXX]% where there are 2 infringements and [XXX]% where there is 1 infringement against the relevant turnover or the duration multiplier that is applied by the CCS. Even though in the Appellants' Alternative Penalty Submissions, the Appellants applied the lower starting percentage point of [XXX]% in its calculations where there are 2 infringements, the Appellants did not provide any proper justification or reason for such an approach. Further, in paragraph 169 above, the Appellants only ask for a lower starting percentage to be adopted if the Board disagrees with their other submissions.

179. In the circumstances, the Board takes the view that there is no reason to disturb the duration multiplier or the starting percentage adopted by the CCS. Indeed, the relatively low starting percentage has already duly taken into account the other factors raised by the Appellants, such as the market share of the respective Appellants, the openness of the cartel price-fixing and the effect on competitors and third parties. The Board is thus of the view that a starting percentage of [XXX]% should be imposed on the relevant turnover for 2 infringements, and a starting percentage of [XXX]% should be imposed on the relevant turnover for 1 infringement

180. The Appellants further take issue with the manner in which the relevant turnover is derived, which is in turn dependent on how the relevant product market is defined. It is contended by the Appellants that the CCS ought to have maintained the distinction between the focal products in deriving the relevant turnover.

181. The CCS identified the focal products as follows (ID at [89]):

(a) "*sale of one-way express bus tickets from Singapore to Malacca, KL, Genting, Ipoh, Simpang/Taiping and Butterworth/Penang, where the MSP Agreement applies*"; and

(b) "*sale of express bus or excursion bus services for destinations in Malaysia or Southern Thailand, in the form of either standalone bus tickets or as part of coach package tours, that are sold with FIC*".

182. The key question that the Board has to determine is what the relevant turnover is. In assessing the relevant turnover, the Board will have regard to 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 (Penalty Guidelines at [2.1]; see also [2.7] of the OFT's Penalty Guidance).

183. The European Commission's Guidelines on the Method of Setting Fines (tendered by CCS at the hearing on 2 June 2010) further provide that (at [13]):

> "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."

184. Insofar as the MSP Agreement is concerned, the Board accepts the logic in the Appellant's contention that as the MSP Agreement only affected the sale of one-way express bus tickets from Singapore to 6 destinations, the Origin-Destination approach should be adopted, such that the relevant turnover should be derived from such sales, and nothing more. In other words, the relevant turnover should be limited to the revenue derived from the sale of one-way express bus tickets from Singapore to the 6 destinations.

185. Insofar as the FIC Agreement is concerned, the Board is however unable to accept the Appellant's contention that the calculation of relevant turnover should be confined to the turnover obtained from the sale of FIC coupons. It is obvious that as there is no separate product market for the FIC coupons and that the sale of each FIC coupon is intrinsically tied with the sale of standalone bus tickets or coach package tours, the affected product market cannot be the sale of the FIC coupons but must be the sale of standalone bus tickets or coach package tours. Further, the decision of the Federal Tribunal in *Qantas Airways* is distinguishable, as not only did it concern a different legislative regime, the parties have already agreed on the level of penalty in that case.

186. Without the coach tickets, there would be no sale of the FIC coupons. Although the Board recognises that the FIC comprised an element of legitimate cost of insurance, this was relatively small. Further, the fact that the price of the FIC was incorporated into the coach tickets (such that the purchase of FIC was in a sense compulsory) further suggests that the affected product market is the sale of the coach tickets, and not just the sale of the FIC coupons alone. The Board thus considers that in determining the relevant turnover derived from the sale of express bus or excursion bus services for destinations in Malaysia or Southern Thailand, in the form of either standalone bus tickets or as part of coach package tours where the FIC Agreement apply, this must be based on the turnover from the sale of the coach ticket and not the FIC coupon itself.

187. Based on the above, the financial penalties should thus be calculated based on the following formula:

(a) [XXX]% on the relevant turnover derived from the sale of one-way express bus tickets from Singapore to Malacca, Kuala Lumpur, Genting, Ipoh, Simpang / Taiping, Butterworth / Penang where both the MSP and FIC Agreements apply; and

(b) [XXX]% of the relevant turnover derived from the sale of express bus or excursion bus services for destinations in Malaysia or Southern Thailand, in the form of either standalone bus tickets or as part of coach package tours where only the FIC Agreement apply.

188. The Board feels that it is fair that the relevant turnover derived from the sale of one-way express bus tickets from Singapore to the 6 destinations where both the MSP and the FIC Agreements apply is excluded in deriving the relevant turnover for (b) i.e. where only the FIC Agreement apply. As a matter of specific deterrence, the infringing party who has engaged in a large part of the MSP is already penalised severely by the imposition of a higher starting percentage of [XXX]% for that part of its relevant turnover, bearing in mind that the MSP which fixes the price of the coach tickets, as compared to the FIC which fixes a component of the price, is regarded as a more serious infringement.

189. Applying the formula set out in paragraph 187 above, the Board determines the penalties of the Appellants (rounded to the nearest dollar) as follows:

(a) It first determines the relevant turnover derived from the sale of one-way express bus tickets from Singapore to Malacca, KL, Genting, Ipoh, Simpang / Taiping, Butterworth / Penang where both the MSP and FIC Agreements apply for each Appellant and then apply the starting percentage of [XXX]% as there are 2 infringements;

(b) It next determines the relevant turnover derived from the sale of express bus or excursion bus services for destinations in Malaysia or Southern Thailand, in the form of either standalone bus tickets or as part of coach package tours where only the FIC Agreement apply and then apply the lower starting percentage of [XXX]% as there is 1 infringement;

(c) Finally, it adds the 2 penalties together to arrive at the starting point, which when multiplied with the duration multiplier, would result in the revised penalty.

Konsortium

190. Konsortium's relevant turnover where both the MSP and FIC Agreements apply is S$[XXX] (based on an aggregate of the revenue in Lines 1-7, 9, 13-15 of the Guess estimates set out in Annex 1 of the Appellant's Alternative Penalty Submissions). The Board does not think that a distinction should be made between the types of coaches traveling to the 6 destinations, and this argument was not pursued by the Appellants during the oral hearing. Applying the starting percentage of [XXX]%, the penalty for the 2 infringements is S$[XXX].

191. Konsortium's relevant turnover where only the FIC Agreement applies is S$[XXX] (which is the difference between the relevant turnover of S$[XXX] and S$[XXX]). Applying the starting percentage of [XXX]%, the penalty for 1 infringement is S$[XXX].

192. The starting point for Konsortium is thus S$[XXX] (which is an addition of S$[XXX] and S$[XXX]). Applying the duration multiplier of 2.5, a penalty of S$[XXX] is arrived at.

Five Stars

193. Five Stars' relevant turnover where both the MSP and FIC Agreements apply is S$[XXX] (based on the figures provided in Table 4 set out in Annex 3 of the Appellant's Alternative Penalty Submissions). Applying the starting percentage of [XXX]%, the penalty for the 2 infringements is S$[XXX].

194. Five Stars' relevant turnover where only the FIC Agreement applies is S$[XXX] (which is the difference between the relevant turnover of S$[XXX] and S$[XXX]). Applying the starting percentage of [XXX]%, the penalty for 1 infringement is S$[XXX].

195. The starting point for Five Stars is thus S$[XXX] (which is an addition of S$[XXX] and S$[XXX]). Applying the duration multiplier of 2.5, a penalty of S$[XXX] is arrived at.

GR Travel

196. GR Travel's relevant turnover where both the MSP and FIC Agreements apply is S$[XXX] (based on the figures provided in Table 4 set out in Annex 3 of the Appellant's Alternative Penalty Submissions). Applying the starting percentage of [XXX]%, the penalty for the 2 infringements is S$[XXX].

197. GR Travel's relevant turnover where only the FIC Agreement applies is S$[XXX] (which is the difference between the relevant turnover of S$[XXX] and S$[XXX]). (The Board does not see how the evidence supports the contention that GR Travel does not purchase FIC coupons.) Applying the starting percentage of [XXX]%, the penalty for 1 infringement is S$[XXX].

198. The starting point for GR Travel is thus S$[XXX] (which is an addition of S$[XXX] and S$[XXX]). Applying the duration multiplier of 2, a penalty of S$[XXX], is arrived at.

Gunung Raya

199. Gunung Raya's relevant turnover where both the MSP and FIC Agreements apply is S$[XXX] (based on the figures provided in Table 4 set out in Annex 3 of the Appellant's Alternative Penalty Submissions). Applying the starting percentage of [XXX]%, the penalty for the 2 infringements is S$[XXX].

200. Gunung Raya's relevant turnover where only the FIC Agreement applies is S$[XXX] (which is the difference between the relevant turnover of S$[XXX] and S$[XXX]). (The Board does not see how the evidence supports the contention that Gunung Raya does not purchase FIC coupons.) Applying the starting percentage of [XXX]%, the penalty for 1 infringement is S$[XXX].

201. The starting point for Gunung Raya is thus S$[XXX] (which is an addition of S$[XXX] and S$[XXX]). Applying the duration multiplier of 2, a penalty of S$[XXX] is arrived at.

Summary of the Penalties determined by the Board

202. The table below summarises the penalties determined by the Board that are to be imposed on the Appellants:

Party	**Relevant turnover – MSP & FIC (S$)**	**Penalty for MSP & FIC (S$)**	**Relevant turnover – FIC (S$)**	**Penalty for FIC (S$)**	**Starting Point (S$)**	**Penalty by the Board (S$)**	**Penalty by the CCS (S$)**
Konsortium	[XXX]	[XXX]	[XXX]	[XXX]	[XXX]	**283,390**	337,635

Party	Relevant turnover – MSP & FIC (S$)	Penalty for MSP & FIC (S$)	Relevant turnover – FIC (S$)	Penalty for FIC (S$)	Starting Point (S$)	Penalty by the Board (S$)	Penalty by the CCS (S$)
Five Stars	[XXX]	[XXX]	[XXX]	[XXX]	[XXX]	**291,247**	450,207
GR Travel	[XXX]	[XXX]	[XXX]	[XXX]	[XXX]	**43,342**	52,432
Gunung Raya	[XXX]	[XXX]	[XXX]	[XXX]	[XXX]	**43,570**	76,668

+ Konsortium's relevant turnover as a result of the infringement in respect of the MSP Agreement is calculated based on an aggregate of the revenue in Lines 1-7, 9, 13-15 of the Guess estimates set out in Annex 1 of the Appellants' Alternative Penalty Submissions.

+ Five Stars, GR Travel and Gunung Raya's relevant turnover as a result of the infringement in respect of the MSP Agreement is based on the figures provided in Table 4 set out in Annex 3 of the Appellants' Alternative Penalty Submissions

203. The Board next considers whether the penalties should be further adjusted to take into account other relevant factors (such as whether the penalties imposed are of sufficient deterrent value). In this regard, a comparison is made between the penalties determined by the Board with the penalties imposed by the CCS and measured against the total turnover of the respective Appellants, as set out in the table below:

Party	Total Turnover	Penalty by the Board (S$)	Percentage of Penalty by the Board over Total Turnover (%)	Penalty by the CCS (S$)	Percentage of Penalty by the CCS over Total Turnover (%)
Konsortium	[XXX]	**283,390**	[XXX]	337,635	[XXX]
Five Stars	[XXX]	**291,247**	[XXX]	450,207	[XXX]

Party	Total Turnover	Penalty by the Board (S$)	Percentage of Penalty by the Board over Total Turnover (%)	Penalty by the CCS (S$)	Percentage of Penalty by the CCS over Total Turnover (%)
GR Travel	[XXX]	**43,342**	[XXX]	52,432	[XXX]
Gunung Raya	[XXX]	**43,570**	[XXX]	76,668	[XXX]

204. Having considered this comparison and other relevant factors, the Board does not see the need for further adjustment.

XVII. COSTS OF THE APPEAL

205. The Board now turns to the issue of costs. The Appellants submit that there must be no direction and/or order as to costs or interests to the prejudice of the Appellants. Relying on *GISC v Director of Fair Trading UK Competition Appeal Board* [2002] CAT 2 ("*GISC*"), the Appellants submit that costs ought not to be awarded against the unsuccessful party in the absence of unreasonable conduct or other exceptional circumstances. The case of *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 11 also provides that an important factor in the exercise of discretion whether to award costs:

> "is the effect which a costs order may have on a undertaking which also has to meet the impact of the penalty and its own costs. 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 ... there is an evident public interest that potential appellants should not be

unduly deterred from bringing an appeal by the risk of a costs order against them".

206. The Appellants also urge the Board to exercise its powers under Regulation 31 of the Competition (Appeals) Regulations, and not impose any interest on the payment of the financial penalties.

XVIII. CCS'S CONTENTIONS ON COSTS

207. The CCS submits that costs should follow the event. It cites the case of *Independent Media Support Limited v Office of Communications* [2008] CAT 27 ("*Independent Media*") which sets out the following guiding principles on costs:

> "(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."

208. The CCS urges the Board to follow the above guidelines, and ask that costs follow the event in view of the comprehensive attack mounted by the Appellants on all aspects of the CCS's decision on liability and penalties.

209. On the exercise of the Board's power to order interest from the date the notice of appeal is filed under Regulation 31 of the Competition (Appeals) Regulations, the CCS submits that the imposition of interest is to prevent appeals being introduced to delay payment and the rate of interest should reflect the benefit derived by the Appellants from the suspension of the obligation to make the penalty payment. The CCS asks that if the Board finds that the Appellants should pay penalties, interest at the rate of 5.33% per annum (based on Practice Direction No. 1 of 2007 for judgment debt) should be imposed from the date of Board's decision.

The Board's Decision on Costs

210. The Appellants in this appeal have failed on liability but have succeeded on the quantum of the penalty to be imposed. In the circumstances, a fair order is that each party should bear and pay its own costs.

211. As for interest, there is no reason why the Board should not exercise its discretion to order that interest should run from the date of its decision at the rate of 5.33% per annum.

XIX. CONCLUSION

212. In view of the above, the appeals on liability should be dismissed, and the appeals on financial penalties should be allowed in part. Each party is to pay its own costs. The Board further orders that each of the Appellants pay interest on the financial penalty at the rate 5.33% per annum from the date of the decision to the date of payment.

Dated this 28th day of February 2011

Wong Meng Meng, SC
Member

Thean Lip Ping
Chairman

Boon Yoon Chiang
Member

Ashish Lall
Member

Ron Foo Siang Guan
Member