Competition Appeal No 1 of 2014

Between

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

... Appellants

And

Competition Commission of Singapore

... Respondent

DECISION

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v
Competition Commission of Singapore

[2016] SGCAB 1

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Goh Joon Seng, G P Selvam, Tan Tee Jim, SC

8 January 2016 Decision reserved.

Introduction

1 This appeal concerns the Infringement Decision ("ID") issued by the Competition Commission of Singapore ("CCS") on 27 May 2014 against four Japanese bearing manufacturers and their corresponding Singapore subsidiaries (collectively, the "Parties").

2 In the ID, the CCS found that the Parties contravened s 34 of the Competition Act (Cap 50B, 2006 Rev Ed) ("Act") by engaging in anti-competitive agreements and unlawful exchanges of information in respect of the price and sale of ball and roller bearings ("Bearings") sold to "Aftermarket Customers" in Singapore (we shall return to the meaning of "Aftermarket Customers" later in this decision).

3 In particular, the CCS found that the Parties met regularly at meetings in Japan and Singapore and during these meetings, they discussed and agreed on the overall strategies for the Singapore subsidiaries to implement pursuant to a common overall objective of co-ordinating the pricing of the Bearings for

sale to Aftermarket Customers in [...] including Singapore. This was to maintain each Party's market share and to protect its profits and sales.

4 The CCS also found that the Appellants in this appeal, Nachi-Fujikoshi Corporation, and its subsidiary, Nachi Singapore Private Limited ("NSPL"), were parties to the single continuous infringement of s 34 of the Act from 1 January 2006 to 26 July 2011.

5 Consequently, the CCS imposed the following financial penalties on the Parties pursuant to s 69(2)(*d*) of the Act (see ID at [529]):

Party	**Financial Penalty**
JTEKT Corporation and its subsidiary, Koyo Singapore Bearings (Pte) Ltd	Nil (granted full immunity)
NSK Ltd and its subsidiary, NSK Singapore (Private) Ltd	S$1,286,375
NTN Corporation and its subsidiary, NTN Bearing-Singapore (Pte) Ltd	S$455,652
Nachi-Fujikoshi Corporation and its subsidiary, Nachi Singapore Private Limited	S$7,564,950
Total	**S$9,306,977**

6 The Appellants are not challenging the CCS's finding of infringement and its decision to impose a financial penalty. They are only appealing against the *quantum* of the financial penalty imposed on them by the CCS. The Appellants contend that a lower penalty should have been imposed as:

(a) in calculating the financial penalty, the CCS applied the turnover of the Appellants for the wrong financial year ("Relevant Financial Year Issue"); and

(b) in the light of the Appellants' unique business model, the CCS should have excluded the export sales by their exclusive local distributor and should have based the turnover on the sales of the Bearings with Singapore as their final destination ("Business Model Issue").

7 At the hearing, the Appellants were represented by Mr Alvin Yeo SC, Ms Ameera Ashraf and Mr Chan Jia Hui while the CCS was represented by Prof Tan Cheng Han SC and Mr Lee Jwee Nguan.

8 Given that the Appellants are not appealing against the CCS's decision on infringement, there is no need to set out the facts concerning the anti-competitive agreements and exchanges of information between the Parties that gave rise to the decision. It suffices for us to deal directly with the issues concerning the financial penalty imposed on the Appellants.

Financial Penalty

9 In *Re Price Fixing in Bus Services from Singapore to Malaysia and Southern Thailand: Konsortium Express and Tours Pte Ltd, Five Stars Tours Pte Ltd, GR Travel Pte Ltd and Gunung Travel Pte Ltd* [2011] SGCAB 1 ("*Re Price Fixing in Bus Services*"), this Board noted (at [144]) that it will have regard to the *CCS Guidelines on the Appropriate Amount of Penalty* (June 2007) ("*CCS Penalty Guidelines*") where appropriate in determining the appropriate amount of financial penalty to be imposed on a party, "unless it is

shown that the [*CCS Penalty Guidelines*] are wrong or that the CCS has erroneously applied the [*CCS Penalty Guidelines*]." The parties to this appeal do not dispute the applicability of the *CCS Penalty Guidelines*. The Appellants' grievance is that the CCS erroneously applied the guidelines in relation to both the Relevant Financial Year Issue and the Business Model Issue.

10 Paragraph 2.1 of the *CCS Penalty Guidelines* provides that the financial penalty imposed by the CCS on a party pursuant to s 69 of the Act shall be calculated by taking into consideration the following factors:

(a) the seriousness of the infringement;

(b) 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;

(c) the duration of the infringement;

(d) other relevant factors, e.g. deterrent value; and

(e) any further aggravating or mitigating factors.

11 These factors are similar to those in the approach adopted by the UK's Office of Fair Trading, as acknowledged by this Board in *Re Price Fixing in Bus Services* at [147].

12 The approach, which was also adopted by the CCS in this case, involves the following steps:

(a) Step 1: ascertain the seriousness of the infringement and apply a starting percentage to the relevant turnover;

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

(c) Step 3: make adjustments for aggravating and mitigating factors;

(d) Step 4: make adjustments for all other relevant factors including general and specific deterrence;

(e) Step 5: make adjustments to avoid exceeding the statutory maximum penalty provided for under s 69(4) of the Act; and

(f) Step 6: make adjustments for leniency discounts.

CCS's calculation of the financial penalty

13 For the purposes of Step 1, the CCS considered, *inter alia*, the nature of the relevant product (*i.e.*, the Bearings) and the Parties' estimated aggregate market share of up to [...]% (of which the Appellants – regarded as a single economic entity – held the [...] market share of [...]%) in relation to the relevant market. According to the CCS, the relevant market was the "Aftermarket Customers" in Singapore. "Aftermarket Customers" was defined in the ID (Glossary at 4) as "customers who use the Bearings for repair and maintenance purposes and distributors who in turn on-sell the Bearings to such customers". The CCS fixed the starting percentage at [...]%.

14 The Appellants' financial year commences on 1 October and ends on 30 September. The CCS applied the starting [...]% to the Appellants' relevant

turnover figure of S$[...] for the sale of the Bearings to Aftermarket Customers in Singapore (which consisted entirely of NSPL's sales to a single Aftermarket Customer in Singapore (namely, the Appellants' [...] local distributor, [A Company]) for the financial year ending 30 September 2012 ("FY 2012") to arrive at a starting amount of S$[...].

15 As for Step 2, the CCS adopted a duration multiplier of 5.50 in consideration of the Appellants' single continuous infringement from 1 January 2006 to 26 July 2011 (rounded down to five years and six months). The application of the multiplier to the starting amount resulted in a figure of S$[...].

16 The CCS did not make any adjustments at Steps 3, 4 and 5. It did, however, at Step 6, reduce the figure of $[...] derived after Step 2 by [...]% pursuant to its leniency programme. Thus, the CCS arrived at the financial penalty of S$7,564,950 imposed upon the Appellants.

Relevant Financial Year Issue

17 Paragraphs 2.4 and 2.5 of the *CCS Penalty Guidelines* provide guidance on the financial year which the CCS is to derive the relevant turnover from when calibrating the financial penalty to be imposed:

> 2.4 In assessing the impact and effect of the infringement on 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.
>
> 2.5 The business year, for this purpose, will be the one preceding the date on which the decision of the CCS is taken or, if figures are not available for the business year, the one immediately preceding it.

18 The CCS submits that these guidelines afford a margin of appreciation in the choice of financial year regarding financial figures for the relevant turnover and calculation of financial penalty. It says that if the figures are not available for a particular financial year, it is to use the financial figures for the financial year immediately preceding that particular financial year.

19 In the present case, when the notice of proposed infringement decision ("PID") was issued on 16 December 2013, the Appellant's turnover for the year ending 30 September 2013 ("FY 2013") was not available to the CCS. Accordingly, the CCS adopted the turnover for FY 2012 to arrive at the financial penalty of S$7,564,950imposed upon the Appellants. In this appeal, the CCS seeks to support the adoption of the turnover for FY 2012 by reference to the provisions in ss 68 and 69 of the Act as well as regs 7, 8 and 13 of the Competition Regulations 2007 (S 347/2007) ("Regulations").

20 Additionally, the CCS argues that it would be administratively unworkable for it to be required to request and apply an updated turnover before issuance of an ID as this would require subsequent rounds of PIDs to be issued.

21 The Appellants, however, submit that the phrase "decision of the CCS" in paragraph 2.5 of the *CCS Penalty Guidelines* (as well as in para 3(1) of the Competition (Financial Penalties) Order 2007 ("Financial Penalties Order")) refers to the ID and that the CCS should have relied on their turnover for FY 2013, which is the business year that immediately preceded the ID issued on 27 May 2014. They point out that they supplied the turnover for FY 2013 to the CCS on 14 March 2014 and 19 March 2014 following a request from the CCS on 6 March 2014. They argue that based on the turnover

for FY 2013, the financial penalty imposed upon them would have been reduced as the turnover is lower than that for FY 2012.

22 The parties' submissions highlight a controversy between them as to whether the phrase "decision of the CCS" in para 2.5 of the *CCS Penalty Guidelines* as well as in para 3(1) of the Competition (Financial Penalties) Order 2007 (S 372/2007) ("Financial Penalties Order") refers to the PID or the ID. It seems to us that to resolve that controversy, it is apposite to briefly examine the relevant statutory scheme of the Act.

The statutory scheme

23 Section 62(1) of the Act provides that the CCS may conduct an investigation if there are reasonable grounds for suspecting that any one of the prohibitions set out in ss 34, 47 or 54 of the Act has been infringed.

24 Upon completion of the investigation, the CCS would issue a PID. This is provided in s 68 of the Act:

> **Decision of Commission upon completion of investigation**
>
> **68.**—(1) Where —
>
> (*a*) after considering the statements made, or documents or articles produced, in the course of an investigation conducted by it under this Part; or
>
> (*b*) in the case of an investigation conducted by an inspector, after considering the report of the inspector,
>
> the Commission proposes to make a decision that the section 34 prohibition has been infringed by any agreement, the section 47 prohibition has been infringed by any conduct, the section 54 prohibition will be infringed by any anticipated merger, if carried into effect, or the section 54 prohibition has been infringed by any merger, the Commission shall —

(i) give written notice to the person likely to be affected by such decision; and

(ii) give such person an opportunity to make representations to the Commission.

(2) Subject to subsections (3) and (5), upon considering any representation made to the Commission under subsection (1)(ii), the Commission may, as it thinks fit, make a decision that —

(*a*) the section 34 prohibition has been infringed by any agreement;

(*b*) the section 47 prohibition has been infringed by any conduct;

(*c*) the section 54 prohibition will be infringed by any anticipated merger, if carried into effect; or

(*d*) the section 54 prohibition has been infringed by any merger.

...

25 Section 68 of the Act is to be read with regs 7 and 8 of the Regulations:

Proposed infringement decision

7.—(1) Where the Commission has conducted an investigation into any agreement or conduct and the Commission proposes to make a decision that the section 34 prohibition or the section 47 prohibition has been infringed, as the case may be, the Commission shall —

(*a*) give notice of this to each person whom the Commission considers is or was a party to the agreement, or is or was engaged in the conduct, as the case may be, which the Commission considers has infringed a prohibition; and

(*b*) state in such notice which prohibition the Commission considers has been infringed.

(2) Where the Commission has conducted an investigation into any anticipated merger or merger and the Commission proposes to make a decision that —

(*a*) an anticipated merger, if carried into effect, will infringe the section 54 prohibition; or

(*b*) a merger has infringed the section 54 prohibition,

the Commission shall give notice of this to each person whom the Commission considers is or was a party to the anticipated merger or party involved in the merger, as the case may be.

(3) Regulation 8 shall apply to a notice given by the Commission under this regulation.

Notices, access to file and representations

8.—(1) Every notice referred to in regulation 7 shall state —

(*a*) the facts on which the Commission relies and its reasons for the proposed decision;

(*b*) the period within which a relevant person may make representations to the Commission, which shall be in the form of a written statement, identifying the information contained in the notice which that relevant person considers the Commission should treat as confidential information and explaining why he considers the Commission should treat such information as confidential information;

(*c*) the period within which a relevant person may submit a written statement to the Commission on the matters referred to in the notice; and

(*d*) where the proposed decision relates to an anticipated merger or a merger, that any party to the anticipated merger or any party involved in the merger, as the case may be, may apply to the Minister within 14 days of the date of the notice for the anticipated merger or merger, as the case may be, to be exempted from the section 54 prohibition on the ground of any public interest consideration.

(2) The Commission shall give a relevant person a reasonable opportunity to inspect the documents in the Commission's file that relate to the matters referred to in the notice given to that relevant person, except that the Commission may withhold any document —

(*a*) to the extent that it contains confidential information; or

(*b*) which is an internal document.

(3) Where, in his written statement on the matters referred to in a notice given to a relevant person, that relevant person

> requests to make oral representations to the Commission on such matters, the Commission may give that relevant person a reasonable opportunity to make such oral representations.
>
> ...
>
> (7) In this regulation, "relevant person" means a person to whom notice is required to be given under regulation 7.

26 It is thus clear from the above provisions that the procedure is for the CCS to first issue a PID and allow the person concerned to make representations to the CCS (s 68(1)(ii) of the Act) in the form of written submissions (regs 8(1)(*b*) and 8(1)(*c*) of the Regulations) and oral representations (reg 8(3) of the Regulations).

27 After considering the submissions (with or without the oral representations), the CCS may then come to a final landing on whether there has indeed been an infringement as proposed in the PID. If it is of the view that such an infringement is made out, it will issue an ID to that effect pursuant to s 68(2) of the Act.

28 In the ID, the CCS may issue such directions as it thinks appropriate to bring the infringement to an end, including a direction "to pay to the [CCS] such financial penalty in respect of the infringement as the [CCS] may determine" (s 69(2)(*d*) of the Act). The directions are to be preceded by a notice in accordance with reg 13 of the Regulations which reads:

> **Directions under section 69 of Act**
>
> **13.**—(1) Where the Commission proposes to give such person as it thinks appropriate any direction referred to in section 69(1) of the Act, the Commission shall give notice to that person of the action it proposes to take and its reasons therefor.
>
> (2) Regulation 8(1)(*b*) and (*c*) and (2) to (6) shall, with the necessary modifications, apply to a notice referred to in paragraph (1).

29 The financial penalty imposed in the ID must not exceed 10% "or such other percentage of such turnover of the business of the undertaking in Singapore for each year of infringement for such period, up to a maximum of three years" (s 69(4) of the Act). The determination of the calculation of the financial penalty is explained in para 3(1) of the Financial Penalties Order as follows:

> **3.**—(1) The turnover of an undertaking for the purposes of section 69(4) of the Act is the applicable turnover for the business year preceding the date on which the decision of the Commission is taken or, if figures are not available for that business year, the business year immediately preceding it.

Our decision on the Relevant Financial Year Issue

30 In our judgment, it is clear from the statutory framework that the phrase "decision of the CCS" in para 2.5 of the *CCS Penalty Guidelines* as well as in para 3(1) of the Financial Penalties Order refers to the ID. The PID is merely a notice by the CCS informing the person concerned of its proposal to make an infringement decision. This is amply clear from, for instance, reg 7(1) of the Regulations:

> "Where the Commission has conducted an investigation into any agreement or conduct and the Commission **proposes to make** a decision that the section 34 prohibition or the section 47 prohibition has been infringed, as the case may be, the Commission shall —
>
> > (*a*) give notice of this to each person whom the Commission considers is or was a party to the agreement, or is or was engaged in the conduct, as the case may be, which the Commission considers has infringed a prohibition; and ..." (emphasis added)

31 The proposal to make an infringement decision cannot be regarded as a "decision" for the purposes of para 2.5 of the *CCS Penalty Guidelines* as well as in para 3(1) of the Financial Penalties Order. We thus agree with the

Appellants that the CCS should have relied on their turnover for FY 2013 to derive the appropriate financial penalty to be imposed, FY 2013 being the financial year immediately preceding the ID.

32 As regards the CCS's argument that it would be administratively unworkable for it to be required to request for and apply an updated turnover before the publication of an ID, we are of the view that the argument is over-stated. The fact that the infringer is to be given an opportunity to make representations upon the issuance of the PID clearly means that the CCS is obliged to amend its proposal in the PID if the representations warrant any amendment. Such an amendment may take the form of a reduction of the financial penalty that is proposed in the PID.

33 Further, given that the Appellants' financial year ends on 30 September, the financial year immediately preceding the PID issued on 16 December 2013 in this case was in fact FY 2013. Therefore, even accepting the CCS's argument that the "decision of the CCS" in para 2.5 of the *CCS Penalty Guidelines* as well as in para 3(1) of the Financial Penalties Order refers to the PID, the CCS should have nonetheless relied on the Appellants' turnover for FY 2013 which immediately preceded the PID.

Business Model Issue

34 The Appellants submit that their business model, in relation to the sale of the Bearings in Singapore, is unique and different from that of the other manufacturers that constitute the Parties (the "other Parties"). While the other Parties sold the Bearings to [...], the Appellants sold the Bearings [...] to a Singaporean third-party distributor, [A Company], which then sold the Bearings to customers in Singapore and elsewhere. The Appellants argue that

the sales of the Bearings to [A Company] accounted for the entirety of their turnover and that the financial penalty should instead be imposed on them after discounting the further sales of the Bearings by [A Company] to customers outside Singapore ("Export Sales").

35 In particular, the Appellants argue that the CCS erred in law and in the exercise of its discretion by :

(a) failing to exclude the Export Sales from the relevant turnover in calculating the Appellant's financial penalty;

(b) failing to consider the nature of the infringement on customers outside Singapore and the relatively small impact of the Appellants' infringement on the relevant market in Singapore in determining the starting percentage to be applied in calculating the financial penalty; and

(c) discriminating against the Appellants' unique business model, thus resulting in a quantum of the financial penalty that was excessive and disproportionate.

36 We do not accept these arguments principally because it is incorrect for the Appellants to have regarded the Export Sales as their own. The fact is that such sales were made by [A Company] and it is not in dispute that [A Company] was *not* acting as the Appellants' agent in respect of the Export Sales. The relationship between the Appellants and [A Company] was one of seller and buyer, rather than principal and agent.

37 Thus, we do not consider the Appellants' infringement to have only a small impact on the relevant market in Singapore. In this connection, we agree

with the observation of the CCS (at [452] of the ID) that consideration must be given to the fact that [A Company] was itself a victim of the anti-competitive behaviour of the Parties in Singapore and, as such, it "bore the full brunt of [the Appellants'] anti-competitive behaviour's impact in Singapore."

38 Thus, we hold that the CCS had properly exercised its discretion in determining the starting percentage of [...]%, given the serious nature of the infringement, the impact of the infringement on the relevant market in Singapore and the Appellants' market share of [...]%. It was appropriate for the CCS to have based the Appellants' relevant turnover on their sales of Bearings to [A Company] at the prices agreed by the Parties during their meetings.

Conclusion

39 In the result, the Board allows the Appellants' appeal in relation to the Relevant Financial Year Issue and dismisses the appeal in relation to the Business Model Issue.

40 As the Appellants' relevant turnover for FY 2013 is S$[...], the financial penalty to be imposed should be S$ S$4,773,423 (after applying the starting percentage of [...]%, the duration multiplier of 5.50 and the [...]% reduction for leniency) instead of the S$7,564,950 imposed.

41 The Board invites the parties to submit on costs in writing within two weeks from the release of this decision.

Dated this 8 January 2016

Goh Joon Seng	G P Selvam	Tan Tee Jim, SC
Chairman	Member	Member