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IN THE COMPETITION APPEAL BOARD OF THE REPUBLIC OF SINGAPORE

Appeal No. 3 of 2009

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

Between

1. **Transtar Travel Pte Ltd**
2. **Regent Star 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 and 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$)**
Transtar Travel Pte Ltd ("**Transtar**")	1 January 2006 to 24 July 2008	1 January 2006 to 24 July 2008	518,167
Regent Star Travel Pte Ltd ("**Regent Star**")	1 January 2006 to 24 July 2008	1 January 2006 to 24 July 2008	103,875

4. Against the ID, the Appellants appealed to the Competition Appeal Board (the "**Board**") under section 71 of the Act. The appeal is in relation to the calculation and the level of the financial penalties and with respect to the CCS's assessment and appraisal of certain primary facts in relation thereto. Transtar and Regent Star filed their Notice of Appeal on 31 December 2009.

II RELEVANT BACKGROUND FACTS

5. Transtar is in the business of operating express bus services between Singapore and Malaysia and of providing coach package tours to Malaysia and Southern Thailand, where the prices of the bus tickets would be incorporated into the prices of the coach package tours (ID at [27]-[32]).

6. Regent Star is in the business of selling express bus tickets and coach package tours, primarily as an agent on behalf of Transtar, and approximately [XXX]% of its business is in respect of Transtar's operated coaches and packages. Its business with other coach operators constitutes approximately [XXX]% of its business.

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**") (ID at [4]). The Executive Committee of the EBAA ("**Exco**") originally comprised 11 members; this was reduced to 9 members from 11 October 2006 (ID at [5]). According to EBAA's press release dated 15 October 2007, the EBAA members who operate bus services commanded a total of 60% market share of the coach traffic between Singapore and Malaysia. The Appellants have been members of the EBAA since the latter's inception.

III DECISION OF THE CCS

8. The CCS found that there was an agreement reached on 1 June 2005 between the Appellants, 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**"), Konsortium Express and Tours Pte Ltd

("**Konsortium**"), Five Stars Tours Pte Ltd ("**Five Stars**"), GR Travel Pte Ltd ("**GR Travel**") and Gunung Travel Pte Ltd ("**Gunung Travel**") 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]).

9. The CCS also found that there was an agreement to fix the prices of the fuel and insurance surcharge, (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]).

10. At paragraphs 436 and 437 of 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."

11. 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]).

12. 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 Act: (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 s 34 Prohibition."

13. 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 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]).

14. 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. CCS was therefore satisfied that each of the EBAA members including the Appellants intentionally infringed the section 34 prohibition (ID at [447]).

15. 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, 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")

16. 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

17. 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 CCS adopt will varies depending on the circumstances of the case (ID at [456]-[457]).

18. 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]).

19. 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]).

20. 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]).

21. 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

22. 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]).

23. 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]).

24. 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]).

25. 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

26. 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]).

27. The relevant period of infringement for Transtar and Regent Star for the MSP and FIC Agreements was from 1 January 2006 (when the Act came into force) to 24 July 2008 (ID at [37]).

Other relevant factors

28. The CCS considered that the penalty may be adjusted as appropriate to achieve 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]).

29. 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 objectives of deterrence, the CCS would adjust the penalty to meet the objective of deterrence (ID at [495]-[497]).

30. 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

31. 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

Transtar

32. The CCS found that Transtar's relevant turnover is S$[XXX]. As Transtar was a party to the MSP and the FIC Agreements, the percentage of [XXX]% of the relevant turnover was applied, giving a starting point in the sum of S$[XXX] (ID at [632]-[633]).

33. As Transtar was involved in the infringements from 1 January 2006 until 24 July 2008, upon applying the multiplier of 2.5, the financial penalty of **S$518,167** was arrived at (ID at [634]).

34. The CCS noted that Transtar is one of the bigger players in the EBAA. It made a net profit of S$[XXX] in 2007. The CCS also noted that the figure reached after adjustment for duration is a significant sum in relation to Transtar because both the

relevant turnover and the figure for the starting point represent an adequate proportion of Transtar's total turnover in 2007. Accordingly, the figure is sufficient to act as an effective deterrent to Transtar and other undertakings which may consider engaging in price-fixing agreements, and no further adjustments to the penalty would be made (ID at [636]).

35. The CCS was of the view that 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 Transtar and its representatives (ID at [637]).

36. The financial penalty also does not exceed the maximum financial penalty that CCS can impose in accordance with s 69(4) of the Act, i.e. S$[XXX] (ID at [638]).

Regent Star

37. The CCS found that Regent Star's relevant turnover is S$[XXX]. As Regent Stars was party to the MSP and FIC Agreements, the percentage of [XXX]% of the relevant turnover was applied giving a starting point in the sum of S$[XXX] (ID at [605]-[607]).

38. As Regent Star was involved in the infringements from 1 January 2006 until 24 July 2008, upon applying the multiplier of 2.5, the financial penalty of **S$103,875** was arrived at (ID at [608]).

39. The CCS noted that Regent Star made a net profit of S$[XXX] in 2007, and that the figure reached after adjustment for duration is a significant sum in relation to Regent Star, because both the relevant turnover and the figure for the starting point represent an adequate proportion of Regent Star's total turnover in 2007. Accordingly, the figure is sufficient to act as an effective deterrent to Regent Star and other undertakings which may consider engaging in price-fixing agreements, and no further adjustments to the penalty would be made (ID at [609]).

40. The CCS was also of the view that 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 Regent Star and its representatives (ID at [610]).

41. The financial penalty also does not exceed the maximum financial penalty that CCS can impose in accordance with s 69(4) of the Act, i.e. S$[XXX] (ID at [611]).

Mitigating factors

42. The Appellants relied on various other mitigating factors (ID at [612]-[614], [639]):

(a) The genuine uncertainty of the Appellants as to whether price-fixing by way of the MSP and FIC Agreements constituted an infringements under section 34 of the Act, as prices were previously regulated by the PTC.

(b) The Appellants had terminated the infringement as soon as investigations commenced.

(c) The Appellants were facing intense competition from budget airlines which would reduce its revenue, and the financial penalties would cause financial hardship and cause them to go into insolvency.

43. The CCS did not find that the mitigating factors were present, and decided that no further reduction should be given in the circumstances (ID at [612]-[614], [639]). In response of the above mitigating factors urged by the Appellants, the CCS held as follows:

(a) Ignorance or a mistake of the law is no bar to a finding of intentional infringement. While the CCS noted that PTC regulated passenger fares before 1 January 2005, the agreement between competitors on passenger fares was an entirely different matter, and the EBAA members were aware of this when they instructed EBAA as early as 6 July 2005 to check with LTA and CASE on the legality of such arrangements. No checks were however made.

(b) As an entire month has passed after the CCS commenced investigations on 24 June 2008 before the members met on 23 July 2008, the Appellants did not terminate the infringement as soon as investigations commenced.

(c) The onus lies on the Appellants to satisfy the CCS that the imposition of the penalty will potentially result in insolvency. Aside from stating that the combined penalty is [XXX] of both companies, no further evidence has been produced to demonstrate that the imposition of the penalty will result in their insolvency.

VI THE APPELLANTS' CONTENTIONS ON OVERLAP

44. The main contentions of the Appellants are these. First, the CCS incorrectly calculated the relevant turnover of the Appellants for the purposes of calculating the applicable financial penalties by not acknowledging and accounting for the fact that there is a significant overlap in revenue between Transtar and Regent Star. The CCS determined the relevant turnover of Transtar and Regent Star, for the purposes of penalty calculations, to be S$[XXX] and S$[XXX] respectively. It is contended that there is substantial overlap in the revenue that exists between Transtar and Regent Star in the following manner. Regent Star represents itself as an authorised agent for Transtar, and not for any coach operator. It does not own coaches and approximately [XXX]% of all "*costs of goods sold*" payments are made by Transtar in respect of Transtar-operated coaches and packages. Only [XXX]% of the Regent Star's "*cost of goods sold*" comprises payments to other coach operators.

45. When an express bus ticket or coach package tour is sold by Regent Star on behalf of Transtar, Regent Star retains approximately [XXX]% to [XXX]% of the ticket price as its agent commission and the remainder is paid to Transtar. In relation to the sale of one-way express coach services, the commission rate is approximately [XXX]%, meaning that [XXX]% of the revenue is paid back to Transtar as cost of goods sold. In respect of coach package tours sold by Regent Star, approximately [XXX]% of the revenue is paid back to Transtar, and the remainder is retained by Regent Star as commission.

46. The CCS determined Regent Star's relevant turnover to be S$[XXX]. This amount is calculated by adding the value of one way coach ticket sales specified in Regent

Star's 2007 Financial Statements (S$[XXX]) and 20% of the turnover from the sale of coach package tours (S$[XXX]). On this point, the contention of the Appellants is that this amount is overstated by S$[XXX] in respect of the one way coach ticket sales (being the exact amount paid back to Transtar in respect of one way coach ticket sales). The Appellants also contend that the amount is overstated by a further sum of S$[XXX] in respect of the sale of coach package tours, being [XXX]% of the turnover figure calculated by the CCS in respect of coach tours. In summary, the Appellants say that the relevant turnover is overstated by S$[XXX], which is an overlap in revenue between Regent Star and Transtar.

47. The Appellants contend that the CCS erred in its consideration and appraisal of the relevant facts. First, there are no sales made by Transtar to Regent Star as stated by the CCS. Second, payments to the other coach operators amount to [XXX]% of Regent Star's total costs of goods sold. These payments, and other payments made by Regent Star do not contribute to an overlap in the revenue between Regent Star and Transtar. It is the case of the Appellants that "*only sales made to end consumer can constitute the relevant turnover*"; all sales made by Transtar and Regent Star are to end consumers. The salient point which the CCS fails to note is that a substantial portion of the revenue obtained from the sales is overlapping between Transtar and Regent Star, and it would be manifestly unfair for the same revenue to be penalised twice.

48. The Appellants rely on paragraph 2 of the Schedule of the Competition (Financial Penalties) Order 2007, which is in the following terms:

> "Subject to paragraph 3, where an undertaking consists of 2 or more undertakings that each prepare accounts then the applicable turnover shall be calculated by adding together the respective applicable turnover of each, save that no account shall be taken of any turnover resulting from the sale of products or the provision of services between them."

49. The question is whether Regent Star and Transtar could be considered together as an "*undertaking consisting of 2 or more undertakings*". It is the contention of the Appellants that, from a practical point of view and for the purposes of considering their relevant turnovers, they should be treated as such, falling within the terms of Paragraph 2 of the Order. In support of this contention, they rely on the following facts:

(a) Mr Sebastian Yap is Regent Star's representative to the EBAA and at the same time he is also the executive director of Transtar.

(b) Mr Elson Yap, the brother of Mr Sebastian Yap, is the managing director of Transtar, and concurrently a shareholder of Regent Star.

(c) Both Transtar and Regent Star have also the same general manager, namely, Ms Loh Choon Lee, who is in charge of the day to day operations of both companies.

(d) Both companies have the same registered address and share business premises at Golden Mile Complex. There is no physical separation of offices and the business operations of the both companies are run from the same premises.

(e) The employees of both companies are interchangeable, in the sense that they work for both companies. In fact, Regent Star's front office employees wear Transtar uniforms.

(f) All commercial decisions relating to Transtar and Regent Star are made simultaneously and by the same management.

(g) When negotiating with suppliers and landlords, both companies also negotiate jointly. Strategic commercial decisions made by Transtar are also automatically adhered to by Regent Star.

(h) Regent Star is an authorised agent of Transtar's express coach tickets and coach package tours.

The Appellants' contentions is that the two entities enjoy no economic independence or autonomy as both companies pursue a single economic aim on a long term basis and as such operate as a single economic entity.

50. The Appellants concede that the two companies have separate board of directors and separate shareholders, each maintaining separate legal identity. However, these facts are not decisive in considering the question whether they operate as a single economic entity. The test is whether there is any unity in their conduct in the market and in the business operations. In the present case, the Appellants have such unity of interest, not only through the existence of those factors listed at paragraph 49 above but also because the relationship between Appellants is one of agency. Agency arrangement may result in the parties being considered a single economic entity: *Metsa-Serla Oyj & Ors v Commission of the European Communities* [2000] ECR I-10065 ("*Metsa-Serla*"). It is contended that the facts in *Metsa-Serla* are analogous to the facts in the particular case relating to the arrangement that exists in relation to the relevant activities between Transtar and Regent Star. The Appellants also rely on *Minoan Lines SA v Commission of the European Communities* ("*Minoan Lines*") in which the

Court determined the existence of the following criteria to be sufficient to determine a relationship of agency in that case:

(a) the agent did business on the market only in the name of and for the account of principal;

(b) the agent took on no financial risk in connection with the business;

(c) the two companies were perceived by third parties and on the market as forming one and the same economic entity.

51. Reverting to the facts of the case, the Appellants refer to the terms and conditions on the reverse of the Regent Star's invoice, from which it is clear that the contract was concluded in the name of Transtar, and the relevant party in relation to any redress under those terms and conditions is Transtar. Further, various terms and conditions there refer to Transtar and at the conclusion of the terms and conditions, it expressly mentioned that "*the above cannot be altered or waived except in writing by a General Manager or Director of Transtar Travel Pte Ltd.*" Regent Star held itself out as the agent of Transtar.

52. It is true that Regent Star sold coach package tours on behalf of tour companies other than Transtar. But the volume of such business is extremely small, amounting to [XXX]% of Regent Star's costs of goods sold. The Appellants pointed out such sales would only arise in circumstances where a Transtar coach was fully booked and another operator was used in order to accommodate a customer or where a regular customer required a very specific coach departure time not offered by Transtar. These were all exceptional cases. The Appellants contend that these exceptional cases

accounting to less than [XXX]% of Regent Star's total costs of goods sold is not a sufficient basis for concluding that Regent Star was not an agent of Transtar.

53. Regent Star complies with all the instructions of Transtar. The Appellants produce some examples of "*internal memos*" issued by Transtar which clearly indicate that Regent Star was subject to these directions.

54. In relation to the extent to which Regent Star took on any financial or commercial risk in the provision of the relevant goods and services, the Appellants contend that Regent Star took on no direct financial risk in connection with all its material business operations, i.e. the operation of coaches or coach package tours. Regent Star does not own or operate its own coaches; nor has it ever done so. The fact that it took on financial risk in relation to its provision of agency services is immaterial: *European Commission Guidelines on Vertical Restraints*. The Appellants also rely on the terms and conditions endorsed on the reverse of Regent Star's invoices or coach tickets, from which it is clear that it took on no risks in the provision of services to Transtar.

55. Further in relation to the third criterion, it is contended that Regent Star and Transtar are perceived by third parties and in the market to form one economic unit. This conclusion is inescapable from the plain reading of the terms and conditions to which Regent Star's sale is subject, as stated in the invoices and the coach tickets.

56. On the facts stated above, the Appellants submit that they have a unity of interest and that there is clear relationship of agency between them. Accordingly, the Appellants contend that in the context of determining how the overlap in revenue between them

should be treated, they should properly be considered as a single economic entity. Thus, applying Paragraph 2 of the Order, the overlap in revenue between the Appellants should be accounted for in the calculation of the applicable turnover by the CCS.

57. If Paragraph 2 of the Order is held to be not applicable, the Appellants contend that to take no account of the overlap in revenue would be manifestly unfair to the Appellants in that, having regard to the penalties imposed on other parties, the amount of financial penalties imposed on the Appellants are disproportionately high. If no account of overlap in the revenue is taken into account, Transtar and Regent Star will effectively be prejudiced because the latter is the authorised agent of the former and transfers a significant proportion of its turnover to the former. It is unfair that they are subject to significantly higher penalties due to the fact that Regent Star has been used as the authorised agent rather than Transtar making all the sales itself.

58. Accordingly, the Appellants contend that proper account of the overlap in revenue should be accounted for, which in the Appellants' submission, should amount to a discounting of S$[XXX] from the relevant turnover of Regent Star or from the combined relevant turnover of the Appellants.

THE CONTENTIONS OF CCS ON OVERLAP

59. At the outset, the CCS contends that if the section 34 prohibition is found to apply, the Appellants can no longer rely on the concept of single economic entity. This is also apparent from the cases cited by the Appellants which relate to the determination of liability in the context of the section 34 prohibition. Following from this, as paragraph

2 of the Schedule of the Order can only apply if there was a single economic entity, there being no finding of a single economic entity for the purposes of liability, it follows that paragraph 2 of the Schedule of the Order is inapplicable.

60. The CCS also rejects the Appellants' contention of Regent Star and Transtar being a single economic unit. It considers the structure of the two companies, and argues that the only link between the two companies is that Mr Elson Yap, the managing director and shareholder of Transtar is also a shareholder of Regent Star. However, Mr Elson Yap is a minority shareholder of Transtar, and the majority shareholder of Transtar is Morning Star Transcorporation Sdn Bhd. Ms Loh Choon Lee holds an equal number of shares in Regent Star as Mr Elson Yap and is the director of Regent Star, as is her father, Mr Loh Chwee Cha. The CCS considers that the legal control of Regent Star rests in the hands of the board of directors, and as long as the board has legal ability to determine the course of business activity for Regent Star, independently of Transtar, it is capable of conspiring with Transtar and other parties in violation of section 34 of the Act.

61. The CCS accepts that the two companies were closely connected in their business activity and that Ms Loh Choon Lee is the general manager of both the companies and both companies use the same staff. On the other hand, the CCS notes that Regent Star holds its own lease to the premises and paid foreign worker levies and pay CPF contributions to its own staff and by reason of this, the CCS contends that Regent Star has held itself out as a distinct legal entity.

62. The CCS also considers that there were occasional sales of coach package tours by Regent Star on behalf of other companies. In such instances, it would make payments to these agencies and earn a commission fee or service fee.

63. While the CCS acknowledges that for each express bus ticket or coach package tour sold by Regent Star on behalf of Transtar, Regent Star would pay over [XXX]% of the ticket prices to Transtar as the costs of the goods sold and retain only [XXX]% as its agent's commission, it does not accept that Transtar's relevant turnover has been overstated by the amount of S$[XXX] being [XXX]% of Regent Star. On this, the CCS considered that this argument is misconceived as "*it ignores the sale made by Transtar to Regent Star*".

64. Thus, the CCS argues that Regent Star and Transtar are not a single economic unit, and as such, Paragraph 2 of the Order has no application.

65. The CCS also has a further contention that by taking into account the overlap in revenue, the Appellants are asking the Board to use gross profits and not turnover as the basis of calculation, and this cannot be right. Such an approach would also mean that where any of the infringing parties has acted as an agent for another infringing party, the overlap has to be taken into account, and this would be contrary to the definition of "*applicable turnover*" in paragraph 1 of the Schedule of the Order which is defined as the "*amounts derived by the undertaking from the sale of products and the provisions of services falling within the undertaking's ordinary activities in Singapore after the deduction of sales rebates, goods and services tax and other taxes directly related to turnover*" (Paragraph 1 of the Schedule of the Order).

V THE BOARD'S DECISION ON OVERLAP

66. The preliminary argument made by the CCS is that since there is a finding of cartel price-fixing amongst the EBAA members (which includes the Appellants) which is not challenged, the Appellants are precluded from raising the argument of single economic entity. This argument can be disposed by reason of the provisions in paragraph 2 of the Schedule of the Order, which specifically contemplates that the finding of a single economic entity would enable the overlap in revenue to be discounted in determining the relevant turnover. Further, from the ID, it seems that the question of whether the Appellants are a single economic entity was not specifically considered in the context of liability.

67. It is generally accepted that a single economic entity is a single undertaking between entities which form a single economic unit. In particular, an agreement between a parent and its subsidiary company, or between two companies which are under the control of a third company, will not be agreements between undertakings if the subsidiary has no real freedom to determine its course of action in the market and although having a separate legal personality, enjoys no economic independence. Ultimately, whether or not the entities form a single economic unit will depend on the facts and circumstances of the case ([2.7]-[2.8] of the CCS Guidelines on the section 34 prohibition; see also *Akzo Nobel v Commission of the European Communities*, 11 December 2003, at [54]-[66]).

68. Clearly, there is no parent-subsidiary relationship between the Appellants. However, relying on the decision in *Minoan Lines*, the Appellants contend that they are a single economic unit by reason of their agency relationship as well as the other factors set

out in paragraph 49 above, which included matters like sharing the same general manager, the same registered address and business premises.

69. In the Board's view, the arguments and the facts shown by the Appellants in paragraphs 44 to 58 above are very compelling. The relationship between Transtar and Regent Star is clearly one of agency, at least in respect of the revenue paid back to Transtar as the cost of goods sold. According to the Appellants (which the CCS is not challenging), Regent Star represents itself as an authorised agent for Transtar, and not for any other coach operator. It does not operate its own coaches and approximately [XXX]% of all costs of goods sold payments were made to Transtar in respect of Transtar's operated coaches and coach package tours. The invoices of Regent Star in the sale of bus tickets or coach tour package bear this out.

70. The Appellants say that when a bus ticket or coach package tour is sold by Regent Star on behalf of Transtar, Regent Star retains approximately [XXX]% to [XXX]% of the ticket price as its agent's commission and the remainder is paid to Transtar. In relation to the sale of one-way express coach services, the commission rate is [XXX]%, meaning that [XXX]% of the revenue is paid back to Transtar as costs of goods sold.

71. The Board accepts that there is a very small percentage of bus tickets and coach package tours which Regent Star sold for other bus or coach operators. The Appellants say that these are exceptional cases and would only arise in circumstances where a Transtar coach was fully booked, or where another operator was used in order to accommodate a customer, or where a regular customer requires a very specific

coach departure time not offered by Transtar, and an exception was made. The Appellants say that critically these sales amount to only [XXX]% of Regent Star's costs of goods sold by Regent Star. This percentage in the Board's view is so small that it may be considered as *de minimis*.

72. Of course each of the Appellants is a separate legal entity and operates as such but they chose to operate in the way they did as shown in paragraphs 44 to 58 above, and the CCS is not disputing these facts. The CCS refers to the separate boards of directors and refers to the duties which each board should exercise. That is technically correct, but again they, i.e. the boards, chose to act in the way they did in the conduct and operation of their respective businesses.

73. The Appellants rely on the case of *Minoan Lines v Commission* ECR II 5515; [2005] 5 CMLR 1597, in which the Court determined the existence of the following criteria to sufficient to determine a relationship of agency:

(a) the agent did business on the market only in the name of and for the account of the principal;

(b) the agent took on no financial risk in connection with the business; and

(c) the two companies were perceived by third parties and on the market as forming one and same economic entity.

The Appellants contends that they have substantially fulfilled these criteria. Other than the facts at paragraph 49 above, they rely on the terms and conditions on which they sold the tickets, which indicates Regent Star as the agent and that the contract is made with Transtar. They also rely on the terms and conditions of the "*Booking and Payments*" and "*Cancellation*" and "*Changes of Tour Price and Itinerary*" which

specifically refer to Transtar. What is significant is that in the sales of bus tickets or coach package tours as agent for Transtar, Regent Star assumes no risk. The risk is borne by Transtar.

74. Lastly, the Appellants rely on the company logos the two companies use and that would demonstrate objectively that they are considered the same.

75. In the present circumstances, the Board agrees with the Appellants' arguments that the facts show a relationship of agency between Regent Star and Transtar, and that a proper account of overlap in revenue should be accounted for. In the Appellant's submission, the overlap in revenue between Regent Star and Transtar which ought to be accounted for is S$[XXX].

VI THE APPELLANTS' CONTENTION ON DEFINITION OF PRODUCT MARKET

76. The second contention of the Appellants is that the CCS over-inflated the starting point for the financial penalties by not adequately distinguishing between, and accounting for, the percentage of the Appellants' sales to which both the MSP and the FIC Agreements applied and the percentage of sales to which only the FIC Agreement applied. The Appellants contend that before applying the starting percentages, the relevant turnover of the infringing parties should have been divided into the following:

(a) relevant turnover in respect of coach ticket sales, to which both the MSP and the FIC Agreements applied; and

(b) relevant turnover in respect of coach ticket sales to which only the FIC Agreement applied.

The Appellants submit that to make no such distinction is manifestly unfair, as it will result in penalties being imposed on the Appellants that are not in proportion with the extent to which the sales of the Appellants were subject to the infringing arrangements.

77. The Appellants points out that the MSP Agreement applied to around [XXX]% of the Appellants' sales. The MSP Agreement only applied to one-way fares, departing from Singapore for Transtar's "*Super VIP*" coach category, being the regular 24-26 seater coaches. In particular, the MSP Agreement did not apply to:

(a) coach tour packages,

(b) first class coach operations (either one-way from Singapore, one-way from Malaysia, or return);

(c) executive coach operations (either one-way from Singapore, one-way from Malaysia, or return);

(d) premium coach operations (either one-way from Singapore, one-way from Malaysia, or return);

(e) return Super VIP bus operations (i.e. Singapore - Malaysia - Singapore);

(f) one-way Super VIP bus operation from Malaysia.

78. It is suggested by the Appellants that the operations detailed within paragraph 77 above contributed to more than [XXX]% of Transtar's. Thus, it is contended that it is manifestly unfair and unreasonable to apply a higher starting percentage penalty to the Appellants' entire turnover when it is clear that only [XXX]% of their revenue was derived from the sales to which both the FIC and the MSP Agreements applied.

79. Further in respect of certain categories of tickets specified in paragraph 77 above (such as one-way First Class / Executive / Premium / Super VIP coach operations from Malaysia), it would be unfair and unreasonable to impose any penalty at all as they were not subject to either the MSP or the FIC Agreement.

VII THE CCS'S CONTENTIONS ON DEFINITION OF PRODUCT MARKET

80. The CCS's contention is that the Appellants engaged in both the MSP and FIC Agreements, and in doing so they had committed two separate infringements. However, the CCS decided to impose only one penalty in respect of both infringing arrangements as the relevant turnover for the purpose of calculating the financial penalty in relation to the MSP Agreement is part of, or a subset of, the relevant turnover for the purpose of calculating the financial penalty in relation to the FIC Agreement as the sale of any ticket affected by the MSP Agreement was also subject to the FIC Agreement). In other words, all sales that were subjected to the MSP Agreement were also subjected to the FIC agreement. As such, the CCS imposed only one penalty using only the relevant turnover for the FIC Agreement as the base so that there would be no double counting. The MSP Agreement was relevant for the starting

percentage point in that those parties who were involved in both the MSP and the FIC Agreements should have a higher starting percentage point at [XXX]% of the relevant turnover in order to reflect the seriousness of the two infringements. The CCS also contends that a distinction should not be drawn between the types of coaches as the MSP Agreement was and could be used as a benchmark for the prices for the types of coaches traveling to the same destinations.

VIII THE BOARD'S DECISION ON DEFINITION OF PRODUCT MARKET

81. The Board observes that the Appellants 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.

82. 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

83. The Appellants, however, 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.

84. 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*".

85. 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).

86. Insofar as the MSP Agreement is concerned, the Board agrees with the Appellants' contention that the CCS should have maintained this definition of focal products rather than proceed to adopt a single product market comprising "*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 [90]) on the singular reason that the focal products overlapped. This is because this would result in an unfair situation whereby a party who has

engaged in very little MSP activity is penalised unnecessarily, simply because it has also engaged in the FIC Agreement.

87. In determining the relevant turnover for the MSP Agreement, the Appellants have also urged the Board to draw a further distinction between the types of coaches. The Appellants claim that the MSP Agreement only applied to Super VIP coaches but not the other classes of coaches such as First Class, Executive and Premium coach operations.

88. From the price list tendered by the Appellants on 3 June 2010, different fares are charged for the different coaches. Although the Board recognises that the answers provided by Sebastian Yap might have been given in a different context, the evidence remains that the MSP which sets a price floor has affected the determination of the coach prices for other classes to a certain extent. In this regard, the Board agrees with the CCS's contentions that as the MSP was and could be used as a benchmark for the prices for the types of coaches travelling to the same destination, and no distinction should be drawn between the types of coaches.

89. Brief mention was made by the Appellants to the inclusion of revenue which did not infringe either the MSP or the FIC Agreements. As the Appellants were the parties who submitted the relevant turnover based upon the focal products identified by the CCS (which would only extend to those which the MSP and/or the FIC Agreements applied), any such inclusion would be based on the Appellants' own calculation and/or would be *de minimis*. The Board further noted that this argument was also not

pursued during the Appellants' oral submissions. As such, the Board would not take this into account in deriving the relevant turnover.

IX THE APPELLANTS' CONTENTION ON FIC

90. The Appellants contend that the price that was fixed was the price of the FIC coupon, and not the entire ticket price. As such, the price of the bus tickets to which only the FIC Agreement applied was still subject to overall competitive pressure. Furthermore, as the surcharge comprised certain legitimate costs, parties could only have benefitted to the accord of a small percentage of the surcharge value (to the extent that they benefited at all). Accordingly, the revenue obtained from the sale of FIC coupons alone would have provided a much more meaningful starting position to which penalty percentages could be applied. This would in fact be consistent with the manner in which the CCS calculated the relevant turnover from the sales of coach package tours; see also *Qantas Airways* case, where the relevant turnover in respect of a collusive understanding between competing airlines on how they would impose a fuel surcharge was deemed to be the revenue from the "*global fuel surcharge*").

91. In the course of their submissions, the Appellants also ask the Board to have regard to the undertaking's profit and not just turnover in considering the overall appropriateness of the penalty. In this case, the proposed fines are [XXX]% of Regent Star's net profit for 2007 and [XXX]% of Transtar's net profit for 2007. Even adopting the Appellants' proposed penalties (as set out in the Penalty Submissions tendered on 3 June 2010), the revised fines would still amount to [XXX]% and [XXX]% of the Appellants' respective profits such that the penalties could not simply

be internalised as business costs, and would suffice as deterrence to the Appellants and to the industry.

X THE CCS'S CONTENTION ON FIC

92. The CCS contends that the turnover in relation to the FIC Agreement should not be limited to the sale of FIC coupons as the relevant turnover is the turnover affected by the infringement, and not the specific portion of turnover derived from the infringing conduct.

93. Not only is there no separate product market for the sale of FIC coupons, if the Board were to accept the Appellants' proposed methodology of using only the sale of FIC coupons as the relevant turnover, this would mean that the Appellants would greatly benefit from their infringing conduct, and there would be no deterrent value.

94. The case of *Qantas Airways* is clearly distinguishable:

(a) Section 76 (1A) of the Australia Trade Practices Act 1974 (which statutory maximum is $10 million, the total value of the benefits that have been obtained that are reasonably attributable to the act / omission or 10% of the annual turnover) greatly differs from the regime in Singapore under s 69(4) of the Act;

(b) Parties have already agreed on the level of penalty and the court only had to decide if the proposed pecuniary penalty was within an acceptable range;

(c) The factors taken into account by the court included the revenue generated from the fuel (with no opinion expressed on whether this should be the appropriate starting point), the size of Qantas, the infringing period, the statutory maximum, and the penalties paid by Qantas in other jurisdictions.

95. On the question of whether profits should be used as a marker of the assessment of the appropriateness of the penalty, the CCS urges the Board to use expenses as a more objective marker (since the deterrent effect is to ensure that the penalties imposed could not be simply internalised as business costs), and the reasons behind an undertaking's profits (whether positive or negative) could be due to various factors which have nothing to do with the infringements in question.

XI THE BOARD'S DECISION ON FIC

96. Insofar as the FIC Agreement is concerned, the Board is unable to accept the Appellants' 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.

97. The Appellants' submission that the same approach adopted by the CCS in using only 20% of the prices of the coach package tours (on the basis that the prices comprised

other legitimate costs which were not subject to any infringing agreement) should be adopted vis-à-vis the FIC coupons should be rejected. The other legitimate costs which were excluded from the coach package tours do not relate to transportation services, and are not intrinsically tied to the transportation services. To the contrary, 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 hold 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, it must be based on the turnover from the sale of the coach ticket and not the FIC coupon itself.

98. The Appellants accept that the financial penalty should be calculated against the relevant turnover (see *Case No. 98/02/2009 Bid rigging in the construction industry in England*, 21 September 2009, tendered by the CCS on 3 June 2010), and do not contend that the penalty should be calculated against the profits. However, the Appellants urge the Board to consider the undertaking's profits in its determination of the overall appropriateness of the penalty. On this, this is something the Board can consider. At the same time, the Board is also entitled to look at the expenses, and what would be a relevant marker would depend on the business in question. In certain businesses, the net profits may not be an accurate marker, as there are various other factors / reasons why the net profits of the undertaking may not be that desirable. At

the end of the day, the Board will always look at matters in the round and consider whether the overall penalty is appropriate in the circumstances.

XII THE BOARD'S DECISION ON THE FINANCIAL PENALTIES

99. Having considered the above, the Board is of the view that the financial penalties should 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;

(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.

100. The Board is of the opinion 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.

101. Applying the formula discussed in paragraph 99 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, Kuala Lumpur, 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) Next it 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.

Regent Star

102. As account must be taken of the overlap in revenue between Regent Star and Transtar which amounts to S$[XXX], Regent Star's relevant turnover of S$[XXX] (comprising S$[XXX] from the sale of coach tickets, and S$[XXX]) is reduced to S$[XXX]. This reduction in turnover as a result of the overlap in revenue would explain the large difference between the penalty imposed by the CCS and the penalty determined by the Board on Regent Star.

103. Based on the Appellant's submission, S$[XXX] would comprise approximately [XXX]% of sales S$[XXX] to which both the MSP and FIC Agreements apply and [XXX]% of sales S$[XXX] to which only the FIC Agreement applies.

104. Regent Star's relevant turnover where both the MSP and FIC Agreements apply is thus S$[XXX] (based on the figures provided in the table at page 2 of the Penalty Calculations tended by the Appellants on 3 June 2010). Applying the starting percentage of [XXX]%, the penalty for 2 infringements is S$[XXX].

105. Regent Star's relevant turnover where only the FIC Agreement applies is S$[XXX] (based on the figures provided in the table at page 2 of the Penalty Calculations tended by the Appellants on 3 June 2010). Applying the starting percentage of [XXX]%, the penalty for 1 infringement is S$[XXX].

106. The starting point for Regent Star 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$7,920 is arrived at. This figure should be revised upwards to $10,000 as accepted by the Appellants in their submissions.

Transtar

107. Transtar's relevant turnover where both the MSP and FIC Agreements apply is S$[XXX] (based on the figures provided in the table at page 2 of the Penalty Calculations tended by the Appellants on 3 June 2010). Applying the starting percentage of [XXX]%, the penalty for 2 infringements is S$[XXX].

108. Transtar's relevant turnover where only the FIC Agreement applies is S$[XXX] (based on the figures provided in the table at page 2 of the Penalty Calculations tended by the Appellants on 3 June 2010). Applying the starting percentage of [XXX]%, the penalty for 1 infringement is S$[XXX].

109. The starting point for Transtar 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$303,472 is arrived at.

Summary of the Penalties determined by the Board

110. The table below summarises the appropriate financial penalties which the Board determines that should 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$)**
Regent Star	[XXX]	[XXX]	[XXX]	[XXX]	[XXX]	**7,920, revised to 10,000**	103,875
Transtar	[XXX]	[XXX]	[XXX]	[XXX]	[XXX]	**303,472**	518,617

+ Regent Star's and Transtar's relevant turnover as a result of the infringement in respect of the MSP Agreement is based on the figures provided in the table at page 2 of the Penalty Calculations tended by the Appellants on 3 June 2010.

111. 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 measured against the total turnover of the respective Appellants, as set out in the table below:

Party	**Total Turnover**	**Penalty by the Board (S$)**	**Percentage of Penalty by the Board over Total Turnover (%)**	**Penalty imposed by the CCS (S$)**	**Percentage of Penalty imposed by the CCS over Total Turnover (%)**
Regent Star	[XXX]	**10,000**	[XXX]	103,875	[XXX]
Transtar	[XXX]	**303,472**	[XXX]	518,617	[XXX]

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

XII CONCLUSION

113. In view of the above, the appeals on financial penalties are allowed in part. On the question of costs, the CCS suggests that each party should pay its own costs. The Appellants, on the other hand, ask that costs follow the event. In the case of *Independent Media Support Limited v Office of Communications* [2008] CAT 27, the following guiding principles on costs are set out:

> "(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."

114. Although the Appellant succeed in the appeal, there are points of arguments where they fail. Having regard to all the circumstances of this case, the Board is of the view that a fair order as to costs is that each party should pay its own costs. The Board so orders.

115. The Board further orders that the Appellants pay interest on the financial penalty at the rate of 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
Member

Thean Lip Ping
Chairman

Boon Yoon Chiang
Member

Ashish Lall
Member

Ron Foo Siang Guan
Member