Section 68 of the Competition Act 2004

Notice of Infringement Decision issued by CCCS

Infringement of the section 34 prohibition in relation to price fixing by warehouse operators at Keppel Distripark

17 November 2022

Case number: CCCS 700/001/2020/001

Confidential information in this Notice is denoted by square parenthesis [✂].

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EXECUTIVE SUMMARY

1. The Competition and Consumer Commission of Singapore ("CCCS") is issuing an Infringement Decision ("ID") against the following undertakings in relation to their participation in an anti-competitive agreement and/or concerted practice, that has infringed section 34 of the Competition Act 2004 (the "Act"):

    a. CNL Logistic Solutions Pte. Ltd. ("CNL");

    b. Gilmon Transportation & Warehousing Pte Ltd ("Gilmon");

    c. Penanshin (PSA KD) Pte. Ltd. ("Penanshin"); and

    d. Mac-Nels (KD) Terminal Pte Ltd ("Mac-Nels")

    (each a "Party" and collectively, the "Parties").

2. CCCS's investigations revealed that the Parties had participated in an agreement and/or concerted practice from 15 June 2017 to fix the price of warehousing services at Keppel Distripark by imposing an FTZ Surcharge in a coordinated manner (the "Price Fixing Conduct"). In doing so, the Parties knowingly substituted the risks of price competition in favour of practical cooperation between them and as such, their pricing strategies were not independently determined. CCCS considers that the Price Fixing Conduct was, by its very nature, injurious to the functioning of normal competition.

3. CCCS finds that the Parties have infringed the section 34 prohibition and imposes on each of the Parties penalties of between S$297,351 and S$1,436,378, amounting to a combined total penalty of S$2,799,138. In determining the penalty amount, CCCS has taken into consideration relevant matters such as the seriousness of the infringement, relevant aggravating and mitigating factors as well as leniency discounts, where applicable.

GLOSSARY OF TERMS

Bill of Lading	:	A legal document issued by the shipping business which serves as proof of possession of the goods being carried. Each middleman in the shipping process may issue a bill of lading. However, the master bill of lading is issued by the shipping business, with house bills of lading issued by others in the supply chain, such as the middlemen referred to above.
Cargo consolidation / Groupage / Co-Loading	:	These phrases may be used interchangeably but generally refer to arrangements where different consignors' goods are consolidated into a single shipping container, thereby maximising the efficiency of the container. Co-loaders (also known as consolidators) are freight forwarders that choose to consolidate or co-load their cargo with other freight forwarders. Each co-loader/consolidator will send its cargo to a master consolidator for consolidation. Where multiple co-loaders/consolidators are involved, the consolidator under whose name the shipment is made is known as the master consolidator. The master consolidator receives the master bill of lading from the shipping business, and issues house bills of lading to the subordinate co-loaders/consolidators.
Consignor/ Consignee	:	The consignor is the person who ships the goods and the consignee is the ultimate recipient of the goods.
Container Freight Station ("CFS")	:	A CFS is a warehouse operator that handles the stuffing and unstuffing (defined below) of shipping containers at its warehouse, amongst other roles, like consolidation/deconsolidation of LCL cargo (defined below). The cargo may be repacked into other containers for shipment to other destinations (known as trans-loading). For the purposes of this decision, CCCS will use the more generic term "warehouse operator" instead of CFS.
Delivery Note ("DN")		A delivery note is a document that accompanies a shipment of goods. It provides a list of the products and quantity of the goods included in the delivery.

Freight Forwarder/ Non-Vessel Operating Common Carrier ("NVOCC")	:	These are businesses which organise the shipment of goods[1] from origin to destination. This includes handling documentation such as customs clearance and finding the most optimal routes. The difference between a freight forwarder and an NVOCC is that freight forwarders engage the services of an ocean carrier to ship their clients' goods. NVOCCs, on the other hand, handle the carriage of their clients' goods. NVOCCs are therefore liable for the carriage of the goods in a similar way to the ocean carrier, whereas the freight forwarders would not be liable for the actual carriage of the goods.
Full Container Load ("FCL")/ Less Than Container Load ("LCL")	:	FCL is where all the goods in a container belong to a single consignor. For LCL, it means that multiple consignors' goods have been consolidated into a single container.
Stuffing/ Unstuffing	:	Industry term used to describe the process of loading and unloading cargo from shipping containers.
Transporters	:	Businesses which transport (i) shipping containers to and from the warehouse and the port; or (ii) cargo between warehouses. They may also transport cargo into or out of Keppel Distripark. Transporters may be employed by the warehouse operator, freight forwarder, specialised transportation businesses, or even individual contractors.
Transshipment cargo / Local/Import Cargo	:	Transshipment cargo is cargo that enters Singapore, but whose final destination is not Singapore and does not leave Keppel Distripark. Local or import cargo is cargo whose final destination is Singapore and is collected out of Keppel Distripark by the relevant consignee.

*CCCS has set out these definitions to assist in the general understanding of the warehousing and logistics industry. It is worth noting that the operations of the warehouse operators referred to in this Infringement Decision may not necessarily conform strictly to the definitions given. For example, freight forwarders may have their own in-house transportation facilities and certain warehouse operators may also offer non-warehousing services. The details of the business activities of each warehouse operator are set out in more detail in the ID.

[1] For the purposes of this decision, only shipments by sea are relevant, although freight forwarders may also be involved in shipments by air or land.

CHAPTER 1: THE FACTS

A. The Parties

1. The Competition and Consumer Commission of Singapore ("CCCS") is issuing an Infringement Decision ("ID") against the following undertakings for their participation in an agreement and/or concerted practice from 15 June 2017 to fix the price of warehousing services at Keppel Distripark by imposing an "FTZ Surcharge" in a coordinated manner, thereby infringing section 34 of the Competition Act 2004 (the "Act"):

    a. CNL Logistic Solutions Pte. Ltd. ("CNL");

    b. Gilmon Transportation & Warehousing Pte Ltd ("Gilmon");

    c. Penanshin (PSA KD) Pte. Ltd. ("Penanshin"); and

    d. Mac-Nels (KD) Terminal Pte Ltd ("Mac-Nels")

    (each a "Party" and collectively, the "Parties").

(i) CNL Logistic Solutions Pte. Ltd.

2. CNL is an exempt private limited company incorporated on 24 June 2014. Its directors and shareholders are Teo Kiang Siak ("Simon (Gilmon)"), Vasu s/o Achuthan ("Vasu (CNL)") and Lee Theng Theng.[2] Its principal activity is the provision of general warehousing services at Keppel Distripark. CNL provides warehousing services related to the stuffing and unstuffing of containers and assists its customers in clearing customs locally. CNL's customers consist entirely of freight forwarders.[3]

(ii) Gilmon Transportation & Warehousing Pte. Ltd.

3. Gilmon is an exempt private limited company incorporated on 25 August 1992. Its sole director and shareholder is Simon (Gilmon).[4] Its principal activity is the provision of general warehousing services at Keppel Distripark. It provides

[2] Information extracted from the Accounting and Corporate Regulatory Authority's ("ACRA") records on 14 October 2022.
[3] Notes of Information/Explanation ("NOI") of Vasu (CNL) dated 19 November 2019, Q5-6.
[4] Information extracted from ACRA records on 14 October 2022.

warehousing services such as the stuffing and unstuffing of containers, as well as dealing with both transshipment and import cargo. Gilmon's customers are freight forwarders and NVOCCs.[5]

(iii) Penanshin (PSA KD) Pte. Ltd.

4. Penanshin is a private limited company incorporated on 10 November 2003. Its directors are Leaw Wee Gin ("Wee Gin (Penanshin)") and Stephanie Er, and its sole shareholder is Penanshin Shipping Pte. Ltd. ("Penanshin Shipping").[6] Its principal activities involve the provision of general warehousing and transportation services at Keppel Distripark. This includes the stuffing and unstuffing of containers, as well as transportation and trucking services.[7] Penanshin derives most of its business from Penanshin Shipping, MP Consol (S) Pte. Ltd. and World Lines Pte. Ltd. (collectively known as the "Penanshin Group").[8] In particular, Penanshin handles the containers of Penanshin Shipping, primarily to facilitate and support Penanshin Shipping's role as a freight consolidator.[9] The companies in the Penanshin Group provide freight forwarding, logistics and transportation services.[10]

(iv) Mac-Nels (KD) Terminal Pte. Ltd.

5. Mac-Nels is a exempt private limited company incorporated on 27 April 1989. Its directors are Nicholas Er ("Nicholas (Mac-Nels)"), Stephanie Er and Matthew Er ("Matthew (Mac-Nels)"), and its sole shareholder is Nicholas (Mac-Nels).[11] Its principal activities involve the provision of warehousing services, stuffing and unstuffing of containers, the import and export of containers, as well as trans-loading and co-loading services. Mac-Nels' primary customers are freight forwarders.[12]

B. Background to Keppel Distripark, the Warehousing and Logistics Industry and Shipment Processes

[5] NOI of Thomas (Gilmon) dated 19 November 2019, Q11-13; NOI of Simon (Gilmon) dated 22 September 2020, Q8-9.
[6] Information extracted from ACRA records on 14 October 2022.
[7] NOI of Wee Gin (Penanshin) dated 18 March 2020, Q4.
[8] Penanshin's Leniency Statement dated 9 March 2020, paragraph 10.
[9] NOI of Wee Gin (Penanshin) dated 18 March 2020, Q11-12.
[10] Penanshin's Leniency Statement dated 9 March 2020, paragraph 10.
[11] Information extracted from ACRA records on 14 October 2022. Stephanie Er was also a shareholder in Mac-Nels until 18 June 2021.
[12] NOI of Andy (Mac-Nels) dated 19 November 2019, Q5-6.

(i) Keppel Distripark

6. Keppel Distripark is a multi-tenanted and modern cargo distribution complex comprising a container freight station, heavy vehicle and chassis parks, warehousing and office facilities.[13] Keppel Distripark was opened in October 1994, and includes a warehouse facility offering 112,700m^2 of warehousing space, made up of four two-storey blocks and 45 modular units across the blocks. Keppel Distripark also includes an adjoining five storey office building and a parking lot for truck chassis. There are approximately 26 warehouse tenants at Keppel Distripark. Keppel Distripark is operated by PSA Corporation Limited ("PSA"), which was appointed under the Free Trade Zones Act 1966.[14]

7. As a free trade zone, duties and Goods and Services Tax are not charged on cargo stored within Keppel Distripark and are only payable when the goods are consumed within Keppel Distripark or are brought out of Keppel Distripark for local sale or consumption.[15]

8. In its role as the operator of Keppel Distripark, PSA charges its tenants rent for warehouse space, docking bays and truck chassis parking lots, as well as conservancy fees. PSA does not impose any other charges, save for minor incidental and ad-hoc fees and charges.[16] PSA also does not regulate the prices charged by the warehouse operators to their respective customers.[17]

(ii) The Warehousing and Logistics Industry

9. Freight forwarders and warehouse operators are both part of the broader international supply chain that facilitates the transport of goods from point of origin to destination.[18]

10. Freight forwarders assist consignors to navigate the international shipping process, which is administratively complex with a myriad of documentary and legal requirements that vary depending on the jurisdiction. Consignors are consequently saved the trouble of having to negotiate with shipping companies and making arrangements relating to documentation, insurance, export and

[13] https://singaporepsa.com/our-business/portplus-services/. Accessed on 1 November 2022.
[14] Section 2 of the Free Trade Zones (Appointment of Authorities to Administer Free Trade Zones) Notification
[15] www.customs.gov.sg/businesses/importing-goods/import-procedures/depositing-goods-in-ftz. Accessed on 1 November 2022.
[16] PSA's Response dated 17 October 2018 to CCCS's s.63 Notice dated 18 September 2018, paragraph 11.1.
[17] PSA's Response dated 17 October 2018 to CCCS's s.63 Notice dated 18 September 2018, paragraph 13.2.
[18] PSA's Response dated 17 October 2018 to CCCS's s.63 Notice dated 18 September 2018, paragraph 1.1.

import custom clearances, warehousing services, trucking and transportation and last-mile delivery services, amongst other things.[19]

11. Warehouse operators occupy the next tier downstream in the supply chain and are often sub-contracted by freight forwarders to handle the storage, stuffing/unstuffing of cargo and transportation between the port and the warehouse.[20]

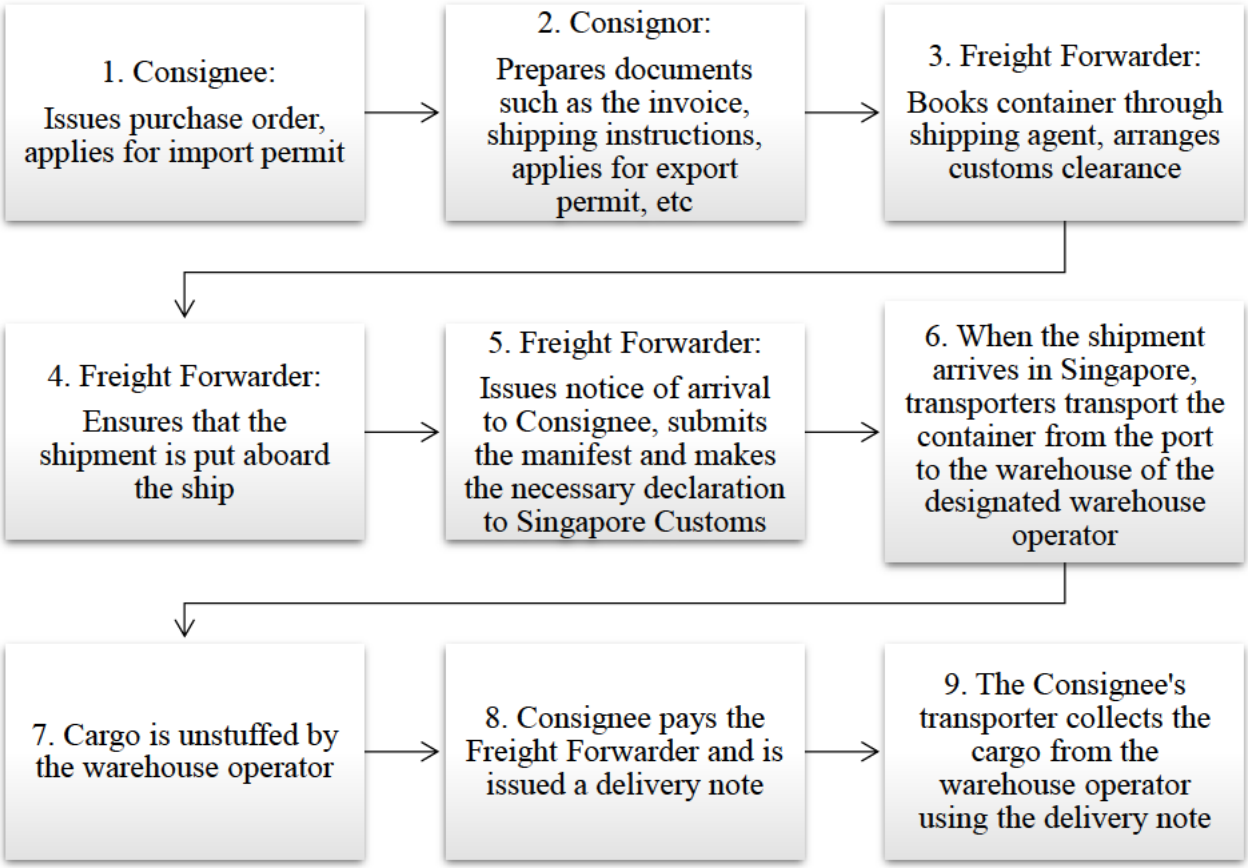
(iii) Shipment Processes

12. For the purposes of this ID, CCCS is only concerned with import cargo and not transshipment cargo. As such, the description of the processes below relates to where cargo is imported into Singapore.

[19] PSA's Response dated 17 October 2018 to CCCS's s.63 Notice dated 18 September 2018, paragraph 1.3.
[20] PSA's Response dated 17 October 2018 to CCCS's s.63 Notice dated 18 September 2018, paragraph 1.4.

13. A general overview of the shipping process is set out in Figure 1 below:[21]

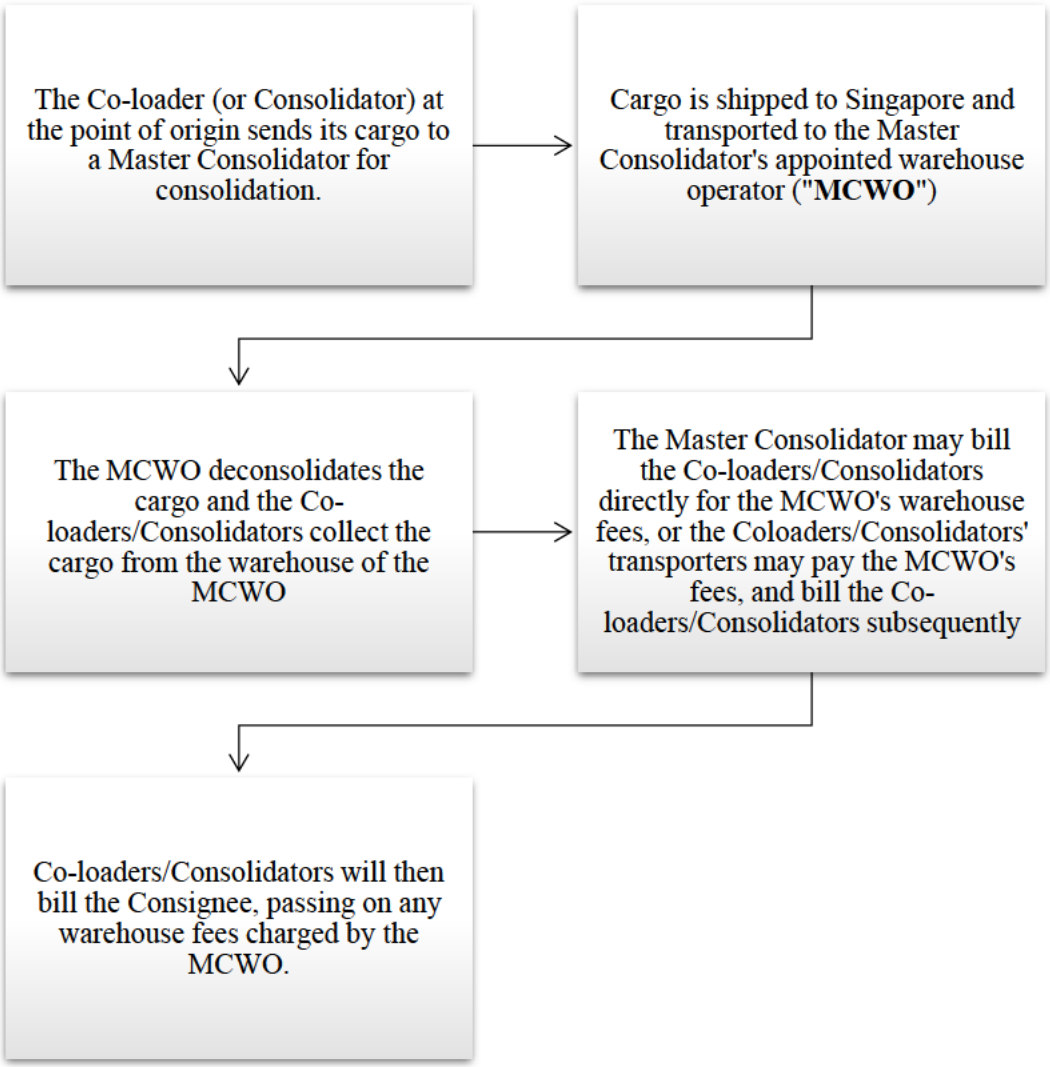
FIGURE 1[22]



[21] PSA's Response dated 17 October 2018 to CCCS's s.63 Notice dated 18 September 2018, paragraph 3.1.
[22] Sometimes Steps 8 and 9 are carried out by the freight forwarder on behalf of the consignee, depending on the contractual arrangement between them.

14. Separately, a general overview of the cargo handling and payment processes for co-loaded cargo is set out below at Figure 2.

FIGURE 2



15. The process overviews in Figures 1 and 2 above serve as a generalised description of each of the relevant processes, and CCCS is mindful that the precise processes between consignees, freight forwarders, master consolidators, warehouse operators and transporters often take on a variety of permutations depending on where and who makes the intermediate payments. However, the consignee would generally bear the ultimate costs of the shipment, including the warehouse operator's charges, regardless of whether the consignee pays its freight forwarder in advance, or reimburses the consignee's appointed transporter upon collection of its cargo.

16. Examples of charges imposed by many warehouse operators are forklift fees, handling fees, stuffing/unstuffing fees, container washing fees, tracing fees, tally fees and, importantly for the purposes of this decision, the FTZ Surcharge which is a surcharge imposed on import cargo stored within the Free Trade Zone by warehouse operators. CCCS notes that on many occasions, particularly where co-loading is involved, the subordinate co-loader/consolidator will not know in advance the warehouse charges that the master consolidator's appointed warehouse operator is going to charge. The subordinate co-loader would therefore have no choice but to pay the prices charged by the warehouse operator, and subsequently pass these warehousing charges to its own customers, the consignees.

C. Investigations and Proceedings

17. On 8 August 2018, CCCS commenced an investigation under section 62 of the Act, following a complaint received from a member of the public.

18. On 19 November 2019, CCCS conducted simultaneous inspections without notice on 11 warehouse operators (including the Parties) that have warehouses located at Keppel Distripark.[23] During the inspection, Penanshin and CNL applied for leniency in relation to the anti-competitive conduct of price fixing or information exchange by warehouse operators at Keppel Distripark.

19. On 25 November 2019, notices under section 63 of the Act were sent to all 11 investigated warehouse operators in order to follow up on evidence obtained during the inspection.

20. In March 2020, CCCS conducted interviews with and obtained information from key personnel of Penanshin. Due to the Covid-19 pandemic and the "circuit breaker" imposed by the Singapore Government in April 2020, interviews with the other warehouse operators were suspended. Following the move to Phases 2 and 3 of Singapore's Covid-19 response, CCCS, using its powers of investigation under section 63 of the Act, resumed the interviews with key personnel from the other warehouse operators between September 2020 and July 2021.

[23] Other than the Parties, the other seven investigated warehouse operators are: Hup Soon Cheong Services Pte Ltd ("HSC"), Capital Logistics Services Pte Ltd ("CLS"), A&T Freight Management Pte Ltd ("A&T"), Freight Link Logistics Pte Ltd, Astro Pacific Pte Ltd ("Astro"), Asian Worldwide Services Pte Ltd ("AWS"), and FPS Global Logistics Pte Ltd.

21. Further section 63 notices were sent to all 11 investigated warehouse operators as well as their customers between December 2020 and August 2021, to require them to provide information and documentation in relation to the investigation. On 20 August 2021, CCCS sent section 63 notices to Penanshin, Gilmon, Mac-Nels and CNL to request their latest available financial information and received their respective responses between 20 and 21 September 2021. Further clarificatory questions and another round of section 63 notices seeking financial information were sent on 22 October 2021, with the Parties providing their responses between 8 November 2021 and 1 December 2021.

22. In relation to the Parties, CCCS conducted interviews with, and obtained information and documents from, key personnel of the Parties pursuant to section 63 of the Act. The dates of the interviews conducted by CCCS with the relevant key personnel of the Parties are set out in **Annex A.**

23. On 16 March 2022, CCCS sent each Party a notice of its Proposed Infringement Decision ("PID"). The documents in CCCS's file were made available for the Parties to inspect from 18 April 2022. CCCS received written representations on the PID from all of the Parties between 12 and 26 May 2022. Oral representations were made by two of the Parties between 14 June and 28 July 2022.

24. On 8 September 2022, CCCS sent section 63 notices to the Parties to request their latest available financial information; CCCS received all of their responses by 4 October 2022.

25. After considering the evidence and representations received from the Parties, CCCS finds that section 34 of the Act has been infringed.

CHAPTER 2: LEGAL AND ECONOMIC ASSESSMENT

26. This section sets out the legal and economic framework in which CCCS has considered the information and evidence it has received during the course of its investigation.

A. The Section 34 Prohibition and Application to Undertakings

(i) Overview of the Section 34 Prohibition and Definition of Undertakings

27. Section 34 of the Act prohibits any agreements between undertakings, decisions by associations of undertakings or concerted practices which have as their object or effect the prevention, restriction or distortion of competition within Singapore (the "section 34 prohibition"). Specifically, section 34(2)(a) of the Act states that "*...agreements, decisions or concerted practices may, in particular, have the object or effect of preventing, restricting or distorting competition within Singapore if they … directly or indirectly fix purchase or selling prices or any other trading conditions*".

28. In *Pang's Motor Trading v CCS* ("*Pang's Motor Trading*") [24], the Competition Appeal Board ("CAB") accepted that decisions from the United Kingdom ("UK") and European Union ("EU") are highly persuasive in interpreting the section 34 prohibition due to the similarities between the relevant sections of their respective competition laws. Specifically, the CAB stated that:

> "*33 … decisions from the UK and the EU are highly persuasive because the s 34 prohibition in our Act was modelled closely after Chapter I of the UK Competition Act 1998 and Art 101 of the Treaty of Functioning of the European Union (formerly Art 81 of the European Community Treaty). Indeed, the Board has previously stated that decisions from these jurisdictions were highly persuasive (Re Abuse of a Dominant Position by SISTIC.com Pte Ltd [2012] SGCAB 1 ("SISTIC") at [287])*".

29. Section 2 of the Act defines "*undertaking*" to mean, "*any person, being an individual, a body corporate, an unincorporated body of persons or any other entity, capable of carrying on commercial or economic activities relating to goods or services*". The concept of an "*undertaking*" in section 2 of the Act covers any entity capable of carrying on commercial or economic activities, regardless of its legal status or the way in which it is financed. Each of the Parties therefore constitute an "*undertaking*" for the purposes of the Act as each of the Parties carries on commercial or economic activities relating to, amongst other things, the provision of warehousing services.

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[24] *Pang's Motor Trading v Competition Commission of Singapore, Appeal No. 1 of 2013* [2014] SGCAB 1, at [33].

(ii) When Two or More Entities Form Part of the Same Undertaking/Economic Unit

30. The section 34 prohibition applies to agreements between undertakings. Consequently, agreements between entities which form a single economic unit, i.e. a single undertaking, will not be caught within the scope of the section 34 prohibition.

31. As such, where one or more entities within the same corporate group are alleged to have engaged in an agreement and/or concerted practice that infringes the section 34 prohibition, an assessment will need to be conducted to determine if these entities in fact constitute a single economic entity ("SEE").

32. Should two or more undertakings be found to form an SEE, the agreements and/or concerted practices between these undertakings will fall outside the scope of the section 34 prohibition. This section sets out in brief the legal framework for the application of the doctrine of SEE followed by how liability may be attributed in the context of an SEE.

33. The position in Singapore on how an SEE may be determined has been neatly summarised by the CAB in *Transtar Travel & Anor v CCS* ("*Express Bus Operators Appeal No. 3*") [25]:

> "*67 It is generally accepted that a[n] [SEE] 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 … 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])*".

This is similarly reflected in the *CCCS Guidelines on the Section 34 Prohibition* (the "*Section 34 Guidelines*").[26]

34. The EU courts have recognised that while companies belonging to the same group may have distinct and separate natural or legal personalities, the term "undertaking" must be understood as designating an economic unit for the

[25] *Transtar Travel & Anor v CCS, Appeal No. 3 of 2009* [2011] SGCAB 2, at [67].
[26] *Section 34 Guidelines*, paragraph 2.7.

purpose of the subject-matter of the agreement in question even if in law, that economic unit consists of several persons, natural or legal.[27]

35. Under EU competition law, when a parent company has a 100% shareholding in a subsidiary, whether held directly or indirectly, the parent and subsidiary are an SEE unless proved otherwise.[28] The European Court of Justice ("ECJ") in *Akzo Nobel NV v Commission* ("*Akzo Nobel*")[29] stated that "*it follows from that case-law … that it is for the parent company to put before the Court any evidence relating to the economic and legal organisational links between its subsidiary and itself which in its view are apt to demonstrate that they do not constitute a[n] [SEE]*".

36. An SEE can also exist where the parent company does not have 100% shareholding in a subsidiary. For example, in *Istituto Chemioterapico SpA & Commercial Solvents Corp v Commission* ("*Commercial Solvents*")[30], the parent company owned 51% of its subsidiary with a 50% representation on its decision-making board and committee, and had the right to appoint the subsidiary's Chairman, who had a casting vote. The ECJ ruled that the parent and subsidiary were an SEE on account of the parent company's power to assert control over the subsidiary.[31]

37. The EU courts have also assessed a parent and its subsidiary to be an SEE where the parent has exercised decisive influence over the subsidiary. Indicia of decisive influence include the parent's shareholding in the subsidiary[32], a parent being active on the same or adjacent markets to its subsidiary[33], direct

[27] Case 170/83 *Hydrotherm Gerätebau GmbH v Compact del Dott. Ing. Mario Andreoli & C.Sas* [1984] ECR 2999, at [11]; and Case C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio v Compañía Española de Petróleos SA* [2006] ECR I-11987, at [40].
[28] Case C-97/08 P *Akzo Nobel NV and Others v Commission* [2009] ECR I-8237, at [60]. See also Case C-90/09P *General Quimica SA and Others v Commission* [2011] ECR I-1, at [39] to [42].
[29] Case C-97/08 P *Akzo Nobel NV and Others v Commission* [2009] ECR I-8237, at [65].
[30] Joined Cases C-6/73 & 7/73 *Istituto Chemioterapico SpA & Commercial Solvents Corp v Commission* [1974] ECR 223.
[31] Joined Cases C-6/73 & 7/7 *Istituto Chemioterapico SpA & Commercial Solvents Corp v Commission* [1974] ECR 223, at [41].
[32] Case C-97/08 *P Akzo Nobel NV v Commission* [2009] ECR I-08237, at [60] to [62]; Case C-286/98 *P Stora Kopparbergs Bergslags AB v Commission* [2000] ECR I-9925, at [23] and [27] to [29]; and Case 107/82 *AEG-Telefunken v Commission* [1983] ECR 3151. More recently, see *Durkan Holdings Limited and Others v Office of Fair Trading* [2011] CAT 6, at [22].
[33] Opinion of Advocate-General Mischo in Case C-286/98 P *Stora Kopparbergs Bergslags AB v Commission* [2000] ECR I-9925, at [50].

instructions being given by a parent to a subsidiary[34] or the two entities having shared directors[35].

38. Importantly, the exercise of decisive influence can be "*indirect and may be established even if the parent does not interfere in the day to day business of the subsidiary and even if the influence is not reflected in instructions or guidelines emanating from the parent to the subsidiary.*"[36]

39. Operational details are also taken into account when determining the existence of an SEE. The CAB in *Express Bus Operators Appeal No. 3*[37] accepted the parties' arguments based on *Minoan Lines v Commission*[38] that they were an SEE by reason of their agency relationship as well as other factors which included matters like sharing of the same general manager, the same registered address and business premises. In the *Freight Forwarding Case*[39], CCCS took into account the reporting structure, arrangements with regard to profit sharing, common directorship, the right to nominate directors, and influence in commercial policies, in assessing whether the relevant companies involved formed an SEE.

(iii) Joint and Several Liability

40. Where two legal entities form an SEE, and the SEE infringes competition law, both legal entities may be held jointly and severally liable for the infringement and the financial penalties imposed in respect of the infringement.

41. The ECJ in *Commission v Siemens AG Osterreich and others*[40] noted that the European Commission ("EC") "*has the possibility of holding jointly and severally liable for payment of a fine a number of legal persons forming part of one and the same undertaking that is responsible for the infringement …*".[41] The

[34] Case 48/69 *ICI Limited v Commission* [1972] ECR 619, at [132] to [133]; Case 52/69 *J R Geigy AG v Commission* [1972] ECR 787, recitals 44 to 45; and Case C-73/95 P *Viho Europe BV v Commission* [1996] ECR I-5457, at [16].
[35] *Sepia Logistics Limited v Office of Fair Trading* [2007] CAT 13, at [77] to [80].
[36] *Durkan Holdings Ltd v Office of Fair Trading* [2011] CAT 6, at [22]. See also Case T-25/06 *Alliance One v Commission* [2011] ECR II-5741, at [138] to [139] which states that day to day management control is not required, and the power to define or approve certain strategic decisions is sufficient.
[37] *Express Bus Operators Appeal No. 3*, at [68] to [69].
[38] Case T-66/99 *Minoan Lines v Commission* ECR II 5515 [2005] 5 CMLR 7597.
[39] *CCS Decision of 11 December 2014 in relation to freight forwarding services from Japan to Singapore*, at [527] to [561].
[40] Joined Cases C-231/11 P to C-233/11 P *Commission v Siemens Osterreich and Others & Siemens Transmission & Distribution and Others v Commission* ECLI:EU:C:2014:256.
[41] Joined Cases C-231/11 P to C-233/11 P *Commission v Siemens Osterreich and Others & Siemens Transmission & Distribution and Others v Commission* ECLI:EU:C:2014:256, at [51].

ECJ expounded upon the rationale behind the EC's power in the following manner:

> "*39 Pursuant to Article 23(2) of Regulation No 1/2003, the [EC] may, by decision, impose fines on undertakings or associations of undertakings where, either intentionally or negligently, they infringe Article 81 EC or 82 EC.*
>
> *…*
>
> *43 The Court of Justice has consistently held that the concept of an undertaking covers any entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed.* ***That concept must be understood as covering an economic unit, even if, from a legal perspective, that unit is made up of a number of natural or legal persons*** *(see, inter alia, Joined Cases C 628/10 P and C 141/11 P Alliance One International and Standard Commercial Tobacco v Commission [2012] ECR, paragraph 42 and the case-law cited).*
>
> *44 When such an economic entity infringes the competition rules, it is for that entity, in accordance with the principle of personal responsibility, to answer for that infringement (see, inter alia, Alliance One International and Standard Commercial Tobacco v Commission, paragraph 42, and Commission v Stichting Administratiekantoor Portielje, paragraph 37 and the case-law cited).*
>
> *45 It should be recalled in that connection that, in certain circumstances, a legal person who is not the perpetrator of an infringement of the competition rules may nevertheless be penalised for the unlawful conduct of another legal person, if both those persons form part of the same economic entity and thus constitute the undertaking that infringed Article 81 EC.*
>
> *46 Accordingly, it is settled case-law that the conduct of a subsidiary may be imputed to the parent company in particular where, although having separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company, having regard in particular to the economic, organisational and legal links between those two legal entities (see, inter alia, Commission v Stichting Administratiekantoor Portielje, paragraph 38 and the case-law cited).*
>
> *47 Where, in a relationship entailing vertical capital links of that kind, the parent company in question is itself deemed to have infringed EU competition rules, its liability for the infringement is wholly derived from*

that of its subsidiary (see, to that effect, Case C 286/11 P Commission v Tomkins [2013] ECR, paragraphs 43 and 49, and Case C 50/12 P Kendrion v Commission [2013] ECR, paragraph 55).

48 The Commission will thus be able to regard the parent company as jointly and severally liable for payment of the fine imposed on its subsidiary (see, inter alia, Joined Cases C 201/09 P and C 216/09 P ArcelorMittal Luxembourg v Commission and Commission v ArcelorMittal Luxembourg and Others [2011] ECR I 2239, paragraph 98).

*49 The General Court was therefore correct to state, at paragraph 150 of the judgment under appeal, that, according to case-law, **where several persons may be held personally responsible for participation in an infringement committed by one and the same undertaking for the purposes of competition law, they must be regarded as jointly and severally liable for that infringement**.*"

[Emphasis added]

B. Agreements and/or Concerted Practices

(i) Agreements

42. An agreement is formed when parties arrive at a consensus on the actions each party will, or will not, take. The section 34 prohibition applies to both legally enforceable and unenforceable agreements, whether written or oral, and to so-called gentlemen's agreements. An agreement may be reached via a physical meeting of the parties or through an exchange of letters or telephone calls or any other means. The form of the agreement is irrelevant. An agreement may be found where it is implicit from the participants' behaviour. This is reflected in paragraph 2.10 of the *Section 34 Guidelines*.

43. For an agreement to exist, EU jurisprudence has emphasised that it "*is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way*".[42] In *Pre-Insulated Pipe Cartel*[43], the EC held:

[42] Case T-7/89 *SA Hercules Chemicals NV v Commission* [1991] ECR II-1711, at [256].
[43] COMP IV/35.691/E.4 *Pre-Insulated Pipe Cartel* [1999] OJ L24/50, at [134].

"*An agreement for the purposes of Article [101(1)]*[44] *may also fall well short of the certainty required for the enforcement of a commercial contract. Its exact terms may never be expressed: the fact of agreement will have to be inferred from all the circumstances. The divergent interests of the cartel members may also preclude a full consensus on all issues. One or other party may have reservations about some particular aspect of the arrangement while still adhering to the common enterprise. Some aspects may deliberately be left vague or undefined. It may be that the parties agree (expressly or tacitly) to adopt a common plan and that they have to meet on a continuing basis to work out the details, alter or amend it from time to time or resolve particular difficulties.*

Formal agreement may never be reached on all matters. Agreements in one area may exist alongside conflicts in another. Competition may not be completely eliminated.

The participants may also show varying degrees of commitment to the common scheme. One may exercise a dominant role as ringleader. There may be internal conflicts and rivalries. Some members may even cheat. There could be outbreaks of fierce competition and even 'price wars' from time to time.

None of these elements will however prevent the arrangement from constituting an agreement/concerted practice for the purposes of Article [101(1)] where there is a combination of parties with a single common and continuing objective. A complex cartel may properly be viewed as a single continuing infringement for the time frame in which it existed. The agreement may well be varied or modified, the cartel's activities may progressively be expanded to cover new markets or its mechanisms may be adapted or strengthened.

Members may join or leave the cartel from time to time without its having to be treated as a new 'agreement' with each change in participation.

Furthermore, as a matter both of evidence and of substantive law it is not necessary, for the existence of an agreement, that every alleged participant participated in, gave its express consent to or was even aware of each and every individual aspect or manifestation of the cartel throughout its adherence to the common scheme."

(ii) Concerted Practices

[44] Article 101 of the Treaty on the Functioning of the European Union ("TFEU") is the functional equivalent to section 34 of the Competition Act. It originally began as Article 85 under the Treaty of Rome in 1957, which was later amended to Article 81 under the Treaty of Amsterdam in 1997 and finally to the current Article 101 under the Treaty of Lisbon in 2007. As such, references to the equivalent Article in cases decided before the TFEU came into being in 2007 are reflected as Article 101.

44. The section 34 prohibition also applies to concerted practices. The *Section 34 Guidelines* state that the key difference between a concerted practice and an agreement is that a concerted practice may exist where there is informal cooperation, without any formal agreement or decision.[45] A concerted practice exists, if parties, even if they do not enter into an agreement, knowingly substitute the risks of competition for practical cooperation between them.[46]

45. This is expounded upon in the ECJ decision in *ICI v Commission* ("*Dyestuffs*"),[47] where the ECJ observed that:

> "*64 Article [101] draws a distinction between the concept of 'concerted practices' and that of 'agreements between undertakings' or of 'decisions by associations of undertakings';* ***the object is to bring within the prohibition of that article a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition.***
>
> *65 By its very nature, then, a concerted practice does not have all the elements of a contract but may inter alia arise out of coordination which becomes apparent from the behaviour of the participants.*"
>
> **[Emphasis added]**

46. In *Coöperatieve Vereniging "Suiker Unie" UA and others v Commission* ("*Suiker Unie")*,[48] the ECJ further considered the features of a concerted practice in light of the principle that economic operators should act independently when determining their conduct in the market:

> *"26 The concept of a 'concerted practice' refers to a form of coordination between undertakings, which, without having been taken to the stage where an agreement properly so-called has been concluded,* ***knowingly substitutes for the risks of competition, practical cooperation between them which leads to conditions of competition which do not correspond to the normal conditions of the market****, having regard to the nature of the products, the importance and number of the undertakings as well as the size and nature of the said market.*

[45] *Section 34 Guidelines,* paragraph 2.18.
[46] Case 48/69 *ICI v Commission* [1972] ECR 619, at [64]; *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4, at [196].
[47] Case 48/69 *ICI v Commission* [1972] ECR 619, at [64] to [65].
[48] Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114-73 *Coöperatieve Vereniging "Suiker Unie" UA and others v Commission* [1975] ECR 1663.

27 Such practical cooperation amounts to a concerted practice, particularly if it enables the persons concerned to consolidate established positions to the detriment of …the freedom of consumers to choose their suppliers.

28 In a case of this kind the question whether there has been a concerted practice can only be properly evaluated if the facts relied on by the [EC] are considered not separately but as a whole, after taking into account the characteristics of the market in question.

…

173 The criteria of coordination and cooperation laid down by the case-law of the Court, which in no way require the working out of an actual plan, must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition ***that each economic operator must determine independently the policy which he intends to adopt on the common market including the choice of the persons and undertakings to which he makes offers or sells****.*

174 Although it is correct to say that this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, ***it does however strictly preclude any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market****.*"

[Emphasis added]

47. In *Commission v Anic Partecipazioni SpA* ("*Anic*"),[49] the ECJ made the following observations:

"*116 The Court of Justice has further explained that criteria of coordination and cooperation must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition, according to which each economic operator must determine independently the policy which he intends to adopt on the market (see Suiker Unie and Others v Commission, cited above, paragraph 173; Case 172/80 Züchner [1981] ECR 2021, paragraph 13; Ahlström Osakeyhtiö and Others v Commission, cited above, paragraph 63; and John Deere v Commission, cited above, paragraph 86).*

[49] Case C-49/92 P *Commission v Anic Partecipazioni SpA* [1999] ECR I-4125 at [116] to [117].

117 According to that case-law, although that requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, ***it does however strictly preclude any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market, where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings and the volume of the said market*** *(see, to that effect, Suiker Unie and Others v Commission, paragraph 174; Züchner, paragraph 14; and John Deere v Commission, paragraph 87, all cited above).*

118 It follows that, as is clear from the very terms of Article [101(1)] of the Treaty, a concerted practice implies, besides undertakings concerting together, conduct on the market pursuant to those collusive practices, and a relationship of cause and effect between the two.

…

121 For one thing, subject to proof to the contrary, which it is for the economic operators concerned to adduce, ***there must be a presumption that the undertakings participating in concerting arrangements and remaining active on the market take account of the information exchanged with their competitors when determining their conduct on that market****, particularly when they concert together on a regular basis over a long period, as was the case here, according to the findings of the Court of First Instance.*"

[Emphasis added]

48. Further, EU jurisprudence has established that there can be a concerted practice even when only one competitor informs the other party of its future intention or conduct on the market.

49. In *Cimenteries CBR and Others v Commission* ("*Cimenteries*")[50], the Court of First Instance ("CFI") held:

[50] Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-S0/9S to T-6S/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others v Commission* [2000] ECR II-491, at [1849].

"*1849 In that connection, the Court points out that the concept of concerted practice does in fact imply the existence of reciprocal contacts (Opinion of Advocate General Darmon in Woodpulp II, cited at paragraph 697 above, points 170 to 175). That condition is met where one competitor discloses its future intentions or conduct on the market to another when the latter requests it or, at the very least, accepts it.*

...

1852 In order to prove that there has been a concerted practice, it is not therefore necessary to show that the competitor in question has formally undertaken, in respect of one or several others, to adopt a particular course of conduct or that the competitors have colluded over their future conduct on the market. ... It is sufficient that, by its statement of intention, the competitor should have eliminated or, at the very least, substantially reduced uncertainty as to the conduct to expect of the other on the market ...".

50. In *Tate & Lyle and Others v Commission* ("*Tate & Lyle*")[51], which dealt with a similar point, the CFI held:

"*54 Moreover, the fact that only one of the participants at the meetings in question reveals its intentions is not sufficient to exclude the possibility of an agreement or concerted practice.*

...

57 In the present case, it is undisputed that there were direct contacts between the three applicants, whereby British Sugar informed its competitors, Tate & Lyle and Napier Brown, of the conduct which it intended to adopt on the sugar market in Great Britain.

58 In Case T-1/89 Rhône-Poulenc v Commission [1991] ECT II-867, in which the applicant had been accused of taking part in meetings at which information was exchanged among competitors concerning, inter alia, the prices which they intended to adopt on the market, the Court of First Instance held that an undertaking by its participation in a meeting with an anti-competitive purpose, not only pursued the aim of eliminating in advance uncertainty about the future conduct of its competitors but could not fail to take into account, directly or indirectly, the information obtained in the course of those meetings in order to determine the policy which it intended to pursue on the market (Rhône-Poulenc, paragraphs

[51] Case T-202/98, T-204/98 and T-207/98 *Tate & Lyle and Others v Commission* [2001] ECR II-2035 (upheld by the ECJ in its judgment of 29 April 2004 in Case C-359/01 P *British Sugar plc and Others v Commission of the European Communities* [2004] ECR I-4933), at [54], [57] to [58].

> *122 and 123). This Court considers that that conclusion also applies where, as in this case, the participation of one or more undertakings in meetings with an anti-competitive purpose is limited to the mere receipt of information concerning the future conduct of their market competitors.*"

51. Further, in *T-Mobile Netherlands & Others v Raad van Bestuur van de Nederlandse Mededingingsautoriteit* ("*T-Mobile*"), the ECJ found that a concertation may involve exchanges between parties at a single meeting or on a selective basis in relation to a one-off alteration in the market.[52] This position has been applied by CCCS in the *Pest Control Case*[53] and the *Ferry Operators Case*[54].

(iii) Necessity to Conclude whether Conduct is an Agreement and/or a Concerted Practice

52. It is not necessary for the purposes of finding an infringement, to characterise conduct as exclusively an agreement or a concerted practice.[55] It is established jurisprudence in the EU that the conduct of an undertaking is capable of being both a concerted practice and an agreement.[56] Both concepts are fluid and may overlap.[57] The non-necessity of drawing a distinction between agreement and concerted practice is likewise the position in the UK. The UK Competition Appeal Tribunal ("UK CAT") stated in the case of *JJB Sports plc and Allsports Limited v Office of Fair Trading* ("*JJB Sports*")[58] that:

> "*644 It is trite law that it is not necessary for the OFT to characterise an infringement as either an agreement or a concerted practice: it is sufficient that the conduct in question amounts to one or the other…*".

53. This position has been applied by CCCS in its previous decisions including the *Pest Control Case*[59], the *Express Bus Operators Case*[60], the *Electrical Works*

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[52] Case C-8/08 *T-Mobile Netherlands and Others v Raad van Bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529, at [59] to [62].
[53] *Collusive Tendering (Bid-Rigging) for Termite Treatment/Control Services by certain Pest Control Operators in Singapore* [2008] SGCCS 1, at [134].
[54] *CCS Imposes Financial Penalties on Two Competing Ferry Operators for Engaging in Unlawful Sharing of Price Information* [2012] SGCCS 3, at [53].
[55] Case IV/37.614/F3 *The Community v Interbrew NV and* others *(re The Belgian Beer Cartel)* [2004] CMLR 2, at [223].
[56] Case T-7/89 *SA Hercules Chemicals NV v Commission* [1991] ECR II-1711.
[57] Case T-7/89 *SA Hercules Chemicals NV v Commission* [1991] ECR II-1711, at [264].
[58] *JJB Sports plc and Allsports Limited v Office of Fair Trading* [2004] CAT 17.
[59] *Pest Control Case*, at [44] to [47].
[60] *Re Price Fixing in Bus Services from Singapore to Malaysia and Southern Thailand* [2009] SGCCS 2, at [55] to [58].

Case[61]*,* and the *Freight Forwarding Case*[62]*,* and upheld by CAB on appeal in the *Express Bus Operators Appeals Nos. 1 and 2*[63].

C. Party to an Agreement and/or a Concerted Practice

54. The mere fact that an undertaking may have played only a limited role in the setting up of the agreement and/or concerted practice, or may not be fully committed to its implementation, or participated only under pressure from the other parties, does not mean that it is not party to the agreement and/or concerted practice.[64]

55. The principle that a party to an agreement and/or concerted practice who did not intend to implement the agreed upon initiatives does not escape liability is also established in EU jurisprudence. In *Dole Food and Dole Germany v Commission* ("*Dole Food*")[65], the European General Court ("GC")[66] noted that:

> "*484 …[E]ven if a participant in collusive conduct may seek to exploit it for its own ends, or even cheat, that does not however diminish its liability in respect of its participation in that conduct. According to settled case-law, an undertaking which, despite a cartel with its competitors, follows a more or less independent policy on the market may simply be trying to exploit the cartel for its own benefit ...*".[67]

56. Further, a participant who "cheats" by attempting to gain market share at the expense of other participants through conducting itself differently from what was agreed upon with the other cartelists is still liable for the infringement. In *Re Polypropylene*[68], the EC held that the fact that on some occasions producers might not have maintained their initial resolve and gave concessions to customers on price which undermined the price initiatives agreed upon by the cartel, did not preclude an unlawful agreement having been reached.

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[61] *Collusive Tendering (Bid-Rigging) in Electrical and Building Works* [2010] SGCCS 4, at [45] to [47].
[62] *Freight Forwarding Case*, at [107] to [110].
[63] *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 ("*Express Bus Operators Appeals Nos. 1 and 2*").
[64] *Section 34 Guidelines*, paragraph 2.11.
[65] Case T-588/08 *Dole Food Company, Inc. and Dole Germany OHG v Commission* ECLI:EU:T:2013:130.
[66] The CFI is now known as the GC, after being renamed in 2009 following the Treaty of Lisbon.
[67] *Dole Food,* at [484]. This passage was cited with approval by the UK CAT in *Balmoral Tanks Limited and Balmoral Group Holdings Limited v Competition and Markets Authority* [2017] CAT 23 ("*Balmoral Tanks*"), at [94].
[68] Case 86/398 *Re Polypropylene* [1986] OJ L230/1, at [85].

57. Finally, the participant in a meeting must publicly distance itself from what was discussed in the meeting in order to relieve itself of liability from participating in an anti-competitive agreement and/or a concerted practice:

> "*223 [W]here an undertaking participates, even if not actively, in meetings between undertakings with an anti-competitive object and does not publicly distance itself from what was discussed at them, thus giving the impression to the other participants that it subscribes to the outcome of the meetings and will act in conformity with it, it may be concluded that it is participating in the cartel resulting from those meetings.*"[69]

D. Object or Effect of Preventing, Restricting or Distorting Competition

(i) "Object" and "Effect" Requirements are Alternative and not Cumulative

58. Section 34(1) of the Act prohibits "... *agreements between undertakings ... or concerted practices, which have as their object or effect the prevention, restriction or distortion of competition within Singapore*". In accordance with the plain reading of the section, "*object*" and "*effect*" are alternative and not cumulative requirements. This has been affirmed by the CAB in *Pang's Motor Trading*[70]:

> "*The Board considers that the phrase "object or effect" in s 34(1) is disjunctive in nature* …".

59. Thus, for the purposes of applying section 34 of the Act, it is sufficient for CCCS to show that the object of an agreement and/or concerted practice is to prevent, restrict or distort competition within Singapore, without having to prove the effects of that agreement and/or concerted practice on competition. This is explained at paragraph 2.22 of the *Section 34 Guidelines* which states that:

> "*Once it has been established that an agreement has as its object the appreciable restriction of competition, CCCS need not go further to demonstrate anti-competitive effects. On the other hand, if an agreement is not restrictive of competition by object, CCCS will examine whether it has appreciable adverse effects on competition.*"

60. EU jurisprudence has established that where the object being pursued is to prevent, restrict or distort competition, there can be an infringement even if

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[69] *HFB and Ors v Commission*, Case T-9/99 [2002] II-01487, at [223].
[70] *Pang's Motor Trading*, at [30].

an agreement does not have an effect on the market. In *Tréfilunion SA v Commission*[71], the CFI stated:

> "*79 ... It must be stated that non-observance of the agreed prices does not change the fact that the object of those meetings was anti-competitive and that, therefore, the applicant participated in the agreements: at most, it might indicate that the applicant did not implement the agreements in question. There is no need to take account of the concrete effects of an agreement, for the purposes of applying Article [101(1)] of the Treaty, where it appears, as it does in the case of the agreements referred to in the Decision, that the object pursued is to prevent, restrict or distort competition within the Common Market ...*".

61. Similarly, the ECJ has held in *Hüls AG v Commission* ("*Hüls AG*")[72] that there can be a concerted practice even if there is no actual effect on the market:

> "*163 Secondly, contrary to Hüls's argument, a concerted practice as defined above is caught by Article [101(1)] EC,* ***even in the absence of anti-competitive effects on the market.***
>
> *164 First, it follows from the actual text of that provision that, as in the case of agreements between undertakings and decisions by associations of undertakings,* ***concerted practices are prohibited, regardless of their effect, when they have an anti-competitive object.***
>
> *165 Next, although the very concept of a concerted practice presupposes conduct by the participating undertakings on the market, it does not necessarily mean that that conduct should produce the specific effect of restricting, preventing or distorting competition.*"
>
> **[Emphasis added]**

62. This is also the position taken in the UK, where in *Argos Limited and Littlewoods Limited v Office of Fair Trading* ("*Argos*")[73], the UK CAT stated:

> "*357 However, the OFT does not in our judgment need to rely on the similarity of prices to prove its case if other evidence shows that relevant agreements or concerted practices came into existence.* ***It is trite law that once it is shown that such agreements or practices had the object of preventing, restricting or distorting competition, there is no need for the OFT to show what the actual effect was****: see Cases 56 and 58/64*

[71] Case T-148/89 *Tréfilunion SA v Commission* [1995] ECR II-1063, at [79].
[72] Case C-199/92 *Hüls AG v Commission* [1999] ECR I-4287, at [163] to [165].
[73] *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2004] CAT 24, at [357].

Consten and Grundig v Commission [1996] ECR 299, 342 and many subsequent cases".

[Emphasis added]

(ii) Object of Restricting, Preventing or Distorting Competition

63. It is well established in EU jurisprudence that the finding of an infringement by object is grounded in the principle that certain types of coordination between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition.[74] This is also reflected at paragraphs 2.23 and 2.24 of the *Section 34 Guidelines* – whilst an examination of the facts underlying an agreement and the specific circumstances in which the agreement operates may be required before it can be concluded whether a particular restriction in the agreement constitutes a restriction of competition by object, it is well-established that agreements involving price fixing, bid rigging, market sharing or output limitations will always be regarded as having an appreciable adverse effect on competition and, consequently, constitute a restriction of competition by object. Thus, once it is established that an agreement and/or concerted practice constitutes a restriction of competition by object, CCCS need not proceed further to make a specific appreciability analysis and/or demonstrate anti-competitive effects. This is because such types of coordination between undertakings are regarded by their very nature, as being harmful to the proper functioning of normal competition.

64. The ECJ in *Groupement des cartes bancaires (CB) v European Commission* ("*Cartes Bancaires*") examined the concept of an object infringement. The case concerned a fee structure established by the nine main members of a payment card system. The ECJ annulled the GC's finding that the fee structure restricted competition by object (i.e. prevented the entry of new banks into the sector) on the basis that it had erred in law on the meaning of object. The ECJ held[75]:

> "*49 [It] is apparent from the Court's case-law that certain types of coordination between undertakings reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects (see, to that effect, judgments in LTM, 56/65, EU:C:1966:38, paragraphs 359 and 360; BIDS, paragraph 15, and Allianz Hungária Biztosító and Others, C-32/11, EU:C:2013:160, paragraph 34 and the case-law cited).*

[74] Case C-67/13 P *Groupement des cartes bancaires (CB) v European Commission* [2014] 5 CMLR 2 ("*Cartes Bancaires*"), at [50].
[75] *Cartes Bancaires*, at [49] to [51].

> *50 That case-law arises from the fact that certain types of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition (see, to that effect, in particular, judgment in Allianz Hungária Biztosító and Others (EU:C:2013:160) paragraph 35 and the case-law cited).*
>
> *51 Consequently, it is established that certain collusive behaviour, such as that leading to horizontal price-fixing by cartels, may be considered so likely to have negative effects, in particular on the price, quantity or quality of the goods and services, that it may be considered redundant, for the purposes of applying Article [101(1)] EC, to prove that they have actual effects on the market (see, to that effect, in particular, judgment in Clair, 123/83, EU:C:1985:33, paragraph 22). Experience shows that such behaviour leads to falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers."*

65. According to the ECJ in *Cartes Bancaires*, the "*essential legal criterion*" for ascertaining whether coordination between undertakings restricts competition by object is the finding that:

> "*… such coordination reveals in itself a sufficient degree of harm to competition*."[76]

66. It is not necessary to prove that the parties have the subjective intention of restricting competition when entering into the agreement or practice, even though the ECJ found that the EC is not precluded from finding that the parties' subjective intention is a relevant factor in assessing whether the object of an agreement is anti-competitive.[77]

67. Furthermore, an agreement may be regarded as having a restrictive object even if the restriction of competition was not its sole aim. In *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd* ("*Irish Beef*")[78], the Beef Industry Development Society argued that the arrangements in question were not anti-competitive in purpose or injurious for consumers or competition, but rather were intended to rationalise the beef industry in order to make it more competitive by reducing production overcapacity. The ECJ rejected the argument and held that:

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[76] *Cartes Bancaires*, at [57].
[77] *Cartes Bancaires*, at [54].
[78] Case C-209/07 *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd* [2008] ECR I-8637; [2009] 4 CMLR 6.

> "*21 In fact, to determine whether an agreement comes within the prohibition laid down in art. [101(1)] EC, close regard must be paid to the wording of its provisions and to the objectives which it is intended to attain. In that regard, even supposing it to be established that the parties to an agreement acted without any subjective intention of restricting competition, but with the object of remedying the effects of a crisis in their sector, such considerations are irrelevant for the purposes of applying that provision. Indeed,* ***an agreement may be regarded as having a restrictive object even if it does not have the restriction of competition as its sole aim but also pursues other legitimate objectives*** *(General Motors [2006] 5 C.M.L.R. 1 at [64] and the case law cited).*" [79]
>
> **[Emphasis added]**

68. The proposition that an agreement may still be restrictive by object even if it purports to pursue other legitimate aims was also applied by the GC in *H. Lundbeck A/S and Lundbeck Ltd v European Commission*,[80] where the argument that restrictions in the agreements at issue were necessary to protect the parties' intellectual property rights was rejected – notwithstanding that such restrictions may have been the most cost-effective or least risky option from a commercial perspective, the GC did not agree that this precludes the application of Article 101 of the TFEU, which prohibits anti-competitive agreements.

E. Price Fixing

69. CCCS considers agreements and/or concerted practices involving price fixing to be restrictions of competition by object which will always have an appreciable adverse effect on competition.[81] It considers direct or indirect price fixing to be, by its very nature, restrictive of competition to an appreciable extent.[82]

70. Price fixing agreements and/or concerted practices may involve fixing either the price itself or components of the price such as a discount.[83] It may also take the form of an agreement and/or concerted practice which restricts price competition, for example, an agreement to adhere to published price lists.[84]

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[79] *Irish Beef*, at [21]. See also Case 96/82 *IAZ International Belgium v Commission* [1983] ECR 3369, at [22] to [25].
[80] Case T-472/13 *H. Lundbeck A/S and Lundbeck Ltd v European Commission* [2016] ECLI:EU:T:2016:449, at [459].
[81] *Section 34 Guidelines*, paragraph 2.24.
[82] *Section 34 Guidelines*, paragraph 3.2.
[83] *Section 34 Guidelines*, paragraph 3.3.
[84] *Section 34 Guidelines*, paragraph 3.4.

71. As stated by the authors of Competition Law,[85] it is:

> "… *important to appreciate that prices can be fixed in numerous different ways, and that a fully effective competition law must be able to comprehend not only the most blatant forms of the practice but also a whole range of more subtle collusive behaviour whose* ***object is to limit price competition.***"

[Emphasis added]

72. In addition, private exchanges between competitors of their individualised intentions regarding future prices will normally be considered a restriction of competition by object as they generally have the purpose of fixing prices.[86]

73. In the *Express Bus Operators Case*, CCCS found that the agreement to impose a uniform surcharge (the fuel and insurance charge agreement), constituted a component of the total coach ticket price and was a "*clear price-fixing agreement*" because it amounted to an agreement to introduce a uniform increase in price.[87] On appeal, the CAB held that the parties who participated in the price fixing 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.[88]

74. The fact that prices were agreed on or coordinated would lead to a finding of infringement notwithstanding that the agreement and/or concerted practice did not have full effect. In *Ferry operators – Currency surcharges* [89], five ferry operators arranged to bring about the imposition of a common currency surcharge on freight being transported on United Kingdom-Continent routes following the devaluation of the pound sterling in September 1992. Identical surcharges with a common introduction date and common method of calculation were subsequently announced. The EC found that the arrangement between the ferry operators amounted to a concerted practice to introduce a uniform increase in price notwithstanding that the surcharges were not implemented at all or that they were only partially implemented.[90] In this regard, the EC stated that "*[t]he clear object of the arrangement between the parties was to bring about the*

[85] Richard Whish and David Bailey on Competition Law, Ninth Edition, page 531.
[86] *Section 34 Guidelines*, paragraph 3.22.
[87] *Express Bus Operators Case*, at [294].
[88] *Express Bus Operators Appeals Nos. 1 and 2*, at [143].
[89] IV/34.503 – *Ferry operators – Currency surcharges* [1997] OJ L 26/23 ("*Ferry operators – Currency surcharges*").
[90] *Ferry operators – Currency surcharges* at [59] and [65].

imposition of a common currency surcharge with effect from the same date. There can be no doubt that the arrangement amounted to concerted practice, the object of which was to fix trading conditions by the parties thereto".[91]

75. The CFI in *Bolloré SA and Others v Commission of the European Communities* ("*Bollore SA*")[92] has also clarified that where undertakings agree to increase prices, and announce to their customers what those increases will be, it is irrelevant to a finding of infringement that prices are subsequently negotiated with individual customers that differ from what was agreed, as price announcements always have an impact on the final outcome:

> "*451. The fact that the undertakings actually announced the agreed price increases and that the prices so announced served as a basis for fixing individual transaction prices suffices in itself for a finding that the collusion on prices had both as its object and effect a serious restriction of competition (Case T-308/94 Cascades v Commission [1998] ECR 11-925, paragraph 194).* ***The [EC] was not therefore required to examine the details of the parties' arguments seeking to establish that the agreements in question did not have the effect of increasing prices beyond those which would have been observed under normal conditions of competition and to respond point by point to those arguments****…*
>
> *452. Furthermore,* ***the fact that certain applicants' price instructions did not always strictly correspond to the target prices set at the meetings is not such as to undermine the finding that there was an impact on the market*** *through the taking into account of the agreed price announcements when individual prices were set ….*
>
> *453. That finding of an impact on the market through the announcement of agreed prices and the fact that those prices impacted on clients cannot be called in question by the fact that the relevant documentary evidence gathered by the [EC] does not cover the entire period referred to … .*"[93]
>
> **[Emphasis added]**

76. In *Tate & Lyle*,[94] the EC held, in finding an object infringement, that the parties could rely on the other participants to pursue a collaborative strategy of higher pricing in "*a climate of mutual certainty*". In short, "… *Article 101(1) will catch*

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[91] *Ferry operators – Currency surcharges*, at [58].
[92] Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02 *Re Carbonless Paper Cartel: Bollore SA and Others v Commission of the European Communities* [2007] 5 CMLR 2.
[93] *Bollore SA*, at [451] to [453].
[94] *Tate & Lyle*, at [60].

any agreement or concerted practice which directly or indirectly seeks to eliminate, distort or limit price competition".

(i) Disclosure and/or Exchange of Commercially Sensitive Information — Price-Information

77. The disclosure and/or exchange of commercially sensitive information (such as information on future pricing intentions) may serve to reinforce a single overall agreement [95] and/or concerted practice. Such disclosure or exchange of commercially sensitive information can also, on its own, amount to an infringement of the section 34 prohibition as the exchange of such information reduces uncertainties inherent in the competitive process and facilitates the coordination of the parties' conduct on the market.[96] Even the mere receipt of information can amount to an infringement, as seen in *JJB Sports*[97], where the UK CAT held that:

> "*873 [Even] if the evidence had established only that JJB had unilaterally revealed its future pricing intentions to Allsports and Sports Soccer a concerted practice falling within the Chapter I prohibition would thereby have been established.* ***The fact of having attended a private meeting at which prices were discussed and pricing intentions disclosed, even unilaterally, is in itself a breach of the Chapter I prohibition****, which strictly precludes any direct or indirect contact between competitors having, as its object or effect, either to influence future conduct in the market or to disclose future intentions. Even where participation in a meeting is limited to the mere receipt of information about the future conduct of a competitor,* ***the law presumes that the recipient of the information cannot fail to take that information into account when determining its own future policy on the market****: Tate and Lyle, cited above, at paragraphs 56 to 58, referring in particular to Rhône-Poulenc at paragraphs 122 and 123.*"
>
> **[Emphasis added]**

78. Similarly, in *Tate & Lye*[98] which concerned meetings and discussions between several sugar producers whereby one sugar producer, British Sugar plc, had

[95] "Single Overall Agreement" is explained in more detail in Section F below.
[96] OFT 408, *Trade Associations, Professions and Self-regulating Bodies*, December 2004, paragraph 3.10. This guidance, originally published by the OFT, has been adopted by the Competition Markets Authority ("CMA") when it acquired its powers on 1 April 2014. The original text has been retained.
[97] *JJB Sports*, at [873].
[98] *Tate & Lyle*, at [54], [57] to [58].

disclosed its future pricing intentions regarding industrial and retail sugar to its competitors, the CFI held that:

> "54 ***Moreover, the fact that only one of the participants at the meetings in question reveals its intentions is not sufficient to exclude the possibility of an agreement or concerted practice***.
>
> …
>
> 57 *In the present case, it is undisputed that there were direct contacts between the three applicants, whereby British Sugar informed its competitors, Tate & Lyle and Napier Brown, of the conduct which it intended to adopt on the sugar market in Great Britain.*
>
> 58 *In Case T-1/89 Rhône-Poulenc v Commission [1991] ECT II-867, in which the applicant had been accused of taking part in meetings at which information was exchanged among competitors concerning, inter alia, the prices which they intended to adopt on the market, the Court of First Instance held that an undertaking by its participation in a meeting with an anti-competitive purpose, not only pursued the aim of eliminating in advance uncertainty about the future conduct of its competitors but could not fail to take into account, directly or indirectly, the information obtained in the course of those meetings in order to determine the policy which it intended to pursue on the market (Rhône-Poulenc, paragraphs 122 and 123).* ***This Court considers that that conclusion also applies where, as in this case, the participation of one or more undertakings in meetings with an anti-competitive purpose is limited to the mere receipt of information concerning the future conduct of their market competitors****."*
>
> **[Emphasis added]**

79. In the EC's decision[99] on this same case, it noted that the undertakings had intended to end a price war between them and to follow the same pricing policy, providing and receiving information on industrial and retail sugar prices, thereby:

> "*[creating] the necessary atmosphere of mutual certainty as to the participants' intentions concerning future pricing whereby each of them could rely, if not on the precise price levels of the other participants, at*

[99] Commission Decision of 14 October 1998 relating to a proceeding pursuant to Article 85 of the EC Treaty Case IV/F-3/33.708 - British Sugar plc, Case IV/F-3/33.709 - Tate & Lyle plc, Case IV/F-3/33.710 - Napier Brown & Company Ltd, Case IV/F-3/33.711 - James Budgett Sugars Ltd (notified under number C(1998) 3061), Paragraph 72 of the Preamble, cited by the CFI in *Tate & Lyle* at [60].

least on their continual pursuit of a collaborative strategy of higher pricing."

80. The CFI thereafter upheld the EC's findings on appeal that, on the facts, the meetings and discussions between the sugar producers amounted to a restriction of competition by object and the EC was not required to further establish that the meetings and discussions had an adverse effect on competition in the market:[100]

> "72 *It is clear from case-law that, for the purposes of applying [Article 101(1) of the TFEU],* ***there is no need to take account of the concrete effects of an agreement when it is apparent, as in this case, that it has as its object the prevention, restriction or distortion of competition within the common market*** *(Case T-142/89 Boël v Commission [1995] ECR II-867, paragraph 89; Case T-152/89 ILRO v Commission [1995] ECR II-1197, paragraph 32).*
>
> 73 *Therefore, once the anti-competitive nature of the purpose of the meetings has been established, it is no longer necessary to verify whether the agreement also had any effects on the market*."

[Emphasis added]

81. In light of the foregoing, it is clear that the disclosure and/or exchange of price information can, on its own, be a restriction of competition by object, or it can serve to reinforce a single overall agreement and/or concerted practice, whether or not there are other legitimate objectives for the conduct.

F. Single Overall Agreement

82. An undertaking which takes part in the common unlawful enterprise by actions which contribute to the realisation of a shared objective may be equally responsible, for the whole period of its adherence to the common scheme, for the acts of the other participants pursuant to the same infringement. The ECJ in *Team Relocations v Commission*[101] stated:

> "*50 An undertaking which has participated in such a single and complex infringement through its own conduct, which fell within the definition of an agreement or a concerted practice having an anti-competitive object within the meaning of Article [101(1) of the TFEU]*

[100] *Tate & Lyle*, at [72] to [74].
[101] Case C-444/11 P *Team Relocations v Commission* [2013] 5 CMLR 38, at [50].

and was intended to help bring about the infringement as a whole, may thus be responsible also in respect of the conduct of other undertakings in the context of the same infringement throughout the period of its participation in the infringement … ."

83. In order to find that a particular undertaking should be found responsible for the conduct of the other undertakings during its involvement, it must be shown that the undertaking intended through its own conduct, to contribute to the infringement or common objectives pursued by all the participants. It must also be shown that it was aware of the offending conduct planned or put into effect by the other participants in pursuit of the same objectives or that it could reasonably have foreseen it and was prepared to take the risk. The ECJ in *Anic* stated that:[102]

> "*83 …[The] Court of First Instance was entitled to consider that* ***an undertaking that had taken part in such an infringement through conduct of its own which formed an agreement or concerted practice having an anticompetitive object for the purposes of Article 85(1) of the Treaty and which was intended to help bring about the infringement as a whole*** *was also responsible, throughout the entire period of its participation in that infringement, for conduct put into effect by other undertakings in the context of the same infringement.* ***That is the case where it is established that the undertaking in question was aware of the offending conduct of the other participants or that it could reasonably have foreseen it and that it was prepared to take the risk.***"
>
> **[Emphasis added]**

84. The EC's statements in finding that a network of bilateral communications constituted a single overall agreement in its infringement decision in respect of the *Optical Disk Drives Case* are also instructive:[103]

> "*351. In the context of a cartel comprising a network of parallel bilateral contacts, [the EC] is not and cannot even possibly be required to produce individualised evidence of actual awareness about all cartel aspects for each and every cartel participant, otherwise it would be too easy for non-cooperating undertakings guilty of an infringement to escape any penalty or part of it. In any event,* ***the [EC] is not obliged to demonstrate that the parties were aware of all details concerning bilateral arrangements between the other parties; it is sufficient if each party is aware about***

[102] *Anic*, at [83]. See also Joined Cases C-293/13 P and C-294/13 P *Fresh Del Monte Produce v Commission* ECLI:EU:C:2015:416, at [157], Case C-441/11 P *European Commission v Verhuizingen Coppens NV* ECLI:EU:C:2012:778, at [42].
[103] Commission Decision AT. 39639 – *Optical Disk Drives* of 21 October 2015, at [351].

the general scope and essential characteristics of the cartel as a whole. The fact that individual parties are not familiar with the details of some collusive contacts taking place between various pairs of the cartel participants in which they did not participate *or the fact that they were unaware of the existence of some of such contacts,* ***cannot detract from the [EC]'s finding that they participated in the cartel as a whole.***"

[Emphasis added]

85. The cases[104] have established in the EU that for a series of acts or continuous conduct to constitute a single overall agreement, it must be shown that:

    a. the agreements or concerted practices that made up the single overall agreement were all in pursuit of the same common objective(s);

    b. each party to the single overall agreement intended to contribute by its own conduct to the common objectives of the single overall agreement; and

    c. each party was aware of or could reasonably have foreseen actual conduct planned or put into effect by other parties in pursuit of the common objective(s).

    These principles have been subsequently applied in Singapore.[105]

G. Burden and Standard of Proof

86. CCCS bears the legal burden of proving the infringements in question. The standard of proof to be applied in deciding whether an infringement of the section 34 prohibition has been established is the civil standard, commonly known as proof on the balance of probabilities. The civil standard of proof was applied by the CAB in *Gold Chic Poultry Supply Pte. Ltd. and anor v CCCS and other*

[104] Joined Cases T-204/08 and T-212/08 *Team Relocations and Others v Commission* [2011] ECR II-2040, at [37]; paragraph cited with approval by the ECJ in the appeal against the GC's judgment: see Case C-444/11 P *Team Relocations NV and Others v Commission* at [51] to [53]. See also Joined Cases C-293/13 P and C-294/13 P *Fresh Del Monte Produce v Commission* ECLI:EU:C:2015:416, at [157]. Note that references to "single and continuous infringement" may be used interchangeably to refer to "single overall agreement". CCCS also notes that in *Re Polypropylene*, the EC noted in its decision at [83] that "*The conclusion that there is one continuing agreement is not altered by the fact that some producers inevitably were not present at every meeting*".

[105] CCCS 500/700/214 *Infringement of the section 34 prohibition in relation to the sale and distribution of fresh chicken products in Singapore*; CCS 700/002/11 *Infringement of the section 34 prohibition in relation to the supply of ball and roller bearings*; CCS 500/003/13 *Infringement of the section 34 prohibition in relation to the distribution of individual life insurance products in Singapore*.

appeals (the "*Fresh Chicken Products Appeals*")[106]. The CAB stated:

> "*59 It is not disputed by the Parties that CCCS bears the burden of proving that an infringement has been committed on the civil standard of balance of probabilities (see also Konsortium Express and others v Competition Commission of Singapore [2011] SGCAB 1 at [85]), or that CCCS has to produce "strong and compelling evidence" to prove the infringement within this civil standard under s 34 of the Act.*
>
> *…*
>
> *66 Requiring "strong and convincing evidence" does not however mean that the standard of proof is higher or more onerous than the ordinary civil standard, or that it is "closer" to the criminal standard; there is no third or intermediate legal burden of proof apart from the civil burden of balance of probabilities and the criminal burden of beyond reasonable doubt (see Super Group at [105]; Alwie Handoyo v Tjong Very Sumito and another and another appeal [2013] 4 SLR 308 at [158]-[160]; Napp Pharmaceutical at [107]). The principle merely goes to the quality of evidence that would sufficiently establish an infringement on a balance of probabilities.*"

87. Given the secret and clandestine nature of cartels or collusive conduct, it is sufficient if the body of evidence, viewed as a whole, proves that an infringement of the section 34 prohibition has occurred on a balance of probabilities. The assessment will take into account (where present) any direct evidence, circumstantial evidence or inference to be drawn from the established facts.

88. In *JJB Sports*[107], the UK CAT was of the view that given the hidden and secret nature of cartels where little or nothing may be committed in writing, even a single item of evidence, or wholly circumstantial evidence, depending on the particular context and the particular circumstances, may be sufficient to meet the required standard. Similarly, in *Napp Pharmaceutical Holdings Limited and Subsidiaries v Director General of Fair Trading*, the UK CAT held that in discharging the burden of proof, the UK Office of Fair Trading ("OFT")[108] "*can rely on inferences or presumptions that would, in the absence of any*

[106] *Gold Chic Poultry Supply Pte. Ltd. and anor v CCCS and other appeals* [2020] SGCAB 1 at [64]. See also *Express Bus Operators Appeals Nos. 1 and 2*, at [85].
[107] *JJB Sports*, at [206].
[108] One of the UK's competition regulators was the OFT, until it was merged with the Competition Commission in 2014, to create the CMA.

countervailing indications, normally flow from a given set of facts".[109]

89. The courts in the EU have also recognised the difficulties in obtaining evidence where anti-competitive conduct takes place secretly. In *JFE Engineering v Commission ("JFE Engineering")*[110], the CFI observed that:

> "*179 As the Japanese applicants correctly observe, the [EC] must produce sufficiently precise and consistent evidence to support the firm conviction that the alleged infringement took place ... .*
>
> *180 However, it is important to emphasise that it is* ***not necessary for every item of evidence produced by the [EC] to satisfy those criteria in relation to every aspect of the infringement. It is sufficient if the body of evidence relied on by the institution, viewed as a whole, meets that requirement ... .***"
>
> **[Emphasis added]**

90. In *Aalborg Portland AS v Commission*,[111] the ECJ stated:

> "*55 Since the prohibition on participating in anticompetitive agreements and the penalties which offenders may incur are well known, it is normal for the activities which those practices and those agreements entail to take place in a clandestine fashion, for meetings to be held in secret, most frequently in a non-member country, and for the associated documentation to be reduced to a minimum.*
>
> *56 Even if the [EC] discovers evidence explicitly showing unlawful conduct between traders, such as the minutes of a meeting, it will* ***normally be only fragmentary and sparse, so that it is often necessary to reconstitute certain details by deduction.***
>
> *57* ***In most cases, the existence of an anticompetitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules.***"
>
> **[Emphasis added]**

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[109] *Napp Pharmaceutical Holdings Limited and Subsidiaries v Director General of Fair Trading* [2002] CAT 1, [2002] Comp AR 13, at [110].
[110] Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering Corp. and Others v Commission of the European Communities* [2004] ECR II 2501.
[111] Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland A/S and Others v Commission* [2004] ECR I-123, at [55] to [57].

91. Similar views were expressed by the CAB in the *Fresh Chicken Products Appeals*:[112]

> "*69 In addition, **it should be appreciated that anti-competitive practices and agreements are by their nature hidden and secret.** Given the clandestine nature of such activities, **it would follow that the associated documentation could be reduced to a minimum and that the evidence CCCS can obtain may be only fragmentary and sparse, such that it is necessary to reconstitute certain details by deduction**. Under such conditions, it is possible that the existence of an anticompetitive practice or agreement has to be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition: see Pilkington Group Ltd v European Commission (Case T-72/09) 17 December 2014 at [83]; Aalborg Portland and others v European Commission (Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P) 7 January 2004 ("Aalborg") at [55]-[57]; JFE Engineering at [203]; Claymore Dairies Ltd and Express Dairies PLC v Office of Fair Trading [2003] CAT 18 at [3]; JJB Sports at [206]; Napp Pharmaceutical at [110]. **CCCS is thus well entitled to draw inferences or presumptions from a given set of circumstances. It is not required to produce documents expressly attesting to contacts between the economic operators concerned, and fragmentary and sporadic items of evidence that are available can be supplemented by inferences that allow the relevant circumstances to be reconstituted**: Silec Cable SAS v European Commission (T-438/14) [2018] 5 CMLR 14.*"
>
> **[Emphasis added]**

92. The CAB emphasised that in such circumstances where CCCS may only be able to obtain fragmentary and sparse evidence, CCCS would be fully entitled to draw inferences or presumptions from a given set of circumstances.

H. Principles of Evidence Assessment

93. As regards the probative value of evidence, CCCS notes that the only relevant criterion for the purposes of evaluating the evidence produced is its reliability.[113]

[112] *Fresh Chicken Products Appeals*, at [69].
[113] *Dalmine SpA v Commission of the European Communities* (T-50/00) [2004] ECR. II-02395, at [72].

94. In this regard, it is trite that statements which run counter to the interests of the declarant are in principle regarded as particularly reliable evidence.[114] This principle was reiterated by the GC in *Toshiba Corp v European Commission ("**Toshiba Corp**")*:[115]

> "*48 Where a person admits that he committed an infringement and thus admits the existence of facts going beyond those whose existence could be directly inferred from the documentary evidence, that implies, a priori, in the absence of special circumstances indicating otherwise, that that person had resolved to tell the truth. Thus, statements which run counter to the interests of the declarant are in principle regarded as particularly reliable evidence*."

95. The same principle has also been affirmed by the ECJ. In *Siemens AG and Ors v European Commission (Re Insulated Switchgear Products Cartel)* ("*Siemens AG*")[116], the ECJ dismissed a complaint that the GC should not have relied on the statement of a leniency applicant because of "*established knowledge relating to the functioning of the memory and the psychology of witnesses*",[117] and the possibility that an individual may have had an interest in maximising the unlawful conduct of competitors and minimising their own liability.[118] The ECJ upheld the GC's conclusion that the leniency applicant's evidence was credible – more credible than the other cartelists which had sought to deny the existence of the common understanding:[119]

> "*138 However, the General Court rightly stated, in [107] of the judgment in Mitsubishi Electric v Commission, that, although it is possible that the representative of an undertaking which has applied for leniency may submit as much incriminating evidence as possible, the fact remains, as is correctly stated in [88] and [89] of that judgment, that such a representative will also be aware of the potential negative consequences of submitting inaccurate information, which could, inter alia, lead to a loss of immunity after it has been granted. Moreover, the General Court was also correct to point out that the risk of the inaccurate nature of those statements being detected and leading to those consequences is increased by the fact that such statements must be corroborated by other evidence.*
>
> …

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[114] *JFE Engineering,* at [211]; *Toshiba Corp v European Commission* (T-519/09) [2014] 5 C.M.L.R. 8, at [48].
[115] *Toshiba Corp*, at [48].
[116] Joined Cases C 239/11P, C-489/11P and C-498/11P *Siemens AG and Ors v European Commission* [2014] C.M.L.R.18.
[117] *Siemens AG*, at [33].
[118] *Siemens AG*, at [34].
[119] *Siemens AG*, at [138] to [141].

> *140 More generally, the Court has already had the opportunity to point out that a statement made by a person acting in the capacity of a representative of a company and admitting the existence of an infringement by that company entails considerable legal and economic risks (Sumitomo Metal Industries at [103]).*
>
> *141 Among those risks is that of actions for damages being brought before the national courts, in the context of which the [EC]'s establishment of a company's infringement may be invoked.*"

96. Similarly, when examining the probative value of evidence, it is relevant to consider the consequences if the declarant was found to have provided false or misleading information. In *JFE Engineering,* which concerned a market sharing agreement between eight seamless steel tubes manufacturers consisting of European and Japanese producers, the CFI stated that statements given to a public prosecutor in connection with an inquiry have more probative value than a mere statement, due to the compulsory requirement to answer questions and in view of the adverse consequences of perjury.[120] In this regard, it is relevant to note that the consequences of providing false or misleading information to CCCS are severe, attracting a fine of up to S$10,000 and/or imprisonment of up to one year upon conviction.[121]

97. Notably, the criteria for assessing reliability of statements as set out by the CFI in *JFE Engineering* was subsequently adopted by a differently constituted GC in *Toshiba Corp* in relation to leniency statements:[122]

> "*47 On the contrary,* ***particularly high probative value may be attached to statements which*** *(i) are reliable, (ii) are made on behalf of an undertaking, (iii) are made by a person under a professional obligation to act in the interests of that undertaking, (iv)* ***go against the interests of the person making the statement****, (v)* ***are made by a direct witness of the circumstances to which they relate****, and (vi) were provided in writing deliberately and after mature reflection."*
>
> **[Emphasis added]**

The criteria espoused by the GC in *Toshiba Corp* was affirmed by the CAB in the *Fresh Chicken Products Appeals*.[123]

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[120] *JFE Engineering,* at [312].
[121] Sections 75 to 83 of the Act.
[122] *Toshiba Corp*, at [47].
[123] *Fresh Chicken Products Appeals*, at [107].

98. In addition, the CFI in *JFE Engineering* also clarified that assessing alternative, plausible explanations are only required where the EC "*relies solely on the conduct of the undertakings in question on the market in finding that an infringement has been committed*".[124] Specifically, the CFI held that an alternative, plausible explanation offered by the Japanese undertakings was irrelevant as the EC in that case had relied on documentary evidence in support of its finding of the existence of an anti-competitive agreement.[125]

99. Further, the CFI in *JFE Engineering* also held that there was no prohibition against the EC relying on statements made by other incriminated undertakings:[126]

> "*192 In that connection, no provision or any general principle of Community law prohibits the [EC] from relying, as against an undertaking, on statements made by other incriminated undertakings (PVC II, cited in paragraph 61 above, paragraphs 109 and 512).* ***If that were not the case, the burden of proving conduct contrary to Article [101] EC and Article 82 EC, which is borne by the [EC], would be unsustainable and incompatible with the task of supervising the proper application of those provisions which is entrusted it by the EC Treaty*** *(PVC II, cited in paragraph 61 above, paragraph 512).*"
>
> **[Emphasis added]**

100. On the degree of corroboration required, the CFI in *JFE Engineering* also noted that whilst the statement of a witness had to be corroborated by other evidence to establish the existence of an infringement, the degree of corroboration required is "*lesser, in terms both of precision and of depth, in view of the reliability of [the witness's] statements*".[127]

101. More significantly, the ECJ in *Siemens AG* upheld the conclusion that evidence corroborating the contents of a leniency statement does not have to be contemporaneous documentation but can comprise other statements made with a view to obtaining leniency:

> "*191 It follows that, contrary to what Toshiba maintains, it cannot be submitted that, in principle, statements made with a view to benefiting*

[124] *JFE Engineering*, at [186].
[125] *JFE Engineering*, at [187].
[126] *JFE Engineering*, at [192].
[127] *JFE Engineering*, at [220].

under the Leniency Notice, cannot be corroborated by other statements of that nature, but solely by other evidence contemporaneous with the facts at issue, namely evidence dating from the time of the infringement."[128]

102. The courts in the EU have also upheld the position that the economic benefits of submitting a leniency application would not necessarily undermine the credibility of a statement made by the leniency applicant. In *Dole Food*, the appellant, Dole Food Company, argued that the leniency application had been made in order to secure the completion of an acquisition by the leniency applicant of another company, as the banks that had been asked to finance the acquisition had expressed concerns about the leniency applicant's operations and only agreed to provide the financing once immunity had been granted. The GC rejected the argument that this undermined the leniency applicant's credibility and held that:[129]

> "*91 The Court observes that the applicants' argument does not correspond to the inherent logic of the procedure provided for in the Leniency Notice. The fact of seeking to benefit from the application of the Leniency Notice in order to obtain a reduction in the fine does not necessarily create an incentive for the other participants in the offending cartel to submit distorted evidence. Indeed, any attempt to mislead the [EC] could call into question the sincerity and the completeness of cooperation of the person seeking to benefit, and thereby jeopardise his chances of benefiting fully under the Leniency Notice (Case T 120/04 Peróxidos Orgánicos v Commission [2006] ECR II 4441, paragraph 70).*
>
> *92 On the assumption that the applicants' claims as to the motives for the immunity application submitted by Chiquita are correct, they are not such as to remove all credibility from the statements of that undertaking.* ***The existence of a personal interest in reporting the existence of a concerted practice does not necessarily mean that the person doing so is unreliable.***
>
> **…**
>
> *94 Moreover, and above all, the applicants' portrayal of the action taken by Chiquita on 8 April 2005 as being solely to Chiquita's advantage is misleading since it disregards a certain and potentially negative consequence relating to Chiquita's recognition of its participation in a cartel. Although the application for immunity gave Chiquita grounds for*

[128] *Siemens AG*, at [191].
[129] *Dole Food*, at [91], [92] and [94]. The ECJ in Case C-286/13P *Dole Food Company Inc. and Dole Fresh Fruit Europe v Commission* [2015] 4 C.M.L.R. 967 (ECJ) dismissed the appellant's case on other grounds.

hoping that it would escape any punishment by the [EC], its admission of its participation and the [EC]'s subsequent decision finding an infringement of Article [101 of the TFEU] [the EC] ***exposes that undertaking to an action for damages by third parties in order to compensate the loss suffered on account of the anti-competitive conduct in issue, which may lead to serious financial consequences for Chiquita****."*

[Emphasis added]

103. This position has been affirmed by the CAB in the *Fresh Chicken Products Appeals*:[130]

"*106* ***We agree with CCCS that leniency statements in themselves are not necessarily undermined by the very fact of the economic incentives in submitting a leniency application.*** *The fact of seeking to benefit from the application of leniency to obtain lower penalties does not necessarily create an incentive for other participants to submit distorted evidence: see Dole Food Company v Commission (T-588/08) [2015] CMLR 967 at [91].* ***Moreover, attempts to deceive or mislead CCCS would jeopardise the leniency application in the first place as it would call into question the sincerity and completeness of cooperation being extended to CCCS****: see Peroxidos Organicos v Commission [2006] ECR II-4441 at [70]*."

[Emphasis added]

104. On the probative value of statements made by undertakings which are not leniency applicants, the fact that testimonies were given by the undertakings' employees at a time when the undertakings were aware of ongoing investigations and had not submitted any leniency applications were considered by the GC in *Toshiba Corp* to be a factor which limits the probative value of the testimonies:

"*150 However, in the present case, first, it must be stated that the testimonies of the applicant's employees were collected at a time when the applicant already knew that the [EC] had begun to suspect a cartel infringement and the undertakings concerned had therefore received a warning. That fact limits their probative value (Case T-59/02 Archer Daniels Midland v Commission [2006] ECR II-3627, paragraphs 277 and 290, and Lafarge v Commission, paragraph 36 above, paragraph 379).*

[130] *Fresh Chicken Products Appeals*, at [106].

> *151 Secondly, the fact that the applicant had not submitted a leniency application and therefore had no interest in admitting the existence of an unlawful cartel must be taken into account*."[131]

105. CCCS notes that "*it is not essential for the date or, a fortiori, the place, of the meetings*" [132] between the participants of the cartel to be established, where there is sufficient evidence that the cartelists had attended meetings among themselves. In other words, the evidence is to be looked at holistically, and that CCCS can make a finding that anti-competitive meetings had taken place, even if it cannot identify the precise dates and location at which such meetings took place.

106. The evidence that CCCS relies on in support of the decision against the Parties are set out in Section J.

I. The Relevant Market

107. Market definition typically serves two purposes in the context of the section 34 prohibition. First, it provides the framework for assessing whether an agreement and/or concerted practice appreciably prevents, restricts or distorts competition. Second, where liability has been established, market definition can assist to determine the turnover of the business of the undertaking in Singapore for the relevant markets that are affected by the infringement and therefore, the appropriate amount of financial penalty as set out in the *CCCS Guidelines on the Appropriate Amount of Penalty in Competition Cases* ("*Penalty Guidelines*").[133]

108. In the present case, a distinct market definition is not necessary for the purpose of establishing an infringement of the section 34 prohibition as the present investigation concerns agreements and/or concerted practices that involve price fixing. Agreements and/or concerted practices that have as their object the prevention, restriction and distortion of competition by way of price fixing, collusive tendering or bid rigging, market sharing or output limitations, are, by their very nature, regarded as preventing, restricting or distorting competition to an appreciable extent.[134]

109. In this regard, CCCS in *Pest Control Case*[135] adopted the position taken by

[131] *Toshiba Corp*, at [150] to [151].
[132] Joined Cases T-305/94, T-306/94, T-307/94, T-313/94, T-314/94, T-315/94, T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij NV v Commission of European Communities* [1999] ECR II-931, at [675].
[133] *Penalty Guidelines*, paragraph 2.1.
[134] *Section 34 Guidelines*, paragraph 3.2.
[135] *Pest Control Case*, at [67].

the UK CAT in *Argos Limited and Littlewoods Limited v Office of Fair Trading (Penalty Judgement)*, that market definition is not intrinsic to the determination of liability in a price fixing case. The UK CAT held that:

> "178 *In our judgment, it follows that in Chapter I cases involving price- fixing it would be inappropriate for the OFT to be required to establish the relevant market with the same rigour as would be expected in a case involving the Chapter II prohibition. In a case such as the present, definition of the relevant product market is not intrinsic to the determination of liability, as it is in a Chapter II case. In our judgment, it would be disproportionate to require the OFT to devote resources to a detailed market analysis, where the only issue is the penalty.*
>
> *179 ... In our view, it is sufficient for the OFT to show that it had a reasonable basis for identifying a certain product market for the purposes of Step 1 of its calculation.*"[136]

110. However, once it is assessed that an undertaking has infringed the section 34 prohibition, and where CCCS exercises its discretion to impose a financial penalty pursuant to section 69(2)(e) of the Act, market definition is relevant for the second purpose mentioned in paragraph 107 above; namely to assess the appropriate amount of financial penalties.

111. For the purposes of exercising its discretion to impose a financial penalty pursuant to section 69(2)(e) of the Act in this case, CCCS has determined that the relevant market is the provision of warehousing services for import cargo at Keppel Distripark. This is because it is the focal product of the agreement and/or concerted practice and specifically the focal product on which the FTZ Surcharge was applied.

J. Evidence Relating to The Price Fixing Conduct

112. This section sets out:

a. The background information relating to the Parties' processes for determining warehouse charges;

b. The genesis of the FTZ Surcharge;

[136] *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, at [178] to [179].

c. The Parties' respective accounts of events between 15 and 16 June 2017; and

d. The Parties' implementation of the FTZ Surcharge.

(i) Parties' Processes for Determining Warehouse Charges

113. During the course of the investigation, each Party was asked to describe its internal processes in deciding its warehouse charges.

1) CNL

114. CNL's price decisions are made by its Director and General Manager, Vasu (CNL), whose responsibilities included liaising with customers and the setting of warehouse charges.[137] Vasu (CNL) is the sole person in CNL responsible for negotiating, proposing and approving charges.[138] CNL imposes different charges for different customers, depending on the services requested by each customer.[139]

115. CNL typically seeks its customers' agreement before it increases its charges for warehousing services, or before it imposes new charges.[140] [✂][141]

2) Gilmon

116. Thomas Chua ("Thomas (Gilmon)"), Gilmon's Assistant General Manager, has the authority to propose and approve warehouse charges. However, Thomas (Gilmon) does not unilaterally impose new charges and would usually have a discussion with Simon (Gilmon), Gilmon's Managing Director, before deciding whether to impose new charges and the quantum of such charges.[142] Upon obtaining Simon's (Gilmon) agreement, Thomas (Gilmon) would then communicate to Gilmon's customers its proposal to impose a new charge.[143]

[137] NOI of Vasu (CNL) dated 19 November 2019, Q3 – 4.
[138] NOI of Vasu (CNL) dated 19 November 2019, Q17.
[139] NOI of Vasu (CNL) dated 19 November 2019, Q13.
[140] NOI of Vasu (CNL) dated 22 September 2020, Q24.
[141] NOI of Vasu (CNL) dated 22 September 2020, Q82.
[142] NOI of Thomas (Gilmon) dated 19 November 2019, Q29 and Q36.
[143] NOI of Thomas (Gilmon) dated 19 November 2019, Q29 and Q36; NOI of Thomas (Gilmon) dated 3 December 2019, Q70; NOI of Simon (Gilmon) dated 22 September 2020, Q19.

117. According to Gilmon, [✂] warehouse operator to introduce a new charge.[144] Instead, Gilmon would [✂].[145] [✂].[146] Gilmon would typically negotiate with and obtain the agreement of its customers before it increases its charges or imposes a new charge.[147] According to Gilmon, without such agreement, new charges cannot take effect.[148]

118. Negotiations with customers are handled by Thomas (Gilmon), Gilbert Yeo (Gilmon's Export Manager) and Arshad (Gilmon's Import Manager).[149] According to Gilmon, one of the key considerations for customers in deciding whether to agree to any proposed increase in charges or the implementation of a new charge is whether Hup Soon Cheong Pte. Ltd. ("HSC"), the largest warehouse operator within Keppel Distripark, had done the same.[150] To persuade customers, Gilmon would also show proof to its customers in the form of notices from HSC informing of any increased or new charge.[151]

3) Penanshin

119. Penanshin's pricing decisions are made by its Director, Wee Gin (Penanshin). Penanshin provides its warehousing services to its parent company, Penanshin Shipping, which provides freight forwarding services to its own customers and other companies within the Penanshin Group. Penanshin therefore does not communicate directly with these customers.[152] Instead, Penanshin would notify Penanshin Shipping of its warehousing charges and Penanshin Shipping would, in turn, notify its customers.[153]

4) Mac-Nels

120. Mac-Nels' Chief Executive Officer, Nicholas (Mac-Nels), has the authority to approve changes to warehousing charges and the imposition of new charges. According to Mac-Nels, any decision whether to revise existing charges or

[144] NOI of Thomas (Gilmon) dated 19 November 2019, Q10.
[145] NOI of Thomas (Gilmon) dated 19 November 2019, Q31 and Q32.
[146] NOI of Thomas (Gilmon) dated 19 November 2019, Q10.
[147] NOI of Thomas (Gilmon) dated 19 November 2019, Q29 and Q34; NOI of Thomas (Gilmon) dated 3 December 2019, Q67; NOI of Simon (Gilmon) dated 22 September 2020, Q19.
[148] NOI of Gilbert (Gilmon) dated 19 November 2019, Q33.
[149] NOI of Thomas (Gilmon) dated 19 November 2019, Q36.
[150] NOI of Simon (Gilmon) dated 22 September 2020, Q21.
[151] NOI of Simon (Gilmon) dated 22 September 2020, Q21.
[152] Penanshin's Response dated 9 December 2019 to CCCS's s.63 Notice dated 25 November 2019, paragraph 2(g).
[153] Penanshin's Response dated 23 July 2021 to Q1 of CCCS's s.63 Notice dated 2 July 2021.

introduce new charges "*[depended] on* [✂]". [154] Andy Leong ("Andy (Mac-Nels)"), Mac-Nels' Operations Manager, would "[✂]". [155] [✂]. [156] [✂]. [157] [✂]. [158] [✂]. [159]

121. Mac-Nels also [✂]. [160] [✂]. [161]

122. However, Mac-Nels [✂]. [162] [✂]. [163]

123. Mac-Nels generally does not seek its customers' agreement before increasing its charges or imposing any new charges (including the FTZ Surcharge). [164] Although Mac-Nels submitted that its customers are generally able to negotiate the imposition of such charges[165], it is noted that in respect of the FTZ Surcharge, a freight forwarding customer had requested to be exempted from the imposition of the FTZ Surcharge but its request was rejected by Mac-Nels. [166]

(ii) Genesis of the FTZ Surcharge

124. It is generally accepted by most of the Parties and all the other warehouse operators interviewed by CCCS that the first warehouse operator to conceive of and implement the FTZ Surcharge was HSC. When asked about the FTZ Surcharge, [✂], the Managing Director of HSC, provided the following answers:

> "*Q14. Who came up with the idea of the FTZ Surcharge?*
> *A: When business is going on, costs is increasing. So we approach our customers to allow us to increase charges. Sometimes they allow us to increase our rates to them, sometimes they allow us to increase warehouse charges. That is where the FTZ Surcharge comes in. But FTZ Surcharge only applies to local cargo, it has no impact on transhipment cargo.*

[154] NOI of Nicholas (Mac-Nels) dated 16 November 2020, Q34.
[155] NOI of Nicholas (Mac-Nels) dated 16 November 2020, Q38.
[156] NOI of Nicholas (Mac-Nels) dated 16 November 2020, Q39 and 43.
[157] NOI of Nicholas (Mac-Nels) dated 16 November 2020, Q39 and 43.
[158] NOI of Nicholas (Mac-Nels) dated 16 November 2020, Q29 and 33.
[159] NOI of Andy (Mac-Nels) dated 19 November 2019, Q16 and 22.
[160] NOI of Nicholas (Mac-Nels) dated 16 November 2020, Q271, Q272, Q275 and Q276.
[161] NOI of Nicholas (Mac-Nels) dated 16 November 2020, Q275.
[162] NOI of Nicholas (Mac-Nels) dated 16 November 2020, Q282.
[163] NOI of Nicholas (Mac-Nels) dated 16 November 2020, Q283.
[164] NOI of Nicholas (Mac-Nels) dated 16 November 2020, Q47 and 95.
[165] NOI of Nicholas (Mac-Nels) dated 16 November 2020, Q48.
[166] Exhibit LKL-007.

Q15. So were you the one who came up with the FTZ Surcharge?
A: Yes, I discussed with the customers. They don't allow us to increase rates but allowed us to increase warehouse charges. So we came up with the idea of the "FTZ Surcharge" and after few rounds of negotiations with our customers, they agreed.

Q16. Am I correct to say that you wanted to increase charges, so you discussed with your customers and when they agreed, you packaged it as an "FTZ Surcharge"?
A: I don't understand what you mean by "package". "FTZ" is just the name. Typically, in the warehouse, there are a few charges already, so we just come up with the name.

Q 17. Why call it "FTZ Surcharge"?
A: It is just a name. We were thinking of possible names. For example, there already is a "fuel surcharge". Since we are in an FTZ zone, part of the cost increase is due to costs in Keppel Distripark, going up, so we decided to call it the FTZ surcharge. We were thinking of calling it KD surcharge initially but decided on FTZ eventually. FTZ stands for Free Trade Zone surcharge.

…

Q20. Am I correct to say that HSC was the first warehouse operator to come up with the FTZ surcharge in [Keppel Distripark]?
A: Yes, because before that there was no such FTZ surcharge. Of course, different operators impose different charges such as sticker charges, bunker and security charges. So that's why when we come up with the name, need to think what name to use.[167]"

125. The fact that the FTZ Surcharge was negotiated between HSC and its customers is corroborated by Vanguard Logistics Services Pte. Ltd. ("Vanguard"), [✂].[168] According to Vanguard, [✂]. After some two to three months of negotiations, which took place via physical meetings at Vanguard's office, Vanguard agreed to the imposition of the FTZ Surcharge by HSC at a quantum of $6 per w/m[169]. Following this, HSC prepared a notice announcing that it was going to impose

[167] NOI of [✂] (HSC) dated 6 October 2020.
[168] Vanguard's Response dated 10 March 2021 to CCCS's s.63 Notice dated 26 February 2021.
[169] "W/m" means "weight or measurement".

the FTZ Surcharge at a rate of $6 per w/m with effect from 1 July 2017, on the basis of an increase in operating costs.[170] An email attaching HSC's FTZ Surcharge Notice was then sent to Vanguard on 15 June 2017 to confirm its implementation.[171] The FTZ Surcharge Notice was also put up by HSC at its warehouse office after 4.41pm on 15 June 2017, stating that the FTZ Surcharge would take effect on 1 July 2017.[172]

126. Save for Mac-Nels, representatives of each of the Parties said that they believed that HSC was the first to introduce the FTZ Surcharge and put up its FTZ Surcharge Notice at its warehouse office.[173] As for Mac-Nels, Andy (Mac-Nels) claims to have learnt about the FTZ Surcharge from Matthew (Mac-Nels), who was informed of this development by Penanshin. Andy (Mac-Nels) did not, however, know which warehouse operator was the first to implement the FTZ Surcharge.[174]

(iii) Parties' Accounts of Events Between 15 and 16 June 2017

127. The evidence uncovered from the Parties revealed interactions which occurred between them on 15 and 16 June 2017 that related to their eventual imposition of the FTZ Surcharge. The evidence (which consists of oral evidence from the Parties' key personnel as well as documentary evidence) comprises evidence relating to physical meetings, emails, phone calls and WhatsApp conversations on various aspects of the FTZ Surcharge.

128. CCCS notes that there are discrepancies between the accounts given by the Parties of the events occurring on 15 and 16 June 2017. Set out below are the accounts of the events of 15 and 16 June 2017 by Penanshin, followed by the different accounts by CNL, Gilmon and Mac-Nels, to the extent that these differences are relevant.

1) <u>Penanshin's Account</u>

129. As a leniency applicant, Penanshin provided a detailed account, as well as contemporaneous documentary evidence, of the events that transpired on 15 and

[170] Such notices announcing the imposition of the FTZ Surcharge by warehouse operators will hereinafter be referred to as "FTZ Surcharge Notices".
[171] Vanguard's Response dated 10 March 2021 to CCCS's s.63 Notice dated 26 February 2021.
[172] NOI of [✂] (HSC) dated 6 October 2020, Q94.
[173] NOI of Yasrin (Penanshin) dated 31 August 2021, Q29-30; NOI of Vasu (CNL) dated 22 September 2020, Q175; NOI of Simon (Gilmon) dated 22 September 2020, Q15.
[174] NOI of Andy (Mac-Nels) dated 19 November 2019, Q25 and clarification.

16 June 2017. This was principally supplied through the information provided in interviews with Penanshin's Container Freight Station Manager, Mohamed Yasrin ("Yasrin (Penanshin)") and Wee Gin (Penanshin), together with Penanshin's leniency statement that set out its version of events.

130. According to Yasrin (Penanshin), Simon (Gilmon) and Vasu (CNL) had approached him at Penanshin's warehouse office unannounced at around 11.30 a.m. on 15 June 2017 (the "15 June 2017 Meeting"). Yasrin (Penanshin) knew Vasu (CNL) from the monthly PSA management meetings and had seen Simon (Gilmon) in or around Keppel Distripark (although they had never been introduced previously). As such, he did not really know Simon (Gilmon).[175]

131. Simon (Gilmon) and Vasu (CNL) struck up a conversation with Yasrin (Penanshin) and, in the course of doing so, mentioned to Yasrin (Penanshin) that "*a number of other warehouse operators at [Keppel Distripark] intend to introduce an 'FTZ Surcharge' of "SGD 6.00 per w/m". Such warehouse operators included (i) CNL, (ii) Gilmon, (iii) HSC, (iv) A&T, (v) Astro Pacific, (vi) AWS, (vii) CWT, (viii) CLS and (ix) FLL. In particular, (i) HSC, (ii) A&T, (iii) AWS, (iv) CLS, (v) CNL and (vi) Gilmon intended to introduce the 'FTZ Surcharge' on 1 July 2017 so that other warehouse operators will not lose their respective customers*".[176]

132. After stating this, Simon (Gilmon) and Vasu (CNL) asked Yasrin (Penanshin) if "*[Penanshin wanted] to be a part of it. They said that [the aforementioned warehouse operators] will also be implementing the FTZ Surcharge on that date*".[177] Simon (Gilmon) asked Yasrin (Penanshin) to also ask Mac-Nels.[178] Yasrin (Penanshin) responded that he had "*no say*" in the matter and needed to talk to Wee Gin (Penanshin) to confirm Penanshin's position.[179] Simon (Gilmon) and Vasu (CNL) asked Yasrin (Penanshin) to communicate with Thomas (Gilmon), a person Yasrin (Penanshin) knew from the monthly meetings called by PSA for the managers of the various warehouse operators[180], after he had

[175] NOI of Yasrin (Penanshin) dated 31 August 2021, Q21.
[176] Penanshin's Leniency Statement dated 9 March 2020, paragraphs 2, 7, 9; Penanshin's Response dated 9 December 2019 to CCCS's s.63 Notice, paragraph 2(c)(i).
The short forms and abbreviations used in this quotation refer to the following warehouse operators: A&T – A&T Freight Management Pte Ltd; Astro Pacific – Astro Pacific Pte Ltd; AWS – Asian Worldwide Services Pte Ltd; CWT – CWT Globelink Pte Ltd; CLS – Capital Logistics Pte Ltd; FLL – Freight Link Logistics Pte Ltd.
[177] NOI of Yasrin (Penanshin) dated 15 January 2021, Q7.
[178] NOI of Yasrin (Penanshin) dated 15 January 2021, Q37; NOI of Yasrin (Penanshin) dated 31 August 2021, Q14.
[179] NOI of Yasrin (Penanshin) dated 15 January 2021, Q5-6.
[180] NOI of Yasrin (Penanshin) dated 17 March 2020, Q14.

checked with Wee Gin (Penanshin).[181] Yasrin (Penanshin) also noted that contacting Thomas (Gilmon) rather than Simon (Gilmon) made sense because, like him, Thomas (Gilmon) was a manager at Gilmon who handled the "groundwork"[182], rather than Simon (Gilmon) who was part of the management of Gilmon.[183] Also, Yasrin (Penanshin) acknowledged that he did not know Simon (Gilmon) and had not been introduced to him until the 15 June 2017 Meeting, whereas Thomas (Gilmon) was involved in operations just like him.[184] Simon (Gilmon) therefore would not send emails to Yasrin (Penanshin), unlike Thomas (Gilmon).[185]

133. Following the 15 June 2017 Meeting, Yasrin (Penanshin) informed Wee Gin (Penanshin) that some other warehouse operators at Keppel Distripark were intending to impose the FTZ Surcharge and proposed to Wee Gin (Penanshin) that Penanshin also impose the FTZ Surcharge in order to defray rising costs.[186] Yasrin (Penanshin) encouraged Wee Gin (Penanshin) to follow the other warehouse operators to implement the FTZ Surcharge as he felt it would be good for the company.[187] Wee Gin (Penanshin) instructed Yasrin (Penanshin) to find out which warehouses would be implementing the FTZ Surcharge before he made a decision.[188]

134. Yasrin (Penanshin) subsequently called Thomas (Gilmon) on 15 June 2017 and requested copies of HSC's and CLS's FTZ Surcharge Notices so that he could prove to Wee Gin (Penanshin) that other warehouse operators were indeed implementing the FTZ Surcharge.[189] Additionally, Yasrin (Penanshin) also wanted the FTZ Surcharge Notices as templates for drafting Penanshin's own FTZ Surcharge Notice.[190] Later that same day, at 7.47 p.m., Yasrin (Penanshin) received a message from Thomas (Gilmon) via WhatsApp enclosing copies of HSC's and CLS's FTZ Surcharge Notices.[191]

135. At 9.57 p.m., Yasrin (Penanshin) sent a message via WhatsApp to Matthew (Mac-Nels). Yasrin (Penanshin) knew Matthew (Mac-Nels) from the time when

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[181] NOI of Yasrin (Penanshin) dated 31 August 2021, Q22.
[182] NOI of Yasrin (Penanshin) dated 31 August 2021, Q21.
[183] NOI of Yasrin (Penanshin) dated 31 August 2021, Q27.
[184] NOI of Yasrin (Penanshin) dated 31 August 2021, Q21-22.
[185] NOI of Yasrin (Penanshin) dated 31 August 2021, Q27.
[186] NOI of Yasrin (Penanshin) dated 17 March 2020, Q16-17; NOI of Wee Gin (Penanshin) dated 18 March 2020, Q21.
[187] NOI of Yasrin (Penanshin) dated 17 March 2020, Q17.
[188] NOI of Yasrin (Penanshin) dated 17 March 2020, Q18.
[189] NOI of Yasrin (Penanshin) dated 17 March 2020, Q28.
[190] NOI of Yasrin (Penanshin) dated 15 January 2021, Q14-15.
[191] Exhibit MY-001, page 1.

the former was an employee of Mac-Nels. Yasrin's (Penanshin) message read as follows:

> "*Mr. Er, [are] you interested to add charges for warehouse? We are going to [impose] one more charge on 1st July to collect extra revenue for warehouse. It will be call[ed] FTZ Surcharge, we will collect $6 per m3. There are a few [warehouses who] will be joining me (i) Penanshin (ii) HSC (iii) Astro (iv) CNL (v) Gilmon (vi) CWT.KIV (vii) A&T.*"[192]

136. Wee Gin (Penanshin) made the decision for Penanshin to impose the FTZ Surcharge on the morning of 16 June 2017, having received the FTZ Surcharge Notices of HSC and CLS from Yasrin (Penanshin).[193] At 7.28 a.m. on 16 June 2017, Matthew (Mac-Nels) replied to Yasrin (Penanshin) on WhatsApp to say, "*Yes I will follow*".[194] Following from this, Yasrin (Penanshin) took the following concurrent steps:

a. Between 7.36 a.m. and 7.42 a.m., he provided Matthew (Mac-Nels) with copies of HSC's and CLS's FTZ Surcharge Notices through a series of messages sent via WhatsApp.[195]

b. At 7.40 a.m. and 7.42 a.m., he sent separate WhatsApp messages to Vasu (CNL) and Thomas (Gilmon), respectively, stating:

> "*Bro, Mac-Nels and Penanshin* ***will follow the increase of new charges FTZ****. I have [talked] to [Mac-Nels] boss* ***he will follow us****. I will give the cc copy notice to [you] soon*".[196]
>
> **[Emphasis added]**

Yasrin's (Penanshin) messages were acknowledged by Vasu (CNL) and Thomas (Gilmon) with "*Thx bro*" and "*Thanks*" respectively.[197] According to Yasrin (Penanshin), he reported this development to Vasu (CNL) and Thomas (Gilmon) out of courtesy as he felt that they were "*coordinating the effort*".[198] Yasrin (Penanshin) said that he felt this way because "*the proposal came from Simon, supported by CNL*".[199]

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[192] Exhibit MY-003, page 1.
[193] Penanshin's Leniency Statement dated 9 March 2020, paragraph 12.
[194] Exhibit MY-003, page 1.
[195] Exhibit MY-003, page 1.
[196] Exhibit MY-002, page 2; Exhibit MY-001, page 1.
[197] Exhibit MY-001, page 1; Exhibit MY-002, page 2.
[198] NOI of Yasrin (Penanshin) dated 15 January 2021, Q19.
[199] NOI of Yasrin (Penanshin) dated 31 August 2021, Q7.

c. At 7.41 a.m., he forwarded HSC's FTZ Surcharge Notice to his assistant, Jason Tay ("Jason (Penanshin)"), instructing the latter to prepare Penanshin's FTZ Surcharge Notice and to follow the wording in HSC's FTZ Surcharge Notice.[200] Yasrin (Penanshin) also instructed Jason (Penanshin) to email the Penanshin FTZ Surcharge Notice to himself and Matthew (Mac-Nels) once prepared.[201]

137. A short while later, at 11.38 a.m. that same morning, Yasrin (Penanshin) sent an image of Penanshin's FTZ Surcharge Notice to Matthew (Mac-Nels) via WhatsApp. Matthew (Mac-Nels) replied at 12.01 p.m. to say "*ok good thanks Can send by pic? I cannot download ur video*".[202] Yasrin (Penanshin) requested the notice to be sent by email instead, which Matthew (Mac-Nels) agreed.[203]

138. At 11.39 a.m., Yasrin (Penanshin) separately sent images of Penanshin's FTZ Surcharge Notice to Vasu (CNL) and Thomas (Gilmon) respectively via WhatsApp.[204] He did so at the request of both Vasu (CNL) and Thomas (Gilmon), both of whom had separately asked him for a copy of Penanshin's FTZ Surcharge Notice after Yasrin (Penanshin) had confirmed to them that Penanshin was going to impose the FTZ Surcharge at 7.40 a.m. and 7.42 a.m. respectively that same morning.[205]

2) <u>CNL's and Gilmon's Accounts</u>

139. When asked about the meeting that took place at Penanshin's warehouse office on 15 June 2017, Vasu (CNL) claimed to be unable to remember if such a meeting took place between Simon (Gilmon), Yasrin (Penanshin) and himself.[206] Vasu (CNL) did, however, agree that if Simon (Gilmon) had asked him to attend such a meeting, Vasu (CNL) would have gone with him as Simon (Gilmon)[207] is "*the boss*".[208]

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[200] Exhibit MY-005, page 1.
[201] Exhibit MY-005, page 1.
[202] Exhibit MY-003, page 1. To note that the record of the WhatsApp conversation between Yasrin (Penanshin) and Matthew (Mac-Nels) shows that a photograph of Penanshin's FTZ Surcharge Notice was sent to Matthew (Mac-Nels) in jpeg format.
[203] Exhibit MY-003, WhatsApp messages between Yasrin (Penanshin) to Matthew (Mac-Nels) sent at 12:29 and 12:32 on 16 June 2017.
[204] Exhibit MY-005, pages 1 and 4.
[205] NOI of Yasrin (Penanshin) dated 15 January 2021, Q13, Q34-35; NOI of Yasrin (Penanshin) dated 31 August 2021, Q9-13.
[206] NOI of Vasu (CNL) dated 22 September 2020, Q153.
[207] Simon (Gilmon) is also a director and majority shareholder (51%) of CNL. Please refer to paragraphs 223 to 226 for further details on the relationship between Simon (Gilmon) and Vasu (CNL).
[208] NOI of Vasu (CNL) dated 22 September 2020, Q156.

140. In this regard, Simon (Gilmon) denied that the meeting with Vasu (CNL) and Yasrin (Penanshin) on 15 June 2017 had taken place, claiming that "*there [was] no reason for [him] to go down to Penanshin's office to meet up with Yasrin*"[209], and that if he had wanted to communicate with Penanshin, he "*would have spoken with Penanshin's boss and not to Yasrin (Penanshin) who is just a manager*".[210] However, Simon (Gilmon) also admitted that he "*hardly knew anybody in Penanshin*" and that he was "*not close to*" Yasrin (Penanshin).[211]

141. Thomas (Gilmon) also claimed that he was unaware of whether the meeting between Simon (Gilmon), Vasu (CNL) and Yasrin (Penanshin) on 15 June 2017 had taken place.[212]

142. When asked about his forwarding of HSC's and CLS's FTZ Surcharge Notices to Yasrin (Penanshin) on 15 June 2017, Thomas (Gilmon) said that Yasrin (Penanshin) had called him to talk about the FTZ Surcharge, and to request copies of the FTZ Surcharge Notices of HSC and CLS, before Thomas (Gilmon) forwarded the FTZ Surcharge Notices of HSC and CLS to Yasrin (Penanshin)[213]. Crucially, Thomas (Gilmon) also admitted to having informed Yasrin (Penanshin) of Gilmon's intention to impose the FTZ Surcharge during this call:

> "*Q41. When you sent the FTZ Surcharge Notices of Hup Soon Cheong and Capital Logistics to Yasrin on 15 June 2017, did you know whether Yasrin was aware that Gilmon was going to impose the FTZ Surcharge too?*
> *A: Yes, Yasrin knew that Gilmon had the intention to impose the FTZ Surcharge on 15 June 2017. This was because I told him over the phone prior to sending him the notices of Hup Soon Cheong and Capital Logistics.*
>
> *…*
>
> *Q46. So to clarify, how did Yasrin come to be aware of Gilmon's intention to impose the FTZ Surcharge?*
> *A: Everyone will check, and I did say yes Gilmon intends to impose, even though I still need to get customers' approval. So Yasrin asked me during*

[209] NOI of Simon (Gilmon) dated 22 September 2020, Q66.
[210] NOI of Simon (Gilmon) dated 22 September 2020, Q68 (clarification section).
[211] NOI of Simon (Gilmon) dated 22 September 2020, Q65.
[212] NOI of Thomas (Gilmon) dated 8 October 2020, Q82.
[213] NOI of Thomas (Gilmon) dated 8 October 2020, Q79-80.

the call whether Gilmon intended to impose FTZ Surcharge and I said yes. During the same call, he asked me for the Hup Soon Cheong and Capital Logistic's notices which I sent them to him on 15 June 2017."[214]

143. When asked about the call and subsequent WhatsApp exchange with Yasrin (Penanshin), Thomas (Gilmon) claimed that he was merely "*sharing the information*" with Yasrin (Penanshin).[215] He also noted that he did not know why Yasrin (Penanshin) would use the word "*follow*"[216], suggesting that it might have been because Thomas (Gilmon) had told Yasrin (Penanshin) that Gilmon was "*following*" HSC and CLS, and hence Yasrin (Penanshin) also used the same term.[217]

144. Vasu (CNL) was similarly unable to give a clear explanation as to why Yasrin (Penanshin) would have sent the 16 June 2017 WhatsApp message to inform him of Penanshin's and Mac-Nels' decisions to "follow" the imposition of the FTZ Surcharge; choosing, also, to suggest that Yasrin (Penanshin) had called him first to ask whether CNL was imposing the FTZ Surcharge.[218]

145. When Vasu (CNL) was asked why Yasrin (Penanshin) had told him on 16 June 2017 that Mac-Nels and Penanshin would be following the imposition of the FTZ Surcharge, Vasu's (CNL) explanation was that once HSC and CLS had put up their FTZ Surcharge Notices, other warehouse operators, including Yasrin (Penanshin), had called him to check whether CNL would also be imposing the FTZ Surcharge.[219] He explained that Yasrin's (Penanshin) WhatsApp message was in response to Vasu's (CNL) own question to Yasrin (Penanshin) when Yasrin (Penanshin) called him, to ask Yasrin (Penanshin) whether other warehouse operators, including Penanshin, were also charging the FTZ Surcharge.[220] According to Vasu (CNL), this call had taken place after Vasu (CNL) had seen HSC's FTZ Surcharge Notices.[221]

3) <u>Mac-Nels' Account</u>

146. When asked about the exchanges between himself and Yasrin (Penanshin) over WhatsApp between 15 and 16 June 2017, Matthew (Mac-Nels) claimed that he

[214] NOI of Thomas (Gilmon) dated 26 August 2021, Q41 and Q46.
[215] NOI of Thomas (Gilmon) dated 8 October 2020, Q79.
[216] NOI of Thomas (Gilmon) dated 26 August 2021, Q55.
[217] NOI of Thomas (Gilmon) dated 26 August 2021, Q58-59.
[218] NOI of Vasu (CNL) dated 22 September 2020, Q84, Q148-149.
[219] NOI of Vasu (CNL) dated 26 August 2021, Q32-33.
[220] NOI of Vasu (CNL) dated 22 September 2020, Q111, Q149.
[221] NOI of Vasu (CNL) dated 22 September 2020, Q148.

did not recall doing anything in respect of Yasrin's (Penanshin) message, and that his response to Yasrin (Penanshin) was merely an acknowledgement:

> "*Q90. After Yasrin sent you message, did you discuss with Nick* [i.e. referring to Nicholas (Mac-Nels)]*?*
> *A. Nothing, I don't recall so I think I never do anything.*
>
> *Q91. If you don't remember, how you know you didn't do anything?*
> *A. I don't remember means I didn't do anything mah. I'm very sure I didn't attend a meeting.*
>
> *Q92. But you said, you will follow?*
> *A. Yes. If they collect, it is prudent for me to collect.* [✂] *But I want to follow if they are charging* [✂].
>
> *Q93. So you made the decision to implement between 10pm on 15 June 2017 and 7.30am on 16 June 2017?*
> *A. I did not.*
>
> *Q94. So your son and Andy next day made the decision?*
> *A. I don't know. My son and I don't communicate...*
>
> *Q95. So when you told Yasrin that Mac-Nels will follow, it was not confirmed?*
> *A. Yes, I was just responding. At that time, it was just a proposal. But I follow up and understand that now it is implemented. "I will follow" is an acknowledgement.*"[222]

147. Nicholas (Mac-Nels) initially adopted a similar position, saying that he was "*not aware of [Yasrin's (Penanshin) and Matthew's (Mac-Nels) Whatsapp] discussion*"[223], but subsequently admitted that Matthew (Mac-Nels) had told him about it "*the day after [Yasrin's (Penanshin) and Matthew's (Mac-Nels)] conversation*"[224]:

> "*Q220. We have information that on 15 June 2017, 9.57 pm, Yasrin asked Matthew Er if Mac-Nels wants to follow other warehouse operators namely (i) Penanshin, (ii) Hup Soon Cheong, (iii) Astro, (iv) CNL, (v)*

[222] NOI of Matthew (Mac-Nels) dated 16 November 2020, Q90-95.
[223] NOI of Nicholas (Mac-Nels) dated 16 November 2020, Q220.
[224] NOI of Nicholas (Mac-Nels) dated 16 November 2020, Q222, Q225.

Gilmon, (vi) CWT, KIV, (vii) A&T in imposing a FTZ Surcharge of $6 per m3 on 1 July 2017, and then Matthew Er replied him on 16 June 2017, 7.28 am that Mac-Nels will follow these warehouse operators. Are you aware of this?
A: I am not aware of their discussion.

Q221. So when Matthew Er discussed with you, he did not tell you that there is this conversation with Yasrin?
A: No.

Q222. Just now you said that Matthew discussed with you after that?
A: Yes, the day after their conversation.

Q223. Did you know that Matthew replied or gave a response to Yasrin to say that Mac-Nels would follow? That means that without discussing with you, he said this.
A: I cannot recollect if he tell Yasrin to proceed that Mac-Nels will follow the actual day. But I do know that we will follow suit thereafter seeing the circular.

…

Q224. I just want to confirm again your answer just now is that you cannot recollect if Matthew Er told Yasrin that Mac-Nels would follow on that day itself.
A: Yes.

Q225. So do you agree that Matthew told you about this conversation with Yasrin?
A: Yes.

Q226. Did he tell you what I shared with you earlier in Q220? What did he tell you?
A: He said FTZ surcharge is being imposed by other operators. He asked if we should follow suit, and the reasons why and when. Then I said, first I need some proof. As I said earlier, in the Q&A, we can proceed to charge on 1 August 2017.

Q227. So did he tell you this before he replied to Yasrin to say that he would follow? Is it before or after he replied Yasrin?

A: I cannot recollect."[225]

148. In relation to whether Matthew (Mac-Nels) had a role in the final decision by Mac-Nels to impose the FTZ Surcharge, Nicholas (Mac-Nels) initially said that he made the final decision himself[226], but later changed his position to say that he made the final decision together with Matthew (Mac-Nels)[227]:

> *"Q71. Who in Mac-Nels made the final decision on the imposition of the "FTZ Surcharge"?*
> *A: Only myself.*
>
> *...*
>
> *Q260. Who made the final decisions to impose FTZ Surcharge? Yourself or with Matthew Er?*
> *A: Together.*
>
> *Q261. Do you agree that Matthew has a role in the final decision on the imposition on FTZ Surcharge?*
> *A: Yes.*"

149. Mac-Nels' FTZ Surcharge Notice was created on 16 June 2017 at 4.54 p.m.[228] and was sent out in an email to its related companies on 16 June 2017 at 5.07 p.m.[229]

(iv) The Parties' Implementation of the FTZ Surcharge

150. CCCS observed that the Parties' decisions on whether to increase or impose new charges were heavily influenced by whether their competitors were also doing the same. It was also important for the Parties, particularly CNL and Gilmon, to prove to their own customers that this was the case.

151. As can be seen from Gilmon's and Mac-Nels' processes in determining warehouse charges (see paragraphs 117 and 120 above), warehouse operators that were contemplating imposing an increased or new charge might make

[225] NOI of Nicholas (Mac-Nels) dated 16 November 2020, Q220-227.
[226] NOI of Nicholas (Mac-Nels) dated 16 November 2020, Q71.
[227] NOI of Nicholas (Mac-Nels) dated 16 November 2020, Q260, Q261.
[228] See Metadata of Attachment entitled "3639_001.pdf", attached to Andy's (Mac-Nels) email dated 16 June 2017 sent at 5.07 p.m.
[229] LKL-005.

inquiries to find out whether other warehouse operators were doing the same. This was done in order to assess if the imposition of the increased or new charge may cause customers to switch warehouse operators – especially if competitors did not impose a similar increased or new charge.

152. The concern over losing customers was noted by Yasrin (Penanshin) during the 15 June 2017 Meeting amongst Simon (Gilmon), Vasu (CNL) and himself:

> "*Q8. Did it seem to you that Gilmon and CNL were trying to get various warehouse operators (including Penanshin and Mac-Nels) to also implement the FTZ Surcharge?*
> *A. What I understand is, based on the conversation [with Simon (Gilmon) and Vasu (CNL)],* ***if everyone implements this, the customer will not go to A, B or C. So if everybody have this charges, the customer will stay put****. Whatever the conversation on this, I relayed to Mr. Leaw [Wee Gin (Penanshin)]. He is the one who made the decision to collect charges or not.*"[230]

[Emphasis added]

153. Vasu (CNL) also noted that a similar concern was shared by the freight forwarders (who are generally the customers of the warehouse operators):

> "*Q40. So are you trying to say that [other warehouse operators] need to ask you before, they tell their bosses? Why does it matter to them whether CNL is imposing?*
> *A: They need to know - [Keppel Distripark] is like that. Whenever got new charges, they need to ask everyone and see if they are charging. Because a freight forwarder will use many warehouses. So they will ask why is warehouse A charging this but not warehouse B? Then they will move, the agent.*
>
> *Q41. But if it's up to the freight forwarder to decide the warehouse charges, why will they move? Since it's up to them whether they want to impose or not.*
> *A: No, you are wrong. Because let's say, in China, there is an agent, if they got a consol box, they will give the business to different freight forwarders like Penanshin.* ***So the agent will look at the rates, they will***

[230] NOI of Yasrin (Penanshin) dated 31 August 2021, Q8.

compare the rates offered by the different freight forwarders and give the consol box to the freight forwarder who charges the most favourable rate.

Q42. Means the freight forwarders are scared of losing business at the agent's side? That's why they are asking CNL?
A: Ah yes, that's why you see at the [Keppel Distripark], warehouse operators all got different charges – not everybody got the same. Even for forklift charges also, it is all different. That's why some freight forwarders, when they see that people are charging, they also want to charge. But big freight forwarders, sometimes they don't bother with all these."[231]

[Emphasis added]

154. This meant that it was inherently risky for the Parties to unilaterally introduce a new surcharge without knowing whether their competitors would be doing the same.

155. Both Matthew (Mac-Nels) and Nicholas (Mac-Nels) also agreed that it would be easier to impose the FTZ Surcharge if more warehouse operators did the same:

Nicholas' (Mac-Nels) evidence

"*Q230: If Hup Soon Cheong didn't impose the FTZ Surcharge, but other warehouse operators did, would you have followed them?*
A. Yes.

Q231: What about Penanshin? How did Penanshin's decision to introduce the FTZ Surcharge influence your decision to follow?
A. I need at least a couple to make an informed decision. Not just one."[232]

Matthew's (Mac-Nels) evidence

"*Q108: Would I be right to say if more people charged the FTZ Surcharge, it would be easier for you to charge?*

[231] NOI of Vasu (CNL) dated 26 August 2021, Q40-42.
[232] NOI of Nicholas (Mac-Nels) dated 16 November 2020, Q230-231.

A. Yes. Not easier, easier to convince the customer to charge. So if other people charge, we can persuade the customer and most customers will accept."[233]

156. The FTZ Surcharge Notices issued by other warehouses concerning any increased or new charge therefore were used as "proof" to a warehouse operator's own customers that other warehouse operators were also imposing the relevant charge and thereby increased the likelihood that customers would agree to the imposition of the increased or new charge and not switch to another warehouse operator.

157. In this regard, Yasrin (Penanshin) agreed that the FTZ Surcharge Notices were "proof" that could assist CNL and Gilmon to impose the FTZ Surcharge:

"*Q22: Did Simon Teo and/or Vasu request that you send Penanshin's FTZ notice to them?*
A: If I remember correctly, they did ask for a copy. That's why you can see got a message saying "sending to you". The "sense" they gave me was that they were coordinating the implementation.

Q23: Why do you think they wanted Penanshin's FTZ notice?
A: I don't know, maybe to convince others.

Q24: Could the notice be considered "proof" that Penanshin was also following the arrangement as suggested by Simon?
A: Could be that they wanted to use it to prove to others that Penanshin was following. Because in this area of [Keppel Distripark], if got charges created, other players would be interested.

Q25. In your view, would it be easier for Gilmon and/or CNL to introduce the FTZ Surcharge if they knew that Penanshin and/or Mac-Nels would also be introducing the FTZ Surcharge?
A: Yes, because we are one of the biggest volume operators. For both companies."[234]

158. Vasu (CNL) affirmed that the FTZ Surcharge Notices served as proof to CNL's customers that other warehouse operators were also implementing the FTZ Surcharge. He agreed that CNL's customers would not have agreed to the

[233] NOI of Matthew (Mac-Nels) dated 16 November 2020, Q108.
[234] NOI of Yasrin (Penanshin) dated 15 January 2021, Q22-23.

implementation of the FTZ Surcharge without seeing the FTZ Surcharge Notices of other warehouse operators:

> "*Q173: If your customers did not see the notices from other warehouse operators, they will not believe that the surcharge is being implemented? A. Yes. They would not have implemented. Everywhere in the port will ask. Customers not in [Keppel Distripark], they can only ask the warehouses to find out.*"[235]

159. Simon (Gilmon) also indicated to CCCS that Gilmon needed to be "*able to show its customers proof [that Hup Soon Cheong had implemented its own surcharge]*"[236] This was further confirmed by Thomas (Gilmon). When asked why Yasrin (Penanshin) had sent Penanshin's FTZ Surcharge Notice to him on 16 June 2017 when Yasrin (Penanshin) had already informed him that Penanshin was imposing it, Thomas (Gilmon) said that "*the customer wanted proof ... something in black and white as proof.*"[237]

160. Nicholas (Mac-Nels) also agreed that the FTZ Surcharge Notices of other warehouse operators was "*proof*" of imposition when he sent an email on 22 June 2017 to his freight forwarding customers:

> "*Q88. Why did you also attach the FTZ notices of [HSC] and Penanshin in this email?*
> *A: If we don't have any circular proof from any other operators, we cannot charge the FTZ Surcharge. We need to have proof. When I inform customers, we cannot say we are going to have it. You need to have proof first.*
>
> …
>
> *Q95. Did Mac-Nels have to seek agreement from these customers before implementing the FTZ Surcharge? If yes, how was such agreement sought?*
> *A. No. I just inform that there is a charge.*
>
> *Q96. How did the customers react to Mac-Nels's proposal to introduce the "FTZ Surcharge" (i.e. were most of them agreeable to the imposition*

[235] NOI of Vasu (CNL) dated 22 September 2020, Q173.
[236] NOI of Simon (Gilmon) dated 22 September 2020, Q21.
[237] NOI of Thomas (Gilmon) dated 8 October 2020, Q86.

of the "FTZ Surcharge" and did they ask for the reason for the introduction of the surcharge)?
A. They asked why, and we said we just follow what other people are charging.

Q97. After you explained, were they okay with it?
A. Yes.

Q98. Did Mac-Nels receive any queries from customers on whether other warehouse operators in [Keppel Distripark] were also introducing the "FTZ Surcharge"?
A. No.

Q99. So they just took it that [Hup Soon Cheong and Penanshin] are the two other warehouse operators that are charging the FTZ Surcharge?
A. Yes.

Q100. To the best of your knowledge, were there any customers of Mac-Nels which objected to the imposition of the "FTZ Surcharge"?
A. From what we know, no."[238]

161. Coming back to the Parties' actual implementation of the FTZ Surcharge, although CNL and Gilmon respectively claimed that they required the agreement of their customers to implement the FTZ Surcharge, the evidence obtained by CCCS shows that CNL and Gilmon, with the knowledge that their competitors were also imposing the FTZ Surcharge, were able to put themselves in a much stronger negotiating position vis-à-vis their customers. In some instances, they were able to insist that their customers agree to the imposition of the FTZ Surcharge.

162. As regards CNL, Vasu (CNL) had, on 16 June 2017 at 9.58 a.m. (after receiving confirmation from Yasrin (Penanshin) that Penanshin and Mac-Nels would be imposing the FTZ Surcharge), forwarded via WhatsApp images of HSC's and CLS's FTZ Surcharge Notices to one [✂] from U.S. Group Consolidator (S) Pte. Ltd. ("USG"), a customer of CNL.[239] Their exchange went as follows:

[238] NOI of Nicholas (Mac-Nels) dated 16 November 2020, Q88, Q95-100.
[239] Exhibit VA-004.

"*Vasu 16/06/2017 10:02: Bro just for your info [Keppel Distripark]* ***all the warehouse, Penanshin, Cms, a&t macnel, cwt, Gilmon, all starting to collect this charges*** *for warehouse*

[✂] *16/06/2017 10:04: So sudden. This for local release I guess*".

[Emphasis added]

163. Further, upon receiving the image of Penanshin's FTZ Surcharge Notice from Yasrin (Penanshin) at 11.38 a.m. that same day, Vasu (CNL) promptly forwarded the same to [✂] (USG) at 12.07 p.m.[240]

164. Whilst USG acknowledged to CCCS that it could negotiate with CNL before new charges could be imposed, USG noted that whether other warehouse operators were also imposing the FTZ Surcharge was a consideration that it took into account to assess if it should agree to the imposition.[241]

165. Another of CNL's customers, Benkel International Pte. Ltd. ("Benkel") informed CCCS that "*[initially] we didn't agree to the imposition of the FTZ surcharge because our [customers] will not agree to paying additional charges .... After several negotiations with [CNL], [CNL] insisted that operating cost in Keppel distripark had increased, we have no other alternative but to informed (sic) our [customers] on the additional surcharge being imposed by the warehouse*."[242] Moreover, Benkel noted that it had been given an opportunity to review CNL's draft FTZ Surcharge Notice and had proposed changes, but that CNL had rejected the proposed changes.[243]

166. As for Gilmon, its [✂] customer, Shipco Transport Pte. Ltd. ("Shipco"), considered that the FTZ Surcharge "*was a market trend brought about by increased costs generally, and hence, considered that it was reasonable. Shipco did not accede to Gilmon's full request however, and reached an agreement that the FTZ Surcharge will be applied only on shipments pertaining to Shipco's* [✂] *and not* [✂]."[244]

167. Another of Gilmon's customers, FP Shipping Pte. Ltd. ("FP"), shared that it was:

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[240] Exhibit VA-004.
[241] USG's Response dated 4 August 2021 to CCCS's s.63 Notice dated 14 July 2021, paragraph 8.
[242] Benkel's Response dated 27 July 2021 to CCCS's s.63 Notice dated 14 July 2021, paragraph 8(a)(iv).
[243] Benkel's Response dated 27 July 2021 to CCCS's s.63 Notice dated 14 July 2021, paragraph 8(a)(vi); email from Benkel dated 4 August 2021, Q4.
[244] Shipco's Response dated 4 August 2021 to CCCS's s.63 Notice dated 14 July 2021, paragraph 8.2(d).

"*... not agreeable [to imposing the FTZ Surcharge] at first ... as [FP's customers] will be unhappy. However,* ***[Gilmon] insists [the FTZ Surcharge] is mandatory*** *so [FP had] to comply.*"[245]

[Emphasis added]

168. As stated above, this illustrates that Gilmon was able to be in a much stronger position to insist that its customers agree to the FTZ Surcharge, [✂]. Thomas (Gilmon) had previously stated that [✂].[246] However, when it came to the FTZ Surcharge, Thomas (Gilmon) readily acknowledged that it was easier for Gilmon to convince ShipCo to accept the FTZ Surcharge if other warehouse operators also implemented it.[247]

169. It is therefore apparent that the certainty afforded by the agreement and/or concerted practice between the Parties to impose the FTZ Surcharge in a coordinated manner afforded CNL and Gilmon a much stronger bargaining position with their customers in convincing them to agree to the imposition of the FTZ Surcharge.

170. Unlike CNL and Gilmon, Penanshin and Mac-Nels did not need to obtain the agreement of their customers[248] to implement the FTZ Surcharge because both the freight forwarding services as well as warehousing services were performed by the Penanshin Group and Mac-Nels together with its affiliated companies, respectively. As such, any 'approval' to start implementing the FTZ Surcharge would have been an internal process. However, it fell to the Penanshin Group's and Mac-Nels' respective affiliated companies (that provided freight forwarding services) to convey the new surcharge to *their* customers (consignees), which is what CNL's and Gilmon's freight forwarder customers would have to do with their own customers (consignees). In particular, it can be seen from Mac-Nels' statements that whilst they did not have to seek their customers' agreement to introduce the FTZ Surcharge, the (consignee) customers might have objected to Mac-Nels' imposition of the FTZ Surcharge if Mac-Nels was the only warehouse operator to impose the FTZ Surcharge.[249]

[245] FP's Response dated 15 August 2021 to CCCS's s.63 Notice dated 5 August 2021, paragraph 8(a)(iv).
[246] NOI of Thomas (Gilmon) dated 8 October 2020, Q64-65.
[247] NOI of Thomas (Gilmon) dated 26 August 2021, Q6.
[248] NOI of Nicholas (Mac-Nels) dated 16 November 2020, Q95; Penanshin's Leniency Statement dated 9 March 2020, paragraph 12.
[249] NOI of Nicholas (Mac-Nels) dated 16 November 2020, Q88-89, Q95-100.

171. The Parties knew that imposing the FTZ Surcharge could cause their customers to switch warehousing service providers, especially if their competitors did not do the same. The exchange between the Parties of their respective intention to impose the FTZ Surcharge not only reduced their own uncertainty in deciding whether to impose the FTZ Surcharge but also enhanced their negotiating positions in respect of their own customers.

172. Ultimately, the Parties implemented the identically named FTZ Surcharge at the same price of $6 per w/m, on the same type of goods (i.e. import cargo). Three of the four Parties set the same effective date for the FTZ Surcharge – CNL, Gilmon and Penanshin on 1 July 2017, and Mac-Nels' was effective from 1 August 2017.

K. Analysis of Evidence & Findings on Price Fixing Conduct

173. As set out in Sections B, C and D of this chapter, an infringement of section 34 of the Act is established where:

a. there is an agreement and/or concerted practice between undertakings[250]; and

b. the agreement and/or concerted practice has the object or effect of preventing, restricting or distorting competition within Singapore.

174. It should also be noted that section 34(2)(a) of the Act states "*... agreements, decisions or concerted practices may, in particular, have the object or effect of preventing, restricting or distorting competition within Singapore if they directly or indirectly fix purchase or selling prices or any other trading conditions*". As set out in Section E of this chapter, CCCS considers agreements involving price fixing to be restrictions of competition by "object". Accordingly, such restrictions will always have an appreciable adverse effect on competition.[251] As such, the Parties may be found liable for infringing the section 34 prohibition if there is evidence which shows, on a balance of probabilities, that they were each a party to an agreement and/or concerted practice to fix prices.

(i) Price Fixing Conduct

[250] As set out in Case T-7/89 *SA Hercules Chemicals NV v Commission* [1991] ECR II-1711, at [256], it "*is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way*".
[251] *Section 34 Guidelines*, paragraph 2.24.

175. Having considered the statements as well as the documentary evidence provided by the Parties throughout the course of CCCS's investigations, CCCS finds that the Parties (i.e. CNL, Gilmon, Penanshin and Mac-Nels) had, through the conduct of their respective representatives between 15 and 16 June 2017, engaged in an agreement and/or concerted practice to fix the price of warehousing services at Keppel Distripark by coordinating the imposition of an "FTZ Surcharge" (the "Price Fixing Conduct"). Such Price Fixing Conduct had infringed the section 34 prohibition.

176. CCCS's analysis of the evidence on how the Price Fixing Conduct constitutes an infringement of the Act, is set out in the sections below.

1) <u>The 15 June 2017 Meeting</u>

177. As can be seen from paragraphs 129 to 145 above, there is a divergence between the accounts provided by Penanshin, CNL and Gilmon as to whether the 15 June 2017 Meeting between Yasrin (Penanshin), Vasu (CNL) and Simon (Gilmon) took place. However, CCCS finds on a balance of probabilities that the meeting had indeed taken place for the following reasons:

a. Yasrin's (Penanshin) behaviour, in approaching Thomas (Gilmon) for the HSC and CLS FTZ Surcharge Notices, conducting the checks with Matthew (Mac-Nels) and subsequently relaying the decisions by Penanshin and Mac-Nels to impose the FTZ Surcharge to Vasu (CNL) and Thomas (Gilmon), is more consistent with that of a person who was responding to an invitation to participate in an agreement and/or concerted practice rather than a person who had conceived the agreement and/or concerted practice. This is further bolstered by the language and tone of Yasrin's (Penanshin) identical WhatsApp messages to Vasu (CNL) and Thomas (Gilmon) on 7.40 a.m. and 7.42 a.m. respectively on 16 June 2017 confirming that "*Mac-Nels and Penanshin will follow the increase of new charges FTZ*".

b. In line with the above, the responses from Vasu (CNL) and Thomas (Gilmon) to Yasrin (Penanshin)'s WhatsApp messages were simple acknowledgements "*Thx bro*" and "*Thanks*" respectively. This suggests that both Vasu (CNL) and Thomas (Gilmon) fully expected to receive such an update from Yasrin (Penanshin). Had they received the message from Yasrin (Penanshin) unexpectedly, an ordinary response might be a

clarificatory one, such as what rate Penanshin was using or what goods the new charge was going to be applied to. Instead, Vasu's (CNL) and Thomas's (Gilmon) behaviour in light of the context and circumstances, indicate that they knew exactly what Yasrin (Penanshin) meant, which was that Mac-Nels and Penanshin would be, as requested, joining CNL and Gilmon in imposing the FTZ Surcharge in a manner that had been previously communicated.

c. Although Yasrin (Penanshin) mentioned in his WhatsApp message to Matthew (Mac-Nels) on 15 June 2017, that warehouse operators other than CNL and Gilmon – namely, HSC, Astro, CWT and A&T – would be implementing the FTZ Surcharge on 1 July 2017, the evidence shows that Yasrin's (Penanshin) subsequent communications are confined to only Vasu (CNL) and Thomas (Gilmon); suggesting that he was approached by and was therefore responding to CNL and Gilmon.

d. Despite Simon (Gilmon) claiming that he would have approached "*Penanshin's boss*" rather than Yasrin (Penanshin) (who is "*just a manager*") if he had wanted to communicate with Penanshin, Yasrin's (Penanshin) version of the events of 15 June 2017 is logical and believable.[252] The evidence suggests that Simon (Gilmon) and Wee Gin (Penanshin) did not know each other, whereas Vasu (CNL) and Yasrin (Penanshin) knew each other from the monthly PSA management meetings which they both attended.[253] In light of this, it makes sense for Simon (Gilmon), together with Vasu (CNL), to have approached Yasrin (Penanshin) (a person with whom Vasu (CNL) was familiar with) on 15 June 2017, to broach the subject of the Price Fixing Conduct and ask him to check with Wee Gin (Penanshin), rather than to have approached Wee Gin (Penanshin) directly.

e. Yasrin (Penanshin) did not have the authority to make decisions relating to the introduction of new surcharges on behalf of Penanshin. As such, it is unlikely that Yasrin (Penanshin) would have been the one to initiate communications with Vasu (CNL) and Thomas (Gilmon) on the imposition of the FTZ Surcharge in a coordinated manner without having been first approached by Simon (Gilmon) and Vasu (CNL) with that idea.

[252] NOI of Simon (Gilmon) dated 22 September 2020, Q68 (clarification section).
[253] NOI of Yasrin (Penanshin) dated 17 March 2020, Q14.

f. Unlike Penanshin and Mac-Nels, CNL and Gilmon needed their customers' agreement before they could introduce the FTZ Surcharge. It is also clear that it would be easier for CNL and Gilmon to convince their customers to accept the FTZ Surcharge if other warehouse operators also implemented it. This suggests that CNL and Gilmon had more impetus to initiate contact with Penanshin to broach the idea of imposing the FTZ Surcharge together. Whilst Penanshin and Mac-Nels would have also benefited from the certainty of knowing that CNL and Gilmon were going to impose the FTZ Surcharge, CNL and Gilmon needed to convince their customers, and having the "proof" of Penanshin's and Mac-Nels' intentions to also impose the FTZ Surcharge made it easier for them to do so. This is illustrated by CNL's conduct, where Vasu (CNL) waited until Yasrin (Penanshin) had confirmed Penanshin's and Mac-Nels' agreement to the Price Fixing Conduct before reaching out to USG, CNL's [✂] customer. It is also noteworthy that he forwarded Penanshin's FTZ Surcharge Notice to USG as soon as he received it from Yasrin (Penanshin).

g. Finally, as set out in *Toshiba Corp*, particularly high probative value may be attached to leniency statements that (i) are reliable, (ii) are made on behalf of an undertaking, (iii) are made by a person under a professional obligation to act in the interests of that undertaking, (iv) go against the interests of the person making the statement, (v) are made by a direct witness of the circumstances to which they relate, and (vi) were provided in writing deliberately and after mature reflection. The evidence provided by Yasrin (Penanshin) pursuant to Penanshin's leniency application fulfils these criteria.

    i. Yasrin (Penanshin) (as an employee of Penanshin at the time that Penanshin's leniency statement was provided to CCCS), would be deemed to owe a general duty of good faith and fidelity to Penanshin.[254] Accordingly, it is unlikely that Yasrin (Penanshin) would have lightly confessed to the existence of the Price Fixing Conduct and Penanshin's role in the Price Fixing Conduct along with the attendant disadvantages for Penanshin (even with the benefit of a leniency application) such as potential exposure to third party follow on action for damages pursuant to section 86 of the Act and damage to Penanshin's commercial reputation,

[254] *Tang Siew Choy and others v Certact Pte Ltd* [1993] 1 SLR(R) 835.

without having weighed the consequences of doing so for Penanshin.

ii. The statements made by Yasrin (Penanshin) on behalf of Penanshin in the leniency statement, which admitted to the existence of the Price Fixing Conduct and Penanshin's role in the Price Fixing Conduct, also go against Penanshin's interest given that CCCS has opened an investigation against the Parties (including Penanshin) for a suspected infringement of the section 34 prohibition and the attendant disadvantages to Penanshin highlighted in sub-paragraph (i) above. As the CFI emphasised in *JFE Engineering*, where a person admits that he has committed an infringement and admits to the existence of facts, going beyond those whose existence could be directly inferred from the documents in question, that fact implies *a priori*, that in the absence of special circumstances, such a person has resolved to tell the truth.[255]

iii. CCCS also notes that as at the time of the last statement given by Yasrin (Penanshin) to CCCS, Yasrin (Penanshin) was no longer employed by Penanshin. Despite this, his evidence, particularly in respect of the 15 June 2017 Meeting, has remained consistent.

Accordingly, CCCS is of the view that the fact that Yasrin (Penanshin) still confessed to the existence of the Price Fixing Conduct and to Penanshin's role in the Price Fixing Conduct notwithstanding these considerations, indicate that it is likely that Yasrin (Penanshin) had resolved to tell the truth in his statements and warrants greater evidentiary weight being accorded to his statements made on behalf of Penanshin.

2) Evidence of Price Fixing Conduct

178. There is also ample evidence of pricing information having been exchanged between the Parties regarding their respective plans to implement the FTZ Surcharge that facilitated an agreement and/or concerted practice:

a. Thomas (Gilmon) admitted to informing Yasrin (Penanshin) about Gilmon's intention to impose the FTZ Surcharge before he sent the HSC

[255] *JFE Engineering*, at [221].

and CLS FTZ Surcharge Notices to Yasrin (Penanshin). Vasu (CNL) similarly admitted to having asked Yasrin (Penanshin) over the phone whether Penanshin was going to impose the FTZ Surcharge and received the WhatsApp message from Yasrin (Penanshin) on 16 June 2017 confirming that Penanshin and Mac-Nels were going to impose the FTZ Surcharge. Vasu (CNL) was therefore, in receipt of confidential, commercially sensitive pricing information regarding Penanshin's intention to impose the FTZ Surcharge. Furthermore, the WhatsApp message sent by Yasrin (Penanshin) to Matthew (Mac-Nels) on 15 June 2017 also establishes the fact that Yasrin (Penanshin) was aware of not just Gilmon's, but also CNL's, intention to impose the FTZ Surcharge on 1 July 2017.

b. Matthew's (Mac-Nels) receipt of Yasrin's (Penanshin) WhatsApp message on 15 June 2017 informing him about CNL and Gilmon's intention to impose the FTZ Surcharge, his reply to Yasrin (Penanshin) on 16 June 2017 saying "*Yes I will follow*", as well as his subsequent acknowledgement of Penanshin's FTZ Surcharge Notice sent by Yasrin (Penanshin) later that same day, establish that Mac-Nels was aware of the intention on the part of Penanshin, CNL and Gilmon to impose the FTZ Surcharge on 1 July 2017.

c. The respective acknowledgments by Vasu (CNL) and Thomas (Gilmon) of Yasrin's (Penanshin) WhatsApp message on 16 June 2017 informing that "*Mac-Nels and Penanshin will follow the increase of new charges FTZ*", as well as their receipt of Penanshin's FTZ Surcharge Notice establishes CNL's and Gilmon's knowledge that both Penanshin and Mac-Nels would be implementing the FTZ Surcharge.

d. The Parties did in fact each implement an identically named FTZ Surcharge with an identical price of $6/w/m, with three of the four parties setting an identical effective date of 1 July 2017, and Mac-Nels setting its effective date on 1 August 2017. The fact that Mac-Nels had a different effective date does not detract from the evidence that there was an underlying agreement and/or concerted practice for a coordinated introduction of the FTZ Surcharge. In this regard, Mac-Nels claimed that it had set its effective date on 1 August 2017 as it wanted to give its customers a notice period before the effective date.[256]

[256] NOI of Nicholas (Mac-Nels) dated 16 November 2020, Q54.

179. In addition, even if the 15 June 2017 Meeting did not take place, there is objective evidence set out in paragraphs 177 and 178 above which supports the finding that the Parties had engaged in the Price Fixing Conduct:

a. CNL and Gilmon had disclosed their respective intentions to impose the FTZ Surcharge to Penanshin:

i. Thomas (Gilmon) admitted that he had informed Yasrin (Penanshin) of Gilmon's intention to impose the FTZ Surcharge before he sent the HSC and CLS FTZ Surcharge Notices to Yasrin (Penanshin);

ii. The content and syntax of Yasrin's (Penanshin) WhatsApp messages to Matthew (Mac-Nels) on 15 June 2017, as well as his subsequent messages to Vasu (CNL) and Thomas (Gilmon) on 16 June 2017, are indicative of Yasrin (Penanshin) having been informed of CNL and Gilmon's intention to impose the FTZ Surcharge:

(1) Yasrin's (Penanshin) WhatsApp message to Matthew (Mac-Nels) on 15 June 2017 explicitly mentions that CNL and Gilmon, amongst others, were going to impose the FTZ Surcharge. This strongly suggests that Yasrin (Penanshin) was already made aware that CNL and Gilmon were going to impose the FTZ Surcharge; and

(2) Yasrin's (Penanshin) WhatsApp messages to Vasu (CNL) and Thomas (Gilmon) on 16 June 2017 were both phrased in the manner of a response to information received from CNL and Gilmon. If Yasrin (Penanshin) had been the first to communicate Penanshin's and Mac-Nels' intent, it would not have made sense for him to say that "*Mac-Nels and Penanshin will follow*".

b. Yasrin's (Penanshin) behaviour in:

i. Approaching Thomas (Gilmon) for the HSC and CLS FTZ Surcharge Notices;

ii. Conducting the checks with Matthew (Mac-Nels);

iii. Subsequently relaying the decisions by Penanshin and Mac-Nels to impose the FTZ Surcharge to Vasu (CNL) and Thomas (Gilmon); and

iv. Sending identical WhatsApp messages to Vasu (CNL) and Thomas (Gilmon) at 7.40 a.m. and 7.42 a.m. respectively on 16 June 2017 confirming that "*Mac-Nels and Penanshin will follow the increase of new charges FTZ* ".

c. Vasu's (CNL) and Thomas's (Gilmon) responses to acknowledge Yasrin (Penanshin)'s WhatsApp message to inform each of them of Penanshin's and Mac-Nels' future intention to impose the FTZ Surcharge.

d. Matthew's (Mac-Nels) reply to Yasrin (Penanshin) that Mac-Nels would follow the CNL, Gilmon and Penanshin's decision to impose the FTZ Surcharge, as well as Matthew's (Mac-Nels) subsequent acknowledgement of Penanshin's FTZ Surcharge Notice sent by Yasrin (Penanshin) on 16 June 2017.

180. The above evidence, even in the absence of the 15 June 2017 Meeting, support the finding that the Parties had engaged in the Price Fixing Conduct. Furthermore, CNL's subsequent conduct provides further evidence of an agreement or concerted practice between the Parties in that Vasu (CNL) waited until Yasrin (Penanshin) had confirmed Penanshin's and Mac-Nels' agreement to the Price Fixing Conduct before reaching out to USG. The fact that he forwarded Penanshin's FTZ Surcharge Notice to USG as soon as he received it from Yasrin (Penanshin) is also suggestive that the Parties had engaged in the Price Fixing Conduct. Finally, the statements made by Yasrin (Penanshin) on behalf of Penanshin in the leniency statement at paragraph 177.g) above which admitted to the existence of the Price Fixing Conduct are also corroborating evidence.

181. CNL and Gilmon, in their representations, submitted that it was more plausible from the evidence that Yasrin (Penanshin) had called Vasu (CNL) and Thomas (Gilmon) first to ask about imposing the FTZ Surcharge. In this regard, they submitted that Yasrin (Penanshin) and/or Penanshin's account of the 15 June

2017 Meeting contained some inconsistencies and should be treated with circumspection.[257]

182. In support of this representation, CNL and Gilmon submitted that the details of what had been said at the alleged 15 June 2017 Meeting were not provided directly by Yasrin (Penanshin) from the outset. It was only after Penanshin had, in its own written responses to CCCS (dated 9 December 2019) and in its leniency statement, made reference to the 15 June 2017 Meeting that Yasrin (Penanshin) subsequently corroborated the same in later interviews. [258] CNL and Gilmon point to the fact that, in his first interview with CCCS on 19 November 2019, Yasrin (Penanshin) said that Vasu (CNL) and Thomas (Gilmon) had told him that their companies intended to introduce the FTZ Surcharge, as well as Yasrin's (Penanshin) evidence that his contact with Vasu (CNL) and Thomas (Gilmon) was "*mainly by telephone calls and Whatsapp*". [259]

183. CNL and Gilmon also highlighted that Penanshin's written statements to CCCS did not explicitly state that Vasu (CNL), Simon (Gilmon) or Thomas (Gilmon) had "*sought any confirmation or agreement*" from Penanshin on CNL's or Gilmon's decision to impose the FTZ Surcharge; only that Simon (Gilmon) and Vasu (CNL) had approached Yasrin (Penanshin) to inform him that other warehouse operators at Keppel Distripark intended to introduce the surcharge. The further details relating to Vasu (CNL) and Simon (Gilmon) asking Yasrin (Penanshin) if Penanshin "*want to be part of*" the group imposing the FTZ Surcharge only arose from Yasrin's (Penanshin) subsequent interviews with CCCS on 17 March 2020 and 15 January 2021. [260]

184. As set out in paragraph 177 above, CCCS considered all the evidence and finds on a balance of probabilities that the 15 June 2017 Meeting had indeed taken place. Despite Yasrin (Penanshin) not mentioning details of the 15 June 2017 Meeting at the very first interview (which took place during CCCS's inspection on 19 November 2019), the evidence and clarifications provided by Penanshin (including oral evidence by Yasrin (Penanshin)) in the course of CCCS's investigation provide a credible account of the events surrounding 15 and 16 June 2017.

[257] Written Representations of CNL and Gilmon dated 12 May 2022, paragraph 16.
[258] Written Representations of CNL and Gilmon dated 12 May 2022, paragraph 16(b).
[259] Written Representations of CNL and Gilmon dated 12 May 2022, paragraph 16(a).
[260] Written Representations of CNL and Gilmon dated 12 May 2022, paragraph 16(b).

185. Contrary to what CNL and Gilmon implied in their representations, there is nothing to suggest that Yasrin (Penanshin) had provided false evidence to CCCS in order to support Penanshin's leniency application. Moreover, as CNL and Gilmon themselves acknowledge, Yasrin's (Penanshin) final interview on 31 August 2021 took place after he had left the employ of Penanshin. Yasrin (Penanshin) nonetheless provided evidence that was consistent with his previous statements.

186. Importantly, as set out above at paragraphs 179 and 180, there is other evidence aside from Yasrin's (Penanshin) statements of the Parties' engaging in the Price Fixing Conduct. In this regard, Yasrin's (Penanshin) version of events is supported by the documentary evidence showing that the Parties had engaged in the Price Fixing Conduct. CCCS considers Yasrin's (Penanshin) version of events more plausible than that of CNL's and Gilmon's, which allege that Yasrin (Penanshin) had called Vasu (CNL) and Thomas (Gilmon) first to ask whether they were imposing the FTZ Surcharge. If Yasrin (Penanshin) had approached Vasu (CNL) and Thomas (Gilmon) about the FTZ Surcharge first, it would not make sense for him to "report" to Vasu (CNL) and Thomas (Gilmon) that Mac-Nels and Penanshin would be following the imposition of the FTZ Surcharge, nor does it explain Vasu's (CNL) and Thomas's (Gilmon) simple acknowledgements.

187. Per *JJB Sports*[261], unilateral disclosure of a Party's pricing intentions regarding the FTZ Surcharge is sufficient to constitute an infringement of the section 34 prohibition which strictly precludes "*any direct or indirect contact between competitors having, as its object or effect, either to influence future conduct in the market or to disclose future intentions*". Even the mere unilateral receipt of information about the future conduct of a competitor can constitute participation in a concerted practice that infringes the section 34 prohibition since the law presumes that the recipient of the information cannot fail to take that information into account when determining its own future policy on the market.[262]

188. Furthermore, as stated in paragraphs 150 to 172 above, the circumstances in Keppel Distripark were such that a warehouse operator's decision to impose increased or new charges carried with it the risk that customers may switch to other warehouse operators that did not impose similar increased or new charges. The exchanges of information between the Parties about their intentions to introduce the FTZ Surcharge in a coordinated fashion summarised in paragraph

[261] *JJB Sports*, at [873].
[262] *Tate & Lyle*, at [58].

178 above, created a substantial degree of certainty amongst the Parties that facilitated their subsequent implementation of the FTZ Surcharge. Each of the Parties' representatives involved in the exchanges of information were cognisant of this. By doing so, each of the Parties had ceased to operate independently and had knowingly substituted practical cooperation between themselves for the risks of competition. According to established case law discussed in Section B above, such as *Dyestuffs* and *Suiker Unie*, this brings the conduct of the Parties well within the scope of the section 34 prohibition.

189. Indeed, Penanshin, CNL and Mac-Nels, having learnt of one or more of the Parties' intentions to implement the FTZ Surcharge, proceeded to use that information to implement the FTZ Surcharge. In the case of Penanshin, after Yasrin (Penanshin) was informed on 15 June 2017 of Gilmon's intention to impose the FTZ Surcharge and was provided images of HSC's and CSL's FTZ Surcharge Notices, he instructed Jason (Penanshin) on 16 June 2017 to prepare and issue Penanshin's FTZ Surcharge Notice to colleagues within the Penanshin Group. In the case of CNL, it proceeded, upon receiving confirmation from Yasrin (Penanshin) that both Penanshin and Mac-Nels would be imposing the FTZ Surcharge, to inform CNL's customer, USG, of the same in an attempt to persuade USG to agree to CNL's imposition of the FTZ Surcharge. Mac-Nels also created its own FTZ Surcharge Notice following the exchange of information between Yasrin (Penanshin) and Matthew (Mac-Nels) between 15 and 16 June 2017 and issued the same to its related companies at 5.07 p.m. on 16 June 2017.

190. CNL and Gilmon submitted in their representations that they had followed other market leaders in introducing the FTZ Surcharge, making the decision independently and did not need to come to any agreement with the Parties.[263] They submitted that by the time CNL's and Gilmon's decisions to impose the FTZ Surcharge were communicated to Yasrin (Penanshin), CNL and Gilmon had already made the decision to follow HSC and that this decision was made without receiving any confirmation or arriving at any agreement with Penanshin.[264]

191. To support this, they characterised their communication to Yasrin (Penanshin) as a communication of "*their own decision to follow the charges already introduced into the market by HSC and CLS*"[265] and that "*all that was done was*

[263] Written Representations of CNL and Gilmon dated 12 May 2022, paragraphs 12 to 14 and 17.
[264] Written Representations of CNL and Gilmon dated 12 May 2022, paragraph 20.
[265] Written Representations of CNL and Gilmon dated 12 May 2022, paragraph 12(b)(i).

a one-off communication of information" instead of an agreement to implement the FTZ Surcharge in a coordinated manner[266]. In particular, Gilmon submitted that the evidence did not show that Gilmon had mentioned to its customers that CNL, Penanshin or Mac-Nels had introduced the FTZ Surcharge in order to persuade them to accept it.[267]

192. In response to the representations made, CCCS reiterates that an anti-competitive agreement and/or concerted practice to fix prices exists where the parties have "*created the necessary atmosphere of mutual certainty as to the participants' intentions concerning future pricing whereby each of them could rely, if not on the precise price levels of the other participants, at least on their continual pursuant of a collaborative strategy of higher pricing*"[268]. Unilateral disclosure of a party's pricing intentions is sufficient to constitute a concerted practice falling within the section 34 prohibition which strictly precludes any direct or indirect contact between competitors having, as its object or effect, either to influence future conduct in the market or to disclose future intentions.[269] Even if CNL and Gilmon had already decided to impose the FTZ Surcharge prior to informing Yasrin (Penanshin) of the same, they communicated that decision to Penanshin. In doing so, they had directly contacted their competitor and disclosed their future pricing intentions.[270] CCCS emphasises that it is the communication of the intention to impose the FTZ Surcharge, which decision had allegedly been arrived at prior to the communication, that affects competition and is in fact prohibited under section 34 of the Act.

193. It bears mentioning that it would appear irrational for CNL and Gilmon to disclose their future pricing intentions to a competitor, given the concern that the competitor might use this information to win over their customers. This disclosure would only make commercial sense if there was a clear intention to decrease competition by coordinating the imposition of the FTZ Surcharge with their competitors, which is supported by the fact that they also asked if Penanshin would likewise be imposing the FTZ Surcharge. Penanshin responded to CNL and Gilmon that both Penanshin and Mac-Nels would also be imposing the FTZ Surcharge. This further promoted the atmosphere of mutual certainty as to the Parties' intentions concerning their future pricing. This affirmation from Yasrin (Penanshin) that Penanshin and Mac-Nels would be joining CNL and Gilmon in

[266] Written Representations of CNL and Gilmon dated 12 May 2022, paragraph 17.
[267] Written Representations of CNL and Gilmon dated 12 May 2022, paragraph 12(d)(v).
[268] Sugar Producers Price Fixing EC Decision, Paragraph 72 of the Preamble, cited by the CFI in *Tate & Lyle* at [60].
[269] *JJB Sports*, at [873].
[270] *Dyestuffs*, at [64]

imposing the FTZ Surcharge provided greater assurance to CNL and Gilmon about imposing the FTZ Surcharge, and in their negotiations with their customers on the FTZ Surcharge. CNL and Gilmon had sought to coordinate the imposition of the FTZ Surcharge with Penanshin and Mac-Nels which was clearly detrimental to competition. CCCS finds that there was clearly an agreement and/or concerted practice between the Parties to fix prices.

194. CCCS is of the view that CNL and Gilmon's argument, that Penanshin's and Mac-Nels' agreement or otherwise to impose the FTZ Surcharge would not have affected them since they had independently decided to impose it, misses the point. This is because the evidence demonstrated that there was in fact an agreement and/or concerted practice between the Parties, irrespective of the necessity for them to have done so. CCCS also reiterates that an agreement may be regarded as being restrictive of competition even if it had other legitimate objectives.[271]

195. Further, as will be elaborated on below, at the material time, it was far from certain whether the warehouse operators would indeed introduce the FTZ Surcharge. It would therefore be to the Parties' advantage to have the certainty afforded from the Price Fixing Conduct.

196. CNL's representation - that USG already knew about the introduction of the FTZ Surcharge when Vasu (CNL) informed [✂] (USG) about it and therefore it was merely a communication of "*information already provided on confirmed movements in the market by other warehouse operators*"[272] - is similarly immaterial to the finding that the Parties had entered to an agreement and/or concerted practice to fix prices. In any event, CCCS notes that the evidence suggests that [✂] (USG) may not actually have been aware of the introduction of the FTZ Surcharge as evidenced by his statement "*So sudden. This for local release I guess*" in response to Vasu (CNL)'s text message that "*all the warehouse, Penanshin, CMS, A&T Macnel, CWT, Gilmon, all starting to collect [FTZ Surcharge] for warehouse*". It is also clear that CNL used the information that other warehouse operators were likewise imposing the FTZ Surcharge to convince USG to accept CNL's FTZ Surcharge.

197. CNL submitted in its representations that when Vasu (CNL) first informed [✂] (USG) about CNL's proposed implementation of the FTZ Surcharge, he only

[271] *Irish Beef*, at [21].
[272] Written Representations of CNL and Gilmon dated 12 May 2022, paragraph 12(e).

had the FTZ Surcharge Notices of HSC and CLS and not Penanshin's[273]. However, it is noted that once Vasu (CNL) received confirmation from Yasrin (Penanshin) that Penanshin and Mac-Nels were likewise going to impose the FTZ Surcharge, Vasu (CNL) informed [✂] (USG) of it. Later in the day, when Vasu (CNL) received Penanshin's FTZ Surcharge Notice from Yasrin (Penanshin), he promptly forwarded it to [✂] (USG).[274] It is immaterial that Vasu (CNL) first informed [✂] (USG) about CNL's proposed implementation of the FTZ Surcharge before he received Penanshin's FTZ Surcharge Notice. It is apparent that Vasu (CNL), having entered into the Price Fixing Conduct, used the information that Penanshin and Mac-Nels were likewise going to impose the FTZ Surcharge to convince USG to accept CNL's FTZ Surcharge.

198. As regards Gilmon, CCCS notes that Thomas (Gilmon) alleged that he spoke to Gilmon's customers on the phone[275]. CCCS highlights that it is not necessary (for a finding that Gilmon engaged in the Price Fixing Conduct) for CCCS to show that Gilmon had mentioned to its customers that CNL, Penanshin or Mac-Nels were also implementing the FTZ Surcharge. The evidence that CNL had used the information it had obtained from Penanshin to convince USG to agree to the implementation of the FTZ Surcharge is set out in at paragraph 163 above to illustrate how the Parties could have used (and in CNL's case, in fact used) the Price Fixing Conduct to their benefit.

199. CNL and Gilmon also submitted that the holding from paragraph 873 of *JJB Sports* does not stand for the proposition that unilateral receipt of future pricing intentions can constitute participation in an agreement and/or concerted practice to fix prices; rather, it merely states a rebuttable presumption that the recipients of information would have taken that information into account when determining their own future policy on the market. [276] CNL and Gilmon then sought to argue that they were mere recipients of information and had rebutted the presumption (that they had taken into account the information received from Penanshin and Mac-Nels) by submitting that there was no causal connection established between the communication of information by Penanshin, and CNL's and Gilmon's conduct on the market.[277] In this regard, CNL and Gilmon averred that their market conduct was the natural and rational response to a movement in the market.[278]

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[273] Written Representations of CNL and Gilmon dated 12 May 2022, paragraph 12(e)(iv).
[274] Paragraph 163 above.
[275] NOI of Thomas (Gilmon) dated 8 October 2020, Q47.
[276] Written Representations of CNL and Gilmon dated 12 May 2022, paragraphs 18 and 19.
[277] Written Representations of CNL and Gilmon dated 12 May 2022, paragraph 23.
[278] Written Representations of CNL and Gilmon dated 12 May 2022, paragraph 26.

200. CCCS finds that there is no merit in this representation as paragraph 873 of *JJB Sports* clearly sets out that mere receipt of information about the future conduct of a competitor can constitute participation in an anti-competitive concerted practice.[279] In any event, it is clear from the evidence in this case that the Price Fixing Conduct was an agreement and/or a concerted practice to fix prices between the Parties; it is not one which involves the mere receipt by CNL and Gilmon of pricing information which was unilaterally disclosed to them. CNL's and Gilmon's participation in the Price Fixing Conduct went far beyond the mere receipt of information. As set out above at paragraphs 177 to 179, CNL and Gilmon contacted their competitors, disclosed their intentions to impose the FTZ Surcharge, enquired as to whether their competitors were also intending to impose the FTZ Surcharge and received confirmation from their competitors that these competitors were intending to do so. This is clear from the 15 June 2017 Meeting. Even if the 15 June 2017 Meeting had not occurred (which CCCS does not accept on the basis of the evidence before it), it can be inferred from the objective evidence set out in paragraph 179.a) above that CNL and Gilmon had disclosed their intentions to impose the FTZ Surcharge to Penanshin. For CNL and Gilmon to contend that their participation in the Price Fixing Conduct was limited to being mere recipients of information about the future conduct of their competitors is a mischaracterisation of CCCS's findings.

201. CNL and Gilmon also submitted in their representations that the warehouse operators in Keppel Distripark would have found out about one another's imposition of the FTZ Surcharge on their own accord eventually, and if this had occurred, this would not constitute an anti-competitive agreement.[280] CCCS notes that this is speculative and is in any event, immaterial to CCCS's finding since the Parties did in fact enter into the Price Fixing Conduct. The Price Fixing Conducts allowed the Parties to become aware of the FTZ Surcharge "*more rapidly and directly*", and "*allowed the Parties to create a climate of mutual certainty*.[281]" The evidence is clear that the Parties had engaged in the act of communicating their pricing intentions as they sought to obtain certainty about the future market conduct of their competitors.

202. Further, CCCS does not consider CNL's and Gilmon's representations that the Parties are allegedly small market players (which would be affected by the competitive constraints imposed by the other competitors) to be material to a

[279] See also paragraph 50 above on *Tate & Lyle* which stands for the same proposition.
[280] Written Representations of CNL and Gilmon dated 12 May 2022, paragraph 38.
[281] *Balmoral Tanks* at [43], citing *Tate & Lyle* at [60].

finding that the Parties had been involved in the Price Fixing Conduct or to necessarily mean that the market conditions must have been such that it would have been competitive for the FTZ Surcharge to be imposed, especially in light of the factors stated at paragraphs 251 to 253 of the ID. As set out at paragraph 63 above, price fixing is a serious restriction of competition by object and will always have an appreciable adverse effect on competition, regardless of the market share of the undertakings involved[282].

203. In relation to representations from Mac-Nels, CCCS notes that Mac-Nels had unequivocally stated in its oral representations that "*it is not disputing its culpability or liability under the Competition Act*".[283] Notwithstanding this, as some of Mac-Nels' representations appear to relate to its liability, CCCS has nonetheless taken Mac-Nels' representations into account in making its decision.

204. Mac-Nels claimed in its representations that their customers would not have changed service providers even with the FTZ Surcharge.[284] However, this is contradicted by Nicholas' (Mac-Nels) own statements saying that he needed proof from other warehouse operators before Mac-Nels could impose the FTZ Surcharge[285] as well as admitting that if Mac-Nels had been the only warehouse operator to impose the FTZ Surcharge, it would have lost revenue as their customers might have switched to other warehouse operators.[286] Nicholas (Mac-Nels) also acknowledged that it made sense for warehouse operators to introduce an FTZ Surcharge together such that customers would be less likely to question the surcharge and so that warehouse operators who introduced the FTZ Surcharge would not lose customers to those who did not.[287]

205. CCCS finds, on a balance of probabilities, that the Parties had indeed engaged in an agreement and/or concerted practice to fix the price of warehousing services at Keppel Distripark by coordinating the imposition of an "FTZ Surcharge". The requirement in paragraph 173(a) is therefore satisfied. The fact that the agreement and/or concerted practice pertained to the FTZ Surcharge which is a component of the price of warehouse services performed by the respective Parties also means that the agreement and/or concerted practice that the Parties had engaged in had the "object" of preventing, restricting or distorting competition within the market for warehousing services in Keppel Distripark. As

[282] Paragraph 63 above.
[283] Agreed record of Oral Representations of Mac-Nels dated 21 June 2022, paragraph 7.
[284] Written Representations of Mac-Nels dated 26 May 2022, paragraphs 89, 138, 167-168.
[285] Paragraph 160 above.
[286] NOI of Nicholas (Mac-Nels) dated 16 November 2020, Q299.
[287] NOI of Nicholas (Mac-Nels) dated 16 November 2020, Q306.

explained at paragraph 174 above, agreements and/or concerted practices involving price fixing are considered restrictions of competition by "object" and will always have an appreciably adverse effect on competition. Accordingly, the requirement in paragraph 173.b) for CCCS to show that the agreement and/or concerted practice had the object or effect of preventing, restricting or distorting competition within Singapore is therefore also satisfied.

206. In the circumstances, having considered all the evidence obtained and the representations made by the Parties, CCCS finds that the Parties have infringed the section 34 prohibition.

3) Involvement of Other Warehouse Operators

207. For completeness, CCCS notes that although the message from Yasrin (Penanshin) to Matthew (Mac-Nels) referred to other warehouse operators, CCCS's investigations did not establish that Yasrin (Penanshin) had spoken to these other warehouse operators before he sent his message to Matthew (Mac-Nels). The evidence suggests that these other warehouse operators were first mentioned by Simon (Gilmon) and Vasu (CNL) earlier during the 15 June 2017 Meeting as being other warehouse operators in Keppel Distripark which would also be implementing the FTZ Surcharge. CCCS has investigated the conduct of these other warehouse operators at Keppel Distripark [288] and did not find evidence of their participation in the Price Fixing Conduct.

208. As set out in paragraphs 46 and 47 above, economic operators are free to adapt themselves intelligently to the existing and anticipated conduct of their competitors. In this regard, it is not an infringement of section 34 of the Act for a warehouse operator to independently decide to implement the FTZ Surcharge in response to market conditions or the observable market actions of its competitors. However, an infringement of section 34 of the Act may be found where competing warehouse operators directly or indirectly communicate with one another to coordinate their implementation of the FTZ Surcharge; disclose to each other their intentions to implement the FTZ Surcharge; or to try to influence each other's commercial conduct on the market.

209. CNL and Gilmon claimed in their representations that the identical conduct of the other warehouse operators (who had imposed the FTZ Surcharge but had not

[288] Refer to paragraph 18 for the other warehouse operators which were investigated.

been found to have infringed the Act) is a clear indicator that the conduct of the Parties did not have the effect of distorting competition in Keppel Distripark.[289]

210. CCCS, having found that the Price Fixing Conduct had the object of preventing, restricting or distorting competition at paragraph 205, does not need to demonstrate that the Price Fixing Conduct had anti-competitive effects.[290] This is because price fixing is deemed to always have an appreciable effect on competition (as set out at paragraph 63). CNL and Gilmon's representations in this respect are therefore immaterial to the finding of liability. Nonetheless, CCCS considers that it is incorrect for CNL and Gilmon to claim that their conduct was "identical" to other warehouse operators, given that the evidence shows that CNL and Gilmon had:

    a. Contacted their competitors directly to inform them of their future pricing intentions;

    b. Asked Penanshin if it was also going to impose the FTZ Surcharge as well;

    c. Asked Penanshin to check with Mac-Nels if Mac-Nels would also want to impose the FTZ Surcharge; and

    d. Received information from their competitors that their competitors were going to follow CNL and Gilmon and impose the FTZ Surcharge.

211. Further, as mentioned above, given that the infringement in this case is price fixing, it is deemed to have an appreciable adverse effect on the market even if the infringing parties only have a small combined market share.[291]

4) Participation in a Single Overall Agreement

212. As set out in paragraphs 82 to 85 above, for different acts to constitute a single overall agreement, it must be shown that:

    a. the agreements or concerted practices that made up the single overall agreement were all in pursuit of the same common objective(s);

[289] Written Representations of CNL and Gilmon dated 12 May 2022, paragraph 21.
[290] Paragraph 59 above, also the "essential legal criterion" from *Carte Bancaires* at paragraph 65 above.
[291] *Section 34 Guidelines*, paragraph 2.24.

b. each party to the single overall agreement intended to contribute by its own conduct to the common objectives of the single overall agreement; and

c. each party was aware of or could reasonably have foreseen actual conduct planned or put into effect by other parties in pursuit of the common objective(s).

213. The evidence shows that Vasu (CNL) and Simon (Gilmon) had approached Yasrin (Penanshin) on 15 June 2017 to communicate CNL's and Gilmon's future intentions to implement the FTZ Surcharge and to ask whether Penanshin wanted to join them in collectively imposing the FTZ Surcharge[292] so as to avoid losing their respective customers.[293] At the same meeting, Simon (Gilmon) asked Yasrin (Penanshin) to specifically invite Matthew (Mac-Nels) to join them in the imposition of the FTZ Surcharge.[294] Putting aside the 15 June 2017 Meeting, CCCS notes that there is other evidence of communication between the Parties on their respective intentions to implement the FTZ Surcharge. Thomas (Gilmon) had separately informed Yasrin (Penanshin) of Gilmon's intentions, and Vasu (CNL) had spoken to Yasrin (Penanshin) about Penanshin's intentions. Yasrin (Penanshin) subsequently communicated Penanshin's, CNL's and Gilmon's intentions to Matthew (Mac-Nels) who responded to say, "*Yes I will follow*". Moreover, Yasrin (Penanshin) not only reported to Thomas (Gilmon) and Vasu (CNL) Penanshin's and Mac-Nels' intentions to similarly impose the FTZ Surcharge, he also provided them with images of Penanshin's FTZ Surcharge Notice.

214. It is reasonably clear on these facts that the communications between the Parties' respective representatives involved the same common objective; namely the coordinated imposition of the FTZ Surcharge. Each of the Parties, in subsequently imposing the FTZ Surcharge, would have contributed to their common objective to impose the FTZ Surcharge in a coordinated manner. Given the nature of the Parties' communications, it is clear that each of the Parties was either aware of or could reasonably have foreseen the conduct planned or actuated by the other Parties in pursuit of their common objective.

215. Mac-Nels claims, in its representations, that the Price Fixing Conduct was an agreement between Gilmon, CNL and Penanshin. It contended that it was not

[292] NOI of Yasrin (Penanshin) dated 17 March 2020, Q3.
[293] Penanshin's Leniency Statement dated 9 March 2020, paragraph 9.
[294] NOI of Yasrin (Penanshin) dated 15 January 2021, Q37; NOI of Yasrin (Penanshin) dated 31 August 2021, Q14.

part of the 15 June 2017 Meeting, having only (i) agreed to the FTZ Surcharge after being instigated by Yasrin (Penanshin), and (ii) implemented the FTZ Surcharge on a different day than the other three Parties.[295] Further, Mac-Nels submitted that CCCS did not find that it had "*conspired [with] or abetted [the other three Parties] in formulating the price fixing scheme*"[296]. Mac-Nels added that Yasrin's (Penanshin) representations to Matthew (Mac-Nels) that most of the warehouse operators in Keppel Distripark (including the major ones) had agreed to apply the FTZ Surcharge gave the arrangement a "*false garb of legitimacy*".[297]

216. Although Mac-Nels was not part of the 15 June 2017 Meeting, for the reasons given above, CCCS finds that it is liable as part of a single overall agreement. The fact that Mac-Nels was not present at the original meeting does not absolve it from liability, nor is it a mitigating factor. CCCS notes that Mac-Nels, in its written representations, acknowledged that it was part of an agreement with the other Parties:

> "*159. With respect to [Mac-Nels], the nature of [Mac-Nels'] infringement under s. 34 of the Competition Act was* ***merely to agree to the prices fixed FTZ SC by [Penanshin], CNL and Gilmon. The agreement took place only after Yasrin of [Penanshin] instigated [Mac-Nels] to use their pricing system****.*
>
> *160. [Mac-Nels] used the fixed prices agreed on by Gilmon, CNL and Penanshin. Despite that [Mac-Nels] [✂].*
>
> *161. The geographic scope of the price fixed scheme was just Keppel Distripark*."[298]
>
> **[Emphasis added]**

217. Furthermore, Mac-Nels was "*aware about the general scope and essential characteristics of the cartel as a whole*"[299] given that Yasrin's (Penanshin) message to Matthew (Mac-Nels) on 15 June 2017 in essence, was to inform him that a group of warehouse operators would be imposing an FTZ Surcharge at a particular quantum ($6 per m^3) from 1 July 2017 and to ask Mac-Nels to also join these warehouse operators in the imposition of the FTZ Surcharge. The exact identities of the warehouse operators that were involved in the Price Fixing

[295] Written Representations of Mac-Nels dated 26 May 2022, paragraphs 7, 26-28, 35, 122-127, 128-133, 136.
[296] Written Representations of Mac-Nels dated 26 May 2022, paragraph 9.
[297] Written Representations of Mac-Nels dated 26 May 2022, paragraphs 9-10, 13, 18-19.
[298] Written Representations of Mac-Nels dated 26 May 2022, paragraphs 159-161.
[299] *Optical Disk Drives Case*, at [351].

Conduct is not critical to the finding that Mac-Nels had agreed to join the agreement and/or concerted practice for the coordinated imposition of the FTZ Surcharge. In fact, Matthew's (Mac-Nels) own evidence was equivocal on whether the number of warehouse operators would have been a critical factor in Mac-Nels' decision as to whether to join the Price Fixing Conduct.[300] Crucially, Yasrin's (Penanshin) WhatApp message to Matthew (Mac-Nels) on 15 June 2017 meant that Mac-Nels had received commercially sensitive information about its competitors' future pricing intentions (i.e. CNL's, Gilmon's and Penanshin's intended implementation of the FTZ Surcharge) on that same day. CCCS notes that there is no evidence provided by Mac-Nels that it had taken any steps to publicly distance itself from the Price Fixing Conduct upon the receipt of this information from Yasrin (Penanshin). On the contrary, Nicholas (Mac-Nels) admitted that upon receipt of the WhatsApp message from Yasrin (Penanshin), Matthew (Mac-Nels) had proceeded to share the information disclosed by Yasrin (Penanshin) with Nicholas (Mac-Nels) and had a discussion with him and Andy (Mac-Nels) on whether Mac-Nels should follow suit.[301] Matthew (Mac-Nels) subsequently responded to Yasrin (Penanshin)'s WhatsApp message with "*Yes I will follow*" on 16 June 2017. Notably, Nicholas (Mac-Nels) admitted that he, Matthew (Mac-Nels) and Andy (Mac-Nels) had exchanged information with Penanshin through Yasrin (Penanshin), and discussed Mac-Nels' implementation of the FTZ Surcharge before the decision was made to implement Mac-Nels' FTZ Surcharge on or around 16 June 2017.[302]

218. It bears repeating that Mac-Nels' infringement arises from the fact that Mac-Nels became a party to the Price Fixing Conduct between the Parties from 15 June 2017 onwards. That it chose to implement the FTZ Surcharge on a different date from the rest of the Parties does not affect (a) the finding that Mac-Nels was party to the Price Fixing Conduct, (b) the duration of its infringement conduct since the starting date would be the date of the Price Fixing Conduct and not the date of implementation of the FTZ Surcharge, or consequently, (c) the quantum of its financial penalties.

5) Conclusion on Price Fixing Conduct

219. For the reasons elaborated upon above, CCCS concludes that each of Penanshin, CNL, Gilmon and Mac-Nels did engage in the Price Fixing Conduct and has, accordingly, each infringed the section 34 prohibition.

[300] NOI of Matthew (Mac-Nels) dated 16 November 2020, Q107-111.
[301] NOI of Nicholas (Mac-Nels) dated 16 November 2020, Q225 – 226.
[302] NOI of Nicholas (Mac-Nels) dated 16 November 2020, Q303.

CHAPTER 3: INFRINGEMENT DECISION

220. CCCS is satisfied that there is sufficient evidence in Section K of Chapter 2 above to find that the Parties had infringed the section 34 prohibition by entering into an agreement and/or concerted practice to fix the price of warehousing charges in the form of the Price Fixing Conduct as set out at paragraphs 177 to 205 above. Given that the Price Fixing Conduct has as its object the restriction of competition, CCCS need not go further to demonstrate its anti-competitive effects.

A. Addressees of CCCS's Infringement Decision

221. The relevant case law on SEE and attribution of liability as a consequence of a finding of SEE has been discussed at paragraphs 30 to 41. As stated above, it is established case law that an undertaking can consist of several persons, natural and legal. [303] Whether persons constitute an SEE is dependent on the circumstances of a case.

222. In respect of the Parties, CCCS considers that notwithstanding their common directors and shareholders, CNL and Gilmon, and separately Penanshin and Mac-Nels, are not SEEs, as each of the Parties is run separately and independently of each other and is therefore separately liable for their involvement in the Price Fixing Conduct. For completeness, CCCS notes that even if CNL and Gilmon, and separately Penanshin and Mac-Nels, were found to be SEEs, there would still have been price fixing between the two SEEs.

(i) CNL and Gilmon

223. CCCS notes that structurally, CNL and Gilmon bear some characteristics of an SEE. Currently, Gilmon's sole director and shareholder is Simon (Gilmon). Simon (Gilmon) is also one of CNL's three directors (the other two being Vasu (CNL) and one Lee Theng Theng), and holds 51.22% of the shares in CNL, with Vasu (CNL) and Lee Theng Theng each holding 24.39% respectively.[304]That is likely why Vasu (CNL) had referred to Simon (Gilmon) as "*the boss*" when he

[303] Case C 217/05 *Confederación Española de Empresarios de Estaciones de Servicio* [2006] ECR I 11987, at [40].
[304] Information extracted from ACRA records on 14 October 2022.

was asked whether he would have gone with Simon (Gilmon) to meet Yasrin (Penanshin) on 15 June 2017 if Simon (Gilmon) had asked him to.[305]

224. However, both CNL and Gilmon unequivocally averred that the businesses were run independently, and that Simon (Gilmon) did not interfere in the operations of CNL. Simon (Gilmon) noted[306]:

> *Q32. What is the relationship between CNL and Gilmon?*
> *A: I have shares in CNL. There are two other shareholders in CNL besides myself I am a common shareholder between CNL and Gilman.*
>
> *Q33. Please describe your job scope and associated responsibilities in CNL.*
> *A: The signing of cheques.*
>
> *Q34. What decisions do you make on behalf of CNL?*
> *A: I am the biggest shareholder in CNL but I do not hold any positions in CNL. I am also not an office holder in CNL.* ***All the operations in CNL are handled by Vasu. I do not have any involvement in the price setting and negotiating process in CNL****.* ***CNL is a warehouse operator which is run separately from Gilmon*** *and was started around four to five years ago.*
>
> *Q35. Who makes decisions on the prices that CNL imposes?*
> *A: The customers will have to agree on the prices. I am not involved in the price setting and it is Vasu who will speak to the customers about the prices.*
>
> *Q36. Who makes decisions on the increase in prices and/or the imposition of new charges on customers for CNL?*
> *A: Vasu is the one responsible for making the decisions relating to the increase in prices or the imposition of new charges on customers of CNL. Vasu runs the whole operations in CNL including negotiating with customers and deciding on whether to propose to CNL's customers to increase prices and/or impose a new surcharge. In making such a decision, Vasu will typically inform me, which can be either before or after he decides to propose to CNL's customers to increase prices and/or impose a new surcharge. Although I am the final decision maker on whether to propose to CNL's customers to increase prices and/or impose a new surcharge,* ***I usually leave this to Vasu and I have never made any objections.*** *Vasu is the person responsible for proposing and*

[305] NOI of Vasu (CNL) dated 22 September 2020, Q156.
[306] NOI of Simon (Gilmon) dated 20 September 2020, Q32-36.

communicating any prices increases and/or imposition of new surcharges to CNL's customers.

[Emphasis added]

225. Vasu (CNL) added that he was the one who managed CNL, and Simon's (Gilmon) sole responsibility in CNL was to make payment to PSA for the rental of the warehouse[307]:

Q4. Please describe your job scope and its associated responsibilities.
A: I manage everything in CNL, including managing the staff and running the warehouse. Payment to PSA for the warehouse is decided by Simon Teo, while everything else, such as liaising with customers, is done by me. This includes the setting of prices and surcharges.

…

Q17. Please provide a full list of personnel in your company who are responsible for each (i) negotiating; (ii) proposing; and (iii) approving any charge imposed by your company for providing its services.
A: I am the only one responsible. My customers followed me from Asian Groupage Services Pte. Ltd., which has since closed down. I will directly negotiate, propose and approve the charges.

226. Vasu (CNL) subsequently maintained that Simon (Gilmon) and Lee Theng Theng were merely investors, and that all business decisions of CNL were made by him[308]:

Q4. What company was Simon and you in previously?
A: We were in AGS. Asian Groupage Service Pte Ltd. Simon was in Gilmon, I am manager in AGS. AGS wanted to [✂]*, then I got to know Simon from there. Shipco is Gilmon' s customer.*

Q5. In CNL, what do they do?
A: Simon and Laura are just investors. I am just running the show there.

Q6. You are running the company?
A: Yes.

…

[307] NOI of Vasu (CNL) dated 19 November 2019, Q4 and 17.
[308] NOI of Vasu (CNL) dated 22 September 2020, Q4-6, Q9-12.

Q9. Does Simon Teo make any management or operational decisions at CNL? If so, please describe the kind of decisions that he makes.
A: Yes. He is the 51 % main authorised signatory. I got my own forwarders. I am just a service provider. All customers are from my ex company.

Q10. You report to Simon?
A: No reporting. All the customers are my own customer. Simon just pump in money and oversee accounts.

Q11. All business decisions of CNL are made by you?
A: Yes. Because all these are my customers.

Q12. What about Laura?
A: Sleeping partner. She just supports us. They are more the food industry.

[Emphasis Added]

227. It is therefore very clear that even from CNL and Gilmon's own perspectives, the two companies are run independently, and that Simon (Gilmon) merely has *de jure* control over CNL, with limited actual influence over its business decisions. Crucially, Simon's (Gilmon) own statement that he had never objected to Vasu's (CNL) proposals to increase prices supports this. Vasu (CNL) himself did not see himself reporting to Simon (Gilmon) and viewed CNL's customers as his own. CCCS finds on the facts that CNL and Gilmon are economically independent of each other and operate on the market independently of each other and are therefore not an SEE.

(ii) Penanshin and Mac-Nels

228. Similarly, Penanshin and Mac-Nels also bear some structural characteristics of an SEE. Penanshin's sole shareholder is Penanshin Shipping, with the directors of both companies being Wee Gin (Penanshin) and Stephanie Er. Wee Gin (Penanshin) and Stephanie Er are the shareholders of Penanshin Shipping, with their shareholdings at 45% and 55% respectively.[309] Stephanie Er is also a director of Mac-Nels but does not hold shares in the company.[310] Stephanie Er is also the daughter of Matthew (Mac-Nels), and the sister of Nicholas (Mac-Nels).

[309] Information extracted from ACRA records on 3 November 2022.
[310] Information extracted from ACRA records on 14 October 2022.

229. However, Penanshin and Mac-Nels clearly and unequivocally averred that both companies were run independently notwithstanding their common director and the relationship between their respective shareholders.

230. When he was asked, Wee Gin (Penanshin) noted that Penanshin and Mac-Nels used to be friendly competitors, but that the relationship had deteriorated and that he regarded both companies as competitors:

> *Q32. What is your relationship with Mac-Nels?*
> *A: We used to be friendly competitors, now not friendly. I used to work for Mac-Nels. In 1998, we started Penanshin. We are in the same business, so we are competing.*[311]

231. Matthew (Mac-Nels) corroborated Wee Gin (Penanshin), noting that the relationship between Penanshin and Mac-Nels had [✂] Further, [✂] He also stated that Stephanie Er was his nominee shareholder in Penanshin Shipping and Mac-Nels.[312] Similarly, Stephanie Er was a non-executive shareholder in both companies and had no duties.

> *Q69. What is the relationship between Penanshin and Mac-Nels?*
> *A: We were shareholders.*
>
> *Q70. What you mean by "we"?*
> *A: I am a shareholder of Penanshin.* [✂]
>
> *Q71. So now you are still a shareholder?*
> *A: Yes, in name.* [✂]
>
> *Q72. You were responsible for starting Penanshin?*
> *A: Yes. About 40 years ago.*
>
> *Q73. So you continue to be involved in Penanshin?*
> *A: No. I'm the owner but it was always managed by other people.* [✂]
>
> *Q74. Are the business decisions of Penanshin and Mac-Nels made independently?*
> ***A: They are separate. 100 percent since maybe 5 to 10 years ago. Like a, marriage, slowly slowly distance and split.***
>
> *Q75. Does Nicholas Er own any shares in Penanshin?*

[311] NOI of Wee Gin (Penanshin) dated 18 March 2020, Q32.
[312] Based on information extracted from ACRA records on 14 October 2022, CCCS notes that Stephanie Er was no longer a shareholder of Mac-Nels since 18 June 2021.

A: No.

Q76. Is Stephanie Er Hui Yin your daughter and what is her role, if any, in Penanshin and MacNels respectively?
A: She is a non-executive shareholder. [✂] so I transferred my shares to her. She has no activities at all, just a nominee shareholder for me.[313]

[Emphasis Added]

232. Nicholas (Mac-Nels) echoed the points made by Matthew (Mac-Nels), noting in particular that both companies were run independently, and that Stephanie Er did not have any role in either Penanshin or Mac-Nels:

Q185. What is the relationship between Penanshin and Mac-Nels?
A. My dad is a shareholder of both companies.

Q186. Do you know the percentage of his shareholding?
A. No.

*Q187. Since your father is a shareholder in both companies**, are the business decisions of Penanshin and Mac-Nels made independently?***
*A. **Independently.***

Q188. What is the role of your father in Penanshin?
A. No idea, but he is a shareholder as far as I know.

Q189. In relation to decisions concerning operations e.g. pricing, is Penanshin/Mac-Nels involved in the other company's decision making?
*A. **No. We operate independently.***

Q190. Do you yourself own any shares in Penanshin?
A. No.

Q191. Do you have a role in Penanshin?
A. No.

Q192. Who is Stephanie Er Hui Yin and what is her role, if any, in Penanshin and Mac-Nels respectively?
A. She is my sister. She is a shareholder of Penanshin but she does not work there. She is a shareholder in Mac-Nels but does not work there.[314]

[Emphasis added]

[313] NOI of Matthew (Mac-Nels) dated 16 November 2020, Q69-76.
[314] NOI of Nicholas (Mac-Nels) dated 16 November 2020, Q185-192.

233. The evidence from the directors of Penanshin and Mac-Nels clearly show that both companies are run independently of each other, notwithstanding their common director and the relationship between their respective shareholders. Notably, Mac-Nels does not have any input in Penanshin's operations whatsoever, including the setting of prices. CCCS finds on the facts that Penanshin and Mac-Nels are economically independent of each other and operate on the market independently of each other and are therefore not an SEE.

234. In view of the findings that CNL and Gilmon, and separately, Penanshin and Mac-Nels, are not SEEs, the ID is addressed to each of the Parties as separate entities.

B. Duration of Infringements

235. The duration of an infringement is of importance insofar as it may have an impact on the penalty that may be imposed for that infringement.[315] The duration of an infringement is assessed on the facts of each case.

236. It is settled law that the duration of an infringement is not limited by reference to the period during which an agreement was in force, but can be determined by reference to the period during which the agreement continued to produce its effects (i.e. even after the agreement formally ceases to be in force).[316] For example, the General Court stated in *Coats Holdings Ltd v European Commission ("Coats Holdings")*:

> "*162. … It follows that the duration of an infringement had to be appraised not by reference to the period during which an agreement was in force,* ***but by reference to the period during which the undertakings concerned adopted [the] conduct prohibited*** *… .*"[317]
>
> **[Emphasis added]**

237. Similarly, in *Ventouris Group Enterprises SA v Commission of the European Communities ("Ventouris")* cited in *Coats Holdings*, the CFI stated:

> "*182. In so far as concerns evidence of the continuance of an infringement, the Community judicature has held that the system of competition rules established by Article [101 of the TFEU] et seq. of the Treaty is concerned*

[315] *Penalty Guidelines*, paragraphs 2.1, 2.9 to 2.12.
[316] C-450/19-*Kilpailu-ja kuluttajavirasto* [2021], ECLI:EU:C:2021:10, at [30].
[317] Case T-439/07 *Coats Holdings Ltd v European Commission* [2012] 5 C.M.L.R. 11, at [162].

> *with the economic effects of agreements or of any comparable form of concerted practice or coordination rather than with their legal form.* ***Consequently, with regard to cartels which are no longer in force, it is sufficient, for Article [101] to be applicable, that they continue to produce their effects after they have formally ceased to be in force*** *(see, for example, Case 243/83 Binon v AMP [1985] ECR 2015, paragraph 17, and Case T-327/94 SCA Holding v Commission [1998] ECR II-1373, paragraph 95).*"[318]
>
> **[Emphasis added]**

238. In determining whether an agreement or a cartel can be considered to continue to produce its effects, the ECJ stated in *EMI Records v CBS Schallplatten*:

> "*15. … An agreement is only regarded as continuing to produce its effects if* ***from the behaviour of the persons concerned there may be inferred the existence of elements of concerted practice and of coordination peculiar to the agreement and producing the same result as that envisaged by the agreement***."[319]
>
> **[Emphasis added]**

239. The principle that the duration of an infringement can be appraised by reference to the period during which the agreement continued to produce its effects was applied by the CFI in *Acerinox v Commission* ("*Acerinox*") to cartel agreements which are intended to continue indefinitely, and which have not been formally brought to an end.[320]

240. In *Acerinox*, several producers of stainless flat products agreed, at a meeting held in Madrid on 16 December 1993 (the "Madrid Meeting"), to increase their prices on a concerted basis by adopting an identical calculation method of an alloy surcharge (i.e. a price supplement that is commonly added to the basic price of stainless steel).[321] In this regard, the producers decided to apply, from 1 February 1994, an alloy surcharge based on the method last used in 1991, taking for all producers the September 1993 prices as reference values.[322] The EC found that the agreement between the producers to adopt an identical calculation method of

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[318] Case T-59/99, *Ventouris Group Enterprises SA v Commission of the European Communities* [2003] at [182] and the cases cited therein. See also Case T-439/07 *Coats Holdings Ltd v European Commission* [2012] 5 C.M.L.R. 11 at [162], citing *Ventouris*.
[319] Case 96/75, *EMI Records v CBS Schallplatten* [1976] ECR 811, at [15].
[320] Case T-48/98, *Compañía Española para la Fabricación de Aceros Inoxidables SA (Acerinox) v Commission of the European Communities* [2001] ECR II-3859, at [63].
[321] *Acerinox*, at [10].
[322] *Acerinox*, at [10].

the alloy surcharge constituted an anti-competitive agreement and/or concerted practice that infringed Article 65 of the European Coal and Steel Community Treaty.[323] The duration of the infringement was stated to be from December 1993 (i.e. the date of the Madrid Meeting) to the date of the infringement decision issued by the EC.[324]

241. Upon Acerinox's appeal, the CFI affirmed the principle that the duration of the infringement can be determined by reference to the effects of the agreement and upheld the EC's decision that the duration of the infringement ranged from December 1993 to the date of the adoption of the EC's infringement decision, given that Acerinox had continued to apply the same reference values in its calculation method for the alloy surcharge as was agreed at the Madrid Meeting. In this regard, the CFI held that as Acerinox's continued application of the same reference values could not be accounted for by reasons other than the existence of the concertation between the producers of stainless flat products, the EC was thus fully entitled to consider that the infringement lasted until the date of the adoption of its infringement decision:

> "*61. … The infringement attributed to the applicant consisted not in the application of an alloy surcharge as such but in the determination of its amount on the basis of a calculation method embodying reference values identical to those of its competitors, determined jointly with other producers and in concertation with them.* ***Accordingly, the fact that the applicant maintained those reference values in its calculation method for the alloy surcharge cannot be accounted for otherwise than by the existence of such concertation***."[325]
>
> ….
>
> "*63. Finally, it must be borne in mind that, with regard to cartels which are no longer in operation, it* ***is sufficient, for Article [101] of the EC Treaty to be applicable, and, by analogy, Article 65 of the ECSC Treaty, that they continue to produce their effects after they have formally ceased to be in force*** *(Case 51/75 EMI Records [1976] ECR 811, paragraph 30, Case 243/83 Binon [1985] 2015, paragraph 17, Case T-2/89 Petrofina v Commission [1991] II-1087, paragraph 212, and SCA Holding v Commission, cited above, paragraph 95).* ***The same applies a fortiori where, as in this case, the effects of the agreement lasted until the adoption of the Decision, without the agreement having been***

[323] *Commission Decision 98/247/ECSC of 21 January 1998 relating to a proceeding under Article 65 of the ECSC Treaty (Case IV/35.814 — Alloy Surcharge)*, at [46].
[324] *Acerinox*, at [13].
[325] *Acerinox*, at [61].

formally brought to an end. It follows that, in so far as the applicant had not abandoned the application of the reference values agreed at the Madrid meeting before the adoption of the Decision, the [EC] was fully entitled to consider that the infringement lasted until that date."[326]

[Emphasis added]

The CFI's decision in respect of the duration of the infringement was upheld on appeal by the ECJ in *Acerinox v Commission*.[327]

242. Similarly, in *GDF Suez SA v European Commission* ("*GDF Suez SA*")[328], the GC dismissed an appeal by GDF Suez SA alleging that there was a lack of evidence by the EC to prove the existence of the infringement between January 1980 to February 1999.[329] In this regard, the GC stated that the fact that the infringement arose from an initial written market sharing agreement (i.e. the MEGAL Agreement) concluded in 1975 that was of an unspecified duration[330] and the fact that GDF Suez SA had not adduced any evidence indicating that the agreement had been cancelled before 1999 [331], meant that the MEGAL Agreement should be regarded to have been in force from between 1975 to 1999, such that there was no need for the EC to produce additional evidence concerning implementation of the MEGAL Agreement during this period in support of its findings on duration[332]. It thus rejected GDF Suez SA's appeal on this ground.

243. It has been established at paragraphs 175 to 205 above that the Price Fixing Conduct had commenced from 15 June 2017. There is no evidence that the Price Fixing Conduct was specified to be for a fixed duration only, or that Gilmon, CNL, Penanshin or Mac-Nels had at any point withdrawn from, or sought to terminate, the agreement and/or concerted practice with any of the other Parties. CCCS further notes that Gilmon, CNL and Mac-Nels continue to impose the FTZ Surcharge at $6 per w/m (without any variation on the amount of the

[326] *Acerinox*, at [63].
[327] Case C-57/02 P *Acerinox v Commission of European Communities* [2005] ECR I-6689, at [60] to [64].
[328] Case T-370/09 *GDF Suez SA v European Commission* [2012] ECLI:EU:T:2012:333, concerning an appeal against an infringement decision issued by the EC finding that E.ON AG, E.ON Ruhrgas AG and GDF Suez SA had infringed Article 81(1) of the EC Treaty by participating in an agreement and/or concerted practice between several undertakings not to penetrate – or to penetrate only in a limited manner, each other's home market and to protect their own home markets by not selling on the other's home market the gas transported by the MEGAL gas pipeline.
[329] *GDF Suez SA*, at [33] to [40] and [145].
[330] *GDF Suez SA*, at [142].
[331] *GDF Suez SA*, at [143].
[332] *GDF Suez SA*, at [144].

surcharge) from 2017 to date on their customers.[333] CCCS notes that Penanshin had taken steps to stop all imposition of the FTZ Surcharge since the end of 2019.[334]

244. Notwithstanding the above, CCCS also considers the point in paragraph 208 above that it is not the imposition of the FTZ Surcharge *per se* that amounts to an infringement of section 34 of the Act. Rather, it was the agreement and/or concerted practice between the Parties to impose the FTZ Surcharge in a coordinated manner that is prohibited. Competition law does not prevent warehouse operators from independently deciding to impose the FTZ Surcharge. On balance, CCCS gives the Parties the benefit of the doubt in this instance that following CCCS's inspection on 19 November 2019, the Parties had ceased the Price Fixing Conduct.

245. CNL and Gilmon claimed in their representations that the duration of the infringement should be limited to the duration which the communication and/or exchange of information on the introduction of the FTZ Surcharge took place between the Parties (i.e., 16 June 2017).[335] In this regard, CNL and Gilmon submitted that the widespread imposition of the FTZ Surcharge by the warehouse operators at Keppel Distripark could have been the natural outcome of the competitive process in any case, absent the Price Fixing Conduct.[336] This is as HSC and CLS, the major market players, had already taken the first step to impose the FTZ Surcharge and various other market players independently introduced the surcharge in response.[337] According to CNL and Gilmon, the likelihood is thus that the decision to continue maintaining the FTZ Surcharge after initial imposition must have been an independent decision by CNL and Gilmon, rather than a continued adherence to any alleged initial agreement or concerted practice.[338]

246. CNL and Gilmon submitted that this was all the more so given that there was no evidence that the Parties continued to engage in coordination on prices after the

[333] All customers who had either agreed to the FTZ Surcharge in the course of their negotiations with the relevant warehouse operator or who had the FTZ Surcharge imposed on them (i.e. not given any option to negotiate). Gilmon's Response dated 2 December 2019 to CCCS's s.63 Notice, Q1 and 3. Gilmon's Response dated 20 September 2021 to CCCS's s.63 Notice dated 20 August 2021, Q7(b). CNL's Response dated 30 November 2019 to CCCS's s.63 Notice, page 1. CNL's Response dated 20 September 2021 to CCCS's s.63 Notice dated 20 August 2021, Q7(b). Penanshin's Response dated 9 December 2019 to CCCS's s.63 Notice, paragraphs 2(d) and (f). Mac-Nels's Response dated 26 November 2019 to the CCCS's s.63 Notice, Q1(c), 2 and 3.
[334] Penanshin's Leniency Statement dated 9 March 2020, paragraph 17.
[335] Written Representations of CNL and Gilmon dated 30 August 2022, paragraphs 47, 48.
[336] Written Representations of CNL and Gilmon dated 30 August 2022, paragraphs 54(a), 61(c)(i).
[337] Written Representations of CNL and Gilmon dated 30 August 2022, paragraphs 39, 40.
[338] Written Representations of CNL and Gilmon dated 30 August 2022, paragraph 53.

singular exchange of information on 15 and/or 16 June 2017.[339] Given that market conditions are constantly changing, CNL and Gilmon submitted that it would not have been possible for parties to have continued to coordinate their conduct on the market without meeting regularly to take into account changing market conditions[340], especially in view of the following:

a. the Parties only hold a small market share of the relevant market and would be affected by the competitive constraints imposed by other competitors. Accordingly, the market conditions must have been such that it would be competitive for the FTZ surcharge to be imposed;[341]

b. after the FTZ Surcharge was also imposed by other operators, a new competitive equilibrium would have been formed such that it would have been uncompetitive for the Parties to withdraw the FTZ Surcharge.[342]

247. In a similar vein, Mac-Nels submitted in its representations that it is very likely that absent the Price Fixing Conduct, Mac-Nels would have simply followed HSC's lead in imposing the FTZ Surcharge and that the FTZ Surcharge would have been implemented in the normal course of business.[343] Penanshin, in its oral representations, opined that when HSC put up its notices, all warehouse operators in Keppel Distripark would follow it and hence Penanshin did not think the fact that Penanshin also put up its own notices mattered much.[344]

No evidence that the decision to "follow" in the imposition of the FTZ Surcharge was the "natural and rational" response to market developments

248. CCCS considers CNL's and Gilmon's representations that the continued imposition of the FTZ Surcharge by the Parties after 15 June 2017 was an independent decision on the part of CNL and Gilmon to be a bare assertion as CNL and Gilmon have not provided any evidence to substantiate their claims. Instead, CNL and Gilmon sought to rely on claims that at least five other operators had allegedly independently responded to HSC's and CLS's introduction of the FTZ Surcharge by imposing their own FTZ Surcharge to extrapolate that the decision to "follow" HSC and CLS in the imposition of the

[339] Written Representations of CNL and Gilmon dated 30 August 2022, paragraph 50 to 53.
[340] Written Representations of CNL and Gilmon dated 30 August 2022, paragraph 54(d).
[341] Written Representations of CNL and Gilmon dated 30 August 2022, paragraph 54(a).
[342] Written Representations of CNL and Gilmon dated 30 August 2022, paragraph 54(b).
[343] Written Representations of Mac-Nels dated 26 May 2022, paragraphs 44, 220 – 222.
[344] Agreed Record of Penanshin's Oral Representations on 21 June 2022, paragraph 16.

FTZ Surcharge must have been the "natural and rational" response for all warehouse operators.[345]

249. CCCS considers that the conduct of other warehouse operators does not have a bearing on CNL's and Gilmon's own conduct, especially given that, unlike the other five warehouse operators, there is clear evidence that CNL and Gilmon had engaged in the Price Fixing Conduct. The fact that other warehouse operators may have independently imposed the FTZ Surcharge does not mean that the Parties' Price Fixing Conduct necessarily came to an end.

250. Having been shown to have participated in the Price Fixing Conduct, the Parties bear the burden of proving that they are no longer adhering to the Price Fixing Conduct.[346] Where this is not shown, CCCS is entitled, as was the case in *Acerinox* discussed in paragraph 241 above, to draw the inference that the Price Fixing Conduct continued as long as the Parties continued to impose the FTZ Surcharge, even if there were no further meetings between the Parties after the 15 June 2017 Meeting. CCCS is of the view that this burden is not discharged by CNL's and Gilmon's references to the conduct of other warehouse operators.

251. In any case, CCCS considers that the evidence contradicts Gilmon's, CNL's and Mac-Nels' representations that the decision to "follow" the imposition of the FTZ Surcharge would have been the "natural and rational" response by all warehouse operators:

a. First, there is the evidence from Thomas (Gilmon) that a few other warehouse operators such as CWT and FPS had called him to check if Gilmon was also imposing the FTZ Surcharge.[347]

b. Second, there is the evidence from Vasu (CNL) that once the warehouse operators at Keppel Distripark received the flyers from HSC, he received calls from other warehouse operators to check on whether CNL was intending to also impose the FTZ Surcharge.[348] For instance, Simon (Gilmon) called Vasu (CNL) to ask if CNL was intending to also impose the FTZ Surcharge and if so, the effective date on which CNL was

[345] Written Representations of CNL and Gilmon dated 30 August 2022, paragraph 40.
[346] Paragraphs 242 and 243.
[347] NOI of Thomas (Gilmon) dated 8 October 2020, Q118 to Q123.
[348] NOI of Vasu (CNL) dated 22 September 2020, Q148.

imposing the FTZ Surcharge.[349] [✂](AWS) also called Vasu (CNL) to ask about the implementation of FTZ Surcharge.[350]

c. Third, there is evidence from Vasu (CNL) where he admits to attempting to check with other warehouse operators, apart from HSC and CLS, (i.e. [✂] (AWS), [✂] (A&T) and [✂] (Astro)) whether their respective companies were going to impose the FTZ Surcharge even after he became aware that HSC and CLS intended to impose the FTZ Surcharge.[351]

252. CCCS considers that queries by other warehouse operators such as CWT, AWS and FPS would not have been necessary if the Parties' claims that the "natural and rational" market response to HSC's and CLS's earlier implementation of the FTZ Surcharge is for all the other warehouse to follow suit, were true. Similarly, if CNL was truly of the belief that all other warehouse operators would automatically have "followed" HSC and CLS in the imposition of the FTZ Surcharge, Vasu (CNL) should have had the assurance that other warehouse operators would also be imposing the FTZ Surcharge, without the need for further checks personally with these warehouse operators.

253. Instead, the evidence indicates that there was still considerable uncertainty amongst warehouse operators at Keppel Distripark about whether to impose the FTZ Surcharge after HSC and CLS had announced their decision to do so. It appears from the available evidence that many warehouse operators were keen to find out if others would similarly be imposing the FTZ Surcharge before deciding to do so themselves. In this regard, CCCS reiterates the observations at paragraphs 154 and 158 above that it is inherently risky for the warehouse operators to unilaterally introduce a new surcharge without knowing whether their competitors would be doing the same, due to the fear of loss of customers, which was the reason for why the Parties had engaged in the Price Fixing Conduct in the first place.

254. Furthermore, CCCS notes that CNL's and Gilmon's own representations contradict their claim that the "ordinary market trend" would have been for other warehouse operators to "follow" HSC's and CLS's warehouse charges. In their written representations, CNL and Gilmon cited an example where HSC increased forklift charges by decreasing the unit of measurement from per block of 4 w/m to per block of 3 w/m on 1 April 2019 and CNL, Gilmon and Astro

[349] NOI of Vasu (CNL) dated 22 September 2020, Q21-23 and Q34.
[350] NOI of Vasu (CNL) dated 19 November 2019, Q31. NOI of Vasu (CNL) dated 22 September 2020, Q122-124.
[351] NOI of Vasu (CNL) dated 22 September 2020, Q76-78.

followed suit subsequently.[352] By their own admission, other warehouse operators at Keppel Distripark did not follow suit[353] which undermines their present claim that all warehouse operators would generally "follow" HSC's and CLS's warehouse charging practices.

255. In view of the above, CCCS considers that, contrary to CNL's and Gilmon's representations, the evidence does not support that it was a foregone conclusion that all the warehouse operators in Keppel Distripark would have automatically "followed" in the imposition of the FTZ Surcharge solely because HSC and CLS had announced that they were imposing the FTZ Surcharge. CCCS considers that it is possible that the other warehouse operators would not have decided to impose the FTZ Surcharge but for the Price Fixing Conduct. In this regard, CCCS considers that the fact that the Parties also implemented the FTZ Surcharge collectively, in addition to HSC and CLS, would have made it easier for other warehouse operators in Keppel Distripark to convince their customers to also accept the FTZ Surcharge[354]. Accordingly, the Price Fixing Conduct artificially altered the market by reducing the uncertainties inherent in the competitive process in "paving the way" for other warehouse operators to impose the FTZ Surcharge once it was evident to these warehouse operators that the Parties would also be "following" HSC and CLS in the implementing of the FTZ Surcharge.

256. In their representations, CNL and Gilmon also referred to a statement by CCCS at paragraph 211[355] of the PID which according to CNL and Gilmon, reflected a recognition on CCCS's part that because there were other warehouse operators at Keppel Distripark that were also imposing the FTZ Surcharge as at 19 November 2019, the maintenance of the FTZ Surcharge by the Parties could be accounted for by reasons other than a continuation of any coordination between them.[356] CNL and Gilmon submitted that if this were indeed the case, as other warehouse operators had imposed the FTZ Surcharge in July and August 2017,

[352] Written Representations of CNL and Gilmon dated 30 August 2022, paragraph 54(c)(i).
[353] Written Representations of CNL and Gilmon dated 30 August 2022, paragraph 54(c)(i).
[354] Paragraphs 161 to 172.
[355] Paragraph 211 of the PID stated that "*Rather, it was the agreement and/or concerted practice between the Parties to impose the FTZ Surcharge in a coordinated manner that is prohibited. Competition law does not prevent warehouse operators from independently deciding to impose the FTZ Surcharge. In this regard, CCCS notes that as at 19 November 2019, there were other warehouse operators at Keppel Distripark that were also imposing the FTZ Surcharge at a rate of $6 per w/m; and the continued imposition of the FTZ Surcharge by the Parties after 19 November 2019 may be accounted for by reasons other than the continuation of the Price Fixing Conduct*." CCCS has, in this ID, revised paragraph 211 of the PID (now paragraph 244 of the ID) for clarity.
[356] Written Representations of CNL and Gilmon dated 30 August 2022, paragraph 54(b).

the reasons for the deemed duration to be cut off on 19 November 2019 were already operative as early as 1 July 2017.[357]

257. In this regard, CCCS notes that CNL and Gilmon may have misunderstood paragraph 211 of the PID and clarifies that it was merely intended to highlight that the infringement finding is based on the Parties' agreement and/or concerted practice to impose the FTZ Surcharge in a coordinated manner; not on the imposition of an FTZ Surcharge *per se*. CCCS clarifies that the statement should not be taken as an implicit recognition by CCCS that the continued maintenance of the FTZ Surcharge by the Parties could have been accounted for by reasons other than the continuation of the Price Fixing Conduct.

258. CCCS reiterates the factors at paragraphs 241 to 243 above and considers that it is entitled to consider that the duration of the infringement should be until the date of the PID.[358] CCCS however, exceptionally accords the Parties the benefit of the doubt in this instance by using 19 November 2019 - the date of CCCS's inspection during which the Parties were advised to cease all alleged anti-competitive activities - as the end date of the Price Fixing Conduct.

259. CCCS considers the representation by CNL and Gilmon that a new "competitive equilibrium" would have been formed such that it would have been uncompetitive for the Parties to withdraw the FTZ Surcharge to be a bare assertion. CNL and Gilmon have not provided any evidence or any explanation to substantiate how a new "competitive equilibrium", where all warehouse operators would have opted to impose the FTZ Surcharge, could have arisen absent the Price Fixing Conduct, especially in light of the factors highlighted in paragraph 251 above. No explanation or evidence has been provided either to substantiate the representation that the new "competitive equilibrium" would have made it "uncompetitive" for the Parties to withdraw the FTZ Surcharge. In any case, CCCS is of the view that a true "competitive equilibrium" is when suppliers compete independently and respond dynamically to changing demand conditions – which is unlike the behaviour of the Parties when they engaged in the Price Fixing Conduct.

A single meeting could have sufficed to sustain the collective imposition of the FTZ Surcharge

[357] Written Representations of CNL and Gilmon dated 30 August 2022, paragraph 54(b).
[358] *Acerinox*, at [64]-[65] and [97].

260. With regard to CNL's and Gilmon's representations that it would not have been possible for the Parties to have continued to coordinate their conduct on the market without meeting regularly to take into account changing market conditions, CCCS reiterates the ECJ's observation in *T-Mobile* that what matters is not so much the number of meetings between the participating undertakings; rather it is whether the meeting or meetings which took place afforded sufficient opportunity for the undertakings to implement the anti-competitive objectives.[359] Accordingly, where the cartel relates to a one-off alteration in market conduct with reference to one parameter of competition, a single meeting may be sufficient to implement the anti-competitive objectives that the participating undertakings seek to achieve.[360]

261. In this regard, CCCS notes that the Price Fixing Conduct entailed the introduction of the FTZ Surcharge by the Parties, an additional component of the price of warehouse services that does not need to be frequently adjusted since it is not determined with reference to any actual cost items (which would plausibly be subject to fluctuations due to changing market conditions). Accordingly, CCCS considers that the Price Fixing Conduct relates to a one-off alteration in market conduct for which a single meeting would suffice to implement the anti-competitive objectives that the Parties sought to achieve i.e. to implement the FTZ Surcharge collectively so as to avoid the loss of customers through switching.

262. Further, CCCS emphasises that per the holding of *Acerinox*, it is entitled to consider that the duration of the infringement should be until the date of the PID given the factors highlighted in paragraph 243 above, even in the absence of further meetings between the Parties after 15 June 2017 Meeting. In view of the agreement and/or concerted practice that began on 15 June 2017, and in the absence of any evidence that demonstrates that it had been discontinued before CCCS's inspection on 19 November 2019, the burden of proof is then on the Parties to show that they are no longer adhering to the Price Fixing Conduct.[361] In CCCS's view, they have not done so.

Fixing one component of prices constitutes a price fixing agreement and there is no evidence that the Parties continued to engage in price competition on other components of prices in any case

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[359] Case C-8/08 *T-Mobile Netherlands and Others v Raad van Bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529, at [61].
[360] Case C-8/08 *T-Mobile Netherlands and Others v Raad van Bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529, at [60].
[361] Paragraphs 242 and 243.

263. CNL and Gilmon claimed in their representations that the Parties were clearly still engaging in price competition after their imposition of the FTZ Surcharge. CNL and Gilmon allude to the fact that independent changes were made to their overall prices of warehouse services notwithstanding that the quantum of their FTZ Surcharges remained unchanged such that the overall price for warehousing services had presumably decreased.[362]

264. Having found that the Parties engaged in the Price Fixing Conduct, it is immaterial for the present finding of infringement whether the Parties made independent adjustments to other components of the overall price for warehousing services. CCCS reiterates paragraph 70 of the ID that price fixing agreements can include agreements to fix just one component of price (i.e. the FTZ Surcharge). Also, independent adjustments to other components of the overall price for warehousing services does not necessarily mean that the Parties' agreement/concerted practice to impose the FTZ Surcharge in a coordinated manner had come to an end.

265. Even if CNL's and Gilmon's representations were relevant to the present finding of infringement – which CCCS maintains is not the case – they have provided no evidence to substantiate their claim that these adjustments had been made. Further, CCCS notes that the Parties had unequivocally stated that one of their motivations for the imposition of the FTZ Surcharge was to increase their revenue. Simon (Gilmon) said in his statement to CCCS that the FTZ Surcharge was financially beneficial to Gilmon and was intended to increase Gilmon's revenue.[363] Similarly, Mac-Nels admitted that the only advantage in imposing the FTZ Surcharge was to increase its revenue[364] and that "*any entity would want the chance to get more money, even if $6 was not a big increase*"[365]. In this respect, given that the Parties had intended to increase their revenue via the introduction of the FTZ Surcharge, adjusting the other components of price of warehousing services such that the overall price of warehousing services decreased is inconsistent with their stated goal of increasing revenue. In view of this, CCCS considers such an unsubstantiated assertion from CNL and Gilmon to be difficult to accept.

[362] Written Representations of CNL and Gilmon dated 30 August 2022, paragraph 54(c).
[363] NOI of Simon (Gilmon) dated 22 September 2020, Q17 and 88.
[364] Agreed Record of Mac-Nels' Oral Representations on 28 July 2022, paragraph 6.
[365] Agreed Record of Mac-Nels' Oral Representations on 21 June 2022, paragraph 23.

266. In view of the above, CCCS considers that for the purposes of this ID, the Price Fixing Conduct between the Parties lasted from 15 June 2017 to 19 November 2019.

CHAPTER 4: CCCS'S ACTION

A. Financial Penalties – General Points

267. Under section 69(2)(e) read with section 69(4) of the Act, where CCCS has made a decision that an agreement has infringed the section 34 prohibition, CCCS may impose on a party to that infringing agreement a financial penalty not exceeding 10% of the turnover of the business of that party in Singapore for each year of infringement, up to a maximum of three years.

268. CCCS may impose a financial penalty only if it is satisfied that the infringement has been committed intentionally or negligently. [366]

269. As established in *Pest Control Case*[367], *Express Bus Operators Case*[368] and *Electrical Works Case*[369], the circumstances in which CCCS might find that an infringement has been committed intentionally include the following:

a. The agreement and/or concerted practice has as its object the restriction of competition;

b. The undertaking in question is aware that its action will be, or is 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 conduct would have the effect of restricting competition, even if it did not know that it would infringe the section 34 prohibition.

270. The CAB in *Express Bus Operators Appeals Nos. 1 and 2*, has also established that the threshold conditions under section 69(3) of the Act would be satisfied if the undertaking must have been aware, or could not have been unaware, that the

[366] Section 69(3) of the Act.
[367] *Pest Control Case*, at [355].
[368] *Express Bus Operators Case*, at [445].
[369] *Electrical Works Case*, at [282].

agreements had the object or would have the effect of restricting competition.[370] These principles were subsequently affirmed by the CAB in *Uber v CCCS*.[371]

271. Ignorance or a mistake of law is no bar to a finding of intentional infringement under the Act. CCCS 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.[372]

272. In this case, the actions of the Parties which amounted to the Price Fixing Conduct, such as the WhatsApp exchanges and telephone conversations containing their future pricing intentions, were committed intentionally. For example, the following actions of the Parties were deliberate actions to share their intentions relating to the imposition of the FTZ Surcharge with each other:

a. At the 15 June 2017 Meeting where CNL and Gilmon's intentions to introduce the FTZ Surcharge on 1 July 2017 were revealed to Penanshin;[373]

b. Yasrin's (Penanshin) WhatsApp message to Matthew (Mac-Nels) at 9.57 p.m. on 15 June 2017, informing him of Gilmon's, CNL's and Penanshin's intention to impose the FTZ Surcharge on 1 July 2017;[374]

c. Matthew's (Mac-Nels) WhatsApp message to Yasrin (Penanshin) at 7.28 a.m. on 16 June 2017, informing him of Mac-Nels' intention to impose the FTZ Surcharge;[375]

d. Yasrin's (Penanshin) WhatsApp messages to Thomas (Gilmon) and Vasu (CNL) at 7.42 a.m. and 7.40 a.m. on 16 June 2017 respectively, informing them of Penanshin's and Mac-Nels' intention to impose the FTZ Surcharge;[376]

[370] *Express Bus Operators Appeals Nos. 1 and 2*, at [143].
[371] *Uber Singapore Technology Pte Ltd and Others v CCCS, Appeal No 1 of 2018* [2020] SGCAB 2, at [182].
[372] *CCCS Guidelines on Directions and Remedies*, paragraphs 6.3 to 6.11.
[373] Paragraph 131.
[374] Paragraph 135.
[375] Paragraph 136.
[376] Paragraph 136.b).

e. Thomas' (Gilmon) phone call with Yasrin (Penanshin) on 15 June 2017 where Yasrin (Penanshin) was informed by Thomas (Gilmon) of Gilmon's intention to impose the FTZ Surcharge;[377] and

f. Vasu's (CNL) phone call with Yasrin (Penanshin) on 15 or 16 June 2017, where he had asked Yasrin (Penanshin) whether Penanshin was going to impose the FTZ Surcharge.[378]

273. As stated at paragraphs 150 to 172 above, the Parties were aware that the exchange of their respective intentions to impose the FTZ Surcharge not only reduced their own uncertainty in deciding whether to impose the FTZ Surcharge, but also enhanced their negotiating positions in respect of their customers. The Parties also knew that imposing the FTZ Surcharge could cause their customers to switch warehousing service providers, especially if their competitors did not do the same[379], demonstrating that they were aware, or could not have been unaware, that the Price Fixing Conduct would lessen competition between them, thereby reducing the incentives for their customers to switch warehousing service providers.

274. Mac-Nels submitted in its representations that Matthew (Mac-Nels) did not realise that texting Yasrin (Penanshin) to indicate that he would "follow" in imposing the FTZ Surcharge was an infringement of the section 34 prohibition.[380] Further, Mac-Nels submitted that it had no intention to distort competition and that its purpose of imposing the FTZ Surcharge was for what it believed to be a "legitimate revenue stream" and that it thought that the FTZ Surcharge was legitimate due to its belief that a large number of warehouse operators were imposing the FTZ Surcharge. It feared that if it had not imposed the FTZ Surcharge, it would have lost out to its competitors.[381]

275. CCCS reiterates that ignorance or mistake of the law is no bar to the finding of an intentional or negligent infringement. As the CAB affirmed in *Uber v CCCS*, "*an infringement is intentional if the parties are aware that the object or effect of the act is to restrict competition, and* ***it is not essential for the undertaking to be aware that it is infringing a provision of the Competition Act***" **[emphasis added]**.[382] In the present case, Mac-Nels must have been aware, or could not

[377] Paragraph 142.
[378] Paragraph 145.
[379] Paragraph 151.
[380] Written Representations of Mac-Nels dated 26 May 2022, paragraphs 14, 139-140, 146, 206-210.
[381] Written Representations of Mac-Nels dated 26 May 2022, paragraphs 104, 137.
[382] *Uber v CCCS*, at [182].

have been unaware, that by introducing the FTZ Surcharge in a coordinated manner with the other Parties, it would reduce the commercial uncertainty for all parties that were part of the agreement and/or concerted practice.

276. In any event, it is immaterial as to whether the infringement was intentional or negligent when determining whether an infringing undertaking should be penalised for its anti-competitive conduct as CCCS is entitled to impose penalties as long as there is a finding of an intentional or negligent infringement.[383] In addition, Mac-Nels' assertion that it thought it was doing something legitimate that was being practiced industry-wide is not justification for an infringement of the Act. The subjective intention also does not preclude CCCS from finding that Mac-Nels had participated in the Price Fixing Conduct, which had the object of preventing, restricting or distorting competition.

277. CCCS is therefore satisfied that each of the Parties intentionally or negligently infringed the section 34 prohibition. CCCS imposes a penalty on the Parties as set out in the following section.

B. Calculation of Penalties

278. The *Penalty Guidelines* provide that the objectives of imposing financial penalties are to reflect the seriousness of the infringement, and to deter the infringing undertakings and other undertakings from engaging in anti-competitive conduct.[384]

279. The *Penalty Guidelines* provide that the financial penalty to be imposed by CCCS under section 69 of the Act will be calculated following a six-step approach[385]:

a. Step 1: calculation of the base penalty having regard to the seriousness of the infringement (expressed as a percentage rate) and the party's turnover of the business in Singapore for the relevant product and relevant geographic markets affected by the infringement (i.e., relevant turnover) in the party's financial year preceding the date when the infringement ended[386];

[383] Section 69(3) of the Act.
[384] *Penalty Guidelines*, paragraph 1.7.
[385] *Penalty Guidelines*, paragraph 2.1.
[386] *Competition (Financial Penalties) Order 2007,* paragraph 3 and *Penalty Guidelines*, paragraph 2.5.

b. Step 2: the duration of the infringement;

c. Step 3: any aggravating and mitigating factors;

d. Step 4: other relevant factors such as deterrent value;

e. Step 5: statutory maximum penalty as provided for under section 69(4) of the Act; and

f. Step 6: immunity, leniency reductions and/or fast-track procedure discounts.

280. The starting point is a base figure, which is worked out by taking a percentage or proportion of the relevant sales or turnover. A multiplier is applied for the duration of infringement and that figure is then adjusted to take into account factors such as deterrence, aggravating and mitigating considerations and leniency discounts.

(i) Step 1: Calculation of the Base Penalty

281. The seriousness of the infringement and the relevant turnover of each Party would be taken into account by setting the starting point for calculating the base penalty amount as a percentage rate of each Party's relevant turnover in each infringement.

1) Relevant turnover

282. An undertaking's relevant turnover is the turnover of the business of the undertaking in Singapore for the relevant product and geographic markets affected by the infringement in the undertaking's last business year.[387] The "last business year" is the financial year preceding the date when the infringement ended.[388]

283. Based on the market definition, the relevant turnover for each undertaking in this case is the turnover derived from the provision of warehousing services for import cargo at Keppel Distripark. In this regard, CCCS is of the view that where products/services which form the subject matter of the infringement are intrinsically tied to other products/services and are offered as part of a package,

[387] *Penalty Guidelines*, paragraph 2.5.
[388] *Competition (Financial Penalties) Order 2007*, paragraph 3 and *Penalty Guidelines*, paragraph 2.5.

and there is no separate product market for the former, the affected product market for the calculation of relevant turnover is the entire package.

284. This was accepted in the CAB's decision in *Express Bus Operators Appeals Nos. 1 and 2*, where the undertakings concerned made the argument that the relevant turnover for the agreement to fix fuel and insurance charges ("FIC") should be limited to the turnover derived by the undertakings from the sale of the FIC coupons only; whereas CCCS had defined the relevant turnover as the turnover from the sale of all coach tickets which was sold with an FIC coupon. The CAB agreed with CCCS and held:

> "*...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*".[389]

285. The CAB's decision in *Express Bus Operators Appeals Nos. 1 and 2* was cited with approval by a differently constituted CAB in *IPP Financial Advisers Pte Ltd v Competition Commission of Singapore* ("*IPP Financial Advisers*").[390] In this case, the appellant, together with nine other financial advisors had participated in an agreement and/or concerted practice with the object of pressuring another financial advisor to withdraw its marketing of individual life insurance products with a significant commission rebate to policyholders.

286. The CAB rejected the appellant's contention that the relevant turnover for the purpose of the calculation of financial penalties should comprise only of the turnover generated from the new business that the appellant received in FY 2014 as opposed to the appellant's entire turnover for FY 2014 (comprising of both turnover generated from new business and existing policies before FY 2014).[391] Instead, the CAB held that the relevant turnover for the purposes of the calculation of financial penalties was the appellant's entire turnover for FY 2014 since the product and geographic market affected by the infringement was the distribution of the Insurers'[392] relevant individual life insurance products in Singapore – a market which should not be further subdivided based on the year that the insurance policies were entered into since the infringement would have

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[389] *Express Bus Operators Appeals Nos. 1 and 2*, at [185] and [186].
[390] *IPP Financial Advisers Pte Ltd v Competition Commission of Singapore* [2017] SGCAB 1.
[391] *IPP Financial Advisers*, at [28].
[392] This refers to the insurers whose investment and insurance products were distributed by IPP Financial Advisers Pte Ltd.

affected competition for the individual life insurance products entered into before FY 2014.[393] Accordingly, the CAB held that:

> "*On analogy with the Transtar Appeal, the individual life insurance policies existing before FY 2014 do not form a market of their own but constitute part of the market for the distribution of the Insurer's individual life insurance products in Singapore. The relevant turnover includes the business from all the policies in force in FY 2014.*"[394]

287. Similarly, in the *EC Freight Forwarding Case*[395], which concerned pricing coordination between 47 freight forwarders in respect of the imposition of four different surcharges, the EC rejected the contentions raised by several freight forwarders that the value of sales in the calculation of the fine should include only the turnover reached in connection with the collection of the surcharges and should not include the aggregate freight forwarding sales reached on the relevant lane.[396]

288. In this regard, the EC considered that the fact that customers approach freight forwarders for a package of services as opposed to obtaining separate services[397] and the fact that pricing of one part of the freight forwarding service has a direct impact on the overall price of the freight forwarding services paid by the customer [398] meant that:

> "*There is therefore no objective reason, why the value of sales should be calculated only on the basis of the (collected) surcharges, when it is evident that an imposition of a surcharge equals to a standard price increase as in any other service industry. The fact that the freight forwarders labelled this price increase for various reasons as a surcharge does not deprive it of its impact on customers*."[399]

Accordingly, the EC concluded that even though the elements of the service directly affected by the infringements were the specific surcharges or charging mechanisms, the infringements related to the entirety of the market for freight forwarding services.[400] The EC's decision to base the starting point for the fines calculation on the aggregate value of freight forwarding services provided on the

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[393] *IPP Financial Advisers*, at [32].
[394] *IPP Financial Advisers*, at [39].
[395] CASE AT.39462 – *Freight forwarding*.
[396] *EC Freight Forwarding Case*, at [865] and [873].
[397] *EC Freight Forwarding Case*, at [867].
[398] *EC Freight Forwarding Case*, at [867].
[399] *EC Freight Forwarding Case*, at [867].
[400] *EC Freight Forwarding Case*, at [870].

affected route was upheld by the GC[401], and subsequently by the ECJ[402] on appeal on the basis that the cartel had affected freight forwarding services as a package of services.

289. In this present case, CCCS notes that similar to the cases cited above, there is no separate product market for the FTZ Surcharge, as well as the other associated fees and charges for the provision of warehousing services (e.g. forklift charges, delivery notice processing fees, tally & tracing fees). This is because the FTZ Surcharge, which is the subject matter of the infringement, is intrinsically tied to these other associated fees and charges for the provision of warehousing services at Keppel Distripark (i.e., there is no standalone service for which the FTZ Surcharge was imposed on). In other words, the FTZ Surcharge would not be chargeable without the procurement of the underlying warehousing services.

290. Additionally, the introduction of the FTZ Surcharge was essentially an increase in the overall warehouse prices given that (i) each of the Parties mentioned that the reason for introducing their respective FTZ Surcharge was to allegedly defray rising costs or follow what other warehouse operators were doing; and (ii) more importantly, there were no additional goods or services provided with the introduction of the FTZ Surcharge. This further shows that there is no separate product market for the FTZ Surcharge.

291. Where an undertaking is unable or unwilling to provide information to determine its relevant turnover, or is suspected of providing CCCS with incomplete or very low relevant turnover, CCCS may attribute a relevant turnover to that undertaking with a view to impose a penalty that will reflect the seriousness of the infringement and deterring the undertaking as well as other undertakings from engaging in similar practices.[403] This will similarly apply where an undertaking's relevant turnover is zero.

2) Seriousness

292. As set out in paragraph 2.3 of the *Penalty Guidelines*, CCCS will consider the seriousness of the infringement and set a percentage starting point for calculating the base penalty. The more serious and widespread the infringement, the higher the starting percentage point is likely to be. In assessing the seriousness of the

[401] Case T-265/12 *Schenker Ltd v European Commission* [2016] ECLI:EU:T:2016:111, at [256].
[402] Case C-264/16 P *Deutsche Bahn AG, Schenker AG, Schenker China Ltd, Schenker International (H.K.) Ltd v European Commission* [2018] ECLI:EU:C:2018:60, at [47] to [54].
[403] *Penalty Guidelines*, paragraphs 1.7 and 2.7.

infringement, CCCS will consider a number of factors, including the nature of the product, the structure and condition of the market, the market share(s) of the undertaking(s) 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. The seriousness of the infringement also depends on the nature of the infringement, and this has been taken into consideration when fixing the starting point of the relevant turnover of the Parties in the calculation of financial penalties. The assessment will be made on a case-by-case basis for all types of infringements, taking into account all of the circumstances of the case.[404]

293. Nature of the products and structure of the market – The relevant market in this case is the provision of warehousing services in Keppel Distripark for import cargo in Singapore. Warehousing services refers to all services provided to any customer involving the handling of cargo at the warehouse, including the provision of storage facilities, stuffing/unstuffing of containers, container washing and processing of cargo. There are 26 warehouse operators in total at Keppel Distripark in the period between June 2017 and 2018. Competition is mainly between these 26 warehouse operators as Keppel Distripark is the only warehouse linked directly to the container terminals at Pulau Brani, Keppel, Tanjong Pagar and Pasir Panjang, all of which, including Keppel Distripark, are designated as free trade zones. According to PSA, the key barriers to entry for warehouse operators are labour and rental costs, as well as difficulties to source for workers to undertake labour-intensive activities such as container stuffing and unstuffing.[405]

294. Effect on customers, competitors and third parties – It is difficult to quantify the exact amount of loss caused by agreements or concerted practices due to the unavailability of a counterfactual price.[406] By engaging in the Price Fixing Conduct, the Parties had agreed to implement the FTZ Surcharge in a coordinated manner, thereby substituting the risks of price competition in favour of practical cooperation. CCCS finds that but for the infringement, each of the Parties, as competitors, would have had a higher level of uncertainty in terms of the pricing strategies of their competitors, and this would in turn have resulted in a higher level of competitive constraint on the Parties. Without knowing whether its competitors would be implementing the FTZ Surcharge, each Party

[404] *Penalty Guidelines*, paragraph 2.4.
[405] PSA's Response dated 17 October 2018 to CCCS's s.63 Notice dated 25 September 2018, paragraph 6.1.
[406] The counterfactual price refers to the price where the infringing conduct did not occur, i.e., the price in a scenario which the Parties did not have an agreement and/or a concerted practice regarding the imposition of the FTZ Surcharge.

may have contemplated not implementing the FTZ Surcharge, or implementing it at a lower rate, to avoid having its customers switch warehouse service providers. CCCS notes that there is evidence, as set out in paragraphs 150 to 172 above, showing that the FTZ Surcharge was in fact implemented following the Price Fixing Conduct, notwithstanding that some of the Parties' customers had objected to its imposition. The Price Fixing Conduct may have also weakened competitive constraints on the other competing warehouse operators in Keppel Distripark. It is notable that there were other competing warehouse operators in Keppel Distripark that also imposed the FTZ Surcharge at the same quantum as the Parties shortly after the Parties did so.[407]

295. Nature of infringement – The infringement involves price fixing between the Parties. Price fixing, by its very nature, is one of the most serious types of infringements.[408] As stated in *Express Bus Operators Case*[409] and the *Motor Vehicles Case*[410], CCCS considers 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 starting percentage of the relevant turnover that is on the higher end. This would be the case, even if the aggregate market share of the parties in a particular case falls below the 20% threshold and even if the parties to that particular agreement are small and medium sized enterprises.[411] In this regard, CCCS notes that while the OFT in *British Airways/Virgin Atlantic* [412] had considered the fact that coordination between the parties involved only a component of the overall ticket price, the OFT also took into account that "*cartel conduct is regarded to be among the most serious infringements*" and imposed a high starting percentage.

296. Having regard to all the factors as well as the circumstances of this case, CCCS considers it appropriate to fix the starting point at **[✂]%** of relevant turnover for each of the Parties.

(ii) Step 2: Duration of the Infringements

[407] See VA-003, email from Vasu (CNL) to [✂] (AWS) attaching FTZ Surcharge Notices of A&T, CLS, CNL, FLL, Gilmon, HSC, Mac-Nels and Penanshin.
[408] *Section 34 Guidelines*, paragraph 3.2.
[409] *Express Bus Operators Case* at [457].
[410] *Re CCS Imposes Penalties on 12 Motor Vehicle Traders for Engaging in Bid-Rigging Activities at Public Auctions* [2013] SGCCS 6, at [252].
[411] *Section 34 Guidelines*, paragraph 2.24.
[412] CE/7691-06 *OFT decision: Infringement of Chapter 1 of the CA98 and Article 101 of the TFEU by British Airways Limited and Virgin Atlantic Airways Limited*, 19 April 2012.

297. After calculating the base penalty sum, CCCS will next consider whether this sum should be adjusted to take into account the duration of the infringements. CCCS considers 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.[413] However, CCCS may, in cases involving duration of over one year, round down part years to the nearest month.

298. All the Parties were involved in the single overall agreement from 15 June 2017 to 19 November 2019. CCCS therefore adopts a duration multiplier of **2.42** after rounding down the duration to 29 months.

299. CNL and Gilmon submitted in their representations that CCCS's finding that the duration of the Price Fixing Conduct was at least until 19 November 2019, amounts to a double penalisation of CNL and Gilmon.[414] This is as CNL and Gilmon claimed to be punished for both the Price Fixing Conduct as well as allegedly unobjectionable "tacit collusive behaviour" thereafter.[415]

300. CCCS considers that there is no evidence that the continued imposition of the FTZ Surcharge by CNL and Gilmon was due to any alleged unobjectionable "tacit collusion", as opposed to the continued adherence to Price Fixing Conduct. Accordingly, applying the holding in *Acerinox* with respect to the calculation of duration of an infringement for penalty purposes does not result in double penalisation of CNL and Gilmon, but instead rightly holds CNL and Gilmon responsible for the entire duration for which the anti-competitive agreement/concerted practice was put into effect.

301. In this regard, CCCS notes that in *Acerinox*, where the infringement consisted of an agreement and/or concerted practice which was decided upon at one point in time but is to be executed over a prolonged period, the whole period of application should be regarded as included in the duration of the infringement.[416] To hold otherwise would mean that, paradoxically, most anti-competitive agreements and/or concerted practices would last only for one day[417], namely the day the agreement or concerted practice was concluded or decided upon, even if these agreements and/or concerted practices were implemented for a much longer period.

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[413] *Penalty Guidelines*, paragraph 2.10.
[414] Written Representations of CNL and Gilmon dated 30 August 2022, paragraph 65.
[415] Written Representations of CNL and Gilmon dated 30 August 2022, paragraph 65.
[416] *Acerinox*, at [54].
[417] *Acerinox*, at [54].

302. Mac-Nels submitted that it had only imposed the FTZ Surcharge from 1 August 2017, which should result in a lower duration multiplier of 2.25 instead of 2.42.[418]

303. To be clear, the start date of the Price Fixing Conduct reflects the date on which each of the Parties became a party to the agreement and/or concerted practice to fix the price of warehousing services at Keppel Distripark by imposing an FTZ Surcharge in a coordinated manner. The evidence, as set out in paragraphs 177 to 205 above, shows that each of the Parties had become a party to the Price Fixing Conduct on the same day, i.e. 15 June 2017. As set out above at paragraph 217, Mac-Nels was "*aware about the general scope and essential characteristics of the cartel as a whole*" after receiving information about the intended implementation of the FTZ Surcharge by other warehouse operators (such as CNL and Gilmon) when Yasrin (Penanshin) sent Matthew (Mac-Nels) a WhatsApp message with the relevant details on 15 June 2017. No evidence was provided by Mac-Nels that it had taken steps to publicly distance itself from the Price Fixing Conduct upon receipt of this information. Consequently, the same start date applies for all the Parties regardless of the stated effective date of their respective FTZ Surcharge. The fact that Mac-Nels selected a different effective date for its FTZ Surcharge does not detract from the evidence that as of 15 June 2017, the Parties had already engaged in the Price Fixing Conduct.

304. Having considered the representations of CNL, Gilmon and Mac-Nels, CCCS finds that the duration multiplier for each of the Parties remains at **2.42**.

(iii) Step 3: Aggravating and Mitigating Factors

305. At this stage, CCCS will consider the presence of aggravating and mitigating factors and make adjustments when assessing the amount of financial penalty,[419] i.e., increasing the penalty where there are aggravating factors and reducing the penalty where there are mitigating factors.

306. The adjustments for mitigating and aggravating factors, if any, will be dealt with below for each Party.

(iv) Step 4: Other Relevant Factors

[418] Written Representations of Mac-Nels dated 26 May 2022, paragraphs 39, 68-70.
[419] *Penalty Guidelines*, paragraph 2.13.

307. CCCS considers that the penalty may be adjusted as appropriate to achieve policy objectives, particularly the deterrence of the Parties and other undertakings from engaging in anti-competitive practices.

308. 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 this conduct.[420] 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, CCCS will adjust the penalty to meet the objectives of deterrence. For example, in *Express Bus Operators Appeal No. 3*[421], the CAB revised the financial penalty against Regent Star upwards to S$10,000 to achieve the objective of deterrence.

309. In determining whether to impose an uplift, CCCS may take into account other considerations, including, but not limited to, an objective estimate of any economic or financial benefit derived or 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.[422]

(v) Step 5: Maximum Statutory Penalty

310. Section 69(4) of the Act provides that the maximum financial penalty shall not exceed 10% of the turnover of the business of such party in Singapore for each year of infringement, up to a maximum of three years. The total turnover of the business of the undertaking in Singapore for the purposes of section 69(4) of the Act is defined in the *Competition (Financial Penalties) Order 2007* as the applicable turnover for the business year preceding the date on which the decision of CCCS is taken, or if figures are not available for that business year, the previous business year. The financial penalty will be adjusted, if necessary, to ensure that the statutory maximum is not exceeded.

311. CCCS notes that a common refrain throughout Mac-Nels' representations was that there were multiple mitigating factors that should be applied to its conduct, and in light of this, its financial penalty was high given that the quantum of its penalty was [✂]% of the maximum financial penalty under the law. While CCCS will address the merits of these representations on mitigating factors in the analysis below, this is an appropriate juncture to note that the maximum

[420] *Penalty Guidelines*, paragraph 2.3.
[421] *Express Bus Operators Appeal No. 3*, at [106].
[422] *Penalty Guidelines*, paragraph 2.18.

financial penalty that CCCS may impose under section 69(4) of the Act is not a scale to measure the culpability of the undertaking. Rather, the maximum penalty under statute operates to limit the penalty that can be imposed on an infringing undertaking, and thereby prevents a penalty that is excessive *vis a vis* the total turnover of an infringing undertaking.

(vi) Step 6: Adjustments for Leniency Reductions

312. An undertaking participating in cartel activity may benefit from total immunity from, or a significant reduction in the amount of financial penalty to be imposed if it satisfies the requirements for immunity or lenient treatment set out in the *CCCS Guidelines on Lenient Treatment for Undertakings Coming Forward with Information on Cartel Activity* ("*Leniency Guidelines*"). CCCS will make the necessary adjustments to the financial penalty calculated after Step 5 to take into account immunity or any leniency reductions conferred on an undertaking.[423]

313. In the present case, only one of the four Parties is a successful leniency applicant. The adjustment to this Party's penalty for its leniency reduction is dealt with below.

C. Penalty for CNL

314. CNL was involved in the Price Fixing Conduct which had the object of restricting, preventing or distorting competition in the provision of warehousing services for import cargo at Keppel Distripark.

315. **Step 1: Calculation of base penalty**: CNL's financial year commences on 1 January and ends on 31 December. As the infringement ended on 19 November 2019, the business year for the purpose of determining relevant turnover is the financial year ending 31 December 2018, i.e., 1 January 2018 to 31 December 2018. CNL submitted that its relevant turnover for the financial year ending 31 December 2018 was **S$[✂]**.[424]

316. CCCS has analysed its findings regarding the seriousness of this infringement in accordance with paragraphs 292 to 296 above and fixed the starting point at **[✂]%** of relevant turnover.

[423] *Penalty Guidelines*, paragraph 2.22.
[424] CNL's Response dated 13 December 2021 to CCCS's email dated 2 December 2021, Q2.

317. CNL and Gilmon submitted in their representations that a starting percentage of [✂]% would be appropriate given that the conduct:

a. only took place for a short period;

b. involved a very brief exchange of a small amount of information between a few players in a relatively large market;

c. involved information of independent decisions to follow market leaders in introducing a surcharge;

d. occurred in market conditions where independent market players as well as the undertakings in question would have introduced the surcharge in any event; and

e. did not appear to have lasting anti-competitive effects (if at all) on the market.[425]

318. As stated in paragraphs 219 and 266 above, CCCS is of the view that the conduct in question involved price fixing and that the duration of the Price Fixing Conduct was until 19 November 2019 at the very least. CCCS does not accept the representations of CNL and Gilmon that the imposition of the FTZ Surcharge would have been the natural outcome of the competitive process in any case, absent the Price Fixing Conduct for the reasons stated in paragraphs 248 to 255. CCCS also does not accept CNL's and Gilmon's representation that the Price Fixing Conduct did not appear to have lasting anti-competitive effects on the market. CCCS reiterates paragraph 69 above that cartel cases involving price fixing are especially serious infringements and will always be regarded to have an appreciable adverse effect on competition.

319. In any case, CCCS notes that the Price Fixing Conduct involved the coordinated introduction of a new additional warehouse charge on the Parties' customers, on top of the other warehouse charges that these customers already had to pay. This coordination "*should have eliminated or, at the very least, substantially reduced uncertainty as to the conduct to expect of the other on the market*"[426], resulting in the Parties behaving differently than they would otherwise have had they needed to decide based on commercial risk. As stated above, there was

[425] Written Representations of CNL and Gilmon dated 30 August 2022, paragraph 57.
[426] *Cimenteries*, at [1852].

considerable uncertainty between the warehouse operators as to whether or not the FTZ Surcharge should be imposed.

320. As a result of the Price Fixing Conduct, the Parties were aware that their competitors would soon be implementing the identically named FTZ Surcharge at the same price of $6 per w/m. The result of the Price Fixing Conduct was a market that was less competitive than it would otherwise have been. Absent the Price Fixing Conduct, some of the Parties may well have chosen not to implement the FTZ Surcharge or they might have had to agree to a lower quantum of FTZ Surcharge in negotiations with their customers, for fear that the customers might switch to competing warehouse operators. As a result of the Price Fixing Conduct, customers were faced with fewer choices of warehouse operators (that may have chosen to not impose the FTZ Surcharge) which they could switch to and, *ceteris paribus*, higher prices for warehousing services (since the FTZ Surcharge was a new charge that was added on top of the component prices for warehousing services). Accordingly, CCCS notes that the evidence does not support CNL's and Gilmon's representations that the Price Fixing Conduct did not have lasting anti-competitive effects on the market.

321. CCCS therefore does not accept CNL's representations in respect of the starting percentage.

322. The starting amount for CNL is therefore **S$[✂]**.

323. **Step 2: Duration of infringement**: In accordance with paragraphs 297 to 298 above, the duration multiplier is **2.42 years**. Therefore, the penalty after adjustment for duration is **S$[✂].**

324. **Step 3: Aggravating and mitigating factors**: CCCS considers that CNL did not provide cooperation over and above the extent to which it was legally required. CCCS therefore [✂] the penalty by **[✂]%.** Having taken into consideration all the facts and circumstances of this case, and after taking into account the aggravating and mitigating factors, the penalty **[✂].**

325. **Step 4: Adjustment for other factors**: CCCS considers that the figure of **S$[✂]** is sufficient to act as an effective deterrent and to other undertakings which may consider engaging in similar price fixing conduct. No adjustments were made to the financial penalty at this step.

326. **Step 5: Adjustment to prevent maximum penalty being exceeded**: The applicable turnover for CNL for the business year preceding the date of this ID (i.e. the financial year ending 31 December 2021) is **S$[✂]**. As such, the statutory maximum penalty for CNL is **S$[✂]**.

327. The financial penalty of **S$[✂]** does not exceed the maximum financial penalty that CCCS can impose in accordance with section 69(4) of the Act, i.e. S$[✂]. Hence, the financial penalty **[✂]**.

328. **Step 6: Adjustment for leniency**: CNL applied for leniency on 19 November 2019 during CCCS's section 64 inspection. However, as CNL failed to meet the requirements for a leniency application, in particular that it did not provide any details of the cartel activity, CNL was informed that its application was rejected on 2 September 2021.

329. Accordingly, CCCS concludes that a financial penalty of **S$522,889** is to be imposed on CNL.

D. Penalty for Gilmon

330. Gilmon was involved in the Price Fixing Conduct which had the object of restricting, preventing or distorting competition in the provision of warehousing services for import cargo at Keppel Distripark.

331. **Step 1: Calculation of base penalty**: Gilmon's financial year commences on 1 November and ends on 31 October. As the infringement ended on 19 November 2019, the business year for the purpose of determining relevant turnover is the financial year ending 31 October 2019, i.e. 1 November 2018 to 31 October 2019. Gilmon submitted that its relevant turnover for the financial year ending 31 October 2019 was **S$[✂]**.[427]

332. CCCS has analysed its findings regarding the seriousness of this infringement in accordance with paragraphs 292 to 296 above and fixed the starting point at [✂]**%** of relevant turnover.

333. As Gilmon made the same representations with respect to the starting percentage as CNL, paragraphs 317 to 320 above are repeated here. CCCS does not accept Gilmon's representations in respect of the starting percentage.

[427] Gilmon's Response dated 17 December 2021 to CCCS's email dated 7 December 2021, Q2b.

334. The starting amount for Gilmon is therefore **S$[✂]**.

335. **Step 2: Duration of infringement**: In accordance with paragraphs 297 to 298 above, the duration multiplier is **2.42 years**. Therefore, the penalty after adjustment for duration is **S$[✂].**

336. **Step 3: Aggravating and mitigating factors**: CCCS considers that Gilmon did not provide cooperation over and above the extent to which it was legally required. CCCS therefore [✂] the penalty by **[✂]%.** Having taken into consideration all the facts and circumstances of this case, and after taking into account the aggravating and mitigating factors, the penalty **[✂].**

337. **Step 4: Adjustment for other factors**: CCCS considers that the figure of **S$[✂]** is sufficient to act as an effective deterrent and to other undertakings which may consider engaging in similar price fixing conduct. No adjustments were made to the financial penalty at this step.

338. **Step 5: Adjustment to prevent maximum penalty being exceeded**: The applicable turnover for Gilmon for the business year preceding the date of this ID (i.e. the financial year ending 31 October 2021) is **S$[✂]**. As such, the statutory maximum penalty for Gilmon is **S$[✂]**.

339. The financial penalty of **S$[✂]** does not exceed the maximum financial penalty that CCCS can impose in accordance with section 69(4) of the Act, i.e. S$[✂]. Hence, the financial penalty [✂].

340. Accordingly, CCCS concludes that a financial penalty of **S$1,436,378** is to be imposed on Gilmon.

E. Penalty for Penanshin

341. Penanshin was involved in the Price Fixing Conduct which had the object of restricting, preventing or distorting competition in the provision of warehousing services for import cargo at Keppel Distripark.

342. **Step 1: Calculation of base penalty**: Penanshin's financial year commences on 1 October and ends on 30 September.[428] As the infringement ended on 19

[428] Penanshin's Response dated 20 September 2021 to CCCS's s.63 Notice dated 20 August 2021, Q1.

November 2019, the business year for the purpose of determining relevant turnover is the financial year ending 30 September 2019, i.e. 1 October 2018 to 30 September 2019. Penanshin submitted that its relevant turnover for the financial year ending 30 September 2019 was **S$[✂]**.[429]

343. CCCS has analysed its findings regarding the seriousness of this infringement in accordance with paragraphs 292 to 296 above and fixed the starting point at **[✂]%** of relevant turnover. The starting amount for Penanshin is therefore **S$[✂]**.

344. **Step 2: Duration of infringement**: In accordance with paragraphs 297 to 298 above, the duration multiplier is **2.42**. Therefore, the penalty after adjustment for duration is **S$[✂]**.

345. **Step 3: Aggravating and mitigating factors**: CCCS considers that Penanshin did not provide cooperation over and above the extent to which it was legally required. CCCS therefore [✂] the penalty by **[✂]%**.

346. Penanshin submitted that its cooperation in applying for leniency early, provision of quality evidence of high probative value that added significant value to CCCS's investigation, and the fact that it was not the initiator of the price fixing should be considered mitigating factors in the calculation of the financial penalties.[430] CCCS clarifies that it has already taken the quality of the information provided as well as Penanshin's cooperation into consideration in determining the leniency discount at Step 6 below. CCCS further clarifies that it is not a mitigating factor that a party to an infringement was not the initiator of anti-competitive conduct. Rather, it may be considered an aggravating factor if CCCS makes a finding that a party is the leader or initiator of anti-competitive conduct.

347. Having taken into consideration all the facts and circumstances of this case, and after taking into account the aggravating and mitigating factors, the penalty **[✂]**.

348. **Step 4: Adjustment for other factors**: CCCS considers that the figure of **S$[✂]** is sufficient to act as an effective deterrent and to other undertakings which may consider engaging in similar price fixing conduct. No adjustments were made to the financial penalty at this step.

[429] Penanshin's Response dated 17 December 2021 to CCCS's s.63 Notice dated 9 December 2021, Q2.
[430] Written Representations of Penanshin dated 12 May 2022, paragraph 19.

349. **Step 5: Adjustment to prevent maximum penalty being exceeded**: The applicable turnover for Penanshin for the business year preceding the date of this ID (i.e. the financial year ending 30 September 2021) is **S$[✂]**.[431] As such, the statutory maximum penalty for Penanshin is **S$[✂]**.

350. The financial penalty of **S$[✂]** does not exceed the maximum financial penalty that CCCS can impose in accordance with section 69(4) of the Act, i.e. S$[✂]. Hence, the financial penalty **[✂]**.

351. **Step 6: Adjustment for leniency**: Penanshin applied for leniency on 19 November 2019 during CCCS's section 64 inspection, which was after CCCS had commenced its investigation.

352. As Penanshin was the first leniency applicant and not the initiator of the Price Fixing Conduct, Penanshin is entitled to a leniency discount of up to 100% on the financial penalty. CCCS considers it appropriate to grant a leniency discount of [✂]**%** to Penanshin in view of the useful information and cooperation rendered, in accordance with the *Leniency Guidelines*.[432]

353. Penanshin submitted in its representations that it should have received a leniency discount of 100%, or in the alternative, a leniency discount of more than [✂]% as it had satisfied the criteria for a reduction of up to 100%[433]. CCCS confirms that Penanshin had satisfied the criteria set out in the *Leniency Guidelines* to be eligible for a leniency discount of up to 100%. In this regard, CCCS has considered the stage at which Penanshin came forward for leniency, the evidence already in CCCS's possession when Penanshin applied for leniency, and the quality of information provided by Penanshin, in deciding that a leniency discount of [✂]% is appropriate in the circumstances. CCCS considered the fact that Penanshin applied for leniency only on 19 November 2019, which was when Penanshin was subject to an inspection by CCCS. A higher percentage may have been warranted if Penanshin had made its leniency application earlier such as after CCCS has commenced investigations but had yet to make this known to the Parties e.g. through the taking of any investigative steps such as the issuance of a notice under section 63 or an inspection under section 64 of the Act. An earlier leniency application before the inspection would have provided areas of focus for the inspection. The value of Penanshin's evidence would also have been

[431] Penanshin's Response dated 3 October 2022 to CCCS's s.63 Notice dated 8 September 2022, Financial Report FY2021.
[432] *Leniency Guidelines*, paragraphs 3.1 and 3.2.
[433] Written Representations of Penanshin dated 12 May 2022, paragraph 3.

greater had it been provided to CCCS prior to the inspection, instead of after the inspection had commenced. For instance, CCCS notes that the WhatsApp messages that were retrieved from Yasrin (Penanshin) were obtained during the inspection pursuant to CCCS's investigative powers.

354. Mac-Nels claimed in its representations that as Yasrin (Penanshin) had induced or instigated Mac-Nels into being a party to the Price Fixing Conduct, it was not in the interests of justice for Penanshin to benefit from leniency.[434] CCCS rejects these representations for the following reasons:

a. Given the circumstances surrounding the 15 June 2017 Meeting, CCCS has not made a finding that Penanshin was the instigator of the Price Fixing Conduct as a whole.

b. The evidence does not show that Penanshin had coerced Mac-Nels into being part of the Price Fixing Conduct. [435]

c. In any event, CCCS has assessed at paragraphs 353 that Penanshin satisfies the conditions for leniency.

355. Accordingly, CCCS concludes that a financial penalty of **S$297,351** is to be imposed on Penanshin.

F. Penalty for Mac-Nels

356. Mac-Nels was involved in the Price Fixing Conduct which had the object of restricting, preventing or distorting competition in the provision of warehousing services for import cargo at Keppel Distripark.

357. **Step 1: Calculation of base penalty:** Mac-Nels' financial year commences on 1 January and ends on 31 December.[436] As the infringement ended on 19 November 2019, the business year for the purpose of determining relevant turnover is the financial year ending 31 December 2018, i.e. 1 January 2018 to 31 December 2018. Mac-Nels submitted that its relevant turnover for the financial year ending 31 December 2018 was **S$[✂]**.[437]

[434] Written Representations of Mac-Nels dated 28 May 2022, paragraph 66.
[435] *Leniency Guidelines*, paragraph 3.1.
[436] Mac-Nels' Response dated 20 September 2021 to CCCS's s.63 Notice dated 20 August 2021, Unaudited Financial Report for 2020.
[437] Mac-Nels' Response dated 14 December 2021 to CCCS's Further Request For Information dated 8 December 2021, Q6iii, Import Revenue from 2017 to 2020.

358. CCCS has analysed its findings regarding the seriousness of this infringement in accordance with paragraphs 292 to 296 above and fixed the starting point at **[✂]%** of relevant turnover.

359. Mac-Nels claimed in its representations that the starting percentage of [✂]% was too high for a number of reasons:

a. [✂].

b. The Parties had a low market share and hence there was no appreciable effect on competition.

c. Mac-Nels should only "*share one-quarter of the blame*" since there were four Parties to the Price Fixing Conduct.

d. The factual matrix of the case is novel.

Each of these will be dealt with in turn.

[✂]

360. Mac-Nels submitted that notwithstanding its introduction of the FTZ Surcharge, [✂]. It was therefore not in the interests of justice or fairness to impose a starting percentage of [✂]% when Mac-Nels [✂].[438]

361. [✂].[439] In addition, [✂].[440] This representation by Mac-Nels is therefore rejected.

Low Market Shares

362. Mac-Nels also claimed in its representations that CCCS had acknowledged in paragraph 238 of the PID that the Parties did not have a market share of 20% in the relevant market; and as such, there was no appreciable effect on competition.[441]

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[438] Written Representations of Mac-Nels dated 26 May 2022, paragraphs 33, 55, 57, 59, 144.
[439] *Express Bus Operators Case*, at [500], *CCS 500/002/09 Price Fixing in Modelling Services* ("*Models*"), at [292] to [293] and Case T-54/14 *Goldfish BV etc. v Commission* EU:T:2016:255, at [135] to [136].
[440] *Express Bus Operators Appeal No. 3*, at [98].
[441] Written Representations of Mac-Nels dated 26 May 2022, paragraphs 41, 43, 45-47, 48, 52, 56, 143, 195.

363. CCCS notes that Mac-Nels' representation arose from misreading a line in paragraph 238 of the PID.[442] The material line is a quotation from paragraph 2.24 of the *Section 34 Guidelines* and referred to parties in general rather than the Parties in this case. CCCS has therefore rephrased the material line in paragraph 295 above for the avoidance of doubt. In any event, given that price fixing is an object infringement, CCCS considers that the starting percentage should, accordingly, be high.

One-Quarter Culpability

364. Mac-Nels submitted that the starting percentage of [✂]% was too high.[443] First, it asserted that it should only "*share one-quarter of the blame*"[444] since there were four Parties to the Price Fixing Conduct. It further submitted that CCCS had "*failed to address the lack of seriousness*"[445] of Mac-Nels' role in the infringement, in particular the fact that its role was "*simply to apply the price fixed FTZ Surcharge*"[446] as it was not part of the discussions at the 15 June 2017 Meeting, nor did it apply deception on other parties to instigate more parties to be part of the Price Fixing Conduct.[447] Accordingly, Mac-Nels submitted that the appropriate starting percentage to determine its financial penalty ought to be [✂]% to reflect its role in the infringement.[448]

365. CCCS notes that these representations are premised on a fundamental misunderstanding of the process of determining financial penalties under CCCS's 6-step framework as set out in the *Penalty Guidelines*. As mentioned in paragraph 292, the starting percentage is a measure of the seriousness of the infringement as a whole. It is not a pie to be apportioned between all the parties to an anti-competitive agreement or concerted practice, as a reflection of the relative culpability of each individual party. Taking Mac-Nels' logic to its extreme would lead to absurd results, as doing so would result in a lower starting percentage in cases where there are more infringing parties. Instead, every

[442] The material line in paragraph 238 of the PID read:

> "…CCCS considers that cartel cases involving price fixing… are especially serious infringements and should normally attract a starting percentage of the relevant turnover that is on the higher end. **This is notwithstanding that the aggregate market share of the parties falls below the 20% threshold and even if the parties to such agreements are small and medium enterprises.** (emphasis in bold added)"

[443] Written Representations of Mac-Nels dated 26 May 2022, paragraphs 235 – 238.
[444] Written Representations of Mac-Nels dated 26 May 2022, paragraph 234.
[445] Written Representations of Mac-Nels dated 26 May 2022, paragraph 191.
[446] Written Representations of Mac-Nels dated 26 May 2022, paragraph 192.
[447] Written Representations of Mac-Nels dated 26 May 2022, paragraph 193.
[448] Written Representations of Mac-Nels dated 26 May 2022, paragraph 235.

undertaking that is a participant to the relevant anti-competitive agreement ought to be subject to the same starting percentage, which is then applied to its own relevant turnover, at Step 1. It is the relevant turnover of the individual undertaking which "*constitutes an objective criterion which gives a proper measure of the harm which the offending conduct represents for normal competition and it is therefore a good indicator of the capacity of each undertaking to cause damage*"[449] and thus serves to differentiate the base penalty for each undertaking. Individual aggravating or mitigating factors may then be considered by CCCS at Step 3, if applicable. For the avoidance of doubt, as set out in paragraphs 373 to 382 below, CCCS does not consider Mac-Nels' role to be a mitigating factor, and has addressed Mac-Nels' representations on alleged deception and not being part of the initial discussions at paragraphs 215 to 218above.

Novel Factual Matrix

366. Mac-Nels claimed in its representations that the factual matrix in the present case is novel and thus the starting percentage applied should be low.[450] In support of this submission, Mac-Nels reproduced paragraph 190 from CCCS's past infringement decision in the *Ferry Operators Case.*

367. Mac-Nels submitted that as the *Ferry Operators Case* involved a duopoly,[451] and was the first case in Singapore involving information exchange, CCCS had considered that the "*relatively low starting point* [in the *Ferry Operators Case*] *takes into account the novel nature of this case in Singapore and would not be the starting point for future similar cases.*" By this same token, Mac-Nels submitted that since this is "*the first case where a peripheral not involved in the agreement to fix and promulgate use of the price fixed [FTZ Surcharge] is involved … [and Mac-Nels was not] intricately involved [in the discussions]*", the starting percentage should also be at the lower end of the scale.[452]

368. CCCS notes that this submission from Mac-Nels is premised on a misunderstanding of competition law. To begin with, the 'novelty' that CCCS had considered in the *Ferry Operators Case* was the fact that it was the first infringement decision in Singapore where the conduct involved was information exchange. The 'novelty' was thus in relation to the nature of the infringing

[449] *Gütermann AG and Zwicky & Co v European Commission* (Joined Cases T-456/05 and T-457/05 (28 April 2010), at [275].
[450] Written Representations of Mac-Nels dated 26 May 2022, paragraphs 183 – 186.
[451] Written Representations of Mac-Nels dated 26 May 2022, paragraph 183.
[452] Written Representations of Mac-Nels dated 26 May 2022, paragraph 186.

conduct. In contrast to the *Ferry Operators Case*, the present case relates to the Price Fixing Conduct between the Parties. Price fixing (even where it relates to a component of price, such as a surcharge, as set out in paragraph 70), is a well-recognised form of anti-competitive behaviour.

369. Coming to the specific facts surrounding the Price Fixing Conduct, CCCS rejects the submission that there is 'novelty' on the basis that Mac-Nels was introduced to the Price Fixing Conduct later. The mere fact that Mac-Nels was not involved in the initial discussions at the 15 June 2017 Meeting and was only subsequently included does not make this a 'novel' case. As highlighted above at paragraph 84 to 85, it is well established that an undertaking can be found to be a party to an anti-competitive agreement despite not being present at every single meeting or being involved in every single correspondence. In fact, this was the case in *IPP Financial Advisers* where the appellant was not present at the initial meeting but was found to be part of the anti-competitive agreement when it subsequently participated in email correspondence where it was copied in.

370. The starting amount for Mac-Nels is therefore **S$[✂]**.

371. **Step 2: Duration of infringement**: In accordance with paragraphs 297 to 298 above, the duration multiplier is **2.42**. Therefore, the penalty after adjustment for duration is **S$[✂]**.

372. **Step 3: Aggravating and mitigating factors**: Mac-Nels claimed in its representations that it should receive mitigating discounts for the following reasons:

a. As a starting point, CCCS should apply the 2016 version of the *Penalty Guidelines* ("2016 PG") in determining Mac-Nels' financial penalty. Based on the CAB's interpretation of Step 3 of the 2016 PG in the *Fresh Chicken Products Appeals*, Mac-Nels was merely a follower or passive participant. This is because Mac-Nels only applied the price mentioned by Penanshin and did not instigate other warehouse operators to impose the FTZ Surcharge.[453]

b. In furtherance to point (a) on Mac-Nels only following the agreement to implement the FTZ Surcharge, there was no cartel conduct on the part of Mac-Nels.[454]

[453] Written Representations of Mac-Nels dated 26 May 2022, paragraphs 32, 72-74, 88, 142, 147, 169.
[454] Written Representations of Mac-Nels dated 26 May 2022, paragraph 214.

c. Mac-Nels' conduct had been negligent rather than intentional.[455]

d. The evidence did not show that Mac-Nels knew that its participation in the Price Fixing Conduct would be used to persuade CNL's and Gilmon's customers to accept the imposition of the FTZ Surcharge.[456]

e. [✂].[457]

f. Nicholas (Mac-Nels) and Andy (Mac-Nels) were not directly involved in the Price Fixing Conduct,[458] and only Matthew (Mac-Nels) had spoken to Yasrin (Penanshin).

g. Matthew (Mac-Nels) was a cooperative witness,[459] while Mac-Nels cooperated with CCCS and readily furnished confidential documents and financial documents.[460]

Each of these will be dealt with in turn.

The mitigating weight to be placed on an undertaking's role, as set out in the Penalty Guidelines

373. The current version of the *Penalty Guidelines* was published on 31 December 2021 and took effect on 1 February 2022. The key amendments relate to clarifications on when CCCS would consider an undertaking's role in a section 34 prohibition infringement to be a mitigating factor, and the high evidential threshold that the undertaking would be required to meet. In particular, under paragraph 2.15 of the *Penalty Guidelines*, if an undertaking seeks to rely on its role in the cartel as a mitigating factor, there is a high threshold it needs to satisfy. It must (a) provide evidence that its involvement in the infringement was substantially limited, and (b) demonstrate that, during the period in which it was

[455] Written Representations of Mac-Nels dated 26 May 2022, paragraphs 139-140, 206 – 210.
[456] Written Representations of Mac-Nels dated 26 May 2022, paragraph 31.
[457] Written Representations of Mac-Nels dated 26 May 2022, paragraphs 33, 55, 144.
[458] Written Representations of Mac-Nels dated 26 May 2022, paragraph 20.
[459] Written Representations of Mac-Nels dated 26 May 2022, paragraphs 92 – 103.
[460] Written Representations of Mac-Nels dated 26 May 2022, paragraphs 145, 148.

party to the infringement, it actually avoided applying it by adopting competitive conduct in the market.[461] Mac-Nels has failed to show this.

374. Paragraph 2.16 of the *Penalty Guidelines* also provides, for the avoidance of doubt, that "*the fact that an undertaking did not play a leader or instigator role in the infringement or that it was not a pro-active participant in the infringement will not, in itself, be regarded as a mitigating factor*." Therefore, the fact that Mac-Nels was not involved in the initial discussions at the 15 June 2017 Meeting and did not get other warehouse operators involved in the Price Fixing Conduct is not a mitigating factor.

375. Mac-Nels submitted that:

a. The applicable law must be the sentencing laws and regulations which were in force at the time the infringement was committed.[462] Therefore, the 2016 PG (that did not contain these clarifications of CCCS's policy position) ought to apply. This is because the Price Fixing Conduct occurred in 2017, which was before the 2022 version of the *Penalty Guidelines* took effect.[463]

b. Justice cannot be achieved by imposing law or regulations on sentences and penalties retrospectively,[464] as Mac-Nels may find itself subject to heavier penalties which would likely not have applied at the time the infringement occurred in 2017.[465] As clarity and transparency on parties' exposure to consequences for infringing the law is important, parties need to know the penalties that they would be facing for their actions.[466] In the same vein, counsel could only have advised Mac-Nels based on the

[461] CCCS notes that its policy position in relation to the role of the undertaking, as set out in paragraph 2.15 of the *Penalty Guidelines*, is similar to the application of the EC's mitigating factor on "*substantially limited involvement*" as found in its 2006 *Guidelines on the method of setting fines*. The EU jurisprudence on this point has established a high threshold that an infringing undertaking will need to satisfy before it can have the benefit of a mitigating discount. See for example, *Eni SpA v Commission* (Case T-558/08) at [190] – [191] and [241] where the European GC noted that the dual requirements of (a) substantially limited involvement and (b) applying competitive conduct on the market are cumulative in nature, and *Case AT.39462 – Freight Forwarding*, at [995] – [996], [1002] and [1004], where the EC noted that the parties did not in any way indicate that they objected to the agreed measures and "*the mere fact that an undertaking takes a passive role should not be rewarded by a reduction in the applicable fine [as] it still participates in the cartel.*"

[462] Agreed Record of Oral Representations by Mac-Nels dated 28 July 2022, paragraph 25.

[463] Agreed Record of Oral Representations by Mac-Nels dated 21 June 2022, paragraphs 33 – 34.

[464] Agreed Record of Oral Representations by Mac-Nels dated 28 July 2022, paragraph 12.

[465] Agreed Record of Oral Representations by Mac-Nels dated 28 July 2022, paragraph 23.

[466] Agreed Record of Oral Representations by Mac-Nels dated 28 July 2022, paragraph 19.

prevailing 2016 PG when investigations commenced in 2019 and were underway in 2020.[467]

c. Applying the CAB's reasoning in *Fresh Chicken Products Appeals* (which was premised on its interpretation of the 2016 PG), Mac-Nels' financial penalty ought to be discounted on account of it being a passive participant to the Price Fixing Conduct. [468]

d. In any event, even if the 2022 version of the *Penalty Guidelines* were to apply, Mac-Nels' 'passive' behaviour in the Price Fixing Conduct should still be given mitigating weight, since there were other mitigating factors to be considered in tandem [469] and the 2022 version of the *Penalty Guidelines* did not explicitly forbid passive participation from being mitigating.[470]

376. In response to Mac-Nels's representations, CCCS first notes that fundamentally, Mac-Nels' role cannot be properly conceived as passive regardless of which version of the *Penalty Guidelines* applied. As highlighted at paragraph 273, Mac-Nels's conduct essentially involved the sharing of information on its future pricing intentions, which, in turn, reduced the uncertainty of the other Parties to the Price Fixing Conduct.

377. Notwithstanding this, CCCS will, for completeness, also address Mac-Nels' representations on the applicable set of *Penalty Guidelines*. In this regard, CCCS takes the view that Mac-Nels' submissions on the 2022 *Penalty Guidelines* not being applicable to conduct that occurred in 2017 are based on an erroneous understanding of the law.

378. The CAB had explained in *Fresh Chicken Products Appeals* that the *Penalty Guidelines* that would apply to any given case would be the one that is in force at the time that CCCS's decision is issued. The crux of the CAB's analysis was that the 2016 PG had already come into force while parties were still contesting liability in the administrative process, with "*no final [infringement decision], and by inference no final decision on the liability, and susceptibility to financial penalties had yet been*

[467] Agreed Record of Oral Representations by Mac-Nels dated 28 July 2022, paragraph 29 – 30.
[468] Agreed Record of Oral Representations by Mac-Nels dated 28 July 2022, paragraph 15 – 17.
[469] Agreed Record of Oral Representations by Mac-Nels dated 28 July 2022, paragraph 9. The claimed mitigating factors are that Mac-Nels (i) did not conspire with CNL, Gilmon and Penanshin to impose the FTZ Surcharge; (ii) did not promote the introduction of the FTZ Surcharge to other warehouse operators; and (iii) was never involved in any of the discussions between CNL, Gilmon and Penanshin.
[470] Agreed Record of Oral Representations by Mac-Nels dated 28 July 2022, paragraph 3.

determined".[471] In other words, if a new penalty framework had already been operationalised, it should be followed where CCCS has not issued a final decision. CCCS observes that the CAB's reasoning in the *Fresh Chicken Products Appeals* on which version of the *Penalty Guidelines* should apply was not influenced by the date of the infringing conduct. In fact, as is acknowledged by Mac-Nels, the CAB had held that it was appropriate to rely on the 2016 PG even though the infringing conduct by the chicken producers took place before the 2016 PG came into force.[472]

379. The approach taken by CAB in *Fresh Chicken Products Appeals* is consistent with other areas of law that impose sanctions on parties for breaches of the law, e.g. criminal law. In *Adri Anton Kalangie v Public Prosecutor* [2018] 2 SLR 557 ("***Adri Anton***"), the Court of Appeal stated at, paragraph 46, that any new sentencing frameworks "should ordinarily apply to all offenders who are sentenced after the delivery of the decision introducing the new sentencing framework, **regardless of when they had committed the offence**". In other words, the focus is on "the date of sentencing (as opposed to the date of commission of the offence or the date of conviction) as the general date of reference to determine the applicability of the new sentencing framework."[473] By virtue of the reasoning in *Fresh Chicken Products Appeals* and *Adri Anton*, there is no question that the appropriate set of guidelines to apply in this case is the 2022 version of the *Penalty Guidelines*.

380. As for the statements made by the CAB in relation to passive participation as a mitigating factor, which Mac-Nels has relied on in its emphasis on transparency and clarity in the application of guidelines in its submissions,[474] it is important to understand the proper context of what the CAB said in *Fresh Chicken Products Appeals*. The CAB had taken the view that (a) CCCS's policy position on the mitigating weight of passive participation was not clear on the face of the 2016 PG, and (b) based on its interpretation of the 2016 PG, mitigating weight could be accorded to passive participation, if proven by the appellants in *Fresh Chicken Products Appeals*.

381. It is clear from the CAB's comments that its holding on the effect of passive participation as a mitigating factor was made in the absence of a clear policy position by CCCS at the time. CCCS notes that it has the remit to issue guidelines "*indicating the manner in which the Commission will interpret and give effect*

[471] *Fresh Chicken Products Appeals*, at [298].
[472] Agreed Record of Oral Representations by Mac-Nels dated 28 July 2022, paragraph 13.
[473] *Adri Anton*, at [49].
[474] See for example, Agreed Record of Oral Representations by Mac-Nels dated 21 June 2022, paragraph 20, and Agreed Record of Oral Representations by Mac-Nels dated 28 July 2022, paragraphs 13 - 14.

to"[475] the enforcement of the Act and has consequently clarified its position with the 2022 version of the *Penalty Guidelines*. Therefore, the CAB's statements on passive participation in *Fresh Chicken Products Appeals* was premised on the circumstances of that case and do not apply to the present case.

382. Lastly, CCCS notes that Mac-Nels had submitted, in the alternative, that even if the 2022 *Penalty Guidelines* were to apply, "*If there are other mitigating factors, then passive participation becomes a mitigating factor.*"[476] This is not an accurate characterisation of the 2022 *Penalty Guidelines*. Paragraph 2.16 of the 2022 *Penalty Guidelines* makes it very clear that an undertaking cannot simply rely on its role as not being a leader, instigator, or pro-active participant in and of itself, to be regarded as warranting a mitigating discount. As Mac-Nels has to meet the high threshold as set out in paragraph 2.15 of the *Penalty Guidelines*, it is not sufficient for Mac-Nels to say that it was not involved in the 15 June 2017 Meeting or that it did not get other warehouse operators involved, in order to get a mitigating discount on account of its role in the Price Fixing Conduct.

383. Furthermore, there are no other mitigating factors that assist Mac-Nels in the present case, as CCCS will be addressing in the rest of this section.

Claims that Mac-Nels was not involved in cartel conduct

384. Mac-Nels has attempted to draw a distinction between its involvement in the Price Fixing Conduct and that of the other three Parties, by claiming that only the other three Parties engaged in cartel conduct. It is incorrect for Mac-Nels to assert that there was no cartel conduct on its part, given CCCS's explicit finding at paragraphs 212 to 218 above that Mac-Nels participated in the single overall agreement to impose the FTZ Surcharge in a coordinated manner. There is no basis to give Mac-Nels a mitigating discount on account of it not being present at the 15 June 2017 Meeting.

Claims of negligent conduct

385. CCCS rejects Mac-Nels' submissions that it should receive a mitigating discount for negligent conduct:

    a. The evidence strongly suggests that Mac-Nels' infringement was intentional, i.e. that it must have been aware, or could not have been

[475] Section 61(1) of the Act.
[476] Agreed Record of Oral Representations by Mac-Nels dated 28 July 2022, paragraph 3.

unaware, that it joining the Price Fixing Conduct would reduce competition between the Parties. As mentioned above, Matthew (Mac-Nels) was provided with sufficient details from Yasrin (Penanshin) detailing the nature of the Price Fixing Conduct (quantum, name of surcharge, parties involved). CCCS notes that under the *Penalty Guidelines*, it may impose an aggravating uplift at Step 3 if it makes a finding that there was an intentional infringement. In this case, CCCS had exercised its discretion not to impose such an uplift.

b. Mac-Nels' submission that its infringement was negligent was on the basis of (i) it "*fail[ing] to check on whether the imposition of [the FTZ Surcharge] was unlawful and could lead to [a] financial penalty*"[477] and (ii) that it was misled by Yasrin (Penanshin). Contrary to Mac-Nels' assertions, the test to determine negligent infringement is **not** whether an undertaking fails to obtain legal advice, but whether it ought to have known that its **conduct** would have had the object or effect of restricting competition.

c. Under the *Penalty Guidelines*, a negligent infringement is not recognised as a mitigating factor at Step 3. For completeness and the avoidance of doubt, whilst the *Penalty Guidelines* are not binding, there is no basis on the facts of this case to award Mac-Nels a mitigating discount for negligent conduct, even if it had been found to be minimally negligent.

Claims on Mac-Nels' lack of awareness on how its participation in the Price Fixing Conduct would be used by the other Parties

386. Mac-Nels' submission that it did not know the extent to which its participation would assist CNL and Gilmon in persuading their customers to accept the FTZ Surcharge is an irrelevant consideration in determining financial penalties under the 6-step framework.

The applicability of the "high turnover, low margin" factor

387. Mac-Nels submitted that [✂],[478] and that its financial penalty should be discounted as [✂].[479] Mac-Nels cited the CAB's decision in *Pang's Motor Trading v CCS* for the proposition that "*the fact that an undertaking operates in*

[477] Written Representations of Mac-Nels dated 26 May 2022, paragraph 140.
[478] Written Representations of Mac-Nels dated 26 May 2022, paragraph211.
[479] Written Representations of Mac-Nels dated 26 May 2022, paragraphs 217 – 278.

a unique industry with high turnovers but low margins is a factor that can be taken into account in adjusting the financial penalty"[480], otherwise known as the "monies passed through" mitigating factor. Mac-Nels then concluded that as a significant portion of its turnover was operational expenses and rental, this would be considered as "monies passed through".[481]

388. CCCS notes that in *IPP Financial Advisers v CCCS*, the CAB applied the position taken by the UK courts that an undertaking seeking to rely on the "monies passed through" mitigating factor bears the burden of proving that the nature of the industry is such that a significant proportion of the gross revenue earned is not retained but "passed on" to other independent parties.[482] It is significant to note that examples of this would include the *Modelling* decisions, where the very nature of the industry involved payments made to models and their agencies.[483]

389. In contrast, Mac-Nels has [✂]. CCCS is of the view that other business costs that affect an undertaking's profit, such as the administrative and operational expenses incurred cannot be considered as "monies passed through", because this would lead to the perverse result of penalising more efficient undertakings that have lower overheads. Accordingly, Mac-Nels has failed to fulfil the burden of proof in proving that this mitigating factor ought to apply to it.

Which individuals from Mac-Nels corresponded directly with Yasrin (Penanshin)

390. Mac-Nels submitted in its representations that neither Nicholas (Mac-Nels), their managing director, nor Andy (Mac-Nels), their operational manager, spoke to Yasrin (Penanshin), and that it was only Matthew (Mac-Nels) who had done so.[484] It appears from Mac-Nels' representations that it is requesting CCCS to consider it mitigating that Nicholas (Mac-Nels) and Andy (Mac-Nels) "*did not discuss with any other parties on the price fixing*".[485]

391. CCCS notes the fact that Nicholas (Mac-Nels) and Andy (Mac-Nels) did not communicate directly with Yasrin (Penanshin) is a neutral factor which does not entitle Mac-Nels to a mitigating discount. In fact, CCCS notes that Matthew (Mac-Nels) was a director of Mac-Nels at the material time. CCCS had already

[480] Written Representations of Mac-Nels dated 26 May 2022, paragraph 212.
[481] Written Representations of Mac-Nels dated 26 May 2022, paragraph 218.
[482] *IPP Financial Advisers*, at [68] – [70].
[483] *Ave Management Pte Ltd v Competition Commission of Singapore* [2013] SGCAB 2 at [139]-[140]; *Bees Work Casting Pte Ltd and ors v Competition Commission of Singapore* [2013] SGCAB 1 at [131]-[137].
[484] Written Representations of Mac-Nels dated 26 May 2022, paragraph 20.
[485] Written Representations of Mac-Nels dated 26 May 2022, paragraph 141.

exercised its discretion not to apply an aggravating uplift on account of Matthew's (Mac-Nels) involvement.

Claims of Mac-Nels' cooperation with CCCS

392. Mac-Nels submitted that Matthew (Mac-Nels) was a candid witness[486] and that he was not intending to be uncooperative with CCCS.[487] To that end, Mac-Nels stated that Matthew (Mac-Nels) was [✂][488], presumably to explain why Matthew (Mac-Nels) gave "*incoherent*"[489] and "*muddled*" responses.[490]

393. It appears that Mac-Nels takes the position that Matthew (Mac-Nels) had the intention to cooperate with CCCS's investigations but due to extenuating [✂] circumstances, ended up giving responses which were unhelpful. To begin with, CCCS notes that Mac-Nels has not supported its representations on this point with evidence such as [✂]. That said, even if Mac-Nels had been able to substantiate its representations on Matthew's (Mac-Nels) infirmity, the fact remains that Matthew (Mac-Nels)'s responses did not significantly assist CCCS's investigations in any way.

394. No weight is placed on Mac-Nels' representations that it had voluntarily furnished confidential documents. CCCS notes that such documents were in fact provided pursuant to CCCS's investigative powers under section 63 of the Act, where refusal to provide such documents without reasonable excuse would have constituted an offence under section 75 of the Act.

395. CCCS therefore considers that Mac-Nels did not provide cooperation over and above the extent to which it was legally required. CCCS therefore [✂] the penalty by **[✂]%**.

396. Having taken into consideration all the facts and circumstances of this case, and after taking into account the aggravating and mitigating factors, the penalty [✂].

397. **Step 4: Adjustment for other factors**: CCCS considers that the figure of **S$[✂]** is sufficient to act as an effective deterrent and to other undertakings which may consider engaging in similar price fixing conduct. No adjustments were made to the financial penalty at this step.

[486] Written Representations of Mac-Nels dated 26 May 2022, paragraphs 92 – 94.
[487] Written Representations of Mac-Nels dated 26 May 2022, paragraphs 95, 103.
[488] Written Representations of Mac-Nels dated 26 May 2022, paragraph 97.
[489] Written Representations of Mac-Nels dated 26 May 2022, paragraph 96.
[490] Written Representations of Mac-Nels dated 26 May 2022, paragraph 102.

398. **Step 5: Adjustment to prevent maximum penalty being exceeded**: The applicable turnover for Mac-Nels for the business year preceding the date of this ID (i.e. the financial year ending 31 December 2021) is **S$[✂]**.[491] As such, the statutory maximum penalty for Mac-Nels is **S$[✂]**.

399. The financial penalty of **S$[✂]** does not exceed the maximum financial penalty that CCCS can impose in accordance with section 69(4) of the Act, i.e. S$[✂]. Hence, the financial penalty [✂].

400. **Step 6: Adjustment for leniency**: Mac-Nels claimed in its representations that it had not been given the opportunity to apply for leniency notwithstanding that its employees had been asked to provide statements during the inspection on 19 November 2019. Mac-Nels claimed that Nicholas (Mac-Nels) and Matthew (Mac-Nels) were also not asked to provide statements on 19 November 2019, suggesting that CCCS had never considered Mac-Nels part of the cartel.[492] Mac-Nels averred that it would have applied for leniency had it been given the opportunity to do so, as evidenced by Nicholas (Mac-Nels) asking about Mac-Nels' legal exposure when interviewed by CCCS in November 2020.[493]

401. CCCS rejects the allegation that Mac-Nels had not been given the opportunity to apply for leniency as being baseless. First, details of CCCS's leniency programme are set out on CCCS's website. Undertakings are free to apply for lenient treatment by coming forward with information on their cartel activity at any point, even prior to any investigation by CCCS. During the inspection on 19 November 2019, Mac-Nels was served with a notice under section 64 of the Act, which was functionally identical for all the undertakings involved in the inspection, and which contained a section explaining CCCS's leniency programme. Mac-Nels' assistant manager Randy Tan, had in fact additionally had the leniency programme explained to him on the date of the inspection.[494] Additionally, just a week later, on 25 November 2019, a notice under section 63 of the Act was sent to the Parties, including an annex on CCCS's leniency programme, with the notice addressed to Mac-Nels' directors and sent to Nicholas' (Mac-Nels) email address. Mac-Nels cannot claim that it had not been afforded as much opportunity as the other Parties to apply for leniency. Finally, no weight should be placed on the fact that CCCS did not interview Nicholas

[491] Mac-Nels' Response dated 23 September 2022 to CCCS's s.63 Notice dated 8 September 2022, Unaudited Financial Report for 2021.
[492] Written Representations of Mac-Nels dated 26 May 2022, paragraphs 61-64.
[493] Written Representations of Mac-Nels dated 26 May 2022, paragraph 65.
[494] NOI of Tan Han Kee, Randy, dated 19 November 2019, before Q1.

(Mac-Nels) and Matthew (Mac-Nels) during the inspection as it is within CCCS's discretion as to which individuals it chooses to interview during an investigation.

402. Accordingly, CCCS concludes that a financial penalty of **S$542,520** is to be imposed on Mac-Nels.

G. Conclusion on Penalties

403. In conclusion, pursuant to section 69(2)(e) of the Act, CCCS imposes the following financial penalties on the Parties for their involvement in price fixing:

Party	Financial Penalty
CNL	**S$522,889**
Gilmon	**S$1,436,378**
Penanshin	**S$297,351**
Mac-Nels	**S$542,520**
Total	**S$2,799,138**

Sia Aik Kor
Chief Executive
Competition and Consumer Commission of Singapore

ANNEX A: INTERVIEWS CONDUCTED BY CCCS WITH KEY PERSONNEL OF THE PARTIES

Company	Key Personnel Interviewed	Dates of Interview	Designation
CNL	Vasu s/o Achuthan	19 November 2019 22 September 2020 26 August 2021	Director, CNL
Gilmon	Teo Kiang Siak [Simon]	8 October 2020	Director, CNL
	Chua Chung Wei [Thomas]	19 November 2019 3 December 2019 8 October 2020 26 August 2021	General Manager, Gilmon
	Yeo Chee Min Gilbert	19 November 2019	Export Manager, Gilmon
	Ramli Bin Abu Bakar	19 November 2019	Warehouse Assistant, Gilmon
	Susan Ng Suk Kian	19 November 2019	Account Executive, Gilmon
Penanshin	Mohamed Yasrin	19 November 2019 17 March 2020 15 January 2021 31 August 2021	Warehouse Manager, Penanshin
	Leaw Wee Gin	18 March 2020	Director, Penanshin
Mac-Nels	Nicholas Er	16 November 2020	CEO, Mac-Nels
	Matthew Er	16 November 2020	Shareholder, former Director, Mac-Nels
	Lim Chwee Bok	19 November 2019	General Clerk, Mac-Nels
	Tan Han Kee, Randy	19 November 2019	Assistant Manager, Mac-Nels
	Leong Kwong Liang, Andy	19 November 2019	Operations Manager, Mac-Nels