Section 68 of the Competition Act (Cap. 50B)

Notice of Infringement Decision issued by CCS

Infringement of the section 34 Prohibition in relation to the price of ferry tickets between Singapore and Batam

18 July 2012

Case number: CCS 500/006/09

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

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CHAPTER 1: THE FACTS

A. The Parties

1. In October 2009, following a complaint received from a member of the public, the Competition Commission of Singapore ("CCS") commenced formal investigations on passenger ferry services on the Singapore-Batam routes to determine whether there has been a breach of the prohibition under section 34 ("the section 34 prohibition") of the Competition Act (Cap. 50B) ("the Act").

2. Information gathered by CCS (see paragraphs 17 to 21) indicates that the following operators (each a Party, together, the Parties) described in more detail in paragraphs 3 to 4 below, engaged in the exchange and provision of sensitive and confidential price information in relation to ferry tickets sold to corporate clients and travel agents for the passenger routes between Singapore (HarbourFront) and Sekupang, and between Singapore (HarbourFront) and Batam Centre:

   a) Batam Fast Ferry Pte Ltd ("Batam Fast")

   b) Penguin Ferry Services Pte Ltd ("Penguin")

(i) Batam Fast Ferry Pte Ltd

3. Batam Fast is a limited private company registered in Singapore, providing ferry services since 2005. Batam Fast's listed address is 1 Maritime Square, #11-20, HarbourFront Centre, Singapore 099253. Batam Fast's turnover for the financial year ending 31 March 2010 was S$[✂].[1] Paul Gannaway, Managing Director of Batam Fast, Eric Lim Chin Boon ("Eric Lim"), Sales Manager of Batam Fast and Chua Choon Leng, Passage Operations Manager of Batam Fast, are referred to in this Infringement Decision ("ID").

(ii) Penguin Ferry Services Pte Ltd

4. Penguin is a limited private company registered in Singapore, providing ferry services since 1999, and up until 1 July 2011 was a wholly owned subsidiary of Penguin International Limited. Following the completion of a sale and purchase agreement, where Penguin was fully acquired by SIF Group Pte Ltd by means of a purchase of 100% of the issued and paid-up share capital of Penguin, Penguin ceased its passenger ferry services operations. Sindo Ferry Pte Ltd (formerly known as Penguin Ferry Services Pte Ltd) took over operation of the passenger ferry services. For the purposes of this ID, the infringing party shall be referred to as Penguin. Penguin's listed address was 18 Tuas Basin Link Singapore 638784. Penguin's turnover for the financial year

[1] Information provided by Batam Fast on 8 June 2011 pursuant to the section 63 Notice issued by CCS dated 13 May 2011.

ending 31 December 2010 was S$[✂].[2] Sun Mun Yew, General Manager of Penguin, and Liu Nam Leong, Commercial Manager of Penguin, are referred to in the ID.

B. Industry Background

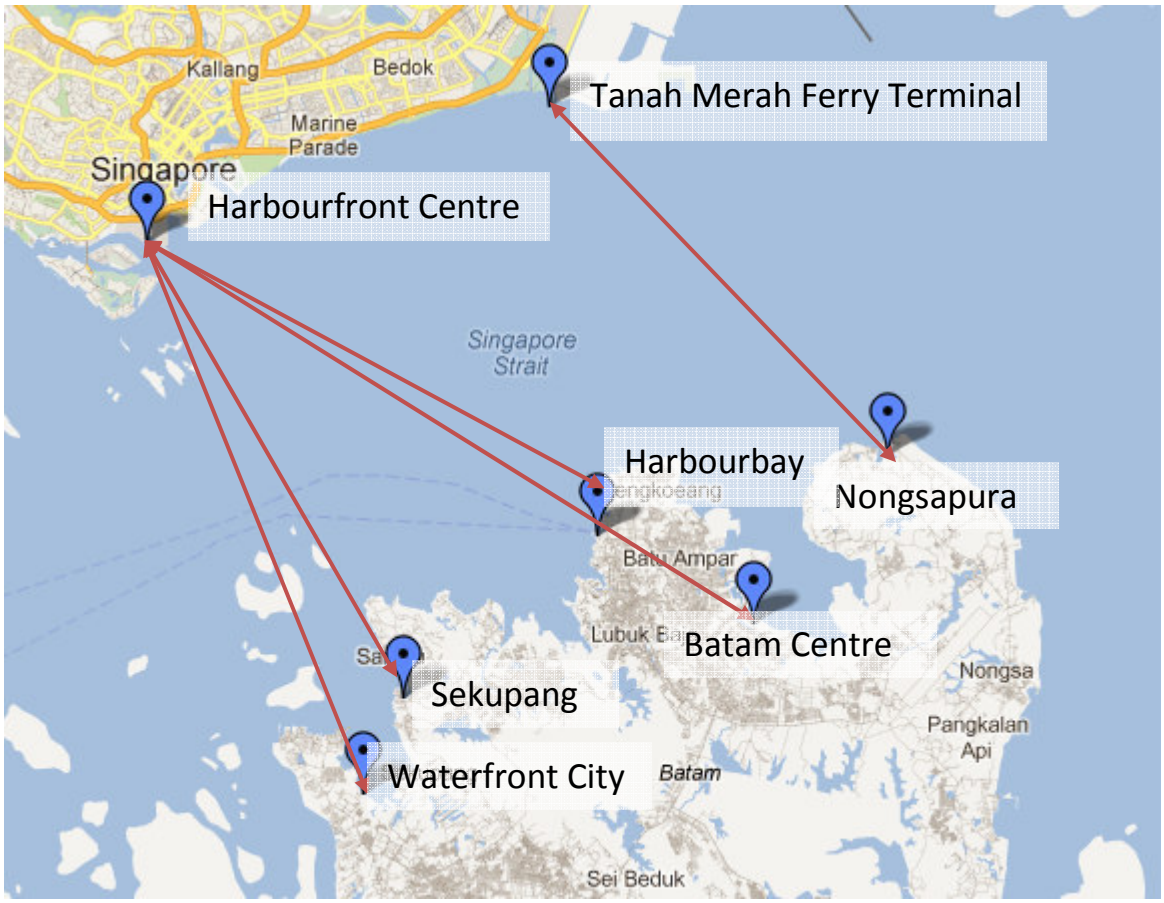
(i) Routes and competition

5. There are five passenger ferry terminals in Batam, namely Batam Centre, Sekupang, Waterfront City, Harbourbay and Nongsapura which are served by the five licensed passenger ferry operators as follows:[3]

Ferry Operator	HarbourFront to Batam Centre	HarbourFront to Sekupang	HarbourFront to Waterfront City	Tanah Merah to Nongsapura	HarbourFront to Harbourbay
Batam Fast	X	X	X	X	
Penguin	X	X			
Berlian Ferries Pte Ltd					X
Indofalcon Shipping & Travel Pte Ltd			X		
Pacific Ferry Pte Ltd		X			

A pictorial representation of the routes is attached:[4]

[2] Information provided by Penguin on 27 May 2011 pursuant to the section 63 Notice issued by CCS dated 13 May 2011.
[3] Out of the five passenger terminals, Penguin provides passenger ferry services to Batam Centre and Sekupang. Batam Fast provides passenger ferry services to Batam Centre, Sekupang, Waterfront City and Nongsapura. Harbourbay is a private port and is served only by Berlian. Indofalcon provides passenger ferry services to Waterfront City. Pacific Ferry provides passenger ferry services to Sekupang starting December 2010.
[4] © 2011 Google, GMS, MapIT, Tele Atlas.



(ii) Market shares in the relevant routes

6. CCS notes that the Parties had an aggregate market share of 100% on both the Singapore (HarbourFront) to Batam Centre route as well as the Singapore (HarbourFront) to Sekupang route at the material time.[5] In effect, the Parties formed a duopoly[6] in the Singapore (HarbourFront) to Batam Centre and the Singapore (HarbourFront) to Sekupang routes.

(iii) Customer categories

7. The Parties[7] submitted that they have three main categories of customers, namely: walk-in/counter, corporate clients, travel agents.[8] Walk-in customers purchase the ferry tickets over the counters at the ferry terminals in Singapore and/or Batam. Corporate clients and travel agents which form around [✂]% of

[5] In December 2010, Pacific Ferry Pte Ltd started the provision of ferry services between Singapore (HarbourFront) and Sekupang. It is estimated that after the entry of Pacific, the Parties have an aggregate market share of at least [✂] on the Singapore to Sekupang route according to estimates made by the Parties.
[6] A duopoly refers to a situation where there are only two producers/suppliers in the relevant market.
[7] See Answer to Question 22 of Sun Mun Yew's Notes of Information/Explanation Provided on 25 January 2011. See Answer to Question 19 of Eric Lim's Notes of Information/Explanation Provided on 9 February 2011.
[8] Liu Nam Leong had also identified a separate category of customers i.e. ticketing agents to whom Penguin sells their tickets. See Answer to Question 24 of Liu Nam Leong's Notes of Information/Explanation Provided on 25 January 2011.

the customer base[9] purchase tickets in bulk from the respective ferry operators based on mutually agreed terms and conditions.

8. Corporate clients are, in general, companies which have operations such as factories in Batam, and who require tickets for their staff to travel frequently between Singapore and Batam. Corporate clients may be based in Singapore and/or Batam, and they generally do not act as agents to sell tickets to others. Travel agents can be located either in Singapore or Batam and there is evidence to suggest that Batam travel agents offer one-day travel packages to Singapore travel agencies.[10] The ticket prices charged by the Parties to individual corporate clients and travel agents differ depending on negotiation outcomes and the number of tickets bought by each client.

9. The infringements referred to in this ID refer *only* to the businesses of the Parties with respect to corporate clients and travel agents, and not to walk-in customers and/or any other types of customers.

(iv) Terminal Operator: Singapore Cruise Centre Pte Ltd

10. The Singapore Cruise Centre Pte Ltd ("SCCPL") is a cruise and ferry terminal operator. It manages and operates two regional ferry terminals, one cruise terminal, and one domestic ferry terminal in Singapore. The two regional ferry terminals are located at HarbourFront and Tanah Merah.

(v) Licensing schemes

11. The Maritime Port Authority of Singapore ("MPA") licences both terminal operators and ferry operators in Singapore. The licensing schemes are part of MPA's ongoing efforts to safeguard the security of the ferries and passengers.

12. Batam Fast and Penguin are licensed by MPA[11] to provide passenger ferry services, *inter alia*, between Singapore and Batam in Indonesia. Besides Batam Fast and Penguin, there are three other licensed regional ferry operators, namely, Berlian (Wavemaster), Pacific Ferry and Indofalcon. However, these operators do not operate on the routes which are the subject of this ID at the material time. The licence conditions are primarily focused on security, safety and navigation considerations. To apply for a licence, the ferry operator is required to, amongst other things, state the routes that it wishes to operate and also produce documents to show that it has concluded the necessary arrangements with the authorities at the foreign destination port.[12] As a licensed

[9] See Answer to Question 23 of Liu Nam Leong's Notes of Information/Explanation Provided on 25 January 2011.
See Answer to Question 17 of Eric Lim's Notes of Information/Explanation Provided on 9 February 2011.
[10] See Answer to Question 108 of Eric Lim's Notes of Information/Explanation Provided on 9 February 2011.
[11] http://www.mpa.gov.sg/sites/global_navigation/news_center/mpa_news/mpa_news_detail.page?filename=nr050103.xml.
[12] See Answer to Question 7 of the Notes of Information/Explanation of Christina Siaw Provided on 30 March 2011 pursuant to the section 63 Notice issued by CCS dated 1 March 2011.

operator, SCCPL provides and manages berthing space and time slots to ferry operators, taking into account MPA's safety objectives as well as its own commercial ones. Ferry operators pay SCCPL a Passenger Departure Fee ("PDF"), which comprises:

- passenger fee,
- security fee,
- dockage charges,
- ground handling fee,
- SPOS[13] transaction fee, and
- ramp service fee.

13. The passenger fee, the security fee and the dockage charges are regulated by MPA via a price control mechanism. The ground handling fee, the SPOS transaction fee and the ramp service fee are fees payable to SCCPL for commercial services requested by the ferry operators. The levels of these fees are agreed upon between ferry operators and SCCPL via commercial negotiation. Notification to MPA is required for the introduction or adjustment of these rates.[14]

14. Penguin, in its representations[15] said that SCCPL, as the terminal operator of SCCPL (HarbourFront), is solely responsible for determining the levels of the components of the PDF, instead of it being agreed upon by both the ferry operators and SCCPL via commercial negotiation. CCS notes that based on information submitted by SCCPL, the said fees are subject to commercial agreements between the ferry operators and SCCPL and were based on commercial terms.[16]

15. Importantly, neither MPA nor SCCPL regulates the fares charged by the ferry operators in Singapore and passenger ticket pricing is solely within the ferry operators' commercial discretion.[17]

[13] "SPOS" refers to the on-line computer system, software, documentation and any customisations, developments, modifications, enhancements, copies or derivations thereto, offered by SCCPL but excluding any source codes.
[14] Information provided by Singapore Cruise Centre on 15 April 2011 pursuant to the section 63 Notice issued by CCS dated 4 April 2011.
[15] Representations made by M/s A&G on behalf of their client, Penguin Ferry Services Pte Ltd on 23 April 2012 at paragraph 2.3.
[16] Information provided by Singapore Cruise Centre on 15 April 2011 pursuant to the section 63 Notice issued by CCS dated 4 April 2011.
[17] Information provided by Singapore Cruise Centre on 25 January 2010 pursuant to the section 63 Notice issued by CCS dated 13 January 2010.

(vi) Regulation in Indonesia

16. The Indonesian government plays dual roles as both the regulator as well as the terminal operator[18] in Batam. The Indonesian Ferry Terminals imposes the Batam Terminal Fee.

C. Investigation and Proceedings

17. In June 2009, CCS received a complaint from a member of the public alleging that companies providing passenger ferry services between Singapore and Batam operated some form of price fixing agreement and that they had similar ticket prices and shared ferry schedules.

18. In October 2009, CCS commenced investigations after being satisfied that there were reasonable grounds to suspect an infringement of the section 34 prohibition.

19. In January 2010, pursuant to the investigations, CCS sent section 63 Notices to various parties to obtain information. On 11 November 2010, CCS conducted simultaneous inspections without notice at the premises of Batam Fast and Penguin pursuant to section 64 Notices.

20. CCS conducted interviews with the relevant personnel of the Parties and third parties as detailed below under section 63 of the Act:

Name	Company	Designation	Date(s) of interview
Sun Mun Yew	Penguin	General Manager	25 January 2011
Liu Nam Leong	Penguin	Commercial Manager	25 January 2011 26 January 2011
Paul Gannaway	Batam Fast	Managing Director	8 February 2011 1 November 2011
Chua Choon Leng	Batam Fast	Passage Operations Manager	8 February 2011 28 October 2011
Eric Lim Chin Boon	Batam Fast	Sales Manager	9 February 2011 28 October 2011
Christina Siaw Mong Lee	Singapore Cruise Centre Pte Ltd	Chief Executive Officer	30 March 2011
Eddie Tang Cheng Giap	Singapore Cruise Centre Pte Ltd	Assistant Vice President (Cruise Operation)	28 April 2011
Sumardi Bin Hussein	Singapore Cruise	Assistant Manager	29 April 2011

[18] See Answers to Questions 10 and 12 of Paul Gannaway's Notes of Information/Explanation dated 8 February 2011.

	Centre Pte Ltd		
Jeffrey Lee	Nidec Sankyo (A Nidec Group Company)	Senior General Manager	4 July 2011
Chee Nan Chuang Ben	Prime Travel & Tour Pte Ltd	Director of Operations	6 July 2011
Norraihan Binte Kamarudin	Batam Holidays	Director	7 July 2011
Jason Low Chan Seng	Cibavision	Sourcing Manager	7 July 2011
Leong Kar Hin	Labroy Shipping and Engineering Pte Ltd	Finance Manager	12 July 2011
Suhaimi Bin Ahmad	Southlink Country club	Customer Service and Operation Executive	2 August 2011

21. CCS sent further notices under section 63 of the Act to each of the Parties on 13 May 2011, requesting documents and information relating to each of the Parties' turnover from FY2008 onwards. CCS received the responses between 27 May 2011 and 8 June 2011. A further notice requesting information on Penguin's turnover under section 63 of the Act was sent on 27 June 2011 and a response was received on 8 July 2011. CCS followed up with an email clarification to Penguin on 23 November 2011. A response was received by CCS on 28 November 2011.

CHAPTER 2: LEGAL AND ECONOMIC ASSESSMENT

22. This section sets out the legal and economic framework based upon which CCS considers the evidence. This section further sets out the extent of the Parties' involvement, the evidence and CCS' assessment of the evidence.

A. The Relevant Market

23. 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 has the object or effect of restricting competition appreciably. Second, it provides the basis for determining the relevant turnover for the purpose of calculating penalties.

24. The starting point for market definition relating to the provision of scheduled transport services (as in this instance) is the pairing of the point of origin of the journey and the point of destination. This is referred to as the origin and destination pair ("O&D pair") and is usually a pairing of cities, i.e. a city as a point of origin and a city as a point of destination. O&D pairs are derived from the observation and analysis of passengers' behaviour; namely that passengers generally want to travel to a specific destination and will not substitute another

destination when faced with a small, non-transitory increase in price. Therefore, each combination of a point of origin and point of destination can form a separate market. This is in line with CCS' past decisions such as those involving notifications made by airlines.[19]

25. The process of defining the relevant market begins with the focal product or the area in which the focal product is sold.[20] As a starting point for determining the relevant product and geographic market, CCS identified the focal product and geographic areas as the sale of one-way and two-way ferry tickets from Singapore to Batam, Indonesia.

(i) Relevant product market does not comprise alternative forms of transport

26. CCS notes that there are no feasible alternative modes of transportation from Singapore to various destinations in Batam, Indonesia.[21] Passengers may travel through Jakarta and/or Johor[22] but CCS notes that this is unlikely to be a feasible option in practice.[23] Helicopters were also cited as an alternative but are considered to be a very expensive option.[24] CCS is of the view that these next best forms of transport between Singapore and Batam should not be included in the relevant market as it is unlikely that a significant number of buyers will switch to using these modes of transportation when faced with a small but significant, non-transitory increase in price.

(ii) The relevant product market(s) should be divided by routes

27. The next step is to consider whether the focal product should be further narrowed to that for specific routes.

Demand-side substitution

28. In terms of distance, it is estimated that the travelling time between each ferry terminal is between 15 minutes to 55 minutes. For example, the distance between Sekupang and Batam Centre is about 20km and this translates to a travelling time of approximately 30-50 minutes.[25] CCS notes that travellers going to different ports in Batam usually have a specific reason for doing so. For example, hotels serving tourist and other recreation seekers are located

[19] CCS 400/002/06, CCS 400/003/06, CCS 400/008/10, and CCS 400/001/11.
[20] In this context, the general observations of CCS set out in Chapter 1, "Industry Background" should be noted.
[21] See Answer to Question 20 of Paul Gannaway's Notes of Information/Explanation Provided on 8 February 2011, Answer to Question 16 of Chua Choon Leng's Notes of Information/Explanation Provided on 8 February 2011 and Answer to Question 18 of Liu Nam Leong's Notes of Information/Explanation Provided on 25 January 2011.
[22] See Answer to Question 20 of Paul Gannaway's Notes of Information/Explanation Provided on 8 February 2011 and Answer to Question 16 of Chua Choon Leng's Notes of Information/Explanation Provided on 8 February 2011.
[23] See Answer to Question 20 of Paul Gannaway's Notes of Information/Explanation Provided on 8 February 2011.
[24] See Answer to Question 16 of Chua Choon Leng's Notes of Information/Explanation Provided on 8 February 2011.
[25] http://maps.google.com.sg.

mainly in Batam Centre and Waterfront City.[26] Batam Centre is also Batam's main point of entry and is physically proximate to tourist attractions, while Sekupang is near to industrial areas serving the manufacturing and shipbuilding industries.[27] Corporate clients typically purchase tickets to a ferry terminal that is near to their factory.[28]

29. In this regard, an objective distinction can be made between point-to-point travel, for example, from Singapore (HarbourFront) to either Sekupang or Batam Centre. It is also CCS' view that a small but significant non-transitory increase in the price of a ferry ticket to a particular ferry terminal in Batam will not cause customers to switch, i.e. take an indirect option to another ferry terminal in Batam, and then to continue their journey via taxi. For example, it is estimated that the cost of a taxi fare from Sekupang to Batam Centre is roughly between Rup50,000 to Rup80,000 (SGD 7.20-11.40), which is significant relative to ferry ticket prices of about $47 at the material time.[29] Passengers will also have to put up with increased travelling time and additional inconvenience. In other words, the various ferry terminals in Batam are unlikely to be substitutes for one another, and passengers wanting to travel to say, Sekupang, are unlikely to purchase tickets to travel to another ferry terminal and travel the remaining journey by road instead.

Supply-side substitution

30. In terms of supply-side substitution, CCS considered that ferry operators would need to obtain approval from MPA before it may switch its routes. Further, ferry operators would need to ensure that they have secured time slots for both the Singapore and the Indonesia ferry terminals before they can provide service to any routes.

(iii) The relevant product market(s) should be divided by customer type

31. CCS has also considered the different categories of customers that the Parties serve. The Parties have indicated that they do not regard corporate clients as being similar to travel agents. Also, due to their price differential, there is reason to believe that each category of customers will not switch i.e. travel agents will not switch to purchasing from the counter due to a small but significant non-transitory increase in the prices that they may be charged. As such, there is reason to believe that each category of customers as described in paragraphs 7 and 8 is distinct and separate.

[26] See Answer to Question 6 of Norraihan Binte Kamarudin's Notes of Information/Explanation Provided on 7 July 2011.
[27] Information provided by Penguin on 8 July 2011 pursuant to the section 63 Notice issued by CCS dated 27 June 2011.
[28] See Answers to Questions 2 -5 of Jeffrey Lee's Notes of Information/ Explanation Provided on 4 July 2011.
[29] It is worth highlighting that there were several price changes during the material time. The figure provided in the ID is a ballpark figure as of December 2009.

32. For these reasons stated from paragraphs 26 to 30, CCS is of the view that the relevant product markets comprise the following point-to-point pairs: 1) Singapore (HarbourFront)-Batam Centre, and 2) Singapore (HarbourFront)-Sekupang, and should be further categorised by customer type. To the extent that the infringing conduct relates to the travel agents and corporate clients only, CCS' assessment focuses on these two segments as relevant product markets.

The Relevant Geographic Market

33. For the purposes of calculating relevant turnover and determining penalties in this case, CCS considered the following factors when determining the relevant geographic market.

34. CCS notes that the Parties are incorporated in Singapore and sell their tickets to both Singapore and Batam corporate customers. With respect to tickets sold by travel agents in Batam, CCS notes that Batam travel agents offer one-day travel packages to Singapore travel agencies.

35. CCS has considered the submission made by Penguin that the relevant market is the provision of ferry services from Singapore to Batam as a whole.[30] However, as noted in the relevant product market definition above, CCS will adopt the following market definition i.e. the sale of one-way and two-way tickets between Singapore (HarbourFront)-Sekupang and Singapore (HarbourFront)-Batam Centre for Singapore corporate clients and all travel agents. In any case, even if the relevant markets were considered more broadly, i.e. for the relevant market to consist of all routes from Singapore to Batam, it is estimated that the Parties will still have a combined market share of [✂]%[31] and the conduct of the Parties would still have an appreciable adverse effect on competition. Refer to paragraphs 69 to 72 of the ID for a full discussion.

B. The Section 34 Prohibition and its Application to Undertakings

36. 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.

37. 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." Each of the Parties is carrying on a commercial or

[30] Information provided by Penguin on 15 March 2010 pursuant to the section 63 notice issued by CCS dated 13 January 2010.
[31] See Answer to Question 24 of Paul Gannaway's Notes of Information/Explanation Provided on 8 February 2011.

economic activity and therefore falls within the meaning of "undertaking" as defined in the Act.

38. Batam Fast has submitted[32] that the discussions and representations carried out by the Passage Operations Manager, Chua Choon Leng, of Batam Fast with the Commercial Manager of Penguin that relate to ticket pricing matters were unauthorised personal acts and thus *ultra vires* acts which were not sanctioned by Batam Fast. As such, these acts of the Passage Operations Manager should not be regarded against Batam Fast because the *ultra vires* acts of an employee should not be considered as acts of the corporation. Batam Fast referred to the cases of *Gennari v Weichart Co Realtors*[33] and *Allen v. V and A Bros, Inc*[34] in support of its position.

39. CCS notes that the decisions cited by Batam Fast refer to the application of the Consumer Fraud Act ("CFA") in New Jersey which contemplates the imposition of liability on individuals. The Singapore Competition Act (Cap. 50B) does not provide for the similar imposition of individual liability. As such, the rationale of the Supreme Court of New Jersey in defining the application of the CFA to individuals is not applicable to this present decision.

40. As previously stated in the *Pest Control Case*[35]: "*...it is trite law, in the EC*[36] *and UK*[37]*, that the fact that an employee of an undertaking is not authorised to make an infringing agreement does not relieve the undertaking of its liability"*. It was further held by the Competition Appeal Tribunal ("CAT") in *Argos Limited and Littlewoods Limited v Office of Fair Trading,* that whilst an employee might not be specifically authorised to enter into certain discussions, this did not necessarily mean that the undertaking should be able to evade liability:[38]

> "771. Littlewoods further submits that there was no agreement because nothing was ever authorised by Mrs. Paisley. It is trite law that the fact that an employee of an undertaking is not authorised to make an infringing agreement does not relieve the undertaking of its liability: e.g. Cases 100/80 etc. Musique Diffusion Française v Commission [1983] ECR 1825".

41. It was further observed in *Safeway Stores Limited and Others v Twigger and Others*[39], that the UK Court of Appeal held that the liability of an undertaking

[32] Representations made by Batam Fast Ferry Pte Ltd on 16 April 2012.
[33] *Gennari v. Weichert Co. Realtors* 148 N.J. 582, 589-613, 691 A. 2d 350, 353-269 (N.J. ,1997)
[34] *Allen v. V and A Bros. Inc* (A-30-10)(066568) Decided July 7, 2011
[35] Collusive Tendering (Bid-Rigging) for Termite Treatment/Control Services by certain Pest Control Operators I Singapore (CCS 600/008/06) at [184]
[36] *SA Musique Diffusion Francaise and Others v Commission* [1983] ECR 1825 at [97]
[37] *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2004] CAT 24 at [771]
[38] *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2004] CAT 24 at [771]
[39] *Safeway Stores Ltd and others v Twigger and others* [2010] EWCA Civ 1472 – The appeal in this case was in relation to Safeway seeking to recover the costs of the penalty imposed on it by the OFT from its directors and

under the UK Competition Act was not vicarious in nature but personal to the undertaking which had infringed, and the principles of whether acts of an agent were in breach of his duty to his principal could not apply. Similarly, the Singapore Competition Act (Cap. 50B) which was based on the UK Competition Act provides that liability under the section 34 prohibition is imposed on the undertaking i.e. the companies in this case, and not on individuals.

42. CCS is of the view that Batam Fast's liability is not predicated upon the strict application of the concept of *ultra vires* or vicarious liability under the law of agency. In any event, CCS notes that the discussions and representations carried out by Chua Choon Leng, who was employed by Batam Fast as its Passage Operations Manager, were made on behalf of Batam Fast in the ordinary course of its business. CCS notes that Liu Nam Leong had, in his interview with CCS on 25 January 2011, stated the following:

Q. 55. Who did you have communications with in Batam Fast in relation to the ticket prices charged to corporate clients, travel agents and walk-in- customers?

A: Only verify with Chua and Eric on few occasions, when customer feedback to us on the other party's price and ask for price reduction.

43. Based on the facts and evidence of the case, it is clear that Liu Nam Leong of Penguin, in particular, treated Chua Choon Leng as representing Batam Fast on the occasions when Liu Nam Leong verified with Chua Choon Leng the prices that Batam Fast quoted to their corporate clients or travel agents.

C. Agreements and/or Concerted Practice

44. 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 non-enforceable 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.[40]

45. The section 34 Prohibition also applies to concerted practices. There is a concerted practice if parties, even if they do not enter into an agreement, knowingly substitute the risks of competition with practical cooperation between them.[41] It is CCS' view that the Parties entered into a concerted practice in this case.

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employees who were responsible for the infringement. However, the principle that the liability of undertakings found under the UK Competition Act is not based on vicarious liability is relevant.

[40] Paragraph 2.10 of the CCS Guidelines on the Section 34 Prohibition.

[41] Paragraph 2.16 of the CCS Guidelines on the Section 34 Prohibition. At [206 (iii)] of *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4.

46. As CCS stated in the *Pest Control Case*,[42] and subsequently in the *Express Bus Operators Case*[43] and the *Electrical Works Case*:[44]

> "*the concept of a concerted practice must be understood in the light of the principle that each economic operator must determine independently the policy it intends to adopt on the market*."

47. This principle was set out in the decision of the European Court of Justice ("ECJ") in the case of *Cooperatiëve Vereniging Suiker Unie v Commission*,[45] where it was held that that any direct or indirect contact between competitors, the object or effect whereof is either to influence the conduct on the market of an actual 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 is strictly precluded:

> 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.
>
> 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 whom 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*

[42] [2008] SGCCS 1 at [42].
[43] [2009] SGCCS 2, at [50].
[44] [2010] SGCCS 4 at [40].
[45] Joined cases 40 -8, 50, 54 -6, 111, 113 and 114-73 [1975] ECR- 1663. See also Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85, C-125/85 to C-129/85, *Ahlstr_m Osakeyhti_ and Others v Commission*, [1993] ECR I-01307 at [63].

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]

48. In *Tate & Lyle plc v Commission*,[46] a case which concerned a series of meetings between British Sugar and its competitors, Tate & Lyle and Napier Brown, the Court of First Instance ("CFI") (now European General Court) 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.
>
> 58 In Case T-1/89 *Rhône-Poulenc v Commission* [1991] ECR II -867, in which the applicant had been accused of taking part in meetings at which information was exchanged amongst 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]

49. Finally, in *T-Mobile v Netherlands v Raad van Bestuur van de Nederlandse Mededingingsautoriteit*[47] the ECJ found that a concertation may involve exchanges between parties at a single meeting or a selective basis in relation to a one-off alteration in the market. The ECJ held:

> 59 Any other interpretation would be tantamount to a claim that an isolated exchange of information between competitors could not in any case lead to concerted action that is in breach of the competition rules laid down in the Treaty. Depending on the structure of the market, the possibility cannot be ruled out that a meeting on a single occasion between competitors, such as that in question in the main

[46] Case T-202/98, T-204/98 and T-207/98 [2001] ECR II-2035 (upheld by the Court of Justice in its judgment of 29 April 2004 in Case C-359/01P *British Sugar plc v Commission*).
[47] *T-Mobile v Netherlands v Raad van Bestuur van de Nederlandse Mededingingsautoriteit* Case C-8/08, 4 June 2009.

proceedings, may, in principle, constitute a sufficient basis for the participating undertakings to concert their market conduct and thus successfully substitute practical cooperation between them for competition and the risk that that entails.

60 ...the number frequency, and form of meetings between competitors needed to concert their market conduct depend on both the subject-matter of that concerted action and the particular market conditions. If the undertakings concerned establish a cartel with a complex system of concerted action in relation to a multiplicity of aspects of their market conduct, regular meetings over a long period may be necessary. If, on the other hand, as in the main proceedings, the objective of the exercise is only to concert action on a selective basis in relation to a one-off alteration in market conduct with reference simply to one parameter of competition, a single meeting between competitors may constitute a sufficient basis on which to implement the anti-competitive object which the participating undertakings aim to achieve.

61 In these circumstances, what matters is not so much the number of meetings held between the participating undertakings as whether the meeting or meetings which took place afforded them the opportunity to take account of the information exchanged with their competitors in order to determine their conduct on the market in question and knowingly substitute practical cooperation between them for the risks of competition. Where it can be established that such undertakings successfully concerted with one another and remained active on the market, they may be justifiably called upon to adduce evidence that that concerted action did not have any effect on their conduct on the market in question.

62. In the light of the foregoing ... *in so far as the undertaking participating in the concerted action remains active on the market in question, there is a presumption of a causal connection between the concerted practice and the conduct of the undertaking on that market, even if the concerted action is the result of the meeting held by the participating undertakings on a single occasion.* [Emphasis added]

50. While it is CCS' view in this case that the Parties had concerted their market conduct and thus substituted practical cooperation between them for competition and the risk that that entails, it has also been established in the

jurisprudence of the European Union that it is not necessary to characterise the conduct in question as exclusively an agreement or a concerted practice.[48] This position was endorsed and followed by CCS in the *Pest Control Case*,[49] *Express Bus Operators Case*[50] and the *Electrical Works Case.*[51] Instead, the important distinction is whether the behaviour is collusive or not. As stated by the European Commission in the *Polypropylene*[52] case,

> "The importance of the concept of a concerted practice does not thus result so much from the distinction between it and an 'agreement' as from the distinction between forms of collusion falling under Article 85(1) [now Article 101] and mere parallel behaviour with no element of concertation."

51. The above principles are encapsulated and explained in detail in the Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements[53]:

> 60. Information exchange can only be addressed under Article 101 if it establishes or is part of an agreement, a concerted practice or a decision by an association of undertakings. The existence of an agreement, a concerted practice or decision by an association of undertakings does not prejudge whether the agreement, concerted practice or decision by an association of undertakings gives rise to a restriction of competition within the meaning of Article 101(1). In line with the case-law of the Court of Justice of the European Union, the concept of a concerted practice refers to a form of coordination between undertakings by which, without it having reached the stage where an agreement properly so- called has been concluded, practical cooperation between them is knowingly substituted for the risks of competition. The criteria of coordination and cooperation necessary for determining the existence of a concerted practice, far from requiring an actual plan to have been worked out, are to be understood in the light of the concept inherent in the provisions of the Treaty on competition, according to which each company must determine independently the policy which it intends to adopt on the internal market and the conditions which it intends to offer to its customers.

[48] *SA Hercules Chemicals v Commission,* Case T-7/89 [1991] ECR II-711, at [264]. Also see *The Community v Interbrew NV and others (re the Belgian beer cartel),* Case IV/37.614/F3 [2004] CMLR 2, at [223].
[49] See [2008] SGCCS 1, at [44] to [47].
[50] See [2009] SGCCS 2, at [55] to [58].
[51] See [2010] SGCCS 4, at [45] to [47].
[52] Case 86/398 OJ 1986 L 230/1 at [87].
[53] [2011] OJC 11/1.

> 61. This does not deprive companies of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors. It does, however, preclude any direct or indirect contact between competitors, the object or effect of which is to create conditions of competition which do not correspond to the normal competitive 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. This precludes any direct or indirect contact between competitors, the object or effect of which is to influence conduct on the market of an actual or potential competitor, or to disclose to such competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market, thereby facilitating a collusive outcome on the market. Hence, information exchange can constitute a concerted practice if it reduces strategic uncertainty in the market thereby facilitating collusion, that is to say, if the data exchanged is strategic. Consequently, sharing of strategic data between competitors amounts to concertation, because it reduces the independence of competitors' conduct on the market and diminishes their incentives to compete.

Party to a Concerted Practice

52. CCS is of the view that contact between competitors which would erode the independence of individual undertakings, may take the form of discussions on such issues during meetings, in tele-conversations, and via e-mail communications. So long as information is clearly and unequivocally communicated, it is indistinguishable for the purposes of establishing liability how the communication took place. In line with case law, liability can be attributed even where a party is a mere recipient of the information, unless the party distances itself from the unlawful initiative.

53. In *Cimenteries v Commission*,[54] the appellants had argued that merely letting a competitor know of its intention could not have amounted to a concerted practice. In rejecting this argument, the CFI held that:

> 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
> ...

[54] Case T-25/95 [2000] ECR II-491.

> 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 [on the market to be expected on his part].

54. In this respect, CCS notes that the disclosure of strategic pricing information which is not readily accessible serves to eliminate or reduce uncertainty associated with competition, and in fact facilitates the creation of a climate of mutual certainty between the Parties in relation to their future pricing policies. As stated in the cases cited in paragraphs 47 to 49, where the exchange of information between competitors results in a reduction of uncertainty between the parties, this is sufficient to establish that there has been a concerted practice.

55. CCS further notes that the mere fact that a party may have played only a limited part in setting up the agreement 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 was not party to the agreement or concerted practice.[55] Active steps should be taken by the recipient of the information to distance itself from the conduct. In this regard, while this case concerns contact between competitors via email, CCS finds the decisions where there was a public exchange of information and expressions of intention of collusion by parties involved in meetings to be equally relevant. These cases would be considered in turn in the ensuing sections.

56. In the *Pest Control Case*, one of the infringing parties, Aardwolf, claimed that it had never intended to abide by the agreement to submit cover bids in support of the designated winner. Aardwolf had claimed that it gave the other parties the impression that it was participating in the agreement so that it could use the information on the tender it received from the other pest-control operators to gain a competitive advantage over the others. In rejecting Aardwolf's argument, CCS found:

> …that an agreement would still be caught under the section 34 prohibition even if it was not the intention of an undertaking so agreeing to implement or adhere to the terms of the agreement.[56]

[55] Paragraph 2.11 of the CCS Guidelines on the Section 34 Prohibition.
[56] Collusive Tendering (Bid-Rigging) for Termite Treatment/Control Services by certain Pest Control Operators in Singapore (CCS 600/008/06), at [120] to [128].

57. The position espoused by CCS is consistent with the case law of the European Union. In *Aalborg Portland AS v Commission*,[57] the ECJ held that:

> 82. The reason underlying that principle of law is that, having participated in the meeting without publicly distancing itself from what was discussed, the undertaking has given the other participants to believe that it subscribed to what was decided there and would comply with it.
>
> 84. In that regard, a party which *tacitly approves* of an unlawful initiative, *without publicly distancing itself from its content or reporting it to the administrative authorities, effectively encourages the continuation of the infringement and compromises its discovery. That complicity constitutes a passive mode of participation in the infringement which is therefore capable of rendering the undertaking liable in the context of a single agreement*.
>
> 85. *Nor is the fact that an undertaking does not act on the outcome of a meeting having an anti-competitive purpose such as to relieve it of responsibility for the fact of its participation in a cartel, unless it has publicly distanced itself from what was agreed in the meeting.*
>
> 86. Neither is the fact that an undertaking has not taken part in all aspects of an anti-competitive scheme or that it played only a minor role in the aspects in which it did participate material to the establishment of the existence of an infringement on its part. Those factors must be taken into consideration only when the gravity of the infringement is assessed and if and when it comes to determining the fine (see, to that effect, *Commission* v *Anic*, paragraph 90). [Emphasis added]

58. Where a party wishes to publicly distance itself from such arrangements, it has to show that it has taken active steps to do so. It was held by the CFI in *Westfalen v Commission* that silence at a meeting during which parties colluded unlawfully on a precise question of pricing policy was not tantamount to an expression of firm and unambiguous disapproval.[58] Further, a party's disagreement with what was proposed at the meeting is not sufficient to amount to public distancing. This position was endorsed by the CFI in *LR AF 1998 v Commission*[59] and by the CAT in the United Kingdom in *JJB Sports Plc v*

[57] 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.*
[58] Case T-303/02 *Westfalen Gassen Nederland BV v Commission* [2007] 4 CMLR 334 at [124].
[59] Case T-23/99 *LR AF v Commission* [2002] ECR II-1705. See [55].

Office of Fair Trading.[60] CCS thus notes that silence at a meeting or disagreement with the substance of the proposal does not constitute an unequivocal communication that the party disagrees with the unlawful initiative. CCS considers that these principles also apply with regard to silence following the receipt of sensitive and confidential price information.

59. The steps taken in relation to public distancing must be shown to have had the effect of pronouncing the relevant party's disagreement to the other parties involved in the meeting or anti-competitive arrangements. This was considered in detail by the CFI in *Adriatica v Commission*[61] which set out the requirements for an undertaking to publicly distance itself in order to have the effect of conveying its disagreement to the other undertakings in the meeting:

> 137. Contrary to the applicant's submission, there is no question of requiring evidence that is impossible to furnish. *In order to avoid liability by distancing itself, an undertaking which has attended meetings with an anti-competitive purpose need do no more than inform the other companies represented, with sufficient clarity, that, despite appearances, it disagrees with the unlawful steps which they have taken.* The fact, to which the applicant points, that the meetings in question were held in circumstances where minutes were generally not taken and where the participants generally took no notes has no effect on the extent to which an undertaking must distance itself publicly if liability is to be avoided. Indeed, the contrary is true: in such a context only an undertaking which proves that it firmly and clearly expressed its disagreement can satisfy the test of having publically distanced itself, as required by case-law. *Contrary to the applicant's suggestion, that case-law does not indicate that mere assertions by its competitors can provide sufficient evidence that an undertaking has distanced itself. What must be proved is that the means chosen by the undertaking in order publicly to distance itself did in fact have the effect of conveying its disagreement to the other undertakings that attended the meeting.* [Emphasis added]

60. In summary, the jurisprudence from other jurisdictions such as the European Union and the United Kingdom is clear on the categorisation of exchanges of current or future price information as a restriction of competition by object and on the remedial action that must be taken following an exchange of such price information. As a unilateral disclosure may in itself be indicative of an agreement or concerted practice, parties receiving the information will be presumed to be liable unless they distance themselves with sufficient clarity.

[60] *JJB Sports Plc v Office of Fair Trading* [2004] CAT 17, at [879].
[61] Case T-61/99 *Adriatica di Navigazione SpA v Commission* [2003] ECR II 05349.

The legal threshold for parties to avoid liability as discussed above is understandably high, and mere assertions to the effect that the party receiving the information distanced itself from the anti-competitive arrangement are insufficient. Indeed, the Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements[62] states that:

> 62. A situation where only one undertaking discloses strategic information to its competitor(s) who accept(s) it can also constitute a concerted practice. Such disclosure could occur, for example, through contacts via mail, emails, phone calls, meetings etc. It is then irrelevant whether only one undertaking unilaterally informs its competitors of its intended market behaviour, or whether all participating undertakings inform each other of the respective deliberations and intentions. When one undertaking alone reveals to its competitors strategic information concerning its future commercial policy, that reduces strategic uncertainty as to the future operation of the market for all the competitors involved and increases the risk of limiting competition and of collusive behaviour. For example, mere attendance at a meeting where a company discloses its pricing plans to its competitors is likely to be caught by Article 101, even in the absence of an explicit agreement to raise prices. When a company receives strategic data from a competitor (be it in a meeting, by mail or electronically), it will be presumed to have accepted the information and adapted its market conduct accordingly unless it responds with a clear statement that it does not wish to receive such data.

61. CCS is thus of the view that any form of correspondence or discussions on strategic data such as pricing information, which data is sensitive and confidential, relating to a competitor's future conduct on the market which affects competition, should be assessed on the basis of the same principles. This position was also taken in the *Employment Agencies Case* where it was clearly stated that "in order to avoid liability by publicly distancing itself, an undertaking must inform the other companies represented with sufficient clarity, that, despite appearances, it disagrees with the unlawful steps which they have taken"[63]. Unless a party can adduce sufficient evidence that it has publicly or unequivocally distanced itself from the communication, the presumption would have been raised that the party had subscribed to what has been communicated. Hence, a passive recipient of sensitive and confidential information from and relating to the future conduct of its competitors, in the

[62] [2011] OJC 11/1.
[63] [2011] SGCCS 5 at [54]

absence of any legitimate purpose for the conveyance of such information and the public or unequivocal distancing from the same, would be considered to be a participant to a concerted practice.

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

62. 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 its plain reading, "object" and "effect" are read disjunctively and are not cumulative requirements.

63. As elaborated in CCS' Guidelines on the Section 34 Prohibition,[64] agreements or concerted practices concerning the exchange of information on prices may lead to price co-ordination and therefore diminish competition, which would otherwise be present between the undertakings. This includes the exchange of information in relation to the prices charged or to the elements of a pricing policy, such as an undertaking's costs, terms of trade and dates of change. It is also noted that price announcements made in advance to competitors may be anti-competitive where they facilitate collusion.[65]

64. Whether the exchange of price information has the object of preventing, restricting or distorting competition depends on the facts and circumstances of each case and must be analysed in its legal and economic context. European jurisprudence has set out that in order to assess whether a concerted practice is anticompetitive, "*close regard must be paid in particular to the objectives which it is intended to attain and its economic and legal context*." [66] Furthermore, "*while the intention of the parties is not an essential factor in determining whether a concerted practice is restrictive there is nothing to prevent the Commission of the European Communities or the competent Community judicature from taking it into account*".[67]

65. CCS found in the *Pest Control Case*,[68] which was subsequently applied in the *Express Bus Operators Case*,[69] *Electrical Works Case*,[70] and the *Employment Agencies Case*,[71] that the object of an agreement or concerted practice is not based on the subjective intention of the parties when entering into an agreement, but rather on:

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[64] See paragraphs 3.21 and 3.22 of the CCS Guidelines on the section 34 Prohibition.
[65] See paragraph 3.21 of the CCS Guidelines on the section 34 Prohibition.
[66] *T-Mobile v Netherlands v Raad van Bestuur van de Nederlandse Mededingingsautoriteit* Case C-8/08, 4 June 2009 at paragraph 27 (see also Joined Case 96/82 to 102/82, 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ International Belgium and Others v Commission* [1983] ECR 3369, at [25] and Case C-209/07 *Beef Industry Development Society and Barry Brothers* [2008] ECR1-0000, at [16] and [21]).
[67] *Ibid* (see also *IAZ International Belgium and Others v Commission*, at [23] to [25]).
[68] [2008] SGCCS 1.
[69] [2009] SGCCS 2.
[70] [2010] SGCCS 4.
[71] [2011] SGCCS 5.

> …..the objective meaning and purpose of the agreement considered in the economic context in which it is to be applied. Where an agreement has as its object the restriction of competition, it is unnecessary to prove that the agreement would have an anti-competitive effect in order to find an infringement of section 34.[72]

66. European jurisprudence has established in earlier decisions that a concerted practice may be established in the absence of an actual effect on the market.[73] In *T-Mobile v Netherlands v Raad van Bestuur van de Nederlandse Mededingingsautoriteit*,[74] the ECJ had in response to the referring court's first question on the criterion to be applied when assessing whether a concerted practice has as its object the prevention, restriction or distortion of competition within the common market under Article 81(1), made a preliminary ruling that:

> 43. In light of all the foregoing considerations, the answer to the first question must be that a concerted practice pursues an anti-competitive object for the purpose of Article 81(1) EC where, according to its content and objectives and having regard to its legal and economic context, it is capable in an individual case of resulting in the prevention, restriction or distortion of competition within the common market. It is not necessary for there to be actual prevention, restriction or distortion of competition or a direct link between the concerted practice and consumer prices. An exchange of information between competitors is tainted with an anticompetitive object if the exchange is capable of removing uncertainties concerning the intended conduct of the participating undertakings.

67. The European position is consistent with that in the United Kingdom. In *Argos Limited and Littlewoods Limited v OFT*,[75] heard before the CAT, the Office of Fair Trading ("OFT") had sought to support its case that there was a price-fixing agreement by drawing attention to the difference in prices in the relevant catalogues before the alleged agreements or concerted practices and the high degree of similarity in the relevant prices thereafter. In response, the CAT said:

> 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

[72] See *Pest Control Case* [2008] SGCCS 1, at [49], *Express Bus Operators Case* [2009] SGCCS 2, at [71], *Electrical Works Case,* [2010] SGCCS 4, at [49] and *Employment Agencies Case,* [2011] SGCCS 5, at [61].
[73] *Hüls AG v. Commission,* Case C-199/92 [1999] ECR I-4287, at [164] to [168].
[74] Supra Case C-8/08, 4 June 2009, fn. 47.
[75] [2004] CAT 24.

58/64 *Consten and Grundig v Commission* [1966] ECR 299, 342 and many subsequent cases.

68. Given that this case concerns the exchange and provision of sensitive and confidential price information[76] and in view of the economic circumstances, including the number of market players in the market, CCS considers this case to be one involving a concerted practice with the object of preventing, restricting or distorting competition. In doing so, CCS has taken into account the aims and purposes of the said exchange of price information in light of its legal and economic context as set out in Chapter 2, part E below. In light of the case law, it is reiterated that there is no necessity for there to be a direct link between the conduct in question and consumer prices, in order to establish that a concerted practice has an anticompetitive object.[77]

E. Appreciable adverse effect on competition

69. CCS had stated in its Guidelines on the Section 34 Prohibition that agreements or concerted practices will fall within the scope of the Section 34 Prohibition if they have as their object or effect the *appreciable* prevention, restriction or distortion of competition in Singapore.[78]

70. CCS first notes that the requirement of appreciable adverse effect is not a legal requirement. However, CCS has stated previously that an agreement between competing undertakings will generally have no appreciable adverse effect on competition if the aggregate market share of the parties does not exceed 20% on any of the relevant markets affected by the agreement.[79] However, this does not apply to agreements or concerted practices involving price-fixing, bid-rigging, market-sharing or output limitations, which CCS generally considers to have an appreciable adverse effect on competition, notwithstanding the fact that the market shares of the parties are below the 20% threshold level and even if the parties to such agreements are SMEs.[80]

71. As noted in paragraph 68, CCS considers that in the circumstances of this case, the conduct involving the exchange and provision of price information between Batam Fast and Penguin in relation to the sale of ferry tickets to corporate clients and travel agents to various destinations in Batam has the object of restricting competition. CCS takes the view that such restrictions would not be subject to enforcement under the Section 34 Prohibition if they have an insignificant effect on the market, for example, in light of the extremely low market shares of the parties to the agreement or concerted practice.[81]

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[76] See parts E and G below.
[77] *T-Mobile v Netherlands v Raad van Bestuur van de Nederlandse Mededingingsautoriteit* Case C-8/08, 4 June 2009 at [39].
[78] See paragraph 2.18 of CCS' Guidelines on the Section 34 Prohibition.
[79] See paragraph 2.19 of CCS' Guidelines on the Section 34 Prohibition.
[80] See paragraph 2.20 of CCS' Guidelines on the Section 34 Prohibition.
[81] Case C-5/69, *Völk v. Vervaecke*, [1969] ECR 295.

72. In this case, CCS considered that even if the relevant markets were considered more broadly, i.e. for the relevant market to consist of all routes from Singapore to Batam, it is estimated that the Parties would still have a combined market share of [✂]%.[82] As such, CCS takes the view that it cannot be argued that the conduct involving the exchange and provision of price information between Batam Fast and Penguin in relation to the sale of ferry tickets to Batam and Singapore corporate clients and travel agents has an insignificant effect on the market in light of: (i) the market shares of the Parties and the structure of the market, and (ii) the importance of price competition in the relevant markets affected by the Infringing Conduct as discussed in paragraphs 23 to 35.

(i) Assessing the restriction of competition by object

73. As set out in Chapter 2 Part C, CCS is of the view that where a concerted practice is found to have the object of appreciably preventing, restricting or distorting competition, it would not be necessary to show the actual effects of such arrangements. While considerations such as the intention of parties may be taken into consideration in determining whether an agreement is restrictive, it is *not* a necessary factor in making a finding of whether there has been a restriction of competition by object.[83]

74. CCS has examined the jurisprudence of the European Union where the economic context in which the concerted practices operated was similar to that of the present case, namely that of a highly concentrated market akin to that of a duopoly.

75. The *UK Agricultural Tractor Exchange*[84] case is a seminal decision on the finding of an infringement in relation to the exchange of detailed sales data between competitors in a highly concentrated market for the manufacture and importation of agricultural machinery in the United Kingdom. The data exchanged included the exact volume of retail sales and the exact market shares of the competitors in the United Kingdom tractor market. The data was further broken down by product, territory and time periods, which created a higher degree of market transparency between the competitors. The market structure was such that there were four major suppliers of agricultural tractors in the United Kingdom making up approximately 80% of the market (each holding market shares of between 15% and 25%), and seven suppliers with 87-88% of the market (constituting the main suppliers in the United Kingdom). The remaining 12% was made up by small manufacturers who were not involved in the information exchange.

[82] See Answer to Question 24 of Paul Gannaway's Notes of Information/Explanation provided on 8 February 2011.
[83] *GlaxoSmithKline Services v Commission*, Joined cases C-501/06 P, C513/06 P, C-515/06 P and C-519/06 P, 6 October 2009 at [58].
[84] *UK Agricultural Tractor Exchange*, O.J. 1992, L68/19.

76. The case sets out the principles and relevant factors considered by the Commission when assessing the potential restrictive effects of the exchange of information. The Commission's decision was upheld on appeal by both the CFI and the ECJ. The Commission based its infringement decision on four main findings, i.e. (i) the highly concentrated nature of the market, (ii) the confidential nature of the information exchanged, (iii) the extremely detailed level of information exchanged, in terms of product and geographical breakdown, and time periods taken into account, which created an even higher degree of transparency in an already highly concentrated market, and (iv) the fact that the participants in the exchange system met regularly within an industry association giving them a forum for contacts.

77. Whilst there was no exchange of price information per se, there were several factors that the Commission took into consideration which are relevant to the assessment of whether or not an agreement has the object of restricting competition. The Commission observed that the increased level of transparency in an already highly concentrated market would prevent residual hidden competition (or the "surprise effect") between the participants in the exchange of information, who would be less exposed to the aggressive reaction of the other market players. The Commission further noted that in concentrated markets, secrecy and uncertainty, are the key factors in residual competition:

> (37) The [*UK Agricultural Tractor*] Exchange restricts competition because it creates a degree of market transparency between the suppliers in a highly concentrated market which is likely to destroy what hidden competition there remains between the suppliers in that market on account of the risk and ease of exposure of independent competitive action. In this highly concentrated market, 'hidden competition' is essentially that element of uncertainty and secrecy between the main suppliers regarding market conditions without which none of them has the necessary scope of action to compete efficiently.
>
> Uncertainty and secrecy between suppliers is a vital element of competition in this kind of market. Indeed active competition in these market conditions becomes possible only if each competitor can keep its actions secret or even succeeds in misleading its rivals.
>
> This reasoning, however, in no way undermines the positive competitive benefits of transparency in a competitive market characterized by many buyers and sellers. Where there is a low degree of concentration, market transparency can increase competition in so far as consumers benefit from choices made in full knowledge of what is on offer. It is emphasized that the United Kingdom

> tractor market is neither a low concentration market nor is the transparency in question in any way directed towards, or of benefit to, consumers.
>
> On the contrary, the high market transparency between suppliers on the United Kingdom tractor market which is created by the Exchange takes the surprise effect out of a competitor's action thus resulting in a shorter space of time for reactions with the effect that temporary advantages are greatly reduced. Because all competitive actions can immediately be noticed by an increase in sales, the consequences are that in the case of a price reduction or any other marketing incentives by one company, the other can react immediately, thus eliminating any advantage of the initiator. This effect of neutralizing and thus stabilizing the market positions of the oligopolists is in this case likely to occur because there are no external competitive pressures on the members of the Exchange except parallel imports which are however also monitored as has been explained above.
>
> [Words in italics ours]

78. CCS notes that it is pertinent that in the *UK Agricultural Tractors'* case,[85] there was no actual exchange of price information, unlike in the present case.

79. Recently, in *T-Mobile v Netherlands v Raad van Bestuur van de Nederlandse Mededingingsautoriteit*, [86] the ECJ also took a strict view on information exchanges and held that "…*an exchange of information which is capable of removing uncertainties between participants as regards the timing, extent and details of the modifications to be adopted by the undertaking concerned must be regarded as pursuing an anti-competitive object*". [87] The ECJ further confirmed that even a limited exchange of information in the context of a single meeting can be infringing.

80. This position is set out in the EU Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements[88] where it is stated:

> "72. Any information exchange with the objective of restricting competition on the market will be considered as a restriction of competition *by object***.** [...]

[85] Supra *UK Agricultural Tractor Exchange*, fn 84.
[86] Case C-8/08, 4 June 2009 at [31-32].
[87] Case C-8/08, 4 June 2009 at [41]
[88] [2011] OJC 11/1

> 74. Information exchanges between competitors of individualised data regarding intended future prices or quantities should therefore be considered a restriction of competition by object. In addition, *private exchanges between competitors of their individualised intentions regarding future prices or quantities would normally be considered and fined as cartels because they generally have the object of fixing prices or quantities*. [...]" [Emphasis added]

81. CCS notes that where the market in question is highly concentrated with both the Singapore (HarbourFront)-Sekupang and the Singapore (HarbourFront)-Batam Centre routes being characterised as a duopoly at the material time, any disclosure of pricing behaviour is particularly restrictive to competition as it invariably removes uncertainty as to the conduct of the party making the disclosure. Markets in which price competition is already limited by extraneous factors will have to be examined very carefully to ensure that the parties themselves do not do anything further to limit competition.[89] This has been held to be specifically the case in an oligopolistic market where competition is already restricted.[90]

82. It is also noteworthy that the uncertainty as regards the pricing policy in oligopolistic markets is the main driving force of competition in such a market. The CFI in *Tate & Lyle plc v Commission*[91] considered that in highly concentrated markets where price competition is marginal, and where it would be possible for the operators to obtain the price information after the unlawful meeting, the exchange of price information had the object of restricting competition. The CFI held that despite having had regard to the structure of the market, "the fact remains that uncertainty as to the pricing policies which the other operators intend to practise in the future constitutes the main stimulus to competition in such a market must be accepted."[92]

83. Batam Fast submitted[93] that while the market shares in the Singapore (HarbourFront)-Sekupang and the Singapore (HarbourFront)-Batam Centre sectors were practically shared between Batam Fast and Penguin during the material period, it was for all intents and purposes coincidental and not by design. The port operators in Singapore and Batam had not imposed any restriction as to which operator may operate in these sectors and it was open for any qualified and licensed operators to ply the various routes. Batam Fast also submitted that the characteristics of a typical duopoly such as barriers to entry, interdependent actions, and non-price competition were not exhibited in this case as there were no implied and explicit barriers to entry in the subject ports,

[78] Supra *Tate & Lyle plc v Commission,* fn 42.
[90] Supra *Tate & Lyle plc v Commission,* fn 46.
[91] Supra *Tate & Lyle plc v Commission,* fn 46.
[92] Supra *Tate & Lyle plc v Commission*, fn 46 at [46].
[93] Representations made by Batam Fast Ferry Pte Ltd on 16 April 2012.

and no indications of interdependent actions that were purposely collaborative, and there was actual and functioning price competition between the Parties. They maintained that except for the trip rationalisation for the Singapore (HarbourFront)-Sekupang route imposed by the SCCPL, there was no evidence of a deliberate concerted effort to reduce competition on the part of Batam Fast and Penguin.

84. In the ID, CCS based its assessment of the industry on a factual assessment of the market share of Batam Fast and Penguin at the material time. It was a material fact that only two ferry operators, namely Batam Fast and Penguin, were providing passenger ferry services between Singapore (HarbourFront)-Sekupang, as well as the route between Singapore (HarbourFront)-Batam Centre; how this came about is irrelevant for the purposes of determining liability in this matter. Even if the state of affairs was not one of design, it did not change the fact that the market was one that was characterised by a duopoly and had only two players for the two routes. Most importantly, it did not change the conclusion that, given the structure of the relevant market, any anti-competitive conduct between Batam Fast and Penguin (which is factually demonstrated in this case) would affect the competitive process appreciably.

85. Further, CCS notes that apart from the trip rationalisation efforts for the Singapore (HarbourFront)-Sekupang route, there had been ongoing exchanges and provision of information between Batam Fast and Penguin, and as such, submissions in this regard are not accepted.

F. Burden and Standard of Proof

86. The burden of proof rests on CCS to prove the infringements in question. Infringements of Section 34 Prohibition are not criminal offences. Hence, the standard of proof to be applied in deciding whether an infringement of the section 34 prohibition has been established is the civil standard, that is, on a balance of probabilities. This was also the standard of proof that was applied in the *Express Bus Operators* case by the Competition Appeal Board ("CAB") in deciding the merits of the appeal.[94]

87. In this regard, CCS notes that in *Westfalen v Commission*,[95] the CFI was of the view that given the clandestine nature of cartels, where little or nothing may be committed in writing, every piece of evidence, even wholly circumstantial evidence, depending on the particular context and the particular circumstances, may be sufficient to meet the required standard. This position was earlier set out in *Aalborg Portland v Commission*[96] where the ECJ stated:

[94] *Konsortium Express & Others v CCS (Appeals Nos. 1 and 2 of 2009)*
[95] Supra *Westfalen Gassen Nederland BV v Commission*, fn 58, at [106-107].
[96] Cases C-204/00 P etc [2004] ECR I-23 at paragraphs [55-57]. See also *Durkan Holdings Ltd & Ors v Office of Fair Trading* at paragraph 96.

56 Even if the Commission discovers evidence explicitly showing unlawful contact 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 anti-competitive 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.

88. CCS is of the view that it has proved the infringement findings to the requisite standard. The evidence that CCS relies on in support of its ID against the Parties is set out in Chapter 2, Section G.

G. The Evidence relating to the Agreements and/or Concerted Practices

89. This part of the ID deals with the evidence proving the Parties' conduct as follows:

i. The Parties' pre-existing Commercial Agreement;
ii. The relationship of the Parties;
iii. Facts and evidence on the exchange and provision of information on prices for travel agents and corporate clients;
iv. CCS' analysis of evidence; and
v. CCS' conclusion on the infringement.

(i) The Parties' Pre-existing Commercial Agreement

90. Penguin and Batam Fast submitted that they had entered into a commercial agreement which was in effect from 4 December 2007 to 21 June 2011[97] for round trips from Singapore (HarbourFront) to Sekupang (the "Commercial Agreement"). According to the Parties, the scope of the Commercial Agreement included the following:[98]

a. Each operator would carry stock of the other's one-way tickets. The transfer tickets would have a three month validity from the date of issue;

b. Each operator would be allowed to include the other operator's timings on his schedule, however each operator would indicate that the ferry was operated by the other operator;

c. When an operator's passenger approached its counter wishing to depart for Sekupang, the operator would offer the passenger the opportunity to transfer to another operator if the next available timing happened to be

[97] http://www.batamfast.com/announ.html
[98] Information provided by Penguin and Batam Fast on 15 March 2010 and 26 January 2010 respectively pursuant to the section 63 notice issued by CCS dated 13 January 2010.

that belonging to another operator. Passengers may also present their ferry ticket and request to board a ferry for a particular slot belonging to that of another ferry operator. During such scenarios, the operator's ticket would be exchanged for the ticket of the operator that would carry the transferred passenger;

d. The operator that sold the ticket would pay the other operator (that carried the transferred passenger) a transfer fee of $20.50 (for an adult) per single trip from Singapore to Sekupang and $23.50 from Sekupang to Singapore. The transfer fee is higher for the trip from Sekupang to Singapore because Sekupang charges a higher terminal fee.

91. Penguin had submitted in their representations[99], that in addition to being offered the opportunity by the ferry operator to transfer to another operator, passengers may also present their ferry ticket and request to board a ferry for a particular slot belonging to that of another ferry operator. CCS duly notes from the representations made by Penguin that this was consistent as an alternative which was presented to passengers.

92. This arrangement was intended to help each operator serve their customers who needed tickets for timeslots which were no longer operated by them. The transfer passengers were allowed to board the carrying operator's ferry, subject to there being available seats on the specific slot requested, on a first-come first-served basis.

93. Penguin[100] submitted two reasons for entering into the Commercial Agreement with Batam Fast. First, it was entered into in response to the reduction of the number of slots allocated by the SCCPL to ferry operators at Harbourfront terminal. Second, the Commercial Agreement was initiated to avoid inefficient usage of slots by Penguin and Batam Fast. According to SCCPL,[101] there was a streamlining exercise of timeslots in 2008 to reduce congestion at the terminals and improve ferry services.

94. Penguin also submitted that both Parties would discuss ferry schedules depending on the demand of their ferry services before submitting their respective recommended ferry schedules to the SCCPL for its final approval.

95. Broadly, there are two elements within the Commercial Agreement, viz. a coordinated schedule between the two operators as approved by SCCPL and the transfer ticket prices independently set by the operators. CCS notes that the Commercial Agreement did not appear to mandate the same transfer ticket

[99] Representations made by M/s Allen & Gledhill on behalf of their client, Penguin Ferry Services Pte Ltd on 23 April 2012 at paragraph 2.4.1.
[100] Information provided by Penguin on 15 March 2010 pursuant to the section 63 notice issued by CCS dated 13 January 2010.
[101] See Answer to Question 18 of the Notes of Information/Explanation Provided by Sumardi Bin Hussein on 29 April 2011 and Answer to Question 18 of the Notes of Information/Explanation Provided by Eddie Tang on 28 April 2011 pursuant to section 63 Notice issued by CCS dated 1 March 2011.

price as well as the components of the transfer ticket price for the ferry operators and as such CCS exercised its discretion not to investigate this as a separate infringement in this ID.

(ii) The relationship of the Parties

96. CCS notes that there is evidence that the ferry operators had been engaging in discussions and exchanging information about ticket prices as far back as October 2006. CCS notes that in the monthly operation review/records of Penguin dated October 2006, an excerpt of the minutes recorded the following:

"All ferry operators in discussion about price increasement [sic] *at Batam Market. In the meeting all agreed on the following prices:*

	Counter	*Outside Market*
2 way Adult Foreign	*$20*	*$18*
2 way Adult Indonesia	*$17*	*$15*
1 way Adult Foreign	*$16*	*$14*
2 way Child Foreign	*$17*	*$12*
1 way Child Foreign	*$12*	*$10*

To prevent any ferry operators further drop the selling price to travel agent, all ferry operators agreed to standardize the selling price to travel agent.

97. Liu Nam Leong of Penguin recalled that this meeting was attended by [✂], Batam Fast and Penguin. The participants of the meeting from Penguin's representatives included Capt Kang (Penguin's then Executive Director), and Liu Nam Leong himself. [✂][102] was represented by [✂] and Paul Gannaway represented Batam Fast.[103] Liu Nam Leong said that "At that point in time, only [✂] and Penguin implemented the price increase for two-way Indonesian passport holder tickets at Batam".

98. Batam Fast's Paul Gannaway denied that he attended the meeting and said that he was not aware of any agreement.[104] Eric Lim of Batam Fast also claimed

[102] CCS decided not to proceed against [✂] as well as both Parties for this information exchange due to reasons set out in paragraph 104 of this ID.
[103] See Answers to Questions 65-67 of Liu Nam Leong's Notes of Information/Explanation Provided on 26 January 2011.
[104] See Answers to Questions 1 to 8 of Paul Gannaway's Notes of Information/Explanation Provided on 1 November 2011 and representations made by Batam Fast Ferry Limited on 16 April 2012.

that he could not recall attending the meeting and he was not aware of the agreement.[105]

99. However, it was recorded in the monthly operation review/records of Penguin dated November 2006 that:

"BatamFast increase their counter selling price for Indo ticket on 2nd Nov to:

2W Adult Indo - $17

1W Adult Indo/Foreign - $14

2W Child Foreign - $17

1W Child Foreign -$12

100. In relation to the applicability of the ticket prices to specific routes, Liu Nam Leong stated that the ticket prices above pertained to routes from Singapore to Sekupang, Singapore to Waterfront City and Singapore to Batam Centre and were only applicable to sales in Batam.[106] Liu Nam Leong also said that the increase of Batam Fast ticket to $17 for a two-way adult Indonesian ticket was the result of the meeting between [✂], Penguin and Batam Fast where they agreed to the increase in the ticket price for the Batam Market as reflected in the monthly operation review/records for October 2006.[107] According to Paul Gannaway, he was not aware of any meeting with Penguin to discuss the increase in counter selling prices. Paul Gannaway added that the information on the counter selling price was made public on the companies' websites and Batam Fast also regularly photographed Penguin's counter and monitored Penguin's website to track their prices.[108]

101. In the monthly operation review/records of Penguin dated January 2007, the following was recorded, "*Dated Jan 23 Jan 07, Meeting with BatamFast personnel, Paul & Eric. Minutes as per below: -Batam Fast brought out the corporate lists and mentioned that Penguin under cut his clients".*

102. In response to questions pertaining to the above-mentioned discussion, Liu Nam Leong said that only Batam Fast showed Penguin its corporate lists in this meeting, while Penguin did not. In relation to the reason why Batam Fast claimed that Penguin undercut its customers, Liu Nam Leong said that he thought it was because Batam Fast's clients switched over to Penguin to buy its

[105] See Answers to Questions 1 to 3 of Eric Lim's Notes of Information/Explanation Provided 28 October on 2011.
[106] See Answers to Questions 72-73 of Liu Nam Leong's Notes of Information/Explanation Provided on 26 January 2011.
[107] See Answer to Question 87of Liu Nam Leong's Notes of Information/Explanation Provided on 26 January 2011.
[108] See Answer to Question 15 to 18 of Paul Gannaway's Notes of Information/Explanation Provided on 1 November 2011.

tickets.[109] According to Paul Gannaway, he had shown Penguin a list of some smaller companies which were affected by the transfer agreement and which Penguin had undercut Batam Fast.[110] Eric Lim said that Paul Gannaway verbally named a few companies which Penguin had counter offered because Paul Gannaway wanted to question Penguin on the reason/s for counter offering their corporate clients and it was a casual talk without any conclusions or follow-up action after the meeting.[111]

103. Batam Fast, in its representations[112], submitted that the purpose of this meeting was not for the purposes of eliminating competition but was within the context of code sharing. Batam Fast alleged that as Penguin had abused the code sharing arrangement by "poaching" known Batam Fast corporate customers with the intention of boarding the said customers in Batam Fast's own trips at the cheaper transfer pricing rates. This resulted in Penguin carrying on their own trips and freeing their capacity for the more profitable non-transfer passengers and at the same time profiting on the transfer transactions for the poached Batam Fast corporate customers. Batam Fast also submitted that the corporate lists shown to Penguin during the meeting were information that was "practically known beforehand" to Penguin and such Batam Fast corporate customers were documented in the daily transfer transactions. Hence, Batam Fast submitted that the purpose of the meeting was to establish fairness in the code sharing arrangement and to confront Penguin's predatory practices and abuse of the code sharing facility.

104. As CCS had exercised its discretion not to investigate the Commercial Agreement as a separate infringement (as it did not mandate the same transfer ticket price as well as the components of the transfer ticket price for the ferry operators), CCS did not delve into the merits of whether there was an overall benefit.

Discussion on Boarding Management System ("BMS") in July 2009

105. Further, investigations revealed that the operators engaged in discussions in July 2009 on issues relating to the BMS fee of about 30 Singapore Cents charged by the Indonesian terminal operator to the ferry operators for every ticket sold. According to Chua Choon Leng,[113] Batam Centre Terminal called for a meeting with Batam Fast and Penguin to talk about increasing the BMS fee. According to both Liu Nam Leong[114] and Chua Choon Leng, the terminal

[109] See Answers to Questions 110 to 112 of Liu Nam Leong's Notes of Information/Explanation Provided on 26 January 2011.
[110] See Answer to Question 22 of Paul Gannaway's Notes of Information/Explanation Provided on 1 November 2011.
[111] See Answer to Question 11 of Eric Lim's Note of Information/Explanation Provided on 28 October 2011.
[112] Representations made by Batam Fast Ferry Limited on 16 April 2012.
[113] See Answers to Questions 119 to 136 of Chua Choon Leng's Notes of Information/Explanation Provided on 8 February 2011.
[114] See Answers to Questions 138 to 154 of Liu Nam Leong's Notes of Information/Explanation Provided on 26 January 2011.

proposed that the ferry operators increase their ticket price to cover the BMS fee. After that meeting, Liu Nam Leong initiated a meeting with Pak Ric from Batam Terminal, for a joint meeting between Penguin, Batam Fast, and the terminal. According to Liu Nam Leong, Chua Choon Leng represented Batam Fast in that meeting. During the meeting, both parties rejected the terminal's proposal to increase their fees to cover the BMS fee.[115] Liu Nam Leong later told Chua Choon Leng that Penguin would not consider increasing its ticket price to cover the BMS charges, and Chua Choon Leng replied that Batam Fast would be absorbing the BMS fee.[116]

106. As set out in paragraphs 96 to 104 above, there was evidence of communications between Batam Fast and Penguin on price-related matters as far back as October 2006. CCS notes that the same staff members involved in these communications were involved in the incidences cited in paragraphs 108 to 140 below which forms the subject matter of this ID. In this regard, CCS would take this evidence into consideration for the purposes of setting the context of the candid nature of the price-sensitive communications taking place between the parties in relation to the other incidents of price information exchange. With the relevant factual and economic context in mind, CCS will proceed to examine individual pieces of evidence in relation to the exchange and provision of sensitive and confidential price information of ferry tickets sold to Singapore corporate clients and travel agents for passengers travelling between Singapore (HarbourFront)-Sekupang and Singapore (HarbourFront)-Batam Centre.

(iii) **Facts and evidence on the exchange and provision of sensitive and confidential information on prices for travel agents and corporate clients for the Singapore market**

107. CCS' investigations[117] revealed that there was exchange and provision of sensitive and confidential price information between Batam Fast and Penguin for ferry tickets sold to travel agents and corporate clients.

Provision of information on prices for travel agents

(a) Email of 17 June 2008

108. On 17 June 2008, Eric Lim of Batam Fast sent an email to Desmond Lee of Desindo Tour, a travel agent.[118] He blind copied the email to Liu Nam Leong of Penguin.[119] An excerpt of the email is as follows:

[115] See Answer to Question 131 of Chua Choon Leng's Notes of Information/Explanation Provided on 8 February 2011.
[116] See Answers to Questions 151-154 of Liu Nam Leong's Notes of Information/Explanation Provided on 26 January 2011.
[117] Documentary evidence was obtained during inspections conducted by CCS pursuant to powers set out in section 64 of the Act ("section 64 inspection") and provided by various parties in response to the notices issued pursuant to powers set out in section 63 of the Act ("section 63 Notice") during the course of the investigation.

From: *Eric [sales@batamfast.com]*
Sent: *Tuesday, 17 June, 2008, 5:55 PM*
To: *DesindoSukses-DesmondLee; DesmondLee168*
Cc: *Shirley*
Subject: *Re: Ferry ticket fare quotation*

Dear Pak Desmond Lee,

Please refer to our offered dated 29th June 2007.

Please be informed that with effect 01-07-2008, ferry ticket fare will be revised as below:

- *HarbourFront Centre to Sekupang -Adult S$15.00 & Child S$15.00*
- *HarbourFront Centre to Batam Centre -Adult S$17.00 & Child S$16.00*
- *HarbourFront Centre to WaterFront City - Adult S$17.00 & Child S$16.00*
  Tanah Merah Ferry Terminal to NongsaPura - Adult S$17.00 & Child S$16.00

All other terms & conditions remain unchanged as per email below.

Thank you & best regards.

(b) Email of 20 May 2009

109. Again, on 20 May 2009, Eric Lim of Batam Fast sent an email to Desmond Lee of Desindo Tour, a travel agent. He again blind copied the email to Liu Nam Leong of Penguin. An excerpt of the email is as follows:

From: *"Eric"<sales@batamfast.com>*
To: *"PT.DesindoTour-Desy"<desy@desindotour.com>; "PT.DesindoSukses-DesmondLee" <desindotours@yahoo.co.id>*
Cc: *"Shirley" <accounts@batamfast.com>; "Sandy" <admin_support@batamfast.com>*
Sent: *Wednesday, May 20, 2009 5.42 PM*
Subject: *Ferry ticket fare quotation*

Dear Pak Desmond Lee,

Please be informed that with effect 01-06-2009, ferry ticket fare will be revised as below:

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[118] Email was provided by Penguin to CCS in response to a section 63 Notice dated 13 January 2010, and subsequently by Batam Fast during the section 64 inspection conducted by CCS on 11 November 2010.
[119] See Answers to Questions 96-98 of Eric Lim's Notes of Information/Explanation Provided on 9 February 2011.

- *HarbourFront Centre to Sekupang -Adult S$15.00 & Child S$15.00*
- *HarbourFront Centre to Batam Centre -Adult S$17.00 & Child S$16.00*
- *HarbourFront Centre to WaterFront City - Adult S$17.00 & Child S$16.00*

  Tanah Merah Ferry Terminal to NongsaPura - Adult S$17.00 & Child S$16.00

The above ferry ticket fares are exclude [sic] SPDF, Surcharge & Batam Terminal Fee.

All other terms & conditions remain unchanged as per email below.

Thank you & best regards.

110. From the plain reading of the 17 June 2008 and 20 May 2009 emails, it can be seen that information was being provided by Batam Fast to its competitor, Penguin, about prospective fare increases to Desindo Tours from four Singapore points of origin to four Batam destinations. This was done surreptitiously by way of a "blind-copy" (i.e. a "Bcc" in common parlance) made to an email sent to a client. In the email dated 17 June 2008, Eric Lim made reference to an offer dated 29 June 2007. This offer was in relation to the prices quoted by Batam Fast to its clients where the ticket fares for four destinations namely Sekupang, Batam Centre, Nongsapura and Waterfront City, were lower at $14.[120]

111. When asked about the email dated 17 June 2008, Paul Gannaway of Batam Fast said that Desindo was not their regular client and while Desindo might have occasionally bought ferry tickets from Batam Fast, they had not been Batam Fast's client for many years and he could not understand why Eric Lim would copy the email to him. He added that he suspected that it was Desindo who had sent the email to Penguin and not Eric Lim.[121] In his opinion, if Eric had blind copied the email to Liu Nam Leong of Penguin, it "*would be just plain stupid*".[122]

112. When Eric Lim of Batam Fast was queried on this, he replied that it was he who *had* blind copied both emails to Liu Nam Leong of Penguin. When asked why he had blind copied this email to Penguin, Eric Lim's explanation was that "*Firstly, Desindo is not my customer, secondly, the main purpose of this email was Desindo's travelling destination is Sekupang. Desindo kept on coming to me and that's why I informed Leong that my ticket price to Desindo would*

[120] See email dated 29 June 2007 sent by Eric Lim to Desmond at 10.32 am. Documentary evidence provided by Batam Fast to CCS following CCS' s.64 inspections.
[121] See Answers to Questions 127 to 136 of Paul Gannaway's Note of Information/Explanation Provided on 8 February 2011.
[122] Ibid.

incur a transfer fee of SGD 2." He added that he wanted to tell Leong that Desindo was coming to him for a quote.[123]

113. Liu Nam Leong of Penguin denied knowing why Eric Lim had blind copied the emails dated 17 June 2008 and 20 May 2009 to him.[124] He claimed that he ignored the emails and did not consider if it was feasible to adjust Penguin's prices after receiving the emails containing the fare revisions from Batam Fast.[125] Following CCS' interviews with Liu Nam Leong, Penguin wrote in with a formal letter which amended their initial submissions[126] to state that "*Penguin assumes that Batam Fast's purpose of forwarding these emails to Penguin was to invite Penguin to fix its prices to Desindo at a similar level*".[127]

114. Additionally, while Liu Nam Leong denied that Penguin's corporate and travel agent price lists would be shared with Batam Fast, he conceded that there were a few occasions when Batam Fast would approach him to verify on Penguin's quotes to corporate clients or travel agents, and that he would verify with them whether this was correct.[128] This verification process was reciprocated by Batam Fast when Penguin made *similar enquiries*.[129] Penguin's conduct in relation to the exchange and provision of sensitive and confidential information on prices for corporate clients is set out in paragraphs 121 to 140 below.

115. Penguin, submitted in its representations[130] that the number of occasions where Batam Fast would approach Liu Nam Leong (Penguin) for verification of quotes were few, and should not be made out to seem that there were many occasions of such exchanges. While CCS had acknowledged that in the interview with Liu Nam Leong he said that there were a few occasions where Batam Fast approached him to verify if Penguin had quoted a corporate client or travel agent a certain price and Liu Nam Leong would then verify with Batam Fast whether the price was correct[131]. When asked if Penguin would verify with Batam Fast the prices that Batam Fast quoted to their corporate

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[123] See Answers to Questions 96 to 110 of Eric Lim's Notes of Information/Explanation Provided on 9 February 2011.
[124] See Answer to Question 1 of Liu Nam Leong's Notes of Information/ Explanation Provided on 26 January 2011.
[125] See Answers to Questions 1-12 of Liu Nam Leong's Notes of Information/ Explanation Provided on 26 January 2011.
[126] The initial submissions made by Penguin claimed that, "*Batam Fast's purpose of forwarding these emails to Penguin was to invite Penguin to fix its prices to Desindo at a similar level*"; such emails were unsolicited and Penguin did not change its prices. The submissions were made by M/s Allen & Gledhill on behalf of their client, Penguin Ferry Services Pte Ltd dated 15 March 2010.
[127] Email submission made by M/s Allen & Gledhill on behalf of their client, Penguin Ferry Services Pte Ltd on 11 February 2011.
[128] See Answer to Question 22 of Liu Nam Leong's Notes of Information/Explanation Provided on 26 January 2011.
[129] See Answer to Question 23 of Liu Nam Leong's Notes of Information/Explanation Provided on 26 January 2011.
[130] Representations made by M/s A&G on behalf of their client, Penguin Ferry Services Pte Ltd on 23 April 2012 at paragraph 2.5.1..
[131] See Answer to Question 21 of Liu Nam Leong's Notes of Information/Explanation Provided on 26 January 2011.

clients or travel agent, Liu Nam Leong reiterated that he would do so (albeit only on a few occasions)[132]. CCS acknowledges Penguin's representations on this point, and has reflected this in the ID accordingly.

116. Similarly, Batam Fast, submitted in its representations[133] that the exchange of information on prices for travel agent was an isolated case and there was no evidence that similar communications involving other agents and corporate clients had transpired during the subject period of alleged infringement. Batam Fast referred to the exchange of information as a "singular" incident which was isolated and should not be regarded that it was a pervasive practice within the company. There were no indications that showed that such injudicious pricing communications from the Sales and Marketing Manager of Batam Fast and the Commercial Manager of Penguin were systemic in nature.

117. In relation to Batam Fast and Penguin's representations as stated in paragraphs 115-116, CCS notes that the European Commission held that in *Bananas*[134], it is not decisive whether or not communications took place systematically or regularly when evaluating the existence of infringement. The European Commission considered each separate instance of communication as having an anticompetitive object and observed that the parties were able to make use of the established pattern of communications according to their needs. It is also clear from European case law that exchanges between parties at a single or a selective basis in relation to a one-off alteration in the market is adequate to establish liability[135]. While the emails contained information on four routes namely (i) HarbourFront Centre to Sekupang, (ii) HarbourFront Centre to Batam Centre, (iii) HarbourFront Centre to Waterfront City and (iv) Tanah Merah Ferry Terminal to Nongsapura, CCS exercised its discretion not to pursue the conduct in relation to the routes from HarbourFront Centre to Waterfront City and Tanah Merah Ferry Terminal to Nongsapura. In doing so, CCS notes that Penguin was not engaged in the provision of ferry services from HarbourFront to Waterfront City and from Tanah Merah to Nongsapura.

118. Batam Fast had in its written representations[136] submitted that this particular incident was divergent with the finding in *T-Mobile v Netherlands v Raad van Bestuur van de Nederlandse Mededingingsautoriteit*[137] as the exchange of information in *T-Mobile v Netherlands v Raad van Bestuur van de Nederlandse Mededingingsautoriteit*[138] had the effect of determining the subsequent conduct of the participants and resulted in practical cooperation and reduced competition. Batam Fast submitted that the communication cited above was

[132] See Answer to Question 23 of Liu Nam Leong's Notes of Information/Explanation Provided on 26 January 2011.
[133] Representations made by Batam Fast Ferry Limited on 16 April 2012.
[134] Case COMP/39188 – *Bananas* 15 October 2008 at [270]
[135] *T-Mobile v Netherlands v Raad van Bestuur van de Nederlandse Mededingingsautoriteit* Case C-8/08 Case C-8/08, 4 June 2009. Refer to paragraph 49 of this decision.
[136] Representations made by Batam Fast Ferry Limited on 16 April 2012.
[137] Case C-8/08, 4 June 2009 at [43].
[138] Case C-8/08, 4 June 2009 at [43].

specific to a "singular" client and was immaterial and irrelevant to pricing decisions for other clients. Further, it was Batam Fast's assertion that the one-way flow of information from Batam Fast to Penguin negated any potential for concerted actions as Batam Fast did not actually have any direct reciprocal information from Penguin that could be used as a basis for further market action.

119. CCS has set out in the foregoing analysis in Sections D and E that CCS' previous decisions set out the principle that where an agreement has as its object the restriction of competition, it is unnecessary to prove that the agreement would have an anti-competitive effect in order to find an infringement of the section 34 prohibition. In *T-Mobile v Netherlands v Raad van Bestuur van de Nederlandse Mededingingsautoriteit*[139], the ECJ had also enunciated the principle that for the purpose of Article 81(1), it is not necessary for there to be actual prevention, restriction or distortion of competition or a direct link between the concerted practice and consumer prices.

120. In relation to Batam Fast's submission that the unilateral flow of information would negate any potential for concerted practice, CCS notes that this did not follow that there was no prevention, restriction or distortion on competition. Even a one-way provision of information by Batam Fast or mere receipt by Penguin, without any reciprocal exchange raised the presumption that Penguin's future behaviour on the market would not be independent. Such flow of information would have increased the transparency on the duopoly market at the material time where there was already limited opportunity for competition and thus made it easier for competitors to act in concert. In the EC decision in *Bananas*[140], it was stated that "it is well settled case-law that there must be a presumption, subject to proof to the contrary, which is for the economic operators concerned to adduce, that undertakings participating in concerting arrangements and remaining active on the market take account of the information exchanged with competitors when determining their conduct on the market."

<u>Exchange and provision of information on prices for corporate clients</u>

(c) Email of 9 November 2007

121. On 9 November 2007, there was an email exchange between Liu Nam Leong (Penguin) and Chua Choon Leng (Batam Fast) in relation to the promotional ferry tickets for corporate clients that Penguin was selling. In the email exchange, Chua Choon Leng forwarded an email which he had received from a corporate client to Liu Nam Leong. Upon receipt, Liu Nam Leong asked Chua

[139] Case C-8/08, 4 June 2009 at [43].
[140] Case COMP/39188 – *Bananas,* 15 October 2008 at [218]

Choon Leng[141] which company the promotion was forwarded from, and Chua Choon Leng replied that,

> "*from one of our corporate clients. I know it could be part of the game that why [sic] I ask them to show prove. My stand is not to engage in price war hence I advice my sales team not to give any complimentary and special offer*".

122. Liu Nam Leong replied that,

> "*as u know, previously some of my corporate clients having low price, they may taking the advantage from there*."

123. When asked to explain the context of the email, Chua Choon Leng declined to reply and said that "*ticket prices are beyond me, but I still have to entertain, on and off, this sort of email*." Chua Choong Leng also claimed that the "*first email is not from me, its starts with "Hi Chua*".

124. When asked questions about why Chua Choon Leng sent the emails to him, Liu Nam Leong said that while Chua Choon Leng did not make this clear, from his understanding, he believed Chua Choon Leng wanted to verify the promotion that Penguin was having and that he wanted to check whether Penguin did indeed have the promotion as mentioned by the customer in the email.

125. However, a plain reading of the email makes it clear that although the first email was not from Chua Choon Leng but from a corporate client who forwarded it to Chua Choon Leng to verify the information, it was Chua Choon Leng who sent the email to Liu Nam Leong for him to "*check from your end*". Chua Choon Leng went on to say that "*When come to pricing, it is always case sensitive. Would appreciate if could let me know in advance before I forward to Paul and Eric for further action*". Chua Choon Leng also went on to say that "*my stand is not to engage in price war hence I advice my sales team here not to give any complimentary and special offer*".

126. In Penguin's representations[142], it was submitted that the statement in paragraph 121 that "*my stand is not to engage in price war hence I advice my sales team here not to give any complimentary and special offer*" may be misconstrued to imply that there was an agreement between Penguin and Batam Fast not to engage in price war. It was also stated in Liu Nam Leong's statement that, as far as he knew, there was no such agreement between Penguin and Batam Fast not to engage in price war[143].

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[141] Referred to as "Chua CL" in the emails.
[142] Representations made by M/s Allen & Gledhill on behalf of their client, Penguin Ferry Services Pte Ltd on 23 April 2012 at paragraph 2.5.2.
[143] See Answer to Question 48 of Liu Nam Leong's Notes of Information/Explanation Provided on 26 January 2011.

127. In CCS' view, the statement made by Chua Choon Leng stands on its own. Even if the submission by Penguin that there was no agreement between Batam Fast and Penguin was to be accepted, it did not detract from the fact that there was indeed an exchange of price information amounting to a concerted practice between the two ferry operators. Chua Choon Leng had, upon receiving the price information, stated in the email exchange of 9 November 2007 that his stand was not to engage in price war and hence his advice to his sales team was not to give any complimentary and special offer. The communication of the position not to engage in a price war and the attempt by Chua Choon Leng to verify the prices charged by Penguin to corporate clients was clearly aimed at influencing Penguin's conduct on the market and reducing the uncertainty associated with competition, which amounted to a concerted practice between the parties. It was notably held in *Bananas*[144] that "when undertakings, as in this case, are in direct contact with competitors, even if they merely receive information concerning the future conduct of competitors, they can be considered to have taken part in a concerted practice since the receiving undertaking could not fail to take into account, directly or indirectly, the information obtained in order to determine the policy which it intended to pursue on the market".

(d) Emails dated 5 February 2009

128. In the afternoon of 5 February 2009, there was another email exchange between Liu Nam Leong (Penguin) and Chua Choon Leng (Batam Fast) on the selling price of Penguin's ticket to Nidec Sankyo, a corporate client. The excerpts of the emails are as follows:

From: *Chua CL passage_ops@batamfast.com*
Sent: *Thursday, 5 February 2009 5:45 PM*
To: *'Liu Nam Leong'*
Subject: *Re: Question*

This is our calculation and as I have mentioned, we will make a bit of margin.

The price is not right, I can assure you.

Best regards,
Chua CL
Passage Operations
Batam Fast Ferry Pte Ltd
BatamFast Pte Ltd. as agents
Tel: +65 6270 0311 Fax: +65 6270 0322
Mobile: +65 9666 5066
Email: passage_ops@batamfast.com
www.batamfast.com
BatamFast-Asia's Favourite Fast Ferry Operator

[144] Case COMP/39188 – *Bananas* at [228]

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From: Liu Nam Leong [mailto:leong@penguin.com.sg]
Sent: Thursday, 5 February 2009 4:59 PM
To: Chua CL
Subject: Re: Question

Thanks Chua. So the selling price to your corporate client must be minimum of $17 or total $44, at least to break even. Anyway nidec sankyo call us to ask for $43, keep mentioned bf sell to them at this price and allow for transfer without surcharge, we did not sell to them. Fyi.

Rgds/Tks
Liu Nam Leong
DID: 6377 6343
Website: www.penguin.com.sg

129. When asked about Chua Choon Leng's involvement in ticket prices, Paul Gannaway replied that "Chua is not supposed to get involved in pricing at all" and that "Chua is probably trying to act like something that he's not".[145] Eric Lim also stated that pricing was not within Chua's purview.[146]

130. However, there was a contradiction between the explanations which were provided by Paul Gannaway and Eric Lim, and those which were provided by Chua Choon Leng and Liu Nam Leong in relation to Chua Choon Leng's involvement and ability to make pricing decisions. When Chua Choon Leng was asked about his involvement in the price discussions with Penguin, he explained that he received emails in relation to pricing from Liu Nam Leong. When asked about a particular email where prices were discussed with Penguin,[147] he replied that while ticket prices were not his responsibility, he would still have "*...to entertain such pieces of information, because [they] need to cooperate on other operational issues*." He went on to state that sometimes prices would be raised and that Penguin may check with him whether [they] had offered an agent a "*type of price or not*".[148] In such a case, he would then check on the facts. As he regarded such a request as a small matter among more urgent matters, and that in any event, pricing was not his responsibility, he claimed that he may or may not reply to the email.[149]

[145] See Answer to Question 100 of Paul Gannaway's Notes of Information/Explanation Provided on 8 February 2011.
[146] See Answer to Question 42 of Eric Lim's Notes of Information/Explanation Provided on 9 February 2011.
[147] See Answer to Question 79 of Chua Choon Leng's Notes of Information/Explanation Provided on 8 February 2011.
[148] See Answer to Question 82 of Chua Choon Leng's Notes of Information/Explanation Provided on 8 February 2011.
[149] See Answer to Question 83 of Chua Choon Leng's Notes of Information/Explanation Provided on 8 February 2011.

131. Liu Nam Leong corroborated Chua Choon Leng's statement when he stated that he would usually deal with Chua Choon Leng.[150] When asked about whether he would discuss with any one from Batam Fast on ferry ticket prices charged to corporate clients, travel agents and walk-in customers, he said that whenever he needed someone from Batam Fast to verify pricing, it would most often be Chua Choon Leng even though it may occasionally be Eric Lim.[151] However, this would only be done on a few occasions when customers gave feedback on the other party's price and asked for a price reduction.[152]

132. Chua Choon Leng explained that Penguin's purpose for sending the email was to ask Batam Fast how they charged for tickets that were transferrable. According to Chua Choon Leng, his reply "*This is our calculation and as I have mentioned, we will make a bit of margin. The price is not right, I can assure you*" was actually meant to inform Penguin that their transfer price was correct and he said that he thought he wanted to tell Liu Nam Leong that the price was right.[153] When asked to explain the statement in the email dated 5 February 2009 "*so the selling price to your corporate client must be minimum of $17 or total $44, at least to break even*", Liu Nam Leong said that he was merely trying to ask Chua Choon Leng whether he was selling the breakeven price at $44 to his corporate client. He went on to clarify that $44 included the Singapore and Batam terminal taxes. CCS notes that Chua Choon Leng's explanation to CCS on the email was disingenuous as the entire subject matter centred on the pricing which Batam Fast charged to its corporate clients.

133. It was submitted by Penguin[154] that the statement "Leong said that he was merely trying to ask Chua whether he was selling the breakeven price at $44 to his corporate client" was inaccurate as the purpose of the email was not to ask Chua Choon Leng whether he was selling tickets at the price of $44, but to ask Batam Fast if passengers were allowed to transfer where the tickets were sold at a lower price.

134. CCS notes that Liu Nam Leong had, in his interview with CCS on 25 January 2011, stated the following:

> Q. 113: *Explain the statement "So the selling price to your corporate client must be minimum of $17 or total $44, at least to break even."*

[150] See Answers to Questions 39 and 51 of Liu Nam Leong's Notes of Information/Explanation Provided on 25 January 2011.
[151] See Answers to Questions 24 and 25 of Liu Nam Leong's Notes of Information/Explanation Provided on 26 January 2011.
[152] See Answers to Questions 54 and 55 of Liu Nam Leong's Notes of Information/Explanation Provided on 25 January 2011.
[153] See Answer to Question 96 of Chua Choon Leng's Notes of Information/Explanation Provided on 8 February 2011.
[154] Representations made by M/s Allen & Gledhill on behalf of their client, Penguin Ferry Services Pte Ltd on 23 April 2012 at paragraph 2.6

A: *I was trying to ask Chua whether he was selling the breakeven price at $44 to his corporate client? $44 is inclusive of Singapore and Batam terminal tax*[155].

135. The above answer clearly sets out that Liu Nam Leong's reply was intended to ask Chua Choon Leng whether he was selling the breakeven price at $44 to his corporate clients. There was no mention of transferability of tickets and as such, no basis to say that the purpose of the statement was to ask Batam Fast if passengers were allowed to transfer where the tickets were sold at a lower price. Further, the sale of tickets by each ferry operator to passengers was clearly a commercial decision made by each party, and there was no reason for them to consult the other on this. Therefore, after due consideration, CCS is unable to accept Penguin's submissions in this regard.

136. With regard to Nidec Sankyo, Chua Choon Leong claimed that he did not know who Nidec Sankyo was although he thought that it was likely to be a corporate client rather than a travel agent.[156] While the plain reading of the email indicates that Chua Choon Leng had replied to Liu Nam Leong that the price of $43 was not the right price that BF [Batam Fast] was quoting to Nidec Sankyo, Chua Choon Leng maintained that his response to Liu Nam Leong was not on the issue relating to Nidec Sankyo and he maintained that he did not handle anything to do with prices.[157]

137. In response to the question on the purpose of Liu Nam Leong sending an email to Chua Choon Leng on 5 February 2009 at 4.59pm, Liu Nam Leong said that he wanted to tell Chua Choon Leng that Nidec Sankyo had asked for a ticket price of $43 and informed them that Batam Fast had offered to them a price of $43. He also wanted to verify with Chua Choon Leng if that was true and wanted to inform Chua Choon Leng that he did not make an offer to Nidec Sankyo. Liu Nam Leong claimed that if he had really only wanted to verify the prices with Chua Choon Leng, he would just do so.[158] CCS notes that it is clear from the plain reading of Penguin's email that it was sharing its confidential price strategies with Batam Fast. He even went so far as to inform Batam Fast that ultimately, Penguin had not made an offer to the customer.

(e) Email of 17 November 2009

138. On 17 November 2009, Chua Choon Leng forwarded an email relating to a clarification of ticket price by Southlink Country Club (SLCC) to Liu Nam Leong. In the email, Nurman from SLCC wanted to clarify with Batam Fast on

[155] See Answers to Question 113 of Liu Nam Leong's Notes of Information/Explanation Provided on 25 January 2011.
[156] See Answer to Question 97 of Chua Choon Leng's Notes of Information/Explanation Provided on 8 February 2011.
[157] See Answer to Question 99 of Chua Choon Leng's Notes of Information/Explanation Provided on 8 February 2011.
[158] See Answers to Questions 110-116 of Liu Nam Leong's Notes of Information/Explanation Provided on 25 January 2011.

the ticket price. Specifically, he said the following: "*Just to clarify about the ticket price. Penguin quoted $42 per ticket, all tax inclusive. Meanwhile Batam Fast quoted $43 at the same condition. I would like to request for your approval to quote us at the same price*."

139. Chua Choon Leng forwarded the email to Liu Nam Leong and stated "*FYI and action, if any*". When asked to clarify who "SLCC" referred to, Chua Choon Leng said that "*this is Southlink-the golf course. Again, they asked for price comparison. Penguin is quoting $42 and whether or not Batam Fast can give the same*".[159]

140. In response to a question on the reason why he passed on the email to Penguin, Chua Choon Leng said that he only wanted to let Liu Nam Leong know that this pertained to another complaint about Sekupang and that the ticket that SLCC had was a non-transferable ticket. Chua Choon Leng's views on this was that while "*the email doesn't mention transfer, but he has clarified with Eric and Liu Nam Leong, and basically it was about Southlink's case, and the ticket involved was not transferable*" and that "*this is purely transfer pricing problem, not to check prices*". However, apart from the fact that this explanation is tenuous in view of the wording used in the email, this is also inconsistent with Liu Nam Leong's account; according to Liu Nam Leong,[160] Chua Choon Leng of Batam Fast told Liu Nam Leong that SLCC was trying to bargain with him and that the latter wanted to verify with him that Penguin had offered the price to SLCC. Liu Nam Leong said that he replied to Chua Choon Leng that he would check and get back to him. He did not do so eventually.

(iv) CCS' Analysis of the Evidence

Provision of information on prices for travel agents

141. CCS notes that the integrity of the emails sent by Batam Fast and the receipt of emails by Penguin in each of the instances cited above were not challenged by either of the Parties.

142. Batam Fast's acts of informing Penguin of its changes in its future prices to customers removed or reduced uncertainty between Batam Fast and Penguin in relation to prices, specifically, the prices that the former would be charging Desindo. As these prices were not cited in the public domain and are, in CCS' view, strategic and confidential business secrets, it would have been difficult for Penguin to know the price charged by Batam Fast to Desindo but for the fact that it had been blind copied on the email. As noted in the case of *T-Mobile v Netherlands v Raad van Bestuur van de Nederlandse Mededingingsautoriteit* [161] referred to in paragraph 66, an exchange of

[159] See Answer to Question 110 of Chua Choon Leng's Notes of Information/Explanation Provided on 8 February 2011.
[160] See Answers to Questions 27 to 35 of Liu Nam Leong's Notes of Information/Explanation Provided on 26 January 2011.
[161] Case C-8/08, 4 June 2009 at [43].

information is tainted with an anti-competitive object if the exchange is capable of removing uncertainties concerning the intended conduct of the participating undertakings. As the *UK Agricultural Tractor Exchange* case noted above in paragaphs 75 to 78, in a highly concentrated market, information exchange restricts competition because it creates a degree of market transperancy between suppliers which is likely to destroy what hidden competition there remains between these suppliers on account of the risk and ease of exposure of independent competitive action. In view of these considerations, CCS is of the view that the provision of price information for ferry tickets sold to travel agents had the object of restricting competition.

143. CCS notes that the Parties had given a range of justifications for the email, but CCS does not find these compelling. As noted in paragraph 65 the object of an agreement or concerted practice does not depend on the subjective intention of the parties but rather on the *objective meaning and purpose* of the agreement considered in the economic context in which it is to be applied. CCS finds that the information exchange on Batam Fast's future pricing was not justified, and would make available to the Parties, sensitive commercial information with which they could use to determine their conduct on the market. Under normal market conditions where competition on pricing is intense, such strategic data on the pricing policy to travel agents would be kept confidential.

144. As observed earlier, the market is highly concentrated, and is in fact, effectively a duopoly for the Singapore (HarbourFront) to Batam Centre route and the Singapore (HarbourFront) to Sekupang route at the material time. Therefore, under normal competitive market conditions, movements in price would cause either party to lose or gain market share quickly. This is particularly so given the structure of competition in this market: a duopoly with a homogenous product, where each Party would react very quickly to the other's price changes. In this context, deliberate information sharing on prices had a negative effect on competition, as the Parties had substituted the risks of price competition in favour of practical cooperation. The Parties shared with each other the prices charged by each other in what was a highly concentrated market, and which were neither available in the public domain nor easily observable. In the absence of any other objective justification, CCS is of the view that the Parties would take into consideration such price information when quoting to their travel agents and there is reason to believe that competition is thus lessened.

145. While Penguin claimed that it did not respond to the email and did not use the information, it should be noted that Liu Nam Leong was a member of the management whose responsibility included pricing. This email was also not sent in isolation to Penguin but against a backdrop of candid and frequent communication on prices as earlier outlined in paragraphs 96 to 106. As discussed in paragraph 58, an undertaking will be taken to have participated in an agreement or concerted practice if it receives information relating to an anti-competitive arrangement without manifestly and publicly opposing it, unless

that undertaking puts forward evidence to establish that it had indicated its opposition to the anti-competitive arrangement to its competitors. Liu Nam Leong (Penguin) did not manifestly oppose the receipt of Batam Fast's pricing information nor did he remonstrate against the provision of such commercially sensitive information by Batam Fast. Liu Nam Leong's passive participation served to endorse the unlawful conduct and almost certainly contributed to Penguin's further receipt of the blind-copied email on 20 May 2009. It also raised the presumption that Penguin's commercial policies on the market would no longer be independently determined but instead be determined with knowledge and credence to the information shared.

146. Penguin, in its written representations[162], submitted that it did not agree with CCS' position in the PID that it would not have been possible for Penguin to know the price charged by Batam Fast to Desindo but for the fact that it had been blind copied on the email. It was Penguin's argument that it was possible for it to find out the prices through travel agents or corporate clients when they cited these prices in order to bargain with Penguin for discounts. It may also be able to obtain price information from another ferry operator's client by making cold calls.

147. CCS acknowledges that while there may be avenues for a competitor to obtain prices charged by other ferry operators, it would not have been possible, on the facts of this case, for Penguin to obtain specific information about the quote given by Batam Fast to a specific customer, in this case Desindo, if it did not come from Batam Fast. As noted above, these prices were confidential business secrets which would not be shared between competitors. For Penguin to argue that customers may in the course of bargaining with it cite quotations given by other competitors was disingenuous since this entirely missed the point as the acts amounted to undertakings knowingly substituting practical cooperation for the risks of competition, that is, a concerted practice which restricted competition (see paragraph 45 above). Further, if the prices were indeed readily available, Batam Fast would not have had to blind-copy Penguin in the correspondence. Even if it were accepted that such information were more readily available, CCS notes that such direct information sharing enabled Parties to become aware of the information more simply, rapidly or directly than if it were obtained via the market or other sources. As the Commission pointed out in the *Bananas*[163] case,

> "The exchange of quotation prices enabled the parties to achieve monitoring, even if they could have learned such information from customers or various private or public sources. First, even if a party first notifies its quotation price to customers that fact does not imply that at the time of exchange of information those quotation prices constituted

[162] Representations made by M/s A&G on behalf of their client, Penguin Ferry Services Pte Ltd on 23 April 2012 at paragraph 2.7

[163] Case COMP/39188 – *Bananas,* 15 October 2008 at [276]

> objective market data that were readily accessible. Moreover, it would necessarily take some time before such information would appear in various public or private sources of information which publish quotation prices. Even if such information were readily accessible at the time it was exchanged with a competitor, a direct contact with the competitor still serves for monitoring. In particular, it makes it possible, in case of necessity, to give an immediate reaction to the competitor and/or internally regarding that competitor's quotation price. Second, through direct information exchanges the parties became aware of that information more simply, rapidly or directly that they would via the market. The parties were able to rely on the established pattern of communication in case of necessity for example if that information did not reach them or if they wanted to verify it. Third, the systematic participation of undertakings in bilateral communications allows them to create a climate of mutual certainty. Such exchange of information reinforced the bonds of cooperation arising from pre-pricing communications between the parties. Finally, such a mechanism also enabled the participants to discuss any deviations and exposed them to competitors' reactions in case of any unexpected course of conduct which followed their pre-pricing communications."

Exchange and provision of information on price for corporate clients

148. CCS is of the view that Chua Choon Leng's email of 9 November 2007 was to verify the promotion that Penguin was holding for expatriates. While Chua Choon Leng denied any involvement in pricing, there is evidence to the contrary as seen in his email where he states that pricing was "sensitive" and that he wanted Liu Nam Leong to inform him in advance so that he could forward to his superiors for further action. In addition, CCS views the email of 17 November 2009 as another attempt by Chua Choon Leng to verify with Liu Nam Leong on Penguin's prices offered to SLCC.

149. The fact that Chua Choon Leng went on to indicate that his stand was not to engage in a "price war", hence his advice to his sales team not to give any complimentary and special offer, indicates that the purpose of the verification was aimed at influencing Penguin's pricing policy. Penguin's actions threatened the stability of the prices at the material time and the above exchange between Parties clearly had the object of restricting competition. As a matter of fact, based on the above response given by Chua Choon Leng, it is evident that Batam Fast was not keen to compete with Penguin on pricing, and even tried to influence Penguin not to make special offers.

150. In any event, Batam Fast had no legitimate reason to verify with Penguin its promotional offers as well as confidential prices offered to SLCC. As discussed in paragraphs 46 and 47, such pricing policies and future conduct should be independently determined. Batam Fast had clearly disclosed its intentions and made known its stance on "special offers" and on avoiding a price war. Most pertinently, no objections or disapproval was voiced from Penguin. CCS reiterates that the exchange had the object of restricting competition i.e. the Parties are competing less aggressively in the market as they otherwise would have without the discussions and verifications on prices and promotions.

151. The bilateral exchange of information between Batam Fast and Penguin involved sensitive pricing information, which would otherwise not be easily obtained by either Party. This fact, coupled with the fact that this market was highly concentrated, was likely to have further contributed to price stabilisation and uniformity. CCS also notes that the ongoing relationship between the Parties also meant that Parties were willing to provide sensitive pricing information on some occasions. Instead of distancing themselves from such price exchange, they have instead established a stable channel of communication from as far back as 2006.

152. CCS is of the view that the timing of the email sent on 5 February 2009 was significant as it took place when a customer (Nidec Sankyo) was seeking a bulk purchase. It also demonstrates the easy and open channels of communications as sensitive information such as quotations given to clients were readily shared between the Parties. Liu Nam Leong (Penguin) discussed prices quoted to Nidec Sankyo shortly after on that same afternoon on 5 Feb 2009 with Batam Fast, to check the prices that Batam Fast had quoted to Nidec Sankyo. Batam Fast even assured Liu Nam Leong that the pricing information quoted to him by Nidec Sankyo was not correct.

153. Jeffrey Lee of Nidec Sankyo[164] informed that, at some point in February 2009, he was unhappy with Penguin as they wanted to charge him an extra $2 transfer fee should he use the ticket on a ferry operated by Batam Fast.[165] Jeffery Lee made his displeasure known to Liu Nam Leong (Penguin) in the morning of 5 February 2009 via email, and indicated that he had decided to purchase tickets from Batam Fast from then on as Penguin was more expensive.[166] It is noteworthy that after the discussion with Batam Fast on pricing, Penguin then decided to waive the transfer fee for Nidec Sankyo on 12 May 2009. CCS notes that in deciding to review its quotation to Nidec Sankyo, Penguin would have taken into account, directly or indirectly, the information obtained in their communication on 5 February 2009 with Batam Fast on the quotation to Nidec Sankyo.

[164] See Answer to Question7 of Jeffrey Lee's Notes of Information/Explanation Provided on 4 July 2011.
[165] There was no such surcharge before February 2009.
[166] See email exchange between Jeffrey Lee and Penny Cheong of Penguin dated 5 February 2009.

154. This, again, was another incidence of price verification and information exchange by the parties. CCS is of the view that Penguin had no reason to verify the prices quoted to their corporate clients, which should be information privy to each party only. The fact that Liu Nam Leong mentioned that he was merely trying to ask Chua whether he was selling at the breakeven price at $44 to his corporate client is a clear indication that he was verifying the prices that Penguin charged with those that Batam Fast was charging. The prices that each Party charged to their corporate clients should be decided independently, without consultation with competitors. As noted in the case of *T-Mobile v Netherlands v Raad van Bestuur van de Nederlandse Mededingingsautoriteit*[167] referred to in paragraph 66, an exchange of information is tainted with an anti-competitive object if the exchange is capable of removing uncertainties concerning the intended conduct of the participating undertakings. As the *UK Agricultural Tractor Exchange* case noted above in paragaphs 75 to 78, in a highly concentrated market information exchange restricts competition because it creates a degree of market transperancy between suppliers which is likely to destroy what hidden competition there remains between these suppliers on account of the risk and ease of exposure of independent competitive action. In this case, CCS finds that by further indicating that a price was not quoted to the particular corporate client, Penguin had eliminated the uncertainty as regards its conduct and had in effect given free rein to Batam Fast to maintain its price levels without the risk of competition from it. It also revealed its price floor on its tickets sold to corporate clients and eliminated the uncertainty in relation to the future conduct of Penguin. This had the object of restricting competition, especially in the present context where, given the highly concentrated market, price competition is particularly important.

155. As stated earlier in paragraph 49, there is a presumption of a causal connection between the concerted practice and the conduct of the undertaking on that market, even if the concerted action is the result of the meeting held by the participating undertakings on a single occasion.[168] In the present case, the Parties were unable to provide any evidence to rebut the presumption.

(v) CCS' Conclusion on the Evidence

156. Having considered the totality of the evidence gathered, CCS is of the view that the evidence demonstrates that the Parties were sharing sensitive information relating to pricing, and as evidenced by the emails listed above, were even prepared to share quotations to various clients with each other. It bears repeating that the Parties communicated continually from 17 June 2008 and twice in 2009 (on 5 February 2009 and 20 May 2009). The timings of the communication were significant as emails were sent by one Party to another when a fare revision was announced to customers and when customers were seeking quotations.

[167] Case C-8/08, 4 June 2009 at [43].
[168] Case C-8/08, 4 June 2009 at [62].

157. CCS is of the view that price is an important parameter of competition in the market under consideration and that the Parties have an incentive to monitor each other closely on prices. For example, Batam Fast[169] claimed that they would consider adjusting their prices offered to corporate clients in reaction to an adjustment in the corporate client prices of Penguin if Batam Fast's staff managed to obtain such information from Penguin's corporate client through [✂]. Exchanges of future price information, especially non-counter prices (in this case, to travel agents and corporate clients) which are not readily observable is particularly damaging to the competitive process between the Parties. Such exchanges significantly reduce the uncertainty of each Party's actions and therefore significantly dampen any competition between them. Indeed, as mentioned earlier, the Parties' conduct of continuing communication in respect of prices during the material time suggests an implicit understanding between the Parties to avoid incidences of undercutting, and to limit competition on pricing.[170]

158. As discussed in paragraph 26 on the relevant product market, CCS notes that there are no other practical alternatives for transportation to Batam Centre and Sekupang. Passengers were afforded an alternative ferry provider as an option for the route from Singapore (HarbourFront) to Sekupang when Pacific entered the market in December 2010. That said, this was after the period when the collusion took place and the aggregated market share of the Parties for the Singapore (HarbourFront)-Sekupang route remains high.

159. Given the homogeneous nature of the product i.e. ferry services for the routes (i) Singapore (HarbourFront) to Sekupang and (ii) Singapore (HarbourFront) to Batam Centre, movements in price would likely cause either party to lose or gain market share quickly under normal competitive market conditions. An exchange and provision of sensitive and confidential price information would reduce the incentive to price competitively and encourage practical cooperation over the risks of competition. Where one party makes a disclosure of a quoted price, the other would be the only other competitor which may provide an alternative price to the potential customer.

160. CCS also notes that the quality of the information provided and exchanged is also a relevant factor in determining whether an agreement and/or concerted practice had the object or effect of preventing, distorting or reducing competition. In the present case, sensitive and confidential quotations to a potential customer were shared with the only other competitor.

[169] See Answer to Question 14 of Eric Lim's Notes of Information/Explanation Provided on 28 October 2011.

[170] Paragraph 59 of the Guidelines on the applicability of Article 101 of the Treaty of the Functioning of the European Union to Horizontal Co-operation Agreements states, "Moreover, communication of information among competitors may constitute an agreement, a concerted practice, or a decision by an association of undertakings with the object of fixing, in particular, prices or quantities. Those types of information exchanges will normally be considered and fined as cartels. Information exchange may also facilitate the implementation of a cartel by enabling companies to monitor whether the participants comply with the agreed terms. Those types of exchanges of information will be assessed as part of the cartel."

161. CCS has observed that the prices of ferry tickets to various destinations in Batam were a frequent point of discussion as noted in the various Monthly Operational Reviews conducted by Penguin (provided to CCS under Notices issued pursuant to section 63 and 64 of the Act), and that many email exchanges between Penguin and Batam Fast were regarding verifications of emails sent by their customers demanding that one operator matched the price offered by the other operator (for example, see paragraphs 121 and138). CCS is of the view that price verifications can have an anti-competitive purpose as they can potentially raise, fix, maintain and stabilise prices.

162. The Parties' various claims[171] that they would frequently monitor each other's counter prices and adjust their prices swiftly when the other did so is strong evidence that price is an important parameter of competition in the present case.

163. In view of the evidence set out above, CCS reached the conclusion that the conduct involving the exchange and provision of sensitive and confidential price information between Batam Fast and Penguin in relation to the sale of ferry tickets to various destinations in Batam to corporate clients and travel agents had the object of preventing, restricting or distorting competition to an appreciable extent. CCS also observes that, in any event, the Parties' aggregate market shares are well above the level at which their conduct can be expected to have an appreciable effect on the market.

164. CCS therefore finds a concerted practice between Penguin and Batam Fast with the object of restricting, preventing or distorting competition in the markets for the sale of ferry tickets to corporate clients and travel agents for the routes between Singapore (HarbourFront) and Batam Centre, and Singapore (HarbourFront) and Sekupang, acts which are in breach of the section 34 prohibition.

CHAPTER 3: DECISION OF INFRINGEMENT

165. After having considered the Parties' representations, CCS is satisfied that there is sufficient evidence as described in Chapter 2, Part G of the ID to conclude that the Parties have infringed the section 34 prohibition by engaging in a concerted practice with the object of restricting, preventing or distorting competition in the markets in the prices of ferry tickets sold for passenger travel between Singapore (HarbourFront) and Batam Centre, and Singapore (HarbourFront) and Sekupang, to corporate agents and travel agents. CCS therefore issues this Decision that the Parties have infringed the section 34 prohibition and imposes penalties on the Parties listed at paragraph 2 above in respect of the aforesaid conduct.

[171] See Answer to Question 109 of Chua Choon Leng's Notes of Information/Explanation Provided on 8 February 2011, Answer to Question 5 of Eric Lim's Notes of Information/Explanation Provided on 28 October 2011 and Answer to Questions 54 and 55 of Liu Nam Leong's Notes of Information/Explanation Provided on 25 January 2011.

166. CCS imposes a financial penalty on each of the Parties for the aforesaid conduct.

CHAPTER 4: CCS' ACTION

167. CCS' action stated in this section is based on the matters set out in this ID, and has taken into account the representations made by the Parties following service of the proposed infringement decision.

A. Directions

168. Section 69(1) of the Act provides that where CCS has made a decision that an agreement has infringed the section 34 prohibition, it may give to such person as it thinks appropriate such directions as it considers appropriate to bring the infringement to an end. As CCS considers that the infringements have already ended, it does not deem it necessary in the present case to issue any directions for the Parties to terminate the infringing conduct.

B. Financial Penalties - General Points

169. Under section 69(2)(d) of the Act, CCS may, where it has made a decision that an agreement[172] has infringed the section 34 prohibition, impose on the Parties to that infringing agreement[173] a financial penalty. CCS may impose a financial penalty only if it is satisfied that the infringement has been committed intentionally or negligently. The financial penalty may not exceed 10% of the turnover of the business of the undertaking in Singapore for each year of infringement, up to a maximum of 3 years.

170. As established in the *Pest Control Case*,[174] the *Express Bus Operators Case*[175] and the *Electrical Works Case*,[176] the circumstances in which CCS might find that an infringement has been committed intentionally include the following:

a) the agreement has as its object the restriction of competition;

b) the undertaking in question is aware that its action will be, or are reasonably likely to be, restrictive of competition but still wants, or is prepared, to carry them out; or

c) the undertaking could not have been unaware that its action would have the effect of restricting competition, even if it did not know that it would infringe the section 34 prohibition.

[172] Section 34(4) states that "Unless the context otherwise requires, a provision of this Act, which is expressed to apply to, or in relation to, an agreement shall be read as applying, with the necessary modifications, equally to, or in relation to, a decision by an association of undertakings, or a concerted practice."
[173] Ibid.
[174] See[2008] SG CCS 1, at [355].
[175] See[2009] SG CCS 2, at [445].
[176] See[2010] SG CCS 4, at [282].

171. In *Konsortium Express & Others v CCS*, *Appeals Nos. 1 and 2 of 2009*,[177] 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.

172. The intention relates to the facts, not the law. Ignorance or a mistake of law is thus no bar to a finding of intentional infringement under the Act. CCS is likely to find that an infringement of the section 34 prohibition has been committed negligently where an undertaking ought to have known that its agreement or conduct would result in a restriction or distortion of competition[178]. The issue of whether an agreement or concerted practice was entered into "intentionally or negligently" was dealt with by the CAB in *Appeals No.s 1 and 2*[179]. The CAB referred to the cases of *(1) Argos Limited (2) Littlewoods Limited v The Office of Fair Trading* ("*Argos*")[180] and *Luxembourg Brewers*[181] . In the *Argos* case, the UK CAT said:

> "221. The Tribunal has previously held that an infringement is committed intentionally for the purpose of section 36(3) of the Act if the undertaking must have been aware, or could not have been unaware, that its conduct had the object or would have the effect of restricting competition. An infringement is committed negligently for the purposes of section 36(3) if the undertaking ought to have known that its conduct would result in a restriction or distortion of competition."[182]

173. In *Luxembourg Brewers,* the Commission of EC said at paragraph 89:

> "(89) An infringement of the Community competition rules is regarded as being committed intentionally if the parties are aware that the object or effect of the act in question is to restrict competition. It is not essential that they should also be aware that they are infringing a provision of the Treaty."

174. CCS finds that information exchanges that relate to sensitive and confidential pricing are an infringement of the section 34 prohibition, which have as their object the restriction of competition, and are likely to have been, by their very

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[177] *In the matter of Case No. CCS 500/003/08: Notice of Infringement Decision issued by the Competition Commission of Singapore, Price Fixing in Bus Services from Singapore to Malaysia and Southern Thailand, 3 November 2009, between Konsortium Express and Tours Pte Ltd, Five Stars Tours Pte Ltd, GR Travel Pte Ltd, Gunung Travel Pte Ltd and the Competition Commission of Singapore,* Decision of 28 February 2011, at [143].

[178] See paragraphs 4.7 to 4.10 of CCS Guidelines on Enforcement

[179] *In the matter of Case No. CCS 500/003/08: Notice of Infringement Decision issued by the Competition Commission of Singapore, Price Fixing in Bus Services from Singapore to Malaysia and Southern Thailand, 3 November 2009, (1) Konsortium Express and Tours Pte Ltd (2) Five Stars Tours Pte Ltd (3) GR Travel Pte Ltd, (4) Gunung Travel Pte Ltd v The Competition Commission of Singapore,* decision of the CAB dated 28 February 2011, at [141] – [143].

[180] [2005] CAT 13, at [221].

[181] COMP/37.8001F3, (5 December 2001)

[182] Section 36(3) of the English Competition Act 1998 is similar to section 69(3) of Singapore's Competition Act.

nature, committed intentionally. CCS finds that the Parties must have been aware that the information exchanges relating to the prices of tickets sold to (i) corporate clients and (ii) travel agents would have the object of preventing, restricting or distorting competition. In view of the secretive manner in which the email exchanges were conducted, CCS is of the view that the Parties were aware of the implications and the illegality of the conduct and had chosen to engage in such conduct despite these considerations.

175. In light of the foregoing, CCS is satisfied that each Party had intentionally or negligently infringed the section 34 prohibition.

176. CCS therefore imposes a financial penalty on Penguin and Batam Fast as set out in the following Section.

C. Calculation of Penalties

177. The *CCS Guidelines on the Appropriate Amount of Penalty* provide that in calculating the amount of penalty to be imposed, CCS will take into consideration the seriousness of the infringement, the turnover of the business of the undertaking in Singapore for the relevant product and geographic markets affected by the infringement ("the relevant turnover") in the undertaking's last business year, the duration of the infringement, other relevant factors such as deterrent value, and any aggravating and mitigating factors. CCS notes that the European Commission and the OFT adopt similar methodologies in the calculation of penalties. 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 and aggravating and mitigating considerations.

178. This methodology of calculation was also applied in the Express Bus Operator's case which was approved by the CAB on appeal.[183]

(i) Seriousness of the Infringements and Relevant Turnover

179. CCS considers that the seriousness of the infringement and the relevant turnover of each undertaking would be taken into account by setting the starting point for calculating the base penalty amount as a percentage rate of each undertaking's relevant turnover. The relevant turnover in this case would be the turnover for one-way and two-way ferry tickets sold to corporate clients and/or travel agents for the Singapore (HarbourFront)-Sekupang route and the Singapore (HarbourFront)-Batam Centre route.

180. With respect to the tickets sold to corporate clients, CCS has further narrowed this to Singapore corporate clients and not Batam corporate clients. This is in view that tickets sold to Batam corporate clients are generally not resold and

[183] *Konsortium and ors v CCS in Competition Appeals Nos 1 and 2 of 2009* [2011] SGCAB 1 at [179].

will have little impact in relation to the prevention, restriction and/or distortion of competition in Singapore.

181. With respect to the tickets sold to travel agents, all turnover will be included, as CCS notes that such tickets can be, and is in fact, resold by Batam travel agents to Singapore travel agents, for sale to passengers originating from Singapore.

182. In assessing the seriousness of the infringement, CCS will consider a number of factors, including the nature of the product, the structure of the market, the market share(s) of the undertaking(s) involved in the infringement 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.[184]

183. The relevant turnover in the last business year will be considered when CCS assesses the impact and effect of the infringement on the market.[185] The "last business year" is the business year preceding the date on which the decision of the CCS is taken, or if figures are not available for that business year, the one immediately preceding it.[186]

184. The seriousness of the infringement may also depend on the nature of the infringement. CCS recognises that this is the first case in which it has found an infringement of the section 34 prohibition in the absence of an express finding that the prevention, distortion or restriction of competition was the result of a hardcore restriction on competition, and will take this into consideration when fixing the starting point of the relevant turnover of the Parties in the calculation of financial penalties.

185. Nature of the product: The conduct referred to in this ID can be categorised into two main focal products namely (a) provision of ferry services from Singapore (HarbourFront)-Sekupang and Singapore (HarbourFront)-Batam Centre to Singapore corporate clients, and (b) provision of ferry services from Singapore (HarbourFront)-Sekupang and Singapore (HarbourFront)-Batam Centre to travel agents. The relevant geographic market for these two focal products is Singapore.

186. Structure of the market and market share of the Parties: There are five licensed regional ferry operators, of which only two, namely Batam Fast and Penguin provide ferry services for the Singapore (HarbourFront)-Sekupang route and the Singapore (HarbourFront)-Batam Centre route at the material time.

187. CCS notes that there exist regulatory entry barriers to the relevant market as a ferry operator has to obtain a requisite licence from MPA before it may provide ferry services. The license conditions are primarily focused on whether security,

[184] See CCS Guidelines on the Appropriate Amount of Penalty, paragraph 2.3.
[185] See CCS Guidelines on the Appropriate Amount of Penalty, paragraph 2.4.
[186] See Competition (Financial Penalties) Order 2007, paragraph 3 and CCS Guidelines on the Appropriate Amount of Penalty, paragraph 2.5.

safety and navigation requirements are complied with. The onus is also on the ferry operator to secure ferry terminal time slots from both the Singapore ferry terminal and the Indonesia ferry terminal before they can provide ferry services.

188. CCS notes that the Parties have an aggregate market share of 100% on both the Singapore (HarbourFront)-Batam Centre route and the Singapore (HarbourFront)-Sekupang route at the material time, essentially forming a duopoly on both routes.

189. Effect on customers, competitors and third parties: It is difficult and not practically feasible for CCS to quantify the amount of loss caused by the concerted practice in relation to the exchange and provision of price information for prices of ferry tickets sold to Singapore corporate clients and travel agents. This is due to the unavailability of the actual prices that would have been charged to Singapore corporate clients and travel agents under the "counterfactual" scenario, i.e. the prices of ferry tickets for the Singapore (HarbourFront)-Sekupang route and the Singapore (HarbourFront)-Batam Centre route for Singapore corporate clients and travel agents during the infringement period had the Parties not engaged in price information exchange. That said, CCS is of the view that in the absence of the infringing conduct, there would have been more competition and potentially lower prices as CCS notes that one of the Parties had wanted to avoid a price war and hence advised his sales team not to give any "complimentary and special offer".[187]

190. CCS considers information exchange relating to sensitive and confidential pricing which amounts to a concerted practice which has as its object the prevention, restriction or distortion of competition to be a clear infringement of the Act. However, as mentioned in paragraph 184, CCS is mindful that this is the first infringement decision relating to such conduct in Singapore. Also, after having regard to the nature of the product, the structure of the market, the market shares of the Parties, the potential effect of the infringements on customers, competitors and third parties, and the representations made by the Parties, CCS considers it will be appropriate to fix a relatively low starting point of [✂]% of relevant turnover for each of the Parties. CCS would further highlight that this relatively low starting point takes into account the novel nature of this case in Singapore and would not be the starting point for future similar cases.

(ii) **Duration of the Infringement**

191. After calculating the base penalty sum, the next step is to consider whether this sum should be adjusted to take into account the duration of the infringement. The duration for which the Parties infringed the section 34 prohibition will depend on when they became party to the agreement, and when they ceased to be party to the same.[188] For parties whose duration was more than 1 year, CCS

[187] Refer to paragraph 121 of ID.
[188] See CCS Guidelines on the Appropriate Amount of Penalty, Paragraph 2.8.

will use the method as established in the "Employment Agencies Case,"[189] and adopt an approach of rounding down the period to the nearest month.

192. CCS deals with the adjustment for duration applicable to each Party in the calculation of penalties for each Party in the following paragraphs.

(iii) **Aggravating and Mitigating Factors**

193. At this next stage, CCS will consider the presence of aggravating or mitigating factors and make adjustments when assessing the amount of financial penalty,[190] i.e. increasing the penalty where there are aggravating factors and reducing the penalty where there are mitigating factors. These points are considered in relation to each of the Parties.

194. CCS considers the involvement of directors or senior management as an aggravating factor. The amount of the penalty will be adjusted upwards to reflect their direct involvement in or knowledge of any decision leading to the infringement, or failure to take the necessary steps to avoid an infringement.

195. CCS considers cooperation, which enables the enforcement process to be concluded more effectively and/or speedily, as a mitigating factor.[191] The amount of the penalty will be adjusted downwards to reflect cooperation by an undertaking during CCS' investigations. In the present case, CCS has specifically considered the degree of cooperation rendered by each Party and reflected this in the quantum of mitigating discount given to the respective Party.

(iv) **Other Relevant Factors**

196. Moving on to consider other relevant factors, the penalty may be adjusted as appropriate to achieve policy objectives such as general and specific deterrence, for example, to deter parties and other undertakings from engaging in anti-competitive practices, such as price information exchange. CCS considers that information exchange relating to pricing is an impactful infringement of the Act and as such, penalties imposed should be sufficient to deter undertakings from engaging in such a practice.

197. Where a party is unable or unwilling to provide information to determine its relevant turnover, CCS will impose a penalty that will reflect the seriousness of the infringement and with a view to deterring the undertaking as well as other undertakings from engaging in similar practices. In considering the appropriate penalty to be paid, CCS will consider the turnover of the other parties that are party to the infringement in estimating the same of those undertakings that were unable or unwilling to provide CCS with the necessary information on their relevant turnover.

[189] [2011] SGCCS 5, at [217].
[190] See CCS Guidelines on the Appropriate Amount of Penalty, Paragraph 2.10.
[191] See CCS Guidelines on the Appropriate Amount of Penalty, Paragraph 2.12.

198. While the financial position of the Parties is a relevant consideration in determining whether the penalty imposed will be sufficiently deterrent, the Parties should not rely on their economic difficulties and those of the market in seeking a reduction of the penalties imposed.[192] The mere finding of an adverse or loss-making financial situation is not sufficient reason to justify a reduction in the financial penalty.[193] A party seeking more lenient treatment because of its financial position must provide CCS with all information and documentation it wishes to have taken into account.[194]

D. Penalty for Batam Fast

199. CCS regards the conduct described in paragraph 107 to 140 as one infringement. However, for the purpose of calculating the appropriate penalties, the calculation has been broken down into penalties for the infringing conduct involving the (i) exchange and provision of sensitive and confidential price information in relation to tickets sold to Singapore corporate clients and (ii) provision of sensitive and confidential price information in relation to ferry tickets sold to travel agents; for both the Singapore (HarbourFront)-Sekupang route and the Singapore (HarbourFront)-Batam Centre route.

200. Starting point: Batam Fast was involved in the exchange and provision of sensitive and confidential price information in relation to tickets sold to (i) Singapore corporate clients and (ii) travel agents for the Singapore (HarbourFront)-Sekupang route and the Singapore (HarbourFront)-Batam Centre route.

201. Batam Fast's financial year commences on 1 April and ends on 31 March of the succeeding year. Batam Fast's relevant turnover figures for the infringements in Singapore for the financial year ended 31 March 2010 was S$[✂][195]for tickets sold to Singapore corporate clients and S$[✂][196] for ferry tickets sold to travel agents, for the Singapore (HarbourFront)-Sekupang route and the Singapore (HarbourFront)-Batam Centre route in total.

202. CCS has analysed its findings regarding the seriousness of the infringement in accordance with paragraphs 179 to 190 above and fixed the starting point for Batam Fast at the relatively low figure of [✂]% of relevant turnover. The starting amounts for Batam Fast are therefore S$[✂] and S$[✂] respectively for the infringing conduct involving the (i) exchange and provision of sensitive and confidential price information in relation to ferry tickets sold to Singapore corporate clients and (ii) provision of sensitive and confidential price

[192] *Tokai Carbon Ltd and others v European Commission* [2004] ECR II-1181, [2004] 5 CMLR 28.
[193] *Achilles Paper Group Limited v OFT* [2006] CAT 24 see paragraph 56.
[194] *Sepia Logistics Limited (formerly known as Double Quick Supplyline Limited) and Precision Concepts Limited v OFT* [2007] CAT 13.
[195] Information provided by Batam Fast on 8 June 2011 pursuant to the section 63 Notice issued by CCS dated 13 May 2011.
[196] Information provided by Penguin on 8 June 2011 pursuant to the section 63 Notice issued by CCS dated 13 May 2011.

information in relation to ferry tickets sold to travel agents; for both the Singapore (HarbourFront)-Sekupang route and the Singapore (HarbourFront)-Batam Centre route respectively.

203. Adjustment for duration: Batam Fast was a party to the concerted practice from 9 November 2007 until at least 17 November 2009 i.e. the date of the last known communication pertaining to the exchange and provision of price information on corporate clients. In considering the duration of the infringing conduct, CCS notes that there is evidence to indicate that the infringing conduct involving the exchange and provision of price information in relation to tickets sold to Singapore corporate clients, continued till at least 17 November 2009[197]. As such, in accordance with the principles stated in paragraph 191, CCS will adopt a duration multiplier of two for the concerted practice for the exchange and provision of price information in relation to ferry tickets sold to Singapore corporate clients between 2007 and 2009. The penalty after adjustment for duration is S$[✂] for the infringing conduct involving the exchange and provision of price information in relation to tickets sold to Singapore corporate clients.

204. Batam Fast was a party to the concerted practice for the provision of price information sold to travel agents from 17 June 2008 for at least 11 months i.e. the date of the last known communication pertaining to the provision of price information on travel agents. In considering the duration of the infringing conduct, CCS notes that there is evidence to indicate that the infringing conduct involving the provision of price information in relation to tickets sold to travel agents, continued till at least 20 May 2009[198]. As such, in accordance with the principles stated in paragraph 191, CCS will adopt a multiplier for a duration of 11 months. The penalty after adjustment for duration is S$[✂] for the infringing conduct involving the provision of price information in relation to tickets sold to travel agents.

205. Adjustment for aggravating and mitigating factors: As CCS does not note any aggravating factors in this matter, it does not make any adjustment for aggravating factors.

206. CCS considers that Batam Fast and its representatives were cooperative in promptly replying to CCS' request for documents via the section 63 notices and during the subsequent interviews.

207. Having taken into consideration all the facts and circumstances of this case, including the degree of cooperation rendered by Batam Fast, CCS reduces the penalty by [✂]%. After taking into account the aggravating and mitigating

[197] Refer to emails exchanges between Parties dated 9 November 2007, 5 February 2009 and 17 November 2009 as discussed at [121], [128], and [138] respectively.
[198] Refer to email exchanges between Parties dated 17 June 2008 and 20 May 2009 and discussed at paragraphs [105] to [106].

factors, the penalties for the infringing conduct involving the (i) exchange and provision of sensitive and confidential price information in relation to ferry tickets sold to Singapore corporate clients and (ii) provision of sensitive and confidential price information in relation to ferry tickets sold to travel agents have been adjusted downwards by [✂]% to S$[✂] and S$[✂] respectively.

208. Adjustment for other factors: CCS considers that the figure of S$172,906, which is made up of (i) S$[✂] for the infringing conduct involving the exchange and provision of sensitive and confidential price information in relation to ferry tickets sold to Singapore corporate clients, plus (ii) S$[✂] for the infringing conduct involving provision of sensitive and confidential price information in relation to ferry tickets sold to travel agents, is sufficient to act as an effective deterrent to Batam Fast and to other undertakings which may consider engaging in price information exchange arrangements. As such CCS will not be making adjustments to the penalty at this stage.

209. Adjustment to prevent maximum penalty being exceeded: The financial penalty of S$172,906 does not exceed the maximum financial penalty that CCS can impose in accordance with section 69(4) of the Act, i.e. S$[✂]. Accordingly, CCS concludes that a financial penalty of S$172,906 is to be imposed on Batam Fast.

210. Representations by Batam Fast on penalty: Batam Fast submitted[199] that they had been very cooperative and had submitted all relevant documents and information during the entire progress of the CCS investigation. CCS has taken this into consideration when calculating the penalties. Accordingly, CCS does not consider that a further reduction in the financial penalty is appropriate in the circumstances and imposes a financial penalty of S$172,906 on Batam Fast.

E. Penalty for Penguin

211. CCS regards the conduct as described in paragraph 107 to 140 as one infringement. However, for the purpose of calculating the appropriate penalties, the calculation has been broken down into penalties for the infringing conduct involving the (i) exchange and provision of sensitive and confidential price information in relation to ferry tickets sold to Singapore corporate clients and (ii) provision of sensitive and confidential price information in relation to ferry tickets sold to travel agents; for both the Singapore (HarbourFront)-Sekupang route and the Singapore (HarbourFront)-Batam Centre route.

212. Starting point: Penguin was involved in the exchange and provision of sensitive and confidential price information in relation to ferry tickets sold to (i) Singapore corporate clients and (ii) travel agents for the Singapore (HarbourFront)-Sekupang route and the Singapore (HarbourFront)-Batam Centre route.

[199] Representations made by Batam Fast Ferry Pte Ltd on 16 April 2012.

213. Penguin's financial year commences on 1 January and ends on 31 December each year. Penguin's relevant turnover figures for the infringement in Singapore for the financial year ended 31 December 2010 was S$[✂][200]for tickets sold to Singapore corporate clients and S$[✂][201] for tickets sold to travel agents, for the Singapore (HarbourFront)-Sekupang route and the Singapore (HarbourFront)-Batam Centre route in total.

214. CCS has analysed its findings regarding the seriousness of the infringement in accordance with paragraphs 179 to 190 above and fixed the starting point for Penguin at the relatively low figure of [✂]% of relevant turnover. The starting amounts for Penguin are therefore S$[✂] and S$[✂] for the conduct involving the exchange and provision of sensitive and confidential price information in relation to ferry tickets sold to Singapore corporate clients and (ii) provision of sensitive and confidential price information in relation to ferry tickets sold to travel agents; for both the Singapore (HarbourFront)-Sekupang route and the Singapore (HarbourFront)-Batam Centre route respectively.

215. Adjustment for duration: Penguin was a party to the concerted practice from 9 November 2007 until at least 17 November 2009 i.e. the date of the last known communication pertaining to the exchange and provision of sensitive and confidential price information on corporate clients. In considering the duration of the infringing conduct, CCS notes that there is evidence to indicate that the infringing conduct involving the exchange and provision of sensitive and confidential price information in relation to ferry tickets sold to Singapore corporate clients, continued till at least 17 November 2009[202]. As such, in accordance with the principles stated in paragraph 191, CCS will adopt a duration multiplier of two for the concerted practice for the exchange and provision of sensitive and confidential price information in relation to ferry tickets sold to Singapore corporate clients between 2007 and 2009. The penalty after adjustment for duration is S$[✂] for the infringing conduct involving the exchange and provision of sensitive and confidential price information of ferry tickets sold to Singapore corporate clients.

216. Penguin was a party to the concerted practice for the provision of sensitive and confidential price information sold to travel agents from 17 June 2008 for at least 11 months i.e. the date of the last known communication pertaining to the provision of sensitive and confidential price information on travel agents. In considering the duration of the infringing conduct, CCS notes that there is evidence to indicate that the infringing conduct involving the provision of sensitive and confidential price information in relation to ferry tickets sold to

[200] Information provided by Penguin on 8 July 2011 pursuant to the section 63 Notice issued by CCS dated 27 June 2011.
[201] Information provided by Penguin on 8 July 2011 pursuant to the section 63 Notice issued by CCS dated 27 June 2011.
[202] Refer to emails exchanges between Parties dated 9 November 2007, 5 February 2009 and 17 November 2009 as discussed at [121], [128], and [138] respectively.

travel agents, continued till at least 20 May 2009[203]. As such, in accordance with the principles stated in paragraph 191, CCS will adopt a multiplier for a duration of 11 months. The penalty after adjustment for duration is S$[✂] for the infringing conduct involving the provision of sensitive and confidential price information in relation to ferry tickets sold to travel agents.

217. Adjustment for aggravating and mitigating factors: As CCS does not note any aggravating factors in this matter, it does not make any adjustment for aggravating factors.

218. CCS considers that Penguin and its representatives were cooperative in replying to CCS' request for documents via the section 63 notices and during the subsequent interviews. Additionally, CCS considers the fact that Penguin cooperated fully by furnishing CCS with information on the details of the infringement.

219. Having taken into consideration all the facts and circumstances of this case, including the degree of cooperation rendered by Penguin, CCS reduces the penalty by [✂]%. After taking into account the aggravating and mitigating factors, the penalties for the infringing conduct involving the (i) exchange and provision of sensitive and confidential price information in relation to ferry tickets sold to Singapore corporate clients and (ii) provision of sensitive and confidential price information in relation to ferry tickets sold to travel agents have been adjusted downwards by [✂]% to S$[✂] and S$[✂] respectively.

220. Adjustment for other factors: CCS considers that the figure of S$113,860 which is made up of (i) S$[✂] for the infringing conduct involving the exchange and provision of sensitive and confidential price information in relation to ferry tickets sold to corporate clients, plus (ii) S$[✂] for the infringing conduct involving the provision of sensitive and confidential price information in relation to ferry tickets sold to travel agents, is sufficient to act as an effective deterrent to Penguin and to other undertakings which may consider engaging in price information exchange arrangements. As such, CCS will not be making adjustments to the penalty at this stage.

221. Adjustment to prevent maximum penalty being exceeded: The financial penalty of S$113,860 does not exceed the maximum financial penalty that CCS can impose in accordance with section 69(4) of the Act, i.e. S$[✂]. Accordingly, CCS concludes that a financial penalty of S$113,860 is to be imposed on Penguin.

222. Representations by Penguin on penalty: Several submissions on penalties were made in the representations submitted by Penguin[204]. Firstly, Penguin argued

[203] Refer to email exchanges between Parties dated 17 June 2008 and 20 May 2009 and discussed at paragraphs [105] to [106].
[204] Representations made by M/s A&G on behalf of their client, Penguin Ferry Services Pte Ltd on 23 April 2012

that while there had been instances where commercially sensitive information was exchanged between Penguin and Batam Fast, these were "mostly initiated by Batam Fast" and were "mostly ignored by Penguin". As stated above, CCS does not accept that exchanges between the Parties were mostly on a unilateral basis. CCS is of the view that even if this were the case, that is, "most" exchanges were "ignored", a single exchange or a selective basis in relation to a one-off alteration in the market is adequate to establish liability in the absence of action from the receiving party to distance itself from the anti-competitive conduct. In this event, Penguin had not taken active steps to explicitly distance itself and/or to stop the anti-competitive conduct, to support a further reduction in the penalty.

223. Secondly, Penguin submitted that on occasions where information was exchanged, the intention was not to restrict competition but was for the purpose of carrying out the Commercial Agreement which required a level of cooperation and coordination. CCS notes that the exchange of information extended clearly beyond the requirements of the Commercial Agreement and in fact involved the exchange of information which was otherwise not usually available in the public domain. As such, CCS does not accept this submission.

224. Thirdly, Penguin submitted that they had not sent Batam Fast emails in a secretive manner, and whenever they had received blind-copied emails from Batam Fast, they had ignored the emails and did not consider whether it was feasible to adjust Penguin's prices after receiving the emails. Penguin had also said that its role in the infringement was not one where it was aware of the implications and illegality of the conduct and had continued to take part in such conduct despite being aware of these considerations. CCS has considered this representation and notes that Penguin had not taken specific action to explicitly distance and/or dissociate itself from the infringing conduct, and as such CCS does not consider this to be a mitigating factor.

225. Fourthly, Penguin submitted that the alleged infringement was not committed intentionally, and that at most it could be argued that Penguin ought to have known that the exchange of information would result in a restriction or distortion of competition and therefore that the alleged infringement was committed negligently. As discussed above in paragraph 172, and as stated in the *Express Bus Operators' case*[205] :

> "...ignorance or a mistake of law is no bar to a finding of intentional infringement under the Act. CCS is likely to find that an infringement of the section 34 prohibition has been committed negligently where an undertaking ought to have known that its agreement or conduct would result in a restriction or distortion of competition."

[205] [2009] SGCCS 2, at [44].

226. Based on the circumstances, and from the manner in which the Parties had exchanged the sensitive and confidential information, the Parties must be taken to have known or ought to have known that their actions were to prevent or restrict competition between themselves. As such, CCS does not consider this as a mitigating factor.

227. Lastly, Penguin submitted that they had maintained complete and continuous cooperation throughout CCS' investigation and that they had complied with CCS' notices diligently and sought to provide the information and/or documents to CCS in a timely manner. CCS has taken this into consideration in calculating the penalties. Accordingly, CCS does not consider that a further reduction in the financial penalty is appropriate in the circumstances and imposes a financial penalty of S$113,860 on Penguin.

F. Conclusion on Penalties

228. In conclusion, CCS imposes, pursuant to section 69(2)(d) of the Act, the following financial penalties on the Parties:

Undertaking	Financial Penalty
Batam Fast	$172,906
Penguin	$113,860

229. Both Parties must pay their respective penalties to CCS by no later than 5 p.m. on 18 September 2012. If any of the Parties fail to pay the penalty within the deadline specified above, and no appeal within the meaning of the Act against the imposition or the amount of a financial penalty has been brought or such appeal has been unsuccessful, CCS may apply to register the direction to pay the penalty in a District Court. Upon registration, the direction shall have the same force and effect as an order originally obtained in a District Court and can be executed and enforced accordingly.

Yena Lim
Chief Executive
Competition Commission of Singapore