IN THE COMPETITION APPEAL BOARD OF THE REPUBLIC OF SINGAPORE

[2025] SGCAB 1

Appeal No 1 of 2023

In the matter of Notice of Infringement Decision issued by the Competition and Consumer Commission of Singapore on infringement of the Section 34 Prohibition in relation to price fixing by warehouse operators at Keppel Distripark, CCCS 700/001/2020/001

Between

(1) CNL Logistic Solutions Pte Ltd (Singapore UEN No. 201418330H)
(2) Gilmon Transportation & Warehousing Pte Ltd (Singapore UEN No. 199204539E)

… *Appellants*

And

Competition and Consumer Commission of Singapore

… *Respondent*

DECISION

[Competition Law] – [Anti-competitive agreements] – [Whether undertakings engaged in agreement]

[Competition Law] – [Anti-competitive agreements] – [Whether undertakings engaged in concerted practice]

[Competition Law] – [Anti-competitive agreements] – [Whether undertakings' conduct constituted restriction of competition by object]

TABLE OF CONTENTS

CNL Logistic Solutions Pte Ltd and another
v
Competition and Consumer Commission of Singapore

[2025] SGCAB 1

Competition Appeal Board — Appeal No. 1 of 2023
Tan Puay Boon SC, Dr Burton Ong, Tan Chuan Thye SC and Dr Tan Kim Song
23 April 2024

16 July 2025 Decision reserved.

Introduction

1 On 17 November 2022, the Competition and Consumer Commission of Singapore (the "**CCCS**") handed down its Infringement Decision ("**ID**") against four undertakings (collectively, the "**Undertakings**"):

(a) CNL Logistics Solutions Pte Ltd ("**CNL**");

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

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

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

2 In the ID, the CCCS found that the Undertakings had infringed s 34 of the Competition Act 2004 (2020 Rev Ed) (the "**Act**"), and imposed financial penalties on each of them.

3 In this appeal, CNL and Gilmon (the "**Appellants**") appeal against the ID on both liability and the quanta of the financial penalties imposed upon them.

This appeal has been bifurcated, and parties to this appeal have been heard on the issue of liability first. Separately, Mac-Nels has also filed an appeal against the ID only in respect of the financial penalty imposed upon it, without contesting the ID's finding of liability; that appeal was held in abeyance pending our decision on the Appellants' appeal on liability. There was no appeal by Penanshin, who had previously submitted a leniency statement ("**Leniency Statement**") on 9 March 2020.

4 Having carefully considered the evidence and the parties' submissions, we allow the Appellants' appeal on liability. We set out the reasons for our decision in these grounds.

Infringement Decision

5 The ID sets out in great detail the findings giving rise to the CCCS' decision. We summarise here the background facts of this appeal and the CCCS' findings in respect of its determination that the Appellants had infringed s 34 of the Act, though we shall consider these findings and their bases in greater detail at the appropriate junctures below.

Background facts

6 The Undertakings are each in the business of providing warehousing services[1] at Keppel Distripark, a multi-tenanted cargo distribution complex.[2] Such warehousing services are an integral part of the international shipping process,[3] whereby cargo may be shipped to a warehouse, where it may be stored,

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1 ID at [2]–[5].

2 ID at [6].

3 ID at [9]–[11].

unstuffed or deconsolidated by the warehouse operator[4] before it is sent on to the consignee.

7 Keppel Distripark is a free trade zone, where duties and Goods and Services Tax are not charged on cargo stored within it, and are only payable when the goods are consumed within Keppel Distripark or are brought out of Keppel Distripark for local sale or consumption.[5] At the material time, Keppel Distripark housed approximately 26 warehouse operators.[6] It is the Appellants' position (which the CCCS has not disputed in the ID or in these proceedings) that the Undertakings comprise approximately [10–20]% of the warehouse operator market in Keppel Distripark, with the Appellants only comprising approximately [0–10]% of the market.[7]

8 On 15 June 2017 at approximately 4.41pm,[8] Hup Soon Cheong Pte Ltd ("**HSC**"), the largest warehouse operator within Keppel Distripark,[9] sent a notice to one of its customers that it would be imposing a surcharge on import cargo stored within the free trade zone, called an "FTZ Surcharge".[10] Shortly thereafter, HSC put up the same notice at its warehouse office.[11] It is generally accepted by the parties that HSC was the first to announce such an FTZ

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4 ID at [13]–[14].

5 ID at [7].

6 ID at [6].

7 Written representations of CNL and Gilmon dated 12 May 2022 at [57(b)]; Appellants' Joint Written Reply Submissions on Liability at para 25(a), fn 38.

8 ID at [125]; Notes of Information ("**NOI**") of Alvin Hau dated 6 October 2020, Q94.

9 ID at [118].

10 ID at [125]; NOI of Alvin Hau dated 6 October 2020, Q91; email from Alvin Hau to Alfred Lui dated 15 June 2017 at 4.41pm.

11 ID at [125]; NOI of Alvin Hau dated 6 October 2020, Q93 and Q94.

Surcharge.[12] HSC's sister company, Capital Logistics Services Pte Ltd ("**CLS**"), which is itself one of the larger warehouse operators within Keppel Distripark, followed suit on the same day.[13] In short order, so too did other warehouse operators within Keppel Distripark, including the Undertakings.

The ID's findings in relation to the Appellants' infringement

9 In the ID, the CCCS found that it had been established on a balance of probabilities that a meeting took place at around 11.30am on 15 June 2017 between representatives of Penanshin and the Appellants (the "**15 June 2017 Meeting**"),[14] and that at this meeting:

(a) CNL's Director and General Manager Vasu S/O Achutan ("**Vasu (CNL)**") and Gilmon's Managing Director Teo Siang Siak ("**Simon (Gilmon)**") met with Penanshin's Container Freight Station Manager Mohamed Yasrin Bin Mohamed Yasil ("**Yasrin (Penanshin)**");[15]

(b) Vasu (CNL) and Simon (Gilmon) referred to the intention of certain warehouse operators, including the Appellants, to adopt the FTZ Surcharge,[16] and invited Penanshin to do so as well;[17] and

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12 ID at [124]–[126].

13 Respondent's Written Submissions on Liability dated 22 December 2023.

14 ID at [177].

15 ID at [130].

16 ID at [131].

17 ID at [132].

(c) Vasu (CNL) and Simon (Gilmon) further asked Yasrin (Penanshin) to ask if Mac-Nels wanted to join in adopting the FTZ Surcharge.[18]

10 Notably, the CCCS' finding that the 15 June 2017 Meeting took place was based primarily on the evidence of Penanshin and Yasrin (Penanshin), and supported by circumstantial evidence.[19]

11 In any event, the CCCS also found that even if the 15 June 2017 Meeting did not take place, there had been an exchange of pricing information between the Undertakings,[20] based on the following indicators:

(a) Gilmon's Assistant General Manager Chua Chung Wui ("**Thomas (Gilmon)**") admitted that he had informed Yasrin (Penanshin) that Gilmon intended to impose the FTZ Surcharge, before sending to Yasrin (Penanshin) HSC's and CLS' FTZ Surcharge notices;[21]

(b) Vasu (CNL) admitted that he had asked Yasrin (Penanshin) whether Penanshin was going to impose the FTZ Surcharge;[22]

(c) Messages sent by Yasrin (Penanshin) – to Mac-Nels' director, Matthew Er Yeong Yang ("**Matthew (Mac-Nels)**"), on the night of 15 June 2017, and to Vasu (CNL) and Thomas (Gilmon) on the morning of

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18 ID at [132].

19 ID at [177].

20 ID at [178] and [179].

21 ID at [178(a)]; NOI of Thomas (Gilmon) dated 26 August 2021, Q41.

22 ID at [178(a)]; NOI of Vasu (CNL) dated 19 November 2019, Q111.

16 June 2017 – indicated that Yasrin (Penanshin) had been informed of the Appellants' intentions to impose the FTZ Surcharge;[23] and

(d) Those same messages from Yasrin (Penanshin) to Vasu (CNL) and Thomas (Gilmon) on 16 June 2017 confirmed that Penanshin and Mac-Nels were going to impose the FTZ Surcharge, and Vasu (CNL) and Thomas (Gilmon) had both acknowledged the said messages.[24]

For convenience, we shall refer to the aforementioned communications collectively as the "**Communications**".

12 As explained in the ID, it was the view of the CCCS that the conduct of the Appellants was anti-competitive because they had engaged in "Price Fixing Conduct", in that they had:[25]

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

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

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

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

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23 ID at [179(a)(ii)].

24 ID at [178(b)] and [178(c)].

25 ID at [210].

13 The CCCS went on to find, on a balance of probabilities, that the Appellants had engaged in an agreement and/or a concerted practice to fix the price of warehousing services at Keppel Distripark by coordinating the imposition of an FTZ Surcharge, and that this amounted to an agreement and/or concerted practice which had the object of preventing, restricting or distorting competition within the market for warehousing services in Keppel Distripark.[26]

14 While the CCCS' investigations in this case involved 11 warehouse operators (including the Appellants) at Keppel Distripark, only four of them (Penanshin, Mac-Nels, and the Appellants) were ultimately found to have engaged in "Price Fixing Conduct" that infringed the Section 34 Prohibition.[27] Although the ID states that "CCCS' investigations did not establish that Yasrin (Penanshin) had spoken to … other warehouse operators before he sent his message to Matthew (Mac-Nels)" and that "CCCS has investigated the conduct of these other warehouse operators at Keppel Distripark and did not find evidence of their participation in the Price Fixing Conduct",[28] the CCCS stated during the oral hearing on 23 April 2024 that it was "not difficult to conceive that Yasrin (Penanshin) may have asked other people [about their plans to follow the FTZ Surcharge previously announced by HSC]".[29] While the ID does not document the telephone calls and oral conversations between the different warehouse operators at Keppel Distripark following HSC's announcement, the evidence from Yasrin (Penanshin) and the Appellants indicates that there were in fact other multiple contemporaneous communications (through means other

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26 ID at [205].

27 ID at [206].

28 ID at [207].

29 Transcript of oral hearing on 23 April 2024 ("**Transcript**") at p 96.

than WhatsApp messages) between them and the other warehouse operators who were not penalised by the CCCS (as we later deal with at [55]–[57] below).

15 For completeness, we note that in the ID, CCCS stated that it "did not find evidence of [other warehouse operators'] participation in the Price Fixing Conduct".[30] At the hearing of the appeal, the CCCS commented that "the file has not been closed" in respect of other warehouse operators, and suggested that the CCCS had not foreclosed the possibility of action being taken against the other warehouse operators if any other evidence arises in the course of any further investigation.[31]

Grounds of the Appellants' appeal on liability

16 The Appellants appeal against the CCCS' determination of their liability on two grounds:

(a) First, that the Appellants have acted only to – at most – communicate their independent decisions to follow the decision of market leaders in Keppel Distripark to introduce the FTZ Surcharge, and that this does not amount to infringing conduct within the meaning of s 34 of the Act; indeed, this conduct was indistinguishable from that of other warehouse operators who had not been found to have infringed s 34;[32] and

(b) Second, that the CCCS erred in finding an infringement under s 34 of the Act, because no causal connection has been established

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30 ID at [207].

31 Transcript at p 131 ln 9 to p 132 ln 20.

32 Notice of Appeal at para 11(a).

> between the communication of information by the Appellants to Penanshin, and the subsequent market conduct of the Undertakings; instead, the market conduct of the Undertakings was the natural and rational response to market movements initiated by the market leaders in Keppel Distripark.[33]

17 Crucially, the Appellants dispute that the 15 June 2017 Meeting took place.[34] It is their case that the CCCS, in finding that it did, had placed excessive weight on Yasrin (Penanshin)'s and Penanshin's testimony.

Procedural history

18 On 20 October 2023, we received the Appellants' written submissions on liability. This was followed by the CCCS' written submissions on liability on 22 December 2023, and the Appellants' further written submissions on liability on 2 February 2024.

19 We then sought further assistance from the parties on the question of the approach that should be taken by the Competition Appeal Board ("**Board**") in respect of any inference drawn by the CCCS in the ID, as well as on whether the parties would be calling any witness at the hearing of the appeal.[35] The parties tendered their supplemental submissions on these questions on 22 March 2024. Notably, the parties confirmed that they did not intend to call any witness

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33 Notice of Appeal at para 11(b).

34 Parties' joint Chronology of Events at S/N 5.

35 Procedural Directions No 3

at the hearing, and that they intended instead for us to consider the documentary evidence as it was.[36]

20 Accordingly, at the hearing of this appeal on 23 April 2024, we heard only oral submissions from the parties.

21 Following the hearing, the parties submitted a final round of written submissions, consisting of the CCCS' post-hearing submissions dated 15 May 2024, the Appellants' post-hearing submissions dated 29 May 2024, and the CCCS' post-hearing reply submissions dated 5 June 2024.

Issues

22 In dealing with the issues which we have to decide in this appeal, it is apposite to set out a few guiding principles.

23 First, it is not disputed[37] that the CCCS bears the burden of proving that the Appellants have infringed s 34 by their conduct: *Gold Chic Poultry Supply Pte Ltd and another v CCCS and other appeals* [2020] SGCAB 1 ("***Fresh Chicken Products Appeals***") at [59]. Nor is it disputed that the requisite standard of proof is proof on the balance of probabilities, although – given the seriousness of an allegation of infringement – the quality of evidence required to establish an infringement on the balance of probabilities is "strong and convincing evidence": *Fresh Chicken Products Appeals* at [65] and [66].

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[36] Appellants' Joint Supplemental Submissions on Liability at para 4; Respondent's Written Submissions on Inferences at para 5.

[37] ID at [86]; Appellants' Written Submissions dated 20 October 2023 at para 12.

24 Turning to the Act itself, s 34 prohibits "agreements between undertakings, decisions by associations of undertakings or concerted practices which have as their object or effect the prevention, restriction or distortion of competition within Singapore" (the "**Section 34 Prohibition**"), subject to certain statutorily prescribed exemptions. In other words, there are two distinct elements that must be shown in order to establish an infringement of the Section 34 Prohibition, namely:

(a) that the undertakings in question have engaged in the particular forms of cooperative conduct (i.e. agreements between undertakings, decisions by associations of undertakings or concerted practices); and

(b) that such conduct is restrictive of competition by *either* its "object" *or* its "effect": *Re Pang's Motor Trading v Competition Commission of Singapore, Appeal No 1 of 2013* [2014] SGCAB 1 ("***Pang's Motor Trading***") at [30].

25 Specifically, the CCCS relies on s 34(2)(a) of the Act, which states that "agreements, decisions or concerted practices may, in particular, have the object or effect of preventing, restricting or distorting competition within Singapore if they … directly or indirectly fix purchase or selling prices or any other trading conditions".

26 The crux of the ID is that by reason of the conduct described at [9] and [11] above, the Appellants had participated in an agreement and/or concerted practice, which had the object of fixing the price of warehousing services at Keppel Distripark.[38] However, it was not immediately clear on the face of the

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[38] ID at [175].

ID which aspects of the Appellants' conduct the CCCS was relying on to assert that an agreement had been formed, and which aspects of the conduct the CCCS was relying on to assert that a concerted practice had arisen. In this regard, the CCCS has taken the position that it need not characterise an infringement as either an agreement or a concerted practice.[39] Nonetheless, the CCCS ultimately clarified that its case was as follows:

(a) The 15 June 2017 Meeting and Yasrin (Penanshin)'s 16 June 2017 messages to Thomas (Gilmon) and Vasu (CNL) gave rise to an agreement involving the Appellants with the object of fixing the price of warehousing services at Keppel Distripark;[40] and

(b) In any event, the communications between the parties relating to pricing information at the 15 June 2017 Meeting and in the Communications constituted a concerted practice with the object of fixing the price of warehousing services at Keppel Distripark.[41]

27 Accordingly, we will have to consider the following two issues:

(a) First, whether the CCCS has proven on a balance of probabilities that there was either an agreement or a concerted practice involving the Appellants; and

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39 Respondent's Written Submissions on Liability at para 15; Respondent's Post-Hearing Submissions at para 35.

40 Transcript, p 112 ln 23 to p 113 ln 13.

41 Transcript, p 114 ln 21 to p 116 ln 19

(b) Second, whether the CCCS has proven on a balance of probabilities that this agreement or concerted practice falls within the "by object" limb of the Section 34 Prohibition.

The first issue: whether the Appellants were involved in an agreement or concerted practice

Agreements and concerted practices

28 We begin by making a few preliminary remarks on the nature of agreements and concerted practices. In this regard – and in relation to other issues concerning the Section 34 Prohibition that we shall consider in the course of this decision – "decisions from the UK and the EU are highly persuasive because the s 34 prohibition … was modelled closely after Chapter I of the UK Competition Act 1998 and Art 101 of the Treaty of Functioning of the European Union": *Pang's Motor Trading* at [33].

29 Agreements include both legally enforceable and non-enforceable agreements, whether written or oral, as well as "gentlemen's agreements". The agreement is formed when parties arrive at a voluntary consensus with each other about how they will act, or not act, regardless of how that consensus is arrived at. The agreement may be reached through meetings between the parties, both physical and virtual, or through other exchanges between them by mail or other telecommunication channels because the form of the agreement is unimportant.[42]

30 In contrast, concerted practices extend to other situations where no apparent agreement has been reached between the parties involved, but where

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[42] CCCS Section 34 Guidelines [2.10]

they knowingly substitute the risks of competition with some form of practical cooperation between them. This was the definition given by the ECJ in *Coöperatieve Vereniging "Suiker Unie" UA and others v Commission* [1975] ECR 1663 at [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.

31 The authorities indicate that concerted practices bear the following characteristics. Firstly, there must be direct or indirect contact made between the undertakings, whose interactions with each other reduce or remove uncertainty as to their future market conduct. Secondly, there must be subsequent market conduct by those undertakings from which concertation may be inferred. Thirdly, there must be a causal relationship between the first two elements. Thus, in contrast with the concept of an "agreement", the "concerted practice" may require a more detailed investigation into the character of the engagement between the parties, their subsequent market conduct and the prevailing market conditions under which they operate as market participants. For instance:

(a) In Case 48/69 ICI v Commission ("***Dyestuffs***") [1972] ECR 619 at [68], the ECJ held that:

> [T]he question whether there was a concerted action in this case can only be correctly determined if the evidence upon which the contested decision is based is considered, not in isolation, but as a whole, account being taken of the specific features of the market in the products in question.

(b) In Case C-49/92P *Commission v Anic Partecipazioni SpA* ("***Anic***") [1999] ECR I-4125 at [118] and [121], where rival undertakings exchanged commercially sensitive information with each other, the ECJ held that:

> …a concerted practice implies, besides undertakings concerting together, conduct on the market pursuant to those collusive practices, and a relationship of cause and effect between the two…subject to proof to the contrary, which it is for the economic operators concerned to adduce, there must be a presumption that the undertakings participating in concerting arrangements and remaining active on the market take account of the information exchanged with their competitors when determining their conduct on that market, particularly when they concert together on a regular basis over a long period…

32 A concerted practice may, in some circumstances, arise from a unilateral disclosure by one party of its future pricing intentions or conduct and mere receipt of that information by another party. In *Cimenteries CBR and Others v Commission* [2000] ECR II-491 at [1852] ("***Cimenteries***"), the CFI held that:

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

33 Similarly, in *Tate & Lyle and Others v Commission* ("***Tate & Lyle***") [2001] ECR II-2035 at [54]–[58], where there were direct contacts made between three competing undertakings, the CFI held that:

> … 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… 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… 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.

34 In Case C-8/08 *T-Mobile Netherlands and Others v Raad van Bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529 ("***T-Mobile***"), at [54]–[62], the ECJ has affirmed that a concerted practice may potentially be established from exchanges between the parties at a single meeting through a presumed causal connection between their interactions and their subsequent market conduct:

> …the referring court asks essentially whether, when applying the concept of concerted practices in Article 81(1) EC, there is in all cases a presumption of a causal connection between the concerted practice and the market conduct of the undertakings concerned, even if the concerted action is the result of a single meeting…
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> … [T]he 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 actions 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.
>
> … 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 justifiably be called upon to adduce evidence that that concerted action did not have any effect on their conduct on the market in question.
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> In the light of the foregoing, the answer to the third question must be that, 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 a meeting held by the participating undertakings on a single occasion. [emphasis added in italics]

35 It will be seen from the above that agreements and concerted practices have distinctive features, notwithstanding that they are "*not mutually incompatible*": *Anic* at [132]. To reiterate, an "agreement" can arise simply from the contact or interactions between the parties, so long as some sort of consensus has been reached between them without having to inquire into their subsequent market conduct. In contrast, a "concerted practice" entails more than just the parties making contact or interacting with each other; it also involves some form of subsequent "practical cooperation" between them, which includes "remaining active on the market", with a causal link connecting their initial contact to their subsequent market conduct. Put another way, a "concerted practice" requires *concertation* between the parties, demonstrating cooperative market behaviour that "leads to conditions of competition which do not correspond to the normal conditions of the market", thus requiring a baseline inquiry into what sorts of "normal" market conditions might be observable, in the absence of the contact between the parties, given the prevailing economic characteristics of the relevant market. For example, mere parallel pricing behaviour or independent price-following conduct in a highly concentrated oligopolistic market might be generally regarded as "normal" market behaviour from which an inference of concertation ought not always be drawn. However, an inference of concertation may be appropriate if market players behaved in

similar ways after one undertaking has made significant private disclosures of its pricing plans to another undertaking to signal the former's pricing intentions in advance, in order to influence the latter's future pricing conduct or to persuade the latter to adopt similar pricing strategies without having to wait for the former to make public announcements. A finding of a "concerted practice" between the parties in such circumstances would be reasonable based on a presumptive causal connection between their initial interactions and their subsequent market behaviour, thereby providing a basis for an infringement of the Section 34 Prohibition if the object or effect of this concerted practice is to restrict competition in the market.

36 On a related note, and as stated at [26] above, the CCCS has taken the position that it need not characterise an infringement as either an agreement or a concerted practice.[43] However, the authorities reveal that the basis for that position is that where the *infringement* in question is a complex one spanning multiple *elements* of conduct, some of which may be characterised as agreements and others as concerted practices, the competition authority is not required to characterise the entire *infringement* as an agreement or a concerted practice: Case T-7/89 *SA Hercules Chemicals NV v Commission* [1991] ECR II-1711 at [264]; *Anic* at [132]. Nonetheless, as discussed in the preceding paragraphs, we observe that even for such infringements, careful delineation and characterisation of each *element* of the infringement (as an agreement or concerted practice) would aid analytical clarity.

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[43] Respondent's Post-Hearing Submissions at para 35.

Whether the CCCS has established that there was an agreement involving the Appellants

37 We turn now to the first aspect of the CCCS' case, namely that the 15 June 2017 Meeting and Yasrin (Penanshin)'s 16 June 2017 messages to Thomas (Gilmon) and Vasu (CNL) constituted an agreement involving the Appellants with the object of fixing prices.

38 At the hearing, the CCCS explained that its case was that the agreement was constituted by "an invitation or offer followed by an acceptance of sorts",[44] with Yasrin (Penanshin)'s 16 June 2017 WhatsApp communications constituting the said acceptance.[45] In this regard, the CCCS accepted that its finding of an agreement was "predicated on there having been communications between [the Appellants, and Penanshin] during the [15 June 2017 Meeting]".[46]

39 In addition, the CCCS briefly advanced the submission that even if the 15 June 2017 Meeting had not happened, Yasrin (Penanshin)'s 16 June 2017 messages to Thomas (Gilmon) and Vasu (CNL) implied the existence of prior communications as a starting point of the agreement.[47] However, when it was pointed out that no evidence of such communications was before us, the CCCS did not pursue this submission further.[48]

40 It follows that there are two issues we must address in dealing with this aspect of the CCCS' case:

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44 Transcript, p 112 ln 24 to ln 25.

45 Transcript, p 113 ln 1 to ln 9.

46 Transcript, p 113 ln 10 to ln 13.

47 Transcript, p 113 ln 15 to p 114 ln 3.

48 Transcript, p 114 ln 4 to ln 20.

(a) First, whether the CCCS was correct in determining that the 15 June 2017 Meeting took place; and

(b) Second, in any event, whether the CCCS was correct in considering that Yasrin (Penanshin)'s 16 June 2017 messages to Thomas (Gilmon) and Vasu (CNL) concluded an agreement to which the Appellants were party.

41 Consequently, as referred to at [19] above, we invited submissions from the parties on the approach that the Board should take in determining the correctness of the inferences drawn by the CCCS. While the CCCS took pains to highlight the evidential difficulties faced by competition authorities,[49] it was not disputed that inferences must be rooted in the established facts, and ought to be drawn as a matter of common sense and proper reasoning.[50] At the same time, the Board will also consider whether there are alternative plausible explanations: *Fresh Chicken Products Appeals* at [70]. Ultimately, the Board assesses the whole of the evidence before it holistically, and places the appropriate weight and makes any appropriate inferences based on their reliability and relevance: *Fresh Chicken Products Appeals* at [97].[51]

42 Before turning to an examination of the evidence in the present case, we would highlight one particular submission from the CCCS on the principles governing such examination: that "[e]ven if the [Board] were prepared, on the available evidence, to arrive at a finding that differed from that of CCCS, it may

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49 Respondent's Written Submissions on Inferences at paras 24–25.

50 Respondent's Written Submissions on Inferences at para 29.

51 Appellants' Supplemental Submissions on Liability at para 8(d); Respondent's Written Submissions on Inferences at para 30.

not be appropriate for it to do so if the findings of CCCS were assessed to be reasonable (and therefore not materially erroneous)".[52] Two clarifications are apposite. First, where the Board comes to the view that a different finding is correct, such view would be based on it being the correct view on a balance of probabilities, not that it is a more reasonable view. The analysis is one of the evidential burden, not on a view of what is reasonable. As stated in *Fresh Chicken Products Appeal* at [66], "there is no third or intermediate legal burden of proof apart from the civil burden of balance of probabilities and the criminal burden of beyond reasonable doubt". Second, the Board may consider that the CCCS' finding was not borne out, without making a finding of its own (see *Tan Chin Hock v Teo Cher Koon and another and another appeal* [2022] 2 SLR 314 at [31]). As noted at [23] above, the ultimate question is whether the CCCS has proven its findings on the balance of probabilities, which requires "strong and convincing evidence" of the infringing conduct alleged.

Whether the 15 June 2017 Meeting took place

43 In respect of the first issue, the CCCS' case is premised primarily on the following pieces of evidence, which *directly* allege that the 15 June 2017 Meeting took place:[53]

(a) First, on 9 March 2020, Penanshin submitted its Leniency Statement, alleging that Simon (Gilmon) and Vasu (CNL) had approached Yasrin (Penanshin) at Penanshin's premises, and that Simon (Gilmon) and Vasu (CNL) had informed Yasrin (Penanshin) that the Appellants, along with a number of other warehouse operators,

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52 Respondent's Written Submissions on Inferences at para 15.

53 ID at [177].

"intended to introduce the FTZ Surcharge on or about 1 July 2017 at the same time".[54]

(b) In subsequent interviews with Yasrin (Penanshin) on 17 March 2020, 15 January 2021 and 31 August 2021, Yasrin (Penanshin) confirmed that the 15 June 2017 Meeting had taken place, and provided further details of what had transpired, alleging that he was asked by Simon (Gilmon) and Vasu (CNL) whether Penanshin would like to be part of the plan to introduce the FTZ Surcharge, and to approach Mac-Nels to see if they too would like to be part of the plan.

44 The CCCS also relies on the following pieces of *indirect* evidence, which it submits support its finding that the 15 June 2017 Meeting took place:[55]

(a) The message sent by Yasrin (Penanshin) to Matthew (Mac-Nels) in the evening of 15 June 2017, which indicated that Yasrin (Penanshin) had, by that time, already been made aware of the Appellants' intention to impose the FTZ Surcharge;

(b) The messages sent by Yasrin (Penanshin) to Vasu (CNL) and Thomas (Gilmon) in the morning of 16 June 2017, indicating that Mac-Nels and Penanshin would "follow the increase of new charges FTZ" and that Mac-Nels' boss would "follow us", and which were acknowledged by Vasu (CNL) and Thomas (Gilmon);

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54 Penanshin's Leniency Statement at para 7.

55 Respondent's Post-Hearing Submissions at para 54.

(c) Vasu (CNL)'s admission in an interview on 22 September 2020 that he had asked Yasrin (Penanshin) over a call whether Penanshin was going to impose the FTZ Surcharge; and

(d) Thomas (Gilmon)'s admission in an interview on 26 August 2021 that he had informed Yasrin (Penanshin) over a call about Gilmon's intention to impose the FTZ Surcharge, before Thomas (Gilmon) sent Yasrin (Penanshin) the notices on 15 June 2017.

45 Given that Penanshin's Leniency Statement and Yasrin (Penanshin)'s interviews from 17 March 2020 to 31 August 2021 were given and conducted in the context of a leniency application by Penanshin, an obvious question arises as to the weight that should be given to these sources. In this regard, as set out in *Fresh Chicken Products Appeals* at [107], higher probative value may be ascribed to statements that:

(a) are reliable;

(b) are made on behalf of an undertaking;

(c) are made by a person under a professional obligation to act in the interests of that undertaking;

(d) go against the interests of the maker of the statement;

(e) are made by a direct witness of the relevant circumstances; and

(f) are provided in writing deliberately and after mature reflection.

46 The Board in *Fresh Chicken Products Appeals* also noted that the reliability of the statements and the credibility of the maker should be tested for both internal and external consistency, be it against or taking into account

factors such as the maker's potential motives and incentives and the maker's previous statements and other evidence (at [108]). In this regard, "leniency statements are not necessarily undermined by the very fact of the economic incentives in submitting a leniency application" (at [106]). Nonetheless, as noted in *JFE Engineering Corp (Formerly, NKK Corp) and Others v Commission of the European Communities* [2004] E.C.R. 11-2501 at [219]:

> [A]n admission by one undertaking accused of having participated in a cartel, the accuracy of which is contested by several other undertakings similarly accused, cannot be regarded as constituting adequate proof of an infringement committed by the latter unless it is supported by other evidence.

47 In applying these principles to Penanshin's Leniency Statement and Yasrin (Penanshin)'s interviews from 17 March 2020 to 31 August 2021, we make three main observations.

48 First, following Penanshin's Leniency Statement and Yasrin (Penanshin)'s interviews from 17 March 2020, wherein the allegations of the 15 June 2017 Meeting were made, Simon (Gilmon) and Vasu were both called for interviews on 22 September 2020, at approximately the same time (10.05am and 10.09am respectively). At their respective interviews, it was put to them individually that the 15 June 2017 Meeting had taken place. Simon (Gilmon) denied this,[56] while Vasu (CNL) stated that he could not recall if such a meeting had taken place.[57]

49 The starting point, therefore, is that whether the 15 June 2017 Meeting took place is a "he said, she said" situation. No other direct evidence concerning

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56 NOI of Simon dated 22 September 2020, Q66.

57 NOI of Vasu (CNL) dated 22 September 2020, Q154–Q158.

the 15 June 2017 Meeting, beyond the notes of the interviews of Yasrin (Penanshin), Simon (Gilmon) and Vasu (CNL), was placed before us. Notably, none of these individuals had ever been directly cross-examined on their testimony. Further, as noted at [19]–[20] above, these individuals were not called as witnesses at the hearing of this appeal. We therefore have to consider the appeal on the basis of the facts as set out in the written record, without having had the opportunity of clarifying any of the residual ambiguities therein.

50 Second, as highlighted by the Appellants, Yasrin (Penanshin)'s interviews from 17 March 2020 to 31 August 2021 are contradicted by an earlier interview he underwent on 19 November 2019. At this interview, not only did he fail to bring up any meeting between representatives from the Appellants, to the extent that he did identify representatives from the Appellants as having engaged him in discussions as to the FTZ Surcharge, the representatives he identified were Vasu (CNL) and *Thomas (Gilmon)* (and not Simon (Gilmon), as later statements from Penanshin and Yasrin (Penanshin) identified).[58]

51 The CCCS submitted that this discrepancy was not material, and that save for this discrepancy, Yasrin (Penanshin)'s account of what transpired at the 15 June 2017 Meeting has been largely consistent – namely, that representatives from Gilmon and CNL had approached him to share the details of, and their intention to implement, the FTZ Surcharge alongside other warehouse operators; and that Yasrin (Penanshin) was asked thereafter if Penanshin would like to be a part of the plan to implement the FTZ Surcharge, and whether he could reach out to Mac-Nels as well.[59]

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58 Appellants' Joint Written Submissions on Liability at para 19(a).

59 Respondent's Written Submissions on Liability at para 54(c).

52 However, it is not clear to us that Yasrin (Penanshin)'s apparent failure to recall the exact persons who allegedly visited him could be so simply dismissed. In particular, on Yasrin (Penanshin)'s own testimony at his 17 March 2020 interview, he met Vasu (CNL) and Thomas (Gilmon) at monthly safety meetings between the managers of the warehouse operators, while the extent of his interaction with Simon (Gilmon) was "[meeting] him at the carpark where we said hello". In these circumstances, had the 15 June 2017 Meeting occurred, it is not likely that Yasrin (Penanshin) would have mixed up Simon (Gilmon) and Thomas (Gilmon). Simon (Gilmon)'s presence at a business-related meeting with Yasrin (Penanshin) would likely have registered with the latter as an anomaly, and he would have recalled Simon (Gilmon)'s presence at the meeting with more clarity or certainty.

53 Moreover, in respect of one key point, the notes of Yasrin (Penanshin)'s 19 November 2019 interview do not bear out the common narrative which the CCCS states runs through Yasrin (Penanshin)'s account – namely, Yasrin (Penanshin) did not state that Vasu (CNL) and Thomas (Gilmon) had approached him *at a meeting*, only that they had "told" him that the Appellants intended to introduce an FTZ Surcharge:

> Q22. Did you or your company engage in discussions with (i) Hup Soon Cheong Services Pte Ltd ("HSC"); (ii) Gilmon Transportation & Warehousing ("Gilmon"); or (iii) CNL Logistic Solutions Pte Ltd ("CNL"); and any other WH Operators in deciding to introduce its "FTZ Surcharge"?
>
> A: Vasu from CNL and Thomas from Gilmon told me that their respective companies had intended to introduce an "FTZ Surcharge" of $6 / M3 and asked me whether Penanshin would like to introduce this "FTZ Surcharge". I told them that I would just propose to my boss as I did not have the authority to make such a decision.

54 We would further highlight that despite these discrepancies, it appears that at Yasrin (Penanshin)'s subsequent interviews from 17 March 2020 to 31

August 2021, these discrepancies were never raised to Yasrin (Penanshin) for his clarification. Yasrin (Penanshin) was not asked why he had not described the communications he had with the others as taking place during a meeting between them, nor why he had not referred to Simon (Gilmon) at all in his 19 November 2019 interview. Nor was Yasrin (Penanshin)'s testimony ever tested by way of cross-examination, as we have already noted at [49] above. Moreover, to the extent that Yasrin (Penanshin) was consistent in his later interviews that the 15 June 2017 Meeting took place, we note that no opportunity for establishing such consistency was afforded to Vasu (CNL) or Simon (Gilmon): Simon (Gilmon)'s 22 September 2020 interview appears to be his only interview, whereas Vasu (CNL) was interviewed on one further occasion on 26 August 2021, at which he was not asked about the 15 June 2017 Meeting again. Thomas (Gilmon) was also not asked whether he had attended such a meeting with Yasrin (Penanshin) at Penanshin's office on that day.[60]

55 Third, in his 15 June 2017 messages to Matthew (Mac-Nels), Yasrin (Penanshin) identified 7 operators who would be imposing the FTZ Surcharge, and sought Matthew (Mac-Nels)'s input as to whether he would follow suit. When Yasrin (Penanshin) was asked about this in his 19 November 2019 interview, he admitted that he had gone around and "called the other parties … to get their notices on the FTZ Surcharge". The full context of this admission is set out below:

> Q23. I refer you again to the document marked "MY-003" where there were notices attached from other warehouse operators such as HSC and CLS. Can I understand whether these were also from your discussions with these companies?

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60 NOIs of Thomas (Gilmon) dated 19 November 2019, 3 December 2019, 8 October 2020 and 26 August 2021.

> A: I called the other parties that you see in "MY-003" to get their notices on the FTZ Surcharge and to understand that they are increasing their charges, so that I can show my boss that they would be implementing the "FTZ Surcharge" on 1 July.

56 The Appellants highlight this as an admission on Yasrin (Penanshin)'s part that he was in fact the initiator of contact with other warehouse operators.[61] On the other hand, the CCCS suggests that the proper interpretation of this is that Yasrin (Penanshin) should be understood as saying that he had called other warehouse operators after he was approached by representatives from the Appellants.[62]

57 On our reading of Yasrin (Penanshin)'s admission in its context, the Appellants' interpretation seems more likely. It appears that what Yasrin (Penanshin) meant by "the other parties" he called was "other warehouse operators", as was stated in the question posed to him, i.e. operators that were not Penanshin, rather than operators other than the Appellants. We think this adds weight to the Appellants' assertion that the 15 June 2017 Meeting did not take place as was asserted by Penanshin and Yasrin (Penanshin).

58 The suggestion that Yasrin (Penanshin) was the initiator of contact with other warehouse operators is also significant for another reason. Under the CCCS' Guidelines on Lenient Treatment for Undertakings Coming Forward with Information on Cartel Activities, "[a]n undertaking which has initiated or coerced another undertaking to participate in the cartel will not be eligible for total immunity or receive a reduction in the financial penalty of up to 100%", being only instead eligible for leniency and a reduced reduction in the financial

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61 Appellants' Joint Written Submissions on Liability at para 19(g).

62 Respondent's Written Submissions on Liability at para 54(f).

penalty (para 2.4). This alters the economic calculus, and provides a greater incentive for Penanshin and Yasrin (Penanshin) to have proactively sought to shift the responsibility of initiation onto other operators, particularly in light of Penanshin's leniency application. In this regard, while "leniency statements are not necessarily undermined by the very fact of the economic incentives in submitting a leniency application", the economic incentive for Penanshin and Yasrin (Penanshin) in this case must be considered together with the fact that – as explained at [50]–[53] above – Yasrin (Penanshin) had not, prior to the submission of Penanshin's leniency application on 9 March 2020, attested to the 15 June 2017 Meeting.

59 Given our observation above at [49] that the direct evidence on the 15 June 2017 Meeting amounts to a "he said she said" situation, the discrepancies with Penanshin's and Yasrin (Penanshin)'s narrative and the economic incentive for them to shape their narrative serve to diminish the weight that can placed on the said narrative. Though these issues do not *negate* the value of the statements given by Penanshin and Yasrin (Penanshin), we find that these statements by themselves would not discharge the CCCS' burden of proof in showing "strong and convincing evidence" that the 15 June 2017 Meeting had taken place.

60 We therefore turn to examine the supporting evidence relied upon by the CCCS as indirectly indicative of the 15 June 2017 Meeting, being Yasrin (Penanshin)'s messages with Matthew (Mac-Nels), Thomas (Gilmon) and Vasu (CNL), and Thomas (Gilmon)'s and Vasu (CNL)'s admissions in their interviews.

61 The messages relied upon by the CCCS are as follows:[63]

> Message from Yasrin (Penanshin) to Matthew (Mac-Nels) on 15 June 2017 (at 9.57pm):
>
> *Mr er,*
>
> *Are u interested to add charges for warehouse?*
>
> *We are going to in post one more charge on 1stJuly to collect extra revenue for warehouse.*
>
> *It will be call FTZ Surcharge we will collect $6 PER M3.*
>
> *The are a few whse will be joining me*
>
> *Penanshin*
>
> *HSC*
>
> *Astro*
>
> *CNL*
>
> *Gilmon*
>
> *CWT. KIV*
>
> *A&T.*
>
> Message from Yasrin (Penanshin) to Thomas (Gilmon) and Vasu (CNL) individually on 16 June 2017 (at 7.40am (Vasu (CNL)) and 7.42am (Thomas (Gilmon)):
>
> *Bro,*
>
> *Mac nels & penanshin will follow the increase of new charges FTZ*
>
> *I have talk to mn boss he will follow us.*
>
> *I will give the cc copy notice to soon*

62 The CCCS submits that Yasrin (Penanshin)'s message to Matthew (Mac-Nels) strongly suggests that he was already made aware that the Appellants were going to impose the FTZ Surcharge, and that Yasrin (Penanshin)'s use of the word "follow" suggests that his messages to Thomas

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63 Agreed Bundle of Documents at pp 2293, 2300 and 2304.

(Gilmon) and Vasu (CNL) were in the manner of a response to information received from the Appellants.

63 Neither of these submissions truly bolsters the CCCS' case that the 15 June 2017 Meeting took place. As Yasrin (Penanshin) himself admitted (see [55] above), he had communicated with the representatives of various neighbouring operators and called around to obtain notices from other warehouses. Insofar as the question is whether his knowledge that the Appellants were going to impose the FTZ Surcharge was because Simon (Gilmon) and Vasu (CNL) had approached him (via the 15 June 2017 Meeting), or because he had instead called up the Appellants himself, this message does not indicate which narrative is to be preferred.

64 Similarly, we do not think that Yasrin (Penanshin)'s use of the word "follow" in his messages to Thomas (Gilmon) and Vasu (CNL) necessarily supports the CCCS' case. It is ambiguous whether Yasrin (Penanshin) meant to "follow" *the Appellants* as proposers of a compact between CNL, Gilmon and Penanshin via the 15 June 2017 Meeting, or whether Yasrin (Penanshin) meant to "follow" *the general body of warehouse operators* at Keppel Distripark who had already indicated their intention to institute an FTZ Surcharge after HSC had publicly taken the lead to announce this surcharge on 15 June 2017.

65 Finally, in respect of Thomas (Gilmon)' and Vasu (CNL)'s admissions in their interviews, the CCCS' contention is simply that these are "aligned with the documentary evidence and the evidence of the Appellants' representatives".[64] It is true that they do not contradict Penanshin's and Yasrin

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64 Respondent's Written Submissions on Liability at para 55.

(Penanshin)'s statements, but equally they do not independently enhance the credibility or reliability of those statements.

The insufficient evidence of the 15 June 2017 Meeting

66 In evaluating the sum of the documentary evidence before us on whether the 15 June 2017 Meeting took place, we have concluded that diminished weight should be accorded to Penanshin's and Yasrin (Penanshin)'s statements affirming this, such that they alone would not establish the occurrence of the 15 June 2017 Meeting on a balance of probabilities. Nor do we consider the supporting evidence relied upon by the CCCS to have much of a bearing on this question. Accordingly, both on an assessment of each piece of evidence before us in this regard and on a holistic assessment of all such evidence, we are of the view that the threshold of "strong and convincing evidence" has not been satisfied, meaning that the CCCS has not proven the occurrence of the 15 June 2017 Meeting on a balance of probabilities.

67 As stated at [38] above, the CCCS took the position at the hearing that its case that the Appellants were engaged in an agreement with the object of fixing prices was "predicated"[65] on the 15 June 2017 Meeting having taken place. Our finding that the CCCS has not proven this on a balance of probabilities therefore suffices in disposing of this aspect of the CCCS' case.

68 For completeness, we would highlight that apart from the 15 June 2017 Meeting, both Thomas (Gilmon) and Vasu (CNL) admitted that they had

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65 Transcript, p 113 ln 10 to ln 13.

telephone conversations with Yasrin (Penanshin).[66] However, the CCCS did not submit that these telephone conversations constituted an offer from either CNL or Gilmon to Penanshin, or provided any basis upon which to draw an inference that there was some sort of consensus between these parties. In any event, we do not think this submission would have been made out for the reasons below.

(a) According to Thomas (Gilmon), his telephone conversation with Yasrin (Penanshin) was prior to him sending HSC's and CLS' notices of the FTZ Surcharge, and on this call he had informed Yasrin (Penanshin) that Gilmon was intending to impose the FTZ Surcharge.[67] Yasrin (Penanshin)'s own testimony as to this telephone call indicates that he had called Thomas (Gilmon) to request copies of HSC and CLS' notices.[68] We note that in the joint chronology of events prepared by the parties, the parties did not disagree that this telephone call had taken place at Yasrin (Penanshin)'s behest,[69] and that this telephone call had taken place before Yasrin (Penanshin)'s 16 June 2017 messages to Thomas (Gilmon). However, there is no documentary evidence – whether of the telephone call itself or within Thomas (Gilmon)' and Yasrin (Penanshin)'s recollections of the telephone call – to suggest that there was any sort of offer from Gilmon to Penanshin in this telephone call.

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66 NOI of Thomas (Gilmon) dated 26 August 2021, Q41; NOI of Vasu (CNL) dated 22 September 2020, Q111.

67 NOI of Thomas (Gilmon) dated 26 August 2021, Q41.

68 NOI of Yasrin dated 15 January 2021, Q14-15; NOI of Yasrin dated 31 August 2021, Q22.

69 Chronology of Events at S/N 11 and 12.

(b) As for Vasu (CNL), it is unclear when Vasu (CNL)'s telephone conversation with Yasrin (Penanshin) took place.[70] The only reference in the parties' joint chronology to a telephone conversation between Vasu (CNL) and Yasrin (Penanshin) is to one that took place some time after 7.42am on 16 June 2017, after Yasrin (Penanshin)'s 16 June 2017 messages to Vasu (CNL).[71] In other words, the contents of that telephone conversation could not have been an offer from CNL that was accepted by Penanshin through Yasrin (Penanshin)'s 16 June 2017 messages to Vasu (CNL).

69 In the circumstances, we find that the CCCS has not proven on a balance of probabilities that there was any "invitation or offer" from the Appellants (see [38] above) that was thereafter accepted by Penanshin through Yasrin (Penanshin)'s 16 June 2017 messages to Vasu (CNL) and Thomas (Gilmon), that would have given rise to a consensus between the parties that is necessary to establish an "agreement" for the purposes of the Section 34 Prohibition.

Whether the CCCS has established there was a concerted practice

70 We turn now to the CCCS' alternative case on the first issue, i.e. that there was a concerted practice involving the Appellants. As mentioned at [26(b)] above, it is the CCCS' case that the constituent components of this concerted practice were the communications between the parties relating to pricing information at the 15 June 2017 Meeting and the Communications. As we have found that the CCCS has not proven on a balance of probabilities that

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70 NOI of Vasu (CNL) dated 22 September 2020, Q111.

71 Chronology of Events at S/N 24.

the 15 June 2017 Meeting took place, we need only consider whether the Communications constituted a concerted practice.

71 The CCCS' findings in the ID on there having been a concerted practice may be summarised as follows. Even if the 15 June 2017 Meeting did not take place, the Communications constituted exchanges of information as to the Undertakings' pricing intentions.[72] Although the Appellants had submitted to the CCCS that they had already decided to impose the FTZ Surcharge prior to informing Yasrin (Penanshin) of the same, the CCCS adopted the position that even unilateral disclosure of their pricing intentions was sufficient to constitute a concerted practice.[73] That being the case, the exchanges of information – which the CCCS equated to price fixing (but see below at [80]–[101]) – constituted a serious restriction of competition by object that would always have an appreciably adverse effect on competition.[74] The CCCS noted that this would be the case, "regardless of the market share of the undertakings involved" and despite the Appellants' representations that they were small market players within Keppel Distripark.[75]

72 The ID does not clearly articulate the definitional boundaries of the concept of a "concerted practice", frequently entangling it with the concept of an "agreement". At some parts of the ID, the CCCS appears to take the position that a one-off communication between the parties would be enough to constitute a "concerted practice":[76]

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72 ID at [180] and [186].

73 ID at [192].

74 ID at [202] and [205].

75 ID at [202].

76 ID at [192].

> … Unilateral disclosure of a party's pricing intentions is sufficient to constitute a concerted practice within the section 34 prohibition. … CCCS emphasises that it is the communication of the intention to impose the FTZ Surcharge … that affects competition and is in fact prohibited under section 34 of the Act.

73 In support of this, the CCCS relied on the UK Competition Appeal Tribunal's decision in *JJB Sports plc and Allsports Limited v Office of Fair Trading* [2004] CAT 17 ("***JJB Sports***"), from which it drew the proposition that "mere receipt of information about the future conduct of a competitor can constitute participation in an anti-competitive concerted practice".[77]

74 It is our view that a finding of a "concerted practice" that is based solely on the fact that competitors have communicated with each other sets the bar too low. That competitors have made direct or indirect contact with each other, during which unilateral or bilateral disclosures of information are made, is a necessary but insufficient criterion for there to be a "concerted practice". As the European case law discussed above (at [30]–[35]) suggests, a "concerted practice" also requires these competitors to have engaged in subsequent market conduct that is causally connected to their prior communications with each other.

75 Our view is consistent with a closer reading of *JJB Sports*, which also cites European case law indicating the need to look beyond the initial contact between the parties before a "concerted practice" is established. At [151] of *JJB Sports*, the CAT cited [64]–[66] of *Dyestuffs* where the CJEU describes a "concerted practice" as conduct where the parties knowingly engage in

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[77] ID at [200].

"practical cooperation" which "may inter alia arise out of coordination which becomes apparent from the behaviour of the participants", where:

> [P]arallel behaviour may not by itself be identified with a concerted practice … [but] may however amount to strong evidence of such a practice if it 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 size and number of the undertakings, and the volume of the said market…

76 At [158] of *JJB Sports*, the CAT further cited [1852]–[1853] of *Cimenteries*, where the Court of First Instance also appears to understand the concept of a "concerted practice" to require consideration of the parties' market conduct *after* they have communicated with each other, stating that:

> In order to prove that there has been a concerted practice, it is not… necessary to show that the competitor in question has formally undertaken… 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]. [emphasis added]

77 A "concerted practice" thus requires more than just proof that competitors have made contact with each other. It also requires their communications to result in subsequent market conduct that can be regarded as a form of "practical cooperation" despite the absence of an agreement between them. Depending on what kind of information is disclosed or exchanged in the communications between parties and the manner of their interactions, it may be possible to draw inferences of practical cooperation between them from their subsequent market conduct, especially if the disclosure relates to confidential information about a competitor's future pricing intentions (as illustrated in the decision of *Re CCS Imposes Financial Penalties on Two Competing Ferry Operators for Engaging in Unlawful Sharing of Price Information* [2012]

SGCCS 3 ("***Batam Ferries Case***") at [68] and [154]–[163]; see [107(c)] below). This is why European competition law jurisprudence indicates that "there must be a presumption that the undertakings participating in concerting arrangements and remaining active on the market take account of the information exchanged with their competitors when determining their conduct on that market, particularly when they concert together on a regular basis over a long period" (*Anic* at [121]).

78 Coming back to [192] of the ID, the CCCS also adopted the position, citing *JJB Sports*, that "an anti-competitive agreement and/or concerted practice to fix prices exists where the parties have 'created the necessary atmosphere of mutual certainty as to the participants' intentions concerning future pricing…'". Defining the "agreement" or "concerted practice" in this way is problematic because it focuses on just the anticipated effects produced by the conduct, rather than the objectively visible characteristics of their behaviour. This led the CCCS to emphasise that "it is the communication of the intention to impose the FTZ Surcharge… that affects competition and is in fact prohibited under section 34 of the Act". But an act of communication by one party to another should not, on its own, be equated with a "concerted practice" between them. The statutory provision in question prohibits concerted practices, not communications.

79 However, there are other parts of the ID in which the CCCS did consider the subsequent market conduct of the Appellants after they had engaged in the Communications with Yasrin (Penanshin). At [197] and [198] of the ID, it was established that the Appellants had used the information "obtained from Penanshin to convince [customers] to agree to the implementation of the FTZ Surcharge". Accordingly, to the extent that the Appellants had taken into account the information disclosed to them by another competitor and acted upon that information in its subsequent market conduct, then it can be said that their

communications with each other entail a degree of practical cooperation between them that can be sensibly regarded as a "concerted practice", though an infringement of the Section 34 Prohibition will also require a finding that the "concerted practice" amounted to a restriction of competition by object or by effect. We therefore turn to the second issue, namely whether the Appellants' conduct falls within the "by object" limb of the Section 34 Prohibition.

The second issue: the "by object" limb of the Section 34 Prohibition

Price fixing versus information sharing

80 As a preliminary matter, we shall first consider the CCCS' characterisation of the Communications as "Price Fixing Conduct". The CCCS has maintained this characterisation in its submissions before us. In so doing, it submits that "the term 'price fixing' should not be interpreted literally", and that "[w]hilst price fixing can include actual agreements on future prices, as a concept, it should be understood more broadly to encompass forms of conduct that facilitate the coordination of future pricing conduct between competitors".[78] We take this opportunity to address the importance of proper characterisation of the conduct at hand, as well as to set out a number of principles that will inform our analysis of this aspect of the CCCS' case.

81 While s 34(2)(a) of the Act makes reference to infringing conduct that "directly or indirectly fix[es] purchase or selling prices or any other trading conditions" as an example of anti-competitive behaviour that falls within the scope of the Section 34 Prohibition, there is no statutory definition of what exactly constitutes "price fixing" and whether it can include situations in which

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[78] Respondent's Post-Hearing Submissions at para 41.

there no agreement has been reached between the parties. The ordinary meaning of "price fixing" is "the action or practice of introducing a fixed or standard price for something, esp. by (illicit) agreement between manufacturers."[79] Classic competition law principles regard price fixing as one of the four "hardcore" restrictions of competition – alongside market sharing, output limitations and bid-rigging – which attract the operation of special liability rules (such as treating them as "by object" restrictions of competition – see [87] below) and the harshest of financial penalties. When undertakings engage in these particular categories of anti-competitive behaviour, harms to competition are automatically presumed to materialise based on well-established economic theories and practical enforcement experience.

82 In our view, the CCCS' definition of price fixing conduct casts too wide a net. The sharing or exchange of pricing information, such as the Communications, may in some circumstances amount to anti-competitive information disclosure or information exchange that may lead to "directly or indirectly fix purchase or selling prices or any other trading conditions". But much depends on the nature of the information disclosed or exchanged, the manner and character of the interactions between the parties, as well as the surrounding economic circumstances and characteristics of the relevant market in which they operate. For competition law to equate *any* conduct involving the exchange or sharing of *any* price-related information between competitors with "price fixing" would effectively transform the Section 34 Prohibition into a blanket conduct prohibition on communications between undertakings on price-related matters regardless of whether there are any actual or likely appreciable adverse effects on competition (see [89] below).

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[79] See e.g. Oxford English Dictionary (Revised 2007, online edition).

83 To elevate every situation involving the exchange or sharing of price-related information as legally equivalent, in the eyes of competition law, to "price fixing" is unjustifiable given the highly imprecise definitional boundaries of the allegedly unlawful conduct. Information exchanges or sharing may certainly *reduce* the level of commercial uncertainty faced by competing undertakings – which competition law should scrutinise – but they do not necessarily *eliminate* competition in the same way as "price fixing" (and the other forms of "hardcore" anti-competitive conduct referred to above). To impose financial penalties of the same severity to both categories of conduct would also dilute the stigma that competition law has always attached to "price fixing". A clearer distinction ought to be drawn between these two forms of anti-competitive conduct for the following reasons.

84 First, only the most well-established, egregious and obviously harmful forms of anti-competitive conduct should be regarded as falling within the "by object" limb of the Section 34 Prohibition. Other forms of conduct should only be regarded as infringing the Section 34 Prohibition if they are shown to be restrictive of competition "by effect". A proper characterisation of the allegedly anti-competitive conduct must be carried out before analysing it as a "by object" infringement of the Section 34 Prohibition (as is the case in this appeal). Conduct which falls within the "object" limb of the Section 34 Prohibition is presumptively regarded as harmful to competition without the CCCS having to make any further inquiry into its effects on the market. The legal test we have adopted from the ECJ, which the CCCS itself accepts (see [64] of the ID), to determine if certain types of conduct should be prohibited under this limb, is whether such conduct is "regarded, by their very nature, as being harmful to the proper functioning of normal competition" or whether "such coordination reveals in itself a sufficient degree of harm to competition" (Case C-67/13 P

Groupement des cartes bancaires (CB) v European Commission [2014] 5 CMLR 2 ("***Cartes Bancaires***"), at [50] and [57]). The justification for relying on the *form* of the conduct, instead of investigating its economic *substance* is because, according to the ECJ (*Carte Bancaires* at [51]):

> [I]t is established that certain collusive behaviour, such as that leading to horizontal price-fixing by cartels, may be considered so likely to have negative effects, in particular on the price, quantity or quality of the goods and services, that it may be considered redundant, for the purposes of applying Article [101(1)] EC, to prove that they have actual effects on the market … Experience shows that such behaviour leads to falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers.

85 When determining whether or not a particular form of conduct should be regarded as having the restriction of competition as its object, the ECJ went on to explain that (*Carte Bancaires* at [53]):

> …in order to determine whether an agreement between undertakings or a decision by an association of undertakings reveals a sufficient degree of harm to competition that it may be considered a restriction of competition 'by object' within the meaning of Article 81(1) EC, regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part. When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question.

86 Once it is shown that the anti-competitive conduct falls under the "object" limb of the Section 34 Prohibition, there is no need to go on to examine its actual or likely effects on competition in the market. Further, establishing that the collusion or coordination between the parties amounts to a "by object" infringement of the Section 34 Prohibition does not require the CCCS to prove that the parties have the subjective intention of restricting competition, though the existence of such a subjective intention is a relevant factor when assessing the object of their conduct (*Carte Bancaires* at [54]).

87 In view of the legal ramifications that follow once a particular form of conduct is recognised to fall under the "object" limb of the Section 34 Prohibition, a cautious approach should be taken when extending the scope of the "object" limb. In this regard, the ECJ has observed that a restrictive approach was appropriate when determining the scope of the "object" limb of this competition law prohibition (*Cartes Bancaires* at [58]):

> The concept of restriction of competition 'by object' can be applied only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects, otherwise the Commission would be exempted from the obligation to prove the actual effects on the market of agreements which are in no way established to be, by their very nature, harmful to the proper functioning of normal competition.

88 This observation was reiterated by the ECJ in a later case Case C-228/18 *Gazdasági Versenyhivatal v Budapest Bank Nyrt and Others* at [54]–[55], where it was explicitly stated that "the concept of restriction of competition 'by object' must be interpreted restrictively" and that "[w]here the agreement concerned cannot be regarded as having an anticompetitive object, a determination should then be made as to whether that agreement may be considered to be prohibited by reason of the distortion of competition which is its effect."

89 Second, while price fixing is a well-established category of conduct falling within the "object" limb of the Section 34 Prohibition, the same cannot be said for the broader category of conduct which encompasses anti-competitive information disclosures and information sharing. The CCCS' Guidelines on the Section 34 Prohibition state that "an agreement involving price fixing … will always have an appreciable adverse effect on competition" (at para 2.24; see also paras 3.2 and 3.7). On the other hand, whether information sharing has such an effect "will depend on the circumstances of each individual case: the market

characteristics, the type of information and the way in which it is exchanged" (para 3.20). It is therefore appropriate for the CCCS to provide cogent reasons for why, on the specific facts of a particular case, it regards the parties' information-disclosure or information-sharing conduct as having an appreciable adverse effect on competition, rather than simply equating such conduct with "price fixing" or asserting that it should be analysed as a "by object" infringement of the Section 34 Prohibition.

90 Third, the case law also suggests a difference in the types of cooperative behaviour that needs to be shown for price fixing as opposed to information sharing. For price fixing, decisions from the CCCS and the Board indicate that the presence of an agreement between competitors is a consistent feature of infringement decisions which have relied on price fixing conduct as their theory of harm to competition:

> (a) In *Re Price Fixing in Bus Services from Singapore to Malaysia and Southern Thailand: Konsortium Express and Tours Pte Ltd, Five Stars Tours Pte Ltd, GR Travel Pte Ltd and Gunung Travel Pte Ltd* [2011] SGCAB 1, the CCCS found a "clear price-fixing agreement" between competitors to impose a uniform surcharge, via a "fuel and insurance charge agreement", that was a component of the total ticket price charged to consumers, because there was an agreement to introduce a uniform increase in price. This infringement analysis was upheld by the Board on the basis that the parties who participated in such 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" (at [143]).

(b) In *Re Price fixing of rates of modelling services in Singapore by Modelling Agencies* [2011] SGCCS 11, the CCCS found a "single continuous price-fixing agreement" between a group of modelling agencies that spanned a duration in excess of 4 years, through which the undertakings had sought to collectively raise the rates of their modelling services under the auspices of an industry association. On appeal to the Board, the Board affirmed the infringement decision of the CCCS and agreed with its position that "it is not necessary for the CCS to demonstrate any appreciable adverse effect on competition" when the anti-competitive conduct involves a price fixing agreement (*Re Price-fixing in Modelling Services: Bees Work Casting Pte Ltd, Diva Models (S) Pte Ltd, Impact Models Studio and Looque Models Singapore Pte Ltd* [2013] SGCAB 1 at [101]).

(c) In CCS 700/003/11 *Infringement of the Section 34 Prohibition in relation to the provision of air freight forwarding services for shipments from Japan to Singapore* (11 December 2014), when the CCCS determined that a group of Japanese freight forwarders had "entered into an agreement and/or concerted practice through their participation in a series of meetings over a lengthy duration of time that had as its object the fixing of how [their services] would be priced" (at [522]), its infringement decision was grounded on multiple factual findings of the undertakings reaching a consensus on various occasions, in meetings held in Japan and in Singapore, that they would collectively pass on the costs of fuel surcharges on to their respective customers.

(d) In CCS 700/002/13 *Infringement of the Section 34 Prohibition in relation to the market for the sale, distribution and pricing of Aluminium Electrolytic Capacitors in Singapore* (5 January 2018), the

CCCS imposed penalties for price fixing on undertakings that had "agreed on price increases and exchanged information on the implementation of price increases", while reinforcing their collective price increases with an agreement to resist price reduction requests from their customers (at [160]).

(e) In *Fresh Chicken Products Appeals*, the Board upheld the CCCS' infringement decision against a group of poultry suppliers for engaging in price fixing conduct over a number of years via anti-competitive price discussions "that amounted to collusion to raise or lower prices in concert", with market price movements "the result of an agreement or arrangement to adjust prices in concert" and that the parties who had denied participating in the price discussions had nevertheless "demonstrated a tacit agreement to act in concert" with those who had participated by adjusting their prices (at [179]).

91 As for cases where the theory of harm relates to information sharing, the authorities indicate that to establish an infringement of the Section 34 Prohibition, those concerted practices that restrict competition "by object" are established by showing that the information sharing removes or reduces uncertainties inherent in the competitive process to an appreciable extent.

(a) For example, in *Tate & Lyle*, the price leader in the British sugar market called for meetings with representatives of other sugar manufacturers, and gave information to all participants regarding its future prices. At one of those meetings, the price leader also distributed to the other participants a table of its prices for industrial sugar in relation to purchase volumes. The General Court held that there can be

a concerted practice arising from such meetings even if only one of the participants notified the others of their future pricing intentions.

(b) The ECJ has also held, in *T-Mobile*, that an isolated exchange of information between competitors can amount to a concerted practice with the object of restricting competition, "depending on the structure of the market" where "a meeting on a single occasion between competitors … 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 risks that that entails" (at [59]).

(c) Similarly, in *JJB Sports*, the UK Competition Appeal Tribunal has affirmed that price discussions between competitors at a private meeting can be regarded as an anti-competitive concerted practice that had the object of restricting competition.

(d) Finally, in the *Batam Ferries Case*, the CCCS found that the information disclosure in question had the object of preventing, restricting or distorting competition, on the basis that the information disclosed was sensitive and confidential price information, as well as in view of the economic circumstances such as the number of market players in the market (at [68]). Crucially, the CCCS had highlighted there that the relevant market was a duopoly, and had explained how the disclosure of information relating to an undertaking's future pricing plans in this economic context was likely to, and did, lessen competition (at [142]–[164]).

92 In practice, the distinction between price fixing agreements and information-sharing concerted practices has often been observed in the

European, UK and Singapore authorities. For instance, the European Commission's infringement decision in Case *COMP/39188 – Bananas* framed the infringing conduct in the following way (at [289]):

> As a general observation the Commission notes that in the present decision it does not find an agreement to fix prices … The Commission finds a concerted practice which concerned the fixing of prices.

93 Throughout its infringement decision, the Commission was careful in its wording not to elide price fixing conduct with concerted practices through which competitors engage in information-sharing, even if the latter "concerned" price fixing, at [291]–[292]:

> The Commission considers that communications in which price setting factors are discussed and price trends and/or indications of quotation prices are discussed with or disclosed to competitors before quotation prices are set had the object of eliminating uncertainty about the future pricing policies of competitors, namely the setting of quotation prices. The concept inherent in the provisions of the Treaty relating to competition is that each economic operator must determine independently the policy which he intends to adopt on the common market.
>
> As to the arguments that such activities cannot amount to price fixing, the Commission notes that according to case-law conduct whereby an undertaking discloses to its competitors the conduct which it intends or contemplates to adopt in the market concerning its pricing policy is considered as conduct concerning price fixing. Indeed, the Commission finds a concerted practice between parties which concerned the fixing of prices.

94 While information-sharing conduct and price discussions may, in certain circumstances (see [91] above, and [107] below), have as their object the restriction of competition in the same way that price fixing is regarded as a "by object" infringement of the Section 34 Prohibition, they cannot be *equated* with price fixing. This means that *some* price discussions *can* be regarded as a form of anti-competitive conduct that is *as serious as* price fixing, insofar as it is

another species of conduct that can infringe the "by object" limb of the Section 34 Prohibition, but the two should not be conflated with each other. Agreements or concerted practices that involve information-sharing *may lead to* or *facilitate* the fixing of prices, but that is not the same as characterising such behaviour as price fixing in the first place. The former requires some scrutiny of the actual or likely economic effects of the information-sharing conduct, while an inquiry into the latter need not look beyond the formation of an agreement reached between the parties involved to fix their prices.

95 The ECJ has also addressed the overlap between price fixing conduct and information-sharing conduct. In *Dyestuffs*, the ECJ affirmed the Commission's finding of a concerted practice involving "a coordinated course of action relating to a price increase" through advance price announcements, which infringed the Article 81 prohibition because such conduct led to the "prior elimination of all uncertainty" as to the future pricing conduct of the cooperating undertakings (at [118]). In one part of its decision, the Court held that "these announcements … *led to* the fixing of general and equal increases in prices for the markets in dyestuffs" (at [102]; emphasis added). In another part of its decision, it is noteworthy that the Court explicitly reasoned that "[t]he general and uniform increase on those different markets can only be explained by a *common intention* on the part of the undertakings, first, to adjust the level of prices and the situation resulting from competition… and second, to avoid the risk, which is inherent in any price increase, of changing the conditions of competition." (at [113]; emphasis added) While the conduct of the undertakings was primarily analysed as a concerted practice, the Court also inferred the existence of an agreement between the parties, suggesting that the presence of some sort of consensus between them could also support a price fixing characterisation of the infringing conduct.

96 More recently, in Case AT.39914 – *Euro Interest Rate Derivates* (2016) at [367]–[369], the Commission also appeared to distinguish between price fixing conduct and information-sharing conduct. In response to the parties' arguments that their bilateral exchanges of their respective pricing strategies did not amount to "price-fixing agreements or concerted practices", the Commission reasoned that it had "produced evidence proving that the parties participated in the collusive arrangements" which supported its finding of "collusive behaviour… that… amounted to price-fixing". Describing their conduct as "collusive" implies that there was an agreement of some sort between the undertakings upon which the price fixing label could be applied. The Commission also went on to explain that the "exchanges of information… are at minimum concerted practices that have as their object to artificially affect price components… irrespective of whether they also led to agreements between competitors" because "[t]he traders in question engaged in concerted practices which facilitated the coordination of their behaviour concerning trading positions, trading prices and strategic choices."

97 In any case, by the time the case reached the CJEU in C-883/19 P *HSBC Holdings plc and others v European Commission* (2023), the Court affirmed the infringement decision and observed, at [112], that "the General Court was right to rely on the case-law of the Court of Justice relating to exchanges of information between competitors" and that "[i]n particular, an exchange of information which is capable of removing uncertainty between participants as regards the timing, extent and details of the modifications to be adopted by the undertakings concerned in their conduct on the market must be regarded as pursuing an anticompetitive object". No reference was made by the Court to any characterisation of the infringing conduct as a form of price fixing. This supports the view that information-sharing conduct is a discrete category of anti-

competitive conduct that can be restrictive of competition by object, without necessarily also amounting to price fixing conduct.

98 Tribunals and courts in the UK have also appeared to make a clear distinction between information-sharing conduct and price fixing conduct. In *Balmoral Tanks Ltd and others v Competition and Markets Authority* [2017] CAT 23, the CAT noted at [102] that "the CMA had not alleged that the parties entered into a price-fixing agreement … [where information was exchanged]" even though it had concluded, at [106], that there was an "object infringement". Appealing against the CAT's decision to the Court of Appeal, the appellant argued that they were not party to "the main cartel infringement" that other market participants had engaged in, though the CMA had found that they had made disclosures of commercially sensitive information at a meeting with these cartel members. Rejecting the appellant's argument that they could not be liable for an infringement based on information-exchange if they were not also liable under the CMA's decision relating to the main cartel infringement, the Court of Appeal held that (*Balmoral Tanks Ltd and others v Competition and Markets Authority* [2019] EWCA Civ 162 ("***Balmoral Tanks (EWCA)***") at [28]):

> The main cartel was of a stark kind, with longstanding arrangements for bid-rigging, customer allocation and price-fixing. In contrast, the information exchange involved no more than an exchange of commercially sensitive information which reduced uncertainty as regards pricing. The main cartel and the information exchange can both, doubtless, be said to be related to pricing, but that does not make the information exchange a sub-set of the main cartel or render it right to collapse the former into the latter. There were distinct infringements, with different ingredients.

99 Finally, turning to Singapore, the CCCS' own decision in *the Batam Ferries Case* indicates a nuanced, careful and rigorous approach to the usage of the term "price fixing". While the underlying complaint from a member of the public was that there was "some form of price fixing agreement" between the

passenger ferry operators in question (at [17]), the CCCS consistently framed its analysis and its conclusions in terms of information sharing as to prices (see, for instance, [52]–[68] and [142]–[164]).

100 It is against this backdrop that we find that the CCCS' present proposed definition of "price fixing" – i.e. "forms of conduct that facilitate the coordination of future pricing conduct between competitors"[80] – to be plainly too broad. If this approach is taken, every interaction between the representatives of undertakings in the market where information relating to the operations of a competitor is obtained could potentially qualify as price fixing. Further, such an expansive approach diminishes the practical utility of the term as a clear signal to undertakings as to what should be regarded as presumptively unlawful anti-competitive behaviour.

101 As for the present case, we note that insofar as the Communications are concerned, it is not the CCCS' case that these Communications constitute in themselves a price fixing *agreement*. Rather, it would appear that the CCCS has sought to frame the Communications, which are more accurately described as a form of exchange of pricing information, as rising to the same level of presumptive harmfulness to competition as price fixing conduct. The legal question we have to address, however, is whether the respective indications from CNL, Gilmon and Mac-Nels that they would each be instituting the FTZ Surcharge, following the market leader's announcement of such a surcharge, should fall within the "by object" limb of the Section 34 Prohibition.

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[80] Respondent's Post-Hearing Submissions at para 41.

Whether the Communications amount to a concerted practice with the object of restricting competition

102 We turn now to whether the Communications, as a private exchange of pricing information, amount to a concerted practice that has as its "object" the restriction of competition so as to fall within the "by object" limb of the Section 34 Prohibition. In this regard, Paragraph 3.22 of the CCCS' Guidelines on the Section 34 Prohibition indicate that "private exchanges between competitors of their individualised intentions regarding future prices will normally be considered a restriction of competition by object as they generally have the object of fixing prices".

103 Notwithstanding that the Guidelines appear to contemplate the *possibility* that there may be *some* instances where the private exchange of price information between competitors does *not* constitute a restriction of competition by object, the position taken by the CCCS in its post-hearing submissions was an inflexible one. In the context of a query from us concerning whether unilateral disclosure of pricing information (specifically, a decision to follow price increases previously announced by another market player) could constitute a concerted practice with the object of restricting competition, the CCCS took the view that "where A unilaterally discloses to B that it intends to follow the price increases previously announced by another market player", that "constitutes contact between competing undertakings that is sufficient to establish a concerted practice".[81] In support of this, the CCCS submitted:[82]

> A's unilateral disclosure to B reduces B's uncertainty as to its competitor's (i.e. A's) future conduct on the market. Pre-disclosure, B would have been uncertain about whether A

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81 Respondent's Post-Hearing Submissions at para 22.

82 Respondent's Post-Hearing Submissions at paras 23–24.

> would (i) continue to maintain its prices, (ii) decrease its prices to undercut its competitors and compete more aggressively for customers or (iii) follow the other market player by increasing its own prices. By virtue of A contacting B, B became aware of A's intentions and would now be in a position to take such information into account in determining its own pricing strategy. For instance, where B may previously have felt competitive pressure to lower its own prices or not follow the price increase due to the threat that other competitors such as A would be able to undercut B, A's disclosure obviates this competitive pressure. Where both A and B remain as market players after these disclosures have been made, competition policy and law presume that B cannot but take into consideration A's intention to increase its prices as a factor in B's pricing decisions. B cannot "un-know" such information and therefore any decision it makes must have been taken with the benefit of this knowledge. The elements of a concerted practice are thus made out.
>
> Furthermore, since A's unilateral disclosure relates to its pricing – which is regarded as highly commercially sensitive – such a disclosure would be deemed to be harmful to the proper functioning of normal competition by its very nature and therefore constitute a restriction of competition by object. In such circumstances, it would be unnecessary for the competition authority to prove effects of A's conduct on the market.

104 We find ourselves unable to agree with the CCCS on such an expansive approach towards private exchanges of information. In the course of the hearing, we put forward to the CCCS a hypothetical scenario based on a quotidian example – where a chicken rice seller indicates to another chicken rice seller in the same hawker centre that he intends to follow the price hikes announced by a third stallholder. Would that constitute a restriction of competition by object?

105 In responding to this example, the CCCS did not adopt the rigid stance it later did in its post-hearing submissions (see [103] above). Instead, the CCCS reached for two qualifications. First, the CCCS suggested that there might be

some manner of a *de minimis* principle that might apply.[83] Second, the CCCS suggested that the first chicken rice seller's disclosure of pricing intention might be an infringement, because they could be the only two chicken rice sellers in the entire hawker centre.[84]

106 These qualifications implicitly acknowledge the impracticality of having an absolute competition law rule prohibiting undertakings from making any and every disclosure of price-related information. In the first place, if the rigid stance suggested by the CCCS is adopted, then plainly everyday conversations such as that in our hypothetical would constitute a restriction of competition by object. That, in our view, would be an unreasonably wide extension of liability. Further, to the extent that the CCCS suggested that there might be a *de minimis* principle, that points to the logical necessity of considering the surrounding economic context when evaluating whether a particular instance of information disclosure should be *presumed* to be so obviously harmful to competition that it *should* be regarded as a "by object" infringement of the Section 34 prohibition. Furthermore, according to the CCCS, the *de minimis* principle, as embodied in the "appreciability" concept discussed in [2.21]–[2.28] of the CCCS' Guidelines on the Section 34 Prohibition, does not even apply when the infringing conduct in question concerns a "by object" infringement of the Section 34 Prohibition[85] (see [89] above). This reinforces the point made earlier about the importance of

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83 Transcript, p 126 ln 8–10.

84 Transcript, p 126 ln 18–22.

85 [2.24] of the CCCS Guidelines state that "Agreements involving restrictions of competition by object… will always have an appreciably adverse effect on competition, notwithstanding that the market shares of the parties are below the threshold levels mentioned in paragraph 2.25 and even if the parties to such agreements are small or medium sized enterprises."

proceeding with caution when extending the scope of the "by object" limb of the Section 34 Prohibition (see [87]-[88] above). Finally, the CCCS' reference to the absence of other chicken rice sellers in the hawker centre indicates that at the very least, the context of the market (including the market structure) in which the private pricing intention disclosure took place is a relevant concern.

107 Indeed, the authorities indicate that due attention needs to be paid to the surrounding market context when determining if an information disclosure or information exchange relating to private pricing intentions amounts to a "by object" infringement:

(a) The EC's Guidelines, at [413]–[414], explain that *some* information exchanges between competitors which lead to collusive outcomes can amount to restrictions of competition by object:

> …some agreements reveal in themselves and having regard to the content of their provisions, their objectives and the economic and legal context of which they form part, a sufficient degree of harm to competition such that it is not necessary to assess their effects. In particular, an information exchange will be considered a restriction of competition by object where the information is commercially sensitive and the exchange is capable of removing uncertainty between participants as regards the timing, extent and details of the modifications to be adopted by the undertakings concerned in their conduct on the market. In assessing whether an exchange constitutes a restriction of competition by object, the Commission will pay particular attention to its content, its objectives and the legal and economic context in which the information exchange takes place. When assessing that context, *it is necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question.*
>
> Exchanging information relating to undertakings' future conduct regarding prices or quantities is particularly likely to lead to a collusive outcome. *Depending on the objectives that the exchange seeks to attain, and the legal*

> *and economic context thereof, exchanges of other types of information may also constitute restrictions of competition by object. It is therefore necessary to assess exchanges of information on a case-by-case basis.* [emphasis added]

(b) In the UK CMA's *Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to horizontal agreements* at [8.83], the authority's guidelines indicate that, before "[an] information exchange… [is] considered a standalone restriction by object when the information is competitively sensitive and the exchange is capable of removing uncertainty between participants as regards the timing, extent and details of the modifications to be adopted by the undertakings concerned in their conduct on the market", an appropriate factual inquiry must be carried out into the "objectives and the legal and economic context in which the information takes place" and "[w]hen assessing that context, it is necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question." This fact-sensitive approach was recognised by the UK Court of Appeal in *Balmoral Tanks (EWCA)* at [35] when it upheld the decision of the CAT because the latter had "explained why it considered the exchange of pricing information that took place… to be harmful to competition in the particular context" of the market in which such conduct had taken place.

(c) The CCCS has applied similar analytical principles in its infringement decisions involving information-sharing conduct. In the *Batam Ferries Case*, it reached the conclusion that "the conduct involving the exchange and provision of sensitive confidential price information… had the object of preventing, restricting or distorting competition to an appreciable extent" only after it had methodically

analysed the highly-concentrated nature of the relevant market, the homogenous nature of the product and the confidential quality of the information provided or exchanged (at [68] and [154]–[163]).

108 In other words, although pricing information is necessarily integral to the competitive process in any market, it is not enough to simply deem it "highly commercially sensitive" – as the CCCS does in its submissions[86] – without further regard for the economic context in which such information might be exchanged, and to automatically characterise *every* exchange of *any* price-related information as a "by object" infringement of the Section 34 Prohibition. This economic context must be adequately evaluated (without necessarily engaging in a full-blown effects-based analysis of the impugned conduct), before reaching the conclusion that the information disclosure or exchange in question *in itself* poses a sufficient degree of harm to competition (and hence a "by object" restriction of competition), such that it is not necessary to further investigate its actual or likely *effects* on competition in the market. In this regard, and as set out at [87]–[99] above, a cautious approach should be taken such that the concept of restriction of competition by object is not overexpanded, lest the competition authority be "exempted from the obligation to prove the actual effects on the market of agreements which are in no way established to be, by their very nature, harmful to the proper functioning of normal competition" (*Carte Bancaires* at [58]).

109 In its final round of submissions, the CCCS asserted that it was "not [its] position … that the market structure should be entirely disregarded".[87] It pointed

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86 Respondent's Post-Hearing Submissions at para 24.

87 Respondent's Post-Hearing Reply Submissions at para 13.

to its post-hearing submissions to suggest that it had "analysed and showed how [pricing] information disclosure … is capable of harming competition and thus constitutes a concerted practice that restricts competition by object".[88] However, it appears, from the excerpt of the CCCS' post-hearing submissions that we have reproduced at [103] above, that the CCCS' views towards information disclosures or exchanges apply to *every* market, regardless of the market structure or other economic context. We therefore do not think that the CCCS has adequately engaged with considerations of market structure and other economic context before arriving at its conclusion that the Communications which took place ought to be regarded as a type of information disclosure or exchange that falls within the "by object" limb of the Section 34 Prohibition.

110 Turning to the facts of the present case, it is not disputed that in the warehouse operator market in Keppel Distripark, HSC and its sister company CLS were the market leaders, and that the Appellants were relatively small participants in the market (see [7] above).[89] It is generally accepted that in such market structures, smaller participants often play the role of price-takers, following the prices set by the larger participants in the market. In such circumstances, the real question is whether the disclosure or exchange of pricing information by the Appellants would by its nature be so likely to be injurious to the competition within the warehouse operator market in Keppel Distripark, as to be regarded as a "by object" infringement of the Section 34 Prohibition.

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88 Respondent's Post-Hearing Reply Submissions at para 13.

89 Written Representations of CNL and Gilmon dated 12 May 2022 at paras 54(a) and 57(b).

111 It is the Board's understanding that the Appellants had in fact raised such arguments as to their relative insignificance in the warehouse operator market.[90] In its finding that the Appellants' conduct was nonetheless a "by object" infringement of the Section 34 Prohibition, the CCCS' response was as follows (at [202] of the ID):

> Further, *CCCS does not consider CNL's and Gilmon's representations that the Parties are allegedly small market players* (which would be affected by the competitive constraints imposed by the other competitors) to be material to a finding that the Parties had been involved in the Price Fixing Conduct or *to necessarily mean that the market conditions must have been such that it would have been competitive for the FTZ Surcharge to be imposed*, especially in light of the factors stated at paragraphs 251 to 253 of the ID. As set out at paragraph 63 above, *price fixing is a serious restriction of competition by object and will always have an appreciable adverse effect on competition, regardless of the market share of the undertakings involved.* [emphasis added]

112 Briefly, the "factors stated at paragraphs 251 to 253 of the ID" consist of the CCCS' rejection of the Appellants' representations that it was natural and rational to follow HSC's and CLS' imposition of the FTZ Surcharge, on the basis that had they and other warehouse operators been certain to follow HSC and CLS, there would not have been any need for them to check in on each other to find out if others would be imposing the FTZ Surcharge as well.[91] It should also be noted that [251] to [253] of the ID were located in the section of the ID on the duration of infringement, and not the finding of infringement itself.

113 The CCCS' reasoning here rests primarily on the characterisation of the Appellants' conduct as "price fixing", resulting in the analytical framework which flows from this categorisation of the Appellants' conduct, as discussed

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90 Written Representations of CNL and Gilmon dated 12 May 2022 at paras 54(a).

91 ID at [251]–[253].

above at [84]–[88]. Notably, at [205] and [220] of the ID, the CCCS reiterated its invocation of "price fixing" as the theory of harm, finding that the Appellants "had indeed engaged in an agreement and/or concerted practice to fix the price of warehousing services at Keppel Distripark by coordinating the imposition of an 'FTZ Surcharge'".

114 However, as discussed at [100]–[101] above, we consider that the Appellants' conduct is more appropriately characterised as an exchange of pricing information, rather than "price fixing". In such cases, there is a need to investigate the underlying market structure and economic conditions, which cannot be circumvented by simply applying the label of "price fixing" to the conduct in question.

115 Further, once it is established that "price fixing" is not an appropriate characterisation of the Appellants' conduct, what is left is the CCCS' decision that it "does not consider CNL's and Gilmon's representations that the Parties are allegedly small market players … to necessarily mean that the market conditions must have been such that it would have been competitive for the FTZ Surcharge to be imposed". The logic behind the CCCS' reasoning is not entirely clear. It is not for the Appellants to persuade the CCCS that their imposition of the FTZ Surcharge was the "competitive" thing to do in light of prevailing market conditions. Instead, as noted at [23] above, it is the CCCS which bears the burden of proving, on a balance of probabilities, that the Appellants have infringed the Section 34 Prohibition. This means that the CCCS must establish how – notwithstanding the Appellants' small market shares (which the CCCS has not substantively disputed), the overall market structure and economic conditions of Keppel Distripark – the Appellants' exchanges of information were so likely to be detrimental to competition that they ought to fall within the "by object" limb of the Section 34 Prohibition. Merely stating that the

Appellants have not established the non-harmfulness of their actions to market competition does not suffice to discharge the CCCS' burden of proof.

116 We note that the CCCS *did* come to certain conclusions as to the market structure and economic conditions of the warehouse operator market in Keppel Distripark, albeit in parts of the ID *other than* the CCCS' finding that the Appellants' conduct amounted to a "by object" infringement. Apart from its rejection of the Appellants' representations that it was natural and rational to follow HSC's and CLS' imposition of the FTZ Surcharge (which, as noted at [112] above, was to be found in the section of the ID on the duration of infringement),[92] the CCCS also found that the circumstances in Keppel Distripark were such that the Appellants' exchanges of pricing information led to a substantial degree of certainty that facilitated their subsequent implementation of the FTZ Surcharge (as part of its finding that there had been a concerted practice).[93] However, these disparate observations did not, in our view, amount to an adequate examination of the relevant market structure and economic conditions. Without such a coherent analysis of the economic context of the relevant market in which the communications took place, to ground a conclusion that such conduct is obviously injurious to competition, sufficient to justify its categorisation as a "by object" infringement of the Section 34 Prohibition", a finding of infringement liability creates undesirable legal uncertainty for market players that sits uncomfortably with the commercial realities of how businesses pursue their market intelligence gathering activities.

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92 ID at [251]–[255].

93 ID at [188].

117 Accordingly, we do not consider the CCCS to have discharged its burden of proving that the Appellants' conduct was so likely to be harmful to competition that it constituted a "by object" infringement of the Section 34 Prohibition.

118 For completeness, we note that though it could have done so, the CCCS did not advance an alternative theory of competitive harm based on the "by effect" limb of the Section 34 Prohibition.

Conclusion

119 For the reasons stated above, we allow the Appellants' appeal on liability. We do not find that the CCCS has established that the Appellants' conduct infringed the Section 34 Prohibition. The CCCS has not shown on a balance of probabilities that the Appellants were party to any "price fixing" agreement. As for the CCCS' alternative case, the exchange of information alone, without an adequate examination of the surrounding economic context and market structure, cannot be said to be so obviously injurious to competition that it should be regarded as a "by object" infringement of s 34 of the Act.

120 We emphasise that undertakings should be keenly aware of the real legal risks involved when they engage in private disclosures or exchanges of pricing information. Depending on the particular nature of pricing information exchanged and their specific surrounding economic circumstances, such communications may infringe the Section 34 Prohibition when it has as its object or effect the restriction of competition. At the same time, as a matter of law, the burden of proving that such conduct is harmful to competition, whether presumptively or as based upon available economic evidence, must ultimately be satisfactorily discharged by the competition authority. In this regard, it is

important that the economic reasoning underlying a finding of infringement be presented clearly and coherently, in order to provide guidance to economic actors. If the approach taken is insufficiently grounded, it is likely to result in a surfeit of practical difficulties (as with the chicken rice sellers example referred to at [104]–[106] above), resulting in uncertainty amongst such economic actors as to what types of information disclosure, sharing or exchanges are impermissible conduct under competition law.

121 The parties to this appeal are to make submissions within 21 days on the consequential orders to follow from our decision, including in respect of costs.

Dated this 16th day of July 2025.

Tan Puay Boon SC	Dr Burton Ong	Tan Chuan Thye SC	Dr Tan Kim Song
Chairman	Member	Member	Member

Ronald JJ Wong, Wilbur Lua, Stuart Peter and James Tan (Covenant Chambers LLC) for the appellants;
Tan Cheng Han SC and Loke Shiu Meng (Competition and Consumer Commission of Singapore) for the respondent.