Re. Independent Committee in relation to the fire at Wang Fuk Court in Tai Po ("IC")

Recommendations of the Competition Commission ("CC") in relation to Terms of Reference (2) ("ToR (2)")

Introduction

1. These are the submissions of the CC to the IC pursuant to:

   (1) the IC's directions at the evidential hearing on 30 April 2026 concerning the legality and practicality of fee-scales for the consideration of residents;[1] and

   (2) its directions made on 8 May 2026 concerning any recommendations on improvement measures to ToR (1) and ToR (2).

2. These submissions are broken down into the following sections:

   (1) Part 1 will address the issue of fee-scales and its relevant legality and practicality;

   (2) Part 2 will address any additional developments in terms of the CC's overall recommendations to ToR(2); and

   (3) Part 3 will set out the CC's concluding observations.

3. In summary, the CC's position is as follows:

   Fee-scales

   (1) It is **not unlawful** for a statutory body such as the Urban Renewal Authority ("**URA**") to compile a set of fee-scales whether generally or in order to provide some form of reference for residents in their determination of which consultant / contractor to select in carrying out large-scale building maintenance works.

   (2) Save in exceptional circumstances, it **is unlawful** for members of an association of undertakings (like the Hong Kong Institute of Surveyors ("**HKIS**")) to discuss and agree on a set of fee-scales. Such an arrangement (i.e. where competing undertakings discuss

[1] **[Day 21, 101:14-23]**

and agree on a set of prices they would likely charge for future works) is expressly prohibited by the First Conduct Rule ("**FCR**") under the s.6 of the **Competition Ordinance** (Cap. 619) ("**CO**") **[Tab-1].**

(3) In the event that the URA (or another statutory body) wishes to compile fee-scales of consultants for residents / property management companies to make reference to, the CC's recommendations are as follows:

(a) if the fee-scales are compiled using the prices of previous bids as benchmark, care must be taken to ensure that the previous prices used for benchmarking purposes were, in the opinion of the statutory body, reasonable and competitive;

(b) although it may be suspicious for a consultant to put in an overly "low" bid for consultancy services, it cannot be discounted that there may be legitimate business reasons why a particular consultant may be bidding aggressively for a consultancy contract. This may, for example, be where:

(a) the consultant is willing to forego some of its profits to gain relevant staffing and project experiences especially if it is a new entrant to the consultancy market and needs to accrue such experience in order to meet the URA's prequalification criteria; and/or

(b) the consultant has special technical know-how and expertise that enables it to carry out the relevant works in a manner that is more efficient / cost effective compared to its competitors. It is therefore able to lower its bidding prices without sacrificing its profits;

thus, rather than simply disqualifying a relevant consultancy bid for being priced at a very low level, it may be prudent for the residents / property management companies to make further inquiries to ascertain whether any legitimate reason is present lest they end up disqualifying a genuine competitive tender; and

(c) finally, while a set of fee-scales may be helpful in informing the residents / property management companies which bids are suspiciously cheap, it does not necessarily follow that those bids which are within the fee-scale / reference price range must be free from manipulation. The use of fee-scales must therefore not be the only form of due diligence which needs to be carried out.

Recommendation on Improvement Measures to ToR(2)

(4) In addition to the previous recommendations which the CC has proposed:

(a) the CC will shortly be publishing:

(i) a set of revised model Non-Collusion Clause ("**NCC**") and Non-Collusive Tendering Certificate ("**NCTC**") to strengthen its efficacy in deterring anticompetitive behaviour in the tendering for building maintenance works; and

(ii) a pro-forma statutory declaration for prospective procurers to incorporate into their tenders - requiring bidders in building maintenance works to confirm that they had not engaged in anticompetitive behavior prior to bidding;

which the CC recommends to be included as mandatory criteria in future bids for relevant large-scale building maintenance works;

(5) Finally, on the question of criminalisation and legislative reform, the CC has continued to work closely with the Commerce and Economic Development Bureau ("**CEDB**"), the Government's Task Force on Investigation and Regulation, as well as other stakeholders such as the Hong Kong Bar Association on different options. Subject to any specific recommendations from the IC, the CC should be ready to propose a set of reforms to existing legislations with a view to enhancing the deterrent effect of the law and to better facilitate the detection and enforcement of the CO against cartelists in the building maintenance sector.

<u>Part 1: The legality and practicality of fee-scales</u>

4. On day 21 of the Evidential Hearing (30 April 2026), a series of exchanges took place between the representative of the URA (Mr. Wong Se King ("**Mr. Wong**")), Leading Counsel to the IC, and the Chairman of the IC concerning a set of fee-scales which was published by the HKIS.[2] At the end of the exchange, the Chairman requested the CC to provide some assistance in respect of the legality and practicality of fee-scales noting, especially, that:

> *"The public may want to have more information about this. Without violating the Competition Ordinance, how can we have more of such information?"*

5. In order to address the Chairman's question, the CC will:

   (1) first, set out the relevant background of its exchanges with the HKIS in 2015 and 2016;

   (2) second, set out the relevant principles of law and why it **<u>would be unlawful</u>** for members of a trade association (such as the HKIS) to discuss and agree on a set of fee-scales; and

   (3) third, set out why it **<u>would not be unlawful</u>** for a statutory body (such as the URA) to compile such fee-scales and to provide the CC's recommendations as to how that might be done in compliance with the CO.

<u>Relevant Background</u>

6. In 2015, as part of the CC's initiative to prepare different Hong Kong trade associations for the commencement of the CO (which came into full effect on 14 December 2015), the CC had reviewed the practices of all trade associations in Hong Kong and upon discovering practices which may risk contravening the CO, notified these trade associations of the relevant compliance risks.

7. As part of this project, the CC had reviewed the practices of the HKIS and noted, in particular, that its publication of fee-scales in relation to "Professional Charges for Building Surveying Services", the "Scale of Professional Charges for Land Surveying Services", and the "Scale of

[2] **[Day 21, 96:19-101:23]**

Professional Charges for General Practice Services in Hong Kong" may contravene the FCR.

8. Between 2015 and 2016, the CC and HKIS engaged in numerous communications over the CC's concerns and in 2016, the HKIS, through its solicitors, informed the CC that it was abolishing the said fee-scales.

9. According to HKIS' own Annual Report for 2015/16 this was done upon the HKIS being advised by **its** own appointed legal advisors *"that the Fee Scales… were in contravention of the* [CO] *and should be abolished."*: see. paragraph 4.7 of HKIS' Annual Report for 2015/16 **[Tab-2]**.

10. It was therefore in these circumstances that the HKIS had voluntarily removed the relevant fee-scales and their corresponding association rules.

Fee-Scales Compiled by Trade Associations - Relevant Legal Principles

11. Fundamental to the notion that competition generates consumer welfare is the idea that in a market economy, businesses operating independently will always seek to provide better goods and services and/or provide such services at lower prices and better quality compared to their rivals in order to win businesses from consumers. The more intense the rivalry, the greater the incentive for businesses to seek to capture their businesses by providing greater value to the consumer.

12. Correspondingly, the greater the degree of uncertainty amongst business as to how its rivals may conduct themselves on the relevant market (e.g. what prices they will charge), the stronger the competitive pressure would be on those businesses to offer greater value to consumers (see. in particular, paragraph 15 below).

13. Central to competition law is therefore the protection of this rivalry and feature of uncertainty through prohibiting any means by which businesses may directly or indirectly disclose their future market intent to each other.

14. As was observed by the Competition Tribunal in **Competition Commission v Nutanix** [2019] HKCT 2 **[Tab-3]**:

"32. Any direct or indirect contact between economic operators of such a nature as to disclose to a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market, where the object or effect of such contact is to create conditions of competition which do not correspond to the normal

conditions of the market in question, constitutes a concerted practice…

33. *In order to prove a concerted practice, it is not therefore necessary to show that the competitor in question has formally undertaken to adopt a particular course of conduct. 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…"* [citations omitted]

15. The protection of this state of rivalry and uncertainty amongst bidders is all the more important in the context of bidding and tendering. This is because:

(1) in any given tender, the procurer will likely have little / no idea as to what the state of the market is, what is likely to be the best deal it can get, and what sort of terms it should expect to purchase the relevant goods or services;

(2) while the procurer can try to better understand the market through its own research and analysis, this will likely require substantial time and costs, especially where the goods or services are highly technical in nature;

(3) the procurer may try to engage multiple suppliers and to try and "play" each of their proposed terms against one another. However, in addition to being costly in terms of time, it would similarly be hard for the procurer to know if the number of suppliers it had contacted was enough for it to secure the best deal. This is especially the case where the projected contract sum is sizeable and suppliers may be quoting at wildly different terms / prices;

(4) the procurer may address this information asymmetry through conducting a competitive bidding process. Specifically, the procurer can invite a larger number of suppliers to submit their best offer at a designated date while, at the same time, letting the suppliers know that a large number of their rivals have also been invited to submit their best offers;

(5) as each supplier prepares its best offer for submission, they will know its own cost for providing the goods / services and may also have a reasonably good idea about the cost of its rivals. Its final offer will therefore be influenced by a combination of its own cost,

its beliefs about its rivals' cost, the number of rivals that have been invited to participate, and the profits it can expect to obtain (all of this information being otherwise unknown to the procurer);

(6) through the process of competitive tendering, the procurer is thus able to overcome the problem of its ignorance about the market - by requiring the suppliers to solve the problem through their own rivalry;

(7) the rivalry, which is essential to achieving what the procurer wants, is contrary to the joint interest of the suppliers. If a supplier is able to discover what other suppliers will do (e.g. what their terms of bid are), this will reduce their rivalry and allow the suppliers to increase their joint profits - especially if they can find a way to share the benefits of the reduced rivalry;

(8) the simultaneous consideration of offers by informed bidders, who know that they must prevail against similarly informed rivals in head-to-head competition in order to obtain the payoff (i.e. to win the bid), is a powerful market force which the procurer can pray-in-aid of even if it is uninformed about the relevant market characteristics;

(9) the intensity of the rivalry and the uncertainty among bidders is what encumbers the profits for the bidders. Collusion by the bidders, especially if it reduces this uncertainty, increases payoffs by suppressing that rivalry.

(c.f. **<u>The Economics of Collusion - Cartel and Bidding Rings</u>** at pp. 164-166 **[Tab-4]**).

16. It is, in the circumstances, why collusion between businesses are universally condemned by competition law. To this end, section 6 of the CO **[Tab-1]** expressly prohibits:

(1) undertakings (i.e. businesses) from entering into any agreement or concerted practices that has the object or effect of harming competition in Hong Kong; and

(2) specifically in the context of trade associations, members of those associations from making or giving effect to a decision of the association which has the object or effect of harming competition in Hong Kong.

17. Fee-scales that are the result of members of a trade association discussing / agreeing on what a price they should charge for prospective works harm consumers because they are based on the incentives and profit maximizing aims of the associating members and not the interest of consumers. It is therefore unlikely to represent what a competitive price should be and may end up misleading consumers that it is.

18. Even if the fee-scales are stated to be *"for general reference only"* or that the association members are *"free to depart from the fee-scale"* it may still be capable of harming competition on the relevant market.

19. In the past, the argument that a set of fee-scales should not be regarded as being anticompetitive because it is of a non-binding nature and/or is intended to facilitate transparency for consumers has been rejected in the context of:

    (1) fee guidelines issued by the Royal Institute of British Architects that were stated to be merely indicative and used only as a yardstick by which a client, who may be ignorant of what a reasonable charge is, can forecast the cost of the service;[3]

    (2) a *"list of average fees received by advocates"* issued by the Rennes Bar for professional legal services that were rendered by its members on the basis that it was intended to act as a guide for clients;[4]

    (3) a *"Guideline on Fees"* published by the Singapore Medical Association ("**SMA**") which recommended a range of professional fees for a range of medical services to be provided by medical professionals in Singapore. This was despite the guidelines being recommendatory only and that they were meant to protect patients'

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[3] **Royal Institute of British Architects**, Case GP/908 (14 March 2003), OFT Competition Case closure summaries 1-31 March 2004 **[Tab-5]**. In particular, the Office of Fair Trade noted that: *"Circulation of guidance on fees issued by an association of undertakings or a professional body may encourage tacit collusion as it is likely to provide a lead on prices which may hinder the ability or incentive of efficient firms to compete by reducing price to reflect their lower costs. It may also protect those who are less efficient and reduce the incentive to improve. The fact that the guidance was in the form of an indication rather than a binding decision did not prevent it from being a decision of an association of undertakings."*

[4] **Re. Fees Imposed by the Rennes Bar** [1997] E.C.C. 469 **[Tab-6]**. In particular at [16] therein, the French Competition Council noted that *"… by distributing the document in question the Rennes bar might have led its members to fix their fees on the basis of the figures reproduced in the list, instead of by reference to the terms and conditions of their own chambers"* and then at [17] *"although the* [list of average fees] *did not have the object of distorting competition in the market in question, it could have been used… as a reference by all advocates… Therefore the list, which was identifiable as a reference scale, constituted a concerted action which may have had the effect of distorting competition…"*

interest by reducing the information asymmetry between patients and medical practitioners.[5]

20. Finally, the publication of “guidance prices” 「指導價」; “base prices” 「基準價」; “reference prices” 「參考價」; “recommended prices” 「推薦價」; and “future prices” 「「預測價 」are also expressly regarded as being a “high risk activity” 「高風險行為 」for trade associations in the Chinese Mainland according to the guidance from the State Administration for Market Regulation.[6]

21. In view of all of the above, it was, and still is, the CC’s position that fee-scales which are the result of an agreement between members of a trade association will likely have the object of harming competition in Hong Kong and be unlawful under the FCR.[7]

22. The only exceptional situation in which fee-scales set by members of a trade association may not be in contravention of the FCR is if it can be demonstrated that it enhances overall economic efficiency pursuant to the conditions in s.1 Sch. 1 CO **[Tab-1]**. While each case must be assessed according to its own merits, the CC takes the view that fee-scales set by trade associations are unlikely to satisfy the requisite statutory criteria for the economic efficiency exclusion.[8]

<u>Fee-Scales Compiled by Statutory Bodies - Relevant Legal Principles and CC’s Recommendations</u>

23. Unlike the position of trade associations, statutory bodies stand on an entirely different footing both in terms of:

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[5] **<u>Application for Decision by the Singapore Medical Association in relation to its Guideline on Fees</u>** (Case number: CCS 400/001/09) (“**SMA GOF Decision**”) **[Tab-7]**. See. in particular [58] *“… CCS is of the view that there is no reason for professional or trade associations to circulate recommended prices unless they intend to, at least, provide a reference for members and influence their independent pricing decisions”*; [65] *“… even recommendations that purport to be voluntary can have the object of restricting competition”*; and then at [72] *“… medical practitioners may argue that setting a minimum price helps to ensure that quality will not be compromised… Nevertheless, the jurisprudence is replete with judicial pronouncements rejecting such arguments, as there is no guarantee that, even with minimum price, quality level of services will necessarily be maintained.”*

[6] See. Article 10(2) of **<u>国务院反垄断反不正当竞争委员会关于行业协会的反垄断指南</u>** **[Tab-8]**.

[7] **<u>Guideline for the First Conduct Rule</u>** paras. 2.34 and 6.14 **[Tab-9]**

[8] See, in this respect, CCS’ decision as to why it did not consider the SMA’s guideline of fees met the relevant criteria in Singapore’s equivalent of s.1 Sch. 1 CO: Part V of SMA GOF Decision **[Tab-7]**.

(1) jurisdiction; and

(2) theories of harm.

The FCR does not apply to statutory bodies in general

24. First, s.3 of the CO **[Tab-1]** expressly provides that the conduct rules (e.g. the FCR) does not apply to a statutory body unless they are expressly specified as such by the Chief Executive in Council.

25. As of today, only 6 statutory bodies have been expressly specified as such under the **Competition (Application of Provisions) Regulation** (Cap. 619A) **[Tab-10]**. They are namely:

(1) Ocean Park Corporation;

(2) Matilda and War Memorial Hospital;

(3) Kadoorie Farm and Botanic Garden Corporation;

(4) The Helena May;

(5) Federation of Hong Kong Industries; and

(6) The general committee of the Federation of Hong Kong Industries.

26. There is therefore no prospect of a statutory body, such as the URA, contravening the FCR should it decide to compile a fee-scale.[9]

The FCR does not apply where there is no collusion

27. Furthermore, fee-scales / reference prices that are compiled by a third-party (such as the URA) will not contravene the FCR if they do not involve collusion among competing businesses.

[9] While not strictly relevant for present purposes, it should be made clear that there may be situations where the trade association is a statutory body but its members are not. In these situations, while the FCR may not apply to the trade association, it will continue to have application over its members. These members must therefore not, directly or indirectly, enter into any agreement / concerted practices / make or give effect to the decision of the association that has the object or effect of harming competition.

28. In fact, the URA, itself, has through the Cost Reference Centre established by the Building Rehabilitation Platform, published a set of detailed "Reference Unit Rate" for "typical works items" in building rehabilitation works which are:

(1) to be *"used for reference in preparing the preliminary estimates for building rehabilitation works"*;

(2) compiled using data *"gathered periodically from the awarded contracts and returned tenders of building rehabilitation properties"*; and

(3) intended to be updated *"once a year for the reference of the public"*.[10]

29. As the URA's "Reference Unit Rate" does not involve / require building contractors to agree on a set of prospective fees, it will not contravene the FCR regardless of URA's status as a statutory body. [11]

CC's recommendations

30. Notwithstanding the above, the CC has the following recommendations if a statutory body (such as the URA) wishes to compile a set of fee-scales / reference prices of consultants for the consideration of residents / property management companies:

(1) first, if the fee-scales are compiled by benchmarking against previously awarded contracts, care must be taken to ensure that previous price actually reflects what is, in the opinion of the statutory body, reasonable and competitive and is not, itself, distorted (whether upwards or downwards) because of anti-competitive practices. It may, in this respect, be fallacious to simply assume that the market price is reflective of the competitive price if the market in question has been the subject of anticompetitive practices for a prolonged period of time;

(2) in the context of consultants that appear to be "undercharging" when compared with the fee-scale rates, it may be important for the

[10] https://brplatform.org.hk/en/cost-reference-centre/reference-unit-rate

[11] Notwithstanding the existence of such fee-scales, contractors on the relevant market must still independently determine their bidding prices in any given tender. Putting the point differently, any collusion amongst contractors to use the Reference Unit Rate as a form of focal point when bidding in tenders remains unlawful under the FCR.

procuring residents to be adequately informed that there may, in certain circumstances, be legitimate business reasons why a particular consultant may be bidding aggressively or even seemingly at a loss. This may, for example, be where:

(a) the consultant is willing to forego some of its profit to gain relevant staffing and project experiences especially if it is a new entrant to the consultancy market and needs to accrue such experience in order to meet certain prequalification criteria; and/or

(b) the consultant has special technical know-how and expertise that enables it to carry out the relevant works in a manner that is more efficient / cost effective compared to its competitors. It is therefore able to lower its bidding prices without sacrificing its profits.

(3) stemming from (2) above, rather than simply disqualifying a relevant consultancy bid for being priced at a very low level, it may be prudent for the residents / property management companies to first ascertain whether any legitimate reason is present lest they end up disqualifying a genuine competitive tender; and

(4) finally, while a set of fee-scales may be helpful in informing the residents / property management companies which bids are suspiciously cheap, it does not necessarily follow that those bids which are within the fee-scale / reference price range must be free from manipulation. The use of fee-scales must therefore not be the only form of due diligence which needs to be carried out.

<u>Conclusion on Fee-Scales</u>

31. For the foregoing reasons, it is the CC's position that:

(1) fee-scales that are compiled by members of a trade association discussing / agreeing on prospective prices will likely contravene the FCR;

(2) fee-scales that are compiled by a statutory body (such as the URA) in circumstances that do not involve collusion between businesses will unlikely contravene the FCR; and

(3) if a statutory body wishes to compile such a fee-scale, it should heed the issues raised at paragraph 30 above.

<u>Part 2: CC's recommendations that may be relevant to ToR(2)</u>

32. The CC has previously provided its recommendations that may be relevant to ToR(2) in:

(1) its written opening to the IC dated 9 March 2026 (in particular, paragraphs 27-33); and

(2) its written report to the IC dated 14 May 2026 (in particular, paragraphs 28-34);

the contents of which will not be repeated herein.

33. In terms of additional measures and developments since the filing of the above submissions, the IC may wish to note that:

(1) the CC will shortly be publishing:

(a) a set of revised model NCC and NCTC to strengthen their efficacy in deterring anticompetitive behavior; and

(b) a pro-forma statutory declaration for prospective procurers to incorporate into their tenders - which will require bidders in building maintenance works to confirm, on oath, that they had not engaged in anticompetitive behavior prior to bidding.

which the CC recommends to be included as mandatory criteria in future bids for relevant large-scale building maintenance works; and

(3) on the question of criminalisation and legislative reform, the CC has continued to work closely with the CEDB, the Government's Task Force on Investigation and Regulation, as well as other stakeholders such as the Hong Kong Bar Association on different options. Subject to any specific recommendations from the IC, the CC should be ready to propose a set of reform to existing legislations with a view to enhancing the deterrent effect of the law.

Part 3: Concluding Remarks

34. The CC hopes that these submissions have adequately addressed the concerns of the IC (especially with regards to fee-scales) and will welcome any opportunity to further address / assist the IC.

Dated the 17th day of June 2026.

Competition Commission

Re. Independent Committee in relation to the fire at
Wang Fuk Court in Tai Po ("IC")

List of Materials

1. Sections 3, 6, and s.1 Sch.1 of the **Competition Ordinance** (Cap. 619).

2. Para. 4.7 Annual Report of the Hong Kong Institute of Surveyors for 2015/16.

3. **Competition Commission v Nutanix** [2019] HKCT 2.

4. **The Economics of Collusion - Cartel and Bidding Rings** at pp. 164-166.

5. **Royal Institute of British Architects**, Case GP/908 (14 March 2003), OFT Competition Case closure summaries 1-31 March 2004.

6. **Re. Fees Imposed by the Rennes Bar** [1997] E.C.C. 469.

7. **Application for Decision by the Singapore Medical Association in relation to its Guideline on Fees** (Case number: CCS 400/001/09).

8. 国务院反垄断反不正当竞争委员会关于行业协会的反垄断指南.

9. Paras. 2.34 and 6.14 **Guideline for the First Conduct Rule**.

10. **Competition (Application of Provisions) Regulation** (Cap. 619A).

Dated the 17th day of June 2026

Competition Commission

3. Application to statutory bodies

(1) The following provisions do not apply to a statutory body—

(a) Part 2 (The conduct rules);

(b) Part 4 (Enforcement powers of Commission);

(c) Part 6 (Enforcement before Tribunal); and

(d) Schedule 7 (Mergers).

(2) Despite subsection (1), the provisions referred to in that subsection apply to—

(a) a specified statutory body; and

(b) a statutory body, to the extent that it is engaged in a specified activity.

(3) In this section—

(a) ***specified*** (指明) means specified in a regulation made for the purpose of this section by the Chief Executive in Council under section 5; and

(b) a reference to a statutory body includes an employee or agent of the statutory body, acting in that capacity.

6. Prohibition of anti-competitive agreements, concerted practices and decisions

(1) An undertaking must not—

(a) make or give effect to an agreement;

(b) engage in a concerted practice; or

(c) as a member of an association of undertakings, make or give effect to a decision of the association,

if the object or effect of the agreement, concerted practice or decision is to prevent, restrict or distort competition in Hong Kong.

(2) Unless the context otherwise requires, a provision of this Ordinance which is expressed to apply to, or in relation to, an agreement is to be read as applying equally to, or in relation to, a concerted practice and a decision by an association of undertakings (but with any necessary modifications).

(3) The prohibition imposed by subsection (1) is referred to in this Ordinance as the ***first conduct rule***.

Schedule 1

[ss. 9, 15, 24, 30, 36 & 163]

General Exclusions from Conduct Rules

1. Agreements enhancing overall economic efficiency

The first conduct rule does not apply to any agreement that—

(a) contributes to—

(i) improving production or distribution; or

(ii) promoting technical or economic progress,

while allowing consumers a fair share of the resulting benefit;

(b) does not impose on the undertakings concerned restrictions that are not indispensable to the attainment of the objectives stated in paragraph (a); and

(c) does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question.

2. Compliance with legal requirements

(1) The first conduct rule does not apply to an agreement to the extent that it is made for the purpose of complying with a legal requirement.

(2) The second conduct rule does not apply to conduct to the extent that it is engaged in for the purpose of complying with a legal requirement.

(3) In this section—

legal requirement (法律規定) means a requirement—

(a) imposed by or under any enactment in force in Hong Kong; or

(b) imposed by any national law applying in Hong Kong.

3. Services of general economic interest etc.

Neither the first conduct rule nor the second conduct rule applies to an undertaking entrusted by the Government with the operation of services of general economic interest in so far as the conduct rule would obstruct the performance, in law or in fact, of the particular tasks assigned to it.

4. Mergers

(1) To the extent to which an agreement (either on its own or when taken together with another agreement) results in, or if carried out would result in, a merger, the first conduct rule does not apply to the agreement.

(2) To the extent to which conduct (either on its own or when taken together with other conduct) results in, or if engaged in would result in, a merger, the second conduct rule does not apply to the conduct.

5. Agreements of lesser significance

(1) The first conduct rule does not apply to—

(a) an agreement between undertakings in any calendar year if the combined turnover of the undertakings for the turnover period does not exceed $200,000,000;

(b) a concerted practice engaged in by undertakings in any calendar year if the combined turnover of the undertakings for the turnover period does not exceed $200,000,000; or

(c) a decision of an association of undertakings in any calendar year if the turnover of the association for the turnover period does not exceed $200,000,000.

(2) Subsection (1) does not apply to an agreement, a concerted practice, or a decision of an association of undertakings, that involves serious anti-competitive conduct.

(3) Subject to subsection (4), the turnover period of an undertaking is—

(a) if the undertaking has a financial year, the financial year of the undertaking that ends in the preceding calendar year; or

(b) if the undertaking does not have a financial year, the preceding calendar year.

(4) The turnover period of an undertaking is the period specified as such for the purpose of this subsection in the regulations made under section 163(2) if—

(a) for an undertaking that has a financial year—

(i) the undertaking does not have a financial year that ends in the preceding calendar year; or

(ii) the financial year of the undertaking that ends in the preceding calendar year is less than 12 months; or

(b) for an undertaking that does not have a financial year—

(i) the undertaking is not engaged in economic activity in the preceding calendar year; or

(ii) the period in which the undertaking is engaged in economic activity in the preceding calendar year is less than 12 months.

(5) In this section—

preceding calendar year (對上公曆年) means the calendar year preceding the calendar year mentioned in subsection (1)(a), (b) or (c);

turnover (營業額)—

(a) in relation to an undertaking that is not an association of undertakings, means the total gross revenues of the undertaking whether obtained in Hong Kong or outside Hong Kong; and

(b) in relation to an association of undertakings, means the total gross revenues of all the members of the association whether obtained in Hong Kong or outside Hong Kong.

6. Conduct of lesser significance

(1) The second conduct rule does not apply to conduct engaged in by an undertaking the turnover of which does not exceed $40,000,000 for the turnover period.

(2) Subject to subsection (3), the turnover period of an undertaking is—

(a) if the undertaking has a financial year, the financial year of the undertaking that ends in the preceding calendar year; or

(b) if the undertaking does not have a financial year, the preceding calendar year.

(3) The turnover period of an undertaking is the period specified as such for the purpose of this subsection in the regulations made under section 163(2) if—

(a) for an undertaking that has a financial year—

(i) the undertaking does not have a financial year that ends in the preceding calendar year; or

(ii) the financial year of the undertaking that ends in the preceding calendar year is less than 12 months; or

(b) for an undertaking that does not have a financial year—

(i) the undertaking is not engaged in economic activity in the preceding calendar year; or

(ii) the period in which the undertaking is engaged in economic activity in the preceding calendar year is less than 12 months.

(4) In this section—

preceding calendar year (對上公曆年) means the calendar year preceding the calendar year in which the conduct mentioned in subsection (1) is engaged in;

turnover (營業額) means the total gross revenues of an undertaking whether obtained in Hong Kong or outside Hong Kong.

DIRECTORY AND ANNUAL REPORT 2015-2016

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4. Members' Communication and Services

We value members' experience with the Institute.

4.1 Networking

The HKIS Members' Welfare Committee successfully held two drinks gatherings for members on 31 May and 1 December 2016, with 130 and 88 members in attendance respectively. These events provided invaluable networking opportunities for members across all grades and Divisions.

4.2 HKIS Archive

An archive has been developed under the HKIS website to allow easier access to the Institute's records, including its publications, reports and media coverage.

4.3 Wikipedia

A Wikipedia page for the HKIS has been enhanced and updated with new contents to serve as a platform for the promotion of the Institute's public stature.

4.4 Members' Forums

The Housing Policy Panel organised a discussion forum on "Elderly Housing Policy" on 17 June 2016. The forum reviewed the existing housing policy against the needs of the Elderly in Hong Kong. Speakers from different sectors shared their views on the role of the Government, NGOs and the private sector in this area, as well as issues surrounding the housing supply and demand situation in private and public housing.

4.5 Extraordinary General Meeting and Forum

A discussion forum was held on 9 September 2016 to explain the rationale behind the resolutions on the proposed amendments to the HKIS Rules of Conduct, Constitution and Bye-Laws, the proposed revisions to annual subscriptions and application fees, and the ratification of Guidance Notes on Standards, before an Extraordinary General Meeting (EGM) was held to pass the resolutions.

At the EGM held on 19 September, six out of seven resolutions were passed in respect of the amendments to the Rules of Conduct and Constitution relating to the Competition Ordinance, admission to membership and the ratification of Guidance Notes on Standards (namely the Rules of Conduct, Valuation Standards, Guidance Notes on Land Boundary Survey and Surveyors Acting As Experts in Commercial Rent Determination – A Joint Guidance Note with RICS Hong Kong) as well as the approval of an increase in the annual subscriptions and application fees for membership admission. The proposal to implement an automatic annual subscription adjustment mechanism was not passed.

4.6 Forum for the Creation of an Additional Post of Vice-President

To cope with the growing demands and expectations arising from the development of the surveying profession, the General Council considered and agreed that it was necessary to add one additional post of Vice-President to the existing number of Office Bearers to assist in the affairs of the Institute. A discussion forum was organised by the General Council on 24 October 2016 to explain the rationale behind its decision.

4.7 Competition Ordinance

A working group was formed to study the implications of the Scales of Professional Charges (or Fees Scales) and Rules 1.2.5 and 1.2.6 of the HKIS Rules of Conduct under the Competition Ordinance (Cap. 619). The HKIS was advised by the appointed legal advisors that the Fees Scales and the two Rules were in contravention of the Ordinance and should be abolished. Such abolition became effective at the EGM on 19 September.

4.8 Cooperation with Other Professional Institutes

Regular meetings and liaison were held with four other professional institutes, the Hong Kong Institute of Architects, Hong Kong Institute of Planners, Hong Kong Institute of Landscape Architects and Hong Kong Institution of Engineers to exchange views and pursue subjects of common interest and concerns.

The Institute participated in various functions of the Construction Industry Alliance in 2016 with an aim to promote the healthy growth of the construction industry in Hong Kong.

We also exchanged views on subjects including membership reciprocity agreement and measures to better nurture our young members with the Royal Institution of Chartered Surveyors. We joined the

Public Version
(with confidential information redacted)

CTEA 1/2017
[2019] HKCT 2

IN THE COMPETITION TRIBUNAL OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COMPETITION TRIBUNAL ENFORCEMENT ACTION NO 1 OF 2017

BETWEEN

COMPETITION COMMISSION	Applicant

and

NUTANIX HONG KONG LIMITED	1st Respondent
BT HONG KONG LIMITED	2nd Respondent
SIS INTERNATIONAL LIMITED	3rd Respondent
INNOVIX DISTRIBUTION LIMITED (trading as "INNOVIX DISTRIBUTION")	4th Respondent
TECH-21 SYSTEMS LIMITED	5th Respondent

Before: Hon G. Lam J, President of the Competition Tribunal

Dates of Hearing: 20-22, 25-29 June, 3 July, 17-20 September 2018

Date of Judgment: 17 May 2019

J U D G M E N T

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Abbreviations

APD	Administration and Procurement Department (YWCA)
BT	BT Hong Kong FLimited, the 2nd respondent
Chan	Mr CHAN Wai Ying Denis, Technical Pre-Sales Manager of BT
Cheung	CHEUNG Kar Hay Danny, Assistant Product Manager of Innovix
CJEU	Court of Justice of the European Union
Commission	Competition Commission, the applicant
EU	European Union
FAC	Finance and Administration Committee (YWCA)
Hung	Mr Thomas HUNG, Territory Account Manager of Nutanix
ICCPR	International Covenant on Civil and Political Rights
iCON	iCON Business Systems Ltd
Innovix	Innovix Distribution Limited, the 4th respondent
ISD	Information System Department (YWCA)
IT	Information technology
ITDC	Information Technology Development Committee (YWCA)
Li	Mr Benny LI, Systems Engineer (YWCA) and assistant of Lok
Lok	Mr LOK Yiu Ying Alan, Head of ISD and Secretary of the ITDC (YWCA)
Mak	Mr MAK Pui Hing Harris, Administration and Procurement Manager of YWCA
Nutanix	Nutanix Hong Kong Limited, the 1st respondent
Ordinance	Competition Ordinance (Cap 619)
Percy Ng	Mr NG Tat Keung Percy, Alliance & Business Development Manager of BT
Shek	Mr SHEK Ka Kit Keith, Product Manager of SiS
SiS	SiS International Limited, the 3rd respondent
Siu	Mr SIU Kiu Fai Tommy, Product Manager of Innovix
Steve Ng	Mr NG Chi Hang Steve, Sales Manager of Tech-21
Tech-21	Tech-21 Systems Limited, the 5th respondent
TFEU	Treaty for the Functioning of the European Union
Tribunal	Competition Tribunal
UK	United Kingdom
Wong	Mr WONG Ka Man Morris, Assistant Procurement Officer in the Administration and Procurement Department of YWCA
YWCA	Hong Kong Young Women's Christian Association

A. INTRODUCTION

1. In these proceedings, the Commission contends that the five respondents, in their conduct in relation to a call for tenders for IT equipment YWCA in July 2016, each contravened the first conduct rule (s 6(1) of the Ordinance) which prohibits agreements or concerted practices between undertakings the object or effect of which is to prevent, restrict or distort competition in Hong Kong. The Commission seeks against each of them declarations of contravention and orders for pecuniary penalty pursuant to s 93.

2. Broadly described, the Commission's case is as follows. In July 2016, in response to YWCA's invitation to tender for the supply and installation of a Nutanix cloud-based server system, BT planned to submit a bid. YWCA's procurement policy required a minimum of five bids for this tender. Where fewer than five bids were received, special approval would be required before the contract could be awarded. A prior tender had failed because only one bid was received (from BT). For the second tender, to assist BT's bid, Hung (Nutanix) agreed with Chan (BT) that Hung would obtain four "dummy bids" (in the sense of non-genuine bids) from friendly Nutanix channel partners. Chan gave BT's completed bid including the bid prices to Hung. Hung prepared bids for SiS, Innovix, Tech-21 and another IT company (iCON) with substantially higher bid prices than BT's, and separately agreed with Shek (SiS), Siu (Innovix) and Steve Ng (Tech-21) and a friend from iCON, for them to sign the bids which he arranged to be submitted. Pursuant to these agreements, SiS, Innovix and Tech-21 (but not iCON) each submitted a dummy bid to YWCA, in addition to the bid submitted by BT.

3. The Commission contends that the arrangements between Nutanix and BT, Nutanix and SiS, and Nutanix and Tech-21 respectively were vertical, bilateral agreements or concerted practices, and that the arrangement with Innovix was either a trilateral one between Nutanix, BT and Innovix or a bilateral one between Nutanix and Innovix.

4. The Commission contends that the respondents' conduct constituted contravention of the first conduct rule, in that they made or gave effect to agreements or engaged in concerted practices with the object of preventing, restricting or distorting competition.

5. The Commission further contends that the respondents' conduct constituted "bid-rigging" and therefore "serious anti-competitive conduct" as defined in the Ordinance and that therefore no warning notice was required to be issued to them before the commencement of these proceedings in the Tribunal.

6. In broad terms, the respondents have raised the following matters. Nutanix and BT dispute that they agreed to procure, and Innovix and Tech-21 dispute that they agreed to submit, non-genuine bids. They contend that the bids submitted were genuine bids with prospects (albeit low prospects) of success. SiS contends that it was a junior employee (Shek) who privately agreed to and did submit a bid in its name, and that his conduct was outside his scope of work and authority and not attributable to SiS, which carried on business as a distributor and had never taken part in end-users' tenders.

7. The respondents contend that any such agreements or concerted practices as existed did not have the object of preventing, restricting or distorting competition.

8. Further and in any event, the respondents contend that their conduct did not constitute "bid-rigging" for various reasons including that YWCA knew of their agreements. Accordingly, a warning notice was required before proceedings could be instituted against them and, since none was issued, the proceedings must be dismissed.

9. Separately, Tech-21 has argued that the first conduct rule is excluded by virtue of s 5 of Schedule 1 to the Ordinance on the ground that it has not been shown that the combined turnover of itself and Nutanix for the relevant year exceeds $200 million.

10. This judgment is structured as follows. Section B introduces the general legal framework and basic concepts in the Ordinance relevant to this case. Section C deals with the standard of proof the Commission has to meet in this application. Section D sets out the facts and events which are largely uncontroversial or supported by incontrovertible evidence. Sections E, F, G and H each deals with the agreements or concerted practices between Nutanix and BT, Nutanix and SiS, Nutanix and Innvoix (and BT), and Nutanix and Tech-21 respectively. Section I considers the question of attribution of Shek's conduct to SiS. Section J is concerned with whether the agreements or concerted practices found had the object of preventing, restricting or distorting competition. Section K deals with the exclusion under s 5 of Schedule 1. Section L deals with the issues concerning warning notice, including whether there was bid-rigging and whether the agreements were made known to YWCA. A brief summary is set out in Section M.

B. LEGAL FRAMEWORK

11. In this section I shall outline the statutory scheme so far as relevant and explain in general some of the principal concepts that may be relevant in this case.

(1) Statutory framework for prohibition and enforcement

12. The Ordinance lays down three prescriptive provisions called "competition rules". They include two "conduct rules", namely, the first conduct rule (s 6) and the second conduct rule (s 21), and a "merger rule" (Schedule 7, s 3).

13. Section 6, which lays down the first conduct rule, provides:

> " (1) An undertaking must not—
>
> (a) make or give effect to an agreement;
>
> (b) engage in a concerted practice; or
>
> (c) as a member of an association of undertakings, make or give effect to a decision of the association,
>
> if the object or effect of the agreement, concerted practice or decision is to prevent, restrict or distort competition in Hong Kong.
>
> (2) Unless the context otherwise requires, a provision of this Ordinance which is expressed to apply to, or in relation to, an agreement is to be read as applying equally to, or in relation to, a concerted practice and a decision by an association of undertakings (but with any necessary modifications).
>
> (3) The prohibition imposed by subsection (1) is referred to in this Ordinance as the "first conduct rule"."

14. In the present case the Commission alleges infringement of the first conduct rule "by object". In this respect, s 6 has to be read together with s 7(1) and (2), which provide that:

(1) if an agreement, concerted practice or decision has more than one object, it falls within the first conduct rule if one of its objects is to prevent, restrict or distort competition (s 7(1)); and

(2) the object of prevention, restriction or distortion of competition may be found even if it can be ascertained only by inference (s 7(2)).

15. Following such investigation as it considers appropriate, the Commission may apply under s 92 to this Tribunal for a pecuniary penalty to be imposed on any person it has reasonable cause to believe (a) has contravened a competition rule, or (b) has been involved in a contravention of a competition rule. In addition to pecuniary penalty, under s 94 the Tribunal has power to make a wide range of orders specified in Schedule 3.

16. The Tribunal is set up under the Ordinance as a superior court of record consisting only of the judges of the Court of First Instance: ss 134-135. It has all the powers, rights and privileges of the Court of First Instance with respect to witnesses, production of documents and enforcement of its orders: s 143(1). It may receive any evidence whether or not admissible in a court of law and is not bound by the rules of evidence except in proceedings in which pecuniary or financial penalties are sought: ss 143(2) and 147.

17. Section 93(1) empowers the Tribunal, if it is satisfied on such application, that a person has contravened or been involved in a contravention of a competition rule, to order that person to pay to the Government a pecuniary penalty. Section 93(2)-(4) make further provision for the determination of the amount of a pecuniary penalty. According to s 93(3), the penalty may not exceed in total 10% of the turnover of the undertaking

concerned for each year in which the contravention occurred, or, if it occurred in more than three years, 10% of the turnover for the highest three years.

(2) Warning notice

18. Sections 92 and 93, however, have to be read subject to s 82. Section 82(1) provides:

> " If the Commission has reasonable cause to believe that—
>
> (a) a contravention of the first conduct rule has occurred; and
>
> (b) the contravention does not involve serious anti-competitive conduct,
>
> the Commission must, before bringing proceedings in the Tribunal against the undertaking whose conduct is alleged to constitute the contravention, issue a notice (a "warning notice") to the undertaking."

19. A warning notice has to state that the Commission requires the undertaking to cease the contravening conduct within the period specified in the notice, and not to repeat that conduct after that period: see s 82(2)(d)(i). It is only after the warning period has expired, where there is reasonable cause to believe that the contravening conduct has continued or is repeated, that the Commission may bring proceedings in the Tribunal, and then not in respect of any period preceding the warning period: see s 82(4) and (5).

20. "Serious anti-competitive conduct" is defined in s 2(1) to mean:

> " any conduct that consists of any of the following or any combination of the following—
>
> (a) fixing, maintaining, increasing or controlling the price for the supply of goods or services;
>
> (b) allocating sales, territories, customers or markets for the production or supply of goods or services;
>
> (c) fixing, maintaining, controlling, preventing, limiting or

eliminating the production or supply of goods or services;

(d) bid-rigging".

21. Section 2(2) lays down a specific definition of "bid-rigging" for the purposes of the definition of "serious anti-competitive conduct", which is set out in §491 below.

(3) Guidelines issued by the Commission

22. Certain guidelines have been issued by the Commission as required by s 35(1) of the Ordinance, including the *Guideline on the First Conduct Rule*. These guidelines are not subsidiary legislation (see s 35(8)) but the Legislative Council must be consulted before they are issued or amended (see s 35(4)). They represent the Commission's views and policies and provide guidance to the public, but have no binding legal effect on this Tribunal and the courts or indeed on anyone else. Thus s 35(6) of the Ordinance provides:

> " A person does not incur any civil or criminal liability only because the person has contravened any guidelines issued under this section or any amendments made to them."

23. However, s 35(7) goes on to provide that:

> " If, in any legal proceedings, the Tribunal or any other court is satisfied that a guideline is relevant to determining a matter that is in issue—
>
> (a) the guideline is admissible in evidence in the proceedings; and
>
> (b) proof that a person contravened or did not contravene the guideline may be relied on by any party to the proceedings as tending to establish or negate the matter."

(4) The first conduct rule

24. The first conduct rule is modelled on Art. 101(1) of the TFEU.[1] Both provisions are directed at undertakings; both target agreements, concerted practices and decisions of associations of undertakings; both refer to the object and effect of these arrangements in the alternative, in each case with regard to the prevention, restriction or distortion of competition. EU case law is of obvious value in relation to the interpretation and application of the first conduct rule.

(5) Agreement

25. The present case is not concerned with decisions of associations of undertakings. Only agreements and concerted practices are relevant. An "agreement" is not required to be in any particular form and is not limited to a legally enforceable contract but is defined broadly in s 2(1) to include:

> " any agreement, arrangement, understanding, promise or undertaking, whether express or implied, written or oral, and whether or not enforceable or intended to be enforceable by legal proceedings."

26. It is not in dispute that the central component in the concept of agreement is a meeting of minds or a concurrence of wills between at least

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1 Art. 101(1) of the TFEU provides:

> " The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:
>
> (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
>
> (b) limit or control production, markets, technical development, or investment;
>
> (c) share markets or sources of supply;
>
> (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

two parties. In Case T-41/96 *Bayer v Commission*,[2] the General Court of the EU, based on previous case law, stated (at §69) that the concept of agreement centres around the existence of a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention.[3] It is sufficient that the undertakings in question should have expressed their common intention to conduct themselves on the market in a specific way (§67; on appeal to CJEU, at §97). For the purpose of the first conduct rule, an agreement does not, in my view, require the same certainty as would be necessary for the creation of a contract enforceable at law.

27. The concurrence of wills does not have to consist in an explicit offer and acceptance. An agreement can equally exist where an apparently unilateral anti-competitive measure adopted by one party, constituting an invitation to another party, whether express or implied, to fulfil that goal jointly, receives the tacit acquiescence of that other party: *Bayer v Commission*, at §§71-72, on appeal at §102. It is not essential to have direct evidence of express communications; the existence of an agreement can be deduced from the conduct of the parties (*Bayer*, on appeal, at §100), subject of course to meeting the applicable standard of proof. The inclusion of "understanding" in the statutory definition, in my view, reinforces that tacit dealings suffice and also shows that there can be an agreement even if there is nothing to prevent either party from going back on it.

(6) Concerted practice

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[2] [2000] ECR II-3383.

[3] The passage was apparently approved by the Court of Justice on appeal: Joined Cases C-2/01 & C-3/01P [2004] ECR I-23, §97.

28. “Concerted practice” is not defined in the Ordinance. It is a concept borrowed from EU jurisprudence. A consistent line of decisions in the EU case law, starting with Case 48/69 etc *ICI v Commission* [1972] ECR 619,[4] has held that a concerted practice is:

> “ a form of coordination between undertakings by which, without it having been taken to the stage where an agreement properly so-called has been concluded, practical cooperation between them is knowingly substituted for the risks of competition.”

29. The criteria of coordination and cooperation do not require the working out of an actual plan, and must be understood in the light of the concept that each economic operator must determine independently the policy which he intends to adopt on the market: *Suiker Unie*, §§172-173. Further (at §174):

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

30. Reciprocal contact between the undertakings in question is implied in the concept of “concerted practice”, in the sense that there is an element of acting in concert “where one competitor discloses its future intentions or conduct on the market to another when the latter requests it or, at the very least, accepts it …”: see Joined Cases T-25/95 *Cimenteries CBR v Commission*, EU:T:2000:77, §1849.

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4 Case 40/73 etc, *Suiker Unie v Commission*, EU:C:1975:174, [1975] ECR 1663, §191; Joined Cases C-89/85 *A. Ahlström Osakeyhtiö v Commission (Woodpulp II)*, EU:C:1993:120, [1993] ECR I-1307, §63; Case C-8/08 *T-Mobile*, §26. The quotation is taken from *T-Mobile* at §26.

31. The fact that only one participant reveals his future intentions or other competitive information is not sufficient to exclude the possibility of an agreement or concerted practice, since the recipient of the information in question cannot normally fail to take that information into account when formulating its policy on the market: Cases T-202/98 etc *Tate & Lyle plc v Commission* [2001] ECR II-2035.[5]

32. Any direct or indirect contact between economic operators of such a nature as to disclose to a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market, where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question, constitutes a concerted practice: Case C-49/92P *Commission v Anic Partecipazioni SpA*, EU:C:1999:356, §117; C-199/92P *Hüls AG v Commission*, §160.

33. In order to prove a concerted practice, it is not therefore necessary to show that the competitor in question has formally undertaken to adopt a particular course of conduct. 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: *Cimenteries* at §1852.

34. There was some debate in this case concerning the distinction between agreements and concerted practices, and their relationship *inter se*. Ultimately it seems to me that the difference between the parties is simply a difference in focus and emphasis. That the two concepts are not synonymous

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[5] Upheld on appeal to the CJEU in Case C-359/01P *British Sugar plc v Commission*, ECLI:EU:C:2004:255, 29 April 2004.

is not in doubt. The fact that the legislature has employed two terms instead of one supports this. But the CJEU has stated that:

(1) the relevant treaty provision is intended to apply to all collusion between undertakings, whatever the form it takes. "The only essential thing is the distinction between independent conduct, which is allowed, and collusion, which is not, regardless of any distinction between types of collusion": *Anic*, §108;

(2) the two concepts of agreement and concerted practice have partially different elements but are not mutually incompatible: *Anic*, §132;

(3) the definitions of "agreement" and "concerted practice" are

> " intended, from a subjective point of view, to catch forms of collusion having the same nature which are distinguishable from each other only by their intensity and the forms in which they manifest themselves":

see Case C-8/08 *T-Mobile v Raad van bestuur van de Nederlandse Mededingingsautoriteit* ECLI:EU:C:2009:343, at §23; *Anic*, §131; and

(4) the distinction is made solely with the intention of catching such various forms of collusion: Case C-194/14P *AC-Treuhand v Commission*, ECLI:EU:C:2015:717, at §29.

(7) Infringement by object

35. It is common ground that an anti-competitive object and an anti-competitive effect are alternative conditions in determining whether certain conduct is prohibited by the first conduct rule (see Case C-56/65 *Société Technique Minière v Maschinenbau Ulm*, EU:C:1966:38, 249). In the present case the Commission only alleges infringement "by object" without

advancing a case of infringement "by effect". Where it is established that an agreement has the object of preventing, distorting or restricting competition, it can be concluded there is an infringement of the first conduct rule without having to consider the actual effects of the agreement on competition.

36. In the leading EU case of Case C-67/13P *Groupement des cartes bancaires v Commission* EU:C:2014:2204, the CJEU held that the General Court was wrong to find that the concept of restriction must not be interpreted "restrictively", and that:

> " 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."

37. Consistently with the case law that will be further discussed in section J below, the Commission's *Guideline on the First Conduct Rule* (at §§3.2 – 3.6) explains that:

(1) An arrangement which has the object of restricting competition is one that, by its nature, is harmful to competition. In relation to restrictions having the object of harming competition, there is no need to establish that they have anti-competitive effects.

(2) In order to determine whether an agreement has the object of harming competition, regard must be had to the content of the agreement, the way it is implemented and its context (including both the economic and legal context).

(3) Although determination of the object of an agreement essentially involves an objective assessment of its aims, there is nothing to prevent the parties' subjective intention from being taken into account.

38. Whether a concerted practice has an anti-competitive object is judged by the same criteria as those applicable in the case of an agreement: *T-Mobile* §24.

39. It is the contention of the Commission that the conduct in this case amounts to a prevention, restriction or distortion of competition by object and to bid-rigging because it was intended to interfere with the proper competitive process of a tender. I shall return to these topics in sections J and L below.

(8) Vertical and horizontal agreements

40. It is not in dispute that the first conduct rule applies not only to agreements between undertakings at the same level of the supply chain (horizontal agreements) but also agreements between undertakings at different levels (vertical agreements).

41. At a general level it is however correct to say that in many jurisdictions vertical agreements are viewed with less suspicion than horizontal agreements between competitors. Thus it is stated in the Commission's *Guideline on the First Conduct Rule* that (omitting footnotes):

> " 5.5 Vertical arrangements are, as a general matter, unlikely to be considered Serious Anti-competitive Conduct although the definition of Serious Anti-competitive Conduct does not preclude the possibility (there is no reference in the definition to "competitors").
>
> 5.6 The Commission considers, however, that vertical arrangements may amount to Serious Anti-competitive Conduct in certain cases. For example, in certain circumstances, resale price maintenance may be Serious Anti-competitive Conduct."

42. That said, whether a vertical agreement contravenes the first conduct rule in a particular case depends on the nature, content and context of

the agreement. As the CJEU stated in *AC-Treuhand* at §35, the relevant prohibition refers generally to all agreements and concerted practices which, *in either horizontal or vertical relationships*, distort competition, irrespective of the market on which the parties operate. In the Commission's *Guideline on the First Conduct Rule* it is stated:

> "6.6 While vertical agreements as compared with horizontal agreements are generally less harmful to competition, some vertical agreements may, nonetheless, cause harm to competition.
>
> 6.7 This may be the case where vertical agreements include restrictions which foreclose existing competition or limit the scope for market entry or expansion. In certain cases, vertical restrictions of competition may also serve to facilitate horizontal coordination between competing suppliers and/or downstream distributors."

43. In *Argos Ltd and Littlewoods Ltd v Office of Fair Trading* [2006] EWCA Civ 1318, the English Court of Appeal also recognised the potential of vertical agreements to give rise to infringement of competition law. In terms of the general approach, the court stated:

> "28. The Chapter I prohibition catches agreements and concerted practices whether between undertakings at different levels or between those at the same level of commercial operation. An agreement between a supplier and a commercial customer, which may be called a vertical agreement, may breach the prohibition as much as an agreement between competing suppliers of the same product or the same type of product, which can be referred to as a horizontal agreement.
>
> 29. Each of these types of agreement may be a serious breach of the prohibition, but horizontal agreements have generally been regarded as more serious. It is unavoidable for a supplier and a customer to have dealings and agreements, though they ought not to be anti-competitive. It is not normal for competing undertakings to have dealings with each other, so that any dealings which they do have are regarded with greater suspicion. However, it may be in the interests of a supplier and several of its customers to restrict competition in relation to the supplier's products, so that a serious breach of the Chapter I prohibition may be created by dealings between a supplier and two or more of its customers.
>
> …

> 31. It is not in dispute that there could be a trilateral or multilateral agreement or concerted practice between two or more customers and their common supplier, nor that this might come about by virtue of indirect contact between the customers via that supplier. Equally it is clear that there could be a series of bilateral vertical agreements between one supplier and several of its customers, none of the customers being aware of the fact or nature of the agreements between the supplier and other customers, such that there would be no horizontal element to the customers' agreements. If, on the other hand, each customer did know of the other agreements, it could be equivalent to a multilateral agreement between the supplier and each of the customers."

44. In cases of that kind it is relevant to examine the structure of and parties to the agreement. In *Argos Ltd and Littlewoods Ltd*, the Court of Appeal considered the following scenario to fall within the case law of the CJEU on concerted practice (see §141):

> " The proposition which, in our view, falls squarely within the *Bayer* judgment in the ECJ and which is sufficient to dispose of the point in the present appeal can be stated in more restricted terms: if (i) retailer A discloses to supplier B its future pricing intentions in circumstances where A may be taken to intend that B will make use of that information to influence market conditions by passing that information to other retailers (of whom C is or may be one), (ii) B does, in fact, pass that information to C in circumstances where C may be taken to know the circumstances in which the information was disclosed by A to B and (iii) C does, in fact, use the information in determining its own future pricing intentions, then A, B and C are all to be regarded as parties to a concerted practice having as its object the restriction or distortion of competition. The case is all the stronger where there is reciprocity: in the sense that C discloses to supplier B its future pricing intentions in circumstances where C may be taken to intend that B will make use of that information to influence market conditions by passing that information to (amongst others) A, and B does so."

(9) Knowledge and foresight

45. The Commission submitted that, in order to find that an undertaking participated in an anti-competitive agreement or concerted practice, it is necessary to prove that the undertaking concerned intended to

contribute by its own conduct to the common objectives pursued by all the participants and that it was aware of the actual conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and that it was prepared to take the risk: *AC-Treuhand*, §30; see also *Anic*, §87, and C-204/00P etc *Aalborg Portland and Others v Commission*, EU:C:2004:6, §83.

46. In Case T-82/13 *Panasonic Corp v Commission*, the cartel lasted for a number of years and had a number of facets, and the different actors took part in different forms of collaboration with each other. The question arose whether Panasonic by virtue of its participation in certain forms of coordination could be held liable for the single and complex infringement as a whole. The General Court held that the mere fact that each undertaking takes part in the infringement in ways particular to it does not preclude responsibility for the entire infringement, including conduct put into effect by other undertakings sharing the same anti-competitive object or effect (see §80). Panasonic could be held liable if it was aware of the other undertakings' anti-competitive activities or it could reasonably have foreseen them (§82).

47. In Case C-542/14 *VM Remonts v Konkurences padome*, ECLI:EU:C:2016:578, three firms responded to a Latvian municipal council's call for tenders for food supply. One firm, Pārtikas, had independently prepared a draft tender but had instructed another company providing legal services to prepare a formal tender and submit it on its behalf. That company had, in turn, engaged a sub-contractor, MMD lietas, to perform this task. Without the knowledge of Pārtikas, MMD lietas had also undertaken to prepare the tenders of other two firms, VM Remonts and Ausma. An employee of MMD lietas used the price information received from Pārtikas as

a basis in preparing the bids of VM Remonts and Ausma, so that Ausma's bid was approximately 5% lower than the Pārtikas's and VM Remonts' bid was in turn approximately 5% lower than Ausma's. On a reference by the Latvian Supreme Court, the CJEU held (at §33) that an undertaking may, in principle, be held liable for a concerted practice on account of the acts of an independent service provider if (i) the service provider was in fact acting under the direction or control of the undertaking concerned, (ii) that undertaking was aware of the anti-competitive objectives pursued by its competitors and the service provider and intended to contribute to them by its own conduct, or (iii) that undertaking could reasonably have foreseen the anti-competitive acts of its competitors and the service provider and was prepared to accept the risk which they entailed.

48. Precisely what an undertaking needs to be aware of or to expect will depend on the facts and evidence of the particular case. In the case of disclosure of commercially sensitive information, the English Court of Appeal considered in *Argos Ltd and Littlewoods Ltd* that there may be a concerted practice where A discloses to B its pricing intentions in circumstances where A foresees B would make use of the information to influence market conditions by passing it on to C, and B passes the information to C in circumstances where C appreciates that the information is being passed to him with A's concurrence (see §§91 & 141).

49. There has been some debate between the parties in this case as to the relevance of reasonable foreseeability of the conduct of other parties. The respondents submitted that the approach taken in *AC-Treuhand* and *Panasonic* is not applicable in the present kind of case and that *VM Remonts* should not be followed. On the view that I have taken of the evidence, it is unnecessary to deal with this debate.

C. STANDARD OF PROOF

50. The Commission accepts, in my view correctly, having regard to the well-known *Engel* criteria[6] and the pecuniary penalties that the Tribunal is invited to impose, that these proceedings involve the determination of a criminal charge within the meaning of Arts. 10 and 11 of the Bill of Rights.[7] The parties are in dispute, however, as to whether the standard of proof to be applied in these proceedings is the criminal standard of proof beyond reasonable doubt or the civil standard of proof on the balance of probabilities.

(1) The parties' contentions

51. The Commission acknowledges that because the proceedings involve the determination of a criminal charge, proof beyond reasonable doubt is the starting point. It contends, however, that the civil standard of proof nevertheless applies. Its submissions may be summarised as follows. A criminal classification for the purpose of Art. 11 of the Bill of Rights does not make the case a criminal one for all purposes under all laws. The precise implications of the classification must be determined on a case by case basis: see *Han v Customs and Excise Commissioners* [2001] 1 WLR 2253, §§84 and 88. The applicable legislative rules indicate that these proceedings are characterised internally as non-criminal and that the rules of civil procedure should apply. Such internal classification and the application of civil procedure indicate that the legislature intended that the civil standard of proof

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[6] See *Engel v The Netherlands (No 1)* (1976) 1 EHRR 647 for the criteria, namely, (1) the classification of the offence under domestic law; (2) the nature of the offence; and (3) the nature and severity of the potential sanction.

[7] Section 8 of the Hong Kong Bill of Rights Ordinance (Cap 383).

should apply. Applying the criminal standard might serve to frustrate the effective application of competition laws. The civil standard is applicable in other common law jurisdictions including Australia, Canada, New Zealand, Singapore and the UK, all of which (except Singapore) are state parties to the ICCPR. Application of the criminal standard of proof is not a "guaranteed" right under the Bill of Rights or ICCPR. Alternatively, if it is, then the application of the civil standard of proof in this particular case satisfies the proportionality test.

52. In contrast, the respondents contend that the criminal standard of proof should apply. Their submissions may broadly be summarised as follows. The Court of Final Appeal has decided in *Koon Wing Yee* that the criminal standard of proof is to be applied in proceedings involving the determination of a criminal charge under Hong Kong law, and that decision is binding on the Tribunal. There are legislative materials showing that the Administration's intention was that the criminal standard should apply in proceedings where substantial pecuniary penalties were sought. In particular, SiS submitted that while it is in principle possible for the legislature to modify the standard of proof, any such modification must be prescribed by law and proportionate. Whether or not the legislature has in fact done so in a given case is a question of statutory construction governed by the principle of legality. The legislature has not modified the standard of proof in the Ordinance.

(2) The requirement of Art 11

53. I begin with the question whether Art. 11 of the Bill of Rights requires the application of the criminal standard of proof. Art. 11(1), which is identical to Art. 14(2) of the ICCPR, provides:

> " Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."

54. While Art. 11 does not expressly stipulate any mandatory standard of proof, authoritative guidance has been laid down in *Koon Wing Yee v Insider Dealing Tribunal* (2008) 11 HKCFAR 170 as to what it requires. In that case, the Court of Final Appeal considered the question whether, in an inquiry conducted under the Securities (Insider Dealing) Ordinance (Cap 395), the Insider Dealing Tribunal was obliged to apply the criminal standard of proof. In his judgment, in which the other members of the court concurred, Sir Anthony Mason NPJ recognised that it was not clear that Art. 6(2) of the European Convention on Human Rights mandated the criminal standard of proof.[8] His Lordship however noted that the position is clearer under Art. 14 of the ICCPR because General Comment No. 13 on Art. 14 of the ICCPR, which was later replaced by General Comment No. 32, stated: "No guilt can be presumed until the charge has been proved beyond reasonable doubt".

55. In *Koon Wing Yee*, the relevant General Comment was No. 13 because the acts of infringements were committed and the tribunal inquiry took place both before 2007, when General Comment No. 32 was published. Nevertheless the court had regard to this later version which it considered to be a reinforcement of the criminal standard. General Comment No. 32 (para 30) stated:

> " According to article 14, paragraph 2 everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law. The presumption of innocence,

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8 In *Revenue and Customs Commissioners v Khawaja* [2009] 1 WLR 398, decided after *Koon Wing Yee*, Mann J specifically held that the civil standard of proof applied in the UK in tax penalty cases despite the fact that Art. 6(2) was applicable; see also *R (on the application of V) v Independent Appeal Panel for Tom Hood School* [2010] EWCA Civ 142 at §33. In *Jussila v Finland* (2007) 45 EHRR 39 at §43, the European Court of Human Rights recognised that the criminal-head guarantees will not necessarily apply "with their full stringency" to all proceedings classified as criminal by reference to the *Engel* criteria but which do not fall with the "hard core of criminal law".

> which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle …"

56. Sir Anthony Mason NPJ continued to state in *Koon Wing Yee* (footnote omitted):

> " 101. The General Comments are a valuable jurisprudential resource which is availed of by the Committee in its adjudicative role. While the General Comments are not binding on this Court, they provide influential guidance as to how the ICCPR is applied and will be applied by the Committee when sitting as a judicial body in making determinations.
>
> 102. In *Attorney-General of Hong Kong v Lee Kwong-kut*, the Privy Council regarded General Comment No.13 as indicating that the standard of proof beyond reasonable doubt was the general standard applicable for the purposes of art.14 of the ICCPR and art.11(1) of the BOR. The judgment of the Privy Council delivered by Lord Woolf makes it plain that art.14 of the ICCPR and art.11(1) of the BOR permit a degree of flexibility which allows a balance to be drawn between the interest of the person charged and the state so that sensible and reasonable deviations in certain situations are not proscribed. Lord Woolf is not to be understood, however, as suggesting that the substitution of the civil standard of proof for the criminal standard of proof in a proceeding classified as criminal would be a sensible or reasonable deviation.
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> 103. In my view, this Court should regard General Comment No.13, in so far as it prescribed the standard of proof beyond reasonable doubt, as the appropriate standard to be applied for the purposes of art.11 of the BOR before it was replaced by General Comment No.32 (which then reinforced the application of that standard). In this respect, my view is strongly fortified by the fact that in our criminal jurisprudence proof beyond reasonable doubt is the standard to be applied once proceedings have been classified as involving the determination of a criminal charge."

57. In the case before it, the Court of Final Appeal held that the criminal standard was applicable in the light of the criminal character of the proceedings which flowed from the presence of the power to impose the

penalty. Because it was impossible to say whether that standard had been applied by the tribunal, its findings were impaired. In the result, however, the Court held that the power to impose a penalty was invalid as being contrary to Arts. 10 and 11 of the Bill of Rights and, the reason for characterising the proceedings as criminal having been eliminated, the tribunal's findings were reinstated and upheld.

58. In *Attorney-General of Hong Kong v Lee Kwong-kut* [1993] AC 951, the Privy Council had to consider whether certain statutory provisions creating offences[9] were inconsistent with Art. 11 of the Hong Kong Bill of Rights in placing a burden of proof on the defendant. The parts of the judgment of Lord Woolf referred to by Sir Anthony Mason NPJ in *Koon Wing Yee* are as follows. At p 968B-C, Lord Woolf, giving the advice of the Board, after quoting from General Comment No. 13, stated:

> " However, it should not be assumed from this statement that the comparable article in the International Covenant to article 11(1) does not permit the degree of flexibility which is normally assumed to be implicit in any provision of general application which is of the same nature as article 11(1) of the Hong Kong Bill. Placing to one side for the moment the decisions in Canada all of the many decisions in different jurisdictions, to which their Lordships were referred, recognise that provisions similar to article 11(1) are always subject to implied limitations so that a contravention of the provisions does not automatically follow as a consequence of a burden on some issues being placed on a defendant at a criminal trial."

Further, at p 969D-E, Lord Woolf stated:

> " This implicit flexibility allows a balance to be drawn between the interest of the person charged and the state. There are situations where it is clearly sensible and reasonable that deviations should be allowed from the strict applications of the principle that the prosecution must prove the defendant's guilt beyond reasonable doubt."

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[9] Section 30 of the Summary Offences Ordinance (Cap 228) and s 25 of the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405).

59. There was argument before this Tribunal on the scope of the "flexibility" referred to by Lord Woolf and in particular whether such flexibility extended to the standard of proof applicable to a case as a whole. Upon fuller consideration of matter, I do not think the debate is open in this Tribunal. It seems to me that the tentative view I expressed *obiter* in *Television Broadcasts Ltd v Communications Authority* [2016] 2 HKLRD 41 (at §§290-295) that *Koon Wing Yee* could be distinguished, was wrong. The *ratio decidendi* of *Koon Wing Yee*, consisting in the essential logical steps in the reasons for the conclusion (*Saif Ali v Sydney Mitchell & Co* [1978] 3 All ER 1033, 1040h-j *per* Lord Diplock), seems to me to encompass the proposition that the appropriate standard of proof to be applied to proceedings classified as criminal for the purposes of Art. 11 is proof beyond reasonable doubt. It precludes this Tribunal from adopting the civil standard where pecuniary penalties are sought and the proceedings are to be classified as involving a determination of a criminal charge.

60. Every case is of course decided in the context of its facts, but it is in my view not open to this Tribunal to distinguish *Koon Wing Yee* on the basis that it involved insider dealing as opposed to an infraction of competition law. It is true that in earlier passages in his judgment [10] Sir Anthony Mason NPJ had referred to insider dealing as an "insidious mischief", "very serious misconduct" and "a species of dishonest misconduct", but these were stated as considerations favouring the classification of the proceedings as criminal (see §50), rather than as factors distinguishing insider dealing, for the purpose of standard of proof, from other conduct classified as criminal for Art. 11 purposes. In any event, there are also forms of competition law infringement, such as cartels and bid-rigging, that are viewed

[10] *Koon Wing Yee* at §§45 and 46.

as serious misconduct and punishable as actual criminal offences in other jurisdictions including Australia, Canada, the UK and the United States.

61. Subsequent cases have reinforced the approach that *Koon Wing Yee* mandates. In *Ng Po On v HKSAR* (2008) 11 HKCFAR 91 at §22, Ribeiro PJ stated "there is a clear basis for suggesting that [the criminal] standard of proof is implicit within Article 11(1) of the Bill of Rights".

62. In *Wong Tak Wai v Commissioner of Correctional Services* [2010] 4 HKLRD 409, the Court of Appeal held that prison disciplinary proceedings with the potential result of loss of remission for a serving prisoner involved the determination of a criminal charge for the purpose of Art. 11 of the Bill of Rights. Applying *Koon Wing Yee*, the Court of Appeal held that proof beyond reasonable doubt was *required* by Art. 11; see §100 of Kwan JA's judgment with which Stock VP and A Cheung J (as they then were) agreed.

(3) Is there derogation from the criminal standard of proof by statute?

63. It is common ground that even if Art. 11 mandates the criminal standard of proof, this requirement is not absolute and can be deviated from by proportionate legislation. The difficulty with the Commission's submission that a civil standard of proof applies to all elements of liability, however, is that the Ordinance is silent on this matter, in contrast with other statutes (such as ss 218(7), 252(7) and 387 of the Securities and Futures Ordinance (Cap 571)) that expressly prescribe for the civil standard. It is well established that the legislature will not be taken to have intended any derogation from fundamental rights absent express and unambiguous language or necessary implication: *A v Commissioner of Independent Commission*

Against Corruption (2012) 15 HKCFAR 362, at §§28-29, 67-71; *R v Secretary of State for the Home Department, ex parte Simms & Anor* [2000] 2 AC 115, 131E. A necessary implication is one which necessarily follows from the express provisions of the statute construed in the context; it is a matter of express language and logic, not interpretation: *R (on the application of Morgan Grenfell & Co Ltd) v Special Commissioner* [2003] 1 AC 563 at §45.

64. The fact that s 144 of the Ordinance provides for civil procedure to be adopted by the Tribunal "in so far as it thinks fit" is not an indication of legislative intent that the civil standard of proof should apply, because it is perfectly possible for the applicable standard of proof to be the criminal one notwithstanding the proceedings take a civil mode with civil rules of procedure, as in the case of contempt of court: see *Secretary for Justice v Cheung Kai Yin* [2016] 4 HKLRD 367, §§25, 27 and 36; *In re B (Children) (Care Proceedings: Standard of Proof) (CAFCASS intervening)* [2009] 1 AC 11. It is unnecessary to examine the Competition Tribunal Rules or the Tribunal's Practice Directions for the requisite legislative intent cannot be derived from them.

65. So far as legislative materials are concerned, the respondents relied on the proceedings of the 17th meeting of the Bills Committee on Competition Bill held on 21 June 2011 where it was stated:

> " The Administration pointed out that contravention of the competition rules under the Bill would be subject to civil actions. If a substantial pecuniary penalty was to be imposed on a breach of the competition law, the criminal standard of proof would apply and criminal safeguards would be attracted to the legal proceedings."[11]

[11] LC Paper No. CB(1)3059/10-11, Appendix, p 8.

The context was, however, a discussion of the territorial application of the first conduct rule so that the sentence relied upon appears to have been a side comment made during the discussion of a different topic.

66. Reliance was also placed by the respondents on a speech by the Under-Secretary for Commerce and Economic Development at a competition law forum in December 2009, which referred to the decision of the Court of Final Appeal in *Koon Wing Yee* and expressed the view that the criminal standard of proof had to be applied to meet the requirements of the Bill of Rights.

67. I do not regard these materials as of much significance. Their admissibility is in doubt. While legislative materials may be admitted to show the context in which a law was enacted, there is no need to rely on these materials to show that the administration and the legislature were aware of the decision in *Koon Wing Yee*. Nor do these materials go to the mischief at which the law was aimed. Beyond these established limits I am unable to see how these materials shed any light on the will of the legislature: *PCCW-HKT Telephone Ltd v Telecommunications Authority* (2005) 8 HKCFAR 337, §20.

(4) Nature of competition proceedings and overseas jurisprudence

68. The Commission submitted that having regard to the potentially complex and technical nature of competition proceedings it would not be appropriate to apply the criminal standard. Reliance was placed on what the (UK) Competition Appeal Tribunal said in *Napp Pharmaceutical Holding Ltd v Director General of Fair Trading* [2002] CAT 1 at §106:

> " We add that in many cases under the Act the factual issues before this Tribunal will often relate to such matters as determining the relevant market, whether dominance exists, and assessing whether

> conduct characterised as an 'abuse' is economically justified. Issues of that kind involve a more or less complex assessment of mainly economic data and perhaps conflicting expert evidence. It seems to us more likely that Parliament would have intended us to apply the civil standard of proof to issues of this kind, rather than the time-honoured criminal standard of 'proof beyond reasonable doubt'."

69. The Commission submitted that requiring the criminal standard of proof to be applied "might serve to frustrate the effective application of the competition laws". A similar concern has been raised in relation to the proof of contravention of the equivalent of our second conduct rule in *Whish & Bailey, Competition Law* (9th ed), p 215, as follows: "If every case were to require the demonstration of anti-competitive foreclosure effects beyond reasonable doubt, the enforcement of Article 102 might become all but impossible, which would bring one back to the problem of false negatives and false positives."

70. The Commission further submitted that the civil standard of proof is also uniformly applied (either as a result of express statutory provisions or judicial decisions) in other common law jurisdictions in relation to the imposition of pecuniary penalties for contravention of competition law:

(1) In Australia, Part IV of the Competition and Consumer Act 2010 lays down a number of prohibitions, including against anti-competitive contracts, arrangements and understandings.[12] Section 76(1)(a)(i) empowers the court to impose a pecuniary penalty if a person has contravened a provision of Part IV (other than criminal cartel offences). The standard of proof for breach of the competition provisions (other than in relation to criminal

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[12] For a summary, see *Miller's Australian Competition and Consumer Law Annotated* (39th ed, 2017), pp 353-354, 358-361, 371-380, 603-607 and 611-612.

proceedings for cartel offences[13]) is the civil standard of balance of probabilities: see s 140 Evidence Act 1995; *Heating Centre Pty Ltd v Trade Practices Commission* 65 ALR 429 at 435.

(2) In Canada, issues before the Competition Tribunal are determined according to the civil standard of proof.[14] The Competition Act contains provisions dealing with abuse of dominant position (ss 78 and 79). The application of these provisions lies with the Tribunal, which has power *inter alia* to impose significant financial penalties. [15]

(3) In New Zealand, Part 2 of the Commerce Act 1986 deals with "restrictive trade practices", including "contracts, arrangements, or understandings substantially lessening competition" (s 27) and "cartel provisions" (s 30A). The court may impose pecuniary penalties in relation to restrictive trade practices (s 80). The applicable standard of proof is the civil standard (s 79A).

(4) In Singapore, the Competition Act (Cap 50B) prohibits agreements or concerted practices which have as their object or effect the prevention, restriction or distortion of competition (section 34 prohibition) and also prohibits the abuse of a dominant position (section 47 prohibition). Section 69(2)(d) empowers the Singapore Competition Commission to impose a financial penalty for the infringement of a section 34 or 47 prohibition. The standard of proof is the civil standard of balance of probabilities: see *Konsortium Express and Tours Pte Ltd & Others v Competition Commission of Singapore* [2011] SGCAB 1, §85. This standard has been consistently applied to bid-rigging cases: *Pang's Motor Trading v Competition*

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13 See ss 45AF and 45AJ.

14 See Musgrove, *Fundamentals of Canadian Competition Law* (3rd ed), p 17.

15 See Musgrove, *Fundamentals of Canadian Competition Law* (3rd ed), p 255.

Commission of Singapore [2014] SGCAB 1 §40, though the issue was not argued in either case.

(5) In the UK, while it is accepted that a finding of competition law infringement involves the determination of a criminal charge, the settled view is that the applicable standard of proof is the civil standard of balance of probabilities: *Napp Pharmaceutical Holding Ltd v Director General of Fair Trading* [2002] CAT 1, §§101-106; *JJB Sports v Office of Fair Trading* [2004] CAT 17, §193; *Chester City Council v Arriva* [2007] EWHC 1373 (Ch), §10. This applies equally to cases involving bid rigging.[16]

71. Article 14 of the ICCPR (the equivalent of Art. 11 of the Bill of Rights) has not prevented the courts in Australia, Canada, New Zealand and the UK, all being state parties to the ICCPR, from applying the civil standard of proof to competition cases. As far as Art. 6 of the European Convention on Human Rights is concerned, proof beyond reasonable doubt is not even a concept to be found in many of the domestic systems of the party states, or in the jurisprudence of the courts of the EU.[17]

72. For the reasons I have given above, however, in the absence of express provision or necessary implication by statute, this Tribunal is not at liberty to apply any other standard than proof beyond reasonable doubt. The matters relied upon by the Commission are therefore not matters that can justify the application of the civil standard of proof by this Tribunal.

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[16] Eg see *Makers UK Ltd v Office of Fair Trading* [2007] CAT 11 §46; *GMI Construction Holdings Plc v Office of Fair Trading* [2011] CAT 12 §14; and *Durkan Holdings Ltd v Office of Fair Trading* [2011] CAT 6 §94.

[17] See the summary of the position in the courts of the EU in *Television Broadcasts Ltd v Communications Authority & Anor* [2016] 2 HKLRD 41 at §§283-284. There are, however, statements by the EU courts referring to the principle "*in dubio pro reo*" and that the "benefit of … doubt must be given to the undertakings accused of the infringement" of competition law: Case C-89/11P *E.ON Energie AG v Commission*, §§71-74.

(5) Application of the applicable standard

73. It is not in dispute what the applicable standard of proof requires. I would mention two aspects here. First, the Commission has submitted, and I do not understand it to be controverted by any respondent, that it is not necessary for every item of evidence produced to satisfy the standard of proof in relation to every aspect of the contravention. It is sufficient if the body of evidence relied on, viewed as a whole, satisfies the burden: Case C-407/08P *Knauf Gips v Commission* EU:C:2010:389, §47; *Myers v R* [2015] UKPC 40, §46.

74. Secondly, there is no dispute that this Tribunal can, like any other trier of fact, draw appropriate inferences from facts. As noted by the CJEU in Case C-204/00 *Aalborg Portland v Commission*, in many competition cases the existence of the practice or agreement in question has to be inferred:

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

75. Equally clear is that where the criminal standard of proof applies, three conditions have to be satisfied for an inference to be drawn: (1) the inference must be grounded on clear findings of primary fact; (2) the inference

must be a logical consequence of those facts; and (3) the inference must be "irresistible", that is, it must be the only inference that can reasonably be drawn on the basis of those facts: *Winnie Lo v HKSAR* (2012) 15 HKCFAR 16, §115.

D. THE FACTS AND EVENTS

76. This section sets out the background facts and the main events relating to YWCA's tenders as found on the evidence. They are, for the most part, and unless otherwise specified, uncontroversial.

(1) Nutanix's hyper-converged system

77. Founded in 2009 with its Hong Kong office established in December 2012, Nutanix is an IT infrastructure provider that sells "hyper-converged infrastructure". A hyper-converged system is a new generation of servers. It is a software-defined IT infrastructure that virtualizes all of the elements of the traditional "hardware-defined" server system, including virtualized computing (a hypervisor), virtualized storage and virtualized networking, in a commodity hardware box.

78. Nutanix's hyper-converged system is a software product which can either be packaged and sold on Nutanix's own branded hardware made by contract manufacturers, or on the tailored hardware of one of Nutanix's OEM[18] partners which included Dell and Lenovo at the time. These packaged

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18 Original equipment manufacturer.

product combinations may be referred to as the Nutanix-NX solution, the Dell-Nutanix solution and the Lenovo-Nutanix solution respectively. The product can also be sold on a software-only basis for use on compatible hardware provided by third party manufacturers.

79. Nutanix's main competitors globally include traditional storage array vendors, traditional IT systems vendors which sell integrated systems, software providers such as VMware Inc, providers of public cloud infrastructure as well as a number of vendors which provide hyper-converged infrastructure.

(2) Nutanix's supply chain

80. The Nutanix-NX solution is sold to end-customers via Nutanix's own network of distributors and resellers. In Hong Kong, as of July 2016, Nutanix had two non-exclusive distributors, namely, Innovix and SiS, and around 23 approved resellers which were companies approved and authorised by Nutanix to re-sell Nutanix products.[19] Both BT and Tech-21 were among these resellers.

81. Of the two distributors, Innovix mainly promoted and sold products to resellers, while it would also promote and sell to end-users directly. SiS was permitted by its distributorship agreement to purchase Nutanix products for resale to both resellers and end-users, but in practice it sold only to resellers and not directly to end-users, with certain rare exceptions in special circumstances (see §291 below).

[19] Innovix's distributorship of Nutanix products has ceased since November 2017, but nothing turns on that.

82. In Hong Kong, a reseller can only purchase the Nutanix-NX solution through a distributor, ie Innovix or SiS. For the Dell-Nutanix or Lenovo-Nutanix solution, the applicable hardware would have to be packaged with Nutanix software and then sold by the OEM partner, ie Dell or Lenovo, through its own sales teams or its network of channel partners, which may or may not also be channel partners of Nutanix. Dell or Lenovo would then pay Nutanix a royalty based on sales of Nutanix software as part of the combined product. In this particular case, as will be seen below, YWCA eventually purchased the equipment from a reseller of Dell.

(3) Nutanix's deal registration system

83. Nutanix runs a deal registration system to encourage its OEM partners, distributors and resellers to identify, cultivate and close sales opportunities. It allows business opportunities to be registered via an online platform with Nutanix who would provide discounted pricing exclusively for a specified period on the registered opportunity. Only one partner may register for each opportunity. Nutanix's guidelines suggested that a deal registration could be granted to more than one partner for situations such as RFP[20] or public sector requirements but this was considered non-standard and an exception and required approval on a case-by-case basis.

84. With a deal registration in place, other interested partners are still free to pursue the opportunity and are generally entitled to a standard discount, but the registered deal discount is only available to the registered partner. In Nutanix's published guidelines, the level of the registered deal discount is defined by the partner's level and programme status in the Nutanix Channel Programme, product type and deal registration status, ranging between [●]%

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20 "RFP" stands for "request for proposal".

and [●]%. In practice, sales representatives are allowed flexibility to depart from the published levels. The actual registered deal discount is therefore a matter of discretion for the relevant sales representative on a case-by-case basis but generally does not exceed [●]%.

85. If the opportunity concerns solely a Nutanix-NX solution, it would either be the re-seller registering for the opportunity or the distributor registering on behalf of the re-seller. If the opportunity concerns a Dell-Nutanix or Lenovo-Nutanix product, Dell or Lenovo may register for the opportunity.

86. Upon receipt of a deal registration, Nutanix will validate the request which would include checking that there are no other active registrations for the same opportunity and that the partner is pursuing the opportunity in good faith. The registration, once recognised, will remain valid for 90 days, extendible at Nutanix's discretion.

87. In the case of Dell-Nutanix solutions or Lenovo-Nutanix solutions, the integrated solution is sold by the OEM partner, i.e. Dell or Lenovo, directly, with a royalty paid to Nutanix. Where the OEM partner is registered with Nutanix for a particular opportunity, it may grant a discount to its channel partners of up to [●]% on the Nutanix component of the integrated solution, beyond which it will require special approval from Nutanix.

(4) YWCA's need for a new server system

88. In the first half of 2015, YWCA's ISD was considering replacing the existing IT servers at YWCA Headquarters at MacDonnell Road, Mid-Levels. The person responsible within YWCA for IT services was Lok,

the ISD Head.

89. At that time BT was working for YWCA on two other IT projects. One of them began in the third quarter of 2014, when BT was engaged to consult on a new Customer Relationship Management system to be used in YWCA centres. (For the implementation of the system, however, BT was outbidden by another company, though BT was later engaged to provide quality assurance checks on the implementation of that system in mid-2015.) In the second project, BT was awarded a contract in March 2015 to set up an IT server room and to install the cables and Wi-Fi routers for the YWCA Kowloon Centre in Ho Man Tin. In around the third quarter of 2015, BT was further awarded a contract to install the audio and visual equipment to be used at the YWCA Kowloon Centre, but this came later.

90. Percy Ng was the main person dealing with YWCA at that time. He was the Alliance & Business Development Manager of BT. His primary responsibility concerned the sales of BT's IT products and services. Within his team, he was assisted by Chan, Technical Pre-Sales Manager of BT. Percy Ng's role was focused on more "commercial" matters involving pricing, customer relations, sales of products and internal BT approvals, whereas Chan was more concerned with the pre-sales technical matters such as the provision of technical support.

91. Whilst working on the server room project, Percy Ng enquired with Lok to see what server system YWCA intended to install in the server room in the Kowloon Centre and how the servers at YWCA's Headquarters could support each other. Since YWCA also intended to replace the servers at the Headquarters, Lok asked for Percy Ng's opinion and discussed with him YWCA's server requirements. Percy Ng got Chan involved and together they

decided Nutanix's cloud-based server system would suit YWCA. In around mid-2015 Percy Ng proposed to Lok that YWCA could consider using that system.

92. At around this time, between mid-2015 and September 2015, BT registered the YWCA opportunity on Nutanix's deal registration system.

93. In the initial stages BT was considering offering a Nutanix-NX solution to YWCA. On 28 July 2015, Chan sent an e-mail to Siu (of Innovix) with the subject "YWCA quotation" for a quote based on Nutanix hardware. Siu in turn obtained quotes from Nutanix and, after a mark-up, gave the quotes to Chan. When BT requested a lower quotation, Innovix provided a revised quotation but BT still complained (to both Innovix and Nutanix) that it was too expensive. On 5 August, after discussing with Chan, Hung wrote to Siu saying he would like to update him on the pricing strategy on YWCA. Shortly afterwards, Innovix provided another revised quote to BT for the equipment for YWCA.

94. At that stage, however, BT had not decided which Nutanix model to propose to YWCA. In late September 2015, Chan asked Hung for an update on which model BT should propose to YWCA. On 24 September 2015, Hung sent a bill of materials to Chan (copied to Siu and Cheung of Innovix) and stated the quotation was being prepared.

95. Following a meeting in early October 2015, BT considered the Dell-Nutanix combination more suitable for YWCA having regard to their budget and storage configuration. YWCA's ITDC (Information Technology Development Committee) also felt the Dell-Nutanix solution would be better because they had confidence in Dell's hardware and after-sales maintenance.

96. After further discussions, BT offered to arrange for the loaning of a Dell-Nutanix hyper-converged server to YWCA as part of BT's "proof of concept" to test whether the server was capable of meeting YWCA's needs. Such proof-of-concept exercise is common with clients making the switch from traditional IT infrastructure to hyper-converged infrastructure. Three units of Dell-Nutanix servers were later loaned (from Dell) to YWCA in late October 2015.

97. On 12 November 2015, Percy Ng and Chan delivered a presentation to YWCA's ITDC to introduce the concept of a hyper-converged system by using Nutanix's system as an example.

98. On 5 January 2016, Cheung (Innovix) sent an e-mail to Chan (BT) (copied to Siu) asking if there was anything else Innovix could do regarding "the Nutanix YWCA case". Also in around early January 2016, Siu and Cheung learnt that YWCA's preference had moved to a Dell-Nutanix system. On 8 January 2016, Siu referred the YWCA matter to Innovix's Dell team member Jacky Lee.

99. In late January or early February 2016, the deal registration for the YWCA opportunity was re-registered with Nutanix through Dell. Dell registered it with reference to BT's name, recognising that BT would derive some benefit of the deal registration for this opportunity.

100. BT helped YWCA with the proof-of-concept process, and also assisted Lok to deal with the queries that ITDC members had about the Nutanix system. On 7 January 2016, Eric Mak of Innovix was brought into the loop for the "p2v" troubleshooting (a physical-to-virtual process of migrating a physical server's operating system, applications and data to a

virtual system). On 29 January 2016 Eric Mak forwarded an e-mail chain to Siu from which it is clear that BT was conducting a proof-of-concept for YWCA. On 1 February 2016, Siu responded: "Ok, i will ask Dell HK order the OEM deal to us".

101. While certain technical problems arose and various questions were raised by YWCA about the product and about Nutanix, the Dell-Nutanix solution was eventually found to be suitable, and on 23 May 2016 the ITDC resolved that YWCA should procure Nutanix's hyper-converged system for Headquarters as well as for Kowloon Centre. ISD was to commence preparing for the procurement process.

(5) YWCA's procurement policy and procedures

102. Within YWCA, the APD (Administration and Procurement Department) is responsible for organising and overseeing the procurement of goods, services and works required by YWCA including through tender exercises. APD's head was Mak, the Administration and Procurement Manager, who was assisted by Wong, an Assistant Procurement Officer.

103. Under YWCA's procurement policy, contract for goods, services or works exceeding HK$50,000 must have written quotations from five companies. Procurement for goods exceeding HK$100,000, services exceeding HK$250,000 or works exceeding HK$500,000 must be conducted through a tender. Where the procurement involves a tender, the procurement decision must be approved by YWCA's Tender Board, which is a sub-committee of the FAC (Finance and Administration Committee). The Tender Board is composed of members from FAC, a member from the

relevant user department, and two Tender Board advisors selected from a list of external parties with relevant expertise.

104. The procurement policy required that at least five tender submissions be received from contractors or suppliers. If the requisite number of tenders is not obtained, approval from FAC and a report to YWCA's board of directors are required before the contract can be awarded.

(6) The first tender

105. Within YWCA, APD looked to ISD for preparing the technical specifications for the procurement exercise. ISD in turn received assistance from BT in preparing those specifications. Following discussions, Chan produced the first draft of the technical specifications which he sent to Lok on 10 June 2016. The specifications were for (i) Nutanix's hyper-converged system without specifying the brand of hardware to be used, together with (ii) hypervisors and (iii) backup software. At Lok's suggestion, they had a meeting about the specifications on 16 June.

106. ISD then provided the revised draft technical specifications to APD, which prepared the other tender documents. On 20 June 2016, Wong e-mailed Lok and his assistant, Li, the draft tender documents with a query on the technical specifications. Wong also asked Lok and Li to recommend suppliers for the purpose of completing the tenderers list.

107. Mak explained that this was on the basis that while it was APD that would make the final decision on which tenderers to invite, ISD was likely to have greater familiarity with the potential suppliers and was in a better position to ascertain the companies capable of supplying the server system.

108. Li then made a call to Chan on the same day asking him to recommend the names of vendors in Hong Kong capable of supplying the Nutanix hyper-converged system. Percy Ng then in turn sent a message to Hung saying he needed to provide vendors' names for YWCA to issue the tender, listing six companies including BT and Tech-21, and asked for Hung's opinion.

109. As he was unable to reach Hung, Percy Ng decided to e-mail to Li all the names of Nutanix's suppliers that he knew, suggesting six companies including BT and Tech-21 and mentioning four other companies that were on YWCA's own suppliers list – a total of ten companies.

110. Li then gave this list to Lok. Based on the list, Lok sent a proposed tenderers list setting out those ten companies to APD for their consideration.

111. On 21 June, Hung asked Percy Ng: "Is it a dell Nutanix?" to which Percy Ng replied "yes". Edward Yeung (Nutanix's Managing Director – Hong Kong and Taiwan) suggested to Percy Ng that Expert Systems be removed from the list because they always "bugged" Nutanix for the best price. Percy Ng then asked Li to exclude Expert Systems. Hung also texted Percy Ng that morning, saying "I can assist to manage Tecg21 and basic bit" [*sic*]. Li then e-mailed Wong (copied to Mak and Lok) asking him to exclude Expert Systems. Li later asked Wong to add one more company called ITRC.

112. With these revisions suggested by Li and additions made by Mak himself, the APD finalized a list of tenderers which included twelve companies. An invitation to tender was sent to them on 21 June 2016. The

twelve companies are as follows; they included BT and Tech-21 but not Nutanix, SiS or Innovix.

- Afina Data Systems Ltd
- Automated System Ltd
- Basic Bit Technology Ltd
- BT
- HKT Ltd
- ITRC
- Microware Ltd
- Nikoyo (HK) Ltd
- Petabytes & Beyond Technology Ltd
- Senco-Masslink Technology Ltd
- Tech-21
- Wafer Systems Ltd

113. Having received the invitation, on 21 June 2016 Chan wrote to his contacts in Dell, asking them for the latest quotation, with separate prices for product and maintenance items.

114. On 28 June 2016, after the tender deadline, it was found that only BT had submitted a bid while two other companies, namely, Basic Bit and ITRC, had written to YWCA to indicate that they declined to bid.

(7) The second tender

115. In view of there being only one bid received, whereas YWCA's procurement policy required at least five return bids, on about 30 June 2016, Gary Sze, Director of Finance and Administration of YWCA, together with Mak and Lok, decided to conduct a second tender for the Nutanix server system.

116. In the next few days, in order to better organise the second tender, Mak and Wong contacted several of the companies which did not respond to the first tender to find out why they did not. The responses received included that the period for responding to the tender was too short, some of the mandatory items could not be supplied and that there were too many optional items listed. They passed on the feedback to Lok and asked him to prepare a new set of technical specifications for the second tender to make it easier for invitees to bid.

117. Quite a lot of activities took place on 5 July 2016, Tuesday:

(1) At 09:20, Chan, who did not yet know the result of the first tender, texted to ask Lok whether there was any update on the first tender.

(2) Lok telephoned Chan at 14:50 and they spoke for about six minutes. I find that in this conversation, Lok told Chan that the first tender failed because there were insufficient bids, that BT's was the only bid, and that there would be a second tender.

Lok did not positively deny this conversation; he only said he could not recall whether it was he or Li who told BT. In his first statement he said (at §18) that he told Chan on the phone.

In this conversation Lok also asked Chan to provide names of companies who might be able to supply the equipment sought.

(3) Chan called Hung at 15:37 and they spoke for ten minutes. In broad terms Chan and Hung agreed that Hung would get four friends of his who worked in Nutanix's channel partners to submit bids in the second tender to make up the required minimum number of five. Chan asked Hung to provide him with

a list with contact details of the four bidders that day. What Chan and Hung agreed is dealt with in greater detail in section E below.

(4) At 16:14, Chan sent Hung an e-mail headed "YWCA tender docs" which set out in the body of the e-mail the prices which BT proposed to include in its tender response. It also attached the tender documents sent out by YWCA. The e-mail read:

> " Hi Thomas,
>
> As discussed, attached is the tender spec document. This will change to just providing quotation for Nutanix HW and everything else like ESX license, Veeam license becomes optional so your friends don't need to spend too much time on it. For our proposal, we are proposing the following the Dell XC630 model and price below. Anyway, once I finished the whole table, I will share it with you so you can give the quotation to your friend to just fill in. Thanks!"

(5) At 16:22, Chan sent Lok an e-mail stating:

> " To make things simple, let's get the quotation for Nutanix HW only and everything else becomes optional, e.g. ESX license, Veeam license, migration services etc. Also, please use the following updated spec for your new RFP HW requirement. Let's catch up around 5 pm today to discuss further. Thanks."

The e-mail further set out the technical specifications for the Nutanix server equipment, which were slightly different from those in the first tender. Since Lok was in a meeting, it is not clear whether he read the e-mail at that time.

(6) At 17:08 Chan texted Lok asking him to give him a call when he was free. At 17:15 Lok texted back saying he was still in a meeting and would call him once it finished.

(7) At 18:18, Lok called Chan and they spoke for about 14 minutes.

(8) At 18:56, Chan texted Hung, stating:

> " Hi Thomas, please don't forget to send me the list of vendors

> today with contacts so I can give to ywca. tks!",

to which Hung replied at 19:01:

> " Yep and will get you back after review and discuss with partner."

(9) At 19:25, Lok sent Mak and Wong the revised "scope of work", including technical specifications based on what Chan had provided him at 16:22. Only the Nutanix server system would be mandatory and all the other items called for in the first tender would become optional. Lok went further and decided that the Nutanix server system for the Kowloon Centre would also become optional so that only the Headquarters system would be mandatory.

(10) At 20:42, Chan sent an e-mail to Lok stating that the number of cores that BT could provide without any change in the price was now ten cores (v4) instead of eight as stated in the specifications he had provided in the afternoon.

(11) At 23:55 and 23:57, Chan sent the following messages to Percy Ng (who was on leave):

> " For your information, we are the only one responded to the ywca nutanix rfp. They will re-issue the rfp to just provide the server hw only and everything else become optional."

> " i'd asked Thomas to provide dummy bids from 4 of his partners…"

118. On 6 July, at 08:45, Lok e-mailed the revised specifications (with the number of cores revised to 10) to Mak and Wong.

119. On 6 July, after being chased by Chan for the "vendor list", Hung provided Chan with the names of four companies and the e-mail addresses of the individuals: Shek (SiS), Cheung (Innovix), Mike Lam (iCON) and Steve

Ng (Tech-21). These were understood by Chan to be the friends who would submit bids in the second tender. Chan immediately cut and pasted these names and addresses into an e-mail to Lok and Li, stating: "Here is the vendor list".

120. Lok in turn incorporated these names into the proposed vendors list he was preparing, which he sent to the APD by e-mail on 7 July (containing eleven companies including BT, SiS, Innovix, Tech-21, iCON and 6 others, namely, Afina Data Systems Ltd, Automated System Ltd, Expert Systems Ltd, Microware Ltd, PCCW Ltd and Senco-Masslink Technology Ltd). Mak and Wong revised the list by removing four companies and adding two others. SiS, Innovix, Tech-21 and iCON remained on the list. (Wong had also earlier, on 6 July, telephoned SiS and spoken to Priscilla Szeto: see §297 below.)

121. In the evening of 7 July, upon enquiry by Chan, Lok texted him that the second tender would be issued the next morning.

122. On 8 July, at 8:38am, Hung sent an internal e-mail to his colleagues within Nutanix, referring to, *inter alia*, the YWCA project and stating:

> "Last Tender fail, because only one partner response. Customer request 5 response on the tender. Nutanix assist to ask 4 NX partner for the re-issue tender in coming two weeks to make sure Dell win the deal."

123. On 8 July, after Lok had endorsed the revised drafts of the tender documents, the APD sent the Invitation to Tender and the tender documents to the nine companies in the list, namely:

- Automated Systems Ltd

- BT
- Expert Systems Ltd
- iCON
- Innovix
- Petabytes & Beyond Technology Ltd
- SiS
- Tech-21
- Wharf T&T Ltd

124. The invitation letter and e-mail of 8 July 2016 enclosing the tender documents stated:

> " To be acceptable as a tender, Technical Proposal (i.e. the content of Part D of Form of Tender and Supplier Profile Form), Fee Proposal (i.e. Form of Tender, Schedule of Rates and Compliance List) must be fully completed and furnished in duplicate. … The tender should be deposited in the tender box outside Room 405, 4/F, HKYWCA HQs, No. 1 MacDonnell Road, Hong Kong **on or before 12:00 noon on 18 July 2016** (Closing date for the tender)."

125. The second tender therefore required tenderers to complete and submit four forms:

(1) a Form of Tender;

(2) a Schedule of Rates;

(3) a Compliance List; and

(4) a Supplier Profile Form

and, in addition, to submit a Technical Proposal as required by Part D of the Form of Tender.

126. For the second tender, YWCA included a letter with the title "Request for Support from Principal" which stated, *inter alia*, that YWCA had

not authorised any IT company to be its "exclusive order fulfilment partner", that YWCA respected the existing mechanism of the IT industry, particularly the business collaboration arrangements between manufacturers and their tiers of intermediary agents, and had no intention to interfere with their commercial decisions or collaboration relationship, and that YWCA needed "a fair-game tender exercise".

127. On 8 July, at 12:03, Mike Lam of iCON, having received YWCA's Invitation to Tender, emailed Hung:

> " Boss
> Pls Help To Send Me Doc To Submit La."

128. Shortly afterwards, at 14:39, Hung sent an e-mail to Chan, forwarding Mike Lam's e-mail, adding:

> " Hi Denis,
> Too many documents, send me one sample of what you will submit."

129. Chan then telephoned and spoke to Lok that afternoon.

130. By e-mail dated 10 July with the subject "Pricing template", Chan responded to Hung's request and sent him copies of BT's completed Schedule of Rates with BT's bid prices filled in and Compliance List, stating:

> " Hi Thomas,
> Attached is the template I prepared for your friends to fill in. In particular, the one highlighted in Yellow. All others are optional and no need to fill in if they don't want to. Also, I have attached our compliance list for your reference as well. Any queries please don't hesitate to give me a call. Thanks a lot for your help!"

131. On 11 July, Chan sent another e-mail to Hung, attaching BT's

completed Schedule of Rates again with minor corrections, in both "excel" and "pdf" formats, stating:

> " Hi Thomas,
>
> I found some minor mistake in my previous template and has corrected it. Also, I found that the excel file's format might be different with different version of excel, I have print out a pdf version of what it should look like. If your friends run into any problem, I can help to pdf them if they can provide me with the figure. And don't forget to markup at least 30% on top of mine.
>
> Also, there is another important doc that need to be filled in which is the 'Form of Tender', please ask your friends to fill in their info with the price.
>
> Thanks!"

132. On 12 July, Chan texted Hung saying:

> "Bro, lets spend an hour or so tomorrow to go thru this. I'm ok at 9:30 if you want to meet at my office …".

133. On 13 July, Hung went to see Chan at BT's office at 12:44pm to discuss what documents had to be submitted and how they should be filled out such that there would be five different tenderers responding. At 1:19pm, Chan sent Hung a further e-mail headed "YWCA RFP submission" stating:

> " Hi Thomas,
> To make life easy for your friends, here is what you need to submit in hardcopy by next Monday."

The body of the e-mail set out a table of contents of BT's Technical Proposal. The following documents were attached: (i) Form of Tender (filled in); (ii) Schedule of Rates (filled in); (iii) Compliance List (filled in); (iv) Supplier Profile Form (blank); (v) Dell XC Web-scale Converged Appliances specifications sheet; and (vi) BT Supplement for Terms and Conditions of Contract.

134. On around 14 July, Chan called Lok to ask for his advice on how the Compliance List should be completed (such as which items should be marked as compliant or non-compliant).

135. Chan was going on holiday on 16 July. On 15 July, Friday, he submitted BT's bid to YWCA. He texted Hung a photograph of the invitation to tender with the address and deadline circled in red. Later that day, at 19:14, Chan emailed Hung two Compliance Lists for SiS and Innovix respectively, which he had completed. The e-mail stated:

> " Hi Thomas,
>
> Here are two lists for your friends. Basically they are the same with some wording changes. I've put 'Yes' for most of them with a remark to state that this will require further discussions. This should provide indemnity against any legal responsibilities because you already stated that you did not commit.
>
> Those that are really obvious like 'location', I just put YES. If this is not Yes, then this will be very suspicious!
>
> I think for your other vendor friends, you can use similar approach.
>
> Thanks a lot!"

136. Shortly after sending this e-mail, Chan also left audio messages for Hung, saying:

> " Hey Thomas, just sent you two documents which are basically similar but some of the wordings are different. I put "Yes" on many sections, I've also reviewed the "T&C" and there is nothing much there.
>
> In case you have some worries so I put "subject to further discussion" which means you would not commit, that is, as expressly indicated, even you said "Yes" on these sections, it still requires discussion before it turns into something legal. So, I think you can refer to this for other vendors. If you put "No" on these sections, there are many sections which obviously cannot be "No", which implied that you've no intention to submit the tender. For example, if you put "No" on the clause of delivery address that meant you've no intention to make delivery which I felt quite strange.
>
> So, if you see I have put "Yes" on some sections without any remark

> that meant those sections must need to put "Yes"."[21]

and a little later:

> " Anyway, you can WhatsApp me if there is anything you want to clarify. Hope that you can submit before 12 on Monday otherwise all effort will be in vain."[22]

137. On the same day at 23:34, Chan sent a "handover" e-mail to Percy Ng who was coming back from leave, in which he reminded Percy Ng in red ink:

> " By the way, YWCA Nutanix RFP is due on Monday before 12. Please check with Thomas to make sure that he will deliver all 4 folders before then! Otherwise all our effort will go to waste…"

(8) Submission of bids in the second tender

138. Over the weekend and on Monday 18 July, Hung liaised with his friends with a view to their submitting bids in the second tender. The dealings

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21 In Chinese original:

「喂 Thomas，啱啱 send 咗兩份欸 document 畀你。佢哋基本上差唔多嘅，但啲 wording 唔同嘅啫。嗱，我就擺咗欸 yes for 都……即係都幾多嘅 section 嘅，但我睇過嗰啲 T&C 呢其實嗰啲真係無咩嘢嘅。

欸……欸如果即係我怕你驚呢，咁我都擺咗一個啲 wording 呢就話係 subject to further discussion 嘅。咁呢個已經係……即係你欸唔會 Commit 嘅啦，即係已經講咗明，even 你話 yes 呢，都係要傾咗先至係變成一啲即係 Legal 嘢嘅呢。所以我覺得你可以仿傚呢個……呢個做法，even for 你嗰其他嗰幾個 vendor 嘅。因為呢如果唔係呢你全部話 no 呢。有好多呢即係好多呢好 obvious 係無可能 no 嘅。如果你答 no 呢即係基本上唔會報嘅。即係好似譬如你話連「跌」個 delivery address 都話 no 嘅，咁你即係唔 deliver，即係我覺得有少少好怪囉。

嚇，總之呢你見到呢，如果我有啲淨係寫咗 yes，欸但係就無 remark 嗰啲呢，嗰啲尤其是嗰啲呢一定要寫 yes 嘅呀。」

22 In Chinese original:「嗱，anyway 你如果你有咩嘢你……你想欸再 Clarify 嘅呢，你可以 WhatsApp 我......哦咁欸......咁欸希望你禮拜一欸十二點鐘之前又即係遞呀......遞過去交交啦...如果唔係就......就即係所有 effort 都白費㗎喇。」

with them are set out separately below and further elaborated in sections F, G and H.

139. By 18 July 2016, Hung had prepared and largely filled in the tender documents for the four firms: SiS, Innovix, Tech-21 and iCON. The key financial information of BT's bid and each of the bids of SiS, Innovix, Tech-21 and iCON as prepared by Hung may be seen from the following table:

	BT	**SiS**	**Innovix**	**Tech-21**	**iCON**
Equipment	**Dell-Nutanix**	**Nutanix-NX**	**Dell-Nutanix**	**Nutanix-NX**	**Nutanix-NX**
Item 2.1 (Bid price of server for Headquarters — 3 nodes)	$[●]	$[●]	$[●]	$[●]	$[●]
% higher than BT (for Item 2.1)	-	44.6%	16.6%	27.7%	27.7%
Annual maintenance for each of 4th and 5th years (optional)	$[●]	$[●]	$[●]	$[●]	$[●]
Item 3.1 (Bid price of server for Kowloon Centre — 3 nodes) (optional)	$[●]	-	-	-	-
Contingency sum	$[●]	$[●]	$[●]	$[●]	$[●]
Total (without optionals)	$[●]	$[●]	$[●]	$[●]	$[●]

140. Hung had a very hectic morning on 18 July 2016. As described below, he e-mailed to his friends the documents he had prepared and went successively to Innovix (Quarry Bay), SiS (Chai Wan), Tech-21 (Kwun Tong) and YWCA (Mid-levels) for the purposes of completing, collecting and submitting the tender documents.

(a) Innovix

141. On or around 14 July 2016, Hung and Siu (a Product Manager of Innovix) had a telephone conversation. Siu said that he had received a tender invitation from YWCA and Hung said that he would "handle it".

142. On 15 July, Cheung forwarded to Siu the reminder email from YWCA (Wong) that mentioned the Monday deadline and requested for a tender.

143. On 18 July, at 07:56, Hung texted Cheung (an Assistant Product Manager of Innovix):

> " Need your help on YWCA tender response, deadline today. I prepared the document and some need you to print and sign. V which will send you later. May I collect today before 11:00am?
>
> Will call you 10:00."

144. At 08:34, Cheung replied: "For YWCA please kindly call Tommy, he is handling the tender". Immediately, at 08:35, Hung sent the same message as above to Siu, to which Siu replied at 09:02: "Ok".

145. At 09:16, Hung sent an e-mail to Siu (cc Cheung) with the title "YWCA: Tender Deadlien [*sic*] today", attaching the Form of Tender, Schedule of Rates and Compliance List already filled in, and stating:

> " Hi Tommy,
>
> Can you please print out 2 copy each document with Sign and Chop.
>
> We help BT to bid for Dell deal.
>
> I will help to collect and pass submit today before 12:00pm.
>
> Thanks."

146. At 09:59, Hung sent a further e-mail to Siu (cc Cheung), attaching the Supplier Profile Form which he had also filled in for Innovix. The e-mail stated:

> " One more document need. Please help."

147. Hung then went about getting the documents signed and submitted. His first stop was Innovix. Shortly after 10:00, Hung arrived at Innovix's office in Quarry Bay and met with Siu to finalise the bid documents. Siu signed the tender documents, except the Supplier Profile Form which was signed by Cheung.

148. Hung put the documents into a brown envelope he had prepared in advance, sealed it, and took it away with him. Siu did not keep a copy of the signed tender documents.

(b) SiS

149. On 17 July 2016 (Sunday), Hung telephoned Shek (a Product Manager of SiS) and said that, as there were insufficient tenders for the YWCA deal, he wanted Shek to help submit a bid. Shek responded "Orr", indicating his understanding. Hung did not tell Shek which other companies would submit bids. Shek's oral evidence that it was a text message instead of a conversation must have been mistaken because there was no record of such written message.

150. On 18 July 2016, at 07:56, Hung sent a WhatsApp message to Shek, stating:

> " Need your help on YWCA tender response, deadline today. I prepared the document and some need you to print and sign. V which will send you later. May I collect today before 11:00am?

Will call you 10:00."

151. At 08:26, Shek replied "Ok".

152. At 09:29, Hung e-mailed Shek the tender documents he had drafted for SiS, including the Form of Tender, Schedule of Rates and Compliance List. The e-mail stated:

> " Hi Keith,
> Can you print two copies with sign and chop on the attachment."

153. At 11:03, Hung sent to Shek by WhatsApp an image of the invitation to tender with the address for submission circled in red. Shek replied:

> " wrte on the evelope?
> i havent got your other email
> only 3 document on hand."

154. At 11:10, Hung sent another e-mail to Shek, attaching a Supplier Profile Form:

> " Last copy for print and sign. Need your contact information."

155. At some time after 11:11, Hung arrived at SiS's office in Chai Wan to finalise the documents with Shek. Hung told Shek where to sign and fill in the information required and Shek did so without making any changes to the information set out by Hung. Shek signed the documents, and also caused SiS's company chop to be stamped on them.[23]

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23 The circumstances in which SiS's chop was applied to the documents are dealt with in §§305-309 below.

156. Hung put the SiS bid documents into an envelope addressed to YWCA which Hung had brought with him. He then gave Shek that envelope and another sealed envelope also addressed to YWCA (which, I infer, contained Innovix's bid) and told him to take a taxi to deliver them to YWCA, because Hung had to go to another company in Kwun Tong to handle that company's bid documents. I infer that they parted before 11:24 because at that time Hung texted Shek "Take receipt and I pay you back" and then "Thanks and sorry for the sudden request".

157. Shek boarded a taxi at 11:29 and alighted at 11:44. He submitted the bids to YWCA and at 11:49 told Hung he had done it.

(c) Tech-21

158. On 6 July 2016, Hung texted Steve Ng:

> "May I have your help on one pig pig quotation. YWCA or YMCA I call you now?"

159. This was followed by a telephone conversation between them.

160. On 18 July 2016, at 07:56, Hung sent Steve Ng the same WhatsApp message he was sending at the same time to Shek and Cheung, stating:

> "Need your help on YWCA tender response, deadline today. I prepared the document and some need you to print and sign. V which will send you later. May I collect today before 11:00am?
>
> Will call you 10:00am."

161. At 08:14, Steve Ng replied:

> "Send to me by 10 o'clock, ok?

> I have a meeting with a client at 10 o'clock."

162. After that, Hung and Steve Ng had a telephone conversation at 09:18.

163. At 09:20, Steve Ng sent an audio message to Hung:

> " Does it require company stamp? I don't know, it should require having company stamp for normal case. I'll need to see and think as to what to do for you."[24]

164. Meanwhile, at 10:23, Ivan Lau (a director of Tech-21) replied to Wong's reminder of 15 July and stated that Tech-21 was not able to supply the required product in the tender. However, at 10:38, Ivan Lau e-mailed Wong to apologise for the confusion and stated that Tech-21 would be submitting a bid after all.

165. At 10:38, Hung e-mailed the bid documents that he had drafted for Tech-21 to Steve Ng (without the Compliance List). Steve Ng printed them off, signed and stamped them with Tech-21's company chop, without making any alteration to the documents. At 11:07 Steve Ng sent Hung by WhatsApp a photograph of the sealed envelope, followed by a message "Finished", and a little later texted him an address in Kwun Tong. After leaving SiS, Hung went to Kwun Tong to collect the envelope from Steve Ng and then went to YWCA to submit it, arriving late at 12:15.

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[24] In Chinese original: 「喂要唔要扱公司印㗎？個簽名……我唔知呀，正常應該要揼公司印㗎喎，我要睇嚇諗諗同你點樣搞呀。」

(d) *iCON*

166. Hung also sent an e-mail to Mike Lam of iCON at 09:26 on 18 July, attaching a Form of Tender and Schedule of Rates he had largely filled in for iCON and stating:

> " Hi Mike,
>
> Only two doc. Need your assist for sign and chop submission.
>
> Call you around 10:00am."

167. Hung did not go to iCON's office that morning and, as it turned out, iCON did not submit a bid to YWCA.

(9) *The aftermath*

168. In the evening of 18 July 2016, Hung sent Chan a message that he had submitted three tenders from SiS, Innovix and Tech-21 and that iCON had told him they would do it themselves (although iCON did not in fact submit a bid in YWCA's second tender). Chan replied: "Great. Thanks a lot!"

169. After YWCA opened the tender on 18 July 2016, it was found that bids from four invitees had been received, namely, BT, SiS, Innovix and Tech-21. Wong noticed that there were certain similarities between the tender submissions of these four companies. On Mak's instruction, he compiled a table detailing these similarities.

170. On 21 July, Mak made a complaint on behalf of YWCA to the Commission about suspected bid-rigging by the four companies. The complaint was kept confidential among a few senior people within YWCA.

The ISD was not informed. Mak told Lok there was a problem with the second tender because most tenderers did not put in a price for the optional items including the Nutanix server system for the Kowloon Centre. In response, on 26 July, Lok emailed Mak asking that the APD simply compare the tenderers' prices of the mandatory items only and speed up the tender evaluation process, as there was urgency in installing the CRM and other new applications on the Nutanix platform.

171. Subsequently YWCA decided to hold a third tender for the supply of the Nutanix system. On 3 August, upon Percy Ng's enquiry, Lok told him that it was likely YWCA would issue a third tender because not every return bid had submitted the answers YWCA required in the second tender, and asked for his opinion. Percy Ng told Lok that the easiest thing would be to ask those who had replied to provide the price of optional Nutanix equipment and nothing else, adding: "Then, we can help to ensure that a prompt response can happen timely."

172. On 4 August, Percy Ng texted Lok:

> " Alan, the Nutanix manager helping us on the tender will be away to US for next week. Please see if the clarifications can be out by tomorrow or not."

173. On 4 August, Mak called Percy Ng and told him YWCA's intention was to issue a third tender.

(10) The third tender

174. On 28 July 2016, for the purposes of the third tender, Mak asked Erica Chan of Nutanix for a list of local dealers in Hong Kong to conduct a

tender exercise. On 29 July, Erica Chan replied to Mak (copied to Hung) with the contact details of BT, SiS, Innovix, Tech-21 and Expert Systems Ltd.

175. On 2 August, Mak wrote again to Erica Chan saying it did not need to be the Dell-Nutanix server and that the Lenovo-Nutanix and Nutanix-NX server were also acceptable. He asked for a supplementary list of Nutanix's authorised sellers or partners instead of the five names supplied on 29 July.

176. Meanwhile, Lok had revised the technical specifications for the third tender and asked the APD to put out the tender as soon as possible. In an effort to attract a greater number of bids, the scope of the third tender was narrowed down. Certain software elements included as optional items in the second tender were removed.

177. On 8 August, Erica Chan sent Mak a list of 41 firms. The APD selected a total of 17 firms to which an invitation to bid in the third tender was sent on 9 August. They included BT, SiS, Innovix and Tech-21, as YWCA did not wish to alert them to the fact that YWCA suspected they had attempted bid-rigging in the second tender, though YWCA would not consider any bids received from them.

178. On 9 August, the Commission executed a search warrant in SiS's office.

179. Upon the closing date of 23 August, it was found that only one firm (IT Channel (Asia) Limited) had submitted a bid. The type of equipment offered was the Nutanix-NX solution at $[●] or $[●] per node ($[●] or $[●]

for three nodes) which was substantially higher than BT's bid with the Dell-Nutanix solution in the second tender.

180. YWCA decided not to award the third tender or conduct a further tender exercise. Instead, with authorisation of the FAC, YWCA approached Dell directly to arrange the acquisition of the Dell-Nutanix solution. Eventually, on about 16 November 2016, YWCA acquired three units of the Dell-Nutanix solution for the Headquarters through a Dell re-seller, CriticMission Data Limited, at $[●] per node ($[●] for three nodes). A month later, YWCA purchased another three nodes of Dell-Nutanix solution at a similar price for the Kowloon Centre. There were only minor differences between the technical specifications for the second tender and the eventual purchases. The ultimate purchases included a slightly different version of the processor (with no material difference), seven additional TBs of HDD capacity, and five instead of three years of maintenance support.

E. AGREEMENT BETWEEN NUTANIX AND BT

181. This section deals with the agreement Nutanix came to with BT. The next three sections will deal with the equivalent question with regard to SiS, Innovix and Tech-21 respectively.

182. The Commission contends that there was an arrangement between Nutanix and BT whereby they agreed to distort the competitive process of the second tender by seeking to obtain a number of bids that were

not independently arrived at just to make up the numbers; BT provided commercially confidential information to Nutanix in order to assist; both the objective purpose and subjective intention of the arrangement were to procure four dummy bids (i.e. non-genuine bids) so as to assist BT in winning the second tender.

(1) The communications

183. The principal facts have been set out in Section D(7) above.

184. The first tender failed because there was only one bid, by BT. On 5 July 2016, Chan learnt the result of the first tender and the reason. He was also asked by Lok to provide names of suppliers for the purposes of a second tender. Chan spoke with Hung and they agreed Hung would obtain bids from certain friends. Chan then followed up within an hour with an e-mail to Hung that set out BT's proposed bid prices for the server and for the 4th and 5th years' maintenance, adding that once he finished the whole table, he would share it with Hung so that he could "give the quotation to [his friends] to just fill in". At the end of that day, Chan texted Percy Ng that he (Chan) had asked Hung "to provide dummy bids from 4 of his partners".

185. After the invitation to tender was issued on 8 July 2016, Hung asked Chan for a "sample" of what BT would submit, and in the next few days Chan sent him BT's completed Schedule of Rates. Chan also offered to help prepare the documents for Hung's friends if they could provide him with "the figure", adding "don't forget to markup at least 30% on top of mine". On 13 July he provided Hung with a complete set of documents in order to "make life easy for [his] friends".

186. On 15 July, Friday, the day before he went on leave, Chan sent Hung two Compliance Lists for SiS and Innovix respectively which Chan had completed in such a way that the documents would not look "suspicious". He told Hung to use the same approach for his other two friends. At the end of that day he reminded Hung to submit the bids before noon on Monday (18 July) or else "all effort will be in vain".

187. Hung prepared the bids for SiS, Innovix and Tech-21 including the bid prices, procured them to be signed by Shek, Siu/Cheung and Steve Ng respectively and submitted them to YWCA on 18 July 2016. Hung reported to Chan that he had submitted three tenders from SiS, Innovix and Tech-21 and that iCON had told him they would submit it themselves.

(2) Absence of Hung as witness

188. Before discussing the evidence it is convenient at this point to deal with two evidential points. The first arises from the absence of Hung at the trial; the second is related to Chan's status as a witness called by the Commission.

189. Hung was at all material times and up to around July 2017 an employee of Nutanix. Eventually he did not give evidence at the trial of this matter. It was accepted by the Commission that as a result, no weight should be attached to his interview records at all. Some of the respondents have, however, further submitted that (i) adverse inferences should be drawn against the Commission from its failure to call Hung; and (ii) any doubt arising from the absence of Hung should be resolved in favour of the respondents. To assess this submission, it is necessary to outline the relevant procedural steps.

190. Hung was interviewed by the Commission pursuant to s 42 of the Ordinance on 21-22 February 2017, accompanied by two solicitors from Latham & Watkins who have also been acting for Nutanix throughout these proceedings. The Commission's Originating Notice of Application made references to certain statements made by Hung in the interview. There was subsequently a dispute as to whether the record of Hung's interview was inadmissible against Nutanix in these proceedings by virtue of the prohibition against direct use in s 45(2). This Tribunal ruled that s 45(2) rendered Hung's statements inadmissible against himself as the person compelled to answer questions but not inadmissible against his employer Nutanix: see the Tribunal's decision dated 3 October 2017.

191. At an earlier stage of these proceedings there was some uncertainty as to whether and how the records of interview of various persons might be adduced as evidence. Upon the insistence of the respondents, the Commission indicated it was prepared to call Hung and applied for a witness summons for that purpose in December 2017, but as Hung did not provide a statement, the Commission applied by summons in April 2018 to adduce evidence from him without a statement. That application was not opposed by the respondents except SiS, who submitted, presciently, that it would be an "exercise in futility" because Hung would claim privilege and refuse to answer any questions at all. It was only in May 2018 that the Commission came to agreement in principle with Hung that he would provide a statement and give evidence at the trial in return for the Commission's undertaking not to bring any proceedings against him under the Ordinance in connection with YWCA's tender.

192. On 1 June 2018, the Commission's lawyers provided a draft witness statement to Hung's then lawyers (Sidley Austin), who reverted with

comments on 4 June in the form of extensive deletions from and additions to the draft. The Commission responded on 6 June stating that it "does not consider that the revised draft fully and truly reflects the answers provided in [Hung's] two interviews with the Commission on 21 and 22 February 2017". It was therefore not prepared to grant him immunity. The Commission declined Hung's lawyers' request to identify which of his comments were considered unacceptable, stating that its position was "self-evident" from the draft it prepared. The Commission indicated that it would instead call Hung as a witness and examine him at trial without reliance upon a signed statement from him, whereupon Sidney Austin gave notice by a letter dated 15 June that Hung intended, when called upon to testify, "to invoke his claim for privilege against self-incrimination as regards any questions directed at his involvement in the invitations to tender issued by YWCA in 2016".

193. In the light of that indication, on the first day of the trial the Commission decided not to call Hung to testify, accepting that as a consequence no weight should be attached to his interview records at all. None of the respondents took up the opportunity offered to call or require Hung to be tendered for cross-examination. Nor did the Tribunal propose to call Hung of its own motion. As a consequence Hung did not appear at trial to testify.

194. In these circumstances it would not, in my opinion, be justified to draw any adverse inference against the Commission from the decision not to call Hung as a witness. Granted that the Commission is a public body, not a private litigant, it was nevertheless not bound to put forward any statement that Hung had prepared if it believed that it did not properly reflect the information provided in his earlier interviews with the Commission. The Commission intended to call Hung without adopting his statement but, in light

of the intimation that he would claim privilege in relation to any questions about his involvement in the tender, the Commission was entitled ultimately to take the view that calling him would not be a useful exercise. Furthermore, the Commission's position was subject to the caveat that if any of the respondents wished to question Hung, he should attend the trial.

195. While Hung was a central player in the events in question, I do not consider that his absence from the trial precludes the Tribunal altogether from drawing inferences, one way or another, in relation to matters of which he has knowledge. It seems to me the Tribunal should simply assess and evaluate the available evidence as a whole, drawing inferences from primary facts where it is appropriate to do so, but without taking account of Hung's interview records.

(3) Whether the Commission may impugn Chan's evidence

196. Chan was at all material times and up to the time of trial an employee of BT. He had been on garden leave since the Commission's investigation of BT began.

197. He was interviewed (in English) by the Commission under s 42 of the Ordinance on 25 January 2017 accompanied by a partner of Baker & McKenzie as BT's external lawyer. He gave the Commission a signed witness statement (in English) dated 7 December 2017. There were certain passages in earlier drafts prepared by the Commission which he asked to remove. He was still in the employ of BT though he was not called by BT, but by the Commission, to give evidence at trial.

198. Arguments were raised in closing submissions as to whether it was open to the Commission to advocate for a version of the facts which, according to the respondents, was contradicted by Chan's evidence in chief or in re-examination. I shall come to the specific points in issue further below but I set out here the principles by which I propose to be guided.

199. The legal position, so far as relevant, seems to me to this. There is nothing to prevent a party in the position of the Commission from calling a witness whose evidence is regarded as in part worthy of belief and reliable but not wholly reliable. A party, however, cannot (without obtaining leave to treat the witness as hostile) seek to discredit his witness, i.e. contend that evidence given in chief by a witness he has called is untruthful, though he may suggest, by calling contrary evidence or by inviting an inference, that such evidence, albeit honestly given, is mistaken, unreliable or an innocent exaggeration, provided that care is taken to avoid surprise and hence injustice to the other parties. Ultimately, the Tribunal is not bound to accept the evidence of any witness in full. There is nothing to prevent the Tribunal, upon evaluation, from accepting parts of a witness's evidence and rejecting other parts, or placing different weight on different aspects of his evidence: *The Filiatra Legacy* [1991] 2 Ll R 337, §§361-362; *Secretary for Justice v Tang Sau Ling* [2013] 2 HKLRD 174, §§36-40; *China Shanshui Cement Group Ltd & Others v Zhang Caikui & Anor* [2018] HKCFI 444, §87.

(4) Discussion

200. It is not in dispute that there was an agreement between Hung and Chan. As to what that agreement was, the principal source of evidence is Chan and the contemporaneous documents.

201. Chan gave evidence both in his witness statement and in his answers during his interview by the Commission which he confirmed in evidence to be true unless corrected by his statement. In his witness statement (§27), Chan said:

> " On the same day [i.e. 5 July 2016], I informed Thomas Hung of Nutanix ("Thomas") that the return bid submitted by BT failed because it was the only bid submitted in response to the First Tender and that YWCA required a minimum of five tenders to be submitted. I therefore asked Thomas to help find four Nutanix partners to submit bids to make up the required minimum number of tenders. Thomas agreed to help and told me he would find a few friends who work in Nutanix's distributors, resellers or systems integration partners to submit bids to do so. He asked me to provide him with the relevant information I had relating to the YWCA tender and to show him how to fill in the tender documents. I asked Thomas to provide me with a list with contact details of the four bidders that day. I cannot now recall whether this particular discussion took place at a meeting or over the telephone but Thomas and I had a few meetings at BT's office and a number of telephone conversations to discuss matters relating this."

202. It was submitted by the respondents that this paragraph of Chan's statement (and his interview records) did not suggest there was any reference to "dummy bids" in his conversations with Hung. When his statement was being prepared, Chan declined to accept a sentence in the draft that read: "I therefore asked Thomas to help find four Nutanix partners to submit dummy bids to make sure BT wins this deal". I note however that Chan appeared deeply embarrassed when he was testifying with regard to his communications with Hung. He had a clear motive to legitimise his actions and lessen his responsibility, apart from being still in BT's employ. It is necessary to have regard to the totality of his evidence, the documents and intrinsic probabilities, and not just a particular passage or a specific omission in his statement in isolation.

203. It is clear that Chan's intention was that these bids from Hung's friends would be "dummy bids". Chan himself, in his message to Percy Ng on 5 July 2016, described his arrangement with Hung as being for "dummy bids from 4 of his partners …" (see §117 above). Chan accepted that when he sent this message to Percy Ng, he (Chan) knew that the bids that the four partners were to submit would be dummy bids.[25]

204. As to what Chan meant by dummy bids, he said in his statement at §31, which he re-confirmed in re-examination:

> "When I referred to 'dummy bids', I meant that Thomas's friends would be submitting bids as a favour to him just to make up the numbers, without any expectation of winning the bids and with the knowledge that the prospects of winning the bids would be low (although in the unlikely event that the bids had been successful, I would have expected that they would have been honoured)."

205. Chan had also explained in his interview as follows:[26]

> "Q: But you used 'dummy bids', what's the meaning of 'dummy bids'?
>
> A: There is a better description in Chinese, which is 陪跑 bid [also-ran bid], ok. So I don't know how that in English, so that's why.
>
> …
>
> Q: So from my understanding is if you say it's 陪跑 bid [also-ran bid], then that means the chance to win the tender will be low.
>
> A: Yes, yes. Like I said, it is a natural sort of thing that I explained to you earlier. If a company don't see any win chance, they simply would not bid, the whole reason why they bid is because they were doing a friend's favour, that's all there is.
>
> Q: So that's, so that's a dummy bid.

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25 Chan's interview record, §§1353-1354.

26 Chan's interview records, §§1342-1350.

A: Yes, yes."

206. This is consistent with Percy Ng's understanding of what Chan told him, namely, that Hung would help BT find four bidders who were willing to be "also rans" so that sufficient bids would be received by YWCA to fulfil the requirement of the tender. Percy Ng's evidence in this regard was not challenged in cross-examination.

207. Terms such as "low" prospects and "unlikely" event of winning involve questions of degree. As explained in his interview, Chan's expectation was that the dummy bids were so unlikely to win that the bidders would not even want to "waste the taxi fare to physically go and submit" the bids and that instead Hung would collect the tenders and submit them to YWCA.[27] It is to be noted that in fact, Hung offered to repay Shek his taxi fare for going to YWCA and that Hung delivered Tech-21's bid to YWCA.

208. Chan's understanding with Hung can further be seen from what he went on to do with Hung. Immediately after their conversation on 5 July 2016, by email at 16:14 Chan informed Hung of BT's bid prices and also that BT would be tendering the Dell-Nutanix solution, and said he would share with Hung the whole table when finished so that he could "give the quotation to [his] friend to just fill in". This can be contrasted with the email he sent Lok shortly afterwards at 16:22 in which he took care to set out only the technical specifications of the Nutanix node, and nothing on price. If Chan had wanted to send Hung only the specifications, he could have done it in the same way. By e-mails dated 10 July and 11 July (see §§130-131 above), Chan sent Hung copies of BT's completed Schedule of Rates (among other

[27] Chan's interview record, §§1669-1680.

things), again with the actual prices that BT intended to submit to YWCA, saying it was the template he had prepared for Hung's friends to fill in.

209. BT's bid prices included not only the cost of the Nutanix software but also the cost of the Dell hardware and BT's own mark-up margin on both components. Thus Chan was quite willing and indeed anticipated that the content and prices of his bid would be shown to the friends. As Chan accepted in his evidence, it would not be necessary for him to reveal BT's prices if the agreement was simply to find four companies which would formulate and make their own bids. Nor was it necessary for him to send BT's prices to Hung for any legitimate purposes between BT and Nutanix unrelated to friends' bids.

210. Then there was also Chan's e-mail of 11 July to Hung (see §131 above), where Chan stated:

> " If your friends run into any problem, I can help to pdf them if they can provide me with the figure. And don't forget to markup at least 30% on top of mine."

In his evidence, Chan confirmed that the "figure" was the bid price that the friends would be submitting to YWCA. In the context of this e-mail and the documents attached (in particular the Schedule of Rates filled in by BT), what was written was, on an objective and natural reading, clearly a request to ensure that Hung's friends would tender prices that were at least 30% higher than BT's bid prices. The documents attached to the e-mail did not set out BT's cost, but did set out the prices that BT was going to tender to YWCA.

211. In his interview and in his statement, however, Chan said that he made a mistake in the language and that what he really meant was to remind

Hung to mark up the prices that Nutanix would charge his friends by at least 30% over BT's cost.

212. The respondents submitted that the Commission cannot disown or contradict the contents of Chan's witness statements. Three points may be made here. First, I accept that on such a matter as what Chan meant by the words he used, it is difficult for the Commission to invite the Tribunal to reject the evidence on the ground that Chan's memory was not reliable or that his evidence was mistaken. In submitting that Chan's suggestion is "not credible"[28] the Commission came close to saying Chan was untruthful on this point, which was not permissible. Further, no prior notice was given that the Commission intended to submit that Chan's evidence on this point should be rejected as incredible. For these reasons, while I have grave doubt on the veracity of the explanation offered by Chan (who was very good at English), I shall proceed on the basis that he did in fact subjectively mean to remind Hung to mark up the prices that Nutanix would charge his friends by at least 30% over BT's cost.

213. Secondly, whatever the subjective thinking of Chan might be, what the request objectively conveyed to Hung was clear, namely, a request to ensure his friends' bid prices would be at least 30% higher than BT's. This is entirely consistent with Chan's evidence, which claimed he made a mistake in expression.

214. Thirdly, even on the basis that Chan requested Nutanix to mark up its price to the friends by at least 30% over BT's cost, it would nonetheless be for the purpose of ensuring that the friends' bids would not win — by

[28] Applicant's Closing §94b.

making sure that their bid prices would be higher than BT's or at least not lower than BT's by a sufficient margin to overcome BT's other advantages. Chan explained in his evidence that even if the friends' bid prices were lower than BT's, then provided they were "very close" (within 1% or 5%), he was confident BT would still win. In Chan's words during his interview, "as long as there is a 30 per cent difference between their cost and our cost, then we should be fine, so everyone should be safe, yes, if you know what I mean".[29] In his evidence Chan also said the request was to satisfy Dell that it was given a deep discount but he did not say, nor I do not accept, that this was the sole purpose.

215. In his interview Chan also said that the request to make sure the other bidders' cost would be at least 30% more than BT's came from Dell, which I do not accept. But he also said he reasoned that Dell did not know they were dummy bids because "if they know it's a dummy bid, they don't have to remind me of this…".[30] This shows that Chan intended that the dummy bids were not supposed to win.

216. Of course, to ensure everyone was "safe", from Chan's point of view the chances of BT being accidentally defeated by a dummy bid should be as "low" and as "unlikely" as possible, although obviously the dummy bids' prices should not be so out of the range as to arouse suspicion on the part of YWCA. In the contemporaneous communication, Chan had referred to avoiding suspicion, albeit not in relation to pricing (see his e-mail to Hung at 19:14 on 15 July 2016 and also the audio message on the same date referred to in §§135-136 above).

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[29] Chan's interview record, §1513.

[30] Chan's interview record, §1539.

217. Furthermore, Chan did not only provide his own bid prices to Hung and requested the mark-up for the friends, he also helped prepare documents for the friends. In his evidence,[31] Chan explained that he sent Hung a set of largely completed tender documents that BT were going to submit "to help his friends to fill in those documents", although he wanted BT to win the tender. From Chan's point of view, he would not have gone to such lengths to assist Hung's friends absent an arrangement with Hung that the friends would merely be submitting bids that were intended not to win but to help BT win. In his interview Chan accepted that he "prepared all these documents for Thomas to assist him to submit some dummy bids".[32] He also said that if Hung's friends were submitting "a genuine bid", he would not have helped them.[33]

218. Chan also explained in re-examination that he did not just leave it to SiS and Innovix to complete their own tender documents because he "knew that they would not spend any time at all to read these things". He also said in his interview that if he did not help, they would not do it properly,[34] and he was worried that Hung would "just copy and paste" what Chan had given him.[35] In his statement, Chan states: "I deliberately changed the wording in each of the documents for Thomas because I wanted to avoid having identical documents submitted, as that would arouse suspicion with YWCA". Quite plainly Chan considered that SiS and Innovix would not genuinely be submitting bids to compete and believed they knew they were to submit dummy bids just to make up the numbers. Chan knew what he and Hung agreed was not acceptable and would fail to mislead YWCA if it found out.

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[31] Chan (Re-X) [Day 6/19:2-10].

[32] Chan's interview record, §§1574-1575.

[33] Chan's interview record, §§1735-1740.

[34] Chan's interview record, §1611.

[35] Chan's interview record, §§1577-1585.

219. In his statement, Chan said he believed that each of SiS, Innovix and Tech-21 knew that the bids submitted by them were dummy bids in the sense he had described, and he suspected that Innovix also knew that this was to help BT win the tender. Leaving aside their evidential value on the knowledge of SiS, Innovix and Tech-21, these statements are clearly evidence of Chan's own understanding as derived from his arrangements with Hung.

220. In his audio message to Hung and e-mail to Percy Ng on 15 July 2016, Chan emphasised the need to submit all four bids by the deadline on 18 July, otherwise all the efforts would "go to waste" and be "in vain". In his interview Chan explained that he was concerned that if the tender was not successful, there might be a third tender, and that BT might not be able to participate as "no company can afford to do one bid three times".[36]

221. For their part, Nutanix submitted that the only agreement between Hung and Chan is that, in light of YWCA's requirement of a minimum of five bidders, Hung agreed that he would try to find four Nutanix partners who would submit bids in the second tender.[37] Nutanix submitted that there is no evidence to suggest that Chan and Hung had any meeting of minds that the bids would not be genuine.[38] It was said that Hung knew YWCA had selected Nutanix software and in all probability Nutanix would receive an order from a partner for its software to be supplied to YWCA, and that there was little incentive or reason for Nutanix to engage in anti-competitive conduct.

[36] Chan's interview record, §§1647-1654.

[37] Nutanix Closing para 132.

[38] Nutanix Closing para 134.

222. Having regard to the actual evidence, I am unable to accept this submission. Nutanix was very keen to make sure that BT would win the deal. On 5 October 2015, when there was still concern whether YWCA could afford to purchase a Nutanix solution, Edward Yeung (Nutanix's Managing Director for Hong Kong and Taiwan) stated in an e-mail to Percy Ng (copied to Chan and Hung) headed "YWCA": "Just tell us how we can help you win … Whatsapp me what you need and will try to help". A few days later, Edward Yeung sent an e-mail to Hung headed "What do you need to close YWCA", stating: "If we must win this with BT. How?" In early February 2016, Percy Ng e-mailed Edward Yeung and Hung that BT had just lost a deal on Nutanix solutions: "It's a pity to all of us. Let's get some new wins in the new year of monkey shortly", to which Edward Yeung replied (copied to Chan and Hung and other Nutanix staff): "Thanks for your efforts and the opportunity. It is a pity. Yes we need to win YWCA".

223. It is plain that Hung agreed with Chan to make the arrangements not only to ensure there would be at least five bidders so that the second tender would not be abortive, but also that the friends' bids were not intended to win or would not win. In Hung's e-mail on 8 July 2016 (§122 above), he told his colleagues he was assisting by asking four Nutanix channel partners to take part in the second tender "to make sure Dell win the deal". In referring to Dell, Hung meant the BT/Dell bid. Hung knew that YWCA wanted the Dell-Nutanix solution. He had specifically learnt from Percy Ng in relation to the first tender on 21 June 2016 that YWCA wanted a Dell-Nutanix solution. The proof-of-concept equipment on loan to YWCA was Dell-Nutanix servers. Chan had also told Hung on 5 July that BT was proposing the Dell-Nutanix solution in the second tender. Yet, of the four sets of tenders Hung prepared for his friends, three offered the Nutanix-NX solution; only Innovix's bid offered the Dell-Nutanix solution. As for Innovix's bid, in his e-mail to Siu at

09:16 on 18 July 2016, Hung made clear who was to win: "We help BT to bid for Dell deal". Hung had also, of course, with knowledge of BT's bid, determined the bid prices of SiS, Innovix, Tech-21 and iCON that were, for the main item (2.1), 44.6%, 16.7%, 27.7% and 27.7% higher than BT's respectively (see the table in §139 above). Innovix's bid also had the highest price for the 4th and 5th year's maintenance, which was exactly 20% higher than BT's.

224. The contents of the tender documents Hung prepared for SiS, Innovix and Tech-21 are also telling, as will be seen below. Had they been intended by Hung to be genuine bids representing those firms' real attempt to win business, they would not have been such botched documents, as described in sections F, G and H below. For the Compliance List, he used those prepared by Chan for SiS and Innovix. He did not prepare a Compliance List for Tech-21 at all with the result that it was missing from its bid.

225. The respondents relied on the fact that in preparing his statement with the Commission, Chan had declined to include the words "submit dummy bids to make sure BT wins this deal" or to equate "dummy bids" with "non-genuine bids". From the totality of the evidence, however, it is entirely clear that it is both an objective and a subjective aim of the agreement to submit bids that would not be counted but would not win, the natural consequence of which was that BT would win. Further, while it could be said that the dummy bids were real in the sense that they were capable of being accepted by YWCA and, if accepted, would become binding on the bidders, they were not genuine in the sense that they were not intended to win.

226. The respondents also submitted that bidders often enter a tender with a low expectation and low prospects of winning, that there can be no

suggestion there is anything anti-competitive merely because bids were submitted with a low prospect of success, and that at least in the case of Siu (Innovix), his experience in practice was that out of the many quotations he provided, only a very few would end up in purchase orders. As can be seen from the evidence, however, this is far from the facts of the present case.

(5) Conclusion

227. Taking account of all the evidence, I have no doubt that Chan and Hung came to an arrangement that bids were to be submitted from Hung's friends solely to make up the numbers to make the second tender valid. The bids were not intended or supposed to win. They were to have such a low prospect of winning that it would be safe, and they would instead enable BT to win. The fact that, in the unlikely and wholly unintended event that a dummy bid won the tender, it would be honoured, does not mean that it was intended to win or was a genuine bid in the relevant sense.

228. In my view, the evidence overwhelmingly demonstrates, and I find, that there was an agreement or concerted practice between Chan and Hung:

(1) Chan and Hung both knew YWCA had a requirement of a minimum of five bids and the first tender had failed because there was only one bid, from BT.

(2) For the second tender Chan and Hung agreed to procure from four friendly Nutanix channel partners (i.e. SiS, Innovix, Tech-21 and iCON) a dummy bid each.

(3) Chan and Hung were of one mind that these bids were not intended to win, were to have such low chance of winning that

they would make sure that BT win, and were submitted solely for the purpose of making up the numbers to meet the 5-bid requirement so that the second tender would be valid and BT's bid would win.

(4) Chan provided commercially confidential information (including BT's own bid prices) to Hung for the purpose of their agreement, and, to make sure the friends' bids would not outbid BT, he asked Hung to ensure the friends' bid prices (or, in Chan's mind, their cost) were marked up by 30%.

(5) With knowledge of BT's bid including the prices, Hung prepared the friends' bids, inserting bid prices ranging from 16.7% to 44.6% higher than BT's.

(6) Chan and Hung also agreed to use the documents filled in by Chan (i.e. the Compliance List) for two of the friends (SiS and Innovix).

(7) Chan and Hung intended that YWCA would, without its suspicion being aroused, take the dummy bids as genuine and count them towards the required number.

(8) As agreed, Hung procured bids from SiS, Innovix and Tech-21 which were not genuine, but failed eventually to procure a bid from iCON.

F. AGREEMENT BETWEEN NUTANIX AND SiS

229. This section deals with the agreement between Hung and Shek. The question whether Shek's acts are attributable to SiS is dealt with in section I below. The Commission contends that Hung and Shek made an agreement for Shek to submit a non-genuine bid just to make up the numbers in the second tender.

230. The basic circumstances in which Shek came to submit a bid in the name of SiS are not in dispute. The telephone conversation between Hung and Shek on 17 July 2016 and what they did the following day have been set out in §§149-157 above.

231. Hung prepared the tender documents to be submitted in the name of SiS, including the prices in the Schedule of Rates. The bid offered Nutanix-NX equipment, not Dell-Nutanix. The price inserted for the main item (2.1) — as determined by Hung — was 44.6% higher than BT's. Shek knew that YWCA wanted to purchase Dell-Nutanix equipment, and that Dell had a deal registration with Nutanix.

232. Shek printed off the documents from Hung's e-mails on the morning of 18 July 2016 but did nothing to them on his own until Hung arrived at SiS's office in Chai Wan shortly after 11:10. When they met, time was short. Hung told Shek where to sign and fill in the information required, and Shek did so without making any changes to the information set out by

Hung. Shek looked at the documents but not in any detail. The whole process took only minutes — they had already parted by 11:24. They were in real haste because there was a deadline for submission of the tender at 12:00. Shek had to go to YWCA in Mid-Levels to deliver SiS's bid and another bid Hung entrusted him with (which was in fact Innovix's), while Hung had to collect Tech-21's bid in Kwun Tong before taking it to YWCA. Hung offered to reimburse Shek for the taxi fare.

233. Shek said that his understanding was that SiS's bid was "just to make up the required number"[39] and that he had never thought of winning the tender. This is why the details (including the bid prices) were not of concern to him. Indeed, Shek said he believed Hung had put in very high bid prices in SiS's bid so that it would not be selected by YWCA. Hung did not tell Shek, and Shek did not know, which other companies were also submitting bids. But Shek clearly knew there was some requirement in connection with the tender that there had to be a certain minimum number of bids.

234. I bear in mind that Shek was an immunised witness and that, as such, his evidence must as a general rule be approached with caution: *HKSAR v Shek Ka-kwan* (CACC 438/2014; 27 January 2017). Not surprisingly, Shek's credibility has been heavily attacked by SiS but, importantly, not with respect to his evidence of what he had agreed to do with Hung. In SiS's submission, the common theme around the matters on which Shek had been untruthful is that they either seek to tie SiS to his own wrongdoing, or else to minimise his own role in it.[40]

39 In his Chinese statement:「只是為了湊夠數」。

40 SiS Closing §134.

235. Shek's evidence on what Hung told him and asked of him on 17 and 18 July 2016, and his evidence on purpose of SiS's bid and that he never intended or believed SiS's bid would win, seems to me to be entirely consistent with the other facts. No one challenged Shek in cross-examination with respect to that evidence. Indeed, in its pleaded case SiS relied on Shek's evidence in that regard in order to explain why he concealed his actions from SiS.[41] I accept that evidence.

236. Furthermore, as SiS pointed out, the tender documents Hung prepared for SiS were replete with errors: for example, the business registration filled in had an expired validity date; the technical proposal misstated SiS's name as "SiS Distributor Limited" rather than "SiS International Limited"; the Supplier Profile Form stated SiS's work schedule to be 30 days per month and 24 hours per day. This fortifies Shek's evidence on the nature of the bid Hung told him to sign and submit.

237. On the evidence, I find that:

(1) Pursuant to his agreement with Chan, Hung needed to procure Shek to submit a dummy bid in the name of SiS.

(2) Shek knew that a certain minimum number of bids were required in the YWCA tender.

(3) At Hung's request, there was an agreement between Hung and Shek that Shek would submit a bid in SiS's name to YWCA just to make up the numbers but not genuinely to compete in the tender. Neither of them had any intention or expectation that SiS's bid would win.

[41] SiS Closing §121.

(4) As they both knew, SiS's bid documents, and in particular the bid prices, had been provided by Hung. They were not prepared by or in consultation with Shek or anyone else in SiS.

(5) Hung knew BT's bid prices and that YWCA preferred the Dell-Nutanix solution. He had prepared SiS's bid in such a way that it would offer the Nutanix-NX solution and at a price 44.6% higher than BT's bid.

(6) Shek did not know BT's bid prices or indeed that BT was bidding, but he knew SiS's bid was not intended to win – it was submitted solely to help ensure the tender was valid and that someone else would win.

(7) Both Hung and Shek intended that YWCA would treat SiS's bid as a genuine bid and count it towards the required number.

G. AGREEMENT BETWEEN NUTANIX, BT AND INNOVIX

238. This section deals with the agreement involving Innovix. The basic facts concerning Innovix's bid in the second tender are not in dispute and have been set out in section D(8)(a) above (§§141-148). The Commission contends that there was an agreement or concerted practice among Nutanix, BT and Innovix for Innovix to submit a non-genuine bid to YWCA to help BT win the tender.

239. Innovix raised an objection that it was not open to the Commission to advance a case of concerted practice because "concerted

practice" was not mentioned in the Originating Notice of Application. I reject this objection. While the Originating Notice of Application referred to an "arrangement" between Nutanix, BT and Innovix, the Commission's Reply made it clear that it was alleging agreements or concerted practices. The basis of the Commission's argument, both formal and substantive, was clear to Innovix on the pleadings.

240. Again, Hung had prepared the tender documents to be submitted by Innovix, including the prices in the Schedule of Rates. The prices inserted were 16.7% higher (for the main item – Item 2.1) and 20% higher (in respect of annual maintenance for the 4^{th} and 5^{th} years) than BT's prices. Hung emailed the tender documents he had prepared to Siu and Cheung on 18 July 2016. Later, in Hung's presence, Siu filled in the blanks and signed the tender documents (except the Supplier Profile Form which was signed by Cheung). Hung took away the tender documents, which were eventually delivered by Shek to YWCA together with SiS's bid.

241. Siu and Cheung were called by Innovix to give evidence at trial. Siu was a Product Manager of Innovix. He explained that Innovix was both a distributor and re-seller of IT products. His team, being one of two such teams in Innovix, was responsible for a number of brands of products including Nutanix, and handled a large number of transactions every year (eg around 5,800 purchase orders in 2016) and several hundreds of requests for quotations and other enquiries from customers each week. Although he rarely came across tenders, he considered his role to be the same, ie to provide a quotation for the customer's consideration. In the case of Nutanix products, Innovix had to ask Nutanix for a quote in order to pursue any business opportunity.

242. Siu was involved in providing quotations for the Nutanix-NX solution to BT for the YWCA opportunity in the summer of 2015 (see §§93-100 above), but by early January 2016 he had learnt that YWCA wanted a Dell-Nutanix solution instead. He said that this meant the end of his team's involvement because another team in Innovix (in particular, Jacky Lee's) was responsible for Dell products. He said that after passing to Jacky Lee at the end of January 2016 the e-mails on technical issues between Innovix, BT, Nutanix and YWCA, he did not have any further involvement with the YWCA opportunity until July 2016. He was not aware of the first tender.

243. Cheung received the invitation to the second tender from YWCA and passed the documents to Siu. As to the telephone conversation with Hung on around 14 July 2016 in which he mentioned YWCA's tender invitation and Hung said he would "handle" it (see §141 above), Siu said he understood Hung to mean that Nutanix would decide whether to provide Innovix with a quotation and revert to him.

244. Siu explained that he was not feeling well on the morning of 18 July 2016 and arrived in his office at around 10:00. He said shortly after opening the attachments to Hung's two e-mails at 09:16 and 09:59 that morning, Hung arrived at Innovix's office. In his statement he said he had no recollection of reading the sentence "We help BT to bid for Dell deal" which appeared in the first e-mail or hearing it from Hung. In his oral evidence he positively said he did not read it. He further said in his statement: "Even now, after my attention has been drawn to this sentence, I do not understand what the phrase was intended to mean and I have no idea what Hung meant by that".

245. Siu went through the tender documents with Hung in the meeting room (except the Technical Proposal which Hung prepared without showing

Siu). He said Hung was clearly in a rush and kept telling him to hurry in completing the papers. Siu said the entire process, lasting no more than 20 to 30 minutes, was quite hectic and he had to run around the office to obtain the missing information such as the business registration records and to ask Cheung to sign one of the documents. Siu did not change the prices filled in by Hung and although Siu did not recall discussing Innovix's margin with Hung, he said he felt "comfortable" that Innovix would end up with room for its margin if it won the tender. Hung offered to deliver the tender documents to YWCA and, as Siu was not feeling well, he had no objection.

246. Siu said he was not at that time aware that BT was also a bidder in the second tender, that anyone had a deal registration with Nutanix relevant for the second tender or that YWCA's procurement rules required at least five bids for a valid tender. He considered that whether anyone had a deal registration with Nutanix was not relevant to his decision-making process when providing quotations for Nutanix products. He believed he had "properly considered and completed" the tender documents for Innovix and that, once submitted, they would constitute "a genuine bid with a good chance of winning".

247. Cheung was an Assistant Product Manager of Innovix. He worked with Siu in handling Nutanix products from July 2015 to the end of June 2016. His evidence was that he found Hung very pushy, scary and difficult to work with and that he agreed to stay on in Innovix beyond June 2016 only after it was agreed that he need not work on Nutanix matters from July 2016. YWCA's second tender therefore took place during his transition period.

248. Cheung also recalled that in late 2015 he learnt that YWCA preferred the Dell-Nutanix solution and considered that thereafter it would be a matter for Innovix's Dell team. When he received the WhatsApp message from Hung at 07:56 on 18 July 2016 (see §143 above), he told Hung to contact Siu. He arrived in the office at about 09:15 and then went out with his colleagues for breakfast before returning to the office at about 10:00. He had not read the two e-mails from Hung to Siu which were copied to him. He recalled that later that morning, Siu came to his desk and asked him to sign some papers, saying they were tender documents. Cheung signed them without paying any attention.

249. Cheung's evidence was of peripheral relevance. As to Siu, I do not find him a reliable witness and in critical respects I do not believe his evidence. He was evasive during cross-examination. His answers do not hang together.

250. The WhatsApp message Hung sent him at 08:35 on 18 July 2016 began with the phrase "Need your help". Hung was asking Siu for help; he was not offering help to Innovix to bid for the YWCA business. Siu's response that he did not find those words surprising because if Innovix won the deal Nutanix would also have business, does not sit well with their description of Hung as "scary", "aggressive" and "pushy", or with Siu's evidence that he was simply expecting Hung to help him by providing him with a quotation.

251. Siu had not even attempted to fill in the tender documents by himself prior to 18 July 2016. Although Innovix had not requested or authorised Hung to prepare a tender for it, Hung had taken it upon himself to do so, and had gone to the lengths of filling in the forms as far as he could

including the prices. Siu's claim that he was not surprised by this either was unrealistic if it was Innovix's genuine bid. When asked whether it was a normal procedure at Innovix for an outsider such as Hung to draft Innovix's tender submissions at his own initiative, Siu was unable to provide any credible explanation other than to say he found it "reasonable". In fact he said he had rarely come across tenders, as opposed to requests for quotation.

252. The 09:16 e-mail from Hung to Siu expressly stated "We help BT to bid for Dell deal". The e-mail also asked him to print two copies and he did so.[42] Since he said he was a person who disliked hardcopies, he would not have printed off two copies of the attachments unless he had read the e-mail. I do not find it credible either that he had no recollection of reading the sentence (as claimed in his statement) or that he did not read the e-mail (as claimed in his oral evidence). He was not able to give a satisfactory answer to whether it was his practice to open attachments without reading the text of e-mails. Just prior to the weekend, on around 14 July, Siu had asked Hung what should be done with regard to the YWCA tender which had a deadline of Monday 18 July noon. On 15 July, Friday, Cheung forwarded to Siu the reminder from YWCA (Wong) stating the Monday deadline and requesting for a tender. When he finally received Hung's email on Monday he would have wanted to know how Hung wanted to "handle" the tender. I found that Siu did read it.

253. It is also not credible that Siu did not know what that sentence meant. It was a short, simple sentence. Siu admitted he knew what "BT" referred to. In writing it, Hung plainly thought that Siu would know what he meant. After all, Siu had been involved in helping BT with giving quotations

[42] Siu said either he or Cheung (though he was not sure which) printed the documents but since Cheung had not read the e-mails, it must be Siu who printed the attachments.

to YWCA for the Nutanix system, and later learnt that YWCA wanted the Dell-Nutanix solution instead of the Nutanix-NX solution. He received the invitation to the YWCA tender and had asked Hung what should be done with it. On Monday morning the email to him had the subject of "YWCA Tender deadline today", told him to "help BT to bid for Dell deal", and attached completed YWCA tender forms for him to sign. Siu accepted that he had wondered from time to time what Hung was getting at, but could offer no alternative meaning. His claim that even after the Commission's investigation and the commencement of these proceedings, and even as he was testifying in the Tribunal, he still had "no idea" what Hung meant, is to my mind utterly beyond belief. Plainly, as he well understood, it indicated to him an arrangement whereby Innovix was to put in a bid to YWCA, not to win but to help BT's bid win.

254. The Schedule of Rates had been completely filled in by Hung, leaving only the signature. Remarkably on his case, Siu did not know how much Innovix would itself have to pay for the product. His explanation was that he took a look at the price in the Schedule of Rates, guessed the cost price which he thought would be "a bit more than HK$200,000" per node, and thought the tender price should be "okay". I find this explanation wholly incredible.

255. The mark-up margin of Innovix is a matter for Innovix to decide. It is against business common sense that Innovix would submit a tender, with a price binding on itself, without even obtaining a quotation from the ultimate vendor. If Innovix's bid was truly intended to be genuine, it is inconceivable that Siu would have taken no step at all to find out what Innovix would be charged for the product by Nutanix or Dell, particularly given the importance he attached to prices and numbers.

256. Since Hung was there in Innovix's office, there was no reason why Siu did not obtain a quotation from him, which was what he claimed he thought Hung would revert to him with. In cross-examination, Siu said there was "not a word" discussed with Hung as regards the cost price for Innovix, but could not credibly explain why. Siu said he did not raise it with Hung because he (Siu) "did things based on trust". He knew Hung would not let Innovix make a huge profit but trusted that he would give Innovix "at least a reasonable margin". This is hard to believe given that, according to Siu, he did not like Hung very much at all and found him "pushy and aggressive", and "scary and difficult to work with".[43] Hung had previously repeatedly made demands to Innovix which required "huge resources" from Innovix but with "all too little benefit" to it.

257. It is also incredible that Siu could "guess" the cost price, as he claimed, because the evidence was that it would differ depending on which kind of hardware was employed — Dell, Lenovo or Nutanix. At one point in his oral evidence Siu said the price would be similar whichever hardware was used, but just a little later he said he knew YWCA had earlier opted for Dell partly because of the difference in price between Dell hardware and Nutanix hardware. There is no explanation why he needed to "guess" when Hung was right there at the office with him.

258. What was offered in Innovix's bid was in fact the Dell-Nutanix combination, which means that Innovix would have had to source from Dell. The evidence from Nutanix (Frank Young III) was that for a Dell-Nutanix solution, the product (Dell hardware packaged with Nutanix software) would be sold by Dell directly who would pay a royalty to Nutanix for the software component. Siu did not know how much Dell would charge. In fact, on Siu's

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[43] a description of Hung by Cheung with which Siu agreed.

evidence, what Dell would charge Innovix would never have entered Siu's mind at all because he did not even notice that Innovix's bid offered a Dell-Nutanix solution; he thought it was a Nutanix-NX solution.

259. If the bid was genuine, it would be extraordinary that Siu, as he claimed, did not notice that the Schedule of Rates specified a Dell-Nutanix solution rather than a Nutanix-NX solution. The model numbers for the two products were completely different, and Siu said he was very familiar with Nutanix products. Even if Siu was a "computer geek" (in the words of Innovix's counsel) who would not read the fine print of a tender document, and even assuming he was as busy as he claimed, he would at least have paid attention to what product he was offering to sell in the tender. On his own evidence, while he might not be too interested in the other information, the "most important" was the price and technical documents.

260. The only credible explanation for what happened was that he did not care. It was simply not a genuine bid. He had no expectation that Innovix would be called upon to deliver whatever was written there. There is no truth in his claim that he had carefully and properly considered the tender documents.

261. It is plain that Siu approached the tender documents in a "slap-dash" manner.

(1) In the Form of Tender, Siu filled in the initial numbers of Innovix's business registration certificate and its date in the section intended to apply where a *subsidiary* of the tenderer will be submitting the bid and gave no particular thought as to whether it would be Innovix or its subsidiary that might take up the opportunity. Incidentally, the Form of Tender sent by Hung

to Siu (as one of two attachments to the 09:16 e-mail) had *Tech-21's* website address and *Steve Ng's* e-mail address inserted. These were tippexed out when Siu completed the form with Hung.

(2) Siu had read neither the Terms and Conditions of Tender nor the Technical Specifications before signing the Compliance List which provided what were supposed to be Innovix's answers to questions about those documents.

(3) As for the Supplier Profile Form:

(a) It wrongly stated Innovix to be a "Partnership" (as opposed to "Private Corporation").

(b) None of the documents requested in the Supplier Profile Form, such as a brochure and the business registration certificate, was included with the tender. Nor was any banking information provided. In the space for the bank's name, Hung had typed in the words: "Detail will provided when Tender Award" (*sic*).

(c) Under "work schedule", Hung had typed "5 Days/Month, 7 Days/Week, 24 Hours/Day". Siu crossed out "5" and wrote down "30", but even with the amendment the work schedule was still patently unrealistic.

(4) Siu did not prepare and include any Technical Proposal which was prominently stated in Part D of the Form of Tender as a document *required* as part of the tender offer:

> " The Tenderer is required to provide a **Technical Proposal**, which forms part of the **Tender Offer**, for the consideration of the [YWCA]. …"

Furthermore, YWCA's invitation letter and e-mail of 8 July 2016 had mentioned the Technical Proposal as one of the documents required for the tender to be acceptable.

(5) Siu did not apply Innovix's company chop to the tender documents.

(6) Siu did not even keep a copy of the tender documents as filled in, amended, and signed.

262. While one does not necessarily expect perfection in the documentation, a company which had any desire of winning the tender would have taken some care with the preparation of the tender documents. Clause 1.8 of the Terms and Conditions of the tender expressly provided that tenders may not be considered if complete information was not given or if any of the particulars and data asked for in the Form of Tender, Schedule of Rates and/or Letter of Invitation were not furnished in full. This is not a simple quotation that Siu could provide by sending a short email.

263. Innovix submitted that there was no motive for Siu to agree to submit a non-genuine bid to YWCA. However, as the documents show, it was Hung's request to Siu for help, which was in turn to help BT's bid. I do not think that the absence of any specific financial or commercial reward shows the agreement to be improbable. After all, the parties were in a continuing relationship: Innovix was one of the only two distributors of Nutanix products in Hong Kong at the time, and despite being a relatively new entrant to the Hong Kong market, Nutanix products accounted for about 5% of the team sales of Siu. Nutanix was also a major player, if not the one with the biggest market share worldwide – for hyper-converged systems in 2015 to 2016.

264. For its part, BT knew Innovix was one of the "friends" from whom Nutanix would procure dummy bids. I reject BT's submission that "they had no knowledge that Nutanix were contacting Innovix".[44] On 5 July 2016 Chan already told Hung that once Chan finished the table (referring to the Schedule of Rates), "I will share it with you so you can give the quotation to your friend to just fill in". On 6 July, Hung gave Chan four names including Innovix. On 10 July, Chan sent Hung BT's completed Schedule of Rates saying: "Attached is the template I prepared for your friends to fill in". In fact, on 15 July, Chan prepared and sent Hung a Compliance List with Innovix's name filled in.

265. In my judgment, the evidence shows beyond doubt that:

(1) Pursuant to his agreement with Chan, Hung needed Siu's help to submit a dummy bid to YWCA in the name of Innovix to help make up the numbers so that BT would win the second tender.

(2) BT knew that Innovix was one of the friends from whom Hung was to obtain a dummy bid, which was not intended to win but just to make up the numbers.

(3) Siu agreed to help. He knew that BT was entering a bid and what Hung requested of him was intended to help BT win.

(4) Siu knew that the bid for Innovix and, in particular, the bid prices, had been prepared by Hung and not by himself, without any reference to anyone in Innovix. Hung knew BT's bid prices and that Innovix's bid prices on the main item were 16.7% higher, though there is no evidence that he told Siu this. Nor did Hung tell Chan Innovix's bid prices. But all three knew that Innovix's

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[44] BT Closing §98.

bid was not intended to win and was submitted solely to help BT win, and they all had no expectation that Innovix would win.

(5) They all intended that YWCA would treat Innovix's bid as a genuine bid.

266. There was therefore a trilateral agreement between Nutanix, BT and Innovix for Innovix to submit a dummy bid to YWCA to help BT's bid. Alternatively, they knowingly substituted practical cooperation for the risks of competition by procuring Innovix to submit a bid with no intention of winning but with the intention of helping BT, and thereby engaged in a concerted practice.

H. AGREEMENT BETWEEN NUTANIX AND TECH-21

267. This section deals with the agreement between Nutanix and Tech-21. The Commission contends that there was an agreement or concerted practice between Nutanix and Tech-21 for Tech-21 to submit a non-genuine bid to YWCA.

268. The basic facts are again not in dispute (see section D(8)(c) above). On 6 July 2016, Hung sent a message to Steve Ng, Sales Manager of Tech-21, stating: "may I have your help on one pig pig quotation. YWCA or YMCA. I call you now?" They then had a telephone conversation. Tech-21 received the invitation to the second tender but its director, Ivan Lau, did not

originally intend to bid, and replied to YWCA to that effect at 10:23 on 18 July 2016.

269. Meanwhile, Hung had prepared the tender documents to be submitted by Tech-21, including the prices in the Schedule of Rates. The price inserted for the main item (item 2.1) was 27.7% higher than BT's. The product offered was a Nutanix-NX solution. Hung sent a message to Steve Ng at 07:56 on 18 July 2016 stating: "Need your help on YWCA tender response …" They had a telephone conversation at 09:18, which was followed by Steve Ng's audio message to Hung at 09:20. There were further telephone calls from Hung to Steve Ng and then, at 10:38, Hung e-mailed to Steve Ng (i) the Form of Tender, (ii) the Schedule of Rates, and (iii) the Supplier Profile Form, for him to complete and sign. By 11:07 Steve Ng had finished with the documents. After leaving SiS's office in Chai Wan, Hung went to Kwun Tong and collected Tech-21's bid, which he submitted to YWCA late, at 12:15. Tech-21's bid did not contain a Compliance List.

270. Tech-21 called Steve Ng to give evidence. He explained that he had first approached Hung in around December 2015 to enquire about Nutanix products. Between then and mid 2016, Tech-21 had three business dealings with Nutanix. He was on a long vacation between June and mid July 2016. He said that he was a bit confused by Hung's WhatsApp messages at 07:56 on 18 July 2016 and therefore spoke to him on the telephone. He was under the impression that Nutanix had already done the pre-sales preparatory work with YWCA and that Tech-21's chance of winning the tender was "high".

271. Steve Ng said that he checked the price Hung put in the Schedule of Rates which he found to be similar to the price Tech-21 usually offered. As

time was short, he had not gone through the details of the tender documents except the price. He signed and stamped the company chop on the tender documents, put them into an envelope and handed it to Hung in Kwun Tong. He had not seen the Technical Proposal submitted with Tech-21's bid, which must have been inserted by Hung himself after collecting the envelope.

272. Steve Ng said he adopted Hung's price since his main concern was to win the tender. He thought that Nutanix would offer him "a good price" and that he "would be able to negotiate a good price from Nutanix and make some profit should Tech-21 win the bid". He thought the chance of winning the tender was "50/50". He said some time after 18 July 2016 he called Hung and asked whether Tech-21's price was attractive and Hung said it was. Steve Ng said he had never heard of the company "BT Hong Kong Limited" and that he believed Tech-21's bid was a genuine bid.

273. Although Steve Ng had already left Tech-21 by the time of trial, I do not find his evidence reliable. In my judgment the evidence establishes that Steve Ng knew that the bid submitted by Tech-21 was not intended to win but was submitted simply as a favour to Hung.

274. Steve Ng claimed that he understood Hung was referring the YWCA tender opportunity to Tech-21. However, he accepted that in doing so, Hung would be helping him. But the WhatsApp message Hung sent him at 07:56 on 18 July 2016 started with "Need your help …". This was not usual pleasantry, as Steve Ng claimed. Tech-21 had received YWCA's invitation to tender but did not intend to bid. Steve Ng's boss, Ivan Lau, indeed replied to YWCA at 10:23 on the very same day that Tech-21 would not be tendering. In truth, Steve Ng knew that he was being asked by Hung for help and that he

was helping Hung — rather than the other way round — by completing the tender documents.

275. This is fortified by the audio message Steve Ng sent Hung at 09:20, which ran:

> "Does it require company stamp? I don't know, it should require having company stamp for normal case. I need to see and think as to what to do for you."[45]

276. Plainly Steve Ng knew that this was *not* a "normal case" and that he was doing something for Hung. When asked about this audio message, Steve Ng was unable to give any coherent explanation of what was abnormal about this case, as shown in the following exchanges:

> "Q. Now, in that conversation you made it clear — I'm referring to the second sentence — that for the normal case a company stamp would be required?
>
> A. Right.
>
> Q. So what was abnormal about this case?
>
> A. That no company stamp was affixed, that no company chop was affixed, if there was no company chop affixed and I got flunked, so I will be dead.
>
> Q. So if this was just a normal transaction, why did you not arrange for the company chop to be used, as was the normal practice?
>
> A. So I said that the company stamp needed to be arranged. This here says that the company stamp needed to be arranged. Otherwise the customer might flunk me.
>
> Q. Did you arrange for the chop?
>
> A. Yes.
>
> Q. Was the chop used on the documents?
>
> A. Yes.

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45 In Chinese original: 「喂要唔要扱公司印㗎？個簽名……我唔知呀，正常應該要搽公司印㗎喎，我要睇嚇諗諗同你點樣搞呀。」

Q. Was there anything abnormal about this case that you had to ask that question?

A. No.

Q. In the end of that message you said to Mr Hung, 'I'll need to see and think as to what to do for you'. Do you see those words?

A. Yes.

Q. Was that in response to Mr Hung asking you for help?

A. I would have to give him the reply that I would take the case.

Q. He had asked you for help, and you were saying, 'I'll need to see and think as to what to do for you'?

A. Right, correct."

277. When the three tender documents were eventually sent to Steve Ng at 10:38, time was very short, and he also had a meeting at 11:00. There was clearly insufficient time for him to give proper consideration to the tender documents. Steve Ng also admitted he had not read the terms and conditions of tender before signing the tender documents without any alteration at all.

278. If Tech-21 was serious about the tender, it was important that it submitted documentation satisfactory to those who had the task of awarding the tender. Steve Ng's evidence disputing this seems to me incredible. It is however understandable why he denied it, since there were numerous problems with Tech-21's bid.

279. Prominently on the front page of the Form of Tender, Tech-21 did not fill in its business registration certificate number or the expiry date. Instead, the phrase "Please FILL-in" appeared twice on that page as submitted, which had obviously been inserted by Hung (and highlighted in yellow for Steve Ng in the soft copy).

280. Only one entry (in the space for seven numbered entries) was put in Part D of the Form of Tender, namely "Overall Company Profile with Technical Proposal". However, Steve Ng had neither seen such Overall Company Profile nor Technical Proposal, even though he signed the page and stamped the company chop at the bottom. While a Technical Proposal was eventually submitted with Tech-21's bid, it is plain that Hung inserted it himself into the envelope after he collected it from Steve Ng. Steve Ng said he had not seen the Technical Proposal and had "no idea about this document at all". On Tech-21's case, it would be extraordinary that Steve Ng did not even think about the Technical Proposal, which, as stated in the Form of Tender, was a document *required* and formed part of the tender offer (see quoted words in §124 above). In fact, Steve Ng had no idea about the document because he was not serious about the tender.

281. Steve Ng said he did not have any discussion with Hung about the price. He simply signed and stamped the Schedule of Rates without making any changes. He thought the amount stated in the Schedule of Rates was the cost price to Tech-21, and that if Tech-21 really won the tender they would "become thick faced" and start asking Nutanix to offer a lower cost. I accept that Steve Ng did not discuss the price with Hung but I reject his explanation.

(1) Steve Ng at first accepted that the "normal" procedure for Tech-21 when tendering a price to an end-user was to include a figure with two elements: (i) acquisition cost to Tech-21, and (ii) Tech-21's mark-up margin.

(2) When questioned as to why this transaction was any different, Steve Ng was unable to provide any coherent explanation. Instead, he was forced to say that there was "no difference" and

his "usual practice" was to give out a quote of "zero margin" and then "negotiate the price" with the vendor. This, he claimed, he did "all the time".

(3) This is wholly at odds with his statement, which stated that after he had received a price quote from the vendor, he could decide whether or not to mark up, and, if so, how much to mark up.

(4) On Steve Ng's new version, Tech-21 would inevitably make a loss on its contract with YWCA unless Tech-21 could subsequently negotiate a lower price with Nutanix, given that if it won, Tech-21 had to provide a 3-year onsite maintenance support warranty, third-party liability and employee compensation insurance coverage, site supervision, site coordination with other parties, site protection, site cleaning and debris removal under item 1.0 in the Schedule of Rates. Yet Steve Ng simply signed it, without changing the rates and without even speaking to Hung about price at all. As a matter of business common sense, the evidence is not credible.

(5) This is not a case where Steve Ng was given a quote by Hung of what Nutanix would charge Tech-21 and asked to make his own bid to YWCA. He was faced with a remarkable situation where Hung had, of his own motion, filled in the Schedule of Rates for Tech-21 and sent it to Steve Ng simply to print out and sign. There is no credible reason, if this was a genuine tender, why Steve Ng simply assumed the bid price filled in by Hung was Tech-21's cost price, without speaking to Hung about the price at all.

(6) Steve Ng's explanation is therefore implausible even in the isolated context of the YWCA tender. It is wholly inconceivable that this was Tech-21's "usual practice" as he claimed.

(7) Steve Ng's suggestion that he understood the price stated in the Schedule of Rates provided by Hung represented Tech-21's cost is inconsistent with Siu's suggestion that the price inserted by Hung represented Innovix's cost plus a mark-up margin for Innovix (see §245 above). The truth is that neither explanation is credible.

(8) Tech-21's submission that this might be a naïve but innocent attempt on its part to win a customer is not realistic. The only reasonable inference in my view is that Steve Ng did not care about the price and did not discuss it with Hung because the bid was not intended to win and he did not expect Tech-21 would be called upon to supply the product to YWCA.

282. Tech-21 did not fill in the Supplier Profile Form properly.

(1) The form wrongly stated Tech-21 to be a "Partnership" (as opposed to "Private Corporation").

(2) It wrongly stated the total number of employees as "over 60" when there were only ten odd people in the company.

(3) Under "work schedule", Hung had typed "5 Days/Month, 7 Days/Week, 24 Hours/Day", as in the form he had filled in for Innovix. Unlike Innovix's bid, however, no amendment was made to "5 Days/Month" (see §261 above). The work schedule as submitted just did not make sense.

(4) Under "Bank Name", Hung had filled in: "Detail will provided when Tender Award" (*sic*), which Tech-21 left to stand.

283. Furthermore, Tech-21 did not submit a Compliance List with its tender. That means Steve Ng omitted both the Compliance List and the Technical Proposal even though YWCA's invitation letter and e-mail of

8 July 2016 expressly specified both documents were required for the tender to be acceptable.

284. Tech-21 also did not bother to keep a copy of the signed tender documents.

285. Tech-21 submitted that between 18 July and 9 August 2016, Steve Ng followed up with Hung and asked whether the price offered by Tech-21 was attractive and whether they had the chance to win, and that Hung told him it was attractive and they did have a chance. However, as I have found the central part of Steve Ng's story about the events on 18 July 2016 incredible, I do not consider this alleged subsequent conversation (albeit not dealt with by the Commission in cross-examination) can be given credence.

286. It is true that there is no evidence to show that Steve Ng was aware that YWCA required a certain minimum number of bids, or that Tech-21's bid was to make up a total of at least five bids, or that it was submitted to help BT win. There is no evidence that Steve Ng knew who the other bidders were. However, the way Tech-21 approached the tender is wholly incompatible with any intention on its part that the bid was a genuine one submitted with a view to winning the contract. On the contrary, the evidence shows that Steve Ng saw this as an abnormal case. He knew he was submitting a bid, which was not genuine and not intended to win, in cooperation with Nutanix. The plain intention is to create a false impression for YWCA that there was an independent genuine bid from Tech-21 competing in the tender.

287. On the evidence, I find that:

(1) Pursuant to his agreement with Chan, Hung needed to procure a dummy bid from Tech-21.

(2) The bid documents had been provided by Hung; they were not prepared by or with reference to anyone in Tech-21, and Steve Ng knew that. Steve Ng also knew that the bid prices had already been inserted in the documents, but was not concerned about them because he did not intend or expect the bid to win.

(3) Tech-21's bid was submitted solely because of Hung's request and as a favour, and Steve Ng knew that.

(4) Steve Ng knew that Tech-21's bid was not intended to win, and did not have any expectation it would win, but he intended that YWCA would receive Tech-21's bid as a genuine bid and be led to believe that there was an independent genuine bid from Tech-21 competing in the tender.

I. ATTRIBUTION OF CONDUCT AND KNOWLEDGE

(1) The issue

288. The competition rules in the Ordinance focus on the conduct of undertakings. An undertaking, as defined in s 2:

> " means any entity, regardless of its legal status or the way in which it is financed, engaged in economic activity, and includes a natural person engaged in economic activity".

289. It can be seen that an undertaking designates an economic unit. It does not correspond to the concept of a legal person. While undertakings may be natural persons, very often they are companies. Each of the five respondents in this case is a company. A company acts through human agents. There is no dispute that the conduct of Hung, Chan, Siu and Steve Ng was attributable to Nutanix, BT, Innovix and Tech-21 respectively. The issue has arisen, however, as to whether what Shek knew and did may be attributed to SiS.

(2) The facts

290. The following facts are established by the evidence.

(a) The set-up within SiS

291. SiS was a wholly-owned subsidiary of SiS International Holdings Ltd, a company listed on the Hong Kong Stock Exchange. The principal business of SiS involved the distribution of IT products, including computer storage, network and infrastructure products, in Hong Kong and Macau. This means that SiS would purchase products from the vendors and sell them to resellers who would on-sell them to end-users. It would also help vendors market and promote their products to resellers. As a distributor, SiS did not, with rare exceptions, sell directly to end users, and did not respond to tender invitations from end-users. Exceptions occurred where, for example, resellers purchased products from SiS for their own use, thereby assuming the role of end-users, or a vendor had already signed a global contract with an end-user and SiS was involved as a fulfilment hub to sell directly to the end-user.

292. Thus although the terms of the International Distribution Agreement, whereby SiS was appointed a non-exclusive distributor of

Nutanix products, allowed SiS to purchase Nutanix products for resale to both resellers and end-users, SiS did not in fact sell directly to end-users. In particular, SiS had never submitted a bid in the tender exercises of end-users. This is consistent with the evidence that, on 6 July 2016, when Priscilla Szeto, Assistant Sales Manager of SiS, received a telephone call from Wong (of APD of YWCA) asking if SiS would be interested in submitting a tender to YWCA for a hyper-converged system, she immediately replied in the negative, though she mentioned that she could forward his enquiry to resellers. She followed this up with an email of the same date to Wong in which she offered to remind some resellers to respond to the tender.

293. In cases involving response to a reseller's request for quotation, SiS's Sales Department would work with and obtain approval from the Product Marketing Department, Technical Department, and Finance Department before submitting the response to Raymond Au, Business Development Director and the head of SiS, for consideration, who would also pass the same to the Finance Department at the group level for the terms to be reviewed. No single member of staff within SiS could individually decide on the contents of a response to a request for proposal.

294. Within SiS there were well defined limits of employee responsibility. Shek was at the material time one of eleven Product Managers in SiS, who were relatively junior employees in the organisation, working under the supervision of Joe Lam, Senior Business Manager. Each Product Manager was responsible for approximately two vendors. One of those, in the case of Shek, was Nutanix, starting from October 2015. His job included providing product information to customers and organising promotional activities, but he did not have authority to make any major decisions. He was authorised to provide provisional quotations to resellers, but if a provisional

quotation was acceptable to the reseller, the matter still had to be approved by Shek's superiors and other departments and eventually by Raymond Au. Shek had no authority to commit SiS to any expenditure, to sign any outgoing documents to bind SiS, or to enter into any formal agreement on behalf of SiS, including the tender submitted to YWCA. Shek accepted that the statement in the Form of Tender in SiS's bid that he was the authorised personnel of SiS was false.

295. SiS published a Code of Conduct for its employees. The version current at the relevant time provided in clause 6:

> "- We believe in vigorous, fair and legal competition. The anti-trust laws (aka competition laws, consumer protection laws or unfair competition laws in some countries) prohibit business practices that limit competition improperly. Although the spirit of these laws is straightforward, their application to particular situations can be very complex. Always seek legal advice if there is any doubt.
>
> - Agreements among competitors to fix prices, restrict output, allocate markets or customers, rig bids or violate fair bidding practices, or boycott the supplier or customer are prohibited and generally illegal."

296. After Shek joined SiS, there had been at least two compliance training sessions for its employees on regulatory and compliance issues organised by SiS's vendors. One of them was held in September 2015 and included topics on competition best practices, which explained that bid rigging (referred to as a scheme in which businesses collude so that a competing business can secure a contract for goods or services at a predetermined price) was prohibited.

(b) The second tender

297. On 6 July, Wong called Priscilla Szeto and asked if SiS was a

distributor of Nutanix products, to which Szeto said yes, and whether SiS would be interested in submitting a tender to YWCA for a hyper-converged system, to which Szeto said no. She however offered to forward his enquiry to other resellers to see if they were interested.

298. Later that day, Szeto emailed Wong (cc Shek) and asked him to provide the tender document so that she could chase the resellers to reply. Wong replied (cc Shek), saying the detailed tender specifications were still a work in progress, but gave the basic information of what was required. Szeto then replied saying she would update Wong soon, which she did not because, she explained in her evidence, SiS would not sell directly to end-users anyway and she did not receive the tender document from Wong.

299. By an email dated 8 July 2016 sent to Shek, Wong sent SiS an invitation to the second tender.

(c) Submitting the bid on 18 July 2016

300. According to Shek, on the morning of 18 July 2016, he had told Raymond Au and Joe Lam that Hung would be coming to SiS's office and that Hung had asked SiS to submit a return bid as there were insufficient bids, and neither of them expressed any disapproval. I reject this evidence. In fact, on Au's evidence, which was in the end unchallenged, he was on sick leave that morning and did not get back to the office until after both Hung and Shek had left, and could not therefore have had the conversation with Shek as alleged by him. Joe Lam was in the office and did catch sight of Hung just as he was about to leave, but I accept his evidence that he did not speak to Shek as alleged.

301. Although there were other people in the office, Shek acted alone with Hung in filling in the tender documents in SiS's office. Shek did manage to have SiS's company chop applied to the tender documents. Precisely how this occurred was the subject of controversy, which I deal with below.

302. Shek took a taxi to YWCA to deliver SiS's and Innovix's bids. Hung offered to reimburse him for the taxi fare but Shek declined. Instead, Shek submitted the taxi receipt to SiS for reimbursement of the expense. For the claim, Shek stated that he went to "M Security" or "M Securities", instead of YWCA. Shek was unable to identify which entity he meant to refer to by that name, or to offer any credible explanation for putting down that name which he had not heard of before. I do not believe the suggestion that by the time he filled in the expense form, he had forgotten where he had been that morning. It seems to me far more likely, and I find, that he put down a nondescript name because he did not want to reveal to SiS's Finance Department his trip to YWCA on 18 July 2016.

303. Shek made no report of the bid to SiS; nor did he keep a hard copy of the documents submitted. I do not accept his claim that he kept a set of the documents next to his desk — it was not there when the Commission searched the office. The probable reason why he did not keep a copy was that he believed SiS would never win the tender. Since he was the sole contact person on the tender documents, he would have been the only one in SiS notified by YWCA when eventually the bid, as expected, failed.

(d) The meeting on 9 August 2016

304. Shek did not report to anyone in SiS afterwards that he had submitted a bid to YWCA in the name of SiS. The first time that SiS's

management learnt of the bid was 9 August 2016 when the Commission visited SiS's office for investigation. After the Commission officers left, Raymond Au called a meeting with Shek, attended also by Joe Lam, Priscilla Szeto and one Alan Chan. When questioned why he submitted a bid to YWCA, Shek explained he did so because Hung asked him to do so. He said that the request came at very short notice and that he had submitted the tender "for reference only". Au had a few choice words for Shek for what he had done and told him not to do it again. I reject Shek's evidence that Au did not express any disapproval of his conduct.

(e) SiS's company chop

305. Regarding the use of SiS's company chop on the tender documents, Shek's evidence vacillated. In his statement dated 13 February 2017, Shek said he recalled placing a chop on the documents, which suggests it was he who stamped them. This is consistent with the Commission's Reply which pleaded that Shek signed and chopped the documents. In his statement dated 19 October 2017, Shek said he brought the documents to the colleague who kept the company chop and asked her to stamp the documents with it. He said the colleague asked about the nature of the documents and his reply "should be" that they were tender documents, though he could not recall the exact answer he gave. He identified the colleague as Shirley Pang, head of the Operations Department, in his statement of 27 November 2017. His draft statements were likewise inconsistent. In oral evidence Shek initially said that the chop was applied by Shirley Pang and he did mention to her that it was a tender document, but later retreated to saying that if it was he himself who affixed the chop, it would have been in Pang's presence and with her knowledge.

306. I do not think Shek's evidence that he told Shirley Pang about putting the chop on tender documents is reliable. His evidence in the October 2017 statement was tentative. In that same statement he claimed that no guidelines had ever been laid down by SiS on the use of the company chop, which he admitted at trial to be a false statement, because in fact Shirley Pang had issued a circular on 6 June 2016 on the use of the company chop which stated as follows:

> "For security reason, please be reminded that you should put the company chop in a safe and proper place when you are away. For those who need the Chop for business purpose, you can get it from me by completing the requisition form with your department head's approval."

The requisition form attached required the purpose to be filled in.

307. It is common ground that there was no requisition form filled in by Shek on 18 July 2016. But this could be due to the fact that Shek's responsibilities included completing documents for obtaining import and export licences for products on a weekly basis, which Shek had to bring to Shirley Pang for stamping with the company chop. Raymond Au said that, as a consequence, Shek was in a somewhat special position, so that the policy on company chop was not strictly enforced in relation to him and approval could be obtained orally from Shirley Pang instead.

308. The Commission submitted that the Tribunal should draw an inference, adverse to SiS, from the fact that it did not produce Shirley Pang, who was still in its employ, as a witness. I noticed that Raymond Au was distinctly uneasy when asked why he did not mention Shirley Pang by name in his own statement and also when asked why she was not called. His answer to the latter question was that she "doesn't really know how to speak".

Further, SiS's hearsay notice did not cover the paragraph in Raymond Au's witness statement which stated that he had checked with the colleague in question who confirmed that it was Shek who took the chop and applied it to the tender documents. However, I decline to draw an inference that Shirley Pang knew that Shek applied the company chop to the tender documents, because:

(1) While the Commission relied in its pleaded case on the fact that Shek was provided with access to SiS's company chop, it did not advance a case that Shirley Pang or any other person responsible for the chop either knew or should have known that Shek applied it to the YWCA tender documents.

(2) Shek's evidence in his statement about what he said to Pang was tentative — using the phrase "should be" and saying he could not recall exactly what he told her. Also, for some unknown reason, like Raymond Au, he too was reluctant to name Shirley Pang in his witness statement. It was only in his oral evidence that he asserted definitely that he mentioned it to Pang. Further, his evidence, insofar as it sought to implicate others in SiS, has been shown to be unreliable.

309. It was possible that Shek gave Pang some broad, anodyne reason for requiring urgent access to the company chop, and was trusted by Pang with it. Shek made no claim that he explained to the meeting on 9 August 2016 that he had told Pang about submitting a tender, which one would have expected him to do upon being reprehended, if Pang was indeed in the know. At most, in my opinion, the evidence shows that Pang allowed Shek to have access to the company chop without herself ascertaining what the documents were.

(f) *Shek's motives*

310. As to Shek's motives, in his statement he said that he assisted Hung because it was in the interest of SiS, as one of Nutanix's two distributors in Hong Kong, to maintain good relations with Nutanix and Hung. He was afraid that if he did not act as instructed, he would upset him and that might in turn indirectly affect future business cooperation between SiS and Nutanix. He also said that he made an expense claim for the taxi fare because he considered doing work for SiS's vendors to be part of his day-to-day duties.

311. This in my view is not the complete picture. A very substantial proportion of Shek's income from SiS in May and June 2016 consisted of commission for the sale of Nutanix products (Shek being entitled to a percentage of the revenue as his commission if certain conditions on sales volume and gross profit were met). His income in May 2016 was by far the highest he earned while in SiS. In addition, he was invited to a worldwide Nutanix function in Las Vegas between 20 and 24 June 2016 — his first trip to the United States — during which he socialised with Hung, among others, in events including a helicopter tour of the Grand Canyon (free of charge for Shek).

312. It seems to me that by July 2016, Hung held sway over Shek. In a way, Hung was "boss" (which was how Mike Lam (iCON) addressed him in an email: see §127 above). When Hung asked for a favour, Shek felt obliged to help. He was worried that if he did not, Hung would be very angry with him, and that could potentially affect the sales of Nutanix products through SiS and hence his own performance and commission income, even though Hung made no explicit threat of withdrawing business. He felt under great stress that morning because of the time pressure. He was, on his own

evidence, "very worried" that Hung would be "extremely angry" with him if he failed to deliver the bids on time.

313. I accept that keeping good relations with Nutanix would be of benefit to SiS too, but there was a formal distributorship agreement between the two companies and it is doubtful to my mind how much the personal relationship between Hung and Shek could affect, and was perceived by Shek as capable of affecting, the relationship between the two companies. Moreover, as evidenced by the taxi fare expense claim, Shek took steps to conceal the transaction from SiS. He knew what he did was not authorised or permitted by his employer. It seems to me Shek was actuated to do what he did by a desire to please Hung or avoid offending him.

314. SiS submitted that because it was essentially a distributor only, winning the YWCA tender might have jeopardised SiS's commercial arrangements with vendors and resellers. However, I do not think these consequences entered Shek's mind at the time because he had never intended or expected SiS to win the tender. In all likelihood, he thought that what he did would not cause any harm to SiS, but I do not think he acted primarily with a view to benefiting SiS.

(3) Special rule of attribution

315. As explained by Lord Hoffmann in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500, apart from the primary rules of attribution found in a company's constitution, typically the articles of association, and general rules of attribution in the form of the principles of agency and vicarious liability and the like, there is a third category of special rules of attribution which may be relied upon to determine

the rights and obligations of companies. In particular, Lord Hoffmann stated:

> "But there will be many cases … in which the court considers that the law was intended to apply to companies and that, although it excludes ordinary vicarious liability, insistence on the primary rules of attribution would in practice defeat that intention. In such a case, the court must fashion a special rule of attribution for the particular substantive rule. This is always a matter of interpretation: given that it was intended to apply to a company, how was it intended to apply? Whose act (or knowledge, or state of mind) was *for this purpose* intended to count as the act etc. of the company? One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy."

316. In *Moulin Global Eyecare Trading Ltd v Commissioner of Inland Revenue* (2014) 17 HKCFAR 218, Lord Walker of Gestingthorpe NPJ stated (at §78):

> "The third category is sometimes referred to as special rules of attribution, which may give the impression that they are to be found in specific statutory provisions. Any such impression would be misleading. The way in which Lord Hoffmann himself put it (at p 507E) was that "In such a case, the court must fashion a special rule of attribution for the particular substantive rule." Often the legislature will not have spelled out any rule of attribution in clear terms, and in those cases it is the court's task to determine the intention of the legislature from the statutory language, purpose and context. …"

317. In *HKSAR v Luk Kin Peter Joseph* (2016) 19 HKCFAR 619, Lord Hoffmann NPJ (with whom all other members of the court agreed) stated (at §41):

> "In my opinion it cannot be too strongly emphasized that there are no such 'common law principles' [ie uniform common law principles by which one attributes acts, knowledge, states of mind etc to a company]. The authorities since *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 and in particular the more recent cases of *Moulin Global Eyecare Trading Ltd v Commissioner of Inland Revenue* (2014) 17 HKCFAR 218 and *Bilta (UK) Ltd (in liquidation) and others v Nazir and Ors (No 2)* [2016] AC 1 make it clear that in every case the

> criteria for attribution must be such as will give effect to the purpose and policy of the relevant substantive rule, whether that rule is contained in a statute or the common law."

318. The Commission does not contend that Shek represented SiS on the basis of any primary rule of attribution found in SiS's articles or the general principles of agency. For its part SiS accepts that there should be a special rule of attribution for the purposes of the first conduct rule that goes beyond the general rules. BT was also content to accept that it may be correct for the purposes of the Ordinance to fashion *some* special rule of attribution which goes beyond the primary rules and agency rules (although it submitted that for the purpose of the definition of bid rigging, the sole question is that of actual authority for the submission of the bid). Nutanix took a neutral stance on SiS's defence.

319. It is common ground, therefore, that the issue involves fashioning a special rule of attribution for the purpose of the first conduct rule that is appropriate in light of the statutory scheme. One finds the answer by applying the usual canons of interpretation to the first conduct rule, taking into account its language, content and policy.

(4) The parties' submissions

320. The Commission's primary position is that, as a matter of construction of the Ordinance, an undertaking is responsible for acts of its employees carried out during their employment which give rise to contraventions of the first conduct rule. It is a rule of attribution that depends on the act being committed within the temporal currency of the employment.

321. As an alternative case, the Commission contends, relying on a

number of specified matters which are discussed below, that there was a "sufficiently close connection" between Shek's conduct and his employment with SiS or that Shek acted with the actual or ostensible authority of SiS, and that SiS should therefore be held liable for Shek's conduct.

322. In contrast, SiS submitted that an undertaking can be liable for the wrongful acts of its employee provided that the employee, in so acting (albeit in a wrongful manner), was authorized to act on behalf of the undertaking. Whether the undertaking should actually be held liable involves a "multifactorial assessment", taking into account, *inter alia*, the role and scope of authority of the employee and its proximity to the impugned conduct; whether the acts were done to benefit the undertaking or some other party; whether management (if not the perpetrator) was aware of the unlawful act, and whether it has been tolerated or tacitly approved; and whether the individuals responsible for the acts could separately be held liable under the Ordinance even if they are not attributable to the undertaking.

(5) Overseas jurisprudence

(a) EU

323. As the Commission submitted that its contention is consistent with the position in both EU and English case-law in relation to similar prohibitions on anti-competitive agreements, I shall first examine the jurisprudence of these two jurisdictions.

324. In Joined Cases 40/73 etc *Suiker Unie and Others v Commission*, it was argued, *inter alia*, that since the agreements in question had been entered into between the relevant applicants and their agents who were trade representatives, Art. 85 did not apply. The CJEU held (at §539) that if an

agent sells in the name and for the account of a producer or association of producers, he may in principle be regarded as an "auxiliary organ forming an integral part of the latter's undertaking" bound to carry out his principal's instructions and thus, "like a commercial employee, forms an economic unit with this undertaking".

325. *Suiker Unie* did not concern liability for the acts of employees as such, but it illustrates that EU law approaches the question from the concept of undertaking. For many purposes EU law views employees as incorporated into the employer undertaking, and for that reason, does not consider employees themselves to constitute undertakings within the meaning of EU competition law: see Case C-22/98 *Becu and Others*, EU:C:1999:419, §26.

326. In Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others v Commission* EU:C:1983:158, a distributor of Pioneer Hi-Fi equipment, Melchers, which was a partnership, was said to have engaged in a concerted practice with Pioneer and MDF, another distributor, to prevent the import of Pioneer products from Germany into France, infringing Art. 85(1) of the EEC Treaty. Melchers argued that acts committed by employees who have not received instructions from the partners in the undertaking may not be attributed to the undertaking (§5) and that it was not liable because it had not been shown that its partners intended to commit the alleged infringement or that they acted negligently (§96). Rejecting the argument, the CJEU held that for liability to attach,

> "it is not necessary for there to have been action by, or even knowledge on the part of, the partners or principal managers of the undertaking concerned; action by a person who is authorized to act on behalf of the undertaking suffices." (§97)

At §98, the court added:

> " The applicant has not shown that the managers of the hi-fi division of Melchers exceeded the powers which the partners conferred on them by employing them in those posts. …"

327. In Case T-53/03 *BPB plc v Commission*, ECLI:EU:T:2008:254, it was found that the representatives of BPB and other companies had exchanged information on sales volumes and price increases and met with a view to sharing out or at least stabilising the plasterboard markets in various EU countries. It was argued by BPB that since its relevant employee, a Mr D who was a CEO of BPB[46], continued the information exchanges even though it had prohibited them in March 1998, BPB could not be responsible for actions taken by an employee who was acting contrary to its instructions, and that any attributable infringement should therefore be held to have ended in March 1998. The Court of First Instance of the EU stated (at §360):

> " [BPB's] argument that its participation in the infringement would have already come to an end in March 1998 if Mr [D] had not disobeyed its instructions is irrelevant. An undertaking — that is to say an economic unit comprising personal, tangible and intangible elements (Case 19/61 *Mannesmann v High Authority* [1962] ECR 357, 371) — is directed by the organs provided for in its articles of association and any decision imposing a fine on it may be addressed to the management as provided for in those articles of association (management board, management committee, chairman, manager, and so on). The rules of competition would be easily circumvented if the Commission, faced with unlawful conduct on the part of an undertaking, were required to ascertain and to prove who is the author of the various activities, which could have the effect of preventing it from penalising the undertaking which benefited from the cartel."

328. In Case T-588/08 *Dole Food Co Inc v Commission* (affirmed on appeal: Case C-286/13 P), a case concerning a concerted practice between undertakings in coordinating their quotation prices for bananas marketed in Northern Europe, it was argued that the employees who engaged in the

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46 See §§95, 267.

impugned pre-pricing communications did not have authority to set, and did not in fact set, the quotation prices. The General Court, rejecting the argument, held (at §§581-582) that "action by a person who is authorised to act on behalf of the undertaking suffices", citing *Musique Diffusion française*. Since the applicants did not contest that their employees involved, being an Area Manager and a Sales Executive, were authorised to engage in the pre-pricing communications, the fact that they did not have final responsibility for setting quotation prices was irrelevant. See also *FSL Holdings v Commission* Case T-655/11, §§303-304 to the same effect.

329. In Case C-68/12 *Protimonopolný úrad Slovenskej republiky v Slovenská sporiteľňa a.s.* EU:C:2013:71 (which I shall refer to as the "**Slovakian competition authority case**"), the Slovakian competition authority found that three major banks had infringed Art. 81 by entering into an agreement to terminate the current accounts of Akcenta and to refrain from concluding new contracts with Akcenta, which was a non-bank financial institution providing services comprising cashless foreign exchange transactions and needed to have current accounts in banks for its activities. One of the banks submitted that its employee who took part in the meeting of the representatives of the banks concerned had not been given authority to that effect (§24), though the Slovakian Supreme Court noted that the bank had "not distanced itself from the conduct of that employee". The CJEU, answering a preliminary question posed by the Slovakian Supreme Court, stated:

> " 25. The court observes in that regard that, for Article 101 TFEU to apply, it is not necessary for there to have been action by, or even knowledge on the part of, the partners or principal managers of the undertaking concerned; action by a person who is authorised to act on behalf of the undertaking suffices (Joined Cases 100/80 to 103/80, *Musique Diffusion française and Others v Commission* [1983] ECR 1825, paragraph 97).

> 26. Furthermore, as the Commission has pointed out, participation in agreements that are prohibited by the FEU Treaty is more often than not clandestine and is not governed by any formal rules. It is rarely the case that an undertaking's representative attends a meeting with a mandate to commit an infringement.
>
> …
>
> 28. … Article 101(1) TFEU must be interpreted as meaning that, in order to find that an agreement is restrictive of competition, it is not necessary to demonstrate personal conduct on the part of a representative authorised under the undertaking's constitution or the personal assent, in the form of a mandate, of that representative to the conduct of an employee of the undertaking who has participated in an anti-competitive meeting."

330. In Case C-542/14 *VM Remonts v Konkurences padome* EU:C:2016:578, a case concerning attribution of the acts of an independent service provider to an undertaking, the facts of which I have described in §47 above, the CJEU nevertheless referred to the principles relating to attribution of the conduct of employees before distinguishing them from the principles on attribution of the acts of an independent service provider to an undertaking. The CJEU first noted that, in EU competition law, an undertaking is understood as designating an economic unit even if in law that economic unit consists of several persons, natural or legal (§22). The court went on to state, after citing *Musique Diffusion française* and the Slovakian competition authority case:

> " An employee performs his duties for and under the direction of the undertaking for which he works and, thus, is considered to be incorporated into the economic unit comprised by that undertaking …" (§23)

and that:

> " For the purposes of a finding of infringement of EU competition law any anti-competitive conduct on the part of an employee is thus attributable to the undertaking to which he belongs and that undertaking is, as a matter of principle, held liable for that conduct." (§24)

331. While the language of §24 of the judgment in *VM Remonts* appears very wide, it seems to me, with great respect, that the previous case law did not go that far. *Musique Diffusion française* concerned the acts of managers who had not apparently exceeded the powers conferred on them by the employment in their posts, and the court referred to the actions of "a person who is authorized to act on behalf of the undertaking". In *BPB* the employee was the CEO. The employees in *Dole Food* were authorised to engage in the pre-pricing communications which amounted to a concerted practice. *VM Remonts* itself is not an employee case. None of the cases cited to me is a decision that an undertaking is liable for the infringing acts of *any* employee regardless of his position and general responsibilities.

(b) UK

332. In the UK, in the context of the old law under the Restrictive Trade Practices Act 1976, the question of attribution was considered by the House of Lords in *Director General of Fair Trading v Pioneer Concrete (UK) Ltd and Another* [1995] 1 AC 456. In that case, injunctions had been obtained by the Director General of Fair Trading from the Restrictive Practices Court against, *inter alia*, four companies, restraining them from giving effect to certain agreements in contravention of the 1976 Act. Subsequently, employees of those companies (including one Hayter, Unit Manager of Smiths, one of the four companies) made an agreement for the future allocation of supplies of concrete according to certain fixed percentages. The Director applied for remedies on the ground that the four companies were in contempt, having committed breaches of the injunction, and that their relevant employees aided and abetted the contempt. In defence, each company contended that express instructions had been given to each employee not to participate in arrangements of the kind that were concluded and that it had

adopted reasonable compliance systems to prevent such breaches. Two of the companies admitted contempt. The Restrictive Practices Court found in favour of the Director in relation to the other two companies but, on appeal by Smiths, the English Court of Appeal reversed the decision, holding that (in Smiths' case) the agreement was entered into by Hayter personally, not on Smiths' behalf, as he had made it clear to the other parties that he was forbidden by Smiths to do so and had no authority to do so on its behalf.[47] The two companies who had admitted liability sought leave to appeal out of time and their appeals were also allowed by the Court of Appeal.[48]

333. On appeal of the Director from the decision in relation to these two companies, the House of Lords, however, rejected the Court of Appeal's reasoning, and held that, under the Act, an employer was liable for the acts of its employees carried out during their employment, even if the acts were prohibited by the employer, known by the other parties to be so prohibited and thus beyond the ostensible authority of the employees. Lord Templeman, referring to the Court of Appeal's reasoning, said at p 465:

> " My Lords, I cannot accept this pronouncement.[49] It would allow a company to enjoy the benefit of restrictions outlawed by Parliament and the benefit of arrangements prohibited by the courts provided that the restrictions were accepted and implemented and the arrangements were negotiated by one or more employees who had been forbidden to do so by some superior employee identified in argument as a member of the 'higher management' of the company or by one or more directors of the company identified in argument as 'the guiding will' of the company.
>
> The decisions of the Court of Appeal in *Smiths' case* and in the instant case infringe two principles. The first principle is that a company is an entity separate from its members but, not being a physical person is only capable of acting by its agents. The second

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47 See *In re Supply of Ready Mixed Concrete* [1992] QB 213, 231, 235.

48 *In re Supply of Ready Mixed Concrete* (No 2) [1994] ICR 57.

49 Referring to the similar holding by the Court of Appeal in the decision allowing the other three companies to obtain leave to appeal out of time: [1994] ICR 57, 66-67.

> principle is that a company, in its capacity as supplier of goods, like any other person in the capacity of taxpayer, landlord or in any other capacity, falls to be judged by its actions and not by its language. An employee who acts for the company within the scope of his employment is the company. Directors may give instructions, top management may exhort, middle management may question and workers may listen attentively. But if a worker makes a defective product or a lower manager accepts or rejects an order, he is the company. … When Mr Hayter procured Smiths to implement the arrangement that he had made in breach of his instructions Smiths became a party to the arrangement and Mr Hayter aided and abetted Smiths to commit a breach of the Act of 1976 and a breach of the court orders which bound Smiths." (emphasis added)

334. Similarly, Lord Nolan said at pp 472H-473A:

> " [E]ven in the case of a statute imposing criminal liability, and even without any express words to that effect, Parliament may be taken to have imposed a liability on an employer for the acts of his employees, provided that those acts were carried out in the course of the employment. Further, the liability may be imposed even though the acts in question were prohibited by the employer." (emphasis added)

and at pp 474G-475E:

> " A limited company, as such, cannot carry on business. It can only do so by employing human beings to act on its behalf. The actions of its employees, acting in the course of their employment, are what constitute the carrying on of business by the company. …
>
> It follows that, at any rate for the purposes of the Restrictive Trade Practices Act 1976, I am unable to accept that a prohibition at some senior level against the making of an agreement or arrangement which is ignored by the employees concerned is nonetheless sufficient to prevent the employing company from becoming a party to the agreement or arrangement when made. The Act is not concerned with what the employer says but with what the employee does in entering into business transactions in the course of his employment. The plain purpose of section 35(3) is to deter the implementation of agreements or arrangements by which the public interest is harmed, and the subsection can only achieve that purpose if it is applied to the actions of the individuals within the business organisation who make and give effect to the relevant agreement or arrangement on its behalf.
>
> This necessarily leads to the conclusion that if such an agreement is

> found to have been made without the knowledge of the employer, any steps which the employer has taken to prevent it from being made will rank only as mitigation. Liability can only be escaped by completely effective preventive measures. How great a burden the devising of such measures will cast upon individual employers will depend upon the size and nature of the particular organisation. There are, of course, many areas of business life, not only in the consumer protection field, where it has become necessary for employers to devise strict compliance procedures. If the burden is in fact intolerable then the remedy must be for Parliament to introduce a statutory defence for those who can show that they have taken all reasonable preventive measures." (emphasis added)

335. As Lord Hoffmann explained in *Meridian* at p 508G, the attribution rule in *Pioneer Concrete* was derived from a construction of the restriction by injunction or undertaking against the background of the Restrictive Trade Practices Act 1976: such restriction on corporations would be worth little if the company could avoid liability for what its employees had actually done by arguing that the board did not know about it.

336. The case therefore suggests that where an employee committed an act within the course of his employment that infringed a restriction against collusive agreement, an employer cannot avoid responsibility by relying on a prohibition on the employee against committing anti-competitive acts generally or the specific infringing act in question. Hayter was a Unit Manager of Smiths with extensive responsibilities. From the findings made by the Restrictive Practices Court in that case[50], one can see that there were six plant managers below him. He attended board meetings and made reports to the board. Although minimum prime gross margins were laid down for him, Hayter could intervene in pricing, he had a discretion in setting the target gross margin, he was in charge of the performance of the unit as a whole and of the individual plants within the unit and he generally had responsibility to

50 [1991] ICR 52, at 64-66.

achieve results. His job specifications included "the efficient and profitable operation and control of all ready mixed concrete operations in the unit". He had managerial responsibility for all of Smiths' operations in the area covered by the agreement. He was nominally responsible for pricing (though in fact he did not intervene in pricing contracts), and for contracts and customer relations generally. His duties included meeting competitors. On this basis the court concluded that his participation in the prohibited agreements was an unauthorised mode of doing that which he was employed to do, i.e. to manage the unit, and that his attendance at the impugned meetings was in the course of his employment.

337. By referring to the scope or course of the employment, it seems to me that the House of Lords had in mind the kind of considerations relevant to the question of an employer's vicarious liability for the tort of his employee. That was also the sense in which the phrase was used by the Restrictive Practices Court at first instance.[51] Accordingly *Pioneer Concrete* does not support a purely temporal test that attaches liability to an employer simply on the basis that the act impugned was done during the employee's working time.

338. As mentioned already, the *Pioneer Concrete* case was a decision under the Restrictive Trade Practices Act 1976, independent of EU competition law. Under the (UK) Competition Act 1998, s 60 of which seeks to ensure that the principles of competition law applied by the UK courts are consistent with those laid down by the CJEU, the approach in the UK is now aligned with that in EU law. In *A H Willis and Sons Ltd v Office of Fair Trading* [2011] CAT 13 at §§22-26, the (UK) Competition Appeal Tribunal stated that following EU law, the relevant question under the (UK)

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51 See [1992] ICR 52, 65D, 66G-H.

Competition Act 1998 was whether the person who did the act was part of the undertaking, rather than whether the undertaking was liable upon the common law principles of ostensible authority or vicarious liability although these concepts could be useful by way of cross-check.

339. In *Tesco Stores Ltd v Office of Fair Trading* [2012] CAT 31, which was concerned with concerted practices through the exchange of retail pricing intentions relating to cheeses, the (UK) Competition Appeal Tribunal held that the state of mind to be attributed to an undertaking should be determined as a matter of UK and, by virtue of s 60(2) of the 1998 Act, EU competition law, and that common law concepts of ostensible authority and vicarious liability are therefore "not relevant" (§60). The Tribunal went on to observe (at §62):

> " In *Suiker Unie*, the Court of Justice stated, at paragraph 539, that employees form part of the same undertaking, or "*economic unit*", with their employer. Employees are "*auxiliary organs forming an integral part of the principal's undertaking*" (paragraph 542). It was on this basis that the Court of Justice attributed the employees' collusive activities to their respective employers in the sugar industry. Since an undertaking comprising a body corporate can only act through the individuals employed by it, the acts or conduct of an undertaking are inevitably performed by those individuals. It follows that any act by any employee could, potentially, lead to an infringement attributable to their corporate employer, with whom they comprise the same undertaking." (emphasis added)

The Tribunal decided to proceed on the basis (at §74(a)) that:

> " acts of any employee may be attributed to his or her corporate employer, with whom they comprise the same undertaking". (emphasis added)

340. It should be noted, however, that on the facts of that case, there was no suggestion that any of the individuals in question "acted without authority or disobeyed instructions given to them" (§63). It should also be

noted that in the passages quoted above the Tribunal said "*could*, *potentially*, lead to" and "*may* be attributed to". I do not read these passages as pronouncing a principle that employees' acts, provided they were done during working hours, are inexorably attributable to the undertaking.

(c) Australia

341. The question of attribution is expressly governed by statute in Australia. With regard to the attribution of conduct, the Competition and Consumer Act 2010 (Cth) provides in s 84(2) that:[52]

> " (2) Any conduct engaged in on behalf of a body corporate:
>
> (a) by a director, employee or agent of the body corporate within the scope of the person's actual or apparent authority; or
>
> (b) by any other person at the direction or with the consent or agreement (whether express or implied) of a director, employee or agent of the body corporate, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, employee or agent;
>
> shall be deemed, for the purposes of this Act, to have been engaged in also by the body corporate."

Attribution of state of mind is governed by a similar provision in s 84(1). It can be seen that the Australian rule of attribution is, by statute, in part based on the common law concepts of actual and apparent authority.

342. By the time of closing submissions, SiS no longer relied on the Australian position, but BT submitted that the Australian approach was instructive. Reference was made in particular to *Australian Competition and Consumer Commission v Leahy Petroleum* (2004) FCA 1678 at §§99-100 and

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[52] Formerly s 84 of the Trade Practices Act 1974.

the cases there cited which stated that, in determining whether an employee had relevant authority, it was not to the point to ask whether or not he had actual authority to enter into the particular unlawful transaction, but rather whether, in general, transactions of the sort in question were within the scope of his employment.

343. Although s 84(2) has been described as supplementing the common law position and not replacing it (see *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd (No 3)* [2001] FCA 1861), Australian cases have apparently focussed principally on the law of agency and not approached the matter as a question of finding a special rule of attribution: see *Australian Competition and Consumer Commission v Prysmian Cavi E Sistemi SRL (No 12)* [2016] FCA 822 at §§217-229. For this reason the Australian jurisprudence on this question, whilst instructive, does not lend itself to direct application to the Ordinance.

(d) United States

344. The antitrust law of the United States has adopted a comparable approach to the three jurisdictions considered above. In *United States v Hilton Hotels Corp*, 467 F 2d 1000 (9th Cir 1972), cert. denied, 409 US 1125 (1973), a hotel owner was prosecuted for violation of s 1 of the Sherman Act (15 USC §1) by agreeing with other hotels to prefer suppliers who paid money to help attract conventions to the City of Portland and not to purchase from suppliers who refused to pay. The company's president testified that it would be contrary to the company's policy for the manager of one of its hotels to condition purchases in that manner. The manager of the hotel in question and his assistant testified that it was the hotel's policy to purchase supplies solely on the basis of price, quality, and service, and that they had told the hotel's

purchasing agent to take no part in the boycott. The purchasing agent confirmed the receipt of these instructions, but admitted that, despite them, he had threatened a supplier with loss of the hotel's business unless the supplier paid the contribution. He testified that he violated his instructions because of anger and personal pique toward the individual representing the supplier.

345. The US Court of Appeals for the Ninth Circuit stated that criminal liability for the acts of agents is more readily imposed under a statute directed at the prohibited act itself, one that does not make specific intent an element of the offence. This applies to the relevant offence under the Sherman Act since neither specific intent nor conscious wrongdoing is an element. The court stated:

> " The breadth and critical character of the public interests protected by the Sherman Act, and the gravity of the threat to those interests that led to the enactment of the statute, support a construction holding business organizations accountable, as a general rule, for violations of the Act by their employees <u>in the course of their businesses</u>. In enacting the Sherman Act, 'Congress was passing drastic legislation to remedy a threatening danger to the public welfare ...' *United Mine Workers v. Coronado Coal Co*, 259 U.S. 344, 392, 66 L. Ed. 975, 42 S. Ct. 570 (1922). The statute 'was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.' *Northern Pacific Ry. v United States*, *supra*, 356 U.S. at 4.
>
> With such important public interests at stake, it is reasonable to assume that Congress intended to impose liability upon business entities for the acts of those to whom they choose to delegate the conduct of their affairs, thus stimulating a maximum effort by owners and managers to assure adherence by such agents to the requirements of the Act. ...
>
> In sum, identification of the particular agents responsible for a Sherman Act violation is especially difficult, and their conviction

> and punishment is peculiarly ineffective as a deterrent. At the same time, conviction and punishment of the business entity itself is likely to be both appropriate and effective.
>
> For these reasons we conclude that as a general rule a corporation is liable under the Sherman Act for the acts of its agents in the scope of their employment, even though contrary to general corporate policy and express instructions to the agent." (emphasis added)

(6) Section 91 of the Ordinance

346. SiS submitted that the relatively strict approach to attribution adopted in the EU and UK should not be adopted in Hong Kong, because in those jurisdictions sanctions for anti-competitive conduct may be imposed only on undertakings. Specifically, there is no provision there akin to s 91 of the Ordinance. This "key difference" means the case law in those jurisdictions is of limited value in Hong Kong, and that adoption of a less strict approach to attribution would not diminish the deterrent effect of the Ordinance.

347. To assess this submission it is necessary to examine the scope of the relevant provisions. I do so as briefly as possible because the application of s 91 does not directly arise in the present case and the Commission, whilst expressing "broad agreement" with SiS's interpretation of that provision, has understandably refrained from advancing in detail any submissions on it, which is not free from difficulties.

348. Section 92 of the Ordinance provides that the Commission may apply for, and s 93 provides that the Tribunal may make, an order imposing a pecuniary penalty, not only on a person who has contravened a competition rule, but also a person who has been "involved in a contravention of a competition rule". Section 91, which sets out the persons who are thus

involved, provides:

> " A reference in this Part to a person being involved in a contravention of a competition rule means a person who—
>
> (a) attempts to contravene the rule;
>
> (b) aids, abets, counsels or procures any other person to contravene the rule;
>
> (c) induces or attempts to induce any other person, whether by threats or promises or otherwise, to contravene the rule;
>
> (d) is in any way, directly or indirectly, knowingly concerned in or a party to the contravention of the rule; or
>
> (e) conspires with any other person to contravene the rule."

349. This provision, couched in language familiar in criminal law, is partly based on Australian legislation, incorporating elements of ss 75B and 76(1) of the Competition and Consumer Act 2010 (Cth),[53] which are in turn derived from ss 5, 7A and 86 of the Crimes Act 1914 (Cth).[54]

350. SiS submitted that by targeting "persons" rather than "undertakings", s 91 extends the net of liability to natural persons and corporations that either are not undertakings at all or, if they are undertakings, not *the* undertaking(s) liable for a primary violation of a competition rule.

351. SiS's argument has to be premised on the notion that liability can be imposed on a person via s 91 *independently* of any contravention of a competition rule by an undertaking. Only if this is so can it be argued that the existence of s 91 "casts the net much wider" than regimes that only impose liability on undertakings.

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[53] The Competition and Consumer Act was called the Trade Practices Act 1974 (Cth) prior to 1 January 2011.

[54] See *Yorke v Lucas* (1985) 158 CLR 661.

352. It seems to me, however, that the premise is not entirely correct. First, s 91(b) and (d) concern accessorial liability, which is premised on a primary contravention of a competition rule, which can only be committed by an "undertaking". As SiS accepted, proof of a contravention is logically necessary for liability under s 91(b) for aiding, abetting, counselling or procuring.[55] Likewise, SiS accepted that liability for being "knowingly concerned in or a party to the contravention of the rule" under s 91(d) and also under s 91(c) insofar as it refers to a person who induces another to contravene a competition rule, presupposes the existence of a "contravention".

353. It follows, as SiS accepted, that if an undertaking is not liable because an employee's acts are not attributed to it, then equally the employee cannot be held liable under s 91(b) and (d) for aiding and abetting or for being knowingly concerned in any contravention by that undertaking. Deterrence cannot be effected by imposing sanctions on the employee as an accessory of a non-liable employer.

354. SiS offered two answers to this problem: first, that the employee can instead be made liable under s 91(a), (c) and (e), being forms of inchoate liability that, in its submission, do not depend on the existence of a primary contravention; secondly, the employee can be held liable as an accessory under s 91(b) and (d) in a contravention by an undertaking other than his employer.

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[55] It is unnecessary to discuss here whether under the Ordinance the primary "offender" has to have been held liable in proceedings. The Court of Final Appeal stated in *Sze Kwan Lung v HKSAR* (2004) 7 HKCFAR 475 at §19 that, under the common law principles of accessorial liability, in criminal proceedings "the person charged with aiding, abetting, counselling or procuring an offence can only be convicted if the principal offender, charged at the same trial, is found guilty of the relevant principal offence". Contrast *ACCC v Black on White Pty Ltd & Ors* [2001] FCA 187 at §§46-53, which suggests that it is only necessary for the court to make a *finding* that the principal offender has committed the contravention, and that the fact that the principal offender is a corporation which has been dissolved does not prevent an accessory from being found liable.

355. Without going into details, it seems to me these "solutions" are themselves replete with difficulties. For example, as regards the first answer:

(1) Can an employee be said to have attempted a contravention, or attempted to induce his employer to commit a contravention, in circumstances where the employer undertaking is not liable for any contravention? SiS submitted that liability for "inchoate" contravention such as attempting to contravene (s 91(a)) and attempting to induce another to contravene a competition rule (s 91(c)) does not depend on the existence of a primary contravention: *ACCC v Australian Egg Corporation Ltd* [2016] FCA 69 at §66.[56]

(2) However, the concept of "attempt to contravene" under s 91(a) seems to be targeted at an undertaking's conduct that is more than merely preparatory to the commission of a contravention. It is doubtful if an employee of such an undertaking can be said to be responsible for attempting a contravention.

(3) The concept of "attempt to induce any other person … to contravene" in s 91(c) seems equally inapt to an employee who has purported to act for his employer. It has been said by the Federal Court of Australia in *Yorke v Lucas* (1983) 80 FLR 143, 152 that

> " Inducing a contravention in the context of para.75B(b) [of the Trade Practices Act 1974 (Cth)] connotes, in our view, some act of compulsion by force or threat of force or some act of persuasion or stimulation aimed at ensuring that an act is committed which constitutes a contravention. The word 'incite' is akin to 'induce', though 'induce' probably covers a wider field.

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56 Upheld on appeal: [2017] FCAFC 152. Indeed, SiS submitted that liability for attempt cannot be established *unless* the actual substantive contravention has *not* been completed: *Rogers v Arnott* [1960] 2 QB 244.

> 'Incite' is a word familiar to the criminal law and involves some deliberate act of rousing, stimulating, urging or spurring on: *Young v. Cassels* (1914) 33 N.Z.L.R. 852 *per* Stout, C.J. (at p.854)."[57]

(4) As for conspiracy to contravene a competition rule (s 91(e)), SiS submitted that, by analogy with s 159A of the Crimes Ordinance (Cap 200)[58], conspiracy is an inchoate wrong that can be established even though no actual contravention of any competition rule exists.

(5) But it is again difficult to see how the employee who has engaged in anti-competitive conduct purportedly on behalf of the employer can be said to have conspired with the employer to contravene a competition rule.

356. As to SiS's second answer, as can be illustrated with reference to the alleged facts of the present case, there are likewise problems with the notion that, even if SiS was held not to have contravened a competition rule, Shek could be held liable on the basis that he aided and abetted the contravention by the other respondents, or that he was knowingly concerned in, or a party to, such contravention, or that he conspired with Hung or Nutanix to contravene the first conduct rule. Shek's entire involvement in the case was allegedly to submit a bid purportedly on behalf of SiS, at the request

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[57] On appeal, the High Court of Australia did not deal with the meaning of "induce": (1985) 158 CLR 661.

[58] Section 159A provides:

" (1) Subject to the following provisions of this Part, if a person agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions, either—

(a) will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement; or

(b) would do so but for the existence of facts which render the commission of the offence or any of the offences impossible,

he is guilty of conspiracy to commit the offence or offences in question."

of Hung. If there was no agreement made by SiS, and therefore no liability on Nutanix for making an agreement with SiS, it is difficult to see how it can be said that Shek had aided and abetted some other contravention. It is also not straightforward, to say the least, to suggest that Shek conspired with Hung or Nutanix to contravene the first conduct rule under s 91(e), when Shek's acts were, *ex hypothesi*, not attributable to SiS.

357. The task at hand is to devise a special rule of attribution based on the *Meridian* approach. That approach requires an exercise of statutory construction, taking into account the language, content and policy of the statute, to devise a rule that is workable for all instances where the statute applies, and not just on the facts in this particular case.

358. The tentative discussion above shows there must be a real concern that without attribution of conduct to undertakings, there can be no contravention by the undertaking in question, and that without a primary contravention, it is by no means clear that the employee can be held liable as a person involved in a contravention. Contrary to SiS's argument, therefore, the accessory liability provisions in s 91 cannot "fill the gap" left by a lax rule of attribution.

359. Difficulties and complexities such as these militate against the suggestion that the legislature intended that the scope of attribution of acts to undertakings should be reduced because of the extension of liability to persons involved. I am unable to accept SiS's assertion that the Ordinance would remain effective in the absence of attribution. Likewise I do not accept SiS's submission in essence that there is a fundamental difference between the respective legal schemes such that the attribution rule in Hong Kong should be much narrower than that in the EU or the UK.

(7) Attribution for the first conduct rule

360. The essential policy aim of the first conduct rule is to deter anti-competitive conduct relating to agreements, concerted practices and decisions of an association of undertakings. The deterrent effect is achieved primarily through the availability of financial sanctions under s 93, together with other orders under s 94 and Schedule 3.

361. The first conduct rule applies to and focusses on undertakings. The definition of "undertaking" in s 2(1) has been set out in §288 above. "Undertaking" is a key concept of EU competition law but it is a term unknown in other branches of Hong Kong law. In EU law employees are often regarded to be incorporated as part of an undertaking. They are distinguished from independent service providers who may be themselves functioning as undertakings. But no one has suggested that every act of an individual who is an employee of an undertaking is attributable to the undertaking. Neither the language of the first conduct rule nor that of the definition of "undertaking" sheds real light on the question as to when acts of an employee should be so attributed.

362. A fundamental consideration is the furtherance of the policy of the underlying rule which raises the question whether attribution is required to promote the policy of the substantive rule, and whether, if attribution is denied, that policy will be frustrated: see *Moulin Global Eyecare Trading Ltd*, §116. At the same time one must bear in mind the need for a proper balance between effectiveness in enforcement of competition law on the one hand, and avoiding hardship and injustice on the other hand.

363. The approach the Commission primarily contends for is that an undertaking is responsible for the acts of its employees carried out during their employment which give rise to a contravention of the first conduct rule. SiS characterised this as the functional equivalent of absolute liability. Putting labels on one side, it is undeniably a strict approach which would hold an undertaking responsible so long as the acts in question were done while the employee was at work, irrespective of the responsibilities and authority normally conferred on that employee. This is illustrated by the Commission's contention that SiS would be liable even where one of its messengers managed to submit a bid in its name stamped with the company chop.

364. While the question under consideration concerns the rules of attribution of conduct to undertakings, some assistance may be derived from the authorities on the imposition of strict liability cited by counsel, although in those cases the question was sometimes couched in terms of the requirement of *mens rea*, which is not apt in the present context.

365. In *Reynolds v G H Austin & Sons* [1951] 2 KB 135, 149-150, Devlin J said:

> "Thus a man may be made responsible for the acts of his servants, or even for defects in his business arrangements, because it can fairly be said that by such sanctions citizens are induced to keep themselves and their organizations up to the mark. …
>
> I think it a safe general principle to follow … that where the punishment of an individual will not promote the observance of the law either by that individual or by others whose conduct he may reasonably be expected to influence then, in the absence of clear and express words, such punishment is not intended."

366. In a similar vein, in *Lim Chin Aik v The Queen* [1963] AC 160, 174, Lord Evershed, giving the Opinion of the Privy Council, said:

> "[I]t is not enough in their Lordships' opinion merely to label the statute as one dealing with a grave social evil and from that to infer that strict liability was intended. It is pertinent also to inquire whether putting the defendant under strict liability will assist in the enforcement of the regulations. That means that there must be something he can do, directly or indirectly, by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control, which will promote the observance of the regulations. Unless this is so, there is no reason in penalising him, and it cannot be inferred that the legislature imposed strict liability merely in order to find a luckless victim."[59]

367. In *Hin Lin Yee v HKSAR* (2010) 13 HKCFAR 142, Ribeiro PJ described certain situations when absolute liability might in principle be imposed. His Lordship considered that the imposition of absolute liability may have a justifiable utility in cases involving the statutory imposition of a duty on a person (which may be a corporate body) where the conduct or task which is the subject of the duty is in practice likely to be carried out by someone else, such as an employee or a contractor.[60] The justifiable effect of imposing absolute liability in such circumstances is that it promotes proactive management and diligent supervision on his part to see that the duty is in fact being properly discharged. If the employer knows that he will be held to account, even without actual fault on his part, if his contractor or employee is slack or careless or incompetent on the job, he has every incentive to make sure that the job is properly done and to replace employees who are not up to the task.[61]

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59 In the context of criminal liability in Hong Kong, Ribeiro PJ said in *Hin Lin Yee v HKSAR* (2010) 13 HKCFAR 142 at §151 that the principle should be supplemented by an additional condition, namely, that before concluding that the offence is one of absolute liability, the court should first determine whether the statutory purpose can sufficiently be met by construing the statute as creating an offence subject to the intermediate defence, which allows the accused to prove an exculpatory honest and reasonable belief on a balance of probabilities (see §136).

60 *Hin Lin Yee*, §156.

61 *Hin Lin Yee*, §158.

368. I accept that anti-competitive conduct is an issue of social concern and that the Ordinance has been enacted to address that concern and provide relevant regulation of economic activity for the public welfare.

369. The terms of the first conduct rule invite attention upon the economic activities of the undertaking in question and their impact on competition in Hong Kong. While s 91 extends the liability in applicable cases to relevant persons involved, it is undertakings that carry on economic activities and it is their conduct that may have the object or effect of preventing, restricting or distorting competition in Hong Kong. The statute deters such conduct by, *inter alia*, a pecuniary penalty on the person that constitutes the undertaking. The obligation is placed on the undertaking to provide effective preventive measures and to organise its affairs in such a way as to avoid infringements.

370. Undertakings often carry on their activities through employees. The business and economic activities of an undertaking are carried on by the actions of its employees, acting within the course of their employment. Holding undertakings liable for the acts of their employees in the course of their employment will serve to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited acts.

371. The policy of the statute would be undermined if an undertaking is only liable for an employee's acts that are specifically authorised by or known to senior management. Likewise, exonerating an employer simply on the basis that an employee's anti-competitive conduct is contrary to or prohibited by the employer's policies or instructions would allow the restriction placed on undertakings to be easily bypassed. As was pointed out in *Pioneer Concrete*, it would be fallacious to judge an undertaking simply by

what its management has said rather than by what its employees have done in the course of their employment.

372. But I do not consider that attributing all acts of all employees to an undertaking solely because they were done during the employees' working hours is either just or necessary for the effective enforcement of competition law. There must be a sufficient connection between the acts of the employee in question and the undertaking so that the former can properly be regarded as part of the latter in the relevant context. Where the employer has put the employee in his position to do the kind of acts in question, it will often be fair to conclude that the employer has engaged in economic activity through the employee and is answerable for the manner in which the employee has conducted himself in that appointment.

373. The Commission, relying on *BPB plc v Commission* (see §327 above), submitted that effective implementation of the competition rules would be undermined if it was necessary to prove exactly which individual was responsible for the infringing act in the scope of his authority to act in that way. But *BPB* was a case where the undertaking argued that it was not liable because the employee in question, who was its CEO, had acted contrary to its instructions in continuing the information exchanges. In my respectful opinion, the court was not there making a general statement that competition law would be easily circumvented unless an undertaking is to be held liable for all the acts of all its employees done within their working hours without regard to any other circumstances.

(8) Application to the facts

374. Applying these principles to the facts of this case, should Shek be regarded as part of the undertaking, SiS, such that what he did on the morning of 18 July 2016 should be attributed to SiS?

375. As stated above, save for exceptional circumstances which did not apply here, SiS, as a distributor, did not compete in the market of supplying to end-users such as YWCA. The highest the Commission put its case is that SiS was not prohibited by its contract with Nutanix from competing in the market for end-users. Instead, SiS's business was in the supply of products to resellers. It had never submitted a tender at the invitation of an end-user. It was not within the job description of anyone in the company to be tendering in that market — lawfully or otherwise. On 6 July 2016, Priscilla Szeto had already decided that SiS would not take part in the second tender of YWCA.

376. It was not part of Shek's general responsibility to deal with end-users or to submit tenders to them or to anyone else. Shek accepted he had no authority to commit SiS to liability even for a single dollar. He had no authority to set the price of any deal, even those within the business of SiS, whether upstream or down. As one of the Product Managers, his job involved liaising with upstream suppliers to obtain product information and passing it to the Sales Department for their discussion with resellers. He had no authority to sign any outgoing documents for SiS, which would require the approval of Raymond Au or other departments of SiS. Still less was it part of Shek's job to agree with Hung to put in a bid in the name of SiS which was not intended to win the tender but simply to make up the numbers so as to facilitate a reseller's bid for the contract.

377. It boils down to a case where Shek, a relatively junior employee whose responsibility did not include submitting tenders, had gone rogue. Acting on his own, at the request of a vendor's representative whom he felt obliged to obey, he submitted a dummy bid in a market in which SiS did not compete. He was not acting primarily with his employer's interest in mind. Instead he concealed it from SiS. While Shek did the acts in question within his working hours, he was not acting in the course of his employment. He was not acting as part of SiS.

(9) The Commission's alternative case

378. The Commission's alternative case is that there was a "sufficiently close connection" between Shek's conduct and his employment with SiS or that Shek acted with the actual or ostensible authority of SiS, and that SiS should therefore be held liable for Shek's conduct. For this case the Commission pleaded the following matters:

(1) Shek was SiS's Product Manager responsible for Nutanix products with responsibilities including the provision of product information to customers, conducting promotional activities and negotiating prices with vendors and customers.

(2) Although distributors such as SiS would not generally sell products to end-users directly, a distributor may in certain circumstances sell a product to an end-user directly or participate in a tender submission.

(3) The submission of 'dummy" bids was a common practice in the IT industry in Hong Kong.

(4) Shek was provided with access to SiS's company chop and SiS's tender was printed, signed and chopped by Shek at SiS's office

during his working hours. Hung attended SiS's office for this purpose.

(5) Shek set out from SiS's office to deposit the tenders at YWCA during his working hours.

(6) Raymond Au and Joe Lam knew that Hung attended SiS's office on 18 July 2016 and that Shek submitted a bid on behalf of SiS to "help" Hung. Neither of them raised any disapproval or questioned Shek's authority to do so.

(7) It was in the interests of SiS, as one of Nutanix's two distributors in Hong Kong, to maintain good relations with Nutanix, otherwise its future business cooperation might be affected.

379. Based on my findings, it is plain that a number of these matters are not made out.

(1) The first point is not wholly established in that even if Shek did negotiate prices, he was only authorised to provide *provisional* quotations to customers which were subject to approval by his seniors.

(2) The second point is not made out because SiS would only supply to end-users in exceptional circumstances which did not apply here, and SiS had never participated in any tender submissions of end-users.

(3) As to the third point, there is some evidence that the practice of submitting bids just to help make up the numbers happened from time to time. Priscilla Szeto accepted there was such practice. In June 2016 she had received an unsolicited email from a reseller, Basic Bit, about YWCA's first tender, where the writer

anticipated that another reseller had already secured the deal registration and he (Basic Bit) wanted to see if he needed "to help to submit a higher bid" (emphasis added), which Szeto understood to involve bid-rigging. I prefer her evidence when she said it was very likely that Raymond Au and Joe Lam knew that this sort of thing did occur, to their contrary evidence that they had never heard of it. While she disagreed with the suggestion that such practice happened "all the time" in the IT industry in Hong Kong, she accepted that anyone involved in the business must have been aware that it happened "from time to time". There is no more detailed evidence, however, as to how prevalent this was in the IT industry in Hong Kong.

(4) On the fourth point, it is established that the tender was printed, signed and chopped by Shek at SiS's office during his working hours, but the way in which Shek came by the company chop was not sufficient to implicate anyone else in SiS: see §§305-309 above.

(5) The fifth point is factually correct, but it should be noted that (i) Hung offered to reimburse Shek for the taxi fare; and (ii) Shek concealed the destination from SiS in his expense claim.

(6) The sixth point is not made out on the evidence.

(7) As for the seven point, as stated in §§310-314 above, I have found that Hung was in a position of ascendancy over Shek and that Shek was motivated by a desire to please Hung or avoid offending him.

380. On this basis, in my judgment the Commission's alternative case against SiS also fails.

(10) Conclusion

381. For these reasons, the Commission has failed to establish that Shek's conduct in relation to YWCA's tender should be attributed to SiS. It follows that there was no relevant agreement made between Nutanix and SiS and that there was no contravention of the first conduct rule by either of them arising from the agreement between Hung and Shek.

J. ANTI-COMPETITIVE OBJECT

(1) General principles

382. As explained in section B(7) above, the Ordinance has adopted the same two-prong structure as Art. 101(1) of the TFEU in prohibiting agreements that have the *object* or *effect* of restriction of competition in Hong Kong. If an agreement is a restriction by object, it is not necessary to consider its effects on competition: *T-Mobile*, §§28 and 30; Cases C-501/06 P etc *GlaxoSmithKline Services and Others v Commission*, EU:C:2009:610, §55. The Commission has in the present case only alleged that the relevant agreements infringed the first conduct rule "by object". There is no effects case advanced.

383. The Commission submitted that the essential feature of a tendering process is the expectation on the part of the body calling for tenders that it will receive, as a response, a number of independently articulated bids formulated by contractors wholly independent of each other. The agreements

or concerted practices in the present case aimed to interfere with fundamental aspects of the tender process, leading to conditions of competition which do not correspond to normal market conditions. They were expressly intended to subvert the competitive nature of the tender process by leading YWCA to award the tender in the mistaken belief that there had been a genuine competition. Such arrangements, in the Commission's submission, were by their nature harmful to competition and had the object of preventing, restricting or distorting competition in Hong Kong.

384. It is common ground that the leading EU authority on the approach to restriction by object is Case C-67/13P *Groupement des cartes bancaires v Commission*. That case concerned certain new rules proposed by a grouping of payment card issuers that required financial contribution from its members to finance the operating costs of the payment system and to avoid "free riding" by those which primarily issued cards but did little to ensure that merchants accepted the cards. The EU Commission and the General Court found that the rules constituted a restriction of competition by object, but the CJEU disagreed and remitted the case for consideration of the effects of the rules. The key holdings in that case include:

(1) Certain types of coordination between undertakings reveal a sufficient degree of harm to competition for the examination of their effects to be considered unnecessary. This arises from the fact that certain forms of coordination between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition: see §§49-50.

(2) The essential test for an object restriction is whether such coordination reveals in itself a sufficient degree of harm to competition: §57.

(3) In order to determine whether an agreement or concerted practice constitutes a restriction by object, regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms 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: see §53.

(4) Although the parties' intention is not a necessary factor in determining whether an agreement or concerted practice is restrictive, there is nothing prohibiting that factor from being taken into account: see §54.

(5) The General Court was wrong in that case to find that the concept of restriction must not be interpreted "restrictively". 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: see §58.

385. The decision in *Cartes Bancaires* was subsequently applied by the Grand Chamber of the CJEU in Case C-179/16 *F. Hoffmann-La Roche Ltd v Autorità Garante della Concorrenza e del Mercato*, where it was held that an agreement between Roche and Novartis for the dissemination of misleading information to prevent the off-label use of the lower-priced product *Avastin* (marketed by Roche) in order to favour the sales of the higher-priced product *Lucentis* (marketed by Novartis) could be regarded as a restriction of competition by object.

386. Whilst the CJEU referred in the case law to "types" of coordination, there is no exhaustive list of the categories of agreements that have the object of restriction of competition. As noted in *Whish and Bailey, Competition Law* (9th ed), p 131, the content of the "object box" is not capable of precise definition. Agreements not of a kind considered before may yet be found to be restrictive by object upon a proper assessment in light of their own content and context.

387. An agreement may be found to have an anti-competitive object even if it also pursues legitimate aims. Thus in Case C-209/07 *Competition Authority v Beef Industry Development Society Ltd*, the CJEU held that even if the parties to an agreement acted without any subjective intention of restricting competition but with the object of remedying the effects of a crisis in their sector, their agreement could still be found to have the object of restricting competition.[62] In *Cartes Bancaires*, the CJEU held that the fact that the proposed new rules pursued the legitimate object of combatting "free riding" did not preclude their being regarded as having an object restrictive of competition.[63] In Hong Kong, the Ordinance, by s 7(1), makes clear it is sufficient if one of the objects of an agreement is to prevent, restrict or distort competition.

388. Where it is alleged that an agreement has the *effect* of restricting competition, it is necessary to assess what the competitive position on the relevant market would have been in the absence of the alleged restrictive agreement — commonly referred to as the "counterfactual", and to compare it with the position in the "actual" world: Case 56/65 *Société Technique Minière v Maschinenbau Ulm GmbH* [1966] ECR 235; Case T-328/03 *O2 (Germany)*

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[62] See §21.

[63] See §70.

GmbH v Commission, EU:T:2006:116, §§68-73. Whilst in an "object" assessment the agreement has to be seen in its context, the whole point of prohibiting an object restriction is to avoid the need for an effects investigation. The requisite assessment for an object case is therefore to be distinguished from an effects investigation based on an extensive market analysis, which is not required for an assessment of the existence of a restriction by object. Nor is it necessarily required in such cases to define the market: see *Whish & Bailey, Competition Law* (9th ed), pp 28 & 121.

389. The agreement need not have been implemented in order for it to have an anti-competitive object. This is clear from the wording of s 6(1)(a) of the Ordinance, which requires an undertaking not to "make" or "give effect to" an agreement. "Making" an agreement with an anti-competitive object will contravene the first conduct rule, even if it is not given effect to.

390. Further, as the Commission submitted, in order for an agreement to be regarded as having an anti-competitive object, it is sufficient that it has the potential to have a negative impact on competition. As the CJEU held in Case C-32/11 *Allianz Hungária Biztosító Zrt and Others v Gazdasági Versenyhivatal*, EU:C:2013:160, §38:

> "… in order for the agreement to be regarded as having an anti-competitive object, it is sufficient that it has the potential to have a negative impact on competition, that is to say, that it be capable in an individual case of resulting in the prevention, restriction or distortion of competition within the internal market. Whether and to what extent, in fact, such an effect results can only be of relevance for determining the amount of any fine and assessing any claim for damages …"

The emphasis in *Allianz* on potential impact is not inconsistent with *Cartes Bancaires*. The former case was cited in the latter. The focus of enquiry in an object case is not the concrete actual effects of an agreement as implemented but the agreement's potential effect on competition. It was in this context that the CJEU in *Cartes Bancaires* referred to a sufficient degree of harm to competition.

391. It is common ground that whether certain conduct falls within the definition of "serious anti-competitive conduct" in the Ordinance and whether it contravenes the first conduct rule are distinct questions (see section L(1) below), with the latter turning on whether the Commission can establish that the conduct has the object or effect of restricting, preventing or distorting competition.

(2) Content and context of the agreements

392. The agreements or concerted practices between (i) Nutanix and BT, (ii) Nutanix, BT and Innovix, and (iii) Nutanix and Tech-21, have been set out in sections E, G and H above. As the Commission submitted, the whole point of the exercise was to mislead YWCA into awarding the tender under the mistaken belief that there had been a genuine competitive tender process.

393. It is relevant first to remind oneself what a tendering process is about. In *Apex Asphalt and Paving Co Ltd v Office of Fair Trading* [2005] CAT 4, there were concerted practices between contractors in relation to the making of bids for a tender for flat roofing contracts. Apex supplied figures to another tender invitee (Briggs) for a cover bid to be put in by Briggs for certain contracts (though Briggs in fact did not submit a tender). In relation to another set of contracts, Apex received the tender documents but decided not to carry out a full estimating exercise because the product specification gave a price advantage to another firm (Howard Evans) who, Apex knew, was likely

to bid, and also because of Apex's own workload. Apex contacted Howard Evans for a cover price. Howard Evans provided prices to Apex who then bidded at those prices. Howard Evans won the tender. Dismissing the appeal from the decision of the Office of Fair Trading that Apex was liable for concerted practices with the object of restricting competition, the UK Competition Appeal Tribunal held:

> " 208. The essential feature of a tendering process conducted by a local authority is the expectation on the part of the authority that it will receive, as a response to its tender, <u>a number of independently articulated bids formulated by contractors wholly independent of each other</u>. A tendering process is <u>designed to produce competition in a very structured way</u>.
>
> 209. The importance of the independent preparation of bids is sometimes recognised in tender documentation by imposing a requirement on the tenderers to certify that they have not had any contact with each other in the preparation of their bids. This is important from the standpoint of the customer, since <u>the tendering process is designed to identify the contractor that is prepared to make the most cost-effective bid. The competitive tendering process may be interfered with if the tenders submitted are not the result of individual economic calculation but of knowledge of the tenders by other participants or concertation between participants</u>. Such behaviour by undertakings leads to conditions of competition which do not correspond to the normal conditions of the market." (emphasis added)

394. The notion that bids should be independently articulated finds support also in EU law. In Case T-29/92 *SPO v Commission*, §119, the EU Court of First Instance stated that consultation by contractors regarding the manner in which they intend to respond to an invitation to tender is incompatible with Art. 85(1) of the TFEU, and that it is for each contractor to determine independently his conduct in the tender. This reflects the fundamental principle of competition law that "each economic operator must determine independently the policy which he intends to adopt on the … market": Case 40/73 *Suiker Unie v Commission*, §173.

395. The facts of both *Apex* and *SPO* concern horizontal contacts between potential bidders but the principle is in my view not confined to that setting. The topic of vertical and horizontal agreements will be further discussed below.

396. Nevertheless, whether an agreement or concerted practice has an anti-competitive object depends on a proper analysis of the agreement and the facts of the case. The nature of a tendering process does not warrant any presumption of anti-competitive object simply because the conduct impugned involves interference with that process by the submission of bids that have not been independently articulated.

397. In terms of the economic and legal context of their agreements, it is true that YWCA had selected a very specific brand of product, Nutanix's hyper-converged system (with three possible hardware combinations). Nevertheless, there is no suggestion that BT was the only entity capable of supplying this system. It could have been supplied by the other bidders in the second tender, or the sole bidder in the third tender, or by direct purchase. In other words, there was still actual and potential competition in the supply of this product, which would be precluded by the agreements if successfully implemented. If YWCA had only received BT's bid in the second tender, it would have had decisions to make as to what to do next, on the basis of the true conditions of the market. The objective purpose of the respondents' agreements was to interfere with that process, and to lead YWCA to believe it had received additional genuine bids and to award the tender on that mistaken basis.

398. The respondents also submit that YWCA had a close pre-existing relationship with BT, which had successfully carried out the proof-of-concept

exercise. It does not follow, however, that YWCA would have chosen BT irrespective of the content or price of the other bids received. In fact, in spite of YWCA's favourable experience with BT at the time, it decided to procure the Nutanix system through a competitive tender. There is no basis to suggest that the whole tendering process was intended to be a charade. Although Lok had a close working relationship with Percy Ng and Chan and had some influence in the procurement decision especially on the technical side, I do not think he would, or would be able to, dictate BT be chosen even if that was not supported by the outcome of the tendering process. It is to be recalled that despite BT was the consultant to YWCA on procuring a Customer Relationship Management system, it was eventually outbidden in the tender for the implementation of the system in late 2014 or 2015 (see §89 above).

399. Reliance has been placed by the respondents on the terms and conditions of the tender. It is said that not only was there no requirement for bidders to certify that they had not had contact with each other in the preparation of the bids, there was a statement in YWCA's "Request for Support from Principal" that it "respects the existing mechanism of the IT industry, particularly the business collaboration arrangements made between IT manufacturers (principals) and their tiers of the intermediary agents (distributors/dealers)". In my judgment, this cannot sensibly be read as indicating that YWCA expected there to be direct or indirect contact between bidders or expected there to be arrangements to provide non-genuine bids just to meet its requirement of a minimum number of bids. On the contrary, in that letter YWCA made clear that it had not appointed any company to be its "exclusive order fulfilment partner" and that YWCA wanted "a fair-game tender exercise". The requirement of a minimum of five bids shows that YWCA viewed as important the existence of genuine competition in its procurement exercises.

400. The respondents also submitted that there was little competition for the supply of the Nutanix system to YWCA. In particular, only one response (from BT) was received in the first tender, showing that the invitees did not find it a particularly attractive opportunity. However, a tender can generate competition, by way of inviting competing bids from different bidders, which might otherwise be absent. The agreements in question were intended to bring the tendering and procurement process to an end, which had the potential effect of preventing further competition from being canvassed. After the second tender, Nutanix supplied a list of 41 firms that were its authorised sellers or partners, from which YWCA selected 17 firms (including the 2nd to 5th respondents) to be invited to take part in the third tender. As it happened, there was in fact one response (from IT Channel (Asia) Ltd) in the third tender. Eventually the contract was awarded by direct contact with Dell and a retailer CriticMission Data Ltd. This shows that while the level of interest in YWCA's business was low, it cannot be said there was no potential or actual competition. BT was far from being the only possible supplier.

401. The respondents submitted that any coordination found could not have caused harm to competition if there was no competition to be restricted in the first place. The principle is recognised by the Commission, which stated in its *Guideline on the First Conduct Rule* (at §3.11):

> " In examining the relevant context for an agreement, the following factors may show that an agreement does not have the object of harming competition:
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> …
>
> (b) an examination of the relevant context reveals that at the relevant time there is in fact no competition in the market to be harmed;
>
> …"

402. However, as stated above, it cannot be said here that competition was non-existent. The cases relied upon by the respondents concern very different facts. In *Bookmakers' Afternoon Greyhound Services Ltd v Amalgamated Racing Ltd* [2009] EWCA Civ 750, until 2007 the off-course bookmakers had in place an arrangement to pay a distributor (formed by bookmakers) for the right to show live pictures of horseracing in LBO (licensed betting offices). From 2007 onwards, a number of racecourses formed a joint venture which would serve as a new distributor through another broadcasting channel. The racecourses licensed their own LBO media rights to the joint venture at higher prices. The bookmakers argued that the creation of the joint venture and its entry into the market was the result of an anti-competitive agreement among the racecourses. However, the pre-existing two-sided market was one of a monopoly purchaser of broadcasting rights from racecourses and a monopoly supplier to LBOs. The new arrangements actually had the potential to increase competition in the market. It was in that context that the Court of Appeal (at §92) accepted the argument that there was no competition to be restricted in the first place. In contrast, in the present case, as explained above BT was by no means a monopolistic supplier of Nutanix products.

403. Case T-374/94 *European Night Services Ltd v Commission*, EU:T:1998:198 concerned agreements by which ENS was formed by French, Dutch, German and British railway undertakings for the purpose of providing overnight Channel Tunnel passenger rail services as well as agreements by which ENS acquired certain services including traction, cleaning services and passenger-handling services. The EU Commission concluded they restricted competition by effects, taking the view that there was potential competition among the parent undertakings or between them and ENS. The EU Court of

First Instance disagreed, noting that given the prohibitive cost of the investment required and the fact that there were no economies of scale in the operation of a single route, it would be unrealistic to postulate potential competition among parent undertakings and between them and ENS. Further, following publication of a Commission's notice inviting interested parties to make representations, no third parties took any steps to submit representations as a potential competitor capable of being affected by the implementation of the agreements in question.[64] It can readily be seen that the facts are quite different from those of the present case.

(3) Deal registration system

404. A related point raised by the respondents is that because of the deal registration in place, BT would be able to benefit from a substantial discount from Nutanix and was therefore in an "unassailable" position to win the tender, or at least that was what Chan believed.

405. There is no doubt BT enjoyed certain advantages, but I do not find that it was, or that Chan understood it to be, in an unassailable position to win. The fact that BT (via Dell) had a deal registration with Nutanix in place for the second tender does not mean that there could be no competition for the tender. The discount BT could expect applied to the Nutanix software component of the integrated solution, and was not precisely quantified in evidence. Chan understood that only part of the discount obtained by Dell from Nutanix would be passed on to BT. The cost of the Nutanix software was only part of the bid price; the cost of the hardware component and the reseller's own mark-up on both components would constitute the other parts. As an illustration, in relation to YWCA's eventual purchase of the Dell-

[64] See §§144-145.

Nutanix solution from CriticMission Data Ltd in November 2016, out of the total contract price of HK$[●], Nutanix received US$[●] net. Although YWCA had a preference for the Dell-Nutanix solution, it had specifically discussed with BT to ensure that all three types (Dell-Nutanix, Lenovo-Nutanix and Nutanix-NX) were capable of meeting YWCAs's needs. A non-deal-registered reseller may be able to quote a low and competitive price if it is prepared to take a lower margin or is able to save costs in other aspects, which was accepted by Siu. If the exercise was purely meant to encourage a few other resellers or distributors to bid, Chan would not have needed to send Hung BT's bid prices, and Hung would not have said to his colleagues he was assisting "to make sure Dell win the deal"[65] and to Siu that they were to "help BT to bid for Dell deal". There are also other factors apart from price which an end-user may consider when choosing a reseller, whose importance increases as the price difference decreases. Chan's own evidence suggests that it was only if the received bids were "very close" in price that he was confident BT would win even if its bid was not the lowest.

406. Further, the fact that a particular bidder has a cost or other advantage does not mean that there is no restriction of competition if it enters into agreements with its supplier or other potential bidders to procure non-genuine bids and further enhance its prospects of success. In *Apex Asphalt*, Apex provided a cover bid precisely because (in part) it considered Howard Evans had a price advantage and was likely to bid. The fact that Howard Evans's bid would have been successful even without Apex's cover bid was not a defence, but simply a matter for mitigation.[66]

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[65] See §223 above for the context and meaning of that email.

[66] See §263.

407. The same point applies to the respondents' argument that there was also no commercial rationale for BT to engage in bid-rigging, because it already had a long-standing relationship with YWCA and was therefore the favoured supplier for the Nutanix product anyway. As its own experience shows, even where it had been appointed by YWCA as the consultant for the CRM system, it did not succeed in the bid to implement the system.

(4) No inflated price

408. Nutanix submitted that the agreements did not contain "typical" features of bid-rigging, the first of which is increased or controlled pricing. Similarly, Innovix argued that the Commission must advance a theory of harm which is likely to result from the agreements explaining how they had, or were likely to have, an appreciable adverse impact on the parameters of competition such as price, output, product quality, product variety and innovation (citing the *Guidelines on the Application of Article 81(3)* issued by the EU Commission, at §§15-16).

409. In my view, as Nutanix recognised, price inflation may be a common or typical feature of bid-rigging, but it is by no means a necessary ingredient of a restriction by object or bid-rigging. Cover pricing[67], for example, does not necessarily involve any price increase or contribute to the fixing of the price eventually charged to the purchaser, but is generally regarded as an infringement of competition law. The absence of price

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[67] In *Kier Group plc v Office of Fair Trading* [2011] CAT 3 at §3, the UK Competition Appeal Tribunal explained that "simple" cover pricing occurs "where one of those invited to tender for a construction contract (Company A) does not wish to win the contract, but does not want to indicate its lack of interest to the client, for whose work it may wish to be invited to tender in the future. Company A therefore seeks a cover price from another company which is tendering for that contract (Company B). Company B will be seeking to win the contract and will have reached a view as to its own tender price. Indeed it may already have submitted its own tender to the client. The cover price which it provides to Company A will be at a level sufficiently high to ensure that Company A does not win. This price is submitted to the client by Company A as though it is a genuine tender. It should be noted that Company B does not reveal its own tender price to Company A – the cover price is an inflated price."

inflation in BT's second bid relative to the first is a matter of mitigation in BT's favour, but it does not exonerate it from responsibility for contravention of the first conduct rule.

410. By considering whether there is evidence of increased or controlled pricing, one strays into an inquiry into the *effects* of the agreement. Yet restrictions by object reveal a sufficient degree of harm to competition in themselves, so that "there is *no need* to examine their effects": *Cartes Bancaires*, at §49. The *Guidelines on the Application of Article 81(3)* referred to by Innovix actually the efficiency defence found in Art. 101(3) of the TFEU (the equivalent of s 1 of Schedule 1 to the Ordinance). In the *Guidelines on the applicability of Article 101 to horizontal co-operation agreements* (2011/C 11/01) issued by the EU Commission, it is under the section on "Restrictive effects on competition" that the discussion on the parameters of competition is located:

> " 27. For an agreement to have restrictive effects on competition within the meaning of Article 101(1) it must have, or be likely to have, an appreciable adverse impact on at least one of the parameters of competition on the market, such as price, output, product quality, product variety or innovation. Agreements can have such effects by appreciably reducing competition between the parties to the agreement or between any one of them and third parties …" (emphasis added)

411. The vice of such practice as found in the present case is in its harm to competition. The concrete negative effects of these practices (if successfully implemented) can take various forms: see *Apex Asphalt*, at §251; *Kier Group plc v Office of Fair Trading* [2011] CAT 3, at §§95-99. It is not necessary for the Commission to prove that YWCA suffered or would have suffered actual financial detriment in order to establish an infringement. To find an anti-competitive *object*, it is generally not necessary to show that an

agreement entailed disadvantages for final consumers: *Bellamy & Child, European Union Law of Competition* (8th ed), §2.160. As the Commission submitted, the first conduct rule, in line with Art. 101 of the TFEU, should be interpreted as being intended to protect, among other things, the structure of competition. In Joined Cases C-501/06P etc *GlaxoSmithKline Services Unlimited v Commission*, a case concerning parallel trade, the CJEU held (at para 63):

> " First of all, there is nothing in that provision to indicate that only those agreements which deprive consumers of certain advantages may have an anti-competitive object. Secondly, it must be borne in mind that the Court has held that, like other competition rules laid down in the Treaty, Article 81 EC aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such. Consequently, for a finding that an agreement has an anti-competitive object, it is not necessary that final consumers be deprived of the advantages of effective competition in terms of supply or price (see, by analogy, *T-Mobile Netherlands and Others*, cited above, paragraphs 38 and 39)."

The same principle was repeated by the CJEU in Case C-286/13P *Dole Food Company Inc v Commission* ECLI:EU:C:2015:184 at §125 which was decided after *Cartes Bancaires*.

412. The focus on increased or controlled pricing misapprehends the essence of a tender which is a structured competitive process. The conduct in question is aimed at distorting that process.

(5) No quid pro quo

413. Nutanix submitted that another typical feature of bid-rigging is a trade-off or *quid pro quo* for the other participants who, it is agreed, would not win the tender in question, and that there is no evidence of any *quid pro quo* for SiS, Innovix and Tech-21 in this case. In my view, however, while a *quid*

pro quo is a common element in this kind of cases, it is not a necessary component for such an arrangement to be found a restriction of competition by object. Its absence may be a matter relevant to the plausibility of the agreement or to mitigation, but not to the question whether the agreement, if established, was a contravention by object.

414. Two cases were referred to by Nutanix: *Kier Group* and Case C-440/11P *Commission v Gosselin* EU:C:2013:514. *Kier Group* involved both "simple" cover price cases, as well as infringements that involved compensation payments to the cover bidders. It was an appeal against penalties only which means there was no dispute that even "simple" cover price cases were a contravention. The cases involving compensation payments were considered by the Office of Fair Trading to be more serious than "simple" cover pricing, thereby meriting a higher starting point for the calculation of the appropriate penalty. There is nothing in the case, however, to suggest that *quid pro quo* was a necessary element of liability.

415. In *Gosselin*, the cartel was alleged to have taken various forms: agreement on prices, agreement on cover quotes and agreement on commissions (financial compensation for losing bids, ie *quid pro quo*). The General Court noted that this system was "based on the concept of *quid pro quo*, insofar as each undertaking which paid a commission or issued a cover quote expected to be able, in the future, to benefit itself from that system and obtain commissions or cover quotes. Therefore… those arrangements were ad hoc but displayed a link of complementarity".[68] The court, however, simply

[68] Cases T-208/08 and T-212/08 *Team Relocations NV v European Commission* at §52.

analysed each agreement separately, finding each to be a restriction by object, without relying on the *quid pro quo* as a necessary constituent.[69]

416. Reciprocity may make agreements such as bid-rigging a repeated, systemic problem but it is not required as an element for liability in an individual case. There is nothing to prevent a one-off agreement, done simply as a favour, from being anti-competitive by object.

(6) Vertical vs horizontal

417. On this Tribunal's findings, the agreements in question, with the exception of the trilateral agreement between Nutanix, BT and Innovix, are each a bilateral agreement between a reseller and its supplier. The first conduct rule does not distinguish in terms between horizontal and vertical agreements, and in principle applies to any agreement irrespective of whether it is horizontal or vertical. It may be noted in this connection that the legislature has chosen not to exclude vertical agreements from the scope of the first conduct rule, in contrast to Singapore's Competition Act which does exclude vertical agreements from the equivalent prohibition.[70]

418. Having said that, it is right to point out that in general, horizontal agreements are viewed by competition law with much greater vigilance and suspicion than vertical agreements, though it would be mistaken to think that

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69 §§91-93.

70 Section 8 of the Third Schedule to the Competition Act provides that the section 34 prohibition shall not apply to any vertical agreement, other than such vertical agreement as may be specified by the responsible Minister. For this purpose, "vertical agreement" is defined to mean "any agreement entered into between 2 or more undertakings each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services and includes provisions contained in such agreements which relate to the assignment to the buyer or use by the buyer of intellectual property rights, provided that those provisions do not constitute the primary object of the agreement and are directly related to the use, sale or resale of goods or services by the buyer or its customers".

vertical agreements can never be held to have an anti-competitive object. It depends on their specific content and context.

419. It is not in dispute that vertical discussions between the supplier and downstream undertakings such as a distributor or retailer concerning retail pricing do not in themselves contravene Art. 101 of the TFEU or the UK Chapter 1 prohibition. As stated by the UK Competition Appeal Tribunal in *Makers UK Ltd v Office of Fair Trading* [2007] CAT 11, §99:

> " A simple disclosure of retail pricing information by a retailer to a supplier cannot be treated, without more, as an agreement to fix the retail price."

420. Likewise, in *Argos Ltd v Office of Fair Trading* [2006] EWCA Civ 1318 at §106, Lloyd LJ, giving the judgment of the court, stated:

> " Mr Lasok submitted that the Tribunal's decision in the Football Shirts case has caused uncertainty in commercial circles, casting doubt on freedom of discussion on a vertical basis, above all between manufacturers and their principal customers, in relation to matters which both parties need reasonably to be able to discuss, including actual or likely retail prices, profit margins and wholesale prices or terms of sale. It seems to us that the present decision, and that of the Tribunal, ought not to be seen as casting any cloud of illegality over such discussions, <u>so long as they are conducted on a bilateral basis and limited to discussions of the nature described</u> ..." (emphasis added)

421. In the case of a tender, as the respondents have submitted, there may be nothing anti-competitive in a supplier requesting its customers to bid in a tender held by an end-user and in such customers speaking individually to the supplier about costs or as to the level of their bids. If that is all there is, little competition law concern would be raised.

422. But that is not the present case. The agreement between Chan and Hung was not about BT's pricing or other parameters of BT's bid, but about what Hung should procure other distributors or resellers to do in the second tender, thus taking on a horizontal dimension. The purpose of their agreement was that Hung would find four friends to put in a dummy bid each so as to ensure there were five bids in the second tender, in order to meet YWCA's requirement so that the second tender would be valid and BT would win. In connection with this agreement Chan provided BT's own bid prices to Hung, and Hung prepared four bids for SiS, Innovix, Tech-21 and iCON respectively which he was certain would lose.

423. Equally the agreement between Hung on the one hand and Steve Ng on the other was *not* about "matters which both parties need reasonably to be able to discuss, including actual or likely retail prices, profit margins and wholesale prices or terms of sale"[71], but about submitting a non-genuine bid for Hung's purposes. Indeed it was the *absence* of any discussion of those things they should normally need to discuss that, *inter alia*, shows the non-genuineness of the bid. The objective aim of the agreement between Hung and Steve Ng was to put in a non-genuine bid in the name of Tech-21 to help make up the numbers so as to meet the tender requirement for it to be valid. Hung of course knew more but Steve Ng knew or intended that the bid had been prepared by Hung at prices without input from Tech-21, was submitted purely as a favour to Hung, was not intended to win and would not win, but was intended to be taken by YWCA as genuine and to create a false impression for YWCA that there was an independent genuine bid from Tech-21 competing in the tender.

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[71] *per* Lloyd LJ in *Argos Ltd* as quoted above.

424. It should be noted that in *Argos*, the Court of Appeal went on in the same paragraph as the passage quoted above to state:

> "… As the Tribunal said, there is a risk that discussions about possible prices, or about historic prices, can tend towards discussion of future prices, and agreement as to what they should be. Any party to such discussions on a vertical basis needs to be aware of that risk and to avoid it. But this case is not about such discussions at all. Nor does it outlaw complaints by a wholesale customer to its supplier in general, especially if they are directed at getting better terms for the business between those two parties. In the present case the complaints did not have that aim, and the discussions between manufacturer and customer had a strong and unusual context which makes it clear that there was a horizontal element in the subject of discussion. That is what makes what happened in the present case a breach of the Chapter I prohibition." (emphasis added)

425. In my view the Commission is correct to submit that, consistently with Art. 101 of the TFEU, the first conduct rule is to be interpreted as applying "to all agreements and concerted practices which, in either horizontal or vertical relationships, distort competition …, irrespective of the market on which the parties operate, and … only the commercial conduct of one of the parties need be affected by the terms of the arrangements in question": Case C-194/14P *AC Treuhand v Commission*, §35.

426. It was submitted that in a bidding context, a bilateral vertical agreement has no effect on competition because it only has the effect of affecting the behaviour of that single retailer in question, without any impact on the behaviour of other bidders. It was said that either the tender would be successful and result in the award of the project to other bidders "whose actions were completely independent of and unaffected by this single agreement", or the tender would be unsuccessful on the basis that, if the non-genuine bid were to be discounted, there would not be sufficient bids to meet the minimum requirement.

427. I agree with the Commission that this argument misses the point. A bilateral vertical agreement to submit a non-genuine bid in a tender process solely for the purpose of meeting the requirement of a minimum number of bids for the tender to be effective had, at the very least, the potential to result in the tender being awarded by the procurer in the false belief that it had in fact received the necessary number of genuine bids. The agreement is as such aimed at distorting the competitive process and preventing any further potential competition. In this particular context, the impact on competition occurs whether the submission of a dummy bid has resulted from a vertical or a horizontal agreement.

428. As to the trilateral agreement among Nutanix, BT and Innovix, it was clearly horizontal as between BT and Innovix, who were bidders or potential bidders in the second tender. The aim of the agreement was to put in a dummy bid in the name of Innovix to help make up the numbers so as to satisfy the tender requirement and so that BT would validly win the tender. As already explained, Hung and Chan knew more but Siu knew or intended that the bid had been prepared at prices without input from Innovix, was solely to help BT to win, was not itself intended to win and would not win, but was intended to be treated by YWCA as a genuine bid.

(7) Subjective intentions

429. It was argued by Nutanix and BT that they merely intended to assist YWCA to meet its internal requirement for five bids, so that the second tender would not be abortive. However, this subjective intention, even if accepted, does not itself mean that the object of the agreements was not to prevent, restrict or distort competition.

430. Determining whether an agreement has an anti-competitive object is an objective exercise. The subjective intentions of the parties, while potentially relevant, are not determinative. The concept of a restriction by object does not presuppose that the parties to an agreement have the subjective intention of restricting competition, or even that they have actually considered the effect of their conduct on competition.

431. Agreements can be restrictive of competition by object even if the parties are able to show that restricting competition was not their aim or primary aim, or that they had other laudable motives: see *Beef Industry Development Society* cited in §387 above.

432. Likewise, it was argued in *Apex Asphalt* that the object of putting in the cover bids was to avoid the procuring entities "looking unkindly" on the parties who were invited to bid but failed to put in a bid, lest that they would not be invited on the next occasion. The Tribunal held that this explanation did not absolve Apex of liability. The subjective intentions of a party are immaterial where the obvious consequence of the conduct is to prevent, restrict or distort competition.[72]

433. In any event I do not accept that the parties were solely motivated by a desire to help YWCA. Plainly an abortive second tender would lead to further uncertainty not welcome to BT or Nutanix. Their cooperation with the help of Hung's friends would substantially eliminate this uncertainty. In his interview by the Commission, Chan said he was concerned that if the second tender was not successful, there might be a third tender, and that BT might not be able to participate as "no company can afford to do one bid 3 times".[73]

[72] See §§248-249.

[73] Chan's interview record, §§1647-1654.

Chan also said Hung's friends were "doing this to help Thomas to close the deal. Because if we are stuck, Thomas is stuck. That means we can't buy anything from Thomas, right. So everyone just at the same place, we're not moving forward".[74] It is also to be recalled that Hung announced in his internal email on 8 July 2016 that Nutanix assisted "to make sure Dell[75] win the deal", and that he stated in his email to Siu on 18 July 2016 that what they were doing was to "help BT to bid for Dell deal".

434. On the evidence, an examination of the subjective intentions of the parties reinforces the view that each of the agreements in question had the object of restricting, preventing or distorting competition.

(8) Knowledge of YWCA

435. The respondents have pleaded the issue of YWCA's knowledge of the impugned agreements only in relation to the definition of "bid-rigging" in connection with the warning notice requirement. The question of YWCA's knowledge has arisen only in that context and is dealt with in section L(4) below. In closing, however, Nutanix and Innovix argued separately that the arrangements would not be anti-competitive by object if YWCA had knowledge of them.

436. It seems to me, first, that in theory this is a separate point. Secondly, however, it has not been raised by the respondents up to the opening and ought not to be dealt with separately now. Thirdly, the persons within YWCA whose knowledge is relevant to this question may well be different. For the specific purposes of the warning notice argument and for

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74 Chan's interview record, §§1370-1372.

75 As explained in §223 above, this was a reference to BT's bid offering the Dell-Nutanix solution.

the reasons set out in section L(4)(a) below, I find that the Commission has accepted that Lok's knowledge is attributable to YWCA, but, for the purposes of the anti-competitive object of the agreements, there may be an argument that the relevant knowledge is that of those in YWCA who were to decide on the outcome of the tender. There is no suggestion that members of the Tender Board or staff of APD had any relevant knowledge. Lok had influence (especially on technical matters) but was by no means the sole decision-maker. Fourthly and in any event, as explained in section L(4)(b) below, I find that Lok did not have the requisite knowledge.

(9) Conclusion on "object"

437. In many object cases there would be a debate that the arrangements in question were intended to pursue a legitimate commercial goal rather than to restrict or distort competition. For example, in *Cartes Bancaires*, it was argued that the new rules were intended to promote the grouping's acquisition of merchants' acceptance, which closely interacted with the card-issuing activities of members because consumers would not wish to hold a card that was not accepted by a sufficient number of merchants. In contrast, on the Tribunal's findings, there was no commercial justification in this case. The purpose of the agreements was to mislead YWCA into awarding the tender under the mistaken belief that there had been a genuine competitive tender process. They were aimed at giving YWCA a false impression of competition with additional independent bids to choose from. Their object was to interfere with fundamental aspects of the tender process and distort the true competitive process. The agreements had the potential of deceiving YWCA into awarding the contract simply based on the second tender, rather than to consider further steps in the procurement exercise. In

my view, the Commission has shown that the agreements have the object of preventing, restricting or distorting competition.

438. In *Apex Asphalt* the UK Competition Appeal Tribunal held (at §250) that:

> "Concertation the object of which is to deceive the tenderee into thinking that a bid is genuine when it is not, plainly forms part of the mischief which section 2 of the Act is seeking to prevent."

In my opinion this is also true of the first conduct rule in the Ordinance.

439. Despite the many ingenious submissions made on behalf of the respondents, the conduct in the present case is not innocuous (as the respondents' counsel sought to suggest), and in my view plainly had an object to prevent, restrict or distort competition, although there may be scope for debate as to its seriousness when it comes to the question of the orders to be made.

K. EXCLUSION UNDER SECTION 5 OF SCHEDULE 1

440. It is convenient to deal at this juncture with a point raised solely by Tech-21. Tech-21 submitted that there is no evidence before the Tribunal that the combined turnover of the Nutanix and Tech-21 exceeded $200 million during the relevant turnover period. According to s 30 of the Ordinance and s 5(1) of Schedule 1 to the Ordinance, the first conduct rule does not apply to an agreement between or a concerted practice engaged in by undertakings if their combined turnover for the turnover period does not exceed $200 million.

Section 5(2) provides, however, that s 5(1) does not apply to an agreement or concerted practice that involves serious anti-competitive conduct. Tech-21 submitted that, therefore, unless the Commission proves serious anti-competitive conduct, its case must be dismissed.

441. It is notable that this point was only raised by Tech-21 and not the other respondents, and then only in its closing submissions for the first time. It was not mentioned or in any way hinted at in the Response it filed or in counsel's opening submissions. It is Tech-21 which seeks to assert that this exclusion applies. Given the lack of evidence, it is in my judgment not open to Tech-21 to rely on this exclusion.

442. In any event, as acknowledged by Tech-21, the exclusion does not benefit serious anti-competitive conduct. This therefore simply brings one back to the question raised in the context of warning notice, namely, whether there was bid-rigging in this case, which is dealt with in section L below.

L. WARNING NOTICE

(1) Section 82

443. Section 82 of the Ordinance provides as follows:

> " (1) If the Commission has reasonable cause to believe that—
> (a) a contravention of the first conduct rule has occurred; and
> (b) the contravention does not involve serious anti-competitive conduct,

the Commission must, before bringing proceedings in the Tribunal against the undertaking whose conduct is alleged to constitute the contravention, issue a notice (a "warning notice") to the undertaking.

(2) A warning notice must—

(a) describe the conduct (the "contravening conduct") that is alleged to constitute the contravention;

(b) identify the undertaking (the "contravening undertaking") that has engaged in the contravening conduct;

(c) identify the evidence or other materials that the Commission relies on in support of its allegations;

(d) state—

(i) that the Commission requires the contravening undertaking to cease the contravening conduct within the period (the "warning period") specified in the notice, and not to repeat that conduct after the warning period;

(ii) that, if the contravening conduct continues after the expiry of the warning period, the Commission may bring proceedings in the Tribunal against the contravening undertaking in respect of the contravening conduct; and

(iii) that, if the contravening undertaking repeats the contravening conduct after the expiry of the warning period, the Commission may bring proceedings in the Tribunal against the contravening undertaking in respect of the contravening conduct and the repeated conduct; and

(e) indicate the manner in which the contravening undertaking may cease the contravening conduct.

(3) In determining the warning period, the Commission must have regard to the amount of time which the contravening undertaking is likely to require to cease the contravening conduct.

(4) After the expiry of the warning period—

(a) if the Commission has reasonable cause to believe that the contravening conduct continues after the expiry, the Commission may bring proceedings in the Tribunal against the contravening undertaking in respect of the contravening conduct; and

(b) if the Commission has reasonable cause to believe that the contravening undertaking repeats the contravening

> conduct after the expiry, the Commission may bring proceedings in the Tribunal against the contravening undertaking in respect of the contravening conduct and the repeated conduct.
>
> (5) To avoid doubt, proceedings under subsection (4) may not be brought in respect of any period that precedes the warning period.
>
> (6) The Commission may, either of its own volition or on application made to it in writing, extend the warning period specified in a warning notice if it considers that there is a good reason for doing so.
>
> (7) An application for an extension under subsection (6) must be made before the expiry of the period sought to be extended."

444. Section 82 is a special feature of the Hong Kong competition law regime, not found in other jurisdictions. It requires a warning notice to be issued before any enforcement proceedings may be brought by the Commission in the Tribunal in specified circumstances, and precludes any proceedings from being brought in respect of any time preceding the warning period where applicable.

445. No warning notice was issued to any of the respondents in this case. The Commission's position is that none was required as this case involved "serious anti-competitive conduct" and in particular "bid-rigging". The respondents disagree and contend that the case should be dismissed on this ground alone.

446. It is common ground that the Tribunal has jurisdiction to consider the challenge raised by the respondents based on the absence of a warning notice, as a matter related to the Commission's application with regard to alleged contraventions of the competition rules: s 142(1)(a) & (g). The Commission also accepts that if a warning notice was required in this case, then the proceedings should be dismissed because none was issued.

447. The concept of "serious anti-competitive conduct" is a statutory creature. The definition has been set out in §20 above. Within the Ordinance, this concept is relevant for the following purposes:

(1) in relation to an alleged contravention of the first conduct rule, whether the Commission must issue a warning notice under s 82 before bringing proceedings in the Tribunal (see s 82(1) & (5));

(2) whether the Commission may issue an infringement notice under s 67 in respect of a contravention of the first conduct rule (see s 67(1)((a)(i)); and

(3) whether the exclusion of agreements of lesser significance from the first conduct rule in s 5 of Schedule 1 applies (see s 5(1) and (2) of Schedule 1).

448. Whether certain conduct is serious anti-competitive conduct does not affect the meaning of the first conduct rule, or the question of whether a particular agreement has the object or effect of restriction of competition. Despite the label of "serious anti-competitive conduct", the Ordinance does not provide that such conduct is taken as a matter of law or presumed to be anti-competitive by object or effect, seriously or otherwise. The Commission has expressed the same view in its *Guideline on the First Conduct Rule* at §5.7, where it is stated:

> " Whether conduct is considered Serious Anti-competitive Conduct is not part of the determination of whether the conduct contravenes the First Conduct Rule because it has the object or effect of harming competition. The issue of whether the conduct is considered Serious Anti-competitive Conduct only arises after the Commission forms the view that the conduct contravenes the First Conduct Rule. Conduct that is Serious Anti-competitive Conduct may contravene the First Conduct Rule where it has either the object or effect of harming competition."

449. The respondents agree with this approach. In the present case, the only relevance of "serious anti-competitive conduct" is whether a warning notice was required and the implications under s 82.[76] It does not affect the question whether the conduct infringed the first conduct rule.

450. Serious anti-competitive conduct, as defined, includes several forms of conduct of which only "bid-rigging" is relevant in the present case. The statutory definition of "bid-rigging" is set out in §491 below. That definition has relevance only in the context of the definition of "serious anti-competitive conduct" (see s 2(2)). As will be seen below, one of the components of bid-rigging is that the agreement in question was not made known to the person who called for the tender, namely, YWCA in this case. It is in this context that the extent of YWCA's knowledge of the respondents' agreements has become an issue in these proceedings.

(2) The relevant time for the purpose of s 82

(a) The pleadings

451. In the Commission's Originating Notice of Application, it was stated:

> " 80. The relevant arrangements were not known to YWCA, its Tender Board or any of its staff at or before the time when the bids were submitted by BT, SiS, Innovix and Tech-21. In particular, Mr Lok Yiu Ying (also known as Alan Lok), Head of the Information System Department of YWCA ("Mr Lok") has expressly denied knowledge of any arrangements to submit "dummy" bids in response to the Second Tender and states that he was not aware of any irregularity or communications among BT and other tender invitees in the Second Tender.
>
> 81. As the facts and matters above involved "serious anti-competitive conduct", no warning notice is required to be issued

[76] The point on agreements of lesser significance is not open to Tech-21, as stated in section K above.

> by the Commission pursuant to section 82(1) of the Ordinance."

Reference was made in a footnote to §80 to the statements of Lok dated 21 December 2016 and 6 March 2017 respectively.

452. The respondents filed Responses which, broadly speaking, denied that YWCA had no knowledge of the alleged agreements. For example, Nutanix's Response stated:

> " The Applicant did not issue a warning notice to the 1st Respondent before bringing these proceedings. Accordingly, the Applicant must prove that the 1st Respondent's alleged conduct constitutes serious anti-competitive conduct. Otherwise, its case must be dismissed even if it can demonstrate that there is an independent contravention of the First Conduct Rule."

453. The Commission's Reply dated 7 July 2017 did not respond on this matter and made no mention of warning notices.

454. Prior to the trial, it would appear from the documents filed that the parties (except Innovix, see below) had been proceeding on the basis that the Commission needed to prove serious anti-competitive conduct at trial or its application would have to be dismissed.

(b) The new point

455. In its written opening dated 30 May 2018, the Commission submitted that even if the Tribunal does not at the end of the trial find serious anti-competitive conduct, it can still make a finding of breach of the first conduct rule and make orders under ss 93-94, because, prior to the commencement of the proceedings, the Commission "had reasonable cause to believe that YWCA had no knowledge of the alleged dummy bids".

456. As explained by counsel, the Commission's stance is that, in relation to YWCA's knowledge, only the evidential position before the commencement of proceedings is relevant to the need to issue a warning notice. The findings on YWCA's knowledge based on all the evidence available at trial are not relevant to that question. Accordingly:

(1) If the Tribunal finds that at the time of commencement of proceedings, the Commission had reasonable cause to believe that YWCA did not have knowledge of the dummy bids, then the Commission was not required to issue a warning notice, and the proceedings should not be dismissed pursuant to s 82 even if the Tribunal finds at the end that YWCA did have knowledge. Indeed, on this logic, the question whether or not (based on all the available evidence at trial) YWCA in fact had knowledge is immaterial and need not be determined by this Tribunal.

(2) If the Tribunal finds that prior to the commencement of proceedings, the Commission did not have reasonable cause to believe that YWCA did not have knowledge, then the Commission accepts the Tribunal should dismiss the proceedings due to the failure to issue a warning notice.

457. It seems to me clear that this is a new point which the respondents could not have anticipated from the Commission's pleadings.

(c) Objection to the new point

458. Nutanix and BT submitted that this argument is not open to the Commission because it is a wholly new case which has not been pleaded or otherwise notified to the respondents in advance. The Commission has not

disputed that it is a new point, but argued that it is a legal argument which it should be allowed to run.

459. It is to some extent a legal argument, raising issues on the construction of s 82. But in my view it is not a discrete, pure point of law. As can be seen below, there are arguments about what it is that the Commission had to have reasonable cause to believe. The question of what materials were available to the Commission at the time of commencement of proceedings and what it had reasonable cause to believe at that time are clearly factual matters hitherto not the subject of attention.

460. Nutanix and BT complained that they were taken by surprise. They submitted that they were likely to have pursued a different approach in the evidential stage, particularly in terms of exploring the Commission's state of knowledge prior to the commencement of proceedings.

461. Without determining the question of the respondents' entitlement to discovery of documents or disclosure of information, it seems to me impossible within the present context to rule out that the respondents might have approached the disclosure procedures differently and that the evidentiary base for the trial on this question might have been different, if the Commission had taken the point at an earlier stage.

462. In these circumstances, I agree with Nutanix and BT that the point is not open to the Commission at this late stage. This appears also to be the position of Tech-21. The relevant issue for these respondents is therefore whether the Commission has proved serious anti-competitive conduct based on the evidence at trial. This does not mean the Tribunal will "misapply the law" but simply that it will decide the issues properly raised in the case.

463. In contrast, Innovix submitted that on the Commission's new argument, it had failed to show that at the time of commencement of proceedings it had no reasonable cause to believe YWCA knew of the alleged agreements. (This argument was adopted by Nutanix and BT as their fall-back position if their objection did not prevail.) The Commission submitted that the same approach on this point should be adopted with respect to all respondents. However, Innovix's argument has been its case as stated in its Response from the outset. There is no unfairness to the Commission in dealing with it provided it is based on a correct construction of the statute.

(d) Time for assessing existence of serious anti-competitive conduct under s 82

464. As already explained, the Commission's (and Innovix's) position is essentially that, for the purposes of s 82, it is its belief or grounds for belief in relation to serious anti-competitive conduct that are relevant. In contrast, Nutanix and BT submit that the touchstone is whether serious anti-competitive conduct is established at trial, irrespective of the Commission's belief or grounds for belief at the time of commencement of proceedings.

465. Having regard to the wording of s 82(1), there is in my view considerable force in the Commission's and Innovix's contention. The warning notice, where required, has to be issued before the commencement of proceedings. The time for deciding whether a warning notice is necessary must therefore be that point in time. The bringing of an enforcement application in the Tribunal without having first issued a warning notice (where required) is in itself a breach of s 82(1), vitiating the proceedings from the start irrespective of the substantive merits.

466. Conversely, where the Commission has acted correctly in not issuing a warning notice before bringing proceedings, even if it subsequently transpires that no serious anti-competitive conduct is involved, there is nothing in s 82 to suggest that a warning notice would retrospectively become necessary or that the proceedings properly begun would be vitiated on that ground. Rather, the language and structure of s 82 suggest that the position is crystallised as at the commencement of proceedings.

467. Nutanix and BT submitted that that argument is incorrect as a matter of statutory interpretation because it is (a) contrary to the legislative purpose of s 82, and (b) unworkable in practice.

468. Turning first to legislative purpose, it may be noted that neither the warning notice mechanism nor the notion of serious anti-competitive conduct appeared in the Competition Bill as gazetted in July 2010. As explained in the *Report of the Bills Committee on the Competition Bill*,[77] the warning notice mechanism was introduced in response to concerns raised by the business sector and in particular small and medium enterprises over the possibility of being found to have inadvertently breached competition law for "non-hardcore anti-competitive activities", which were of a less serious nature and for which "there is no hard and fast rule as to whether they may or may not give rise to competition concerns".

469. The protection offered by the warning notice mechanism is two-fold. By requiring a warning notice to be issued before commencement of proceedings, it provides a chance for the undertakings, within a limited period, to remedy its conduct, without being subjected to enforcement proceedings. Secondly, by virtue of s 82(5), it "limits their exposure to

[77] See LC Paper No. CB(1)1919/11-12, §§27-35.

sanctions to the period starting from the commencement of the period prescribed in the warning notice".

470. Another protection added to the law to allay the concerns of small and medium enterprises was an exclusion in respect of agreements of lesser significance, ie agreements between undertakings with a combined turnover not exceeding HK$200 million.

471. At the same time, however, it was considered that these concessions ought not to apply to "hard-core anti-competitive activities" which were widely recognised in other jurisdictions as activities that almost always had an adverse impact on competition. The concept of "serious anti-competitive conduct", comprising price-fixing, market allocation, output control and bid-rigging, was accordingly introduced.[78]

472. These purposes do not, in my view, stand against the Commission's and Innovix's interpretation of s 82. The materials demonstrate a legislative intention in principle to afford protection to undertakings by the warning notice mechanism. How the mechanism should work in detail does not appear to have been discussed (although there was discussion of the situation where a warning notice is wrongly issued[79]). There is nothing in the legislative materials, which were couched in general terms, that is contrary to what appears to be the correct interpretation based on the words used in the statute. Indeed, the respondents have not offered any route of construction by which the language of the statute can be read to bear the meaning they advance.

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[78] See LC Paper No. CB(1)1919/11-12, §§27, 32, 33, 41(b).

[79] See LC Paper No. CB(1)1919/11-12, §§36-37.

473. It was submitted that the Commission's and Innovix's construction would give the Commission the power to decide for itself whether conduct which might not in fact be serious anti-competitive conduct could nevertheless be proceeded against without a warning notice. It was even submitted that it would encourage the Commission to postpone as much as possible the evidence-gathering exercise until after the instigation of proceedings.

474. This is, with respect, an extreme submission. In using the phrase "[i]f the Commission has reasonable cause to believe", the legislature plainly intends to make the Commission's obligation to issue a warning notice — and the correlative right of the undertaking not to be proceeded against without one — dependent upon the Commission's belief or grounds for belief. As with other situations in which statutory power is placed in the hands of public bodies through similar formulae, the legislature proceeds on the basis that the Commission is duty bound to and will act in good faith. Furthermore, even on the Commission's construction, it is not up to it to form whatever belief it desires — the statutory words are "has reasonable cause to believe", which, as is well established, import an objective standard as explained below.

475. Nutanix and BT also submitted that having a two-stage inquiry would be cumbersome and burdensome and would render proceedings more complex and onerous. It was said that on the Commission's and Innovix's interpretation, in all cases on the first conduct rule where no warning notice has been issued but the respondent says it should have been, the Tribunal would be required not merely to consider whether breach of the first conduct rule is proved in the end, but also, in the same proceedings, to look at the material available (or potentially available) to the Commission at the commencement of proceedings, ignoring the evidence that has in fact been led

at trial, and reach a determination as to whether or not the Commission had reasonable cause to believe at that stage that serious anti-competitive conduct had or had not occurred. Counsel submitted that it is hard to imagine a more unsatisfactory and wasteful procedure.

476. The need to investigate the evidential position at an earlier stage can indeed potentially make the trial more complex. Dealing with it as a preliminary issue has been mentioned as an alternative, but whether it would be appropriate to do so would be a matter to be decided in each particular case. But it seems to me such complexities, where they do arise, are the inexorable result of s 82 as formulated. On the other hand, such complications do not necessarily arise in every case on the first conduct rule. The present case, where the issue arises in connection with the knowledge of the person calling for the tender, is by no means a typical one.

477. I take the view therefore that the Commission's and Innovix's interpretation is correct.

(e) "Has reasonable cause to believe"

478. The parties have in addition debated what has to be shown if the position is to be assessed as at the commencement of proceedings.

(i) Subject matter of belief

479. The requirement of warning notice arises if the Commission has reasonable cause to believe that the contravention does *not* involve serious anti-competitive conduct. In a case such as the present where no warning notice was issued, the Commission's position is necessarily that the requirement did not arise, i.e. it did *not* have reasonable cause to believe that

the contravention did *not* involve serious anti-competitive conduct. In the context of this case, the contravention would not have involved serious anti-competitive conduct (*viz* bid-rigging) if the agreement in question was made known to the person calling for tenders (YWCA). In other words, the Commission has to show it did *not* have reasonable cause to believe that it was made known to YWCA.

480. In its submissions the Commission stated that it had reasonable cause to believe that YWCA did not know. The respondents submitted that the Commission asked itself the wrong question, and that the correct question was whether there was reasonable cause to believe that YWCA did know. I accept that *not* having reasonable cause to believe "X" is not logically equivalent to having reasonable cause to believe "*not* X", but I think the difference has been exaggerated in this case.

481. The fallacy in the respondents' position is illustrated by the submission that, because the Commission has to show that it had *no* reasonable cause to believe YWCA knew, so long as there is *some* evidence tending to show that the alleged agreements had been made known to YWCA, the Commission fails.[80] A slight variant of that submission, advanced by Innovix and adopted by Nutanix, was that the materials available could provide reasonable cause both for believing that YWCA did not know and for believing that YWCA did know. I do not accept this submission.

482. Belief is more than idle wondering, conjecture and even suspicion. In *George v Rockett* (1990) 93 ALR 483, the High Court of

[80] R3 Opening §§24-27; R4 Closing §30.

Australia distinguished the concept of "a reason to believe" from "a reason to suspect". In a unanimous judgment, their Honours stated (at pp 490-491):

> " In *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266, a question was raised as to whether a payee had reason to suspect that the payer, a debtor, 'was unable to pay [its] debts as they became due' as that phrase was used in s 95(4) of the Bankruptcy Act 1924 (Cth). Kitto J said (at 303):
>
> > 'A suspicion that something exists is more than a mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust, amounting to 'a slight opinion, but without sufficient evidence', as *Chambers' Dictionary* expresses it. Consequently, a reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence. The notion which 'reason to suspect' expresses in sub-s (4) is, I think, of something which in all the circumstances would create in the mind of a reasonable person in the position of the payee an actual apprehension or fear that the situation of the payer is in actual fact that which the sub-section describes — a mistrust of the payer's ability to pay his debts as they become due and of the effect which acceptance of the payment would have as between the payee and the other creditors.'
>
> The objective circumstances sufficient to show a reason to believe something need to point more clearly to the subject matter of the belief, but that is not to say that the objective circumstances must establish on the balance of probabilities that the subject matter in fact occurred or exists: the assent of belief is given on more slender evidence than proof. Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture."

483. Similarly, as Hely J stated in *St George Bank Ltd v Rabo Australia Ltd* (2004) 211 ALR 147 at 154 in relation to belief, "it is not sufficient to point to a mere possibility. The evidence must incline the mind towards the matter or fact in question".

484. It can be seen that the legislature also differentiates between the two concepts in the Ordinance. It has used the phrase "reasonable cause to

believe" in s 82[81] in contradistinction to the term "reasonable cause to suspect" which may be found in ss 39 and 41 as the condition for exercising investigative powers.

485. The Commission's belief – as an overall inclination – is to be formed by looking at the available material in the round. It is not an instantaneous reaction to each piece of evidence considered in isolation, changing from one moment to another as the Commission sifts through the material. What there is reasonable cause to believe should similarly be based on the entire body of material. If the material examined as a whole objectively gave reasonable cause for one to believe that the matter was *not* made known to YWCA, this effectively means it did *not* give reasonable cause to believe that it was made known to YWCA.

(ii) Subjective belief

486. The respondents submitted that the condition in s 82(1) for *not* issuing a warning notice is partly subjective and partly objective:

(1) the Commission must at the relevant time in fact *not* believe that the contravention did *not* involve serious anti-competitive conduct; and

(2) it must be reasonable for the Commission to hold such position on the evidence then available to it.

487. The Commission submitted that the test is purely objective. While the Commission is correct to point out that the language of the statute in *Yeung May Wan & Others v HKSAR* (2005) 8 HKCFAR 137 at §§71-72 ("he reasonably believes") is distinguishable, the other two cases cited,

[81] and in ss 92, 97 and 99 in relation to commencement of proceedings.

namely, *Inland Revenue Commissioners v Rossminster* [1980] AC 952 at 1013D-E and *O'Hara v Chief Constable of the Royal Ulster Constabulary* [1997] AC 286 at 298A-E, both concern statutory language similar to the phrase "has reasonable cause to believe" in s 82(1). I am inclined to think that the phrase imports a subjective element as was the conclusion in those two cases. This may be contrasted with the different formula "there is reasonable cause to believe" which may well indicate a purely objective test: *Hong Kong Archbold 2018*, §41-19.

488. For the subjective part of the condition, the respondents submitted that the Commission has to lead evidence on its actual state of mind. I do not think that is the legislative intention. The cases cited above concern the power of arrest without warrant on the part of a police officer (*O'Hara*[82] and *Yeung May Wan*[83]) and the power of seizure and removal on the part of an officer executing a search warrant (*Rossminster*[84]). In contrast, under the Ordinance, the person whose belief is relevant is the Commission, which is a statutory body consisting of up to 16 members and which makes decisions by a majority of the votes cast at meetings.[85] The power to make an application to the Tribunal under s 92 is a non-delegable function reserved to the Commission.[86] It is therefore the collective belief of the majority of members

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[82] Section 12(1) of the Prevention of Terrorism (Temporary Provisions) Act 1984 provided: "… a constable may arrest without warrant a person whom he has reasonable grounds for suspecting to be … (b) a person who is or has been concerned in the commission, preparation or instigation of acts of terrorism …".

[83] Section 50(1) of the Police Force Ordinance (Cap 232) provided: "It shall be lawful for any police officer to apprehend any person who he reasonably believes will be charged with or whom he reasonably suspects of being guilty of: (a) any offence for which the sentences fixed by law or for which a person may (one a first conviction for that offence) be sentenced to imprisonment …".

[84] Section 20C(3) of the Taxes Management Act 1970 provided: "On entering the premises with a warrant under this section, the officer may seize and remove any things whatsoever found there which he has reasonable cause to believe may be required as evidence for the purposes of proceedings in respect of such an offence as is mentioned in subsection (1) above …".

[85] Schedule 5 to the Ordinance, ss 2(1), 15(4).

[86] Schedule 5 to the Ordinance, s 31(2)(o).

who voted in favour of bringing proceedings under s 92 without first issuing a warning notice that is relevant.

489. The existence of such belief is in my view evidenced by the decision to file proceedings itself. It could not have been the legislative intention that the deliberation process and results and the subjective state of mind of each and every member who voted in favour of the decision should be probed into. I accept the Commission's submission that there is a presumption as to the genuineness of its subjective belief: see *Rossminster*, at p 1009B-D.

(iii) Objective basis

490. The objective part asks whether there in fact existed reasonable grounds for the Commission to hold that position when it instituted proceedings without first issuing a warning notice. The grounds on which the Commission acted must be sufficient to induce in a reasonable person the required belief: *Nakkuda Ali v Jayaratne* [1951] AC 66, 77; *Rossminster*, at p 1000C-D, 1011B-D. This is an objective question of fact to be determined on the basis of all of the evidence and information known to the Commission before proceedings were issued. The material need not be limited to evidence admissible in an eventual trial: *Secretary for Justice v Xu Aimin* (HCMP 1072/2016; 29 August 2016), §16.

(3) Bid-rigging

(a) Statutory definition

491. Section 2(2) provides that, for the purposes of the definition of "serious anti-competitive conduct" (quoted in §20 above), "bid-rigging" means—

> " (a) an agreement—
>
> (i) that is made between or among 2 or more undertakings whereby one or more of those undertakings agrees or undertakes not to submit a bid or tender in response to a call or request for bids or tenders, or agrees or undertakes to withdraw a bid or tender submitted in response to such a call or request; and
>
> (ii) that is not made known to the person calling for or requesting bids or tenders at or before the time when a bid or tender is submitted or withdrawn by a party to the agreement or by an entity controlled by any one or more of the parties to the agreement; or
>
> (b) a submission, in response to a call or request for bids or tenders, of bids or tenders that are arrived at by an agreement—
>
> (i) that is made between or among 2 or more undertakings; and
>
> (ii) that is not made known to the person calling for or requesting bids or tenders at or before the time when a bid or tender is submitted or withdrawn by a party to the agreement or by an entity controlled by any one or more of the parties to the agreement"

492. The relevant limb of the definition in this case is (b). There are four basic elements to the definition in (b):

(1) there is an agreement;

(2) the agreement must be made between two or more undertakings;

(3) there is a submission of bids or tenders that are arrived at by the agreement; and

(4) the agreement is not made known to the person calling for or requesting the bids or tenders at or before the time when a bid or tender is submitted.

493. The definition of bid-rigging in s 2(2) closely resembles (with one significant difference), and appears to have been derived from, s 47(1) of

the Competition Act of Canada (quoted in §497 below),[87] which was originally enacted in 1976 as s 32.2 of the Combines Investigation Act.[88]

(b) *Agreement*

494. Section 2(2)(b) refers to "agreement". It will be recalled that the word has a wide definition, which includes any agreement, arrangement, understanding, promise or undertaking, whether express or implied, written or oral, and whether or not legally enforceable or intended to be legally enforceable (see s 2(1)).

495. In addition, s 6(2) provides:

> " Unless the context otherwise requires, a provision of this Ordinance which is expressed to apply to, or in relation to, an agreement is to be read as applying equally to, or in relation to, a concerted practice and a decision by an association of undertakings (but with any necessary modifications)."

496. The respondents dispute the application of s 6(2) to the definition of bid-rigging, but I do not see why the plain terms of this provision should not have effect or why the context requires it should not be applied. Section 6(2) is enacted in the context of the first conduct rule and the notion of bid-rigging, as a form of serious anti-competitive conduct, has relevance specifically for the first conduct rule. Accordingly, by virtue of s 6(2), "agreement" in the definition of bid-rigging in s 2(2) includes "concerted practice". It may be noted that BT submitted that the distinction is likely to be immaterial in the present case because "agreement" includes an understanding or arrangement.

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87 R.S.C. 1985, c. C-34.

88 R.S.C. 1970, c. C-23; *as am* S.C. 1974-75-76, c. 76.

(c) Between 2 or more undertakings

497. Section 47(1) of the Competition Act of Canada (RSC, 1985, c C-34), from which the definition of "bid-rigging" in s 2(2) is apparently derived, provides:

> " (1) In this section, ***bid-rigging*** means
>
> (a) an agreement or arrangement between or among two or more persons whereby one or more of those persons agrees or undertakes not to submit a bid or tender in response to a call or request for bids or tenders, or agrees or undertakes to withdraw a bid or tender submitted in response to such a call or request, or
>
> (b) the submission, in response to a call or request for bids or tenders, of bids or tenders that are arrived at by agreement or arrangement between or among two or more bidders or tenderers,
>
> where the agreement or arrangement is not made known to the person calling for or requesting the bids or tenders at or before the time when any bid or tender is submitted or withdrawn, as the case may be, by any person who is a party to the agreement or arrangement." (emphasis added)

498. In comparison with the Canadian statute (especially the words underlined above), it will be noted that the definition of bid-rigging in the Ordinance does not expressly require the agreement to be between or among two or more *bidders or tenderers*, but simply two or more *undertakings*. The fact that Canadian law does not use the concept of "undertaking" does not explain why Hong Kong cannot retain the wording of "two or more bidders or tenderers".

499. The requirement of two or more undertakings means that an agreement between two persons who form a single economic unit, and therefore one undertaking, does not fall within the definition. Nor does an agreement with an individual who is not himself an undertaking suffice,

unless this is attributable to the undertaking on whose behalf he has acted. It follows that the agreement between Hung and Shek does not satisfy the definition, as Shek's conduct was not attributable to an undertaking (SiS).

500. It has been submitted on behalf of the respondents that vertical agreements are not caught by the definition of bid-rigging, and that purely vertical agreements can never constitute bid-rigging.[89] They submitted that bid-rigging as commonly understood must involve a horizontal agreement between competitors. There is however no universal rule that vertical agreements can never give rise to or be characterised as bid-rigging.

501. BT referred to the Commission's *Guideline on the First Conduct Rule* at §6.26 which states that bid-rigging "generally involves two or more undertakings agreeing that they will not compete with one another for particular projects" and at §6.28 that:

> "Bid-rigging can take a number of forms, including undertakings agreeing:
> (a) that certain parties will not submit a bid or will withdraw a bid submitted previously ("bid suppression");
> (b) to take turns at being the winning bidder ("bid rotation");
> (c) that certain bidders will submit higher bid prices or less attractive terms than the supplier "chosen" to win the tender ("cover bidding"); or
> (d) to take other actions that reduce the competitive tension in the bidding process, such as by agreeing minimum bidding prices or agreeing that the winning bidder will reimburse other bidders' bid costs."

In my view, these general, inclusive statements based on the experience that bid-rigging often involves agreements between competitors cannot be elevated to put a gloss on the statutory provisions so as to alter their meaning.

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89 R1 Opening §59, R2 Opening §83.

502. The legislature has conspicuously not confined the definition in the Ordinance to agreements between bidders. It is significant to bear in mind the peculiar context in which the definition is found in Hong Kong. While s 47(2) of the Canadian Act enacts a substantive offence of bid-rigging punishable by a fine or imprisonment for up to 14 years, in Hong Kong the definition in s 2(2) is relevant only to the question whether there is serious anti-competitive conduct, which is not a breach of any substantive rule as such but has relevance only for the specified purposes referred to in §447 above. Having regard to the different contexts, it is not surprising for the legislature to have adjusted the definition.

503. Moreover, much depends on the nature and content of the agreement. A purely vertical agreement between a reseller and his supplier as to how the reseller should respond to a tender exercise by way of his own bid is one thing. Contact by an undertaking with his supplier in a bidding situation, in relation to matters such as cost, profit margin and terms of sale, is normal and unobjectionable (see also §§419-423 above). But several "vertical" agreements between resellers and their common supplier respectively as to how each reseller should bid, with a view to putting in non-genuine bids or helping one of them win, would be a very different matter. Each case has to be examined on its own facts.

504. Nutanix submitted that even in situations involving a vertical player such as a supplier, there must, through that supplier, directly or indirectly, be a horizontal element. Even on this basis, it can be seen that, while the agreement between Nutanix and BT in the present case is structurally vertical, its content was not at all about the vertical relationship between them, but related to the submission of bids by other undertakings acting at the level of BT in the same tender. BT provided its own bid prices to

Nutanix *not* for the purpose of discussing that price with Nutanix. Nutanix then determined the bid prices of the others, who simply adopted them without paying any attention because these were not genuine bids. In the circumstances while the Nutanix/BT agreement was a vertical agreement, its content is about the conduct of BT's horizontal counterparts and not about any vertical relationship (see also section J(6) above).

505. In any event the objection does not apply to the trilateral agreement between Nutanix, BT and Innovix, which involved a horizontal coordination between BT and Innovix.

(d) Submission of bids or tenders arrived at by the agreement

506. The definition requires a submission (in response to a call or request) of bids or tenders that are arrived at by the agreement. In the Canadian case of *R v Durward* (2015), the trial judge directed the jury with respect to the requirement that the bids must be "arrived at" by the agreement, that:

> "the outcome of the impermissible agreement or arrangement must lead to the bid and not simply relate to steps in the preparation of the bid."[90]

507. *R v McLellan Supply Ltd and Scott (SF) Manufacturing Company Ltd (No 2)* [1986] AJ No 1715 was cited by the respondents. There a municipal authority issued an invitation to tender for the installation of chain-link fences to a number of suppliers, including Scott and McLellan. McLellan was a supplier of chain-link fence materials to Scott. McLellan would often submit its own bid whilst at the same time providing quotes to Scott which Scott used to formulate its bid, on the informal understanding that

[90] *R v Durward*, Final Instructions to the Jury, Court File No 09-300-68, p 88.

McLellan would not "undercut" Scott. Following receipt of the tender, Scott sought quotes from McLellan for the required materials and they discussed "acceptable profit margins" on materials as well as labour costs. Subsequently McLellan gave Scott a cost price. Scott then prepared a bid based on the quote. McLellan also submitted a direct bid.

508. The court dismissed the charge of bid-rigging under s 32.2 of the Combines Investigation Act against Scott and McLellan, but it seems to me to be a case on very different facts where (i) the final amount of Scott's bids were not made known to McLellan at any time and *vice versa*, (ii) there was no agreement made to submit a bid of any particular nature or to bid at all on the project, (iii) there was no agreement affecting the calculation of the bids, and (iv) each accused submitted its own tender based on its own projection of costs.[91] As such the case does not assist the respondents. Nor, with respect, does the case of *Australian Competition and Consumer Commission v Olex Australia Pty Ltd* [2017] FCA 222 assist, which is concerned with quite different statutory provisions in s 44ZZRD of Australia's Competition and Consumer Act 2010 (Cth).

509. Nutanix and BT submitted that the opening words in s 2(2)(b) "a submission … of bids or tenders that are arrived at by an agreement" should be interpreted as only applying to a submission by a party to the agreement, and that since BT's own bid was not arrived at by its agreement with Nutanix and the other bids were not submitted by a party to the agreement between Nutanix and BT, that agreement did not fall within bid-rigging. I agree with the Commission that this argument should be rejected:

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91 See §§24-25.

(1) First, no such limitation appears in the wording of s 2(2)(b) (unlike the Canadian Act). The provision should be applied in accordance with its plain wording, without reading in words.

(2) The friends' bids were arrived at by, *inter alia*, the agreement between Nutanix and BT.

(3) The agreement was (on the Commission's case) not made known to YWCA at or before the time when a bid was submitted by BT which was a party to the agreement, meeting the requirement of s 2(2)(b)(ii).

510. On the evidence, the bids of Innovix and Tech-21 (and the bid made by Shek in SiS's name) would not have been submitted without the agreements in question.

(e) Agreement not made known

511. The fourth element of s 2(2)(b) is that the agreement must not have been made known to the person calling for or requesting the bids or tenders at or before the time when a bid or tender is submitted or withdrawn by a party to the agreement. In Canada it appears that the concern that underlay the requirement of "not made known to" was that, otherwise, the law might unwittingly prohibit bids by joint ventures and similar groups, the purposes of which may be entirely legitimate and beneficial to the economy.[92] Canadian authorities on the equivalent provision suggest that express notification of the agreement to the person calling for tenders is required.

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92 Debates of the Senate, Official Report (Hansard), 19 March 1975, p 680.

512. In *R v Travelways School Transit Ltd* (1980) 52 CCC (2d) 399, Osler J rejected the argument that the agreement was made known to the person at the opening of the tender because it was obvious that the bids were identical and that the submission of identical bids was the result of an agreement. The court took the view that such an interpretation of the statute would give rise to an inappropriate lack of certainty in concluding if an agreement has been made known or not. Instead, Osler J held that:

> " there is an affirmative obligation under those who join in such agreement not just to make it possible for the recipient of their bids to become aware that they had made an agreement but to affirmatively notify such persons in some manner other than the mere production of identical bids."[93]

513. In *R v Charterways Transportation Limited* (1981) 32 OR (2d) 719,[94] Dupont J adopted Osler J's view and stated that a necessary inference that the bids were drawn pursuant to an agreement does not amount to making known as required by section 32.2(1) of the Combines Investigation Act.

514. In *R v Lorne Wilson Transportation Ltd* (1982) 138 DLR (3d) 690, on appeal from *R v Charterways Transportation Limited*, the Ontario Court of Appeal, rejecting an argument that the agreement was "made known" to the person requesting tenders because it could be inferred from the fact that identical tenders were submitted that they represented the product of an agreement between the tenderers, stated:

> " As we construe the section, express notification of the agreement or arrangement is required. A person submitting a bid or tender which contravenes s 32.2(1)(a) or (b) must give actual notice of the agreement or arrangement to the person calling for or requesting the

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93 This case concerns bid-rigging as an offence contrary to section 32.2(1) of the Combines Investigation Act (predecessor of section 47 of the Competition Act).

94 Osler J's decision in *R v Travelways School Transit Ltd* was the decision on motions to quash the orders for committal while Dupont J's was the decision after the trial.

> bids or tenders at or before the time when the bid or tender is made in order to take advantage of the proviso in s 32.2(1)."

515. The same approach was adopted more recently in *R v Durward* where the judge directed the jury that the "made known" element "requires express notification to the person calling for bids or tenders" and that "[t]he person calling for bids or tenders must be aware of the impermissible agreement or arrangement".[95]

516. In my respectful opinion, this interpretation of the phrase makes equal sense in the context of the Ordinance. When one comes to the stage of considering this element, the agreement is *ex hypothesi* one that is restrictive or distortive of competition and that falls within "bid-rigging" subject to the question whether it has been made known to the person calling for tenders. In my opinion it is sound law, and not an onerous burden, to require express notification of the agreement if it is to be exempted from being serious anti-competitive conduct on this ground. A different rule would introduce much uncertainty and create scope for unmeritorious argument such as that the person calling for bids or tenders must have believed, or could have guessed, or should have suspected, that the impermissible agreement existed.

(f) A further controlling quality?

517. Nutanix submitted that there must be a further "controlling quality" of the agreement for it to amount to bid-rigging, for not every agreement, even between competing undertakings, resulting in the submission of bids would, without more, be bid-rigging. For example, it was said that an agreement between two undertakings that both would respond to a call for tenders will not, without more, be anti-competitive.

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[95] *R v Durward*, Final Instructions to the Jury, Court File No 09-300-68, p 142.

518. The contrary argument is that it is unnecessary to read any such additional element into the statute because the definition of bid-rigging assumes that the first conduct rule is engaged. As explained above, serious anti-competitive conduct is relevant only in the context of the first conduct rule. It is a sub-set of conduct infringing the rule. The inquiry whether there is serious anti-competitive conduct presupposes there is anti-competitive conduct infringing the first conduct rule. The purpose of the inquiry would be one of those set out in §447 above. In the example postulated, the agreement would simply not infringe the first conduct rule in the first place, so that it would be unnecessary to consider whether it was bid-rigging. In the end Nutanix accepted that the inquiries in both contexts would be similar, so that where, as in the present case, the agreements are held to be anti-competitive by object in the way established, I do not consider that any additional "controlling quality" should be required.

(4) Whether made known to YWCA

519. The main factual issue relevant to the definition of bid-rigging is whether the agreements in question were made known to YWCA at or before the time when the bids were submitted in the second tender.

(a) The scope of the question

520. YWCA is a large organisation. The invitation to tender was issued by APD (headed by Mak), with input from ISD (headed by Lok), after a decision to procure was made by ITDC. The contract was to be awarded by the Tender Board, a sub-committee of FAC. In principle there might be a question as to which individual's knowledge constituted YWCA's knowledge in this context, but it does not arise in this case because, as the respondents submitted and I accept, the parties had up to the commencement of the trial

proceeded on the basis that Mak's and Lok's knowledge was the relevant knowledge. There is no hint of an alternative case in the Commission's pleadings or written opening that, even if the agreements were made known to Mak or Lok, it did not amount to YWCA's knowledge.

521. Mak, who made the complaint on behalf of YWCA to the Commission and testified at trial, stated he had no knowledge and none of the respondents has suggested otherwise.

522. While Percy Ng and the chairman of ITDC, Rosaline Tam, knew each other as former colleagues in another company, there is no doubt that Lok, responsible for YWCA's ISD, was, together with his assistant, Li, the primary contact point within YWCA for BT in relation to the project concerned. By agreement between the parties, Lok, but not Li, was called by the Commission to give evidence.

523. It would not be fair to permit the Commission to run a new case at trial that even if the agreements were made known to Lok, it did not matter because some other persons in YWCA did not know. The issue that arises in this case is therefore whether the agreements had been made known to, in the sense of having been expressly notified to, Lok.

(b) Lok's knowledge

524. Lok denied knowledge of the agreements in question. His evidence was the subject of vigorous attack by the respondents. I bear in mind that he has his own reputation and perhaps his position within YWCA to protect and as such cannot be regarded as wholly disinterested.

525. In assessing the evidence of his knowledge I have borne in mind the good working relationship that existed between Lok and BT. It is clear that by the time of the tenders for the Nutanix solution, Lok had found BT's work for YWCA, thus far, satisfactory and had a good working relationship with Percy Ng and Chan. BT had helped with the presentation of the proposed hyper-converged system to ITDC and with the proof-of-concept exercise. The evidence also shows that Lok and Li trusted Chan and were prepared to give him information and relied on him for assistance on certain matters relating to the procurement exercise:

(1) In late 2015, Lok told BT that he thought YWCA had a budget of about $200,000 for each node of the Nutanix server.

(2) On around 10 June 2016, as neither Lok nor Li was specifically trained on Nutanix's products and the hyper-converged system was a new generation of servers, Lok let Chan prepare the first draft of the technical specifications for the first tender (see §105 above), which Lok adopted and provided to APD.

(3) On 20-21 June 2016, for the purposes of the first tender, Li asked Chan to suggest names of companies capable of supplying the Nutanix system. The names provided by Percy Ng were passed on by Lok to APD. Li later also adopted BT's request (which originated from Nutanix) to remove one of the companies from the list (see §111 above). (It might be thought unusual for YWCA to ask BT to name any potential bidders, but this was due to the fact that at that time, the Nutanix product was very new on the market.[96])

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[96] Chan's interview record, §§1299-1304.

(4) On 5 July 2016, Lok told Chan the first tender had failed because there were insufficient bids and that there would be a second tender.

(5) On 6 July 2016, Lok adopted the revised technical specifications prepared by Chan for the purpose of the second tender and passed them on to APD. The respondents submitted that Lok's evidence that he checked the specifications were available on the market was incredible, but I do not think so. His statement did not mention that check, which was a minor matter, but did say he considered Chan's suggestions with Li. Carrying out an online search to see a product was actually available would not be a difficult or lengthy exercise.

(6) On the same date, Lok also accepted the four names suggested by Chan and included them in the list of potential suppliers he sent to APD for the purposes of the second tender.

526. There is also evidence that BT had in its possession a soft copy of the blank Compliance List in editable format that had been created by Wong. It was put to Lok that he had supplied it to BT but he denied it. There are the following points to note:

(1) The metadata analysis of the file shows that its title had the number "TR16016MW" which was the reference number of the *first* tender.

(2) While it may not have been entirely consistent with YWCA's procurement practice, the provision of the soft copy suggests a readiness to accede to BT's requests rather than an intention to facilitate anti-competitive behaviour.

(3) As the Commission pointed out, if the suggestion is that the soft copy document was provided by Lok to Chan to facilitate the preparation of the second tender documents for Hung's friends, there is no reason why the other documents (such as the Form of Tender, Supplier Profile Form and Schedule of Rates) would not have been provided also.

527. I accept Lok's evidence that he did not himself provide the soft copy to BT but in any event, even if he did, I do not consider it to be evidence of any relevant knowledge of the agreement between Hung and Chan.

528. Lok knew about the deal registration system in the IT industry generally and that BT had registered the YWCA opportunity (although he was not sure whether it was with Dell or Nutanix). He believed that BT might be able to secure a more favourable discount than other IT companies because of the deal registration but there is no suggestion he knew the precise details.

529. The respondents suggest there was an urgent need to procure the system. There is some dispute on the evidence which ultimately seems to me a matter of degree. Clearly Lok wanted YWCA to be able to procure the equipment sooner rather than later. Some of YWCA's data had been transferred to the proof-of-concept machines, which were on loan and had to be returned to Dell. However the pressure to return them, in my view, fell more on Chan than on Lok. By late July 2016, after the second tender, Lok told Mak there was urgency in installing applications on the Nutanix platform and asked him to speed up the process.

530. When it was suggested to Lok that he had agreed with Chan that BT would find other tenderers to make up the required minimum number of

bidders for the second tender, Lok admitted that either he or Li had contacted Chan for assistance in identifying other companies in the market who would be able to provide YWCA with the Nutanix solution.

531. Chan's evidence was that on 5 July 2016, Lok told him that BT's bid was the only bid received in the first tender and that there would be a second tender. Chan and Lok agreed to try to make the second tender successful. Chan said he would simplify the tender specifications. In a subsequent telephone conversation, Chan told Lok that Hung would locate partners to try to make up the minimum number of five responses in the second tender and Chan would supply a list of the partners to Lok.

532. I consider that Lok did understand that Chan contacted the supplier i.e. Nutanix (though Lok did not know Hung's name) who would help and try to get some channel partners of Nutanix to submit bids in the second tender. To the extent he denied that I do not accept that evidence.

533. However, Lok was adamant that he believed the companies suggested by Chan would be capable of and genuinely interested in bidding in the second tender. He stated that he did not ask Chan or Percy Ng or any other person in BT for their assistance to find companies to submit *dummy bids* to YWCA, nor did Chan or Percy Ng tell him that they would do so or had done so. He said that had he known that a company intended to submit a dummy bid, he would have immediately reported this to APD.

534. Lok also categorically disagreed with the suggestion that he had agreed with Chan, whether on 5 July 2017 or otherwise, that BT would find companies to put in bids that would have no chance of winning.

535. It should be noted that Lok added seven other companies to the four names suggested by Chan and gave a list of eleven to APD (see §120 above). Once the company names were given to APD, APD had its own mechanism to produce a list of invitees to tender. Although Priscilla Szeto had told Wong on 6 July 2016 that SiS would not bid, APD did not remove its name. According to Mak, whose evidence I accept, one of the reasons was that Lok wanted SiS on the list. This suggests that Lok thought SiS might well be encouraged to bid, but does not tend to show he was notified of any agreement to procure non-genuine bids.

536. Chan's (unchallenged) evidence was that he did not tell Lok that either he (Chan) or Hung would obtain dummy bids. Indeed, BT did not put to Lok that he was made aware of an agreement to submit dummy bids in the sense referred to by the Commission, i.e. not genuine or not intended to win.

537. In the absence of any evidence of express notification to Lok, the respondents submit that he must have understood from the context that dummy bids would be submitted by the four companies Chan named to him. The high point of this argument is the evidence that Chan sought Lok's advice on 14 July 2016 on how the Compliance List should be completed. This is what Chan said in his witness statement:

> "… After Thomas mentioned to me how he was planning to complete the Compliance List, I asked Alan for his advice how the document should be completed (such as which items should be marked as compliant or non-compliant). It is my belief that Alan would have known from this that I was assisting Thomas so that Thomas could help the other bidders to complete their bids. I did not expressly inform Alan that the other bids would be "dummy bids" in the sense I have mentioned above[97], though I believe he may have known this from the context."

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[97] This refers to the passage in his statement quoted in §204 above.

538. This passage concerned what Chan believed Lok might have understood from the context. In submitting that the agreements in question had not in fact been made known to Lok, the Commission is not in my view in any way impermissibly seeking to discredit Chan.

539. When it was suggested to Lok in cross-examination that he should have known that Chan was assisting Hung to help other bidders to complete their bids, Lok rejected such suggestion. As to this:

(1) Lok explained he did not know and could not remember having met Hung. The first time he learnt about Hung was when he gave his statement to the Commission. I accept this evidence. Lok and Hung clearly had no pre-existing relationship. The fact that Lok might in fact have met Hung on one prior occasion when Percy Ng took Hung to meet with YWCA staff is neither here nor there. It was not something Lok would necessarily have registered in his mind. It is notable that Percy Ng, in a message to Lok on 4 August 2016, wrote in terms of "the Nutanix manager helping us on the tender" rather than referred to Hung by name.

(2) Further, while Lok relied on Chan for certain matters, Lok was after all an employee and a representative of YWCA, the client. Chan had been careful not to include Lok in his communications with Hung. Thus, for example, Chan did not send Lok his email to Hung of 5 July 2016 at 16:14 but sent Lok a different email at 16:22 to set out the specifications. Nor did Chan simply forward to Lok the email from Hung of 6 July 2016 setting out the four names, which would have contained in the chain Chan's email to Hung. Instead, Chan composed a separate email to Lok giving him the names.

(3) Lok's evidence of his understanding was that Chan needed his help on how to complete the Compliance List as Percy Ng was on leave at the time. Chan said he had received assistance and input from Percy Ng on the Compliance List in relation to the first tender, and that he did not himself require help from Lok on how to fill in the Compliance List for BT in relation to the second tender. There is no reason, however, that Lok should know that Chan had prepared BT's Compliance List in the first tender or, even if he did, that Chan intended to submit for BT an identical Compliance List in the second tender. As Lok explained in his evidence, YWCA's prior contracts with BT were Percy Ng's responsibility. Lok understood Chan had come in as the deputy since Percy Ng was on leave and that the second tender was the first time Chan had to fill in such document. Percy Ng's evidence also suggested that he would have dealt with the documents for the first tender but for the fact that he was going on leave on 25 June 2016. The invitation to the first tender had however already been sent out on 21 June 2016 (with the deadline of noon on 28 June) and there is no reason why Lok must have known that Percy Ng did not fill in the Compliance List before going on leave.

(4) Lok's evidence that if he had known that anyone intended to submit a dummy bid, he would have reported it to APD, seems to me to be genuine. He was keen for YWCA to procure the equipment, but had no reason to make sure that BT was the successful tenderer at all costs. There is no basis to doubt his loyalty to YWCA. Despite his reliance on and good working relationship with BT, obtaining more genuine bids might result in the receipt of a bid lower than BT's, which would be for YWCA's benefit. There is no suggestion Lok knew the precise deal

registration discount BT would get and I do not consider that he believed that no bids genuinely and independently formulated and submitted by any other company would have a chance to beat BT's. I do not find it inherently probable that he would acquiesce in Chan procuring bids that were not intended to win but purely to make up the numbers so that BT's bid would prevail.

(5) For his part, Chan simply had a working relationship with Lok and had no control over him. It would be highly unlikely that Chan would wish Lok to know that Chan and Hung were arranging for non-genuine bids to be submitted to YWCA or that Chan had given Hung BT's bid prices for the exercise. On the contrary, Chan was taking care to avoid suspicion on the part of YWCA (see his email to Hung dated 15 July 2016 set out in §135 above). Chan also said in his statement that he deliberately changed the wording in each of the Compliance Lists for SiS and Innovix respectively to avoid arousing "suspicion within YWCA". He was concerned that what he was doing would not be acceptable to YWCA if it found out.

(6) On Chan's own evidence in the statement quoted in §537 above, he did not expressly inform Lok of the purposes of his enquiry about the Compliance List; nor did he tell Lok that he (Chan) and Hung were arranging for dummy bids to be submitted.

(7) In cross-examination, Chan agreed with the suggestion put to him by counsel for Innovix that from the conversation about the Compliance List, Lok must have understood that the bidders found by BT "would not be putting in competitive bids". However, he went on to explain that he said this because BT had a preferential discount with Nutanix and even if the prices were similar, BT would not lose because of the efforts it had already put in and the relationship with YWCA.

(8) When asked by the Tribunal to explain in his own words the relevant conversation he had with Lok, Chan said:

> " Because at the time Thomas said to me that they would fill in most parts in the compliance list with 'no'. So after a discussion with Alan, Alan told me that for some parts, they could not be filled in with a 'no', because if those parts were filled in with a 'no' then it would mean that they did not comply."

There was no suggestion Chan had actually told Lok that he was seeking advice on how the Compliance List should be filled in – not for BT – but for other tenderers that either BT or Nutanix was going to procure to put in tenders.

(9) In his re-examination, Chan was asked by the Tribunal to clarify what he said Lok knew, and Chan's answer was:

> " That we helped find four other bidders to make up the five-bidder requirement."

When asked if there was anything else, he said "No".

540. Innovix submitted that Lok had more relevant knowledge than Siu and that if it is found that Siu had sufficient knowledge to render Innovix privy to an agreement to submit a non-genuine bid, then there must be reasonable cause for the Commission to believe that Lok had sufficient knowledge to take the case out of the definition of bid-rigging. I do not accept this submission. The following critical facts were known to Siu but not to Lok:

(1) Hung provided the completed tender documents to Innovix only on the morning of 18 July 2016 and asked Innovix to print and sign them to "help BT to bid for Dell deal".

(2) Hung had already inserted the bid price for Innovix's bid and virtually completed the documentation without reference to Innovix.

(3) Hung had not sent any Technical Proposal to Siu (it was put into Innovix's bid privately by Hung).

(4) Siu did not know the cost price for Innovix of the product tendered and did not discuss it with Hung at all.

(5) Siu dealt with the tender documents so perfunctorily that he did not even notice the product offered was a Dell-Nutanix solution.

(6) Innovix's bid was submitted with no intention on its part to win the tender but only for the purpose of helping BT.

541. Tech-21 complained about the absence of discovery made from Lok's mobile phone which was in fact seized by the police in July 2017 in connection with an offence committed by Lok at that time which was wholly unconnected with the subject matter of these proceedings. However, it has not been indicated how such disclosure would have any bearing on this case. Moreover, screenshots from Lok's mobile phone were in fact disclosed to the respondents and the textual communication between Lok and Percy Ng and Chan had also been disclosed by BT.

542. On the evidence, I find that Lok did not understand from his conversation with Chan about the Compliance List that Chan was helping other companies to fill in the document. But even if Lok had understood from the context that Chan was seeking to help Nutanix to help the four named companies to tender with a view to meeting YWCA's requirement of five bids, this would not prevent the agreements from constituting serious anti-competitive conduct, for it is common ground that one bidder can arrange for

independent, genuine bids to be submitted by others in response to a tender. It would not amount to express notification to Lok of the agreements to procure non-genuine bids.

543. I consider that Lok was truthful in saying that he had no knowledge that Chan or Hung was trying to procure dummy bids from the four other companies for the purposes of the second tender. I also accept Lok's evidence that he believed the four companies suggested by Chan would be capable of and genuinely interested in bidding in the second tender.

544. On the evidence, the Commission has in my view established that it was not expressly notified to Lok, and that Lok was not aware, at any time before 18 July 2016, that there was any agreement to procure non-genuine bids just to make up the numbers.

(c) Reasonable cause for belief as to knowledge

545. There remains the question, as between the Commission and Innovix, whether, at the time of commencement of these proceedings (23 March 2017), the Commission did not have reasonable cause to believe that the relevant agreements had been made known to YWCA. Again, the person that Innovix had focussed upon was Lok.

546. Based on the materials available to the Commission at that stage:

(1) There was no contemporaneous document that indicated that YWCA was notified or in any way knew that it would receive non-genuine bids from SiS, Innovix, Tech-21 or iCON.

(2) Chan had been interviewed by the Commission though he had not made his statement yet. In his interview Chan suggested that

Lok knew that Hung had arranged for four companies to submit bids in the second tender, but he did not suggest that Lok was told or otherwise knew that these would be dummy bids, non-genuine bids, bids not intended to win, or bids whose prices were determined by Hung with knowledge of BT's.

(3) There was nothing to suggest that Lok was privy to any of the email communications between Chan and Hung, including those in which Chan gave Hung BT's bid prices or requested the 30% mark-up for the friends. Nor was there anything to suggest Lok was privy to Chan's email to Percy Ng in which Chan said he had asked Hung to provide "dummy bids".

(4) In his statements and interviews with the Commission, Lok was clear that he had no knowledge of any false bids. Innovix criticised as incredible Lok's statement in the interview on 23 February 2017 that he "doubted he had *much* communicated with [Chan]" (emphasis added). It is, however, not surprising that Lok could not remember the number of communications he had with Denis Chan, nor is the context of that particular note entirely clear. Lok told the Commission he was "certain" he had not asked Chan to submit any "false" bid. His evidence on this has been consistent throughout. Innovix commented that the interview note did not say the agreements were not made known to Lok, but Chan had never suggested that any agreement to procure false bids was disclosed to Lok.

(5) It was argued that since Lok gave BT preferential treatment and inside information and allowed BT to take part in the design of the technical specifications, he could not conceivably have understood BT or Nutanix would have procured "competitive bids" compared to BT. One can readily accept that Lok believed BT would have a good chance of winning, but this is no basis to

think that he was notified or otherwise knew that the other bids would be not genuine in the way already described.

(6) The respondents submitted that in his interview with the Commission, Mak had mentioned his "suspicions" of potential involvement of employees in ISD. In fact the note said Mak and Gary Sze (Director of Finance and Administration) had "not discussed their suspicions with the IT department". This was consistent with Mak's explanation in his evidence, which I accept, that what he meant was he did not tell his colleagues in the IT department about the suspicious features found in the tender documents (such as spelling mistakes). While this was in a section headed "Potential Involvement of other employees in YWCA?" and shows that the Commission was indeed investigating that possibility with YWCA, I accept the Commission's submission that there was no additional material there which overall gave YWCA basis for believing that any its employees were involved.

(7) It was also submitted that the Commission must itself have suspected at some stage that ISD staff or Lok was involved. Even assuming this was the case, one must distinguish between pursuing all reasonable lines of *suspicion* or inquiries at the investigative stage and forming an overall *belief* based on the entire body of available material at the stage of commencement of proceedings.

(8) Innovix further referred to the Request for Support from Principal (see §126 above). The evidence is that Mak decided to include that document in the second tender to try to maximise the number of responses, as he was concerned that potential tenderers might think YWCA had already chosen a seller. I do not think the document could give rise to any basis for the Commission to

believe that YWCA or its employees had knowledge of any anticompetitive arrangements.

(9) The possibility that Lok might have asked Chan to get help from Nutanix or Hung to encourage more people to submit bids in the second tender does not tend to show that the agreements for dummy bids were made known to Lok.

547. Ultimately, it seems to me there was nothing that should have led the Commission to *believe* that Lok, let alone anyone else in YWCA, had been expressly notified of the alleged agreements. In my view there was no reasonable cause for the Commission, as at the date of commencement of proceedings, to believe that the agreements it intended to impugn had been made known to YWCA.

(5) The definition of bid-rigging applied

548. Accordingly, the elements of the definition of bid-rigging apply to the conduct in question as follows.

549. In respect of the agreement between Nutanix and BT:

(1) There was an agreement.

(2) It was made between two undertakings, namely, Nutanix and BT.

(3) The bids of Innovix and Tech-21 submitted to YWCA were the direct, intended result of the agreement. They were arrived at by that agreement (as well as by the individual agreements between Nutanix and each of Innovix and Tech-21).

(4) The agreement was not made known to YWCA before those bids were submitted.

550. In respect of the agreement between Nutanix, BT and Innovix:

(1) There was an agreement.

(2) It was made between three undertakings, namely, Nutanix, BT and Innovix.

(3) Innovix's bid was arrived at by this agreement.

(4) The agreement was not made known to YWCA before Innovix's bid was submitted.

551. In respect of the agreement between Nutanix and Tech-21:

(1) There was an agreement.

(2) It was made between two undertakings, namely, Nutanix and Tech-21.

(3) Tech-21's bid was arrived at by this agreement.

(4) The agreement was not made known to YWCA before Tech-21's bid was submitted.

552. Coupled with the fact that, as found above, the agreements, examined in the context of the second tender, had the object of preventing, restricting or distorting competition, it follows that the agreements in question constituted bid-rigging and thus serious anti-competitive conduct within the meaning of the Ordinance, and that no warning notice was required before the commencement of these proceedings.

M. SUMMARY AND CONCLUSION

553. In summary, this Tribunal finds as follows. As these proceedings, which are brought by the Commission seeking orders for pecuniary penalties, involve the determination of a criminal charge within the meaning of Art. 11 of the Bill of Rights, the applicable standard of proof required of the Commission is proof beyond reasonable doubt.

554. Nutanix (through Hung) and BT (through Chan) made an agreement to procure the submission of four dummy bids (i.e. non-genuine bids) to YWCA in its second tender for Nutanix equipment in July 2016. BT knew Nutanix would approach SiS, Innovix, Tech-21 and one other firm to procure them to put in bids just to make up the numbers. BT provided Nutanix with BT's own tender documents including its bid prices in order to assist.

555. Pursuant to that agreement, Hung approached Shek (SiS) with the tender documents he had prepared including the bid price which was substantially higher than BT's. Shek agreed to submit the bid in the name of SiS. It was not intended to win but just to make up the numbers. Shek signed the tender documents and stamped them with SiS's company chop.

556. Shek's conduct, however, is not attributable to SiS. Shek was a junior employee whose general duties did not include submission of tender or even provision of any binding quotation, and had no authority to bind SiS in

relation to any commercial commitment. SiS was a distributor whose business did not include sale to end-users. The Commission also failed to show that Shek's seniors were cognisant of his arrangements with Hung, as Shek alleged. The Commission's application in relation to the alleged agreement between Nutanix and SiS must therefore be dismissed.

557. Pursuant to the agreement with BT, Nutanix approached Innovix with the tender documents already prepared including the bid price which was substantially higher than BT's, stating in the email: "We help BT to bid for Dell deal". Innovix agreed to submit the bid which was not intended to win but to help BT's bid. Accordingly there was a trilateral agreement or concerted practice between Nutanix, BT and Innovix.

558. Pursuant to the agreement with BT, Nutanix approached Tech-21 with the tender documents already prepared including the bid price which was substantially higher than BT's. Tech-21 agreed to submit a bid which was not intended to win but to help someone else's bid.

559. The bilateral agreement between Nutanix and BT, the trilateral agreement between Nutanix, BT and Innovix, and the bilateral agreement between Nutanix and Tech-21, each had the object of preventing, restricting or distorting competition in Hong Kong.

560. The exclusion of agreements of lesser significance under s 5 of Schedule 1 to the Ordinance had not been properly raised and it was not open to Tech-21 to rely on it.

561. Further, each of the three agreements falls within the definition of "bid-rigging" and, as such, within the definition of "serious anti-competitive

conduct" in the Ordinance because, in particular, there was a submission of bids that were arrived at by these agreements which were made between two or more undertakings and had not been made known to YWCA before the submission of the bids. Nor did the Commission have reasonable cause to believe this was not the case at the time of commencement of the proceedings. Accordingly, the Commission was not required to issue a warning notice to any of the respondents before issuing proceedings, and these proceedings do not fail for want of a warning notice.

562. Nutanix, BT, Innovix and Tech-21 are therefore persons who have contravened the first conduct rule and liable to have orders made against them accordingly. The application as against SiS (and as against Nutanix in relation to the alleged agreement with SiS) is dismissed. The orders that should be made consequent upon the Tribunal's findings and conclusions are to be dealt with in a further hearing.

(Godfrey Lam)
President of the Competition Tribunal

Mr Mark Hoskins QC, Mr Peter Duncan SC and Ms Catrina Lam, instructed by Winston & Strawn, for the Applicant

Mr Matthew Gearing (Solicitor Advocate), instructed by Latham & Watkins, for the 1st Respondent

Mr Charles Hollander and Mr Law Man-chung, instructed by Baker McKenzie, for the 2nd Respondent

Mr Gerard McCoy SC and Mr Timothy Parker, instructed by Norton Rose Fulbright, for the 3rd Respondent

Mr Paul Shieh SC, Ms Eva Sit and Mr Joshua Chan, instructed by Linklaters, for the 4th Respondent

Ms Cindy Kong, instructed by Fongs, for the 5th Respondent

The Economics of Collusion

Cartels and Bidding Rings

Robert C. Marshall and Leslie M. Marx

The MIT Press
Cambridge, Massachusetts
London, England

only to bidding at auctions or procurements and the consequent division of the collusive gain obtained from that bidding. Members of a bidding ring may compete with one another in other aspects of their business. For example, firms that function as a ring at factor input auctions may compete in their product market. Unlike the industrial cartels of part II, the collusion described in this part is narrowly targeted at the suppression of interbidder rivalry at an auction or procurement.

Auctions and procurements play an important role in the price discovery process, especially for relatively uninformed sellers and buyers, respectively. To illustrate this, we provide the following example.

Suppose that a firm wants to buy some file cabinets. If it is just one file cabinet, then perhaps it can be purchased at a major office products store. Perhaps the firm has already solicited discounts from major office products suppliers and the firm can order from a catalog with the standard discount applied. The firm may learn of a bankruptcy auction of another firm and attend to bid on the file cabinets offered for sale. Alternatively, if the firm wants a large number of file cabinets, it might solicit bids from a number of primary manufacturers of file cabinets. In other words, there are many ways to purchase file cabinets, and it is only when a small number of file cabinet are being purchased as an unusual one-time acquisition that the firm would pay a posted price that was not established through a buyer-specific competitive process.

The experience of most individuals is different from the sales and purchasing methods of firms. The typical individual consumer confronts posted prices for most everyday transactions and invokes competition by "shopping around" to find the lowest posted price. The vast majority of consumers would not go to an auction to buy everyday kitchen items or conduct a procurement to acquire toothpaste. However, firms typically want to simultaneously consider multiple offers by potential sellers when purchasing and to simultaneously consider multiple offers from potential buyers when selling.

Economics textbooks typically do not delve into auctions and procurements because they emphasize markets that can be characterized as perfectly competitive, such as major agricultural commodities like wheat, corn, or pork bellies. Even though the equilibrium price emerges from a double auction, little is typically offered to understand the underpinnings of the price-determination process beyond the graphical demonstration of the intersection of supply and demand.

To see what the simultaneous consideration of offers accomplishes, return to the example of a firm purchasing file cabinets. Suppose a firm wants to acquire 2,000 file cabinets of a particular size and capacity. Suppose there are numerous vendors that make such file cabinets. The firm is not going to send an employee to the local office products store to buy 2,000 file cabinets. The division manager of the firm may only have a loose idea about the best deal they could get for that many file cabinets.

The firm's manager can check online to see that major stationers charge around $125 per file cabinet for such units, so that is an upper bound on what they will need to pay. The lowest price that they may be able to pay is unknown to them. Perhaps the cabinets will cost $100 per unit when bought in such volume, but perhaps they could be acquired for as little as $50 per unit.

A manager could invest resources in developing expertise about the production of file cabinets so as to better understand the range of prices they might pay, but this is costly, especially if such a purchase occurs infrequently. The manager could make inquiries of a major manufacturer of file cabinets. After gathering information from one such supplier, the manager could just buy from them, or the manager could follow up with a discussion with another supplier. Once the second supplier's quote is in hand, the manager still faces questions of whether to play the two suppliers off each other or perhaps contact a third supplier. The manager also decides whether to reveal to the suppliers that they are facing competition.

The manager wants to get the best value possible in procuring the 2,000 file cabinets, but how can that be done given the manager's ignorance about the production costs and demand conditions for file cabinets? The producers of filing cabinets know their own production costs, have information about the production costs of their rivals in the business, and understand current demand conditions.

The best way for the manager to get the producers of file cabinets to reveal their information in a way that translates into the best deal for the purchase of 2,000 file cabinets is to use competitive processes. Specifically, the manager can invite a large number of file cabinet producers to submit their best offers for providing 2,000 files cabinets, letting each producer know that a large number of their rivals have also been invited to submit best offers. The manager can specify that these best offers need to be received by a certain time/date. The manager can rank these offers and award the contract to the producer that offers the best value relative to all other offers that were submitted.

As the producers of file cabinets prepare their best offers for submission, each knows its cost of production and has a reasonably good idea about the costs of its rivals. Each producer considers its own cost, its beliefs about its rivals' costs, as well as the number of rivals that have been invited to participate, to determine what offer is best in terms of the profits it can expect to obtain. The more producers that have been invited to participate, the more intense will be the rivalry and the lower will be the price that the firm will need to pay for the file cabinets.

The manager uses a procurement, where the best offers of informed bidders are simultaneously considered, to overcome his or her relative ignorance about the market for file cabinets. The producers solve the problem for the manager through their own rivalry. The rivalry, which is essential for the procurement to do what the manager wants it to do, is contrary to the joint interests of the file cabinet producers. If the file cabinet producers can see that, and act upon that observation to reduce their own rivalry, they can increase their joint profits, and this can translate into an increase in their individual profits if they can find a way to share the benefits to reduced rivalry.

The simultaneous consideration of offers by informed bidders, who know that they must prevail against similarly informed rivals in head-to-head competition in order to obtain any payoff, is a powerful policing force whether being used by a seller with respect to many buyers or by a buyer with respect to many sellers. The intensity of the rivalry among bidders encumbers the profits of the bidders. This is consistent with the center force of Porter's Five Forces. Collusion by the bidders increases payoffs by suppressing that rivalry.

8.2 Suppression of Rivalry at an Auction

In this chapter, we discuss the gains to the suppression of competition by bidders at two different auctions, an ascending-bid auction and a sealed-bid auction.[2]

2. Seminal papers on auction theory include Vickrey (1961, 1962), Riley and Samuelson (1981), Myerson (1981), and Milgrom and Weber (1982). See also the auction theory textbook by Krishna (2009). As we noted in the preface, we focus on the independent private values framework. With regard to procurements, we focus on homogeneous products where the only relevant dimension of the bid is the price. Procurements where bidding is multidimensional are commonplace, especially when the bid solicitation describes a function rather than a product (i.e. computation rather than computer equipment). The mapping of multidimensional bids into a single score can create additional opportunities for collusive conduct (see Marshall, Meurer, and Richard 1994).

Title: Royal Institute of British Architects

Complainant:

Complaint against:	Royal Institute of British Architects (RIBA)
Case closed:	14 March 2003
Issue:	Whether RIBA's guidance to clients on fees restrict competition
Relevant provision:	Chapter I of CA98

Outline of the case

The Office of Fair Trading has concluded that the Royal Institute of British Architects (RIBA) has demonstrated that revisions to its guidance to clients on fees have addressed competition concerns highlighted in the OFT report 'Competition in professions' published in March 2001[1] and the subsequent progress statement.[2] The report called on RIBA to justify its fee guidance as benefiting consumers or to remove it. The report indicated that the fee guidance issued by RIBA could facilitate collusion.

RIBA sought to justify the existence of its fee guidance on the basis that it could not restrict competition because it was merely indicative and that it was a useful yardstick by which clients who may be ignorant of what a reasonable charge was could forecast the cost of architectural services.

OFT considers that architects that are members of RIBA are likely to be undertakings within the terms of the Chapter I prohibition. RIBA is an association of these undertakings. Circulation of guidance on fees issued by an association of undertakings or a professional body may encourage tacit collusion as it is likely to provide a lead on prices which may hinder the ability or incentive of efficient firms to compete by reducing price to reflect their lower costs[3]. It may also protect those who are less efficient and reduce the incentive to improve. The fact that the guidance was in the form of an indication rather than a binding decision did not prevent it from being a decision by an association of undertakings.

RIBA has amended and revised its fee guidance. New fee guidance is based on historical information and the collation of price trends which do not provide a

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[1] OFT 328, at paragraph 50

[2] OFT 385, at paragraph 38

[3] This approach is apparent in a number of the European Commission and Court of Justice decisions e.g. Verband der Sachversicherer e.V. v Commission, Case C-45/85, point 26, Case C-8/72 Vereeiniging van Cementhandelaren v Commission [1972] ECR 977, [1973] CMLR 7, points 19-21, IV/34.983-FENEX.

lead on this year's prices. The historical information is collated and aggregated by an independent body. OFT considers that this change meets the competition concerns expressed in the report and progress statement and in subsequent correspondence with RIBA.

OFT's action:	Case closed
Case Officer:	Grahame.Horgan@oft.gsi.gov.uk Juliette.Twumasi-Anokye@oft.gsi.gov.uk
Case reference:	GP/908

Title: Alleged price fixing of Volkswagen replacement spare parts

Complainant:	A private consumer
Complaint against:	Volkswagen dealers and Volkswagen Group UK Limited
Case closed:	19 March 2003
Issue:	Whether agreements existed between Volkswagen and its franchised dealers to fix the resale prices of replacement parts to customers in the UK
Relevant provision:	Chapter I of CA'98

Outline of the case

In June 2002, the OFT received a complaint from a consumer about the price of spare parts, based on a letter he had received from a Volkswagen (VW) dealer. This letter stated that the prices charged by VW franchised dealers were governed and set by the manufacturer.

On the basis of this complaint, The OFT carried out an extensive investigation, obtaining evidence from a representative sample of VW franchised dealers throughout the UK.

The OFT has completed its investigation into this complaint, and has found no evidence of resale price maintenance.

OFT's action:	Case Closed
Case Officer:	Stephan.pukas@oft.gsi.gov.uk Geoffrey.kenton@oft.gsi.gov.uk
Case reference:	CE/1637/02

RE FEES IMPOSED BY THE RENNES BAR
(Decision 96–D–79)

BEFORE THE CONSEIL DE LA CONCURRENCE (French Competition Council)

(*The President*, M. Barbeau; M. Cortesse, *Vice-President*; M. Rocca, *Member*)

3 December 1996

Restrictive practices. Anti-competitive practices. Advocates. List of fees earned. Procedure. Under section 13 of the Freedom of Prices and Competition Ordinance 1986, the Competition Council may order those concerned to discontinue anti-competitive practices within a specified period or may impose special conditions. It can order a defendant to refrain from compiling and distributing a fee scale. For the purpose of assessing the fine, the gravity of the practices must be assessed by reference to the fact that the document in question was circulated to all members of the bar, and that representation in certain proceedings by an *avocat* is mandatory. [18]–[21]

In France the profession of *avocat* is organised into bars attached to every Tribunal de Grande Instance. Each bar is governed by a bar council and is responsible for dealing with all questions relating to the practice of the profession, in particular admission, discipline and etiquette. Any decision of the bar which is *ultra vires* or contrary to any statutory provision is, on the Public Prosecutor's application, annulled by the appeal court. Individual decisions may be appealed to the appeal court by the individual concerned.

Avocats are free to fix their own fees. There are some scale fees, but otherwise, pursuant to the Advocates Act 1971, fees are to be agreed by the *avocat* with the client. Contingency fees are prohibited. Any disputes about fees are to be resolved by the bar council, from which decision there lies an appeal to the Court of Appeal.

At the end of 1989, the Rennes Bar drew up and distributed a report on the profession, in which is listed the average fees received by members during 1988 for about 60 individual legal services. There was a declaration that the list had been compiled on the basis of taxation of costs results and that it had no binding force, but was intended as a guide for clients. The tariffs used were not shown, nor did the list go into details of what had had to be done to earn each fee.

The Council found the bar to be guilty of anti-competitive practices and fined it 40,000 FF.

1996 — *Re fees imposed by the Rennes Bar* — French Competition Council — *Decision*

No cases were referred to in the decision.

DECISION

I. *Findings*

A. *The profession of advocate*

[1] The profession of advocate is governed by the Act of 31 December 1971, as amended, reforming certain judicial and legal professions. The profession is organised in bars attached to every tribunal de grande instance.[1] Each bar is a civil-law person and is administered by a local bar council, the members of which are elected for three years by secret ballot of all the advocates admitted to the local bar, trainee advocates who have taken the oath before 1 January of the year during which the election is held, and honorary advocates belonging to the local bar. The local bar council is headed by a *bâtonnier* who is elected for two years and who represents the bar in all civil-law matters. It falls to him to prevent or, as the case may be, attempt to settle professional disputes between members of the bar and to examine complaints by third parties.

[2] The tasks of the local bar council are laid down by section 17 of the abovementioned Act. It is responsible for dealing with all questions connected with the practice of the profession, ensuring the fulfilment by advocates of their obligations and protecting their rights. In particular, it is required:

> to adopt and, if necessary, amend the internal rules, to decide on the admission of advocates to the bar ... to enforce discipline ... to uphold the principles of probity, impartiality, temperateness and fellowship upon which the profession rests and to exercise the supervision necessary for the sake of the reputation and in the interest of its members ... to ensure that advocates are punctilious at hearings and that their conduct befits responsible officers of the court ('*auxiliaires de justice*') ... .

[3] On application by the Public Prosecutor, any resolution or decision of a local bar council which is *ultra vires* or contrary to provisions of statute law or subordinate legislation is annulled by the *appeal court.* Resolutions or decisions of a local bar council which are likely to damage the professional interests of an advocate may be referred to the appeal court on application by the person concerned. Likewise, decisions of a local bar council concerning inclusion on the roll of advocates or the register of trainees, or concerning the omission of or refusal to omit a name from the roll or the register may be referred to the appeal court by the Public Prosecutor or the person concerned.

[3] Under sections 22 *et seq.* of the Act of 31 December 1971, the local bar council, sitting as a disciplinary council, has power to

[1] First instance court with general jurisdiction in civil and commercial matters. Ed.

prosecute and punish offences and misconduct by advocates who are on the roll or the register of trainees. It acts of its own motion or at the request of the Public Prosecutor or on the initiative of the *bâtonnier.* The local bar council may provisionally suspend from his duties an advocate against whom criminal or disciplinary proceedings are brought. It may terminate such suspension in the same way or at the request of the person concerned. Decisions of the local bar council in disciplinary matters may be referred to the appeal court by the advocate concerned or the Public Prosecutor. Any court which considers that an advocate has failed at a hearing to fulfil the obligations imposed on him by his oath may refer the matter to the Public Prosecutor with a view to prosecution before the council of the local bar to which the advocate belongs.

[4] Pursuant to section 1 of the Ordinance of 1 December 1986, advocates are free to fix their fees. With the exception of the scale fees for dealing with procedural matters governed by the rules of civil procedure, section 10 of the Act of 31 December 1971 provides that:

> fees for consultation, assistance, advice, drafting private deeds and for oral pleadings shall be fixed by agreement with the client. In default of an agreement between the advocate and his client, the fee shall be fixed in accordance with custom, depending on the client's financial situation, the difficulty of the matter, the costs incurred by the advocate, his reputation and the care taken by him. It shall be prohibited to fix fees by reference solely to the outcome of proceedings. An agreement which, in addition to the remuneration for services supplied, provides for a supplementary fee to be fixed by reference to the result obtained or the service supplied, shall be lawful.

[5] Disputes which may arise between an advocate and his client concerning the amount and the recovery of fees are regulated by sections 174 *et seq.* of the Decree of 27 Novemer 1991. Complaints are submitted to the *bâtonnier* by either party: there are no formal requirements. Under section 175, the *bâtonnier* must acknowledge receipt of the complaint. He must take a decision within three months, failing which he must refer the dispute to the first president of the appeal court. Pursuant to section 176, an appeal against the *bâtonnier*'s decision may be made to the first president of the appeal court. If there is no appeal, the *bâtonnier*'s decision may be made enforceable by order of the president of the tribunal de grande instance on application by the advocate or his client.

[6] Finally, section 183 of the Decree of 27 November 1991 provides that "any contravention of professional rules and any lapse from probity ... shall expose the advocate responsible to disciplinary sanctions". A list of the sanctions, which are imposed by the local bar council subject to review by the appeal court, is given in section 184 of the Decree. They range from warning and reprimand to a temporary prohibition on practising (which must not exceed three years), striking off the roll or the register of trainees, and the withdrawal of honorary membership. In short, the law gives the client a right of challenge which must be adjudicated upon by the *bâtionnier*, and failure to observe the

duty of moderation with regard to the amount of fees may give rise to disciplinary proceedings by the local bar council.

B. *The facts to be assessed*

[7] At the end of 1989 the Rennes bar drew up and distributed a document entitled *Ordre des Avocats à la Cour d'Appel de Rennes*, consisting of a general account of the profession of advocate, the members of the roll of advocates for the 1989 legal year, information on the permanent services of the local bar and a "list of average fees received by advocates of Rennes in the course of 1988 for different legal services". In this connection the document showed the fees for more than 60 kinds of legal service. Some of the details in the list are as follows:

> I. Fixed costs for each matter (not applied to procedural acts)
> Cost of opening the file: 500 FF
> Letters (court and by post): 22 FF
> Photocopies: 3 FF per sheet.
> Telephone: according to post office tariff.
> II. Taking steps
> Oral consultation: 350 FF
> Sending a report: 300 FF
> Lodging appeal (criminal): 400 FF
> III. Appeal court
> Civil, commercial or social chamber: 4,500 FF
> Criminal chamber: 3,000 FF
> Criminal chamber, with claim for damages by third party: 3,500 FF
> Summary proceedings before first president: 2,200 FF
> Judge preparing case for hearing:
> Advance for costs: 3,000 FF
> Other interlocutory matters: 2,000 FF
> IV. Administrative court
> Main issue: 4,500 FF
> Application in summary proceedings: 2,000 FF
> Defence in summary proceedings: 1,800 FF
> V. Tribunal de grande instance
> General law matter: 4,000 FF
> Commercial property court: 4,000 FF
> XI. Industrial tribunal
> Conciliation: 1,800 FF
> Whether conciliation or decision: 3,000 FF
> Summary proceedings: 2,500 FF
> Judgment: 3,000 FF
> XII. Children's court
> Hearing in chambers: 1,800 FF
> Court: 2,500 FF
> Court, with claim for damages by third party: 3,000 FF

XIII. Miscellaneous
Attachment of salary: 1,000 FF
Order for payment (without objection by debtor): 1,000 FF
Obtaining evidence: 1,800 FF
Meeting with expert (Rennes or district): 1,800 FF
Travel expenses: 2 FF per kilometre

[8] The document does not state whether the amounts shown for fees include or exclude taxes.

[9] By declaration of 12 April 1994, the *bâtonnier* in office at that date stated that the list of fees had been published in 1989 and that it had been drawn up by a "fees committee", functioning in the local bar council, with the authority of the *bâtonnier.* It also appears from the declaration that the list was distributed "to all advocates belonging to the Rennes bar, and it could also have been supplied by the secretarial office of the bar to anyone requesting it". The *bâtonnier* added that the fee list had been compiled on the basis of the results of taxations of costs, that it had no binding force and that it was intended "for clients ... as a first approach towards the proposed fees and for advocates as an incentive to exercise a certain moderation". Finally he observed that the list "could be applied to fees received by trainee advocates or assistants for their own clients".

[10] By declaration of 20 November 1995 the *bâtonnier* in office at that date stated that "the Rennes bar thought it would be appropriate to compile and distribute the document (in 7,000 copies) ... with the object of informing the public of the orders of magnitude of fees charged". He also pointed out that the list "shows fees recorded *a posteriori.* They are results recorded in a competitive market. The tariffs used by different colleagues are not distinguished individually. Averages of this kind certainly cannot be used as a reference for authorising the fixing of fees. The fees in every case depend on the extent of the measures to be taken and the complexity of the matter, the advocate's reputation, the client's financial situation, the interests at issue or legal proceedings, and the results obtained".

[11] In its observations in reply to the notification of complaints, the Rennes bar stated that "the fees charged by an advocate depend on such diverse factors that, although quoting an average fee has the advantage of informing the public of an order of magnitude, it cannot constitute a useful criterion for the advocate ... Observation of the facts shows wide variations in the fees actually charged in matters of the same kind, which is not surprising in view of the criteria laid down by law and the very competitive nature of the market". The Rennes bar concludes from this that "these findings could lead us to question the advisability of publishing a list of fees showing, for the previous year, an average which in very many cases might appear rather remote from reality. However, ... with a view to transparency and as a one-off project, which has not been repeated, the local bar council of Rennes only aimed to give the public certain orders of magnitude".

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II. *On the basis of the foregoing findings, the council,*

With regard to the practices found:

[12] At the end of 1989 the local bar council of Rennes compiled and distributed to its members a document entitled *Ordre des Avocats à la Cour d'Appel de Rennes*, containing a "list of average fees received by advocates of Rennes in the course of 1988 for different legal services". This list showed more than 60 kinds of service which could be provided in connection with various legal proceedings, together with the "average fees", but without indicating whether these included taxes or not.

[13] In reply to the notification of complaints, the local bar council stated that in 1989 it instructed "a committee to compile the list of fees and to ascertain, on the basis of taxing orders made by the *bâtonnier* or his representatives, the average fees charged in the course of the previous year", adding that "the method appeared reliable. Firstly, there are sufficient taxing orders to constitute an appropriate sample. Secondly, they are usually made at the request of advocates without objection from their clients, so that they are not connected with the files which might appear not to give much information".

[14] However, the representative of the local bar council of Rennes stated at a sitting that the committee's work was based on 154 taxing orders made in 1988, and because of the number of services mentioned in the document in question and the size of the sample, the figures presented could not be identified in a list of fees, as the representative admitted at the sitting.

[15] The local bar council points out that the document was brought to the notice of all the members of the Rennes bar and that, "with the object of informing the public of the orders of magnitude of fees charged", 7,000 copies were published and supplied by the secretarial office of the local bar council to anyone requesting a copy. It adds that "observation of the facts shows wide variations in the fees actually charged in matters of the same kind, which is not surprising in view of the criteria laid down by law and the very competitive nature of the market". Therefore, according to the local bar council, the fee scale could not have had an anti-competitive object or effect.

[16] However, by distributing the document in question the Rennes bar might have led its members to fix their fees on the basis of the figures reproduced in the list, instead of by reference to the terms and conditions of their own chambers. Furthermore, in his statement of 12 April 1994 the *bâtonnier* observed that the list was intended "for clients ... as a first approach towards the proposed fees and for advocates as an incentive to exercise a certain moderation ... Bearing in mind that since 1 January 1992 it has been possible to pay advocates a salary, the list could be applied to fees received by trainee advocates or assistants for their own clients". In this way the list of fees could have had an anti-competitive effect.

[17] Having regard to all the foregoing circumstances, it appears that

although "the list of average fees received by advocates of Rennes in the course of 1988 for different legal services", which was compiled by the local bar council of Rennes, published in 7,000 copies and distributed to the members of the Rennes bar, did not have the object of distorting competition in the market in question, it could have been used at least until the beginning of 1992 as a reference by all advocates and could have been applied in particular to the fees received by trainee advocates or assistants. The *bâtonnier* also admitted that the list of fees was for advocates "an incentive to exercise a certain moderation". Therefore the list, which was identifiable as a reference scale, constituted a concerted action which may have had the effect of distorting competition under conditions contrary to section 7 of the Ordinance of 1 December 1986.

Sanctions

[18] Pursuant to section 13 of the Ordinance of 1 December 1986:

> the Competition Council may order those concerned to discontinue anti-competitive practices within a specified period or may impose special conditions. It may impose a pecuniary sanction to apply immediately or in the event of failure to comply with injunctions. The pecuniary sanctions shall be proportionate to the gravity of the acts alleged, to the extent of the damage caused to the economy and to the size of the enterprise or organisation on which the sanction is imposed. Fines shall be determined individually for each enterprise or organisation on which sanctions are imposed and the grounds of each sanction shall be stated. For an enterprise, the maximum sanction shall be 5 per cent of the total turnover before taxes in France for the last complete accounting period. If the offender is not an enterprise, the maximum shall be 10 million FF... The Competition Council may order publication of its decision in newspapers or publications designated by it, public notification in places specified by it and the inclusion of the decision in the report on the year's trading by the directors of the enterprise. Costs shall be paid by the person concerned.

[19] In accordance with the above section 13, the local bar council of Rennes must be ordered to refrain from compiling and distributing a fee scale and informing the members of the bar thereof.

[20] To assess the damage to the economy, it should be observed that the document in question gave the details of fees for some 60 services relating to the most common types of proceedings before different courts.

[21] The gravity of the practices must be assessed by reference to the fact that the document entitled "list of average fees received" was distributed to all the members of the Rennes bar. Furthermore, representation by an advocate in different legal proceedings is mandatory. Finally, the local bar council of Rennes could not have been unaware of the Ordinance of 1 December 1986.

[22] For the year 1995 the resources of the Rennes bar totalled 1,524,540 FF. On the basis of the factors assessed above, the Rennes bar must be ordered to pay a pecuniary sanction of 40,000 FF.

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[23] The Competition Council therefore decides:

Article 1. It has been shown that the Rennes bar infringed section 7 of the Ordinance of 1 December 1986.

Article 2. The Rennes bar is ordered, firstly, to refrain from compiling and distributing a "list of average fees received" and, secondly, to send a copy of this decision, by registered letter with acknowledgement of receipt, to all advocates constituting the Rennes bar, within two months of notification of the decision.

Article 3. The Rennes bar is ordered to pay a pecuniary sanction of 40,000 FF.

Section 44 of the Competition Act (Cap. 50B)

Statement of Decision pursuant to Regulation 9 of the Competition Regulations 2007

Application for Decision by the Singapore Medical Association in relation to its Guideline on Fees pursuant to section 44 of the Competition Act

18 August 2010

(Case number: CCS 400/001/09)

I. INTRODUCTION

1. On 5 February 2009, the Competition Commission of Singapore ("CCS") received an application for decision (the "Application") from the Singapore Medical Association ("SMA"), filed under section 44 of the Competition Act (Cap. 50B) (the "Act"). The Application sought a decision from CCS as to whether the SMA's Guideline on Fees ("GOF"), the fourth edition of which was issued in 2006, infringed Section 34 of the Act. Section 34 prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices, which have as their object or effect the prevention, restriction or distortion of competition within Singapore, unless they are exempted or excluded ("the section 34 prohibition").

2. On 16 June 2010, CCS issued a Statement of Decision (Provisional) to SMA. In accordance with Regulation 11(1) of the Competition (Notification) Regulations 2007, SMA was given up to 30 July 2010 to make written representations to CCS. As no representation was received from SMA by the stipulated deadline, this Provisional Statement of Decision has now become a final Statement of Decision. As SMA has withdrawn the GOF since 1 April 2007, no further action or direction by CCS is required in respect of this Statement of Decision.

3. SMA had also applied to the Minister for Trade and Industry on 28 October 2008 to exclude the GOF from the application of the section 34 prohibition of the Act on grounds of "exceptional and compelling reasons of public policy". On 3 June 2010, the Minister for Trade and Industry, after careful consultation with the Ministry of Health, declined to exclude the GOF from the Act.

II. BACKGROUND

(a) SMA

4. SMA is an association of medical practitioners in Singapore, formed in 1959. It has several categories of memberships, including some categories extending to non-medical practitioners. Figures furnished by SMA[1] show that as at 31 January 2009, 4,602[2] of the 7,969 registered medical practitioners in Singapore were members of SMA. SMA thus claimed that it represents the majority of medical practitioners in Singapore[3].

5. According to SMA, its objectives are to[4]:

i) promote the medical and allied sciences in Singapore;
ii) maintain the honour and interests of the medical profession;
iii) foster and preserve the unity and aim of purpose of the medical profession as a whole;
iv) voice its opinion and acquaint the Government and other relevant bodies with the policies and attitudes of the profession;
v) support a higher standard of medical ethics and conduct;
vi) enlighten and direct public opinion on problems of health in Singapore; and
vii) publish papers, journals and other materials in furtherance of these objectives.

6. SMA is managed by the SMA Council, which is elected by and answerable to SMA's general membership at its Annual General Meetings[5]. The SMA Council appoints various committees to deal with a range of matters. One of these committees was the GOF Committee, which was tasked with developing and revising the GOF.

(b) The GOF

7. The GOF recommended ranges of professional fees for an array of services

[1] SMA's letter to CCS dated 28 May 2009, at ¶1.1. According to SMA, the figures were obtained from the Singapore Medical Council.
[2] Of this figure, 2,132 were from private practice, 2,432 were from the public sector while 38 were from the National University of Singapore.
[3] Form 1 filed by SMA on 5 February 2009, at ¶1.1.2.
[4] Form 1 filed by SMA on 5 February 2009, at ¶1.1.3.
[5] SMA's letter to CCS dated 28 May 2009, at ¶8.1.

(e.g., consultation services, professional services, operations and anaesthesia services) provided by doctors in private practice in Singapore. According to SMA, a range of fees was recommended for most procedures or operations, rather than a fixed rate, as the actual fees to be charged to patients would depend on variable factors such as the level of expertise, complexity, or time required[6].

8. The first edition of the GOF was published in 1987. According to SMA, the GOF was promulgated at that time following complaints from the public about over-charging by medical practitioners, following which the Ministry of Health ("MOH") agreed that there was a need for a schedule of recommended fees for private medical practitioners. According to SMA, the GOF was meant to provide patients with greater transparency on healthcare costs, thereby allowing patients to make an informed choice on private medical practitioners[7].

9. Subsequent editions of the GOF were published in 1992, 2000 and March 2006[8]. According to SMA, there was no explicit criterion for deciding to undertake each review of the GOF. When the SMA Council felt that business costs had increased to the point where the prevailing GOF faced the risk of being less relevant, the SMA Council would instruct the GOF Committee to undertake a review[9]. On average, the GOF was revised once every five years as SMA felt that five years was a reasonable time to re-look the GOF given that healthcare inflation has always been higher than general inflation[10].

10. With each revision, various changes were made to reflect new procedures in light of advancements in medical science, remove obsolete procedures, reclassify procedures to take account of technological advancements and re-price the fee ranges of surgical groups to take account of rising business costs[11].

11. The fourth edition of the GOF, published in March 2006, was the latest edition of the GOF. On 1 April 2007[12], SMA withdrew the GOF in view of concerns that it might potentially infringe the section 34 prohibition[13].

12. The fourth edition of the GOF was extensive, covering more than a thousand procedures, with only the most esoteric operations being left out[14]. It categorized the recommended professional fees under three major parts:

i) <u>Part One: General Consultation Fees</u>
This sets out the recommended consultation fees for the general practitioner ("GP") and specialists, as well as for ICU consultations.

[6] SMA's letter to CCS dated 28 May 2009, at ¶10.1.
[7] Form 1 filed by SMA on 5 February 2009, at ¶3.1.2.
[8] Form 1 filed by SMA on 5 February 2009, at ¶3.1.4.
[9] SMA's letter to CCS dated 28 May 2009, at ¶13.1.
[10] SMA's letter to CCS dated 24 July 2009, at ¶ 3.2.
[11] SMA's letter to CCS dated 28 May 2009, at ¶15.1.
[12] Source: http://www.sma.org.sg/position/Withdrawal_SMA_Guideline_on_Fees.pdf [Accessed on 30 April 2010]
[13] Form 1 filed by SMA on 5 February 2009, at ¶3.1.4.
[14] SMA's letter to CCS dated 28 May 2009, at ¶9.1.

ii) Part Two: Professional Fees
This sets out the recommended professional fees for office surgery and medical procedures, immunisation, medical examinations and reports, court attendance and preparation, as well as the recommended professional fees for certain services from each of the following specialist fields, namely obstetrics, paediatrics, cardiology, radiology, pathology and cytopathology.

iii) Part Three: Fees for Operations and Anaesthesia
This sets out the recommended fees for a wide range of surgical operations, for both the surgeon and the anaesthetist. Part Three was divided into 15 different sections with each section representing a different part of the anatomy. Each section was in turn divided into different groups (e.g., Group A to Group I) of operations, in order of increasing degree of complexity.

13. A copy of the fourth edition of the GOF is attached at Annex 1.

(c) Role of the GOF Committee and processes for setting the GOF's recommended fees

14. The GOF Committee was appointed by and answerable to the SMA Council. According to SMA, the role of the GOF Committee was to conduct studies, arrange for seminars, circulate questionnaires, deliberate findings, hold consultations with members of SMA, review other guidelines similar to the GOF and make recommendations in respect of the GOF[15].

15. SMA explained that the recommended ranges within the GOF were arrived at by "a survey of current rates/pricing"[16] charged by medical practitioners in the market, to identify reasonable price ranges that would protect the interests of patients, while ensuring that doctors were reasonably remunerated for their skills set, competence, experience, specialties and quality of services[17]. In developing and revising the GOF, the GOF Committee appointed subcommittees based on medical specialties. Each subcommittee would review the list of operations available, which were further assigned into groups according to complexity. A suggested price range was then attached to each group[18].

16. Review of the recommended fees in the GOF was an iterative process. SMA would send circulars to the general SMA membership and to all specialty bodies[19] to seek feedback on charges, procedures or operations. In addition,

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[15] SMA's letter to CCS dated 28 May 2009, at ¶8.1-8.2.
[16] Form 1 filed by SMA on 5 February 2009, at ¶¶3.3.1 and 5.1.32.
[17] Form 1 filed by SMA on 5 February 2009, at ¶5.1.15 and 5.1.29.
[18] SMA's letter to CCS dated 28 May 2009, at ¶9.1.
[19] According to SMA, the specialist societies and specialist interest groups in the various hospitals would typically limit their leaders to a certain term period, so that it was unlikely that the same medical practitioners would represent their interest groups for reviews for multiple editions of the GOF (there being a time lag of

specialist groups in different private hospitals were invited to submit their feedback. The GOF Committee would then review the feedback provided before arriving at the first draft of recommended fees for different procedures or operations in the form of fee ranges. Revised drafts of the recommended fees were then re-circulated to the general SMA membership and specialty bodies for further review and comments, before submission to the SMA Council for endorsement[20].

17. In response to CCS' query as to whether SMA sought views from any organisation or body representing the interest of consumers or patients to ensure that the fees recommended in the GOF was reasonable, SMA replied that the list of contributors to the latest edition of the GOF was listed at the back of the 4th edition of the GOF. The contributors were individual doctors, SMA Council Members of the 41st to 46th Councils, specialist interest groups in East Shore Hospital, Gleneagles Hospital, Mount Elizabeth Hospital and Raffles Hospital, medical societies, and the Law Society of Singapore[21]. It is apparent from the list of contributors that no organisation or body specifically representing the interest of consumers or patients contributed to the formulation of the GOF. In addition, CCS also notes that both MOH and the Singapore Medical Council ("SMC") had also indicated that they were not involved in these discussions[22].

18. While feedback on the GOF was only sought from both the SMA members and specialist societies, SMA submitted that there were several mechanisms in place that made it unlikely for medical fees to be raised unreasonably. These mechanisms included[23]:

i) The GOF Committee gave speciality bodies more say than individuals. The GOF Committee felt that specialty bodies were less likely to unreasonably raise fees.

ii) Procedures were classified into various groups based on increasing complexities and the only way to significantly increase fees would be to move the procedure from one group to a higher group, e.g., from Group B to Group C. This was rarely allowed unless there was good justification for the procedures to be moved across groups.

iii) The GOF Committee might not be familiar with the details of certain procedures. But as members of the GOF Committee include doctors in various specialities, these members would at least have some idea of what each of these procedures involved.

iv) The GOF Committee would ask for more details about procedures they were unfamiliar with.

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some five to seven years between the reviews of each edition): see SMA's letter to CCS dated 28 May 2009, at ¶14.1.

[20] SMA's letter to CCS dated 28 May 2009, at ¶10.1.

[21] SMA's letter to CCS dated 24 July 2009, at ¶ 2.3.

[22] MOH's letter to CCS dated 6 April 2009: MOH's response to Q9.

[23] SMA's letter to CCS dated 24 July 2009, at ¶ 2.1.

v) There was often more than one speciality body involved in relation to each procedure. For example, for a cardiac procedure, the GOF Committee could ask the respective cardiology specialty groups in Mount Elizabeth Hospital or Gleneagles Hospital, etc. The GOF Committee could also seek the opinion of the cardiothoracic speciality group in these hospitals. In addition, there was also the national speciality body, which was independent of the speciality bodies in the hospitals.

vi) The first edition of the GOF also included the following text in the introduction page:

> "… [the GOF was] the result of extensive study done jointly by SMA and [Association of Private Medical Practitioners of Singapore (APMPS)] over the past five years. Seminars were held, questionnaires were sent to members, subcommittees were formed and many discussions and consultations were held. Similar guidelines include Scheme of Charges for Government Medical Services, and the Medisave Table for Surgical Procedures and those in other countries were obtained and studied and, where appropriate incorporated."

III. OVERVIEW OF SINGAPORE'S HEALTHCARE SECTOR

19. It is widely accepted that there is market failure in the healthcare sector which does not allow free market forces to produce efficient outcomes[24]. On one hand, healthcare is seen by many as a basic necessity. On the other hand, there is information asymmetry, where patients do not know enough to fully comprehend their own health conditions and needs, and hence are unable to make an informed choice. Instead, they have to rely on doctors to advise them on their treatment options. This results in a "principal-agent" situation which potentially leads to "over-charging", "over-treatment" and/or "over-prescription" by doctors to reduce risk of any complaints of negligence or to increase their earnings ("supplier-induced demand")[25]. Coupled with the importance of healthcare to a person's survival or long term well-being, healthcare is thus a complex and often emotive issue for the patients and their families.

20. Against this backdrop, Singapore's healthcare system has managed to achieve high-quality but affordable medical services through a combination of

[24] The phenomenon of market failures in the healthcare sector was recognised in 1963 by Nobel Laureate Kenneth Arrow in the article "Uncertainty and the Welfare Economics of Medical Care". Since then, health economists generally considered that the healthcare market is likely to suffer from varying degrees of market failure in the absence of government intervention. For more details on the case of Singapore, please refer to the book *Economics in Public Policy: the Singapore Story, Chapter 6 – Healthcare* published by Marshall Cavendish International (Singapore) Private Limited, 2009, section entitled "Healthcare: Not Just Another Market" from pages 124 – 126.

[25] The concept of the principal-agent problem which leads to supplier induced demand is covered extensively in the health economics literature. Specifically, please refer to the book *The Economics of Health and Health Care, Fifth Edition, Chapter 15 – The Physician's Practice* published by Pearson Education International, 2007.

policy measures aimed at addressing or mitigating these market failures[26]. MOH adopts the philosophy that good and affordable basic medical services should be provided for all Singaporeans and this is mainly achieved through government subsidies to the public healthcare facilities, including restructured hospitals, specialty centres and polyclinics[27]. At the same time, it also takes the view that there should be individual responsibility towards healthy living and consumption of scarce medical resources. Singapore's healthcare financing framework, which consists of Medisave, Medishield, ElderShield and Medifund, reflects this fundamental philosophy in that patients are expected to exercise their individual choice by co-paying for part of their medical expenses and to pay more if they demand a higher level of service[28].

21. In the White Paper for Affordable Healthcare[29] (the "White Paper"), MOH recognised that with growing affluence and rising expectations, some Singaporeans would want a higher level of medical care than the government can provide in its basic package. While recognising that Singapore should rely on competition and market forces to "impel hospitals and clinics" to operate efficiently, improve services and offer patients value-for-money services, MOH also believed that the there would be market failure in the healthcare sector if the industry is left unregulated. Specifically, the White Paper stated that the government will intervene to prevent over-supply, moderate demand for medical services, and create incentives to keep healthcare costs under control.

Primary Care[30] in Singapore

22. Primary Care involves the provision of primary medical treatment, preventive healthcare and health education. In Singapore, Primary Care is provided through an island-wide network of outpatient polyclinics and private medical practitioners' clinics. Today, the private sector accounts for 80% of Primary Care, with the remaining 20% provided by polyclinics[31].

23. In the White Paper, MOH had acknowledged that there is sufficient competition from the private sector in the area of Primary Care, while the public sector should maintain its current market share to cater to the lower income group and the training of Primary Care physicians[32].

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[26] For more details, please refer to the book *Economics in Public Policy: the Singapore Story, Chapter 6 – Healthcare* published by Marshall Cavendish International (Singapore) Private Limited, 2009, section entitled "Healthcare: Not Just Another Market" from pages 133 – 135. It was also mentioned that *"Despite relatively low inputs, health outcomes in Singapore are comparable if not superior to many developed countries…. Furthermore, the World Health Organisation in 2000 had ranked Singapore as having the world's sixth best overall health system performance while the equivalent rankings for the UK and the US were only 18th and 37th respectively."*

[27] Source: http://www.moh.gov.sg/mohcorp/hcsystem.aspx?id=102 [Accessed on 30 April 2010]

[28] Source: http://www.moh.gov.sg/mohcorp/programmes.aspx?id=202 [Accessed on 30 April 2010]

[29] White Paper on Affordable healthcare at Chapter 2: Healthcare Philosophy, pages 18-19.

[30] Source: http://www.moh.gov.sg/mohcorp/hcservices.aspx?id=392 [Accessed on 30 April 2010]

[31] *Ibid.*

[32] White Paper on Affordable healthcare at Chapter 4: Supply of Doctors and Hospitals, page 32.

Hospital Care[33] in Singapore

24. MOH currently classifies Hospital Care as including multi-disciplinary acute inpatient and specialist outpatient services and 24-hour emergency services provided by the general hospitals. In addition, Hospital Care also includes the six national specialty centres for cancer, heart, eye, skin, neuroscience and dental care.

25. The public sector is the predominant provider of Hospital Care[34] for the local population. The public sector provides 80% of hospital services through restructured hospitals and specialty centres which are wholly-owned by the government[35]. The 16 hospitals in the private sector provide the remaining 20% Hospital Care services[36]. In terms of specialist outpatient services, roughly 60% of specialists work in the public sector whilst the remaining 40% work in the private sector[37]. MOH has stated that *"[t]he Government's role as the dominant health care provider allows the Government to influence the supply of hospital beds, the introduction of high-tech/high-cost medicine, and the rate of cost increases in the public sector which sets the bench mark in terms of pricing for the private sector"*[38].

26. This structure therefore allows the public sector to provide affordable Hospital Care to the general population, while relying on the private sector to compete for patients who prefer to seek medical services beyond those provided in the restructured hospitals[39].

Other forms of Healthcare in Singapore

27. According to MOH, other than Primary Care and Hospital Care, other aspects of the healthcare system in Singapore include intermediate and long term care and dental services. These other aspects have not been considered in this Statement, as the procedures found in the GOF pertained largely to the provision of Primary and Hospital Care.

Improving price transparency in Singapore

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[33] A distinction was made between tertiary, secondary and community hospitals in MOH's White Paper on Affordable Healthcare, Ministry of Health, 1993 from pages 29-31, in descending order of sophistication in the range of services provided. Currently, MOH classifies both tertiary and secondary healthcare together with specialty centres, under "Hospital Care". Source: http://www.moh.gov.sg/mohcorp/hcservices.aspx?id=394 [Accessed on 30 April 2010]

[34] In terms of hospital beds, about 72% of the beds are in the 13 public hospitals and speciality centres with bed complements between 185 to 2,064 beds. On the other hand, the 16 private hospitals tend to be smaller, with capacity ranging from 20 to 505 beds.

[35] *Ibid* at footnote 33 and footnote 28.

[36] In contrast to the restructured hospitals, some of these private hospitals may not offer the full suite of services such as outpatient specialists' services or emergency care etc.

[37] Source: Page 12 of the Singapore Medical Council's Annual Report 2008.

[38] *Ibid* at footnote 33.

[39] One can argue that quality of healthcare services in the public sector may not be inferior to the private sector, especially given its higher caseload and complexity of cases.

28. To improve pricing transparency, MOH has also undertaken various measures in disseminating price information of medical services, such as:

i) requiring all private medical clinics to display their common charges as indicated by the Guidelines under the Private Hospitals and Medical Clinics Act (1980) & Regulations (1991), thereby increasing pricing transparency for consultations;
ii) publishing individual hospital bill sizes on the MOH website[40] and requiring hospitals to provide financial counselling to patients, thereby increasing pricing transparency before admissions to hospitals; and
iii) requiring medical bills given to patients to be itemised as indicated by the Guidelines under the Private Hospitals and Medical Clinics Act (1980) & Regulations (1991).

IV. CCS' ASSESSMENT

29. CCS takes the view that the GOF infringed the section 34 prohibition. This section details CCS' assessment on each requisite element of the section 34 prohibition. The next section details why SMA has failed to establish that the net economic benefit ("NEB") exclusion applies.

30. CCS' assessment is largely based on information furnished by SMA, as well as information gathered from a market study commissioned by CCS and undertaken by a consortium of consultants ("the Consultant") led by Drew & Napier LLC ("the Market Study"). The Market Study takes into account the inputs, captured through notes of interview ("NOI"), of various stakeholders in Singapore, including MOH, SMC, the hospitals (both restructured and private), various private specialist and GP clinics, various insurance companies and the Consumer Association of Singapore ("CASE").

(a) The Section 33(4) Exclusion

31. Section 33(4) of the Act provides, inter alia, that the prohibitions embodied in the Act shall not apply to any activity carried on by, any person acting on behalf of the Government or that statutory body in relation to that activity, agreement or conduct. It is CCS' view that, in order for a person to be regarded as acting "on behalf of" the Government or a statutory body, there must be a relationship of agency, or a relationship akin thereto between that person and the Government or statutory body. As noted in paragraph 17 above, neither MOH nor SMC was involved in the discussion pertaining to the formulation and review of GOF fee ranges.

32. CCS also notes that it is not SMA's position that it was acting on behalf of

[40] MOH also publishes bill sizes for Ward B1, B2 and C class as well. Source: http://www.moh.gov.sg/mohcorp/billsize.aspx?id=302. [Accessed on 30 April 2010]

MOH in formulating, issuing and reviewing the GOF fee ranges.

(b) The Section 34 Prohibition

33. Section 34 of the Act reads:

> (1) […] 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 are prohibited unless they are exempt in accordance with the provisions of this Part.
> (2) For the purposes of subsection (1), agreements, decisions or concerted practices may, in particular, have the object or effect of preventing, restricting or distorting competition within Singapore if they –
> (a) directly or indirectly fix purchase or selling prices or any other trading conditions; […]

34. The section 34 prohibition is modeled after the Chapter I prohibition of the United Kingdom ("UK") Competition Act 1998 and Article 101 (previously Article 81) of the Treaty on European Union (the "EC Treaty"). Cases from the UK and the European Union ('EU") may thus be persuasive or useful in assisting CCS in arriving at its conclusions, although the value of any foreign competition case law depends very much on the overall facts and context of the case before CCS, as well as the extent to which the facts of these foreign cases are applicable to the local context.

35. CCS has also reviewed the approaches taken by competition authorities in other jurisdictions on similar issues and these cases are summarized in Annex 2.

(c) Theory of harm

36. The GOF can be viewed as an explicit form of price recommendation by a professional association (SMA) which constituted a decision by an association of undertakings pursuant to section 34 of the Act.

37. The GOF might have the object or effect of preventing, restricting or distorting competition in Singapore because price recommendations, even if non-binding, generally harm the competitive process by restricting independent pricing decisions and signaling to market players what their competitors are likely to charge. When market players are able to predict the prices of their competitors with a reasonable degree of certainty, a focal point is created for fees in the market to converge, regardless of the competitors' individual costs.

(d) Market Definition

38. In CCS' deliberation on the Application, market definition serves two main purposes – first, to provide a reference for assessing whether the GOF restricted competition appreciably; second, to provide a reference for assessing whether the NEB exclusion applied to the GOF.

SMA's submission

39. SMA, in its submission, indicated that the relevant market for the purpose of the Application is the market for medical services and procedures provided by medical practitioners in Singapore[41].

Product Market

40. CCS first notes that the GOF is the subject of the Application which covered a wide range of medical services and procedures, and was targeted at the private-sector medical practitioners in Singapore. Accordingly, CCS identifies the provision of medical services and procedures by medical practitioners in the private sector as the focal product[42].

41. CCS then considers whether the focal product needs to be sub-divided into narrower markets. In this regard, CCS notes that MOH broadly classifies the medical services and procedures covered by the GOF into Primary and Hospital Care (see paragraphs 22-26).

42. The nature of Primary and Hospital Care services are significantly different. Patients who seek Hospital Care are likely to require specialist and/or inpatient care; while Primary Care is provided on an outpatient basis by general practitioners. As such, CCS considers Primary and Hospital Care to be in separate markets.

43. CCS then considers whether medical services and procedures provided by the public sector should be included in the relevant market for Primary and Hospital Care respectively.

Primary Care

44. There could be reasons to consider private-sector Primary Care services (i.e. GPs) to be in a separate market from the public sector (i.e. SingHealth and National Healthcare Groups Polyclinics), due to the perceptions and preferences of individual patients. Common considerations include proximity, waiting time, perceived quality of services and long-term relationship (especially for family practice). Given the subsequent analysis in the section on *Appreciability*, CCS notes that the inclusion of the public sector in the relevant market with respect to Primary Care does not affect CCS' conclusion on whether the GOF was appreciably anti-competitive and whether it benefited from the NEB exclusion with respect to Primary Care. As such, CCS proceeds on the conservative basis to include the public sector.

Hospital Care

[41] Form 1 filed by SMA on 5 February 2009, at ¶4.2.1.
[42] CCS Guidelines on Market Definition, at ¶2.1.

45. In terms of Hospital Care (i.e. in-patient and specialist out-patient services), a chain of substitution[43] may exist, with private-sector services being the focal product, unsubsidised public-sector services[44] being the next-best substitute, and subsidised public-sector services[45] being an indirect substitute. However, CCS is of the view that only unsubsidised public-sector services should be included in the relevant market with respect to Hospital Care, for three reasons.

46. First, the service level is different. Subsidised patients are not entitled to choose their preferred doctors. The Class B2 and C wards also have more beds per ward. For out-patients, the need to obtain referral from polyclinics to qualify for subsidised rates constitutes an additional hurdle, given the extra lead-time incurred[46].

47. Second, from the demand-side point of view, those patients who have chosen the private sector are likely to be less price-conscious, because they have opted to pay a substantial premium over *unsubsidised* public-sector services. While their preferences for the private sector may be partly subjective, it is likely that many of them would view *unsubsidised* medical services in the public sector as a more comparable substitute to private sector medical services than *subsidised* medical services, should these patients consider the alternatives available to them given an increase in private-sector prices of around 10%.

48. Third, from the supply-side point of view, the public sector is facing capacity constraints in terms of medical services to unsubsidised patients. We understand from an interview with a public health cluster that, only 20% of its capacity caters to unsubsidised patients[47]. Given that the public-sector healthcare groups are established under the policy mandate to provide affordable and accessible healthcare services to the mass population in Singapore, they are unlikely to be able to switch their production capacities significantly from subsidised to unsubsidised services.

49. For the above reasons, CCS has excluded subsidised public-sector Hospital Care services from the relevant market. However, unsubsidised services has been

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[43] CCS Guidelines on Market Definition, at ¶3.13-¶3.15. In particular, the existence of a chain does not mean that the whole chain should be included in the relevant market, because even if Product A is a good substitute to Product B, and Product B is a good substitute to Product C, Product A could still be a poor substitute to Product C.

[44] E.g. Class A wards, as well as certain classes of patients at specialist outpatient clinics of the restructured hospitals. Source: http://www.pqms.moh.gov.sg/apps/fcd_faqmain.aspx?qst=2fN7e274RAp%2bbUzLdEL%2fmJu3ZDKARR3p5Nl92FNtJifw8iBZoOww9Gf8%2fdLi7cbTadpIw2tF7Fdn5I9r5Y9UM9XPY37bcAtM7ZvDLVsTJgDSks74Ew7gnY0O7OPO5%2fzDG7VL1ugrF%2fa3wpwYm%2fLw8EgQTEN2HpITreQmMf2L2f0BUIH5nRwNLV5fvxTy5jHxoEd75Hgf8LI%3d# and https://www.moh.gov.sg/mohcorp/uploadedFiles/News/Press_Releases/2010/Press%20Release_subsidy%20distinction_annex.pdf [Accessed on 30 April 2010]

[45] E.g. Class B2 and C wards, as well as certain classes of patients at specialist outpatient clinics of the restructured hospitals. Source: *Ibid*

[46] For more details, please refer to the book *Picking the Right Hospital, Right Doctor in Singapore* published by Rank Books, 2006, section entitled "Understanding Medical Cost in Singapore: An Overview" from pages 2 - 7.

[47] See NOI with Public Health Cluster II (dated 11 June 2009) at ¶9.

conservatively included into the relevant market together with private-sector services, as CCS recognises that many people would regard the former as credible alternatives to the latter. Importantly, this inclusion does not affect CCS' conclusion on whether the GOF was appreciably anti-competitive and whether it benefited from the NEB exclusion with respect to Hospital Care.

Geographic market

50. CCS agrees with SMA's submission that the relevant geographic market is Singapore.

Conclusion on market definition

51. Having considered the above, CCS concludes that there are two relevant markets (the "Relevant Markets") for the purpose of assessing whether the GOF infringed the section 34 prohibition in the Act, and whether it benefited from the NEB exclusion:

i) The provision of Primary Care services by medical practitioners in Singapore (the "Primary Care Market");

ii) The provision of unsubsidised Hospital Care services by medical practitioners in Singapore (the "Hospital Care Market"); and

(e) Decision by an Association of Undertakings

52. The term "undertaking" is defined by the Act to mean

> any person, being an individual, a body corporate, an unincorporated body of persons or any other entity, capable of carrying on commercial or economic activities relating to goods or services.

53. It is clear that professionals engaged in private practice, including self-employed medical practitioners, can constitute undertakings[48]. A professional association such as SMA thus constitutes an "association of undertakings". The fact that some members of SMA are employees of the restructured hospitals or of incorporated healthcare groups, rather than self-employed doctors in private practice, does not detract from this fact, as SMA acted as an association of undertakings when it acted on behalf of medical practitioners in the private sector, with respect to the formulation, issuance and revision of the GOF[49].

54. It is also clear that the GOF, being a recommendation by SMA on the professional fees that doctors should charge, constituted a "decision" by an association of undertakings. In this respect, the *CCS Guidelines on the Section 34 Prohibition* state:

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[48] *Pavel Pavlov and Ors v Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-06451, at ¶74 to ¶77.
[49] *Agreements between Irish Actors' Equity SIPTU and the Institute of Advertising Practitioners in Ireland concerning the terms and conditions under which advertising agencies will hire actors*, E/04/2002 at ¶ 2.10.

> 2.13 A decision by an association may include … its recommendations. … The key consideration is whether the object or effect of the decision, whatever form it takes, is to influence the conduct or co-ordinate the activity of the members in some commercial matter. An association's coordination of its members' conduct in accordance with its constitution may also be a decision even if its recommendations are not binding on its members, and may not have been fully complied with.

55. An instructive case on this point would be the 1996 decision of the European Commission ("EC") in *Fenex*[50]. This case concerned a federation of Dutch forwarding organisations, Fenex, which had a tariffs committee that drew up and updated the tariffs annually for adoption by the board of directors. The document setting out the recommended tariffs was then sent to members. The EC found that the recommendation by Fenex as to the tariffs amounted to a decision by an association of undertakings, as:

> [T]he drawing-up and circulation of the tariffs recommended by Fenex must be interpreted as the faithful reflection of the association's resolve to coordinate the conduct of its members on the relevant market. [51]

56. Similarly, the UK Office of Fair Trading ("OFT") considered a case involving fee guidelines issued by the Royal Institute of British Architects ("RIBA"). Following intervention by the OFT, RIBA removed its guidelines. In a case closure summary dated 14 March 2003, the OFT stated: [52]:

> Circulation of guidance on fees issued by an association of undertakings or a professional body may encourage tacit collusion as it is likely to provide a lead on prices which may hinder the ability or incentive of efficient firms to compete by reducing price to reflect their lower costs. It may also protect those who are less efficient and reduce the incentive to improve. The fact that the guidance was in the form of an indication rather than a binding decision did not prevent it from being a decision of an association of undertakings.

(f) "Object" of Restricting Competition

57. In assessing the object of a decision, CCS considers the objective meaning and purpose of the decision in the economic context in which it is to be applied[53].

58. Recommendations by trade or professional associations on the fees that their members should charge can be construed as having the object of restricting price competition. For example, in *Verband*[54], the European Court of Justice ("ECJ") took the view that a recommendation that laid down in mandatory terms a collective, flat-rate and across the board increase in fire insurance premiums had been made with the object of restricting competition in the industrial fire and consequential loss insurance market. Indeed, CCS is of the view that there is no reason for professional or trade associations to circulate recommended prices

[50] Case 96/438/EC.
[51] *Ibid*.
[52] *Royal Institute of British Architects*, Case GP/908 (14 March 2003), OFT Competition Case closure summaries 1-31 March 2004.
[53] *Compagnie Royale Asturienne des Mines SA and Rheinzink GmbH* v *Commission* [1984] ECR 1679 at ¶26.
[54] *Verband der Sachversicherer e.V.* v. *Commission*, [1987] ECR 405 at ¶30.

unless they intend to, at least, provide a reference for members and influence their independent pricing decisions. In this aspect, CCS believes that the GOF is no different from other fee recommendations.

GOF was promulgated with the objective of influencing prices

59. CCS notes that SMA had indicated in its submissions[55] that:

> [The GOF] together with the SMA guidelines on drug pricing markups is designed to *provide a transparent system of charging that is usual, customary and reasonable.* It is designed to discourage doctors from charging apparently low fees in one (usually very visible area) but having a very high mark-up. (Emphasis added)

60. CCS further notes SMA's submission that the GOF was not intended to facilitate price-fixing between medical practitioners. Rather, it was meant to protect the patients' interest, by diminishing information asymmetry between patients and medical practitioners, thereby preventing over-charging of patients. Nevertheless, the recommended fees within the GOF were stipulated as a range, with both a maximum and a *minimum*. CCS' view is that if the GOF was primarily meant to protect patients against over-charging, then the stipulation of a minimum fee would contradict that objective.

61. SMA submitted that the GOF was not intended to be an instrument to protect medical practitioners' incomes[56]. However, SMA also conceded that the GOF helped to improve transparency for young doctors, in that medical professionals are not taught how to charge when they were students in medical schools or when they underwent training in public hospitals, unlike lawyers and accountants who have the benefit of a long apprenticeship in private firms. The GOF was thus useful in helping to educate young medical practitioners entering the private sector on how to charge[57]. Based on the aforementioned, it would appear that one of the objectives of the GOF was to influence pricing decisions of new entrants to the markets. In particular, CCS considers that younger doctors and new entrants into the private practice were more likely to be the ones who would have charged lower prices in the absence of the GOF.

62. SMA indicated that the recommended minimum fees in the GOF would help to protect patients, in that if minimum prices were absent, doctors might be encouraged to quote a low fee for medical services but recover costs through other avenues, such as significant drug mark-ups[58]. CCS cannot agree with SMA's reasoning. In a similar vein, acceptance of SMA's reasoning would mean that cartelists who engaged in price fixing will be allowed to participate in price-fixing agreements as such activities will help them to earn a reasonable return on the goods or services they provide so as to reduce their incentives to exploit customers through other means.

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[55] SMA's letter to CCS dated 24 July 2009 at ¶10.1.
[56] Form 1 filed by SMA on 5 February 2009, at ¶2.3.5 and ¶3.1.3.
[57] SMA's letter to CCS dated 28 May 2009, at ¶21.2.
[58] SMA's letter to CCS dated 5 June 2009, at ¶4.2.

63. It is important to note that SMA had reiterated at several points in its Application that the GOF also served to ensure that doctors were *reasonably remunerated* for their skills, competence, experience, specialties and service quality. During the course of the Market Study, feedback was obtained to the effect that the problems arising from the withdrawal of the GOF included "both *under-cutting* and over-charging" (Emphasis added)[59]. There was also feedback that the medical industry tended to frown upon, and informally exert some peer pressure on, those who charged below the minimum fees in the GOF[60]. CCS is thus of the view that the purpose of the GOF was to influence prices in the private medical services sector so that they would likely be within an acceptable range to the medical practitioners themselves.

GOF restricted competition even though compliance was voluntary

64. SMA submitted that the recommended fee ranges in the GOF were voluntary and that medical practitioners could choose to price above or below them[61]. Furthermore, the introduction to the fourth edition of the GOF stated:

> 4. The fee ranges are meant as a GUIDE and should be treated as such. The practitioner should satisfy himself that the fee charged is fair and reasonable, considering the particular circumstances of the case and the patient.
> 5. Practitioners who wish to charge outside this Guideline should inform their patients accordingly to avoid subsequent misunderstanding.
> 6. Practitioners are encouraged to continue their practice of reducing or waiving fees for patients who cannot afford to pay the usual fees.

65. Be that as it may, even recommendations that purport to be voluntary can have the object of restricting competition. In *Cementhandelaren*[62], the ECJ considered a system of voluntary target prices for cement that replaced an earlier system of imposed prices, and concluded that both systems equally contravened the Article 85 (now Article 101) of the EC Treaty[63]. In the case of target prices, the ECJ was of the view that "the fixing of a price, even one which merely constitutes a target, affects competition because it enables all the participants to predict with a reasonable degree of certainty what the pricing policy pursued by their competitors will be"[64]. In *Verband*[65], the ECJ found that despite the fact that the recommendation to increase fire insurance was described by the association concerned as "non-binding", the mandatory terms in which it was worded, together with the empowerment of the association to coordinate the activities of its members, meant that the recommendation had the object of restricting competition.

66. In the present case, SMA had an Ethics and Complaints Committee that

[59] See NOI with Private Hospital II (dated 17 June 2009), at ¶12.
[60] See NOI with Private Specialist Clinic (Obstetrics and Gynecology) (dated 30 June 2009), at ¶7.
[61] Form 1 filed by SMA on 5 February 2009, at ¶3.3.2.
[62] *Vereeniging van Cementhandelaren* v *Commission* [1972] ECR 977.
[63] *Cementhandelaren*, at ¶19.
[64] *Cementhandelaren*, at ¶21.
[65] *Ibid* at footnote 54.

dealt with complaints of over-charging. In particular, SMA submitted that[66]:

> Complaints on over-charging in the past were directed to the SMA Ethics Committee and subsequently to the Complaints Committee (which was formed as an independent committee in the year 2002). The Ethics and Complaints Committee would seek an explanation from the medical practitioner involved, as well as a breakdown of fees charged for consultation, each drug dispensed, and procedure performed etc. If the charges were found to exceed the GOF, the medical practitioner would be advised to refund the difference to the patient/ complainant.

67. SMA had further elaborated that the GOF in effect created a "price ceiling", and alluded to "pressure" for the medical practitioner to price at the recommended fee range because of the "moral implications" of being seen as over-charging[67]. It is thus clear that although the GOF was stated to be voluntary, SMA had an objective mechanism in place to foster compliance. Although SMA submitted that it had no recourse "in theory" for non-compliance by the "offending" medical practitioner, SMA had no actual experience of a medical practitioner not following SMA's "recommendation" to provide a refund[68].

GOF was not based on actual price data

68. As mentioned above, SMA indicated that the GOF fee ranges were "usual, customary or reasonable". However, CCS notes that, based on the fee review mechanism submitted by SMA, it is arguable whether the GOF fee ranges can be seen as an objective reflection of historical or contemporary prices charged by private medical practitioners. First, the GOF Committee surveyed the professional fees stated by its members, rather than actual prices charged by them, let alone the actual operating costs of medical practitioners. Second, there was no objective and transparent methodology employed by the GOF Committee to derive the first draft of recommended fees from the survey responses.

69. Third and most importantly, various submissions from SMA clearly indicate that the purpose of the GOF was to recommend what prices *should be*, rather than to reflect what prices were. CCS also notes that the GOF did not take into account objective measures such as the actual operating costs of the practitioners in its recommendations. SMA explained that the GOF was meant to increase the transparency of, and educate the public about, costs. According to SMA, failure to include recommended minimum prices may "communicate erroneously to the public that some services do not carry a cost, which is hardly the case," although doctors may still waive their charges[69]. CCS does not agree with this argument as CCS finds it hard to believe that the public would expect that the services rendered do not carry a cost and were provided for free by the private medical practitioners.

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[66] SMA's letter to CCS dated 28 May 2009 at ¶32.1 and¶ 32.2.
[67] Form 1 filed by SMA on 5 February 2009, at ¶5.1.27.
[68] SMA's letter to CCS dated 28 May 2009, at ¶32.2.
[69] SMA's letter to CCS dated 5 June 2009, at ¶4.1.

70. It can also be seen from the following statement in SMA's submission[70] that the GOF consisted of fees that may have been fashioned with a degree of self-interest:

> The GOF sets out a schedule of recommended fees for medical practitioners in private practice in Singapore, based on a survey of current rates charged by medical practitioners in the market to identify reasonable price ranges to protect the interests of patients while ensuring that doctors are *reasonably remunerated* for their skill sets, competence, experience, specialties and quality of services. The GOF was intended to provide greater transparency to patients and enable them to make an informed choice. [*Emphasis added*]

71. CCS is also of the view that as SMA is made up of doctors, there is an inherent conflict of interest for them to set prices[71]. In addition, CCS also notes that this view was also supported in a study cited in the US Federal Trade Commission's advisory opinion in *American Society of Internal Medicine*[72]. In the study, it was indicated that doctors, if forming part of the polled group to determine a relative value scale ("RVS")[73], "would have a financial stake in the outcome of the RVS determinations and thereby have a substantial conflict of interest if empanelled to determine an RVS"[74].

GOF did not necessarily promote better service quality

72. CCS notes that medical practitioners may argue that setting a minimum price helps to ensure that quality will not be compromised. Indeed, arguments about how minimum prices serve to protect customers, through the maintenance of standards and prevention of substandard service, have often been raised in the history of competition law. Nevertheless, the jurisprudence is replete with judicial pronouncements rejecting such arguments, as there is no guarantee that, even with minimum prices, quality level of services will necessarily be maintained.

73. For example, in *AROW/BNIC*[75], the EC considered an industry agreement on the minimum distribution price of mature brandy, which purported to maintain the traditional quality of cognac, and to assure the consumer that there would be no artificial reduction in prices to the detriment of the characteristics of the product. The EC noted that despite the stated objective of the agreement, the decision to fix minimum prices was in reality taken on the ground of the sales policy of the various parties represented by BNIC[76], and had as their object and effect the prevention of free individual price formation by cognac producers[77]. As to the claimed benefits of the minimum pricing agreement, the EC noted[78]:

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[70] Form 1 filed by SMA on 5 February 2009, at ¶3.3.1.
[71] This possibility was also noted by CASE. See NOI with CASE (dated 24 April 2009), at ¶16.
[72] The advisory issued by the US FTC was dated 19 April 1985.
[73] A relative value scale ("RVS") expresses the value of one professional service to another, and can be converted into a fee schedule by the application of a common conversion factor to all the values within the scale.
[74] Berenson, *Group Decision-Making Methods*, cited in *American Society of Internal Medicine*, at page 18.
[75] Case 82/896/EC, OJ L 379, 31/12/1982.
[76] *AROW/*BNIC, at ¶52.
[77] *AROW/*BNIC, at ¶60.
[78] *AROW/*BNIC, from ¶69 to ¶71.

69. The imposition of minimum prices can in no way be justified by reference to an alleged object of guaranteeing quality. Such a measure is both pointless and ineffective for that purpose. It is pointless because the legal requirements for the production, stocking, ageing and distributions of cognac allow sufficient policing of fraud. It is ineffective because it introduces no extra check on products sold at prices above the minimum imposed; if it were accepted that the legal requirements protecting the use of the registered designation of origin "cognac" were ineffective, the imposition of a minimum price would not prevent products which failed to meet the quality criteria laid down by those legal requirements from being sold with impunity at prices above the minimum imposed.

70. Furthermore, the measures at issue are in any event out of proportion to the object referred to, as they completely prevent the sale of spirits qualifying for the registered designation of origin "cognac" at prices below the minimum set by the industry agreement. There is no provision for proving that a product sold at a price below the minimum imposed nevertheless meets the quality criteria laid down by the legal requirements (1).

71. The consumer does not receive the benefit of an improvement in quality, as has been shown above. Neither does he benefit from the other hypothetical advantages alleged by the BNIC (see above, point 67), as the measures at issue have the consequence that prices are at a higher level than that which would result from the free interplay of supply and demand.

74. With respect to recommending maximum prices, SMA submitted that without the GOF, the problem of assessing quality would be exacerbated. SMA argued that due to the presence of information asymmetry, a patient often judges the quality of medical services (especially highly specialised services with few providers available) by price, i.e., the higher the price, the higher the perceived quality of services. Accordingly, without a recommended guideline on pricing through the GOF, medical practitioners may be motivated to charge increasingly higher prices to signal to the patient the quality of services that the medical practitioner is providing, without a corresponding increase in the actual quality of services provided[79]. SMA also stressed that while the GOF would not be able to eliminate all the contributory factors to the information asymmetry problem, the absence of the GOF would however exacerbate the issue of assessing quality.

75. CCS acknowledges that the signaling problem may be present amongst medical practitioners in the private sector, but is not convinced that the GOF can deter such practices, as medical practitioners can still use high prices as a signaling tool in the presence of the GOF. In fact, the GOF might even facilitate signaling, as deliberately charging above the GOF recommended prices could create an even more credible impression of better quality healthcare services than in the absence of the GOF. In particular, CCS notes that, according to SMA's definition[80], a doctor is not over-charging so long as the patient is informed of the charges. Ironically, signaling inevitably involves informing the patient of the charges beforehand.

[79] SMA's letter to CCS dated 28 May 2009, at ¶23.1.
[80] SMA's letter to CCS dated 28 May 2009, at ¶28.1.

76. Considering the above, it cannot be objectively construed that either the minimum or maximum recommended prices in the GOF promoted better quality of medical services.

GOF can restrict competition even if it comprised recommended maximum fees

77. Even if the GOF comprised only recommended maximum fees (i.e. without recommended minimum fees), it would still be deemed to be anticompetitive in its nature." In *Maine Medical Association*[81], the US Federal Trade Commission advised that a proposal for doctors to either freeze their fees or lower them by a particular percentage raised competition concerns, as the recommendation might serve as part of, or evolve into an agreement amongst member doctors to comply with the recommendation. The recommendation could also become coercive if the member doctors did not view it as purely advisory and voluntary.

78. That this is a real prospect in the present case can be inferred from SMA's submissions[82]:

> The SMA further submits that it is possible that the public will base its perception on the level of over-charging (or excessive pricing) by doctors on the GOF. Accordingly, the SMA is of the view that *there may be medical practitioners who would adhere to the upper limit of the GOF as a price ceiling so as to avoid accusations of over-charging by the public*. [Emphasis added]

79. The feedback received by CCS also indicated that the GOF was often used by doctors to justify their fees when queried by patients[83].

Conclusion

80. Based on the totality of factors considered above, CCS concludes that the GOF had the object of restricting competition.

(g) "Effect" of Restricting Competition

81. Given CCS' conclusion that the GOF had the object of restricting competition, it is not necessary to consider if the GOF also had the effect of doing so[84]. Nonetheless, it appears from the facts of this case that the GOF had been effective in influencing prices.

82. CCS first notes SMA's submission that[85]:

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[81] *Advisory Opinion to Maine Medical Association*, 14 May 1984.
[82] Form 1 filed by SMA on 5 February 2009, at ¶3.3.3.
[83] See NOI with Private Hospital II (dated 17 June 2009), at ¶14; NOI with Private Hospital I (dated 16 June 2009), at ¶10; NOI with Private Hospital IV (dated 18 June 2009), at ¶11; NOI with Private Specialist Clinic (Obstetrics and Gynecology) (dated 30 June 2009), at ¶15; NOI with Private Specialist Clinic (Cardiology) (dated 17 June 2009), at ¶10.
[84] *Verband der Sachversicherer e.V.* v. *Commission*, Case 45.85 [1987] ECR 405, at ¶39; *Belgium Architects' Association*, Case Comp/38.549 (24 June 2004), at ¶94.
[85] SMA's letter to CCS dated 28 May 2009, at ¶16.1.

a best guess estimate is that *at least 75 per cent* of private medical practitioners charge within the GOF guidelines prior to its withdrawal [Emphasis added].

83. In addition, CCS notes that the GOF was made available to non-members, at a price of $20 per copy (as opposed to $15 for members). SMA, by its own admission, also used the GOF to 'counsel' errant doctors (including SMA members and non-SMA members) and adopted the same yardstick and criteria when processing over-charging complaints against them[86].

84. Anecdotal evidence from interviews conducted by the Consultant also point to the GOF's widespread effect on medical prices, as doctors (including those who are non-SMA members) stated that they had used the GOF in the past to justify their prices and to address queries from patients on their charges. Other interviewees took the position that the GOF was especially useful to doctors that were new to private practice and who lacked knowledge of the prices charged by other private doctors[87]. This echoes SMA's argument in paragraph 61 that the GOF helped young medical professionals entering the private sector on how to charge.

Results from the Market Study

85. In the Market Study, the Consultant opined that the GOF might be used as a mechanism for doctors to justify their prices to patients. The interviews suggested that consumers generally did not try to dispute prices when they had been informed that the prices were within the recommended range in the GOF. From the interviews conducted, the Consultant also highlighted that the doctors interviewed felt that medical practitioners commonly referred to the GOF as a benchmark for the fees they thought would be appropriate or reasonable in setting fees for their own private practice.

86. In order to quantify whether the GOF had the effect of restricting competition, a thorough analysis would have entailed how medical fees responded to the introduction of various versions of the GOF. However, fee information stretching back more than 20 years ago when the GOF was first introduced is not readily available.

87. Instead, the Consultant conducted a quantitative analysis[88] on professional fees between July 2006 to June 2009 (the "Period") to examine how medical fees had changed during the Period and assess if the changes could be attributed to the removal of the GOF in April 2007.

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[86] SMA's letter to CCS dated 24 July 2009, at ¶9.2.

[87] See NOI with Private Specialist Clinic (Orthopaedics) (dated 24 June 2009), at ¶5; NOI with Private Specialist Clinic (Anaesthesia) (dated 30 June 2009) , at¶7; NOI with Private Specialist Clinic (Obstetrics and Gynecology) (dated 30 June 2009) , at ¶8; NOI with Private Specialist Clinic (ENT) (dated 13 July 2009), at ¶7; Phone interview with Private GP Clinic (Independent, 1 doctor) (dated 17 July 2009), at ¶15;

[88] The analysis is based on data provided to CCS by two insurance companies from 1 July 2006 to 30 June 2009. The Consultant then selected 31 surgical procedures (with 10 observations or more) of which the procedure names could be matched with those in the GOF. Fees corresponding to subsidised services of the restructured hospitals were also excluded, since they fall outside the Relevant Markets.

88. In terms of the effect of the GOF on price level, the data showed that professional fees charged by doctors in the the private sector ("private fees") had been increasing throughout the Period, both before and after the removal of the GOF[89]. However, after adjusting for CPI-Health[90] which is a proxy for healthcare inflation[91], the removal of the GOF did not contribute to the increase in private fees during the Period[92].

89. In terms of the effect of the GOF on price uniformity, the Consultant found that the standard deviation of fees increased by 23.74% throughout the Period, suggesting that the GOF had led to price convergence when it was in force.

(h) Appreciability

90. The *CCS Guidelines on the Section 34 Prohibition* also state:

> 2.18 An agreement will fall within the scope of the section 34 prohibition if it has as its object or effect the **appreciable** prevention, restriction or distortion of competition. [Emphasis added]

Appreciability will depend largely on the influence which the parties to the agreement, or the members of the association whose decision is in issue, have on the market.[93] This influence may be reflected by the market shares of the parties or members concerned[94].This section sets out the reasons why CCS considers the influence of the GOF in the Relevant Markets to be appreciable.

91. According to SMA[95], there are 3,032 registered medical practitioners in private practice, of which 2,132 are SMA members. Doctors interviewed in the Market Study[96] suggested that price ranges in the GOF were usually taken into consideration in setting prices. In addition, SMA also indicated that the SMA Ethics and Complaints Committee processed complaints based on similar yardsticks for members and non-members[97]. Up until the withdrawal of the GOF in 2007, it had had no actual experience of a medical practitioner not following

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[89] The cumulative increase in professional fees charged by doctors in the private sector was 16.9% (¶425 of the Market Study).

[90] Consumer Price Index–Health ("CPI-Health") covers the prices of medical treatment (which includes hospitalisation fees, medical consultations and specialist charges), dental treatment, proprietary medicines & supplies and medical health insurance. As such, professional fees are just one component of the CPI-Health.

[91] The cumulative increase in CPI-Health during the Period was 13.1% (¶426 of the Market Study).

[92] According to the Consultant's multivariate regression model, every 1% increase in CPI-Health corresponds to a 1.25% increase in private professional fees, while the removal of the GOF corresponds to a 2.6% decrease in fees, after controlling for other factors such as operation procedure and hospital type (¶453 and ¶454 of the Market Study).

[93] See *Fenex*, supra, at ¶67-¶69.

[94] See *CCS Guidelines on the Section 34 Prohibition*, at ¶2.19.

[95] SMA's letter to CCS dated 28 May 2009, at ¶1.1.

[96] See NOI with Private Specialist Clinic (ENT) (dated 13 July 2009), at ¶7. See NOI with Private Specialist Clinic (Orthopaedics) (dated 24 June 2009) at ¶5. See NOI with Private Specialist Clinic (Neurology) (dated 6 July 2009) at ¶14. See Phone Interview with Private GP Clinic (Independent, >1 doctor) (dated 12 August 2009) at ¶15.

[97] SMA's letter to CCS dated 7 July 2009, at ¶9.2.

the recommendations of SMA for a refund[98]. Furthermore, as mentioned in paragraph 61, the GOF was also used to educate young doctors how to charge. These factors imply that the influence of GOF on professional fees spanned from SMA members to non-members and from actual to potential competitors.

92. Further, according to SMA's submission, at least 75% of the private medical practitioners charged within the range of the GOF[99].

93. Given the totality of considerations above, CCS concludes that the influence of the GOF in the Relevant Markets was appreciable.

(i) Conclusion on the section 34 prohibition

94. For the above reasons, CCS is of the view that the GOF infringed the section 34 prohibition, unless it can be shown that the GOF was either excluded or exempted under the Act.

V. THE NET ECONOMIC BENEFIT EXCLUSION

95. SMA submitted that the GOF fell within the NEB exclusion in the Act[100]. The NEB exclusion is encapsulated in paragraph 9 of the Third Schedule to the Act, which reads:

> **9 Agreements with net economic benefit**
> The section 34 prohibition shall not apply to any agreement which contributes to —
> (a) improving production or distribution; or
> (b) promoting technical or economic progress,
> but which does not —
> (i) impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; or
> (ii) afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question.

96. The burden of proof in establishing the NEB exclusion lies on the party who claims it (i.e., SMA in this case)[101]. CCS is of the view that SMA has failed to establish that this exclusion applies to the GOF.

(a) & (b): Improving Production or Distribution / Promoting Technical or Economic Progress

SMA's submissions

97. SMA submitted that the inherent characteristics of the healthcare market

[98] SMA's letter to CCS dated 28 May 2009, at ¶32.2.
[99] *Ibid* at ¶82.
[100] Form 1 filed by SMA on 5 February 2009, at ¶2.5.2 and ¶5.1.4.
[101] *Unilever Bestfoods (Ireland) Ltd* v *Commission*, Case C-552/03P, at ¶102; *VBVB* v *Commission* [1984] ECR 19 at ¶52.

render it susceptible to market failure, such that free market principles applicable to other industries may not be applicable to medical services [102]. Specifically, SMA explained that there is a high degree of information asymmetry between medical practitioners (i.e., the medical practitioner will have considerably more information than the patient as regards to the medical practitioner's efficiency and quality of care, as well as his business costs[103]) and patients, which affords the former the ability to overcharge the latter. Patients are unable to compare healthcare costs in order to make informed choices on pricing and quality of medical practitioners prior to consultation[104].

98. As medical costs escalate, patients may choose to consume less (or even not to consume) medical services, resulting in consumption falling below socially and economically optimal levels[105]. The ill-effects that would follow include the occurrence of acute disease outbreaks and greater absenteeism from work and school[106]. Lack of treatment or immunization for diseases or illnesses would affect not only the health of the patient in question, but also that of others, through increased incidence of infections spreading. SMA submitted that these factors will ultimately lead to a fall in overall productivity of the economy[107].

99. SMA also pointed out that over-charging will have an adverse impact on Singapore's medical tourism efforts, as higher costs would deter foreigners from seeking medical treatment in Singapore [108]. SMA also alluded to how the information asymmetry problem may be particularly acute for foreign patients, whom SMA argued would not have the time to shop around or to search for information to make an informed choice[109].

100. In light of the above, SMA claimed that "a calibrated degree of intervention" in the healthcare market is necessary to prevent uninhibited profiteering and the escalation of medical fees[110]. SMA submitted that the GOF helped to achieve this goal and protect patients' interests, by increasing the transparency of healthcare costs, diminishing the information asymmetry between patients and medical practitioners, allowing patients to make an informed choice of medical practitioner[111], so that over-charging can be identified[112] and curbed in the private sector[113].

101. SMA also highlighted that information searches on medical services are

[102] Form 1 filed by SMA on 5 February 2009, at ¶5.1.3.
[103] Form 1 filed by SMA on 5 February 2009, at ¶5.1.6.
[104] Form 1 filed by SMA on 5 February 2009, at ¶5.1.9.
[105] Form 1 filed by SMA on 5 February 2009, at ¶5.1.18-¶5.1.20.
[106] SMA's letter to CCS dated 28 May 2009, at ¶25.1.
[107] Form 1 filed by SMA on 5 February 2009, at ¶5.1.24.
[108] Form 1 filed by SMA on 5 February 2009, at ¶5.1.25; SMA's letter to CCS dated 28 May 2009, at ¶40.3-¶40.4.
[109] *Ibid*
[110] Form 1 filed by SMA on 5 February 2009, at ¶5.1.4.
[111] Form 1 filed by SMA on 5 February 2009, at ¶3.1.2 and ¶3.3.1.
[112] Form 1 filed by SMA on 5 February 2009, at ¶5.1.31.
[113] Form 1 filed by SMA on 5 February 2009, at ¶5.1.15 to ¶5.1.17.

difficult to perform as pricing information is not centrally published and in most instances, medical practitioners would either be unable or unwilling to provide a quote on the medical fees in advance of a consultation or diagnosis. In this regard, consultation fees may form a large part of the overall costs. Accordingly, it would not be economically realistic for patients to perform such information searches[114]. In particular, SMA referred to emergency-type cases, or one-off rather than recurring medical treatment, where the ability of patients to exercise choice is curtailed.

102. SMA reasoned that by preventing over-charging, the GOF promoted the consumption of medical services at socially and economically optimal levels. This in turn translated into increased investment in health capital and a boost in productivity[115]. SMA explained that as productivity is a component of economic growth[116], the GOF would help to promote economic progress[117].

103. SMA's definition of "over-charging" is one where the medical practitioner had charged the patient above the GOF without informing the patient beforehand, and without extenuating circumstances (e.g., complications developed during an operation which necessitated further treatment)[118].

104. To this end, the GOF was used by SMA's Complaints Committee as a primary reference for reviewing the public's complaints about over-charging by medical practitioners[119]. SMA submitted that with the removal of the GOF, the medical profession would not be able to identify when a medical practitioner is over-charging, even in the most extreme examples[120].

CCS' assessment on information asymmetry and over-charging

105. CCS is of the view that the extent or magnitude of the information asymmetry and over-charging problems highlighted above by SMA differ from one relevant market to another. Therefore, the usefulness of the GOF has to be considered separately.

<u>The Primary Care Market</u>

106. CCS notes that Primary Care services are generally homogeneous and less complex in nature, given that patients frequently visit GP clinics for the common and recurring (but usually less serious) ailments such as diarrhea, common cough and influenza. As a result, prices in this segment are generally competitive.

[114] Form 1 filed by SMA on 5 February 2009, at ¶5.1.14.
[115] Form 1 filed by SMA on 5 February 2009, at ¶5.1.30.
[116] Form 1 filed by SMA on 5 February 2009, at ¶5.1.22.
[117] Form 1 filed by SMA on 5 February 2009, at ¶5.1.29-¶5.1.30.
[118] SMA's letter to CCS dated 28 May 2009, at ¶28.1.
[119] Form 1 filed by SMA on 5 February 2009, at ¶3.3.2.
[120] *Ibid* at footnote 118

Given the recurring nature of consumption of Primary Care, patients gain experience and basic knowledge of what kinds of treatment they need, and what constitutes a "reasonable" price. Further, the easily accessible pricing information for Primary Care (as compared to Hospital Care) enables patients to compare prices and exercise choices (i.e. ability to switch if over-charged by a particular GP). Therefore, over-charging in the Primary Care Market is not a major concern. It follows that the need (and relevance) of the GOF is not established. The Primary Care Market is functioning well. There are no strong reasons to have a GOF in this market.

107. Even SMA recognised in its submission that in cases of recurring consumption of medical services, patients would be able to[121]

> [C]onduct information searches on medical practitioners and source out better rates or higher quality of service, as they are able to anticipate with a degree of certainty the kind of medical services required.

108. CCS also notes that SMA agreed that over-charging is not a major concern in the Primary Care Market[122] even following the withdrawal of the GOF.

> The SMA submits that price competition may be particularly important in the area of general practice. Many general practitioners ("GPs") compete mainly on price which has resulted in the low GP prices in Singapore. … Accordingly, GPs are not able to command a premium for such services.

Hospital Care

109. One may argue that information asymmetry is more severe in the Hospital Care Market than in the Primary Care Market, given the complexity of the medical conditions. In addition, the monetary consideration for complicated treatment is much more substantial than Primary Care. Furthermore, some patients with serious illnesses may not be in the frame of mind to consider the financial issues when making choices. These may potentially lead to more over-charging incidents by private practitioners.

110. To this end, CCS notes that the public sector is the major supplier of Hospital Care in Singapore. For the mass population who may be concerned with over-charging by private practitioners, CCS is of the view that the restructured hospitals are either their first choices or credible alternatives to private hospitals[123]. Hospital in-patient and specialist outpatient services provided by the public sector did not refer to the GOF in setting prices. The GOF is irrelevant insofar as patients who choose the public sector for Hospital Care are concerned. The mission of the public sector is to provide good quality and affordable

[121] Form 1 filed by SMA on 5 February 2009, at ¶5.1.13.
[122] SMA's letter to CCS dated 28 May 2009, at ¶3.1.
[123] Based on CCS' market definition, the mass population who choose subsidised public-sector Hospital Care services with or without the GOF falls outside the relevant market. These patients may regard subsidised public-sector services as good substitutes to private-sector services, but this is irrelevant to the question whether the GOF had the ability to appreciably restrict competition in the Hospital Care Market defined.

healthcare services to the mass public. Therefore, over-charging should not be a concern for those patients who choose the public sector for Hospital Care. In addition, there is more price transparency through measures such as those as highlighted in paragraph 28. Patients who face financial difficulties can also apply for financial assistance under various schemes offered by the government.

111. As for the usefulness of the GOF to patients who choose the private sector for Hospital Care, SMA believed that the GOF was useful to patients as it provided them with greater transparency on private healthcare costs. A closer examination of the GOF, however, suggests that the GOF did not serve this purpose. Unlike the price information provided under the publication of hospital bill sizes on MOH’s website, the GOF used highly technical medical terminologies which only doctors would be expected to understand. Hence, patients would not be able to identify or match the medical procedures by themselves, let alone estimate the likely size of the overall bill, based on the information provided in the GOF without any doctor’s assistance.

112. CCS therefore considers the GOF to be of limited use as patients are likely to depend on referrals (either by their family doctor or through word-of-mouth). Others simply go to the restructured hospitals at the very first instance. They may also seek a second opinion before making a decision. If they seek a second opinion from the restructured hospitals, they would be able to estimate the level of premium that they can possibly bear if they switch to private medical practitioners. Even for those patients who are unable to source good pricing information from the above channels, the GOF would also offer little help due to its technical terminologies.

113. Besides, for the GOF to be useful in preventing over-charging, the fees in the GOF had to be “correct” to begin with. Feedback received from the Market Study on the reasonableness of the GOF fee range was mixed. Some doctors viewed the fee ranges in the GOF as being fair[124], some viewed them as generous[125], while others viewed them as being too low[126]. Insurance companies appeared to take the view that the GOF’s rates were reasonable, and could help to curb over-charging[127].

114. As noted in paragraphs 17-18, despite SMA’s argument that various safeguards were in place to ensure the reasonableness of the recommended fees in the GOF, there was no organisation or body specifically representing the interest of consumers or patients that contributed to formulation of the GOF. Besides,

[124] See NOI with Private Hospital I (dated 16 June 2009), at ¶16; NOI with Private Specialist Clinic (ENT) (dated 13 July 2009), at ¶8-¶9; NOI with Private Specialist Clinic (Cardiology) (dated 17 June 2009), at ¶12.
[125] See NOI with Private Specialist Clinic (Neurology) (dated 6 July 2009), at ¶15; NOI with Private Specialist Clinic (Opthalmology) (dated 11 June 2009), at ¶7.
[126] See NOI with Private Hospital III (dated 22 June 2009), at ¶25; NOI with Private Specialist Clinic (Anaesthesia) (dated 30 June 2009), at ¶8; NOI with Private Specialist Clinic (Cardiology) (dated 17 June 2009), at ¶12; NOI with Private Specialist Clinic (Opthalmology) (dated 11 June 2009), at ¶7.
[127] See NOI with Insurance Company II (dated 28 May 2009), at ¶8-¶10; NOI with Insurance Company IV (dated 28 May 2009), at ¶10-¶11 and Insurance Company III (Part 2) (dated 10 June 2009), at ¶6.

neither MOH nor SMC were involved in the fee-setting discussions. Further, some of the national specialist societies claimed that they were not involved in the process, despite SMA's acknowledgment of their contributions to the GOF[128].

115. CCS also notes that the GOF, which primarily concerned prices, would not alleviate the information asymmetry between doctors and patients with respect to the diagnosis of medical conditions and the likely consequences of different treatment options. Therefore, the GOF could not help a patient make an assessment of the appropriateness of the treatment he receives, which ultimately determines the medical costs that he has to incur.

116. In response to SMA's argument that, without the GOF, doctors may be motivated to charge increasingly higher prices to signal to the patient the quality of services that they are providing, without there being a corresponding increase in the actual quality of services provided[129], as mentioned in paragraphs 72-76, CCS is of the view that the GOF is not useful in addressing this problem.

117. As for SMA's claim that anecdotal evidence supported the phenomena of price increases after the removal of the GOF, CCS notes that some respondents to the Market Study observed some increase in prices since the removal of the GOF[130], but many of them were not able to confirm whether this was due to over-charging, or whether it was due to extraneous factors such as increases in costs or inflation[131]. SMA claimed that anecdotal evidence supported the phenomenon that doctors' fees are increasing after the removal of the GOF. CCS is of the view that this is consistent with healthcare inflation during the same period. CCS further notes that SMA's own position is that healthcare inflation has always been higher than general inflation[132].

118. Further, quantitative analysis from the Market Study also did not provide support that the GOF was constraining doctors from overcharging[133]. More

[128] CCS sought inputs from 4 specialist societies. Only the Obstetricians and Gynaecologists Society of Singapore had indicated that they were involved in the review of the GOF in 1996. The other 3 specialist societies who claimed that they were not involved in the setting of the GOF are Singapore Society for Hand Surgery, Singapore Society of Ophthalmology and Singapore Cardiac Society. See letter from Obstetricians and Gynaecologists Society of Singapore to CCS (dated 20 August 2009), letter from Singapore Society for Hand Surgery (dated 17 July 2009), letter from Singapore Society of Ophthalmology (dated 25 June 2009), and letter from Singapore Cardiac Society (dated 28 July 2009).

[129] SMA's letter to CCS dated 28 May 2009, at ¶23.1.

[130] See for example NOI with Private Hospital II (dated 17 June 2009), at ¶13; NOI with Private Hospital I (dated 16 June 2009), at ¶14; NOI with Insurance Company III (Part 2) (dated 10 June 2009), at ¶8; NOI with Private Specialist Clinic (Anesthesia) (dated 30 June 2009), at ¶9.

[131] See NOI with Public Health Cluster I (dated 2 July 2009), at ¶19; NOI with Public Health Cluster II (dated 11 June 2009), at ¶10; NOI with Private Hospital III (dated 22 June 2009), at ¶26; NOI with Insurance Company III (dated 27 May 2009), at ¶13.

[132] SMA's letter to CCS dated 24 July 2009, at ¶ 3.2.

[133] According to the theory of harm proposed in the Market Study, if the GOF was effective in sanctioning high fees and preventing over-charging (defined as SMA as a case where doctors charge above the GOF range without informing patients before hand) one should expect to see a greater fraction of fees just below the maximum of the GOF range than just above the maximum of the GOF range when the GOF was in force, and that this difference in proportions would diminish when the GOF was removed. Instead, the quantitative analysis showed the opposite: there was a greater fraction of fees just below the maximum of the GOF range than just

importantly, as shown from the regression results from paragraph 87, there is no evidence to suggest any systematic increase in the professional fees for the private sector because of the removal of the GOF, CCS considers that the evidence pertaining to more over-charging after the removal of the GOF to be weak.

119. Furthermore, over-charging practices in the medical sector in Singapore did not seem to be widespread. In its responses to CCS, SMA disclosed that it had only handled a total of 24 over-charging cases from 2007 to 2009. CASE, which also deals with complaints on over-charging by medical practitioners, gave inputs that complaints about over-charging by doctors had not increased significantly since the removal of the GOF and that the theoretical consumer protection benefits of the GOF were not borne out by the number of complaints[134] it had received. MOH[135] also indicated that if there is gross over-charging that amounts to unethical and unprofessional practice, the doctor concerned will be referred to SMC instead.

Table 1: Information in relation to complaints received by SMA[136]

Period	Number of Complaints
2006-2007	26
2007-2008	10
2008-2009	14

120. CCS also finds SMA's definition of over-charging (see paragraph 103) to be unhelpful. According to SMA's definition, so long as the doctor informed the patient of the fees beforehand, there would be no over-charging, regardless of the actual level of fees charged. As mentioned in paragraph 28, MOH requires private medical clinics to display their common charges. Since SMA's definition was adopted by its Ethics and Complaint Committee in handling over-charging complaints, the GOF was not useful in curbing over-charging. In particular, those doctors who used high prices as a signaling tool would likely have informed patients of their prices in advance.

121. In any case, CCS is not convinced that the SMA method of deriving the recommended fees in the GOF is the most objective method. The methodology explained by SMA shows that the process mainly involved doctors who were suppliers themselves and whose income depended directly on the fees charged. The fees listed in the GOF did not reflect the "current" rates or actual prices.

above the maximum of the GOF range *after the GOF was removed*, but prior to its removal there was no significant difference in the proportion. See section 4.8 of the Market Study.

134 See NOI with CASE (dated 24 April 2009), at ¶2 and¶ 3.

135 Source : http://www.pqms.moh.gov.sg/apps/fcd_faqmain.aspx?qst=2fN7e274RAp%2bbUzLdEL%2fmJu3ZDKARR3p5Nl92FNtJiccWnX9%2bksdbTzPyVUGb13KTKxpM6TLUdyU%2f%2frHEDywnQRM7QvKtUZYhcfWKytiezuM7HH%2byfBWA29KOIcFIonQwtSKtqfdf7D1LjYSrXkoPDb7qh3jnvrDvRrKLk0%2bOuEATLMJ1MPs%2fTbX9BsumQg%2b3hF0SbQt9Os%3d [Accessed on 30 April 2010]

136 SMA's letter to CCS dated 28th May 2009 at, ¶34.1.

Instead, it laid out a set of fees which the GOF Committee deemed as what *should be* charged. The conflict of interest inherent in this process should not be dismissed.

122. At the very least, the GOF fee ranges were no more credible and/or useful than public-sector prices as a benchmark against over-charging. The specialist outpatient clinics in restructured hospitals are already publishing their consultation charges on their websites for ease of comparison. The charges include consultations for subsidised and unsubsidised patients as well as the charges incurred for the different consultants such as Senior Consultant, Consultant or Associate. In terms of Hospital Care, MOH also publishes on its website actual historical bill sizes of restructured hospitals for 70 common medical conditions and private hospital bills for 10 conditions. In paragraph 135, CCS further notes MOH's continuing efforts to enhance price transparency by compiling billing statistics from the private hospitals for publication in the future.

123. One may argue that the prices in the public sector may not be apple-to-apple comparisons to prices in the private sector due to actual or perceived differences[137]. CCS nonetheless considers that, even if patients find private and public services to be different, they can still make good use of the available pricing information to arrive at a more informed decision on the level of price premium they are willing to pay for private–sector services, if any[138]. Such comparison provides a much more transparent, credible and unbiased benchmark for patients than the GOF did.

124. Finally, CCS also notes that foreign patients who are able to plan for a trip to Singapore for medical treatment would in most instances have the time and resources to compare prices in order to make an informed decision before they make the trip. As the nature of such medical services is usually one-off and involves specialised care, the foreign patients are likely to do some checks and comparison before making the trip. Furthermore, as noted above, foreign patients can also complain to SMC if they believe that there is gross-over-charging.

125. In the case of medical emergencies, CCS recognises that it is almost impossible for patients to shop around, since the conditions are life-threatening if treatment is not rendered immediately. In this regard, CCS notes that there are two types of ambulance services in Singapore, namely the '995' and '1777' services. The '995' service is operated by Singapore Civil Defence Force ("SCDF"). When the '995' hotline is called, the SCDF ambulance will send the patient to the nearest restructured hospital, and will not entertain any request to be sent to private hospitals, in which case the GOF is irrelevant, since restructured hospitals have their own pricing and do not refer to the GOF. According to the SCDF,

[137] In particular, CCS' market definition shows that *subsidised* Hospital Care services provided by the public sector are not good substitutes to private-sector Hospital Care services.

[138] If patients are willing to pay substantial premium for private-sector services, the private and public sectors may constitute different markets in the antitrust context, but this does not affect the usefulness of public-sector prices as a benchmark upon which the premium is to be applied.

there is no charge for any emergency case[139] it conveys to hospitals.

126. In contrast, the '1777' ambulance services operated by private providers will send patients to their hospitals of choice, be it private or restructured. This service costs $60-$100[140] for a one-way trip. These patients (or the caregiver) who wish to be treated at a private hospital would have consciously made such a decision independently of the GOF. Even in the private hospitals, financial counseling is provided to patients admitted as emergencies and depending on the patient's condition, the patient can be transferred to the restructured hospitals if the charges are of concern[141].

127. Besides emergencies which require immediate medical attention, there may also be cases where patients have limited time to decide on an urgent treatment of a critical illness. However, with or without the GOF, CCS notes that public–sector Hospital Care would be a credible alternative for those patients who are nonetheless concerned with over-charging despite their urgent requirements[142], as restructured hospitals and specialty centres do prioritise patients according to their medical conditions[143]. For those patients who opt for the private sector, CCS considers their decisions to be no less conscious than similar decisions made by most other patients.

128. As such, CCS concludes that the scope of emergency cases where the patient is genuinely exposed to the risk of over-charging, if any, is narrow, and would not justify the publication of recommended fees for an entire gamut of medical procedures and operations, pertaining to both emergency and non-emergency cases, for the stated purpose of curbing over-charging.

CCS' assessment on optimal consumption of medical services

129. CCS notes that SMA has not furnished any evidence to establish that medical services in Singapore will fall or has fallen below socially and economically optimal levels. Indeed, SMA submitted that any attempt to tell whether the consumption of medical services is below socially and economically optimal levels would necessarily be a "complex endeavour"[144]. Nevertheless, SMA referred to the government's decision to allow Medisave for outpatient treatment of chronic diseases and subsidised health screenings for the elderly, and identified this as a tacit recognition of the possibility of under-consumption of

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[139] However, with effect from 15 April 2005, the SCDF charges $165 for each non-emergency case that it ferries to hospital. It is for the receiving hospital to determine whether a patient qualifies as an emergency case. Source: http://www.scdf.gov.sg/general/information/emergency_ambulance_service.html#scdf_amb_charges [Accessed on 30 May 2010]

[140] Source: http://www.scdf.gov.sg/general/information/1777_amb_charges.html [Accessed on 30 May 2010]

[141] See NOI with Private Hospital III (dated 22 June 2009), at ¶20; NOI with Private Hospital I (dated 16 June 2009), at ¶7, ¶8 & ¶21.

[142] Those patients who opt for subsidised Hospital Care services would fall outside the Relevant Markets defined by CCS.

[143] Source: http://www.moh.gov.sg/mohcorp/pressreleases.aspx?id=964 [Accessed on 30 April 2010]

[144] SMA's letter to CCS dated 28 May 2009, at ¶25.1.

medical services.[145]

130. First, CCS disagrees with SMA's argument that the level of consumption of medical services is sub-optimal. As indicated in paragraphs 19-28, the government has put in place a healthcare system that is accessible and affordable to the public, with itself being a major supplier. Second, the government will intervene to prevent over-supply, moderate demand and create incentives to keep health care costs under control[146], meaning that the government is as, if not more, concerned about over-consumption of medical services as under-consumption of medical services. Third, CCS is not satisfied that the GOF is the right tool to rectify any sub-optimal consumption of medical services as it may not be effective in addressing over-charging.

131. CCS notes that the Consultant did not agree that a reduction in the incidences of over-charging would lead to a significant impact on the average level of medical services utilization, since over-charging (as defined by SMA) only occurs after a patient has already received treatment. In addition, the Consultant also opined that, while patients may arguably reduce their willingness to seek medical treatments for fear of being overcharged, it could also be argued that patients generally seek medical help out of necessity and may in fact be more motivated to shop around to prevent themselves from being overcharged.

Conclusion

132. Considering the above, CCS is not of the view that the GOF has met the requirements of either improving production or distribution, or promoting technical or economic progress, of medical services in Singapore to in order to qualify for an exclusion from the application of Section 34 of the Act.

(i) Indispensability

133. Given that the requisite conditions for the GOF to improve production or distribution, or to promote technical or economic progress, are not satisfied, the question of the indispensability of the GOF does not arise. Notwithstanding this, CCS is not convinced by SMA's argument that the GOF is indispensable in achieving the objectives and economic benefits that SMA had claimed.

134. On a broader level, it has to be recognised that the information asymmetry issue is not unique to the medical services sector. It exists in many other markets. If the existence of information asymmetry could be used to justify an agreement between competitors on prices in the medical services sector, the same argument could be applied to a myriad of other relationships, including real estate agents and their clients, or between used car dealers and purchasers, to justify price agreements between competitors.

[145] *Ibid*.
[146] *Ibid* at ¶21.

135. Instead, CCS supports independent, objective and unbiased initiatives to improve price transparency in the market, as such efforts would generally be pro-competitive. For instance, CCS agrees that the measures adopted by MOH, such as itemising medical bills and publishing condition specific hospital bill sizes, are useful in promoting price transparency and competition. CCS further notes MOH's continuing efforts to enhance price transparency by compiling billing statistics from the private hospitals for publication in the future. According to MOH, this will be done by amending the Medisave regulations to make it a requirement for Medisave accredited hospitals (including private hospitals) to submit their basic billing statistics when making Medisave claims for their patients. [147]

136. In commenting on the merit of conducting surveys of historical prices, SMA said:[148]

> … the SMA is of the view that the reporting of historical information may not provide similar safeguards to the public interest against over-charging or low quality of medical services as recommendations on minimum and maximum prices. This is because historical information only represents pricing trends *but provides no indication on whether the general pricing is reasonable*. … [Emphasis added]

137. CCS disagrees with SMA's view. Actual prices are objective and are likely to be more reasonable than recommended prices. Price recommendation by an association of competitors is less effective in ensuring reasonable prices, yet more restrictive of competition, than publication of historical prices by individual medical practitioners or establishments.

138. Further, insofar as the GOF served as an ex-post evaluation tool, a possible alternative to the GOF would be for SMA to adopt a peer review mechanism (e.g., similar to the system used in the United States) to address the issue of over-charging by medical practitioners. In the United States, this mechanism has been expressly sanctioned by the US antitrust authorities, subject to certain safeguards, such as voluntary participation in the peer review program, the non-binding nature of the decisions of the peer review panel and confidentiality of the peer review process[149]. SMA submitted that while such a system is theoretically possible, it had concerns about the effort involved in organising such peer review committees to handle over-charging complaints (especially for highly specialised services with few doctors offering such services). SMA hence prefers the GOF as being a more expedient and objective way than peer review committees[150] .

139. In any event, MOH[151] has also indicated that if there is gross over-charging that amounts to unethical and unprofessional practice, the doctor concerned will

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[147] Source: http://www.channelnewsasia.com/stories/singaporelocalnews/view/1054075/1/.html [Accessed 03 May 2010]
[148] SMA's letter to CCS dated 5 June 2009, at ¶3.2.
[149] FTC advisory opinions in *National Capital Society of Plastic and Reconstructive Surgeons*, 23 April 1991, *Tarrant County Medical Society* 11 July 1984, *American Podiatry Association*, 18 August 1983.
[150] SMA's reply to CCS dated 24 July 2009, at¶9.1.
[151] *Ibid* at ¶119.

be referred to the SMC instead. CCS notes that SMC's disciplinary hearing is a mechanism of ex-post peer review[152]. CCS also notes that the recent changes made to the SMC's disciplinary processes[153] are aimed at improving SMC's ability to handle complaints of professional misconduct, which includes complaints of gross-overcharging, expeditiously and effectively.

140. In general, the Consultant also did not consider that the GOF represented the least restrictive way to achieve SMA's stated benefits. In particular, the Consultant considered that there are a number of other initiatives that might be undertaken by SMA, including maintaining a register of complaints relating to doctors who over-charged, educating consumers on what to look out for when searching for the appropriate medical practitioners and using historical price data.

(ii) Elimination of competition in respect of a substantial part of the services in question

141. Similar to the indispensability limb, the question of elimination of competition in respect of a substantial part of the Relevant Markets does not arise, given that the GOF was not demonstrated to improve production or distribution, or to promote technical and economic progress, of medical services in Singapore.

142. Nevertheless, as mentioned above, the GOF was meant to apply to professional fees charged by medical practitioners in the private sector. As mentioned in paragraph 91, out of the 3,032 registered medical practitioners that are in private practice, 2,132 are SMA members. Further, SMA has indicated that the SMA Ethics and Complaints Committee had also processed complaints against non-SMA members and similar yardsticks were applied to them as for SMA members. Although SMA submits that it has no recourse in theory for non-compliance by the offending medical practitioner, until the withdrawal of the GOF in 2007, SMA had had no actual experience of a medical practitioner not following the recommendations of SMA for a refund.

143. On SMA's argument that the GOF helped to educate young medical practitioners entering the private sector on how to charge, as noted in paragraph 61, CCS finds this argument to be unconvincing. Any person venturing into the market is expected to do the necessary research before setting up his own

[152] As an example of a peer-review process, when the Law Society of Singapore brings a case of overcharging against a lawyer, it needs to demonstrate that the lawyer had charged *above what he or she was reasonably entitled to charge*. On what is a reasonable charge, evidence may be led by an expert report prepared by another lawyer involved in the same area of practice who would opine what a reasonable charge would be in such a case , and whether the lawyer in question had overcharged the client in this instance.

[153] The latest Amendment Bill to the Medical Registration Act included a review of SMC's disciplinary processes to strengthen and streamline these processes. The changes include increasing the number of people on the Complaints Committee, empowering SMC's Complaints Committee to appoint officers to carry out investigations, increasing the maximum penalty which can be imposed on the SMC on a medical practitioner for professional misconduct and having lawyers on the SMC's Disciplinary Tribunals to resolve questions of law which medical doctors may not have the expertise to address, hence hampering the disciplinary process. Source: www.moh.gov.sg/mohcorp/speeches.aspx?id=23652 and www.moh.gov.sg/mohcorp/speeches.aspx?id=23654 [Accessed on 30 April 2010]

business, and be responsible for its own commercial decisions such as pricing. Allowing existing competitors to come together and educate new entrants on setting prices is apt to eliminate fresh competitive forces from being injected into the market.

144. As such, given the extensive reach of the GOF and the mechanism used to enforce it, CCS is of the view that competition will be eliminated in respect of a substantial part of the Relevant Markets.

(d) Conclusion on the NEB exclusion

145. In light of the above, CCS is satisfied that SMA has failed to establish that the NEB exclusion applies.

VI. THE STATEMENT OF DECISION

146. CCS recognises that there are valid reasons why market forces alone may not lead to efficient outcomes in the medical services sector. However, CCS' view is that the GOF did not contribute towards achieving better outcomes, and was instead anti-competitive. On the other hand, the restructured hospitals' direct involvement in Hospital Care and the government's efforts to improve pricing transparency are more effective, unrestrictive and unbiased ways to deal with the issues of information asymmetry, over-charging and optimal consumption of healthcare services. SMA can consider contributing to this by encouraging its members in the private sector to support greater transparency in healthcare charges by publishing their actual fees for their services, broken down or itemised in a meaningful way. It can also support SMC in the peer review disciplinary hearings.

147. For the above reasons, CCS concludes in this Statement that the GOF infringed the section 34 prohibition, and did not benefit from the NEB exclusion.

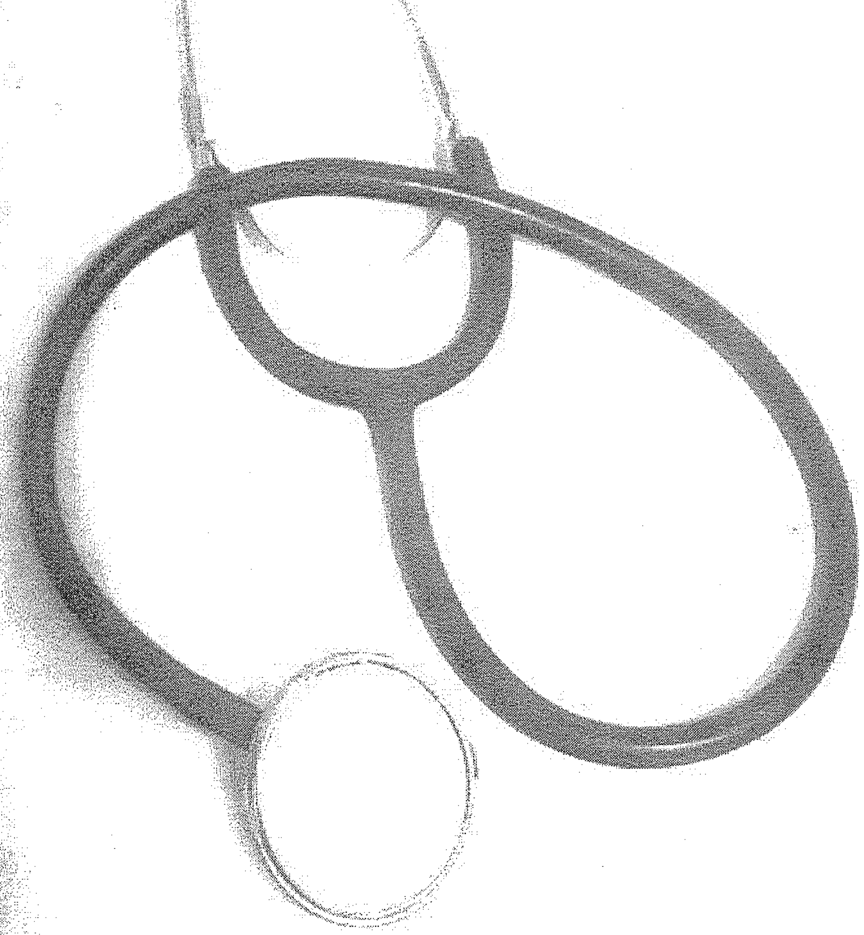
148. In light of the fact that as of the April 2007, the GOF had already been removed prior to any investigations initiated by CCS, there is no need for CCS to issue any direction under section 69 of the Act.

Teo Eng Cheong
Chief Executive
Competition Commission of Singapore

Annex 1: Fourth Edition (2006) of the Guidelines on Fees

Singapore Medical Association

Guideline on Fees



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INTRODUCTION

1. The 4th Edition of the Guideline on Fees for Doctors in Private Practice in Singapore is based on the suggestions and feedback gathered from general membership and specialist bodies, based on the 3rd Edition published in 2000. We have incorporated most of the suggestions.

2. The quantum of fee worked out for each service is based on the following factors:
   a. Level of expertise required
   b. Degree of difficulty
   c. Time required

3. A range of fees is given for most items of services rather than a fixed rate because the fee will depend on the variable factors affecting each item, as mentioned in para (2) above, and on whether the procedure is done on an emergency procedure, and on the socio-economic circumstances of the patient.

4. The fee ranges are meant as a GUIDE and should be treated as such. The practitioner should satisfy himself that the fee charged is fair and reasonable, considering the particular circumstances of the case and the patient.

5. Practitioners who wish to charge outside this Guideline should inform their patients accordingly to avoid subsequent misunderstanding.

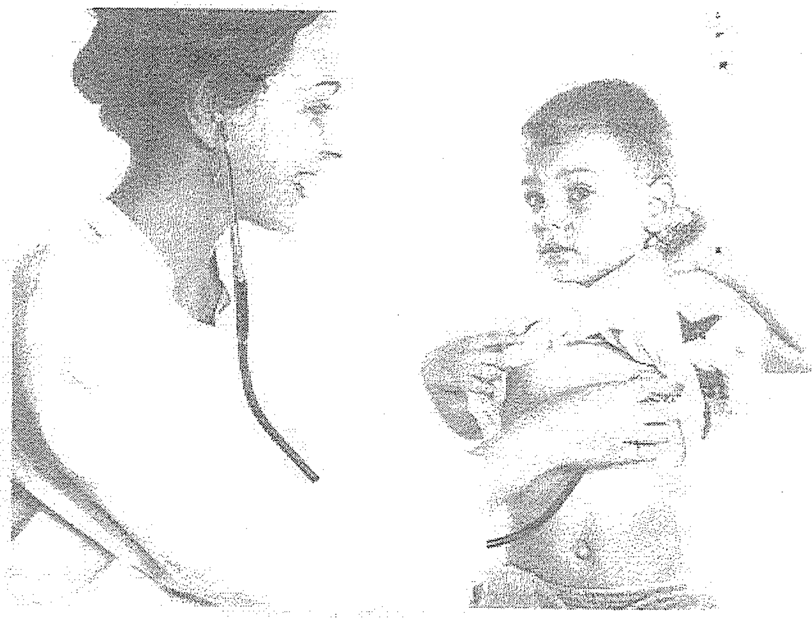
6. Practitioners are encouraged to continue their practice of reducing or waiving fees for patients who cannot afford to pay the usual fees.

7. This Guide will be updated periodically.

8. The Singapore Medical Association (SMA) welcomes suggestions for improving these guidelines.

DR TOH CHOON LAI
Editor

PART ONE
GENERAL CONSULTATION FEES



Section 1 : Standard Consultation Fees
Section 2 : Consultation Fees after Usual Clinic Hours
Section 3 : Adult Intensive Care Fees
Section 4 : Paediatric Intensive Care (ICU) Fees

SECTION 1 – STANDARD CONSULTATION FEES

GENERAL PRACTITIONER / FAMILY PHYSICIAN

IN-OFFICE CONSULTATION FEES

Short Consultation (up to 10mins)	$20 – $30
Long Consultation (11 to 20mins)	$30 – $55
Extended Consultation (over 20mins, per 10-minute block)	$20 – $25

OUT-OF-OFFICE CONSULTATION FEES

Non-Emergency Consultation	$120 – $200
Emergency Consultation	$200 – $300
Hospital Inpatient Consultation (per day)	$50 – $100
Death Certification	$150 – $300

SPECIALIST

IN-OFFICE CONSULTATION FEES

Short Consultation (up to 10mins)	$60 – $100
Long Consultation (11 to 20mins)	$90 – $150
Extended Consultation (over 20mins, per 10-minute block)	$50 – $80

OUT-OF-OFFICE CONSULTATION FEES

Non-Emergency Consultation	$200 – $250
Emergency Consultation	$250 – $400
Hospital Inpatient Consultation (per day)	$100 – $250
Death Certification	$200 – $400

Notes:

1.1 **CONSULTATION FEES DO NOT INCLUDE** costs of medications, injections, operations, special procedures, laboratory tests, other investigations (eg. X-rays), etc.

1.2 **SHORT CONSULTATION** refers to a routine consultation for relatively simple medical cases and problems where the problems allow for ready and quick diagnosis and treatment. Examples: for general practitioners, uncomplicated cases of influenza or gastroenteritis; for specialists, routine antenatal visits for maternity patients or routine post-operative office visits.

1.3 **LONG CONSULTATION** refers to a consultation that is more complex and therefore more time and expertise are needed for diagnosis and treatment. Examples: for the general practitioners, cases of diabetes or hypertension requiring detailed history, examination and advice; for specialists, complicated cases that require major surgery or complicated cases of cancer requiring detailed examination and discussion. Three or more minor ailments qualify as "long consultation". Chronic conditions qualify as "long consultation".

1.4 **EXTENDED CONSULTATION** refers to a consultation where both the doctor and the patient agree on a quantum derived from a time-based computation. Generally, the doctor may wish to propose this form of charging for consultations which are likely to exceed 20 minutes.

1.5 **OUT-OF-OFFICE CONSULTATION** refers to a consultation which occurs outside the clinic, and the attending doctor has to make a purposeful trip for this consultation. The venue of the consultation may be the patient's residence (housecalls), workplace, A&E department or other locations. In-patient consultations are not included in this category. Consultations in the clinic premises outside regular operating hours where the attending doctor has to make a purposeful trip back to the clinic will be considered as Out-of-Office Consultations.

1.6 **EMERGENCY CONSULTATION** refers to a situation where immediate attention is required. The term "emergency" refers to calls requiring immediate attention as agreed between the doctor and the patient or persons requesting the calls. "Non-emergency" refers to calls that can be scheduled to a mutually opportune time.

1.7 **HOSPITAL IN-PATIENT CONSULTATION** (per day) refers to daily fee chargeable for a patient who is already hospitalised, irrespective of the number of visits the doctor makes to the patient. The fee takes into account the fact that the doctor is "on-call" for the patient 24-hours a day and that he has to be contactable at any time or may be called back for any problem.

1.8 **CLINIC VISIT CLAIM FORM**

Definition: A simple claim form that contains the following:

(a) Basic demographic data (5 items or less) such as name, age, sex, ID number and occupation;
(b) The reason for the consultation or clinic encounter;
(c) The fees charged including a breakdown of charges.

This service is NOT chargeable if the form is presented on the same clinic visit or consultation. A fee is only chargeable if the form is presented by the patient on a day other than the clinic visit, as it involves administrative work and time. If a fee is chargeable, the recommendation is up to $10.

1.9 **PRESCRIPTION FEE FOR GENERAL PRACTITIONER AND SPECIALIST**

a) request made within the same visit/consultation:	no charge
b) request made on a separate visit or without consultation:	$10

SECTION 2 – CONSULTATION FEES FOR GENERAL PRACTITIONERS / FAMILY PHYSICIANS AFTER USUAL CLINIC HOURS

Session	Time	Recommended Fee Range
Usual Clinic Hours	8am to 6pm*	SMA Standard
After Usual Clinic Hours	6pm to 12am **	$30 – $60
12 Midnight Onwards	12am to 8am ***	$60 – $90
Weekends and Public Holidays		Add 10-20% to above rates

Note:

* This session starts from the traditional 8am or the stated clinic operating time, whichever is earlier. The time is based on the patient registration time. It is not based on actual consultation time.

** For weekends and gazetted public holidays, this session applies to the period of 8am to 12 midnight.

*** This session ends at the traditional 8am or the stated clinic opening time, whichever is earlier.

SECTION 3 – ADULT INTENSIVE CARE UNIT (ICU) FEES

ICU CONSULTATION FEES

Non-emergency Consultation (First)	$250 – $400
Emergency Consultation (First)	$300 – $500
ICU Consultation per day (Follow Up)	$100 – $300

INTENSIVIST DAILY MANAGEMENT FEE

Critically ill with 3 or more organ failure (high grade intensive care)	$500 – $1,000
Moderately ill with 1 to 2 organ failure (medium grade intensive care)	$300 – $500
Mildly ill with potential organ failure (low dependency intensive care)	$200 – $400

DAILY MANAGEMENT FEES

Continuous Renal Replacement Therapy	$100 – $300
Inotropes/Cardiac Output Study and Management	$100 – $400
Intracranial Pressure Monitor	$100 – $300
Intra-aortic Balloon Pump (IABP)	$200 – $400
Sedation/Paralysis/Analgesia	$50 – $200
Total Parenteral Nutrition (TPN)	$25 – $50
Ventilator	$100 – $300

PROCEDURAL FEES IN ICU

Bronchoscopy	$400 – $800
Cardiopulmonary Resuscitation (including Intubation)	$200 – $800
Central Venous Pressure/Dialysis Catheter Insertion/Jugular Bulb	$400 – $700
Chest Tube Insertion	$250 – $500
Double Lumen Tube Intubation	$300 – $400
IABP – Insertion and Removal	$1,500 – $2,000
Intra-arterial Line Insertion	$200 – $400
Intracranial Pressure Monitor Insertion	$1,500 – $2,000
Pulmonary Artery Catheter Insertion/PICCO Catheter Insertion	$400 – $900
Transvenous Pacing Wire Insertion	$1,000 – $2,000

SECTION 4 – PAEDIATRIC INTENSIVE CARE (ICU) FEES

ICU CONSULTATION FEES (PER DAY)

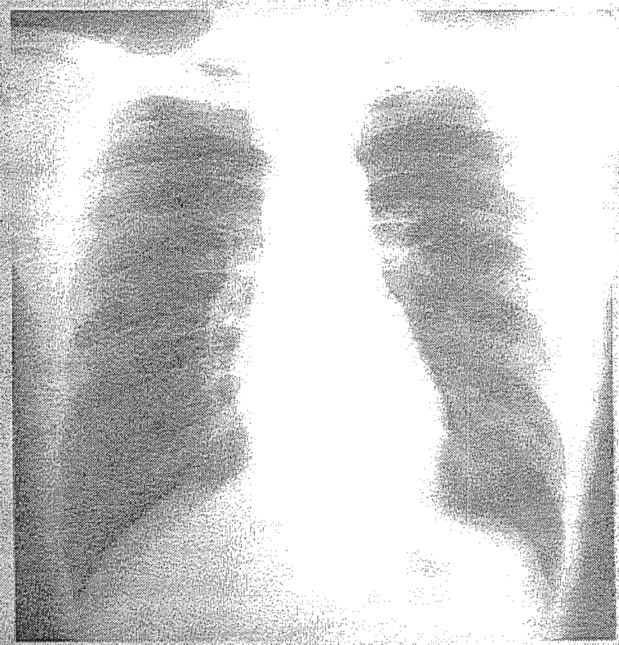
Critically ill*	$300 – $500
Moderately ill: Not intubated, Hood oxygen, Total Parenteral Nutrition (TPN), etc	$200 – $300
Basic monitoring and care, not critically ill	$100 – $300

* Daily management doctors' fees for the use of ventilator, cardiac output study, ICP monitors, CPR, etc can be included in "critically ill" fees. Consummables including equipment like ventilators can be charged separately.

PROCEDURAL FEES IN ICU

2D Echo	$200 – $350
Bronchoscopy	$200 – $300
Central Line or Long Line/Dialysis Catheter Insertion/Cutdown or Intraosseus Access	$100 – $200
Chest tube Insertion/Tap	$100 – $150
Intubation	$75 – $150
Lumbar Puncture	$50 – $100
Ultrasound Head	$75 – $150

PART TWO
PROFESSIONAL FEES



SECTION 1 – OFFICE SURGERY & MEDICAL PROCEDURES

SECTION 1.1

$10 – $40

Electrogustometry
Injection
Removal of Sutures
Urine Pregnancy Test

SECTION 1.2

$30 – $80

Audiological Battery Tests
Basic Hearing Tests (Audiogram, Tympanogram)
Basic Vestibular Tests
Bladder Scan
Cryosurgery of Warts/Keratoses/Similar Lesions (2 or less)
Dressing
ECG (Resting)
Patch Tests (per visit)
Pap Smear
Spirometry

SECTION 1.3

$50 – $150

Aural & Nasal Toilet
Cautery of Warts/Keratoses/Similar Lesions (3 or less)
Cryosurgery of Warts/Keratoses/Similar Lesions (3 or more)
EEG Recording
EEG Reporting
Fine Needle Aspiration Biopsy of the Thyroid
Manual Rectal Evacuation
Retinal Photography
Routine EMG
Incision and Drainage
Removal of Foreign Body from Eye, Ear, Nose or Throat
Toilet and Suture
Skin Biopsy
Urethral Catheterisation

SECTION 1.4

$160 – $190

Aspiration of Joints
Single Punch Biopsy and Incisional Biopsy

SECTION 1.5

$200 – $300

Ambulatory ECG
Cautery of Warts/Keratoses/Similar Lesions (4 to 15)
Electroconvulsive Therapy
Lumbar Puncture
Percutaneous Ethanol Injection of Thyroid Nodule
Removal of Foreign Body from Cornea
Single Excisional Biopsy or Multiple Punch Skin Biopsies
Urodynamic Tests

SECTION 1.6

$300 – $500

Adult Circumcision under Local Anaesthesia
Bone Marrow Aspiration Biopsy
Bone Marrow Trephine Biopsy
Carotid Ultrasound Imaging
Cautery of Warts/ Keratoses/Similar Lesions (more than 15)
Dialysis – Peritoneal/Haemodialysis
Excision of Small Lumps
Exercise Stress Test
Simple Ligation or Injection of Piles
Specialised EMG

Note:

For certain procedures, Specialist Fees may apply. Please refer to Guideline on Fees Part III for Specialist Fees.

SECTION 2 – IMMUNISATION

Immunisation rates comprise of the following components:

2.1 Consultation: new cases are chargeable. Old cases (booster) are not chargeable.

2.2 Procedure (Vaccination): $20 to $25.

2.3 Vaccines: as follows:-

• BCG	$20 – $35
• Chicken Pox (per dose)	$80 – $100
• Cholera	$20 – $35
• Measles, Mumps and Rubella	$40 – $55
• Haemophilus B Virus	$50 – $70
• Hepatitis A (full course)	$180 – $210
• Hepatitis B (complete course of 3 injections)	
full dose (for adult)	$120 – $180
half dose (for children under 18 years)	$90 – $120
quarter dose (for infants less than 1 year)	$60 – $90
• Triple Antigen and Polio	$25 – $40
• Typhoid	$20 – $35
• Anti-Tetanus Toxoid	$20 – $35
• Influenza Vaccination	$25 – $35

Note:

Vaccine prices differ according to brands. Price variations by manufacturers or distributors may also occur from time to time.

SECTION 3 – MEDICAL EXAMINATIONS

INTRODUCTION

(a) Medical examinations refer to physical check-ups which are required for licensing, employment or admission purposes.

(b) The fee does not include charges for chest x-ray, urine pregnancy test, blood and other lab tests, which are charged according to the standard rates.

TYPES OF EXAMINATIONS

3.1 **Short Medical Examinations:** **$25 – 35**
(Laboratory investigations to be charged separately.)

Pre-employment (local employment)
Work Permit Renewal
Maid Screening
Residential Pass
Admission to Tertiary Institutions (local)
Licensing Purposes such as ROV, PSA, etc
Designated Factory Doctor (DFD) Examination

3.2 **Long Medical Examinations:** **$40 – $120**
(Laboratory investigations to be charged separately.)

Pre-employment (overseas employment)
New Work Permit (includes Employment Pass)
Examination Requested by Insurance Company
Student/Work Visa Examination

SECTION 4 – MEDICAL REPORTS

4.1	**Policy Examination** [See note (i)]	
	– Ordinary Examiners' Fees	$100
	– Special Examiners' Fees [See note (ii)]	$150
4.2	**Medical Reports****	
	– Simple Report/Completion of Questionnaire	$90 – $120
	– Standard Report	$120 – $240
	– Specialist Medical Report	$240 – $600
	– Specialist Report for Court Attendance	$600 onwards
4.3	**Renewal of Policy Examination**	
	– Ordinary Examiners' Fees	$100
	– Special Examiners' Fees (See note (ii))	$150
4.4	**Workmen's Compensation Cases**	
	– Reports, given by doctors in attendance of the case	$100 – $250 per report
4.5	**Laboratory Tests (except for routine urine test)** According to Standard Laboratory rates	
4.6	**Handling Charges** These include transport, postages, costs of utensils, etc, and should be borne by the respective insurance companies.	

Note (i) Any additional medical report apart from the standard policy report will be charged according to rates as recommended under item (4.2).

Note (ii) This corresponds to the term "Preferred Examiners".

** See Explanatory Notes

EXPLANATORY NOTES ON GUIDELINES ON MEDICAL REPORT FEES

1. QUESTIONNAIRE

a. Definition: A form requiring medical information other than demographic data (such as name, age, sex, race, occupation). It should usually not exceed 20 items or 2 pages.

b. **CLINIC VISIT CLAIM FORM**
Definition: A simple claim form that contains the following:
(a) Basic demographic data (5 items or less) such as name, age, sex, ID number and occupation;
(b) The reason for the consultation or clinic encounter;
(c) The fees charged including a breakdown of charges.

This service is NOT chargeable if the form is presented on the same clinic visit or consultation. A fee is only chargeable if the form is presented by the patient on a day other than the clinic visit, as it involves administrative work and time. If a fee is chargeable, the recommendation is up to $10.

2. RECOMMENDED FEES FOR MEDICAL REPORT

a. **Simple Report: $90 to $ 120**
Usually on a single, straightforward problem eg. a minor injury, episode of upper respiratory infection or simple straightforward consultations. Laboratory tests are usually simple. Would usually not require more than half a typewritten A4 size page (in single line spacing).

b. **Standard Report: $120 – 240**
Problem with potential major complications (eg. diabetes mellitus); or one or more medical problems eg. hypertension and minor surgery; with copies of more than routine laboratory tests and investigations attached (eg. blood tests, X-rays, uttrasounsonographs). One to two A4 typewritten pages (single line spacing).

c. **Specialist Medical Report: $240 – 600**
Prepared by a doctor on the Specialist Register. Multiple major medical problems, investigations and procedures (eg. stroke, infarct, cancer); one or more hospital admissions; or major surgery. With opinion expressed on each problem and finding. Sophisticated investigations involved and attached (eg. CT scan, MRI, Angiography). More than two pages A4 typewritten pages (single line spacing).

d. **Specialist Report for Court Attendance: $600 onwards**
Detailed medical report which is a medico-legal document prepared at the request of the solicitor to be given as evidence in a court of law.

3. **GUIDELINES FOR PHYSICIANS AND INSURANCE COMPANIES**

The SMA Council would like to request physicians and insurance companies to observe the following procedure in order to ensure the smooth processing of medical reports:

a. Upon receipt of request, the physician would provide a quotation of fee to the insurance company indicating reason for fee and the type of report to be submitted, eg. simple or more complex, and the additional laboratory reports to be forwarded.

b. The physician may request for advanced payment, but upon receipt of payment, the report should be forwarded within 2 weeks.

c. Insurance companies may reasonably request clarification where reports are not clear.

d. Insurance companies should not withdraw a request for a report after a physician has agreed to provide the report.

4. **GUIDELINES ON MEDICAL REPORTS REQUESTED BY LAWYERS**

a. A written request for medical report must be obtained.

b. The purpose or reasons for medical report must be stated.

c. Fee charged should reflect the length of the report.

d. If the patient requests a report for medico-legal purpose, the patient should be referred back to his/her lawyer to satisfy the above points (a) to (c).

e. There must be a written consent from the patient to waive confidentiality.

SECTION 5 – COURT ATTENDANCE & PREPARATION FEES & BEST PRACTICES GUIDELINES

If a private medical practitioner is sought as a witness, the guidelines to the fees claimable are:

5.1 PREPARATION FEES

a. Trial Preparation (review of medical notes)	$100 to $200
b. Trial Preparation by Professional Witness (involving research, discussion with solicitors, preparation of affidavit, etc)	$200 to $400 per hour
c. Trial Preparation by Expert Witness (involving research, discussion with solicitors, preparation of affidavit, etc)	$400 to $600 per hour

5.2 COURT ATTENDANCE FEES

Duration of Court Attendance	Professional Witness	Expert Witnes
a. Each two hours or part thereof (including waiting time)	$1,000 – $2,000	$1,500 – $2,500

5.3 CANCELLATION OF COURT ATTENDANCE

Cancellation before hearing has commenced	Fees Claimable
a. More than 14 days' notice	NIL
b. More than 7 days' and up to 14 days' notice	25% of 1 day's attendance
c. More than 48 hours' and up to 7 days' notice	50% of 1 day's attendance
d. More than 24 hours' and up to 48 hours' notice	75% of 1 day's attendance
e. 24 hours' notice or less	100% of 1 day's attendance

Cancellation after hearing has commenced	Fees Claimable
a. Days where the medical practitioner is present in Court	100% of each day's attendance fees
b. Remaining trial days where medical practitioner has been subpoenaed and compelled to attend (and no arrangement has been made for the medical practitioner to "standby" only on specified dates)	100% of attendance fees for each day subpoenaed
c. Days where medical practitioner is not present in Court but asked to be on "standby"	50% of attendance fees for each day on "standby"

Notes:

(i) A "Professional Witness" is called only because of his direct doctor-patient relationship with the patient.

(ii) An "Expert Witness" is called or appointed for a "second opinion" or expert testimony in legal proceedings. In view of this, a premium would be commanded.

(iii) The court attendance fee that applies if the case is subsequently postponed is subject to the same scale of fees recoverable, as when the case is cancelled.

(iv) The above amounts are negotiable between the practitioner and the Counsel.

(v) These Guidelines are not applicable in criminal cases.

(vi) One day is equivalent to 8 hours.

5.4 MEDICAL FEES FOR COURT ATTENDANCES AND PREPARATION

BEST PRACTICES GUIDELINES ISSUED BY THE LAW SOCIETY OF SINGAPORE AND THE SINGAPORE MEDICAL ASSOCIATION – (March 2006)

5.4.1. These Guidelines are issued jointly by the Law Society of Singapore and the Singapore Medical Association. While they are not binding, it is hoped they will provide a common convention as well as transparency in dealings between lawyers and medical witnesses. They were agreed upon in an effort to address various disputes and misunderstandings over professional fees that have arisen between lawyers and doctors over the past few years. The Guidelines have been prepared in the spirit of mutual respect as fellow professionals.

5.4.2. These Guidelines only affect the conduct of civil litigation. In particular they address the issue of cancellation fees charged by doctors upon being informed of the settlement of a civil action or proceeding, either prior to or after the commencement of the hearing.

5.4.2.1 The rationale of the imposition of cancellation charges is that the medical practitioner, upon being subpoenaed or called as a witness for a period of time, is enable to schedule appointments or procedures for that entire period, leading to a consequential loss of earnings.

5.4.2.2 As a matter of good practice, it is suggested that when a doctor is subpoenaed or called as a witness, arrangements may, with the permission of the court, be made to have the doctor on "standby" for specific dates where he is expected to give evidence.

5.4.2.3 If the doctor agrees to be on "standby", that doctor should make a commitment to be available in Court within one to two hours' notice on the "standby" days. The doctor can then remain in his clinic/office subject to his remaining contactable at all times. In this regard, the doctor should make available his handphone, pager and direct telephone numbers.

5.4.2.4 In practice, in personal injury cases, the evidence of both the Plaintiff's and the Defendant's doctors are often heard on the first day, with the Defendant's doctor being interposed as a witness after the Plaintiff's doctor has completed giving evidence. This is a procedure, albeit subject to mutual agreement between the parties and the Court, which has much to commend it from the point of view of costs. The doctor only needs to "standby" for the first day of trial, and accordingly, will only be entitled to charge at most one day in respect of the scheduled hearing, whether the action settles before or after the commencement of trial. Where possible, this procedure ought to be adopted unless disallowed by the Court, or where it would prejudice either party's case.

5.4.3. Obviously, not all doctors' practices are dependent on pre-arranged scheduling and appointment in advance. Where doctors are able, notwithstanding the subpoena or "standby" dates, to continue practising without any or any significant disruption, they should consider reducing their cancellation charges accordingly.

5.4.4 These Guidelines obviously cannot provide for every situation. However, it is hoped they will reduce conflict between medical and legal practitioners.

SECTION 6 – OBSTETRICS

6.1	Normal Delivery (Excluding Antenatal Visits)	$1,000 – $2,000
6.2	Assisted Delivery – Forceps, Vacuum, etc (Excluding Antenatal Visits)	$1,300 – $2,300
6.3	Caesarean Section (Excluding Antenatal Visits)	$2,000 – $4,000
6.4	Complete Maternity Package (Antenatal Care, Delivery and Postnatal Care)	$2,200 – $6,000
6.5	Antenatal Cardiotocography (With AFI, add $20)	$45 – $90
6.6	Ultrasound Scan (Level 1)	$50 – $100
6.7	Ultrasound Scan (Level 2)	$100 – $150
6.8	Ultrasound Scan (Level 3: Complete Foetal Anomaly Screening, including Colour Doppler Studies)	$150 – $300
6.9	Amniocentesis (Excluding Lab Fees)	$500 – $800
6.10	Chorionic Villus Sampling (Excluding Lab Fees)	$500 – $830
6.11	Foetal Blood Sampling/Cordocentesis (Excluding Lab Fees)	$990 – $1,700
6.12	Anaesthesia for Caesarean Section (Anaesthetist's Fees)	$440 – $880
6.13	Epidural for Labour Pain (Anaesthetist's Fees)	$330 – $550

SECTION 7 – PAEDIATRICS

7.1	Accompanying critically ill patient in ambulance	$170 – $280
7.2	Attendance at delivery of baby	$170 – $330
7.3	Establishment of intravenous line	$55 – $90
7.4	Exchange transfusion	$440 – $660
7.5	Foetal Echocardiography – combined 2D Doppler/M-Mode	$330 – $440
7.6	Venepuncture	$35 – $55

SECTION 8 – CARDIOLOGY

8.1	Ambulatory ECG	$220 – $330
8.2	Biventricular Pacemaker Implantation	$4,000 – $7,000
8.3	Cardiac Catheterisation (without Angiography)	$1,100 – $1,700
8.4	Cardiac Catheterisation (with Angiography)	$1,700 – $2,800
8.5	Cardiac Catheterisation (with Electrophysiological studies)	$1,700 – $3,300
8.6	Cardiac Catheterisation (with EPS and Ablation – Simple)	$2,000 – $4,000
8.7	Cardiac Catheterisation (with EPS and Ablation – Complex)	$3,000 – $6,000
8.8	Cardiac Resynchronisation Therapy (Biventricular Pacemaker – Triple Lead System)	$4,000 – $7,000
8.9	Central Venous Line, Insertion	$220 – $440
8.10	ECG (Resting)	$30 – $80
8.11	Echocardiography – AV Optimisation	$400 – $600
8.12	Echocardiography – Saline Contrast	$50
8.13	Echocardiography – Standard Transthoracic	$250 – $400
8.14	Echocardiography - Stress (Dobutamine)	$400 – $600
8.15	Echocardiography - Stress (Exercise)	$400 – $600
8.16	Echocardiography - Transoesophageal (Intra-operative)	$400 – $600
8.17	Electrophysiology Study with Radiofrequency Catheter Ablation Of Arrhythmia	$4,000 – $6,000
8.18	Implantation of Implantable Cardioverter Defibrillator	$4,400 – $7,700
8.19	Implantation or Reimplantation of Permanent Pacemaker System (Single Lead)	$2,200 – $3,300
8.20	Implantation or Reimplantation of Permanent Pacemaker System (Dual Lead)	$3,300 – $4,400
8.21	Insertion of Transvenous Pacemaker Electrode (Temporary)	$1,100 – $2,200
8.22	Percutaneous Transluminal Coronary Angioplasty (Simple)	$2,800 – $4,400
8.23	Percutaneous Transluminal Coronary Angioplasty (Complex, Multivessel and Multilesion)	$3,000 – $7,000
8.24	Percutaneous Transluminal Peripheral Angioplasty	$1,700 – $4,400
8.25	Percutaneous Transluminal Valvuloplasty	$2,500 – $4,000
8.26	Radiofrequency Ablation Therapy	$3,000 – $6,000

SECTION 9 – RADIOLOGY

9.1 OUTPATIENT RADIOLOGICAL EXAMINATIONS AND PROCEDURES

		Fees
9.1.1	**PLAIN FILMS**	
	Chest (one view)	$35 – $45
	Chest (two views)	$50 – $70
	Abdomen (one view)	$40 – $50
	Abdomen (two views)	$60 – $80
	Lateral Pelvimetry	$45 – $60
	Pelvis	$40 – $50
	Skull (two views)	$60 – $80
	Paranasal Sinuses	$60 – $80
	Mastoids	$60 – $80
	Mandible	$60 – $80
	Nasal Bones (two views)	$40 – $60
	Temporo-Mandibular Joints	$70 – $90
	Internal Auditory Meati	$70 – $90
	Base of Skull	$80 – $100
	Pituitary Fossa	$50 – $70
	Maxilla	$70 – $90
	Neck (lateral view)	$30 – $40
	Cervical Spine (two views)	$50 – $70
	Cervical Spine (including obliques)	$80 – $100
	Thoracic Spine	$70 – $90
	Lumbosacral Spine (two views)	$75 – $95
	Lumbosacral Spine (including obliques)	$105 – $125
	Sacrum-coccyx	$50 – $70
	Sacroiliac Joints	$70 – $90
	Clavicle	$40 – $50
	Shoulder	$40 – $50
	Sternum	$60 – $70
	Sternoclavicular Joint	$50 – $70
	Scapula	$40 – $50
	Humerus	$50 – $70
	Elbow	$40 – $50
	Radius/Ulna	$40 – $50
	Wrist	$40 – $50
	Hand	$40 – $50
	Finger	$30 – $40
	Hip	$50 – $70
	Femur	$50 – $70
	Knee	$40 – $50
	Tibia/Fibula	$50 – $70
	Ankle	$40 – $50

Foot	$40 – $50
Toe	$30 – $40
Skeletal Survey	$250 – $300
Mammogram (Bilateral)	$150 – $200
Mammogram with ultrasound	$200 – $230

9.1.2 ULTRASOUND

Liver	$100 – $120
Gallbladder	$100 – $120
Biliary Tract (Gallbladder, Liver & Pancreas)	$140 – $170
Pelvis	$110 – $130
Obstetrics	$110 – $130
Breasts	$110 – $130
Thyroid	$110 – $130
Whole Abdomen	$200 – $275
Prostate (Transrectal)	$160 – $250
Carotid (Colour Doppler)	$200 – $250
Peripheral Venous/Arterial (Colour Doppler)	$220 – $280

9.1.3 CONTRAST STUDIES

Barium Swallow	$100 – $120
Barium Meal	$110 – $140
Barium Enema	$170 – $210
Barium Meal & Follow Through	$160 – $200
Sialogram	$170 – $200
IVU	$210 – $250
Micturating Cystogram	$220 – $260
Hysterosalpingogram	$160 – $350
Lumbar Myelogram	$500 – $700
Thoracic Myelogram	$500 – $700
Cervical Myelogram	$500 – $700

9.1.4 CT SCANS

Brain (plain)	$425 – $500
Brain (with contrast)	$480 – $600
Thorax (plain)	$425 – $500*
Abdomen (plain)	$425 – $500*
Pelvis (plain)	$425 – $500*
Spine (two levels)	$450 – $600
Spine (extended)	$600 – $800
3D Surface Reconstruction	$300 – $600
CT Angiography (eg. aorta, coronary arteries, renal arteries, peripheral arteries)	$600 – $1,000

CT Colonography Cardiac Calcium Scoring	$550 – $700
CT Dental	$250 – $400
* Additional charge for iodinated contrast medium (includes extra scans)	$300 – $500

9.1.5 MAGNETIC RESONANCE IMAGING

Magnetic Resonance Imaging (per region)	$700 – $900
Magnetic Resonance Angiography (MRA)	$700 – $900
Magnetic Resonance Arthrography	$900 – $1300
MRA – Circle of Willis	$700 – $900
MRA – Carotid	$700 – $900
MRA – Dural Sinuses	$700 – $900
MRA – Peripheral	$1,100 – $1,300
MRA – Abdomen	$1,100 – $1,300
Additional charge for use of Gadolinium contrast (including additional scans)	$350 – $500

9.2 PROFESSIONAL FEES FOR INTERVENTIONAL PROCEDURES
(to be charged separately from the X-ray Department charge/facility charge for the procedure)

9.2.1 BIOPSIES & DRAINAGE PROCEDURES

	Fees
Percutaneous biopsy (fluoroscopic, ultrasound, or CT guided) includes lung, liver, kidney, bone, breast	$200 – $500
Abscess/cyst (cavity) aspiration	$200 – $500
Abscess/cyst (cavity) drainage	$300 – $600

9.2.2 VASCULAR PROCEDURES

Cerebral Angiogram	$300 – $600
Abdominal Angiogram	$300 – $600
Peripheral Angiogram	$300 – $600
Transluminal Angioplasty, peripheral or renal (non-coronary)	$500 – $1,200
Embolisation of arteries, veins or arterio-venous fistulae	$500 – $1,200
Chemoembolisation of tumour	$500 – $800
Neuro interventional procedure	$1,000 – $5,000
Transluminal stent insertion including associated balloon dilatation	$700 – $1,200
Peripheral arterial or venous infusion of thrombolytic or other agents	$500 – $800
Percutaneous insertion of inferior vena caval filter or other device	$700 – $1,200
Venous port implantation	$500 – $800
Image guided central catheter insertion	$300 – $600
Aortic aneurysm stenting	$1,000 – $2,000
Transjugular or transfemoral biopsy	$500 – $1,000

9.2.3 BILIARY AND GI PROCEDURES

PTC	$200 – $500
PTC with drainage	$500 – $800
PTC with biliary stent insertion including dilatation	$500 – $1,200
Percutaneous removal of stone, biliary	$200 – $500
Change of drainage catheter	$100 – $200
Transjugular intrahepatic portocaval stenting (TIPS)	$3,000 – $4,000
Oesophageal dilatation including stenting	$300 – $600
Radiofrequency ablation of liver tumour	$500 – $1,000
Percutaneous gastrostomy	$400 – $600
Vertebroplasty (1 level)	$500 – $1,000
Image guided nerve block/ablation (1 level)	$400 – $600

9.2.4 UROLOGICAL PROCEDURES

Percutaneous nephrostomy	$300 – $500
Percutaneous ureteric stent insertion including dilatation	$500 – $700
Prostate biopsy	$200 – $300
Fallopian tube recanalisation	$250 – $500

9.3 NUCLEAR MEDICINE STUDIES

Isotope scan, bone	$250 – $400
Isotope scan, DTPA	$220 – $400
Isotope scan, lung perfusion	$160 – $350
Isotope scan, lung ventilation	$160 – $300
Isotope scan, thyroid	$160 – $300
Isotope scan, hepatobiliary (HIDA)	$200 – $350
Isotope scan, heart (MUGA)	$220 – $350
Isotope scan, heart (MIBI Stress)	$450 – $600
Isotope scan, heart (Thallium)	$450 – $550
Isotope scan, DMSA	$220 – $350
Isotope scan, Meckel's	$160 – $300
I-131 therapy (cancer)	$500 – $650
I-131 therapy (thyrotoxicosis)	$200 – $350
PET-CT brain tumour	$2,600 – $3,000
PET-CT epilepsy	$2,600 – $3,000
PET-CT myocardial viability	$2,600 – $3,000
PET-CT (cancer)	$3,000 – $3,600
PET-CT whole body	$3,600 – $4,200

9.4 RADIOTHERAPY

9.4.1 TREATMENT

Normal external beam treatment	$100 – $180 per treatment
Brachytherapy	$400 – $750 per treatment
External beam computer plan	$200 – $600
Low temperature plastic shells	$90 – $250
Shielding blocks	$45 – $200 per port
Mouthbite	$10 – $20
Wax compensator	$25 – $100
Simulation	$200 – $400
3D conformal radiotherapy	$250 – $400 per treatment
Stereotactic radiotherapy	$250 – $500 per treatment
Radiosurgery	$9,000 – $12,000 per treatment
IMRT	$400 – $600 per treatment

9.4.2 PROCEDURES

EUA staging	$450 – $600
Interstitial Implants	$550 – $750
ENT Endoscopy	$60 – $100
EPI	$150 – $300 per week

9.4.3 CONSULTATION

As per SMA Guidelines

SECTION 10 – PATHOLOGY & CYTOPATHOLOGY FEES

10.1	Biopsy, Small	\$65 – \$100
10.2	Biopsy, Medium	\$80 – \$120
10.3	Biopsy, Large	\$120 – \$180
10.4	Biopsy, Complex	\$160 – \$300
10.5	Fine Needle Aspirate	\$100 – \$150
10.6	Frozen Section	\$200 – \$350
10.7	Immunohistology	\$150 – \$300
10.8	Non-gynaecological Smear	\$50 – \$100
10.9	Pap Smear	\$15 – \$20

PART THREE
FEES FOR OPERATIONS AND ANAESTHESIA

INTRODUCTION

A. SURGEON'S FEES

1. In this Section, operations are grouped according to the DEGREE OF DIFFICULTY from Group A to Group I.

2. The TIME required and the level of surgical EXPERTISE needed also rise with each Group. Therefore, the fee ranges for the more complicated operations are higher.

3. ASSISTANT'S FEES – In the event that the surgeon's assistant is another surgeon, the surgical assistant's fee chargeable may be twenty-five percent (25%) of the Primary Surgeon's fee.

B. ANAESTHETIST'S FEES

1. Fees compiled by the Committee for Anaesthetists' Fees in the 4th Edition were reviewed by a Subcommittee on Fees and endorsed by the Executive Committee (2005) of the Singapore Society of Anaesthesiologists for the 4th Edition.

2. In view of the nature of safe anaesthetic practice and expertise required, there is a MINIMUM ANESTHETIC FEE of $200.00 in Group A, irrespective of the length or simplicity of the operation.

3. In cases of MONITORED CARE by Anaesthetists, where a procedure is done under local or regional anaesthesia, the Anaesthetist's fee is the same as that charged for the operation done under general anaesthesia.

4. Anaesthetic fees for general anaesthesia, conscious sedation, or monitored care for diagnostic or interventional procedures in radiological and cardiology will be determined on a case-by-case basis, depending on the complexity and duration of the procedures.

SECTION I – CARDIOVASCULAR SYSTEM

GROUP A

	Surgeon's Fees	Anaesthetist's Fees
Vein – Varicose Veins, Ultrasound-guided Sclerotherapy, – up to 3 lesions	$330 – $550	$200 – $270

GROUP B

	Surgeon's Fees	Anaesthetist's Fees
Artery (Pulmonary) – Various Lesions, Insertion of Swan-Ganz Catheter, Insertion of Subclavian Dialysis Catheter	$500 – $820	$270 – $380
Artery – Various Lesions, Removal of Arterio-venous Shunt	$500 – $820	$270 – $380
Vein – Varicosity, Sub-fascial Ligation of Single Deep Perforator	$500 – $820	$270 – $380
Vein – Various Lesions, Insertion of Central Venous Line	$500 – $820	$270 – $380
Vein – Various Lesions, Removal of Arteriovenous Shunt	$500 – $820	$270 – $380
Vein – Varicose Veins, Ultrasound-guided Sclerotherapy, – 4 or more lesions	$500 – $820	$270 – $380

GROUP C

	Surgeon's Fees	Anaesthetist's Fees
Aorta – Various Lesions, Insertion/Removal of Intra-aortic Balloon	$990 – $1,650	$330 – $440
Artery – Various Lesions, Arteriovenous Shunt (External) Insertion of Port-A-Cath	$990 – $1,650	$330 – $440
Artery – Various Lesions, Ligation (including Repair of Artificial Arteriovenous Fistula)	$990 – $1,650	$330 – $440
Heart – Pericardial Effusion, Paracentesis	$990 – $1,650	$330 – $440
Vascular System – Various Lesions, Insertion of Tenckhoff Catheter	$990 – $1,650	$330 – $440
Vein – (Large), Various Lesions, Ligation	$990 – $1,650	$330 – $440
Vein – Varicosity, High Ligation of Long Saphenous Vein at Sapheno-Femoral Junction	$990 – $1,650	$330 – $440
Vein – Various Lesions, Ligation (including Repair of Artificial Arteriovenous Fistula)	$990 – $1,650	$330 – $440

GROUP D

	Surgeon's Fees	Anaesthetist's Fees
Artery (Large) – Various Lesions, Ligation	$1,750 – $2,850	$430 – $770
Artery (Neck and Extremities) – Embolism, Embolectomy	$1,750 – $2,850	$430 – $770
Artery – Various Lesions, Arteriovenous Fistula Creation	$1,750 – $2,850	$430 – $770
Artery – Various Lesions, Intra-arterial Infusion	$1,750 – $2,850	$430 – $770
Heart – Pericardial Effusion, Transthoracic Drainage	$1,750 – $2,850	$430 – $770

GROUP D

	Surgeon's Fees	Anaesthetist's Fees
Heart – Various Lesions, Right Heart Catheterisation with Left Heart Catheterisation (Indirect)	$1,750 – $2,850	$430 – $770
Heart/Lung – Various Lesions, Cardiopulmonary Perfusion	$1,750 – $2,850	$430 – $770
Vein – Arteriovenous Fistula, Dissection and Ligation	$1,750 – $2,850	$430 – $770
Vein – Varicosity, High Ligation and Complete Stripping/ Excision of Long/Long and Short Saphenous Vein	$1,750 – $2,850	$430 – $770
Vein – Varicosity, High Ligation and Complete Stripping/ Excision of Short Saphenous Vein	$1,750 – $2,850	$430 – $770
Vein – Varicosity, Multiple Ligations with/without Local Stripping/Excision	$1,750 – $2,850	$430 – $770
Vein – Various Lesions, Insertion of Porta-Cath	$1,750 – $2,850	$430 – $770
Vein – Various Lesions, Intra-arterial Infusion of Arteries of Neck/Thorax/Abdomen	$1,750 – $2,850	$430 – $770
Vein – Varicose Veins, Endovenous Laser Surgery (Unilateral)	$1,750 – $2,850	$430 – $770
Vein – Varicose Veins, Subfascial Endoscopic Perforator Surgery (Unilateral)	$1,750 – $2,850	$430 – $770
Vein – Varicosity, Sub-fascial Ligation of Multiple Perforators	$1,750 – $2,850	$430 – $770

GROUP E

	Surgeon's Fees	Anaesthetist's Fees
Artery (Extremity) – Thrombosis, Endarterectomy	$2,750 – $4,400	$660 – $1,200
Artery (Femoral/Iliac) – Thrombosis, Endarterectomy	$2,750 – $4,400	$660 – $1,200
Artery (Trunk) – Embolism, Embolectomy	$2,750 – $4,400	$660 – $1,200
Artery – Maxillary, Various Lesions, Transantral Ligation	$2,750 – $4,400	$660 – $1,200
Artery – Arteriovenous Fistula (Small), Excision	$2,750 – $4,400	$660 – $1,200
Artery – Defect, Arterial Patch Graft	$2,750 – $4,400	$660 – $1,200
Artery – Profunda Femoris – Stenosis, Profundoplasty	$2,750 – $4,400	$660 – $1,200
Heart (Great Vessels) – Various Lesions, Intrathoracic Operation	$2,750 – $4,400	$660 – $1,200
Heart – Patent Ductus Arteriosus, Ligation	$2,750 – $4,400	$660 – $1,200
Heart – Pulmonary Incompetence, Pulmonary Artery Banding	$2,750 – $4,400	$660 – $1,200
Vein (Major) – Trauma, Repair	$2,750 – $4,400	$660 – $1,200
Vein – Varicose Veins, Endovenous Laser Surgery (Bilateral)	$2,750 – $4,400	$660 – $1,200
Vein – Varicose Veins, Subfascial Endoscopic Perforator Surgery, (Bilateral)	$2,750 – $4,400	$660 – $1,200
Vein – Varicosity, Bilateral Stripping/Excision/Multiple Ligations	$2,750 – $4,400	$660 – $1,200
Vein – Various Lesions, Saphenous to Femoral Cross-Leg Bypass Graft	$2,750 – $4,400	$660 – $1,200
Vena Cava-Inferior – Various Lesions, Plication/Ligation	$2,750 – $4,400	$660 – $1,200

GROUP F

	Surgeon's Fees	Anaesthetist's Fees
Artery (Distal Extremity/Digit) – Various Lesions, Microvascular Repair	$3,500 – $5,500	$870 – $1,550
Artery (Major) – Aneurysm, Excision and Insertion of Graft	$3,500 – $5,500	$870 – $1,550
Artery (Major) – Trauma, Repair	$3,500 – $5,500	$870 – $1,550
Artery (Others) – Thrombosis, Endarterectomy	$3,500 – $5,500	$870 – $1,550
Artery – Arteriovenous Fistula, Dissection and Repair with Restoration of Continuity	$3,500 – $5,500	$870 – $1,550
Artery – Trauma/Resection, Arterial Anastomosis	$3,500 – $5,500	$870 – $1,550
Artery – Various Lesions, Axilliary-Femoral Subclavian-Femoral Bypass	$3,500 – $5,500	$870 – $1,550
Artery – Various Lesions, Bypass/Graft	$3,500 – $5,500	$870 – $1,550
Vein (Distal Extremity/Digit) – Various Lesions, Microvascular Repair	$3,500 – $5,500	$870 – $1,550
Vein – Various Lesions, Bypass/Graft	$3,500 – $5,500	$870 – $1,550
Vein-Portal – Portal Hypertension, Bypass	$3,500 – $5,500	$870 – $1,550

GROUP G

	Surgeon's Fees	Anaesthetist's Fees
Aorta – Abdominal Aortic Aneurysm, Excision and Insertion of Graft	$4,950 – $6,600	$1,300 – $1,850
Aorta – Aortic Aneurysm, Insertion of Endovascular Stent	$4,950 – $6,600	$1,300 – $1,850
Artery – Arteriovenous Fistula (Large), Excision	$4,950 – $6,600	$1,300 – $1,850
Artery – Carotid, Thrombosis, Endarterectomy	$4,950 – $6,600	$1,300 – $1,850
Artery – Trauma/Resection, Microvascular Graft	$4,950 – $6,600	$1,300 – $1,850
Artery-Pulmonary – Pulmonary Embolism, Pulmonary Embolectomy using Pulmonary Bypass	$4,950 – $6,600	$1,300 – $1,850
Heart – Congenital Heart Disease, Blalock Hanlon Operation	$4,950 – $6,600	$1,300 – $1,850
Heart – Congenital Heart Disease, Blalock Taussing Operation	$4,950 – $6,600	$1,300 – $1,850

GROUP H

	Surgeon's Fees	Anaesthetist's Fees
Aorta – Descending Aortic Aneurysm, Excision and Insertion of Graft	$5,500 – $8,800	$1,400 – $2,550
Aorta – Endovascular Stenting of Aorta Aneurysm	$5,500 – $8,800	$1,400 – $2,550
Heart – Congenital Heart Disease, Open Heart Surgery	$5,500 – $8,800	$1,400 – $2,550
Heart – Coronary Disease, Coronary Artery Bypass Grafts (Low risk)	$5,500 – $8,800	$1,400 – $2,550
Heart – Pericardial Disease, Pericardiectomy	$5,500 – $8,800	$1,400 – $2,550
Heart – Valvular Disease, Open Heart Surgery	$5,500 – $8,800	$1,400 – $2,550
Heart – Valvular Disease, Single Valve Replacement	$5,500 – $8,800	$1,400 – $2,550
Heart – Ventricle, Arrhythmia, Arrhythmia Surgery	$5,500 – $8,800	$1,400 – $2,550

GROUP I

	Surgeon's Fees	Anaesthetist's Fees
Aorta – Thoraco-Abdominal Aneurysm, Excision and Insertion of Graft	$7,700 – $11,000	$1,950 – $3,050
Aorta – Ruptured Abdominal Aortic Aneurysm, Excision and Insertion of Graft	$7,700 – $11,000	$1,950 – $3,050
Artery – Pulmonary, Pulmonary Embolism, Pulmonary Embolectomy using Cardiopulmonary Bypass	$7,700 – $11,000	$1,950 – $3,050
Heart – Aortic Root Replacement with Coronary Artery Reimplantation	$7,700 – $11,000	$1,950 – $3,050
Heart – Atrium, Arrhythmias, Arrhythmia Surgery	$7,700 – $11,000	$1,950 – $3,050
Heart – Ascending and/or Aortic Aneurysm Replacement	$7,700 – $11,000	$1,950 – $3,050
Heart – Congenital Disease, Open Heart Surgery (High Risk)	$7,700 – $11,000	$1,950 – $3,050
Heart – Cardiomyoplasty	$7,700 – $11,000	$1,950 – $3,050
Heart – Complex Cyanotic Congenital Heart Disease, Open	$7,700 – $11,000	$1,950 – $3,050
Heart Surgery Heart – Coronary Artery Bypass Grafts (High Risk)	$7,700 – $11,000	$1,950 – $3,050
Heart – Insertion of Heart Assist Devices	$7,700 – $11,000	$1,950 – $3,050
Heart – Left Ventricular Aneurysm, Resection with Coronary Artery Bypass	$7,700 – $11,000	$1,950 – $3,050
Heart – Open Heart Re-operation	$7,700 – $11,000	$1,950 – $3,050
Heart – Proximal Aortic Aneurysm	$7,700 – $11,000	$1,950 – $3,050
Heart – Re-operation, Coronary Surgery	$7,700 – $11,000	$1,950 – $3,050
Heart – Re-operation, Valve Surgery	$7,700 – $11,000	$1,950 – $3,050
Heart – Valvular Disease, Open Heart Surgery on more than one Valve/involving more than one Chamber	$7,700 – $11,000	$1,950 – $3,050
Heart – Various Lesions, Aneurysmectomy and/or Combined Valve Replacement and/or Repair and Coronary Bypass Grafting	$7,700 – $11,000	$1,950 – $3,050
Heart – Various Lesions, Heart Transplantation	$7,700 – $11,000	$1,950 – $3,050
Heart/Lung – Heart/Lung Transplantation	$7,700 – $11,000	$1,950 – $3,050

SECTION 2 – DIGESTIVE SYSTEM

GROUP A

	Surgeon's Fees	Anaesthetist's Fees
Abdominal Cavity – Percutaneous Drainage of Ascites (Paracentesis)	$330 – $550	$200 – $270
Anus – Ano-Rectal Prolapse, Injection	$330 – $550	$200 – $270
Anus – Fissure, Examination under Anaesthesia	$330 – $550	$200 – $270
Anus – Haemorrhoids, Ligation	$330 – $550	$200 – $270
Anus – Haemorrhoids, Removal of External Anal Tags	$330 – $550	$200 – $270
Anus – Stricture, Dilatation	$330 – $550	$200 – $270
Anus – Various Lesions, Biopsy of Muscle/Mucosa	$330 – $550	$200 – $270
Anus – Injection of Piles	$330 – $550	$200 – $270
Lip – Mucous Cyst/Mucocele, Removal	$330 – $550	$200 – $270
Mouth – Abscess, (Superficial), Drainage	$330 – $550	$200 – $270
Mouth – Foreign Body (Superficial), Removal	$330 – $550	$200 – $270
Mouth – Various Lesions, Uvulotomy	$330 – $550	$270 – $380
Pharynx – Adhesions, Division	$330 – $550	$270 – $380
Tongue – Tongue Tie, Release	$330 – $550	$200 – $270
Tongue – Tongue Tie, Revision	$330 – $550	$200 – $270
Tooth (Superficial) – Unerupted/Partially Erupted/Impacted, Removal of Bone and Tooth without Divison of Tooth	$330 – $550	$200 – $270

GROUP B

	Surgeon's Fees	Anaesthetist's Fees
Anus – Ano-Rectal Malformation, Perineal Anoplasty Primary/Secondary Repair	$500 – $820	$270 – $380
Anus – Ano-Rectal Prolapse, Circumanal Suture	$500 – $820	$270 – $380
Anus – Haemorrhoids, Cryosurgery – Infra-red Coagulation	$500 – $820	$270 – $380
Anus – Insertion of Seton (Single)	$500 – $820	$270 – $380
Anus – Ischiorectal Abscess, Small Saucerisation/Drainage	$500 – $820	$270 – $380
Anus – Perineal Abscess, Small Saucerisation/Drainage	$500 – $820	$270 – $380
Bile Duct – Various Lesions, Operative Choledochoscopy	$500 – $820	$270 – $380
Intestine – Intussusception, Reduction by Fluid	$500 – $820	$270 – $380
Liver – Various Lesions, Percutaneous Biopsy	$500 – $820	$270 – $380
Mouth – Mucous Cyst/Ranula of Floor of Mouth, Removal/Marsupialization	$500 – $820	$270 – $380
Mouth – Abscess (Deep), Drainage	$500 – $820	$330 – $440
Mouth – Leukoplakia, Limited Excision	$500 – $820	$270 – $380
Mouth – Small Soft Tissue Tumour, Excision	$500 – $820	$270 – $380
Rectum – Stricture, Laser Correction	$500 – $820	$270 – $380
Salivary Gland – Calculus, Removal	$500 – $820	$270 – $380
Small Bowel – Various Lesions, Intubation with/without Biopsy	$500 – $820	$270 – $380
Submandibular Gland – Calculus, Removal	$500 – $820	$270 – $380
Tonsils – Abscess, Drainage	$500 – $820	$270 – $380

GROUP B

	Surgeon's Fees	Anaesthetist's Fees
Tonsil – Haemorrhage, Haemostatis	$500 – $820	$330 – $440
Tooth (Superficial) – Unerupted/Partially Erupted/Impacted, Removal of Bone and Tooth with Division of Tooth	$500 – $820	$270 – $380
Tooth – Simple Unerupted-Impacted Tooth, Removal of Roots	$500 – $820	$270 – $380

GROUP C

	Surgeon's Fees	Anaesthetist's Fees
Abdominal Wall – Epigastric/Umbilical Hernia, Repair	$990 – $1,650	$330 – $440
Abdominal Wall – Inguinal Hernia/Femoral Hernia Repair (Unilateral)	$990 – $1,650	$330 – $440
Abdominal Wall – Inguinal Hernia (Infants & Children), Unilateral Herniotomy	$990 – $1,650	$330 – $440
Adenoids – Various Lesions, Removal	$990 – $1,650	$330 – $440
Anus – Fissure, Excision/Lateral Sphincterotomy	$990 – $1,650	$330 – $440
Anus – Fistula-in-ano (Low), Excision/Low Fistulectomy	$990 – $1,650	$330 – $440
Anus – Haemorrhoids, Haemorrhoidectomy	$990 – $1,650	$330 – $440
Anus – Haemorrhoids, Laser Excision	$990 – $1,650	$330 – $440
Anus – Insertion of Seton (Multiple)	$990 – $1,650	$330 – $440
Anus – Ischiorectal Abscess (Large), Saucerisation/Drainage	$990 – $1,650	$330 – $440
Appendix – Abscess, Drainage Only	$990 – $1,650	$330 – $440
Esophagus – Stricture, Dilatation	$990 – $1,650	$330 – $440
Lip – Various Lesions, Full Thickness Wedge Excision with Repair	$990 – $1,650	$330 – $440
Lip – Various Lesions, Vermillionectomy (Single)	$990 – $1,650	$330 – $440
Mouth – Dislocated Teeth/Dento Alveolar Fracture, Jaw Reduction and Immobilisation	$990 – $1,650	$330 – $440
Mouth – Foreign Body (Deep), Removal	$990 – $1,650	$430 – $770
Mouth – Macrocheilia and Macroglossia, Reduction and Reconstruction	$990 – $1,650	$430 – $770
Mouth – Mucous Cyst/Ranula of Floor of Mouth, Removal/Marsupialization	$990 – $1,650	$330 – $440
Mouth – Nasolabial Cyst, Excision	$990 – $1,650	$330 – $440
Mouth – Various Lesions of Oral Mucosa (Small), Cryosurgical Application	$990 – $1,650	$330 – $440
Parotid – Calculus, Removal	$990 – $1,650	$330 – $440
Pharynx – Cysts/Vallecular Removal	$990 – $1,650	$330 – $440
Rectum – Hirschsprung's Disease, Anal Sphincterotomy	$990 – $1,650	$330 – $440
Sacrum & Coccyx – Pilonidal Sinus/Cyst, Excision	$990 – $1,650	$330 – $440
Sacrum & Coccyx – Various Lesions, Excision	$990 – $1,650	$330 – $440
Small Bowel – Ileostomy, Stenosis, Revision	$990 – $1,650	$330 – $440
Small Bowel – Various Lesions, Enterostomy	$990 – $1,650	$330 – $440

GROUP C

	Surgeon's Fees	Anaesthetist's Fees
Small Bowel – Vitello-intestinal Fistula, Excision	$990 – $1,650	$330 – $440
Stomach – Pyloric Tumour (infant), Pyloroplasty/ Pyloromyotomy	$990 – $1,650	$430 – $770
Stomach – Tumour of Cardia, Endoscopic YAG Laser Surgery/Vaporisation	$990 – $1,650	$330 – $440
Sublingual Gland – Tumour, Excision	$990 – $1,650	$330 – $440
Tonsils – Lingual/Lateral Pharyngeal Bands, Removal	$990 – $1,650	$330 – $440
Tooth (Deep) – Unerupted/Partially Erupted/Impacted, Removal of Bone and Tooth with Division of Tooth	$990 – $1,650	$330 – $440
Tooth – Dislocation, Reimplantation and Transplantation	$990 – $1,650	$330 – $440
Tooth – Multiple-Rooted/Posterior Tooth, Apicectomy	$990 – $1,650	$330 – $440

GROUP D

	Surgeon's Fees	Anaesthetist's Fees
Abdominal Cavity – Adhesions (Limited), Lysis	$1,750 – $2,850	$430 – $770
Abdominal Cavity – Ruptured Viscus, Simple Repair	$1,750 – $2,850	$430 – $770
Abdominal Cavity – Subphrenic Abscess, Drainage	$1,750 – $2,850	$430 – $770
Abdominal Cavity – Various Lesions, Laparotomy (Exploratory)	$1,750 – $2,850	$430 – $770
Abdominal Cavity – Volvulus, Reduction	$1,750 – $2,850	$430 – $770
Abdominal Wall – Burst Abdomen, Repair	$1,750 – $2,850	$430 – $770
Abdominal Wall – Epigastric, Umbilical Hernia Laparoscopic Repair	$1,750 – $2,850	$430 – $770
Abdominal Wall – Exomphalos/Gastroschisis, Repair	$1,750 – $2,850	$660 – $1,200
Abdominal Wall – Inguinal Hernia (Infants & Children), Bilateral Herniotomy	$1,750 – $2,850	$430 – $770
Abdominal Wall – Inguinal Hernia (Unilateral), (Laparoscopic) Repair	$1,750 – $2,850	$430 – $770
Abdominal Wall – Inguinal/Femoral Hernia, Bilateral Herniorrhaphy	$1,750 – $2,850	$430 – $770
Abdominal Wall – Ventral/Incisional/Recurrent Hernia, (Small) Repair	$1,750 – $2,850	$430 – $770
Anus – Ano-Rectal Prolapse, Radical Operation without Resection	$1,750 – $2,850	$430 – $770
Anus – Fistula-in-ano (High), Excision/Flap Closure/ Fistulotomy	$1,750 – $2,850	$430 – $770
Anus – Hemorrhoids, Stapled Hemorrhoidectomy	$1,750 – $2,850	$430 – $770
Anus – Stricture, Flap Repair	$1,750 – $2,850	$430 – $770
Appendix – Various Lesions, Appendicectomy	$1,750 – $2,850	$430 – $770
Bile Duct – Various Lesions, Choledochotomy (Exploration Common Bile Duct only)	$1,750 – $2,850	$430 – $770

GROUP D

	Surgeon's Fees	Anaesthetist's Fees
Colon – Loop Colostomy, Loop Ileostomy, Closure (Not requiring Laparotomy)	$1,750 – $2,850	$430 – $770
Colon – Various Lesions, Colostomy	$1,750 – $2,850	$430 – $770
Diaphragm – Diaphragmatic/Hiatus Hernia, Repair	$1,750 – $2,850	$430 – $770
Duodenum – Various Lesions, Gastroenterostomy/Gastroduodenostomy	$1,750 – $2,850	$430 – $770
Esophagus – Tumour, Laser Fulguration	$1,750 – $2,850	$430 – $770
Esophagus – Tumour, Insertion of Celestin Tube	$1,750 – $2,850	$430 – $770
Esophagus – Various Lesions, Cervical Esophagostomy	$1,750 – $2,850	$430 – $770
Gall Bladder – Various Lesions, Cholecystostomy	$1,750 – $2,850	$430 – $770
Intestine – Enterostomy, Closure	$1,750 – $2,850	$430 – $770
Intestine – Intussusception, Laparotomy and Reduction	$1,750 – $2,850	$430 – $770
Intestine – Meckel's Diverticulum, Various Lesions, Resection	$1,750 – $2,850	$430 – $770
Lip – Various Lesions, Vermillionectomy (Multiple)	$1,750 – $2,850	$430 – $770
Liver – Abscess, Trans-Abdominal Drainage	$1,750 – $2,850	$430 – $770
Liver – Hydatid Cyst, Trans-Abdominal Drainage/Excision	$1,750 – $2,850	$430 – $770
Liver – Trauma, Minor Repair Laceration	$1,750 – $2,850	$430 – $770
Liver – Trauma/Tumour, Hepatic Artery Ligation	$1,750 – $2,850	$430 – $770
Mouth – Cleft Lip, Secondary Correction (Partial/incomplete)	$1,750 – $2,850	$660 – $1,200
Mouth – Cleft, Secondary (Closure of Fistula)	$1,750 – $2,850	$660 – $1,200
Mouth – Leukoplakia, Wide Excision and Skin Grafting	$1,750 – $2,850	$430 – $770
Mouth – Oro-antral Fistula, Removal of Tooth/Roots in Antrum and Closure	$1,750 – $2,850	$430 – $770
Neck – Branchial Cyst, Removal	$1,750 – $2,850	$430 – $770
Neck – Branchial Fistula, Removal	$1,750 – $2,850	$430 – $770
Palate – Cleft (Partial), Primary Repair	$1,750 – $2,850	$430 – $770
Palate – Cleft, Secondary Repair (Closure of Fistula)	$1,750 – $2,850	$430 – $770
Palate – Palate Stiffening Procedure with Implants	$1,750 – $2,850	$430 – $770
Pancreas – Various Lesions, External Drainage	$1,750 – $2,850	$430 – $770
Parotid – Fistula, Repair	$1,750 – $2,850	$430 – $770
Parotid – Trauma, Repair/Reimplantation	$1,750 – $2,850	$430 – $770
Pharynx – Pouch, Endoscopic Resection	$1,750 – $2,850	$430 – $770
Rectal Tumor – Transanal Excision (Small, less than 2cm)	$1,750 – $2,850	$430 – $770
Rectum – Hirschsprung's Disease, Rectal Myectomy	$1,750 – $2,850	$430 – $770
Rectum – Tumour, Laser Vaporisation/Endoscopic/Fulguration	$1,750 – $2,850	$430 – $770
Rectum – Various Lesions, Transphincteric Removal	$1,750 – $2,850	$430 – $770
Retro-Peritoneum – Abscess, Drainage with/without Laparotomy	$1,750 – $2,850	$430 – $770
Sacrum & Coccyx – Pilonidal Sinus/Cyst, Excision and Repair/Closure	$1,750 – $2,850	$430 – $770
Stomach – Ulcer, Endoscopic Laser Coagulation	$1,750 – $2,850	$430 – $770
Submandibular Gland – Tumour/Sialectasis, Excision	$1,750 – $2,850	$430 – $770

GROUP D

	Surgeon's Fees	Anaesthetist's Fees
Submanibular Gland – Calculus (Deep), Removal	$1,750 – $2,850	$430 – $770
Tongue – Various Lesions, Partial Excision	$1,750 – $2,850	$430 – $770
Tonsils – Various Lesions, Removal with/without Adenoidectomy	$1,750 – $2,850	$430 – $770
Tooth (Superficial) – Unerupted/Partially Erupted/Impacted, Removal Release of Neurovascular Bundle	$1,750 – $2,850	$430 – $770

GROUP E

	Surgeon's Fees	Anaesthetist's Fees
Abdominal Cavity – Adhesions (Limited), Lysis (Laparoscopic)	$2,750 – $4,400	$660 – $1,200
Abdominal Cavity – Neonatal Alimentary Obstruction, Laparotomy	$2,750 – $4,400	$660 – $1,200
Abdominal Cavity – Ruptured Viscus, (Laparoscopic) Simple Repair	$2,750 – $4,400	$660 – $1,200
Abdominal Cavity – Various Lesions, Laparotomy including Colostomy/Enterostomy/Gastrostomy or GI-Bypass Procedure	$2,750 – $4,400	$660 – $1,200
Abdominal Cavity – Various Lesions, Laparotomy not classified elsewhere	$2,750 – $4,400	$660 – $1,200
Abdominal Wall – Exomphalos/Gastroschisis, Operating by Plastic Flap	$2,750 – $4,400	$660 – $1,200
Abdominal Wall – Inguinal Hernia (Bilateral), (Laparoscopic) Repair	$2,750 – $4,400	$660 – $1,200
Abdominal Wall – Strangulated/Obstructed Hernia, Repair with or without Bowel Resection	$2,750 – $4,400	$660 – $1,200
Abdominal Wall – Ventral/Incisional/Recurrent Hernia, (Large) Repair	$2,750 – $4,400	$660 – $1,200
Anus – Ano-Rectal Prolapse, Radical Operation with Resection	$2,750 – $4,400	$660 – $1,200
Appendix – Laparoscopic Appendicectomy	$2,750 – $4,400	$660 – $1,200
Bile Duct – Various Lesions Transduodenal Sphincteroplasty/Sphincterotomy	$2,750 – $4,400	$660 – $1,200
Bile Duct – Various Lesions, Choledocho-Duodenostomy/Choledocho-Gastrotomy/Choledoscopy	$2,750 – $4,400	$660 – $1,200
Bile Duct – Various Lesions, Choledochotomy (Exploration of Common Bile Duct Only)	$2,750 – $4,400	$660 – $1,200
Bile Duct – Various Lesions, Operation not classified elsewhere	$2,750 – $4,400	$660 – $1,200
Cleft (Parotid), Primary Repair	$2,750 – $4,400	$660 – $1,200
Colon – Colostomy, Resection and Reanastomosis	$2,750 – $4,400	$660 – $1,200

GROUP E

	Surgeon's Fees	Anaesthetist's Fees
Diaphragmatic/Hiatus Hernia, Laparoscopic/ Thoracoscopic Repair	$2,750 – $4,400	$660 – $1,200
Duodenum – Ulcer, Vagotomy – all types	$2,750 – $4,400	$660 – $1,200
Duodenum – Various Lesions, (Laparoscopic) Gastroenterostomy	$2,750 – $4,400	$660 – $1,200
Gall Bladder – Various Lesions, Cholecystectomy & Exploration Common Bile Duct (Open)	$2,750 – $4,400	$660 – $1,200
Gall Bladder – Various Lesions, Cholecysto-Duodenostomy/ Cholecysto-Gastrostomy/Cholecysto-Jejunostomy	$2,750 – $4,400	$660 – $1,200
Intestine – Intussusception, Resection	$2,750 – $4,400	$660 – $1,200
Intestine – Meckel's Diverticulum, (Laparoscopic) Resection	$2,750 – $4,400	$660 – $1,200
Lip – Various Lesions, Reconstruction using Full Thickness Flap	$2,750 – $4,400	$660 – $1,200
Liver – Tumor, Intra-operative Radio Frequency Ablation of Liver Tumor, (1 lesion)	$2,750 – $4,400	$660 – $1,200
Liver – Various Lesions, Wedge/Local Excision	$2,750 – $4,400	$660 – $1,200
Liver – Various Lesions, Wedge Resection Segmental Resection, (1 or 2 segments)	$2,750 – $4,400	$660 – $1,200
Mouth – Angular Cleft with Macrostomia (Unilateral) Repair	$2,750 – $4,400	$660 – $1,200
Mouth – Cleft Lip, Secondary Correction (Complete)	$2,750 – $4,400	$660 – $1,200
Mouth – Cleft Lip, Secondary Correction Nostril/Nasal Tip Palate	$2,750 – $4,400	$660 – $1,200
Mouth – Cleft Lip, Unilateral Primary Repair	$2,750 – $4,400	$660 – $1,200
Mouth – Various Lesions, Pharyngotomy (Lateral) with Excision of Tongue	$2,750 – $4,400	$660 – $1,200
Palate – Cleft (Complete), Primary Repair	$2,750 – $4,400	$660 – $1,200
Palate – Cleft, Secondary, Maxillary Osteotomy with Bone Graft	$2,750 – $4,400	$660 – $1,200
Palate – Urulopalato-pharyngoplasty (UPPP)	$2,750 – $4,400	$660 – $1,200
Pancreas – Cyst/ Pseudocyst, Anastomosis to Stomach/ Intestine	$2,750 – $4,400	$660 – $1,200
Parapharyngeal Space – Tumour, Excision	$2,750 – $4,400	$660 – $1,200
Pharynx – Pouch Removal	$2,750 – $4,400	$660 – $1,200
Pharynx – Various Lesions, Flap/Uvulo-palatoplasty	$2,750 – $4,400	$660 – $1,200
Pharynx – Various Lesions, Pharyngotomy (Lateral) with Excision of Tongue	$2,750 – $4,400	$660 – $1,200
Pharynx – Various Lesions, partial Pharyngectomy with Primary Closure	$2,750 – $4,400	$660 – $1,200
Rectum – Hirschsprung's Disease, Recto-Sigmoidectomy	$2,750 – $4,400	$660 – $1,200
Rectum – Various Lesions, Hartmann's Procedure	$2,750 – $4,400	$660 – $1,200
Rectal Tumor – Transanal Excision (Larger than 2cm)	$2,750 – $4,400	$660 – $1,200

GROUP E

	Surgeon's Fees	Anaesthetist's Fees
Retro-Peritoneum, Tumour, Removal	$2,750 – $4,400	$660 – $1,200
Small Bowel – Various Lesions, Resection	$2,750 – $4,400	$660 – $1,200
Stomach – Obesity, Bypass only	$2,750 – $4,400	$660 – $1,200
Stomach – Obesity, Reduction & Bypass	$2,750 – $4,400	$660 – $1,200
Stomach – Pyloric Stenosis, Pyloroplasty	$2,750 – $4,400	$660 – $1,200
Stomach – Tumour/Ulcer, Gastrojejunostomy	$2,750 – $4,400	$660 – $1,200
Stomach – Ulcers, Vagotomy – all types	$2,750 – $4,400	$660 – $1,200
Stomach – Various Lesions, Wedge Resection	$2,750 – $4,400	$660 – $1,200

GROUP F

	Surgeon's Fees	Anaesthetist's Fees
Abdominal Cavity – Adhesions (Extensive), Lysis (Laparoscopic)	$3,500 – $5,500	$870 – $1,550
Abdominal Cavity – Multiple Ruptures, Major Repair/ Removal	$3,500 – $5,500	$870 – $1,550
Abdominal Cavity – Lymphoma, Laparotomy for Grading Lymphoma with Splenectomy/Liver/Lymph Node Biopsy	$3,500 – $5,500	$870 – $1,550
Abdominal Wall – Ventral/Incisional/Recurrent Hernia, (Laparoscopic) Repair	$3,500 – $5,500	$870 – $1,550
Anus – Ano-Rectal Malformation, Rectoplasty Primary/ Secondary Repair	$3,500 – $5,500	$870 – $1,550
Anus – Rectal Prolapse, (Laparoscopic) Rectopexy (without resection)	$3,500 – $5,500	$870 – $1,550
Appendix – Tumour, Right Hemicolectomy	$3,500 – $5,500	$870 – $1,550
Bile Duct – Biliary Atresia, Porto-Enterostomy	$3,500 – $5,500	$870 – $1,550
Bile Duct – Various Lesions, Choledocho-Jejunostomy	$3,500 – $5,500	$870 – $1,550
Bile Duct – Various Lesions, Hepatico-Jejunostomy	$3,500 – $5,500	$870 – $1,550
Colon – Ileostomy, Colostomy – Closure/Hartmann's Reversal (Requiring Laparotomy)	$3,500 – $5,500	$870 – $1,550
Colon – Various Lesions, Right Hemicolectomy	$3,500 – $5,500	$870 – $1,550
Colon – Various Lesions, Transverse, Sigmoid Colectomy	$3,500 – $5,500	$870 – $1,550
Duodenum – Trauma, Bypass Operation	$3,500 – $5,500	$870 – $1,550
Duodenum – Ulcer, Partial Gastrectomy	$3,500 – $5,500	$870 – $1,550
Esophagus – Achalasia, Cardiomyotomy	$3,500 – $5,500	$870 – $1,550
Esophagus – Atresia, Operation	$3,500 – $5,500	$870 – $1,550
Esophagus – Congenital Stricture, Esophagectomy	$3,500 – $5,500	$870 – $1,550
Esophagus – Tumour, Bypass with Stomach/Intestine	$3,500 – $5,500	$870 – $1,550
Esophagus – Varices, Esophageal Transection	$3,500 – $5,500	$870 – $1,550
Esophagus – Varices, Esophageal Transection with Splenectomy	$3,500 – $5,500	$870 – $1,550
Esophagus – Varices, Subcardial Transection	$3,500 – $5,500	$870 – $1,550
Esophagus – Varices, Transgastric Ligation	$3,500 – $5,500	$870 – $1,550

GROUP F

	Surgeon's Fees	Anaesthetist's Fees
Gallbladder – Various Lesions, Cholecystectomy & Biliary Bypass	$3,500 – $5,500	$870 – $1,550
Gallbladder – Various Lesions, (Laparoscopic) Cholecystectomy	$3,500 – $5,500	$870 – $1,550
Intestine – Total Aganglionosis, Reconstruction	$3,500 – $5,500	$870 – $1,550
Liver – Obstructive Jaundice, Longmire Operation/ Choledocho-Jejunostomy	$3,500 – $5,500	$870 – $1,550
Liver – Trauma, Major Repair Laceration	$3,500 – $5,500	$1,300 – $1,850
Liver – Tumor, Intra-operative Radio Frequency Ablation of Liver Tumor, (2 or more lesions)	$3,500 – $5,500	$870 – $1,550
Mouth – Angular Cleft with Macrostomia (Bilateral) Repair	$3,500 – $5,500	$870 – $1,550
Mouth – Malignant Tumour, Wide Excision and Major Reconstruction	$3,500 – $5,500	$870 – $1,550
Mouth – Various Lesions, Pharyngotomy (Lateral) with Excision of Tongue and Reconstruction	$3,500 – $5,500	$870 – $1,550
Mouth – Cleft Lip, Complete, Bilateral, Primary Repair (one stage)	$3,500 – $5,500	$870 – $1,550
Mouth – Cleft Lip, Secondary Correction (Abbe Flap)	$3,500 – $5,500	$870 – $1,550
Palate – Cleft, Secondary Maxillary Osteotomy with Bone Graft (High)	$3,500 – $5,500	$870 – $1,550
Palate – Cleft, Secondary Repair (Lengthening Procedure)	$3,500 – $5,500	$870 – $1,550
Palate – Cleft, Uvulopharyngoplasty	$3,500 – $5,500	$870 – $1,550
Pancreas – Chronic Pancreatitis, Anastomosis of Pancreatic Duct to Bowel	$3,500 – $5,500	$870 – $1,550
Pancreas – Tumour, Triple Bypass	$3,500 – $5,500	$870 – $1,550
Pancreas – Various Lesions, Distal Pancreatectomy	$3,500 – $5,500	$870 – $1,550
Parotid – Tumour, Superficial Parotidectomy	$3,500 – $5,500	$870 – $1,550
Sacrum & Coccyx – Tumour, Excision	$3,500 – $5,500	$870 – $1,550
Stomach – Various Lesions, Partial/Subtotal Gastrectomy	$3,500 – $5,500	$870 – $1,550

GROUP G

	Surgeon's Fees	Anaesthetist's Fees
Abdominal Cavity – Recurrent Intra-Abdominal Tumor, (Simple) Resection	$4,950 – $6,600	$1,300 – $1,850
Anus – Tumour, Abdomino-Perineal Resection	$4,950 – $6,600	$1,300 – $1,850
Bile Duct – Various Lesions, Revision High Biliary Stricture	$4,950 – $6,600	$1,300 – $1,850
Colon – Various Lesions, Left Hemicolectomy	$4,950 – $6,600	$1,300 – $1,850
Colon – Various Lesions, Sub-total/Total Colectomy with Ileostomy/Ileorectal Anastomosis	$4,950 – $6,600	$1,300 – $1,850
Colon – Various Lesions, Total Procto-Colectomy (Non-restorative) Ileostomy	$4,950 – $6,600	$1,300 – $1,850
Esophagus – Tumour Allison/Ivor-Lewis Operation	$4,950 – $6,600	$1,300 – $1,850

GROUP G

	Surgeon's Fees	Anaesthetist's Fees
Esophagus – Tumour, Cervical/Laryngopharyngectomy with Tracheostomy with/without Plastic Reconstruction	$4,950 – $6,600	$1,300 – $1,850
Esophagus – Tumour, Total Esophagectomy	$4,950 – $6,600	$1,300 – $1,850
Esophagus – Varices, Gastro-Esophageal Devascularisation with Esophageal Transection	$4,950 – $6,600	$1,300 – $1,850
Gall Bladder – Laparoscopic Cholecystectomy with Cholangiography/Exploration of Common Bile Duct	$4,950 – $6,600	$1,300 – $1,850
Liver – Various Lesions, Hemi-Hepatectomy/3 or 4 segments	$4,950 – $6,600	$1,300 – $1,850
Rectum – Hirschprung's Disease Soave/Duhamel Operation or Similar	$4,950 – $6,600	$1,300 – $1,850
Rectum – Tumor, Abdomino-Perineal (AP) Resection with end Colostomy	$4,950 – $6,600	$1,300 – $1,850
Rectum – Various Lesions, Anterior Resection	$4,950 – $6,600	$1,300 – $1,850
Stomach – Cancer, Radical Partial/Subtotal Gastrectomy (with Lymph Node clearance)	$4,950 – $6,600	$1,300 – $1,850
Stomach – Post-Gastrectomy Complications, Revision Gastrectomy	$4,950 – $6,600	$1,300 – $1,850
Stomach – Various Lesions, Total/Proximal Gastrectomy with/without Splenectomy	$4,950 – $6,600	$1,300 – $1,850

GROUP H

	Surgeon's Fees	Anaesthetist's Fees
Colon – Various Lesions, Laparoscopic Colectomy	$5,500 – $8,800	$1,400 – $2,550
Colon – Various Lesions, Total Procto-Colectomy (Restorative, with ileal pouch)	$5,500 – $8,800	$1,400 – $2,550
Gallbladder – Cancer, Radical Cholecystectomy	$5,500 – $8,800	$1,400 – $2,550
Liver – Trauma/Tumour, Extended Lobectomy (5 segments or more)	$5,500 – $8,800	$1,400 – $2,550
Liver – Various Lesions, Extended Hepatectomy (5 segments or more)	$5,500 – $8,800	$1,400 – $2,550
Mouth – Intra-oral Tumour, Radical Excision with Resection of Mandible and Lymph Nodes and Reconstruction	$5,500 – $8,800	$1,400 – $2,550
Mouth – Tumour, Radical Excision with Resection of Mandible and Lymph Nodes and Reconstruction	$5,500 – $8,800	$1,400 – $2,550
Parotid – Tumour, Total Parotidectomy with Parapharyngeal Space Resection and Flap Reconstruction with/without Nerve Reconstruction	$5,500 – $8,800	$1,400 – $2,550
Parotid – Tumour, Total Parotidectomy with Preservation/ Reconstruction Facial Nerve	$5,500 – $8,800	$1,400 – $2,550
Pharynx – Tumour, Partial Pharyngectomy with Radical Neck Dissection with Flap	$5,500 – $8,800	$1,400 – $2,550

GROUP H

	Surgeon's Fees	Anaesthetist's Fees
Pharynx – Various Lesions, Pharyngotomy (Lateral) with Excision of Tongue and Reconstruction	$5,500 – $8,800	$1,400 – $2,550
Rectum – Various Lesions, Abdominal-Perineal Pull-Through Resection with Colo-Anal Anastomosis	$5,500 – $8,800	$1,400 – $2,550
Rectum – Various Lesions, Low/Ultra-Low Anterior Resection, with/without Pouch Reconstruction	$5,500 – $8,800	$1,400 – $2,550
Stomach – Cancer, Radical Total Gastrectomy with Radical Lymph Node clearance, With/without Splenectomy	$5,500 – $8,800	$1,400 – $2,550
Tongue – Tumour, Total Glossectomy with/without Neck Dissection	$5,500 – $8,800	$1,400 – $2,550
Tongue – Tumour, Glossectomy with Radical Neck Dissection	$5,500 – $8,800	$1,400 – $2,550
Tonsils – Tumour, Resection with Reconstruction	$5,500 – $8,800	$1,400 – $2,550

GROUP I

	Surgeon's Fees	Anaesthetist's Fees
Abdominal Cavity – Recurrent Intra-Abdominal Tumor, (Complicated) Resection requiring major resection	$7,700 – $11,000	$1,950 – $3,050
Bile Duct – Radical Resection of Hilar Cholangiocarcinoma (including Hepatectomy)	$7,700 – $11,000	$1,950 – $3,050
Bile Duct – Revision of Hilar Biliary Stricture	$7,700 – $11,000	$1,950 – $3,050
Duodenum – Tumour, Pancreatico-Duodenectomy (Whipple's Operation)	$7,700 – $11,000	$1,950 – $3,050
Liver – Transplantation	$7,700 – $11,000	$1,950 – $3,050
Pancreas – Various Lesions, Whipple's Operation/ Total Pancreatectomy	$7,700 – $11,000	$1,950 – $3,050

SECTION 3 – EAR

GROUP A

	Surgeon's Fees	Anaesthetist's Fees
Ear – Haematoma/Seroma, Evacuation	$330 – $550	$200 – $270
Tympanic Membrane – Perforation, Cauterisation/Diathermy	$330 – $550	$200 – $270

GROUP B

	Surgeon's Fees	Anaesthetist's Fees
Ear – Deformity, Lobule Reconstruction (Unilateral)	$500 – $820	$270 – $380
Ear – External Auditory Meatal Abscess, Drainage	$500 – $820	$270 – $380
Ear – Foreign Body, Removal (Under General Anaesthesia)	$500 – $820	$270 – $380
Ear – Microtia, Repositioning of Lobule	$500 – $820	$270 – $380
Ear – Sebaceous Cyst, Excision	$500 – $820	$270 – $380
Ear – Various Lesions, Myringotomy (Simple)	$500 – $820	$270 – $380

GROUP C

	Surgeon's Fees	Anaesthetist's Fees
Ear – Deformity, Lobule Reconstruction (Bilateral)	$990 – $1,650	$330 – $440
Ear (Middle) – Various Lesions, Exploration and Tympanotomy	$990 – $1,650	$330 – $440
Ear (Middle) – Various Lesions, Insertion of Tube for Drainage (including Myringotomy)	$990 – $1,650	$330 – $440
Ear – Cauliflower Ear, Correction	$990 – $1,650	$330 – $440
Ear – Keratosis Obturans, Removal	$990 – $1,650	$330 – $440
Ear – Laceration (Full Thickness), Repair	$990 – $1,650	$330 – $440
Ear – Microtia, Creation of Post-auricular Sulcus with Skin Graft	$990 – $1,650	$330 – $440
Ear – Polyp, Removal	$990 – $1,650	$330 – $440
Ear – Various Lesions, Meatoplasty	$990 – $1,650	$330 – $440

GROUP D

	Surgeon's Fees	Anaesthetist's Fees
Auditory Meatus (External) – Tumour, Removal	$1,750 – $2,850	$430 – $770
Ear – Deformity, Composite Graft	$1,750 – $2,850	$430 – $770
Ear – Deformity, Correction (Unilateral)	$1,750 – $2,850	$430 – $770
Ear – Exostosis, Removal	$1,750 – $2,850	$430 – $770
Ear – Partial Amputation, Reconstruction	$1,750 – $2,850	$430 – $770
Ear – Pre-Auricular Sinus, Excision (Unilateral/Bilateral/ Infected)	$1,750 – $2,850	$430 – $770
Ear – Various Lesions, Fenestration Operation	$1,750 – $2,850	$430 – $770
Mastoid – Various Lesions, Obliteration of Cavity	$1,750 – $2,850	$430 – $770

GROUP E

	Surgeon's Fees	Anaesthetist's Fees
Ear – Congenital Atresia, Reconstruction of External Auditory Canal and Middle Ear	$2,750 – $4,400	$660 – $1,200
Ear – Congenital Lesion, Meatoplasty	$2,750 – $4,400	$660 – $1,200
Ear – Deformity, Correction (Bilateral)	$2,750 – $4,400	$660 – $1,200
Ear – Tympanoplasty	$2,750 – $4,400	$660 – $1,200
Ear – Various Lesions, Ossicular Chain Reconstruction with/without Myringoplasty	$2,750 – $4,400	$660 – $1,200
Ear – Various Lesions, Myringoplasty	$2,750 – $4,400	$660 – $1,200
Ear (Middle) Round Window Perforation, Repair	$2,750 – $4,400	$660 – $1,200
Ear (Middle) Various Lesions, Stapedectomy	$2,750 – $4,400	$660 – $1,200
Endolymphatic Sac – Various Lesions, Transmastoid Decompression	$2,750 – $4,400	$660 – $1,200
Mastoid – Various Lesions, Mastoidectomy (Cortical)	$2,750 – $4,400	$660 – $1,200
Mastoid – Various Lesions, Mastoidectomy (Radical/Modified)	$2,750 – $4,400	$660 – $1,200
Mastoid – Various Lesions, Mastoidectomy (Radical/Modified) with Myringoplasty	$2,750 – $4,400	$660 – $1,200
Mastoid – Various Lesions, Revision Mastoidectomy	$2,750 – $4,400	$660 – $1,200

GROUP F

	Surgeon's Fees	Anaesthetist's Fees
Ear – Congenital Atresia, Reconstruction of External Auditory Canal and Middle Ear	$3,500 – $5,500	$870 – $1,550
Mastoid – Various Lesions, Mastoidectomy (Radical/ Modified Radical) with/without Myringoplasty	$3,500 – $5,500	$870 – $1,550
Endolymphatic Sac – Various Lesions, Transmastoid Shunt Procedure	$3,500 – $5,500	$870 – $1,550
Labyrinth – Various Lesions, Destruction/Labyrinthectomy	$3,500 – $5,500	$870 – $1,550
Mastoid – Various Lesions, Mastoidectomy (Radical/ Modified Radical) with Myringoplasty and Ossicular Chain Reconstruction	$3,500 – $5,500	$870 – $1,550

GROUP G

	Surgeon's Fees	Anaesthetist's Fees
Auditory Meatus (Internal) – Tumour, Removal, Translabyrinthine Approach/Middle Cranial Fossa Approach	$4,950 – $6,600	$1,300 – $1,850
Ear (Middle) and Mastoid – Malignant Tumour, Sub-total Resection of Temporal Bone	$4,950 – $6,600	$1,300 – $1,850
Ear – Total Amputation, Microvascular Reconstruction	$4,950 – $6,600	$1,300 – $1,850

SECTION 4 – ENDOCRINE SYSTEM

GROUP D

	Surgeon's Fees	Anaesthetist's Fees
Thyroglossal Duct – Cyst/Fistula, Excision	$1,750 – $2,850	$430 – $770
Thyroid – Various Lesions, Partial Lobectomy/ Excision of Nodule	$1,750 – $2,850	$430 – $770

GROUP E

	Surgeon's Fees	Anaesthetist's Fees
Parathyroid – Various Lesions, Excision	$2,750 – $4,400	$660 – $1,200
Thyroid – Various Lesions, Hemithyroidectomy (including Endoscopic)	$2,750 – $4,400	$660 – $1,200

GROUP F

	Surgeon's Fees	Anaesthetist's Fees
Adrenals – Various Lesions, Biopsy/Excision	$3,500 – $5,500	$1,300 – $1,850
Parathyroid – Various Lesions, Re-Exploration	$3,500 – $5,500	$870 – $1,550
Thyroid – Various Lesions, Subtotal Thyroidectomy	$3,500 – $5,500	$870 – $1,550
Thyroid – Various Lesions, Total Thyroidectomy without Block Dissection	$3,500 – $5,500	$870 – $1,550

GROUP G

	Surgeon's Fees	Anaesthetist's Fees
Adrenals – Laparoscopic Adrenalectomy	$4,950 – $6,600	$1,300 – $1,850
Pituitary – Various Lesions, Transsphenoidal Hypophysectomy with Resection of Nasal Septum and Grafting	$4,950 – $6,600	$1,300 – $1,850
Thyroid – Various Lesions, Total Thyroidectomy with Block Dissection	$4,950 – $6,600	$1,300 – $1,850

SECTION 5 – ENDOSCOPIES

GROUP A

	Surgeon's Fees	Anaesthetist's Fees
Cystoscopy – with Controlled Hydrodilatation of the Bladder	$330 – $550	$200 – $270
Cystoscopy – with Ureteric Catheterisation	$330 – $550	$200 – $270
Cystoscopy – with Urethral Dilatation	$330 – $550	$200 – $270
Cystoscopy – with or without Biopsy	$330 – $550	$200 – $270
Nasendoscopy	$330 – $550	$200 – $270
Sigmoidoscopy with/without Biopsy	$330 – $550	$200 – $270
Sinoscopy	$330 – $550	$200 – $270
Urethroscopy – with Related Procedures	$330 – $550	$200 – $270

GROUP B

	Surgeon's Fees	Anaesthetist's Fees
Bronchoscopy – with/without Biopsy	$500 – $820	$330 – $440
Bronchoscopy – Bronchoalveolar Lavage	$500 – $820	$330 – $440
Bronchoscopy – Transbronchial Lung	$500 – $820	$330 – $440
Bronchoscopy – with Dilatation of Tracheal Stricture	$500 – $820	$430 – $770
Choledochoscopy (Operative)	$500 – $820	$270 – $380
Cystoscopy and Insertion of Double J Stent	$500 – $820	$270 – $380
Cystoscopy – External Sphincterotomy for Neurogenic Bladder Neck Obstruction	$500 – $820	$270 – $380
Colonoscopy – Fibreoptic, Complete	$500 – $820	$270 – $380
Cystoscopy – Fulguration of Posterior Urethral Valves	$500 – $820	$270 – $380
Cystoscopy – Removal of Foreign Body/Ureteric Stent	$500 – $820	$270 – $380
Esophagoscopy – Gastroscopy, Duodenoscopy with Injection of Esophageal/Gastric, Various, Repeat Procedure	$500 – $820	$430 – $770
Esophagoscopy – Gastroscopy, Duodenoscopy, with/without Biopsy	$500 – $820	$330 – $440
Foetoscopy	$500 – $820	$270 – $380
Hysteroscopy – Diagnostic	$500 – $820	$270 – $380
Nasendoscopic Removal of Fishbone in Throat		
Sigmoidoscopy with Diathermy/Polypectomy/Thermal Coagulation/Resection of Colorectal Tumour	$500 – $820	$270 – $380
Thoracoscopy, with/without Division of Pleural Adhesions	$500 – $820	$330 – $440
Ureteroscopy	$500 – $820	$270 – $380

GROUP C

	Surgeon's Fees	Anaesthetist's Fees
Arthroscopy – Diagnostic	$990 – $1,650	$270 – $380
Bladder – Litholapaxy	$990 – $1,650	$330 – $440
Colonoscopy – Fiberoptic with Removal of Polyps (4 polyps or less)	$990 – $1,650	$330 – $440

GROUP C

	Surgeon's Fees	Anaesthetist's Fees
Colonoscopy – Therapeutic Injection, Coagulation, Clipping of Bleeder	$990 – $1,650	$330 – $440
Cystoscopy – with Endoscopic Removal/Manipulation of Ureteric Calculus	$990 – $1,650	$330 – $440
Cystoscopy – with Endoscopic Resection/Incision of Bladder Neck	$990 – $1,650	$330 – $440
Esophagoscopy with Dilatation	$990 – $1,650	$330 – $440
Esophagoscopy with Insertion of Prosthesis	$990 – $1,650	$430 – $770
Esophagoscopy – Gastroscopy, Duodenoscopy with Injection of Esophageal/Gastric Varices, First Injection	$990 – $1,650	$330 – $440
Esophagoscopy – Gastroscopy, Duodenoscopy with Polypectomy/with or without Removal of Foreign Body/Diathermy or Laser Coagulation of Bleeding Lesions	$990 – $1,650	$330 – $440
Gastrointestinal Endoscopy (GI) – Laser Treatment of Tumours, Strictures	$990 – $1,650	$330 – $440
Laparoscopy – Diagnostic	$990 – $1,650	$330 – $440
Laparoscopy – Diagnostic with Hydrotubation	$990 – $1,650	$330 – $440
Pancreaticocholangiographic-Endoscopy ERCP	$990 – $1,650	$330 – $440
Percutaneous Nephroscopy	$990 – $1,650	$330 – $440
Small Bowel – Capsule Endoscopy (Interpretation)	$990 – $1,650	$330 – $440
Stomach – Percutaneous Endoscopic Gastrostomy (PEG)	$990 – $1,650	$330 – $440
Testis, Undescended, Laparoscopic Fowler-Stephens (1st or 2nd Stage)	$990 – $1,650	$330 – $440
Uretro-renoscopy	$990 – $1,650	$330 – $440

GROUP D

	Surgeon's Fees	Anaesthetist's Fees
Bronchoscopic Laser Treatment for Tumours/Strictures	$1,750 – $2,850	$430 – $770
Colonoscopy – Fiberoptic with Removal of Polyps (5 polyps or more)	$1,750 – $2,850	$430 – $770
Cystoscopy – with Resection of Bladder Tumour (less than 1.5 cm)	$1,750 – $2,850	$430 – $770
Endoscopic Dilatation of Biliary Stricture	$1,750 – $2,850	$430 – $770
Endoscopic Insertion of Biliary Stent	$1,750 – $2,850	$430 – $770
Endoscopy – Sphincterotomy with/ without Extraction of Stones from Common Bile Duct	$1,750 – $2,850	$430 – $770
Fallopian Tube – Ectopic Pregnancy, Videolaparoscopic Salpingotomy/Salpingectomy	$1,750 – $2,850	$430 – $770
Fallopian Tube – Hydrosalpinx, Salpingostomy	$1,750 – $2,850	$430 – $770
Fallopian Tube – Videolaparoscopic Adhesion Lysis	$1,750 – $2,850	$430 – $770
Fallopian Tube – Videolaparoscopic Laser Surgery	$1,750 – $2,850	$430 – $770
Fallopian Tube – Videolaparoscopic Tuboplasty	$1,750 – $2,850	$430 – $770

GROUP D

	Surgeon's Fees	Anaesthetist's Fees
Gastrointestinal Endoscopy (GI) – Laser Treatment for Tumours/Strictures	$1,750 – $2,850	$430 – $770
Hysteroscopy – Endometrium, Transcervical Ablation/ Resection (Electrocautery, Balloon, Microwave)	$1,750 – $2,850	$430 – $770
Hysteroscopy – Fallopian Tube, Recanalisation	$1,750 – $2,850	$430 – $770
Hysteroscopy – Therapeutic (with or without Laser)	$1,750 – $2,850	$430 – $770
Hysteroscopy – Uterine Polyps, Removal	$1,750 – $2,850	$430 – $770
Hysteroscopy – Uterine Septum, Resection	$1,750 – $2,850	$430 – $770
Hysteroscopy – Uterine Synechae, Resection	$1,750 – $2,850	$430 – $770
Kidney – Retrograde Balloon Dilatation of UPJ with Stenting	$1,750 – $2,850	$430 – $770
Laparoscopy – Therapeutic (with Laser or other Modalities)	$1,750 – $2,850	$430 – $770
Laparoscopic Adhesiolysis (Limited)	$1,750 – $2,850	$430 – $770
Microlaryngoscopy with/without Removal of Tumour	$1,750 – $2,850	$430 – $770
Ovary – Laparoscopic Adhesion Lysis	$1,750 – $2,850	$430 – $770
Pelvis – Laparoscopic Endometriotic Clearance	$1,750 – $2,850	$430 – $770
Rigid Oesophagoscopy for Foreign Body	$1,750 – $2,850	$430 – $770
Small Bowel – Double Balloon Enteroscopy (Diagnostic)	$1,750 – $2,850	$430 – $770
Stomach – Insertion of Intra-Gastric Balloon for Obesity	$1,750 – $2,850	$430 – $770
Uterus – Hysteroscopic Myomectomy (Simple)	$1,750 – $2,850	$430 – $770
Uterus – Laparoscopic Myomectomy	$1,750 – $2,850	$430 – $770

GROUP E

	Surgeon's Fees	Anaesthetist's Fees
Arthroscopic – Abrasion Arthroplasty	$2,750 – $4,400	$660 – $1,200
Arthroscopic – Excision of Isolated Lesions, eg. Villonodular Synovitis Haemangioma	$2,750 – $4,400	$660 – $1,200
Arthroscopic – Lateral Retinacular Release	$2,750 – $4,400	$660 – $1,200
Arthroscopic – Lysis of Adhesions	$2,750 – $4,400	$660 – $1,200
Arthroscopic – Partial or Total Menisectomy	$2,750 – $4,400	$660 – $1,200
Arthroscopic – Removal of Loose Bodies	$2,750 – $4,400	$660 – $1,200
Arthroscopic – Synovectomy	$2,750 – $4,400	$660 – $1,200
Cystoscopy – with Resection of Bladder Tumour (more than 1.5 cm)	$2,750 – $4,400	$660 – $1,200
Kidney – Percutaneous Nephroscopy (PCN)	$2,750 – $4,400	$660 – $1,200
Kidney – Percutaneous Nephropolithotripsy (PCNL)	$2,750 – $4,400	$660 – $1,200
Kidney – Percutaneous Nephroscopy and Removal of Foreign Body	$2,750 – $4,400	$660 – $1,200
Kidney – Percutaneous Endopyelotomy	$2,750 – $4,400	$660 – $1,200
Kidney – Retrograde Endopyelotomy/Accusice Endopyelotomy Laparoscopic Adhesiolysis (Extensive)	$2,750 – $4,400	$660 – $1,200

GROUP E

	Surgeon's Fees	Anaesthetist's Fees
Small Bowel – Double Balloon Enteroscopy (Therapeutic, involving Sclerotherapy, Clipping, Coagulation, Polypectomy, etc.)	$2,750 – $4,400	$660 – $1,200
Uterus – Fibroids, Laparoscopic Myomectomy (Complicated)	$2,750 – $4,400	$660 – $1,200
Uterus – Hysteroscopic Myomectomy (Complicated)	$2,750 – $4,400	$660 – $1,200
Uterus – Various Lesions, Laparoscopically Assisted Hysterectomy (LAVH)	$2,750 – $4,400	$660 – $1,200
Uterus – Various Lesions, Laparoscopically Assisted Vaginal Sub-Total Hysterectomy	$2,750 – $4,400	$660 – $1,200
Uterus – Various Lesions, Laparoscopically Assisted Total (Abdominal) Hysterectomy	$2,750 – $4,400	$660 – $1,200
Video Assisted Thorascopic Surgery (VATS) – Lung/ Mediastinal Biopsy	$2,750 – $4,400	$660 – $1,200

GROUP F

	Surgeon's Fees	Anaesthetist's Fees
Arthroscopic Meniscal Repair/Meniscectomy with Ligament Reconstruction	$3,500 – $5,500	$870 – $1,550
Bladder – Laparoscopic Autoaugmentation	$3,500 – $5,500	$870 – $1,550
Esophagus – Laparoscopic Myomectomy for Achalasia	$3,500 – $5,500	$870 – $1,550
Fallopian Tube – Blocked Tubes, Laparoscopic Tuboplasty	$3,500 – $5,500	$870 – $1,550
Kidney – Laparoscopic Nephrectomy	$3,500 – $5,500	$870 – $1,550
Lung – Video Assisted Thoracopic Surgery (VATS) Lobectomy	$3,500 – $5,500	$870 – $1,550
Stomach – Laparoscopic Gastric Banding for Obesity	$3,500 – $5,500	$870 – $1,550
Thorax – Video Assisted Thorascopic Surgery (VATS) Decortication	$3,500 – $5,500	$870 – $1,550
Thorax – Video Assisted Thorascopic Surgery (VATS) Pleuridesis	$3,500 – $5,500	$870 – $1,550

GROUP G

	Surgeon's Fees	Anaesthetist's Fees
Kidney – Laparoscopic Adrenalectomy	$4,950 – $6,600	$1,300 – $1,850
Kidney – Laparoscopic Partial Nephrectomy	$4,950 – $6,600	$1,300 – $1,850
Kidney – Laparoscopic Dismembered Pyeloplasty	$4,950 – $6,600	$1,300 – $1,850
Spleen – Laparoscopic Splenectomy	$4,950 – $6,600	$1,300 – $1,850
Stomach – Laparascopic Fundoplication	$4,950 – $6,600	$1,300 – $1,850

GROUP H

	Surgeon's Fees	Anaesthetist's Fees
Laparoscopic Colectomy	$5,500 – $8,800	$1,400 – $2,550
Laparoscopic Gastrectomy	$5,500 – $8,800	$1,400 – $2,550

SECTION 6 – EYE

GROUP A

	Surgeon's Fees	Anaesthetist's Fees
Conjunctiva – Naevus, Removal	$330 – $550	$200 – $270
Conjunctiva – Pinguecula, Removal	$330 – $550	$200 – $270
Conjunctiva – Pterygium, Removal	$330 – $550	$200 – $270
Electrolysis	$330 – $550	$200 – $270
Eye – Concretion, Removal	$330 – $550	$200 – $270
Eye – Various Lesions, Examination under General Anaesthesia	$330 – $550	$200 – $270
Incision & Drainage of Chalazion	$330 – $550	$200 – $270
Lacrimal Gland – Obstruction, Probing one/both Ducts	$330 – $550	$200 – $270
Naso Lacrimal Duct – Obstruction, Probing one/both ducts	$330 – $550	$200 – $270
Punctal Occlusion – One eye	$330 – $550	$200 – $270

GROUP B

	Surgeon's Fees	Anaesthetist's Fees
Anterior Chamber – Glaucoma, Paracentesis	$500 – $820	$270 – $380
Conjunctiva – Limbic Tumour, Removal	$500 – $820	$270 – $380
Conjunctiva – Pterygium, Removal with Application of Mitomycin or 5 FU	$500 – $820	$270 – $380
Cornea – Laceration, Conjunctival Peritomy/Repair of Conjunctival Flap	$500 – $820	$270 – $380
Eye – Perforating Wound (not involving Intraocular Structures) Repair	$500 – $820	$270 – $380
Squint – Botulin Injection into Extra-ocular Muscle (One Eye/Excluding Botulinum Cost)	$500 – $820	$270 – $380
Eye – Various Lesions, Resuturing of Wound following Intraocular Procedures	$500 – $820	$270 – $380
Eyelids – Tarsorrhaphy	$500 – $820	$270 – $380
Eyelids – Trichiasis, Cryotherapy	$500 – $820	$270 – $380
Eyelids – Tumour, Shaving Excision	$500 – $820	$270 – $380
Eyelids – Various Lesions, Canthoplasty	$500 – $820	$270 – $380
Iris – Various Lesions, Laser Iridotomy	$500 – $820	$270 – $380
Iris – Various Lesions, Surgical Iridectomy/Iridotomy	$500 – $820	$270 – $380
Lacrimal Gland (Canaliculus) – Various Lesions, Immediate Repair	$500 – $820	$270 – $380
Lacrimal Gland (Punctum) – Various Lesions, 3-Snip Operation	$500 – $820	$270 – $380
Lacrimal Gland – Obstruction, Insertion of Silicon Tubes	$500 – $820	$270 – $380
Lens – Various Lesions, Removal of Intraocular Artificial Lens	$500 – $820	$270 – $380
Lens – Various Lesions, Yag Laser Capsulotomy	$500 – $820	$270 – $380
Retina – Detachment, Removal of Encircling Silicone Band	$500 – $820	$270 – $380
Retina – Fundal Fluorescein Angiography	$500 – $820	$270 – $380

GROUP C

	Surgeon's Fees	Anaesthetist's Fees
Anterior Chamber – Hyphema, Irrigation	$990 – $1,650	$330 – $440
Anterior Chamber – Various Lesions, Vitreous Removal	$990 – $1,650	$330 – $440
Conjunctiva – Pterygium, Removal with Conjunctival Graft	$990 – $1,650	$330 – $440
Cornea – Myopia, Radial Keratotomy (one eye)	$990 – $1,650	$330 – $440
Eye – Glaucoma, Cyclodiathermy/Cyclocryotherapy	$990 – $1,650	$330 – $440
Eye – Glaucoma, Filtering and Allied Operations, Laser Trabeculoplasty	$990 – $1,650	$330 – $440
Eye – Glaucoma, Goniotomy/Trabeculotomy	$990 – $1,650	$330 – $440
Eye – Intraocular Foreign Body, Removal from Anterior Segment	$900 – $1,650	$430 – $770
Eye – Intraocular Foreign Body, Removal from Posterior Segment	$900 – $1,650	$430 – $770
Eye – Perforating Wound (with Incarceration/Prolapse of Uveal Tissue/Lens/Vitreous), Repair	$900 – $1,650	$430 – $770
Eye – Squint, Operation (one/both eyes – 2 Muscles)	$900 – $1,650	$430 – $770
Eye – Various Lesions, Evisceration with/without Insertion of Implant Eyelids – Simple Laceration, Repair	$990 – $1,650	$330 – $440
Iris – Tumour, Excision	$990 – $1,650	$330 – $440
Lacrimal Gland (Lacrimal Sac) – Various Lesions, Excision	$990 – $1,650	$330 – $440
Lens – Various Lesions, Extraction	$990 – $1,650	$330 – $440
Orbit – Various Lesions, Anterior Orbitotomy	$990 – $1,650	$330 – $440
Retina – Tears, Diathermy/Cryotherapy	$990 – $1,650	$330 – $440
Retina – Tears, Photocoagulation (Laser)	$990 – $1,650	$330 – $440

GROUP D

	Surgeon's Fees	Anaesthetist's Fees
Cornea – Photorefractive Keratectomy (PRK)	$1,750 – $2,850	$430 – $770
Cornea – Photorefractive Astigmatic Keratectomy	$1,750 – $2,850	$430 – $770
Eye – Exophthalmos due to Thyrotoxicosis, Retractor Recessions (Unilateral)	$1,750 – $2,850	$430 – $770
Eye – Squint, Operation (one/both eyes – 3 Muscles or more) both eyes	$1,750 – $2,850	$430 – $770 $660 – $1,200
Eye – Squint, Operation (one/both eyes – Adjustable Sutures) both eyes	$1,750 – $2,850	$430 – $770 $660 – $1,200
Eye – Squint, Operation (one/both eyes – Transposition) both eyes	$1,750 – $2,850	$430 – $770 $660 – $1,200
Eye – Various Lesions, Enucleation with/without Insertion of Implant	$1,750 – $2,850	$430 – $770
Eyelids – Ectropion/Entropion Correction	$1,750 – $2,850	$430 – $770
Eyelids – Full, Thickness Laceration, Repair	$1,750 – $2,850	$430 – $770
Eyelids – Haemangioma, Intra-lesion Injections (full course)	$1,750 – $2,850	$430 – $770

GROUP D

	Surgeon's Fees	Anaesthetist's Fees
Eyelids – Tumour, Excision and Repair with Full Thickness Skin Grafting	$1,750 – $2,850	$430 – $770
Eyelids – Various Lesions, Full Thickness Wedge Resection with Repair	$1,750 – $2,850	$430 – $770
Lens – Cataract (Juvenile), Removal with Anterior Vitrectomy	$1,750 – $2,850	$430 – $770
Lens – Cataract, Extracapsular Extraction with Intraocular Lens Implant (Excluding cost of Implant)	$1,750 – $2,850	$430 – $770
Lens – Cataract Extracapsular Extraction with Trabeculectomy	$1,750 – $2,850	$430 – $770
Lens – Various Lesions, Secondary Insertion of Intraocular Lens	$1,750 – $2,850	$430 – $770
Orbit – Contracture, Reconstruction including Mucous Membrane Grafting and Stent Mould	$1,750 – $2,850	$430 – $770
Orbit – Tumour/Foreign Body, Enucleation/Removal	$1,750 – $2,850	$430 – $770
Vitreous – Various Lesions, Vitrectomy (Pars Plana/Removal of Silicone Oil)	$1,750 – $2,850	$430 – $770

GROUP E

	Surgeon's Fees	Anaesthetist's Fees
Blepharoplasty – Cosmetic	$2,750 – $4,400	$660 – $1,200
Cornea – Epikeratophakia, Operation	$2,750 – $4,400	$660 – $1,200
Cornea – Laser In-situ Keratomileusis (LASIK)	$2,750 – $4,400	$660 – $1,200
Cornea – Various Lesions, Transplantation (Superficial/Lamellar/Full Thickness)	$2,750 – $4,400	$660 – $1,200
Eye – Exophthalmos due to Thyrotoxicosis, Retractor Recessions (Bilateral)	$2,750 – $4,400	$660 – $1,200
Eyelids – Ptosis, Correction	$2,750 – $4,400	$660 – $1,200
Eyelids – Tumour, Excision and Repair with Local Flap	$2,750 – $4,400	$660 – $1,200
Eyelids – Various Lesions, Blepharoplasty, Composite Graft (Chondro-cutaneous/Chondro-Mucosal)	$2,750 – $4,400	$660 – $1,200
Eyelids – Various Lesions, Whole Thickness Reconstruction (other than Direct Suture only)	$2,750 – $4,400	$660 – $1,200
Lacrimal Gland – Various Lesions, Dacryocystorhinostomy	$2,750 – $4,400	$660 – $1,200
Lacrimal Gland – Various Lesions, Dacryocystorhinostomy with Lester Jones Tube	$2,750 – $4,400	$660 – $1,200
Lens – Cataract, Extraction with Intraocular Lens Implant and Trabeculectomy	$2,750 – $4,400	$660 – $1,200
Lens – Cataract, Extraction, Phacoemulsification with lens implant	$2,750 – $4,400	$660 – $1,200
Orbit – Tumour, Exenteration/Flap Reconstruction	$2,750 – $4,400	$660 – $1,200
Orbit – Various Lesions, Decompression (Bilateral)	$2,750 – $4,400	$660 – $1,200

GROUP E

	Surgeon's Fees	Anaesthetist's Fees
Orbit – Various Lesions, Decompression (Unilateral)	$2,750 – $4,400	$660 – $1,200
Orbit – Various Lesions, Exenteration	$2,750 – $4,400	$660 – $1,200
Orbit – Various Lesions, Lateral Orbitotomy	$2,750 – $4,400	$660 – $1,200
Orbit – Various Lesions, Reconstruction of Floor/Roof with Bone Graft or Silastic	$2,750 – $4,400	$660 – $1,200
Retina – Detachment, Resection/Buckling Operation/Revision Operation with Single Plomb	$2,750 – $4,400	$660 – $1,200
Retina – Laser Pan-Retinal Photocoagulation (Full Course)	$2,750 – $4,400	$660 – $1,200

GROUP F

	Surgeon's Fees	Anaesthetist's Fees
Eyelids – Various Lesions, Multiple Plastic Lid Procedures	$3,500 – $5,500	$870 – $1,550
Eyelids – Various Lesions, Reconstruction using Full Thickness Flap	$3,500 – $5,500	$870 – $1,550
Naso Lacrimal Duct – Laser Dacryocystorhinostomy	$3,500 – $5,500	$870 – $1,550
Orbit – Lateral Orbitotomy and Removal of Orbitotomy Tumours	$3,500 – $5,500	$870 – $1,550
Retina – Detachments (Complex), Operation (more than one Plomb/Encirclage)	$3,500 – $5,500	$870 – $1,550
Vitreous – Various Lesions, Simple Vitrectomy (Pars Plana)	$3,500 – $5,500	$870 – $1,550
Vitreous – Various Lesions, Virectomy (Pars Plana/Sclerotomy/Lensectomy/Endolaser)	$3,500 – $5,500	$870 – $1,550

GROUP G

	Surgeon's Fees	Anaesthetist's Fees
Bioptics – Phakic Intraocular Lens Implantation and LASIK (excluding cost of Implant and Laser Facility)	$4,950 – $6,600	$1,300 – $1,850
Combined Cataract and Posterior Vitrectomy Procedures	$4,950 – $6,600	$1,300 – $1,850
Cornea – Various Lesions, Transplantation with Cataract Extraction and Intraocular Lens Implantation	$4,950 – $6,600	$1,300 – $1,850
Lens – Various Lesions, Secondary Insertion of Implant with Two or More Points of Scleral Fixation	$4,950 – $6,600	$1,300 – $1,850
Lens – Removal of Implant from the Vitreous Cavity and Secondary Lens Implantation	$4,950 – $6,600	$1,300 – $1,850
Orbit – Various Lesions, Reconstruction including Orbital Shift and Soft Tissue (Craniofacial Approach)	$4,950 – $6,600	$1,300 – $1,850
Vitreous – Various Lesions, Virtrectomy (Pars Plana/Sclerotomy/Silicone Oil/Giant Tears	$4,950 – $6,600	$1,300 – $1,850

SECTION 7 – FEMALE GENITAL SYSTEM

GROUP A

	Surgeon's Fees	Anaesthetist's Fees
Cervix – Stenosis, Dilatation	$330 – $550	$200 – $270
Cervix – Various Lesions, Punch Biopsy	$330 – $550	$200 – $270
Pelvis – Various Lesions, Examination under Anaesthesia	$330 – $550	$200 – $270
Urethra – Carbuncle/Polyp, Excision/Laser Vaporisation	$330 – $550	$200 – $270
Urethra – Stenosis, Dilatation	$330 – $550	$200 – $270
Uterus – Insertion of Intra-Uterine Contraceptive Device	$330 – $550	$200 – $270
Uterus – Retained Placenta, Manual Removal under Anaesthesia	$330 – $550	$200 – $270
Vagina – Atresia/Stenosis, Dilatation	$330 – $550	$200 – $270
Vagina – Foreign Body, Removal	$330 – $550	$200 – $270
Vagina – Incarcerated Pessary, Removal	$330 – $550	$200 – $270
Vagina – Lacerations (Simple), Debridement/Suture	$330 – $550	$200 – $270
Vagina – Various Lesions, Biopsy	$330 – $550	$200 – $270
Vulva – Abscess, Incision & Drainage	$330 – $550	$200 – $270
Vulva – Bartholin Cyst, Marsupialization (including use of Laser)	$330 – $550	$200 – $270
Vulva – Haematoma, Evacuation (Simple)	$330 – $550	$200 – $270
Vulva – Laceration, Debridement/Suture	$330 – $550	$200 – $270

GROUP B

	Surgeon's Fees	Anaesthetist's Fees
Cervix – Cervical Incompetence, Cerclage/Removal of Suture	$500 – $820	$270 – $380
Cervix – Large Loop Excision of Transformation Zone (LLETZ)	$500 – $820	$270 – $380
Cervix – Polyp/Erosion/Cervical Intraephithelial Neoplasia, Colposcopy/ Biopsy/Diathermy/Cryosurgery/Laser Therapy	$500 – $820	$270 – $380
Cervix – Tear, Complicated Repair under Anaesthesia	$500 – $820	$270 – $380
Clitoris – Clitoromegaly, Amputation	$500 – $820	$270 – $380
Genital Tract – Cancer, Staging under General Anaesthesia (includes Cystoscopy Dilation & Curettage/Biopsy)	$500 – $820	$270 – $380
Genital Tract – Pelvic Cyst, Ultrasound Guided Procedure-Aspiration	$500 – $820	$270 – $380
Implant – Sub-dermal Contraceptive, Insertion	$500 – $820	$270 – $380
Implant – Sub-dermal Contraceptive, Removal	$500 – $820	$270 – $380
Uterus – Displaced Intra-Uterine Contraceptive Device, Removal under General Anaesthesia	$500 – $820	$270 – $380
Uterus – Genetic Abnormality/Foetal Maturity, Ultrasound Guided Amniocentesis	$500 – $820	$270 – $380
Uterus – Genetic Abnormality, Ultrasound Guided Chorionic Biopsy	$500 – $820	$270 – $380
Uterus – Gravid, Evacuation	$500 – $820	$270 – $380
Uterus – Hysteroscopy, Diagnostic	$500 – $820	$270 – $380
Uterus – Various Lesions, Curettage with/without Dilatation	$500 – $820	$270 – $380

GROUP B

	Surgeon's Fees	Anaesthetist's Fees
Vagina – Lacerations (Complex), Examination under Anaesthesia and Debridement/Suture	$500 – $820	$270 – $380
Vagina – Simple Tumour/Gartner's Cyst, Removal	$500 – $820	$270 – $380
Vulva – Atresia/Absence, Detachment of Skin Pedicle after Vaginoplasty	$500 – $820	$270 – $380
Vulva – Bartholin Cyst, Excision (including use of Laser)	$500 – $820	$270 – $380
Vulva – Haematoma, Evacuation (Complicated)	$500 – $820	$270 – $380
Vulva – Imperforate Hymen, Hymenectomy	$500 – $820	$270 – $380
Vulva – Warts, Laser Vaporisation (Small Area)	$500 – $820	$270 – $380

GROUP C

	Surgeon's Fees	Anaesthetist's Fees
Abdomen – Various Lesions, Exploratory Laparotomy	$990 – $1,650	$330 – $440
Cervix – Cone Biopsy (including use of Laser)	$990 – $1,650	$330 – $440
Cervix – Ectropion, Amputation/Repair of Cervix (Trachelorrhaphy)	$990 – $1,650	$330 – $440
Fallopian Tube – Completed Family, Division/Ligation	$990 – $1,650	$330 – $440
Ovary – Tumour/Cyst, Endoscopic Aspiration except for Ovum Retrieval	$990 – $1,650	$330 – $440
Ovary – Various Lesions, Biopsy	$990 – $1,650	$330 – $440
Ovary – Various Lesions, Ovariopexy	$990 – $1,650	$330 – $440
Pelvis – Abscess, Drainage	$990 – $1,650	$330 – $440
Uterus – Foetal Disorder, Ultrasound Guided Foetal Blood Sampling/Cordocentesis	$990 – $1,650	$330 – $440
Uterus – Gravid, Hysterotomy	$990 – $1,650	$330 – $440
Uterus – Inversion, Repositioning	$990 – $1,650	$330 – $440
Uterus – Retroversion, Ventrosuspension	$990 – $1,650	$330 – $440
Uterus – Termination of Pregnancy, Second Trimester	$990 – $1,650	$330 – $440
Vagina – Pelvic Abscess, Colpotomy and Drainage	$990 – $1,650	$330 – $440
Vagina – Prolapse, Obliteration	$990 – $1,650	$330 – $440
Vulva – Labial Abnormality, Labioplasty	$990 – $1,650	$330 – $440
Vulva – Tight Introitus, Fenton's Operation	$990 – $1,650	$330 – $440
Vulva – Warts, Laser Vaporisation (Large Area)	$990 – $1,650	$330 – $440

GROUP D

	Surgeon's Fees	Anaesthetist's Fees
Fallopian Tube – Ectopic Pregnancy, Laparotomy	$1,750 – $2,850	$430 – $770
Fallopian Tube – Tubal Pathology other than Ectopic, Salpingectomy	$1,750 – $2,850	$430 – $770
Fallopian Tube – Blocked Tubes, Salpingostomy (Macrosurgery)	$1,750 – $2,850	$430 – $770

GROUP D

	Surgeon's Fees	Anaesthetist's Fees
Fallopian Tube – Ectopic Pregnancy, Laparascopic Salpingotomy/Salpingectomy	$1,750 – $2,850	$430 – $770
Fallopian Tube – Hydrosalpinx, Salpingostomy	$1,750 – $2,850	$430 – $770
Fallopian Tube – Laparoscopic Adhesion Lysis	$1,750 – $2,850	$430 – $770
Fallopian Tube – Peritubal Adhesions, Salpingolysis (Macrosurgery)	$1,750 – $2,850	$430 – $770
Fallopian Tube – Tubo-Ovarian Abscess, Drainage (Transabdominal)	$1,750 – $2,850	$430 – $770
Ovary – Laparoscopic Adhesion Lysis	$1,750 – $2,850	$430 – $770
Ovary – Polycystic Ovarian Syndrome, Puncture	$1,750 – $2,850	$430 – $770
Ovary – Tumour/Cyst, Oophorectomy/Salpingo-Oophorectomy	$1,750 – $2,850	$430 – $770
Ovary – Tumour/Cyst, Cystectomy (Simple)	$1,750 – $2,850	$430 – $770
Ovary – Various Lesions, Wedge Resection	$1,750 – $2,850	$430 – $770
Pelvis – Laparoscopy/Laparoscopy, Diagnostic, with/without Hydrotubation	$1,750 – $2,850	$430 – $770
Pelvis – Laparoscopic Endometriotic Clearance	$1,750 – $2,850	$430 – $770
Ulterosacral Ligament – Laparoscopic Transection	$1,750 – $2,850	$430 – $770
Uterus – Endoscopic Endometrial Ablation/Resection (Electrocautery/Balloon/Microwave)	$1,750 – $2,850	$430 – $770
Uterus – Fibroids, Myomectomy (Simple)	$1,750 – $2,850	$430 – $770
Uterus – Foetal Disorder, Ultrasound Guided Foetal Therapy	$1,750 – $2,850	$430 – $770
Uterus – Hysteroscopy, Fallopian Tube, Recanalisation	$1,750 – $2,850	$430 – $770
Uterus – Hysteroscopy, Therapeutic (with or without Laser)	$1,750 – $2,850	$430 – $770
Uterus – Hysteroscopy, Uterine Polyps, Removal	$1,750 – $2,850	$430 – $770
Uterus – Hysteroscopy, Uterine Septum, Resection	$1,750 – $2,850	$430 – $770
Uterus – Hysteroscopy, Uterine Synechae, Resection	$1,750 – $2,850	$430 – $770
Uterus – Hysteroscopic Myomectomy (Simple)	$1,750 – $2,850	$430 – $770
Uterus – Laparoscopic Myomectomy (Simple)	$1,750 – $2,850	$430 – $770
Uterus – Perforation, Repair Uterus - Ruptured, Repair (Simple)	$1,750 – $2,850	$430 – $770
Uterus – Transcervical Endometrial Ablation (Balloon/Microwave)	$1,750 – $2,850	$430 – $770
Vagina – Atresia, Vaginoplasty	$1,750 – $2,850	$430 – $770
Vagina – Cystocele, Repair	$1,750 – $2,850	$430 – $770
Vagina – Enterocele, Repair/Vaginal Vault Suspension (Abdominal)	$1,750 – $2,850	$430 – $770
Vagina – Fistula, Repair (Simple)	$1,750 – $2,850	$430 – $770
Vagina – Malignant Condition, Vaginectomy (Partial)	$1,750 – $2,850	$430 – $770
Vagina – Prolapse, Colporrhaphy with Repair of Pelvic Floor	$1,750 – $2,850	$430 – $770
Vagina – Rectocele, Repair	$1,750 – $2,850	$430 – $770
Vagina – Stress Incontinence, Kelly's Operation	$1,750 – $2,850	$430 – $770
Vagina – Tension-free Vaginal Tape (TVT), Operative Insertion	$1,750 – $2,850	$430 – $770

GROUP E

	Surgeon's Fees	Anaesthetist's Fees
Ovary – Tumour/Complex Cyst/Dermoid Cyst/Endometrioma, Cystectomy (Complicated)	$2,750 – $4,400	$660 – $1,200
Ovary – Tumour/Complex Cyst/Dermoid Cyst/Endometrioma, Oophorectomy/Salpingo-Oophorectomy (Complicated)	$2,750 – $4,400	$660 – $1,200
Ovary – Tumour/Cyst, Hysterectomy with Salpingo-Oophorectomy	$2,750 – $4,400	$660 – $1,200
Ovary – Various Lesions, Ovarioplasty (Microsurgery)	$2,750 – $4,400	$660 – $1,200
Pelvis – Recto-vaginal Nodule/Deep Fibrotic Endometriosis, Cul-de-sac Dissection	$2,750 – $4,400	$660 – $1,200
Ureter – Endometriotic Involvement, Ureteral Dissection	$2,750 – $4,400	$660 – $1,200
Uterus – Broad Ligament Tumour, Hysterectomy	$2,750 – $4,400	$660 – $1,200
Uterus – Chronic Pelvic Inflammation, Hysterectomy	$2,750 – $4,400	$660 – $1,200
Uterus – Gravid, Hysterectomy, Total or Sub-Total	$2,750 – $4,400	$660 – $1,200
Uterus – Endometriosis, Hysterectomy with/without Salpingo-Oophorectomy	$2,750 – $4,400	$660 – $1,200
Uterus – Fibroids, Large/Multiple, Myomectomy (Complicated)	$2,750 – $4,400	$660 – $1,200
Uterus – Hysteroscopic Myomectomy (Complicated)	$2,750 – $4,400	$660 – $1,200
Uterus – Pregnancy, Caesarean Section with Hysterectomy	$2,750 – $4,400	$660 – $1,200
Uterus – Prolapse, Vaginal Hysterectomy with/without Pelvic Floor Repair	$2,750 – $4,400	$660 – $1,200
Uterus – Rupture, Repair (Complicated)	$2,750 – $4,400	$660 – $1,200
Uterus – Sub-Total Hysterectomy with/without Salpingo-Oophorectomy	$2,750 – $4,400	$660 – $1,200
Uterus – Total Hysterectomy with/without Salpingo-Oophorectomy	$2,750 – $4,400	$660 – $1,200
Vagina – Fistula, Repair (Complicated)	$2,750 – $4,400	$660 – $1,200
Vagina – Malignant Condition, Vaginectomy (Total)	$2,750 – $4,400	$660 – $1,200
Vagina – Prolapse, Colporrhaphy with Amputation of Cervix (Manchester Repair)	$2,750 – $4,400	$660 – $1,200
Vagina – Stress Incontinence, Sling/Combined Abdomino-Vaginal Operation/Videolaparoscopic Colposuspension	$2,750 – $4,400	$660 – $1,200
Vulva – Malignant Condition, Vulvectomy (Slide) with or without use of Laser	$2,750 – $4,400	$660 – $1,200

GROUP F

	Surgeon's Fees	Anaesthetist's Fees
Fallopian Tube – Blocked Tubes Laparoscopic Tuboplasty	$3,500 – $5,500	$870 – $1,550
Fallopian Tube – Blocked Tubes, Plastic Repair (Microsurgery)/Cornual Reanastomosis	$3,500 – $5,500	$870 – $1,550
Fallopian Tube – Peritubal Adhesions, Salpingolysis (Microsurgery), Salpingostomy	$3,500 – $5,500	$870 – $1,550

GROUP F

	Surgeon's Fees	Anaesthetist's Fees
Ovary – Malignant Tumour/Cyst, Total Hysterectomy Billateral Salpingo-Oophorectomy with Omentectomy	$3,500 – $5,500	$870 – $1,550
Uterus – Congenital Organ Abnormality, Plastic Repair including Metroplasty	$3,500 – $5,500	$870 – $1,550
Uterus – Fibroids, Laparoscopic Myomectomy (Complicated)	$3,500 – $5,500	$870 – $1,550
Uterus – Malignant Condition, Extended Hysterectomy	$3,500 – $5,500	$870 – $1,550
Uterus – Various Lesions, Laparoscopically Assisted Sub-Total Hysterectomy	$3,500 – $5,500	$870 – $1,550
Uterus – Various Lesions, Laparoscopically Assisted Vaginal Hysterectomy (LAVH)	$3,500 – $5,500	$870 – $1,550
Uterus – Various Lesions, Laparoscopically Assisted Vaginal Total (Abdominal) Hysterectomy	$3,500 – $5,500	$870 – $1,550
Vulva – Malignant Condition, Radical Vulvectomy	$3,500 – $5,500	$870 – $1,550

GROUP G

	Surgeon's Fees	Anaesthetist's Fees
Sex Reassignment – Male to Female	$4,950 – $6,600	$1,300 – $1,850
Sex Reassignment – Female to Male	$4,950 – $6,600	$1,300 – $1,850
Uterus – Malignant Conditions, Anterior Pelvic Exenteration	$4,950 – $6,600	$1,300 – $1,850
Uterus – Malignant Conditions, Posterior Exenteration	$4,950 – $6,600	$1,300 – $1,850
Cervix – Malignant Conditions, Wertheim's Operation	$4,950 – $6,600	$1,300 – $1,850
Uterus – Malignant Conditions, Wertheim's Operation	$4,950 – $6,600	$1,300 – $1,850

GROUP H

	Surgeon's Fees	Anaesthetist's Fees
Uterus, Malignant Conditions, Total Pelvic Exenteration	$5,500 – $8,800	$1,400 – $2,550

SECTION 8 – HAEMIC & LYMPHATIC SYSTEM

GROUP A

	Surgeon's Fees	Anaesthetist's Fees
Marrow – Various Lesions, Diagnostic Aspiration	$330 – $550	$200 – $270

GROUP B

	Surgeon's Fees	Anaesthetist's Fees
Lymph Node (Single) – Superficial, Various Lesions, Excision Biopsy	$500 – $820	$270 – $380
Lymphatics – Lymphangiectasis, Limited Excision	$500 – $820	$270 – $380
Lymphatics – Lymphedema, Excision (Small)	$500 – $820	$270 – $380

GROUP C

	Surgeon's Fees	Anaesthetist's Fees
Lymph Node (Deep, Multiple) – Various Lesions, Excision	$990 – $1,650	$330 – $440
Lymph Node (Axillary) – Various Lesions, Limited Excision	$990 – $1,650	$330 – $440
Lymph Node (Cervical) – Various Lesions, Limited Block Dissection	$990 – $1,650	$330 – $440
Lymph Node (Inguinal) – Various Lesions, Limited Excision	$990 – $1,650	$330 – $440
Lymphatics (Face & Neck) – Cystic Hygroma, Excision (Small)	$990 – $1,650	$330 – $440
Lymphatics – Lymphedema, Excision (Moderate)	$990 – $1,650	$330 – $440

GROUP D

	Surgeon's Fees	Anaesthetist's Fees
Lymph Node (Axillary) – Various Lesions, Radical Excision	$1,750 – $2,850	$430 – $770
Lymph Node (Cervical) – Various Lesions, Excision Biopsy	$1,750 – $2,850	$430 – $770
Lymph Node (Inguinal) – Various Lesions, Radical Excision	$1,750 – $2,850	$430 – $770
Lymphatics (Face & Neck) – Cystic Hygroma, Excision (Moderate)	$1,750 – $2,850	$430 – $770
Lymphatics – Lymphangiectasis, Radical Excision	$1,750 – $2,850	$430 – $770
Lymphatics – Lymphedema, Excision (Large)	$1,750 – $2,850	$430 – $770

GROUP E

	Surgeon's Fees	Anaesthetist's Fees
Lymph Node (Cervical) – Various Lesions, Radical Block Dissection	$2,750 – $4,400	$660 – $1,200
Lymph Node (Retroperitoneal) – Various Lesions, Radical Excision	$2,750 – $4,400	$660 – $1,200
Lymphatics (Face & Neck) – Cystic Hygroma, Excision (Large)	$2,750 – $4,400	$660 – $1,200
Lymphatics – Cystic Hygroma, Excision (Extensive) with/without Thoracotomy	$2,750 – $4,400	$660 – $1,200
Lymphatics – Lymphedema, Excision (Large & Deep Seated)	$2,750 – $4,400	$660 – $1,200
Lymphatics – Lymphedema, Thomson's Procedure	$2,750 – $4,400	$660 – $1,200

GROUP E

	Surgeon's Fees	Anaesthetist's Fees
Marrow – Various Lesions, Harvesting	$2,750 – $4,400	$660 – $1,200
Spleen – Trauma, Conservation	$2,750 – $4,400	$660 – $1,200
Spleen – Trauma, Splenectomy	$2,750 – $4,400	$660 – $1,200
Spleen – Various Non-Traumatic Lesions, Splenectomy	$2,750 – $4,400	$660 – $1,200

GROUP F

	Surgeon's Fees	Anaesthetist's Fees
Lymphatics – Lymphedema, Major Excision & Grafting	$3,500 – $5,500	$870 – $1,550
Spleen – Hypersplenism/Massive Enlargement, Splenectomy	$3,500 – $5,500	$870 – $1,550

GROUP G

	Surgeon's Fees	Anaesthetist's Fees
Lymphatics – Lymphedema, Excision (Extensive and Complex)	$4,950 – $6,600	$1,300 – $1,850
Lymphatics – Lymphedema, Lympho-Venous Anastomosis (Microsurgery)	$4,950 – $6,600	$1,300 – $1,850

SECTION 9 – INTEGUMENTARY SYSTEM

GROUP A

	Surgeon's Fees	Anaesthetist's Fees
Breast Aspiration – Cystic Lesions, Fine Needle Aspiration Cytology	$330 – $550	$200 – $270
Breast – Various Lesions, Trucut Biopsy	$330 – $550	$200 – $270
Lip – Hair Removal by Laser Phototherapy (per treatment)	$330 – $550	$200 – $270
Skin and Subcutaneous Tissue – Abscess, Saucerisation	$330 – $550	$200 – $270
Skin and Subcutaneous Tissue – Burns, Escharotomy (Limited)	$330 – $550	$200 – $270
Skin and Subcutaneous Tissue – Wound (Large), Secondary Suture	$330 – $550	$200 – $270
Skin and Subcutaneous Tissue – Wound, Debridement	$330 – $550	$200 – $270
Skin – Angioma, Cauterisation/Injection	$330 – $550	$200 – $270
Skin – Burns (less than 2%), Excision	$330 – $550	$200 – $270
Skin – Burns (more than 10%), Dressing	$330 – $550	$200 – $270
Skin – Mucous Membrane, Superficial Laceration equal/less than 5cm, Repair	$330 – $550	$200 – $270
Skin – Plantar Wart, Excision	$330 – $550	$200 – $270
Skin – Tattoo (less than 1%), Laser Excision	$330 – $550	$200 – $270
Skin – Tattoo, Repeat Laser Excision	$330 – $550	$200 – $270
Skin – Various Lesions of Face (Single), Excision Biopsy	$330 – $550	$200 – $270
Skin – Various Lesions, Collagen Sensitivity Test	$330 – $550	$200 – $270
Skin – Various Lesions, Intralesional Steroid Injection	$330 – $550	$200 – $270
Skin – Various Lesions, Trial Dermabrasion	$330 – $550	$200 – $270

GROUP B

	Surgeon's Fees	Anaesthetist's Fees
Breast Abscess – Small, Superficial	$500 – $820	$270 – $380
Carbuncle (Small) – Saucerisation	$500 – $820	$270 – $380
Face – Cosmetic Laser Phototherapy (Minor)	$500 – $820	$270 – $380
Mucous Membrane – Superficial Laceration equal/less than 3cm Repair	$500 – $820	$270 – $380
Mucous Membrane – Tumour/Cyst/Ulcer/Scar, Excision	$500 – $820	$270 – $380
Muscle and Deep Tissue – Foreign Body, Removal	$500 – $820	$270 – $380
Skin and Mucous Membrane – Laceration (less than or equal to 2.5 cm)	$500 – $820	$270 – $380
Skin and Mucous Membrane – Various Lesions, Excision Biopsy, Laser Ablation	$500 – $820	$270 – $380
Skin and Subcutaneous Tissue (Face and Neck) – Scar of less than 3cm, Revision	$500 – $820	$270 – $380
Skin and Subcutaneous Tissue – Defect, Free Graft (Split Skin Graft under 1/2%)	$500 – $820	$270 – $380
Skin and Subcutaneous Tissue – Defect, Staged Local Flap (Division)	$500 – $820	$270 – $380

GROUP B

	Surgeon's Fees	Anaesthetist's Fees
Skin and Subcutaneous Tissue – Foreign Body (Subcutaneous), Removal	$500 – $820	$270 – $380
Skin and Subcutaneous Tissue – Haematoma (Large Cellulitis/Similar Lesion, Incision with Drainage	$500 – $820	$270 – $380
Skin and Subcutaneous Tissue – Haematoma, Abscess (Small)/Similar Lesion, Incision with Drainage	$500 – $820	$270 – $380
Skin and Subcutaneous Tissue – Laceration (Superficial) of more than 5cm, Repair	$500 – $820	$270 – $380
Skin and Subcutaneous Tissue – Sebaceous Cyst, Excision	$500 – $820	$270 – $380
Skin and Subcutaneous Tissue – Sinus (Superficial), Excision	$500 – $820	$270 – $380
Skin – Keratoses/Warts/Similar Lesions, Excision (1-2 lesions)	$500 – $820	$270 – $380
Underarm – Hair Removal by Laser Phototherapy (per treatment)	$500 – $820	$270 – $380

GROUP C

	Surgeon's Fees	Anaesthetist's Fees
Abscess (Large, Deep) I & D + Saucerisation	$990 – $1,650	$330 – $440
Breast Abscess – Deep, Multiple and Drainage	$990 – $1,650	$330 – $440
Breast – Inverted/Hypertrophic Nipple, Surgical Eversion/ Reduction (Unilateral)	$990 – $1,650	$330 – $440
Breast – Lump/Lesion (Single), Excision (Open/with hookwire localization/Mammotome)	$990 – $1,650	$330 – $440
Breast – Lump, Non-Palpable – Biopsy	$990 – $1,650	$330 – $440
Breast – Mammotome Biopsy (Single)	$990 – $1,650	$330 – $440
Breast – Sentinel Lymph Node (Unilateral) Biopsy (Axilla)	$990 – $1,650	$330 – $440
Carbuncle (Large) – Saucerisation	$990 – $1,650	$330 – $440
Face – Cosmetic Laser Phototherapy (Major)	$990 – $1,650	$330 – $440
Fascia (Deep) – Rupture with Herniated Muscle, Repair	$990 – $1,650	$330 – $440
Forearms – Hair Removal by Laser Phototherapy (per treatment)	$990 – $1,650	$330 – $440
Laser Drainage of Breast Abscess	$990 – $1,650	$330 – $440
Laser Drainage/Debridement of Deep Muscle Abscess	$990 – $1,650	$330 – $440
Laser Excision/Saucerisation of Breast and Deep Muscle Sinus	$990 – $1,650	$330 – $440
Mucous Membrane (Ear/Nose/ Eyelid) – Laceration, Full Thickness Repair	$990 – $1,650	$330 – $440
Mucous Membrane – Deep Laceration/Multiple Lacerations, Repair	$990 – $1,650	$330 – $440
Mucous Membrane – Superficial Laceration more than 3cm Repair	$990 – $1,650	$330 – $440

GROUP C

	Surgeon's Fees	Anaesthetist's Fees
Pilonidal Sinus	$990 – $1,650	$330 – $440
Pre-Auricular Sinus	$990 – $1,650	$330 – $440
Skin and Mucous Membrane – Laceration (> 2.5 cm)	$990 – $1,650	$330 – $440
Skin and Subcutaneous Tissue (Ear/Nose/Eyelid) – Laceration, Full Thickness Repair	$990 – $1,650	$330 – $440
Skin and Subcutaneous Tissue (Face and Neck) – Scar of more than 3cm, Revision	$990 – $1,650	$330 – $440
Skin and Subcutaneous Tissue Defect (Deep) – Staged Distant Flap (Division)	$990 – $1,650	$330 – $440
Skin and Subcutaneous Tissue – Haemangioma/ Lymphangioma (Small), Excision	$990 – $1,650	$330 – $440
Skin and Subcutaneous Tissue – Burns, Escharotomy (Extensive)	$990 – $1,650	$330 – $440
Skin and Subcutaneous Tissue – Deep/Extensive Contaminated Wound, Debridement	$990 – $1,650	$330 – $440
Skin and Subcutaneous Tissue – Defect (Multiple Digits), Staged Local Flap (Division)	$990 – $1,650	$330 – $440
Skin and Subcutaneous Tissue – Defect (Single Digit), Free Full Thickness Graft	$990 – $1,650	$330 – $440
Skin and Subcutaneous Tissue – Defect, Free Grafts (Split Skin Graft 1/2% to less than 2%)	$990 – $1,650	$330 – $440
Skin and Subcutaneous Tissue – Laceration (Superficial) of more than 5cm Repair	$990 – $1,650	$330 – $440
Skin and Subcutaneous Tissue – Neurofibromatosis of Face and Neck, Excision (Small)	$990 – $1,650	$330 – $440
Skin and Subcutaneous Tissue – Periobital Dermoid, Excision	$990 – $1,650	$330 – $440
Skin and Subcutaneous Tissue – Sinus (Deep, Single), Excision	$990 – $1,650	$330 – $440
Skin and Subcutaneous Tissue – Tumour/Cyst Ulcer/Scar, Excision	$990 – $1,650	$330 – $440
Skin and Subcutaneous Tissue – Tumour/Cyst/Ulcer (Deep), Lipoma Excision	$990 – $1,650	$330 – $440
Skin – Burns (2% to 5%) Excision	$990 – $1,650	$330 – $440
Skin – Keratoses/Warts/Similar Lesions, Excision (2 to 4 Lesions)	$990 – $1,650	$330 – $440
Skin – Mucous Membrane, Superficial Laceration more than 5cm, Repair	$990 – $1,650	$330 – $440
Skin Plantar Warts (Multiple), Excision	$990 – $1,650	$330 – $440
Skin Scar, Removal of Tissue Expander Prosthesis and Revision of Scar	$990 – $1,650	$330 – $440
Skin – Scar, Revision with Z-plasty	$990 – $1,650	$330 – $440

GROUP C

	Surgeon's Fees	Anaesthetist's Fees
Skin – Subcutaneous Tissue, Various Lesions, Implants (Chin, Nose) Removal	$990 – $1,650	$330 – $440
Skin – Tattoo (1% to 2%), Laser Excision	$990 – $1,650	$330 – $440
Skin – Various Lesions of Face (2 to 3), Excision Biopsy	$990 – $1,650	$330 – $440
Skin – Various Lesions, Abrasive Therapy (Limited)	$990 – $1,650	$330 – $440
Skin – Various Lesions, Insertion of Tissue Expander (Single)	$990 – $1,650	$330 – $440
Subcutaneous Tissue (Face) – Obesity, Liposuction	$990 – $1,650	$330 – $440
Sweat Gland – Axillary, Hyperhidrosis, Wedge Excision	$990 – $1,650	$330 – $440
Tendon Sheath and Subcutaneous Tissue – Ganglion/ Small Bursa, Excision	$990 – $1,650	$330 – $440

GROUP D

	Surgeon's Fees	Anaesthetist's Fees
Abdomen – Hair Removal by Laser Phototherapy (per treatment)	$1,750 – $2,850	$430 – $770
Breast (Nipple) – Various Lesions, Reconstruction (Unilateral)	$1,750 – $2,850	$430 – $770
Breast – Cystosarcoma Phyllodes, Excision	$1,750 – $2,850	$430 – $770
Breast – Excision of Accessory Breast (Axillary) (Unilateral)	$1,750 – $2,850	$430 – $770
Breast – Gynecomastia, Reduction (Unilateral)	$1,750 – $2,850	$430 – $770
Breast – Hypoplasia, Augmentation Mammoplasty (Prosthesis and Unilateral) excluding cost of Implant	$1,750 – $2,850	$430 – $770
Breast – Inverted/ Hypertrophic Nipple, Surgical Eversion/ Reduction (Bilateral)	$1,750 – $2,850	$430 – $770
Breast – Lumps/Lesions (2 to 4), Excision (Open/with hookwire localization/Mammotome)	$1,750 – $2,850	$430 – $770
Breast – Mammotome Biopsies (2 to 4)	$1,750 – $2,850	$430 – $770
Breast – Microdochectomy (Unilateral)	$1,750 – $2,850	$430 – $770
Breast – Post Prosthetic Contraction, Capsulotomy (Unilateral)	$1,750 – $2,850	$430 – $770
Breast – Sentinel Lymph Nodes (Bilateral) Biopsy (Axilla)	$1,750 – $2,850	$430 – $770
Breast – Sentinel Lymph Node (Unilateral) Biopsy (Internal Mammary)	$1,750 – $2,850	$430 – $770
Breast – Tumour (Malignant), Lumpectomy/Segmental Mastectomy (without Axilla Node Dissection)	$1,750 – $2,850	$430 – $770
Botox Injection (per area or treatment)	$1,750 – $2,850	$430 – $770
Skin and Subcutaneous Tissue – Laceration (Deep)/ Multiple Lacerations, Repair	$1,750 – $2,850	$430 – $770
Skin and Subcutaneous Tissue – Defect (Deep) Free Graft (Split Skin Graft-Extensive/Inlay Graft using a Mould)	$1,750 – $2,850	$430 – $770

GROUP D

	Surgeon's Fees	Anaesthetist's Fees
Skin and Subcutaneous Tissue – Defect (Deep), Dermofat/ Fascia Graft (including Transplant/Muscle Flap)	$1,750 – $2,850	$430 – $770
Skin and Subcutaneous Tissue – Defect (Multiple Digits), Free Full Thickness Graft	$1,750 – $2,850	$430 – $770
Skin and Subcutaneous Tissue – Defect, Free Grafts (Split Skin Graft 2 to less than 5%)	$1,750 – $2,850	$430 – $770
Skin and Subcutaneous Tissue – Defect, Single Stage Local Flap (Simple/Small)	$1,750 – $2,850	$430 – $770
Skin and Mucous Membrane – Laceration (deep or multiple), Repair	$1,750 – $2,850	$430 – $770
Skin and Subcutaneous Tissue – Haemangioma/ Lymphangioma (Moderate), Excision	$1,750 – $2,850	$430 – $770
Skin and Subcutaneous Tissue – Sinus (Deep) Excision (Multiple)	$1,750 – $2,850	$430 – $770
Skin and Subcutaneous Tissue – Burns, Excision and Small Full Thickness Graft	$1,750 – $2,850	$430 – $770
Skin and Subcutaneous Tissue – Tumour/Cyst/Ulcer/ Lipoma Excision (Multiple)	$1,750 – $2,850	$430 – $770
Skin and Subcutaneous Tissue – Neurofibromatosis of Face and Neck, Excision (Moderate)	$1,750 – $2,850	$430 – $770
Skin and Subcutaneous Tissue – Tumour (Malignant), Excision and Reconstruction	$1,750 – $2,850	$430 – $770
Skin and Subcutaneous Tissue – Various Lesions, Creation of Dimples (Unmarked)	$1,750 – $2,850	$430 – $770
Skin and Subcutaneous Tissue – Various Lesions, Fat/Dermal Fillers to Face per cc/treatment	$1,750 – $2,850	$430 – $770
Skin – Burns (more than 5% to 10%) Excision	$1,750 – $2,850	$430 – $770
Skin – Keratoses/Warts/Similar Lesions, Excision (more than 5 lesions)	$1,750 – $2,850	$430 – $770
Skin – Scar (Extension) Extensive, Revision	$1,750 – $2,850	$430 – $770
Skin – Scars (two) Removal of Tissue Expander Prosthesis and Revision of Scars	$1,750 – $2,850	$430 – $770
Skin – Superficial Nasal Dermoid, Excision	$1,750 – $2,850	$430 – $770
Skin – Tattoo (Multiple/more than 2%), Laser Excision	$1,750 – $2,850	$430 – $770
Skin – Various Lesions, Abrasive Therapy (Extensive)	$1,750 – $2,850	$430 – $770
Skin – Various Lesions, Insertion of Tissue Expander (Two)	$1,750 – $2,850	$430 – $770
Soft Tissue – Tumour, Wide Excision	$1,750 – $2,850	$430 – $770
Subcutaneous Tissue (Calves/ Knees/ Ankles) – Liposuction	$1,750 – $2,850	$430 – $770
Subcutaneous Tissue (Cheeks/ Neck) – Liposuction	$1,750 – $2,850	$430 – $770
Sweat Gland – Axillary, Hyperhidrosis Excision (Complete)	$1,750 – $2,850	$430 – $770

GROUP E

	Surgeon's Fees	Anaesthetist's Fees
Breast – Diffuse Hypertrophy, Reduction Mammoplasty (Unilateral)	$2,750 – $4,400	$660 – $1,200
Breast – Drooping Breast, Mastopexy (Unilateral)	$2,750 – $4,400	$660 – $1,200
Breast – Excision of Accessory Breast (Axillary) (Bilateral)	$2,750 – $4,400	$660 – $1,200
Breast – Lumps/Lesions (5 or more), Excision (Open/with hookwire localization/Mammotome)	$2,750 – $4,400	$660 – $1,200
Breast – Mammotome Biopsies (5 or more)	$2,750 – $4,400	$660 – $1,200
Breast (Nipple) – Various Lesions, Reconstruction (Bilateral)	$2,750 – $4,400	$660 – $1,200
Breast – Post Contraction, Capsulotomy, (Bilateral)	$2,750 – $4,400	$660 – $1,200
Breast – Post Mastectomy, Reconstruction (Unilateral)	$2,750 – $4,400	$660 – $1,200
Breast – Radical Mastectomy with Skin Graft	$2,750 – $4,400	$660 – $1,200
Breast – Sentinel Lymph Nodes (Bilateral) Biopsy (Internal Mammary)	$2,750 – $4,400	$660 – $1,200
Breast – Tumor (Malignant), Lumpectomy/Segmental Mastectomy with Sentinel Node Biopsy (Unilateral)	$2,750 – $4,400	$660 – $1,200
Breast – Tumour (Malignant), Simple Mastectomy with Axillary Sampling	$2,750 – $4,400	$660 – $1,200
Breast – Tumour (Malignant), Simple Mastectomy	$2,750 – $4,400	$660 – $1,200
Breast – Various Lesions, Unilateral/Subcutaneous Mastectomy	$2,750 – $4,400	$660 – $1,200
Hand – Burns (Major), Excision and Split Skin Graft	$2,750 – $4,400	$660 – $1,200
Legs – Hair Removal by Laser Phototherapy (per treatment)	$2,750 – $4,400	$660 – $1,200
Nerve – Facial Paralysis, Free Fascia and Nerve Graft (Microsurgical – Stage 1)	$2,750 – $4,400	$660 – $1,200
Nerve – Facial Paralysis, Free Fascia Graft	$2,750 – $4,400	$660 – $1,200
Nerve – Facial Paralysis, Muscle Transfer/Graft	$2,750 – $4,400	$660 – $1,200
Skin – Burns (more than 10%) Excision	$2,750 – $4,400	$660 – $1,200
Skin – Burns, Excision and Free Skin Graft less than 2%	$2,750 – $4,400	$660 – $1,200
Skin and Mucous Membrane – Laceration (multiple & complex), Repair	$2,750 – $4,400	$660 – $1,200
Skin and Subcutaneous Tissue – Burns, Excision and Major Full Thickness Graft	$2,750 – $4,400	$660 – $1,200
Skin and Subcutaneous Tissue – Defect, Direct Flap (Cross Finger/Similar Flaps)	$2,750 – $4,400	$660 – $1,200
Skin and Subcutaneous Tissue – Defect, Free Grafts (Split Skin Graft 5% to 10%)	$2,750 – $4,400	$660 – $1,200
Skin and Subcutaneous Tissue – Haemangioma/ Lymphangioma (Large), Excision	$2,750 – $4,400	$660 – $1,200
Skin and Subcutaneous Tissue – Neurofibromatosis of Face and Neck, Excision (Large)	$2,750 – $4,400	$660 – $1,200
Skin and Subcutaneous Tissue – Scalp Baldness, Hair Transplant (Per Session)	$2,750 – $4,400	$660 – $1,200

GROUP E

	Surgeon's Fees	Anaesthetist's Fees
Skin and Subcutaneous Tissue – Tumour (Malignant), Excision with Immediate Block Dissection	$2,750 – $4,400	$660 – $1,200
Skin and Subcutaneous Tissue – Various Lesions, Fat Autologous Augmentation (Large Area) per session	$2,750 – $4,400	$660 – $1,200
Skin and Subcutaneous Tissue – Various Tissues, Various Lesions, Creation of Dimples (Bilateral)	$2,750 – $4,400	$660 – $1,200
Skin and Subcutaneous Tissue/Baldness – Scalp Reduction (Hair Transplant)	$2,750 – $4,400	$660 – $1,200
Subcutaneous Tissue – Obesity, Lipectomy (Transverse Wedge Excision of Abdominal Apron/Lipectomy with Excision of Skin)	$2,750 – $4,400	$660 – $1,200
Subcutaneous Tissue (Abdomen) – Obesity Liposuction	$2,750 – $4,400	$660 – $1,200
Subcutaneous Tissue (Back) – Liposuction	$2,750 – $4,400	$660 – $1,200
Subcutaneous Tissue (Buttocks) – Obesity Liposuction	$2,750 – $4,400	$660 – $1,200
Subcutaneous Tissue (Thigh) – Obesity Liposuction	$2,750 – $4,400	$660 – $1,200
Subcutaneous Tissue (Upper Limbs) – Obesity Liposuction	$2,750 – $4,400	$660 – $1,200

GROUP F

	Surgeon's Fees	Anaesthetist's Fees
Breast – Drooping Breast, Mastopexy (Bilateral)	$3,500 – $5,500	$870 – $1,550
Breast – Gynaecomastia, Reduction (Bilateral) Major/Large	$3,500 – $5,500	$870 – $1,550
Breast – Hypoplasia, Augmentation Mammoplasty (Prosthetic and Bilateral), excluding cost of Implants	$3,500 – $5,500	$870 – $1,550
Breast – Tumour (Malignant), Radical Mastectomy	$3,500 – $5,500	$870 – $1,550
Breast – Various Lesions, Bilateral/Subcutaneous Mastectomy	$3,500 – $5,500	$870 – $1,550
Breast Malignancy – Wide Excision and Axillary Clearance	$3,500 – $5,500	$870 – $1,550
Breast – Malignant Tumour – Mastectomy and Axillary Clearance	$3,500 – $5,500	$870 – $1,550
Breast – Microdochectomy (Bilateral/Multiple)	$3,500 – $5,500	$870 – $1,550
Breast – Post Contracture, Capsulectomy (Unilateral)	$3,500 – $5,500	$870 – $1,550
Breast – Post Mastectomy, Reconstruction (Bilateral)	$3,500 – $5,500	$870 – $1,550
Skin and Subcutaneous Tissue – Burns, Excision and Major Flap Repair	$3,500 – $5,500	$870 – $1,550
Skin and Subcutaneous Tissue – Defect (Deep), Direct Flap (Cross Arm/Radial Fore Arm/Abdominal/Similar)	$3,500 – $5,500	$870 – $1,550
Skin and Subcutaneous Tissue – Defect (Deep), Direct Flap Repair (Cross Leg)	$3,500 – $5,500	$870 – $1,550
Skin and Subcutaneous Tissue – Defect, Free Grafts (Split Skin Graft more than 10%)	$3,500 – $5,500	$870 – $1,550
Skin and Subcutaneous Tissue – Defect, Local Flap to Multiple Digits (Cross Finger/Thenar/Flag/Rotation Flap)	$3,500 – $5,500	$870 – $1,550

GROUP F

	Surgeon's Fees	Anaesthetist's Fees
Skin and Subcutaneous Tissue – Defect, Single Stage Local Flap (Complicated/ Large)	$3,500 – $5,500	$870 – $1,550
Skin and Subcutaneous Tissue – Haemangioma/ Lymphangioma (Large and Deep-Seated), Excision	$3,500 – $5,500	$870 – $1,550
Skin and Subcutaneous Tissue – Neurofibromatosis of Face and Neck Excision (Large and Complicated)	$3,500 – $5,500	$870 – $1,550
Soft Tissue, Tumour (Malignant) – Radical Excision	$3,500 – $5,500	$870 – $1,550
Subcutaneous Tissue, Obesity – Lipectomy (Excision with Undermining of Skin Edges and Strengthening of Abdominal Wall)	$3,500 – $5,500	$870 – $1,550

GROUP G

	Surgeon's Fees	Anaesthetist's Fees
Breast – Post Mastectomy, Reconstruction using Distant Musculocutaneous Flap (Unilateral)	$4,950 – $6,600	$1,300 – $1,850
Breast – Tumor (Malignant), Lumpectomy/Segmental Mastectomy with Axillary Node Dissection/Sentinel Node Biopsy (Bilateral)	$4,950 – $6,600	$1,300 – $1,850
Breast – Tumor (Malignant), Simple Mastectomy (Bilateral)	$4,950 – $6,600	$1,300 – $1,850
Lymphatics and Subcutaneous Tissue – Lymphedema, Major Excision and Grafting Skin – Wrinkles, Partial Rhytidectomy	$4,950 – $6,600	$1,300 – $1,850

GROUP H

	Surgeon's Fees	Anaesthetist's Fees
Breast – Bilateral Mastectomy, with or without Axillary Clearance	$5,500 – $8,800	$1,400 – $2,550
Breast – Diffuse Hypertrophy, Reduction Mammoplasty (Bilateral)	$5,500 – $8,800	$1,400 – $2,550
Breast – Post-Contracture, Capsulectomy (Bilateral)	$5,500 – $8,800	$1,400 – $2,550
Breast – Post Mastectomy, Reconstruction using Distant Musculocutaneous Flap (Bilateral)	$5,500 – $8,800	$1,400 – $2,550
Breast – Post Mastectomy Reconstruction using Transverse Rectus Abdominis Musculocutaneous Flap (Unilateral)	$5,500 – $8,800	$1,400 – $2,550
Breast – Post Mastectomy, Reconstruction using Transverse Rectus Abdominis Musculocutaneous Flap (Bilateral)	$5,500 – $8,800	$1,400 – $2,550
Breast – Tumor (Malignant), Modified Radical Mastectomy/ Mastectomy with Axillary Clearance (Bilateral)	$5,500 – $8,800	$1,400 – $2,550
Nerve-Facial – Paralysis, Free Fascia and Nerve Graft (Microsurgical – Stage 2)	$5,500 – $8,800	$1,400 – $2,550

GROUP H

	Surgeon's Fees	Anaesthetist's Fees
Skin and Subcutaneous Tissue – Defect (Deep), Free Flaps	$5,500 – $8,800	$1,400 – $2,550
Skin and Subcutaneous Tissue – Haemangioma/ Lymphangioma (Extensive and Complex), (Excision)	$5,500 – $8,800	$1,400 – $2,550
Skin and Subcutaneous Tissue – Neurofibromatosis of Face and Neck, Excision (Extensive and Complex)	$5,500 – $8,800	$1,400 – $2,550
Skin – Wrinkles, Total Rhytidectomy	$5,500 – $8,800	$1,400 – $2,550
Subcutaneous Tissue – Obesity, Radical Abdominoplasty with Repair of Abdominal Wall and Transposition of Umbilicus	$5,500 – $8,800	$1,400 – $2,550
Skin and Subcutaneous Tissue – Tumour/Haemangioma/ Lymphangioma Excision (Extensive and Complex) and Free Flap Reconstruction	$5,500 – $8,800	$1,400 – $2,550

SECTION 10 – MALE GENITAL SYSTEM

GROUP A

	Surgeon's Fees	Anaesthetist's Fees
Penis – Paraphimosis/Phimosis/Reduction Prepuce, Circumcision	$330 – $550	$200 – $270
Penis – Penile Warts, Laser Vaporisation	$330 – $550	$200 – $270
Penis – Priapism, Decompression (Aspiration)	$330 – $550	$200 – $270
Penis – Various Lesions, Excision	$330 – $550	$200 – $270
Prostate – Cyst, Transurethral Ultrasound Guided Aspiration	$330 – $550	$200 – $270
Prostate – Various Lesions, Needle Biopsy	$330 – $550	$200 – $270
Seminal Vesicles – Various Lesions, Transurethral Ultrasound Guided Aspiration/Injection	$330 – $550	$200 – $270
Testis – Undescended/Ectopic, Secondary Detachment from Thigh	$330 – $550	$200 – $270
Testis – Various Lesions, Biopsy	$330 – $550	$200 – $270

GROUP B

	Surgeon's Fees	Anaesthetist's Fees
Penis – Paraphimosis/Phimosis/Reduction Prepuce, Laser Circumcision	$500 – $800	$270 – $380
Penis – Hypospadias, Correction of Chordee	$500 – $820	$270 – $380
Penis – Hypospadias, Meatotomy & Hemicircumcision	$500 – $820	$270 – $380
Spermatic Cord – Hydrocele/Varicocele, Removal (Unilateral)	$500 – $820	$270 – $380
Spermatic Cord – Spermatocele/Epididymal Cyst, Excision	$500 – $820	$270 – $380
Spermatic Cord – Various Lesions, Epididymectomy	$500 – $820	$270 – $380
Testis – Various Lesions, Exploration/Repair	$500 – $820	$270 – $380
Testis – Various Lesions, Orchidectomy (Simple)	$500 – $820	$270 – $380
Testis – Various Lesions, Orchidoplasty	$500 – $820	$270 – $380
Vas Deferens – Various Lesions, Vasectomy	$500 – $820	$270 – $380
Vas Deferens – Various Lesions, Vasoepididymography & Vasovesiculography	$500 – $820	$270 – $380

GROUP C

	Surgeon's Fees	Anaesthetist's Fees
Penis – Epispadias, Repair not involving Sphincter (each stage)	$990 – $1,650	$330 – $440
Penis – Hypospadias, Secondary Correction	$990 – $1,650	$330 – $440
Penis – Trauma, Repair of Laceration/Fracture involving Cavernous Tissue	$990 – $1,650	$330 – $440
Penis – Tumour, Amputation (Partial)	$990 – $1,650	$330 – $440
Prostate Gland – Abscess, Retropubic/Endoscopic Drainage	$990 – $1,650	$330 – $440
Prostate Gland – Various Lesions, TUR Biopsy	$990 – $1,650	$330 – $440
Spermatic Cord – Hydrocele/Varicocele, Removal (Bilateral)	$990 – $1,650	$330 – $440

GROUP C

	Surgeon's Fees	Anaesthetist's Fees
Testis – Undescended/Ectopic (Unilateral), Orchidopexy/Transplantation with Hernia Repair	$990 – $1,650	$330 – $440
Testis – Various Lesions, Orchidectomy with Complete Excision of Spermatic Cord	$990 – $1,650	$330 – $440

GROUP D

	Surgeon's Fees	Anaesthetist's Fees
Penis – Epispadias, Repair involving Bladder Neck Closure	$1,750 – $2,850	$430 – $770
Penis – Hypospadias, Correction of Chordee with Transposition of Prepuce	$1,750 – $2,850	$430 – $770
Penis – Hypospadias, Urethral Reconstruction	$1,750 – $2,850	$430 – $770
Penis – Peyronie's Disease, Operation	$1,750 – $2,850	$430 – $770
Penis – Priapism, Decompression (Shunt Operation)	$1,750 – $2,850	$430 – $770
Penis – Trauma, Repair of Avulsions	$1,750 – $2,850	$430 – $770
Penis – Tumour, Amputation (Total)	$1,750 – $2,850	$430 – $770
Prostate Gland – Various Lesions, Insertion of Stent	$1,750 – $2,850	$430 – $770
Prostate Gland – Various Lesions, Ablation (Microwave/Laser/Radiofrequency)	$1,750 – $2,850	$430 – $770
Prostate Gland – Various Lesions, Prostatectomy (Open)	$1,750 – $2,850	$430 – $770
Prostate Gland – Various Lesions, Transurethral Resection of Prostate (less than 30 gm)	$1,750 – $2,850	$660 – $1,200
Testis – Undescended/Ectopic (Bilateral), Orchidopexy/Transplantation with Hernia Repair	$1,750 – $2,850	$660 – $1,200
Varicocele – Various Lesions, Varicocelectomy (Microsurgical)	$1,750 – $2,850	$430 – $770
Vas Deferens – Various Lesions, Reanastomosis	$1,750 – $2,850	$430 – $770
Vas Deferens – Various Lesions, Vasoepididymostomy	$1,750 – $2,850	$430 – $770

GROUP E

	Surgeon's Fees	Anaesthetist's Fees
Penis – Hypospadias, Urethral Reconstruction & Correction of Chordee	$2,750 – $4,400	$660 – $1,200
Penis – Trauma Reconstruction (2nd Stage)	$2,750 – $4,400	$660 – $1,200
Penis – Various Lesions, Insertion of Penile Prosthesis	$2,750 – $4,400	$660 – $1,200
Prostate Gland – Various Lesions, Transurethral Resection of Prostate (more than 30 gm)	$2,750 – $4,400	$660 – $1,200
Testis – Undescended/Ectopic, Orchidopexy with Microvascular	$2,750 – $4,400	$660 – $1,200
Anastomosis Vas Deferens – Various Lesions, Exploration (Microsurgical) and Testicular Biopsy	$2,750 – $4,400	$660 – $1,200

GROUP E

	Surgeon's Fees	Anaesthetist's Fees
Vas Deferens – Various Lesions, Reanastomosis (Microsurgical)	$2,750 – $4,400	$660 – $1,200
Vas Deferens – Various Lesions, Vasoepididymostomy (Microsurgical)	$2,750 – $4,400	$660 – $1,200

GROUP F

	Surgeon's Fees	Anaesthetist's Fees
Penis – Trauma, Reconstruction (Ist Stage)	$3,500 – $5,500	$870 – $1,550
Penis – Tumour, Amputation (Total) with Block Dissection	$3,500 – $5,500	$870 – $1,550
Prostate Gland – Various Lesions, Total Prostatectomy (Open)	$3,500 – $5,500	$870 – $1,550
Testis – Tumour, Retroperitoneal Lymph Node Dissection following Orchidectomy	$3,500 – $5,500	$870 – $1,550

GROUP G

	Surgeon's Fees	Anaesthetist's Fees
Penis – Trauma (Amputation), Microvascular Reattachment	$4,950 – $6,600	$1,300 – $1,850

SECTION 11 – MUSCULOSKELETAL SYSTEM

GROUP A

	Surgeon's Fees	Anaesthetist's Fees
UPPER LIMB		
Application of Full Plasters	$330 – $550	$200 – $270
Removal of Plaster Cast Under Anaesthesia	$330 – $550	$200 – $270
LOWER LIMB		
Application of Full Plasters	$330 – $550	$200 – $270
Removal of Plaster Cast Under Anaesthesia	$330 – $550	$200 – $270
Simple Wedge Excision/Avulsion of Toe Nail	$330 – $550	$200 – $270

GROUP B

	Surgeon's Fees	Anaesthetist's Fees
UPPER LIMB		
Decompression of Tendon Sheath and Synovial Biopsies (eg. Trigger Finger)	$500 – $820	$270 – $380
Drainage of Abscesses (Superficial)	$500 – $820	$270 – $380
Manipulation and Reduction under General Anaesthesia for Greenstick Fractures and Simple Dislocations	$500 – $820	$270 – $380
Minor Skin Graft	$500 – $820	$270 – $380
Removal of Simple Implants	$500 – $820	$270 – $380
Zadik's Operation or Matrixectomy of Toe Nails	$500 – $820	$270 – $380
SPINE		
Primary Application of Localiser Cast, Full Body Jacket and Minnerva Jacket	$500 – $820	$270 – $380
LOWER LIMB		
Incision and Drainage of Superficial Abscesses	$500 – $820	$270 – $380
Manipulation and Reduction of Greenstick Fractures and Simple Dislocation	$500 – $820	$270 – $380
Removal of Simple Implants	$500 – $820	$270 – $380

GROUP C

	Surgeon's Fees	Anaesthetist's Fees
UPPER LIMB		
Amputation – Single Digit with Reconstruction/ Terminalisation	$990 – $1,650	$330 – $440
Decompression of Carpal Tunnel	$990 – $1,650	$330 – $440
Decompression of Trigger Thumb	$990 – $1,650	$330 – $440
Drainage of Deep Muscle Abscess	$990 – $1,650	$330 – $440
Excision – Arthroplasty of Small Joints	$990 – $1,650	$330 – $440

GROUP C

	Surgeon's Fees	Anaesthetist's Fees
Excision of Ganglion and Small Lumps	$990 – $1,650	$330 – $440
Excision of Lower End of Ulna	$990 – $1,650	$330 – $440
Excision of Olecranon Bursa	$990 – $1,650	$330 – $440
Excision of Radial Head	$990 – $1,650	$330 – $440
Local Skin Flaps	$990 – $1,650	$330 – $440
Major Desloughing	$990 – $1,650	$330 – $440
Major Skin Grafts	$990 – $1,650	$330 – $440
Manipulation and Reduction under Local or Regional Anaesthesia for Fractures and Dislocations	$990 – $1,650	$330 – $440
Nail Bed Repair	$990 – $1,650	$330 – $440
Removal of Deep Implants	$990 – $1,650	$330 – $440
Repair of Single Extensor Tendon and Simple Tenotomy	$990 – $1,650	$330 – $440
Simple Drainage Procedure for Osteomyelitis and Septic Arthritis	$990 – $1,650	$330 – $440
Wound Debridement of Minor Crush Hand	$990 – $1,650	$330 – $440
SPINE		
Application of Skull Calipers	$990 – $1,650	$330 – $440
LOWER LIMB		
Amputation of Single Digit	$990 – $1,650	$330 – $440
Excision of Ganglion and Small Lumps	$990 – $1,650	$330 – $440
Floating Osteotomy of One Metatarsal	$990 – $1,650	$330 – $440
Major Desloughing	$990 – $1,650	$330 – $440
Primary Repair of Tendon (other than Tendo-Achilles) – Single	$990 – $1,650	$330 – $440
Removal of Deep Implants	$990 – $1,650	$330 – $440
Repair of Single Peripheral Nerve	$990 – $1,650	$330 – $440
Wound Debridement of Minor Crush Injury to the Foot	$990 – $1,650	$330 – $440

GROUP D

	Surgeon's Fees	Anaesthetist's Fees
HEAD-FACE		
Maxilla, Alveolar Cleft (Incomplete), Bone Graft	$1,750 – $2,850	$430 – $770
UPPER LIMB		
Complicated Removal of Implants	$1,750 – $2,850	$430 – $770
Decompression of Nerve Entrapment Syndromes, Cubital Tunnel, etc.	$1,750 – $2,850	$430 – $770
Excision of Benign Tumour in Hand	$1,750 – $2,850	$430 – $770
Fasciotomy for Vascular Insufficiency	$1,750 – $2,850	$430 – $770

GROUP D

	Surgeon's Fees	Anaesthetist's Fees
Percutaneous Fixation of Supracondylar Fractures in children	$1,750 – $2,850	$430 – $770
Reduction and Internal Fixation of Phalangeal Fractures and Metacarpal Fractures	$1,750 – $2,850	$430 – $770
Reduction and Internal Fixation with Wires and Tension Bands of Olecranon Fracture, Condylar Fractures, etc.	$1,750 – $2,850	$430 – $770
Open Reduction, Wound Debridement for Compound Fractures and Dislocations	$1,750 – $2,850	$430 – $770
Percutaneous Wiring of Phalangeal or Metacarpal Fractures	$1,750 – $2,850	$430 – $770
Primary Repair of Flexor Tendon (Single)	$1,750 – $2,850	$430 – $770
Synovectomy of Digit	$1,750 – $2,850	$430 – $770
Synovectomy of Flexor and Extensor Tendons	$1,750 – $2,850	$430 – $770
Synovectomy of Small Joints	$1,750 – $2,850	$430 – $770
Wound Debridement for Major Crush Injuries of the Hand	$1,750 – $2,850	$430 – $770
SPINE		
Release of Torticollis	$1,750 – $2,850	$430 – $770
Removal of Spinal Implant – Simple	$1,750 – $2,850	$430 – $770
Vertebroplasty – Single Level	$1,750 – $2,850	$430 – $770
LOWER LIMB		
Arthrodesis of Single Small Joint	$1,750 – $2,850	$430 – $770
Arthrotomy of the Hip	$1,750 – $2,850	$430 – $770
Arthrotomy of the Knee	$1,750 – $2,850	$430 – $770
Complicated Removal of Implants	$1,750 – $2,850	$430 – $770
Corrective Surgery for Hallux Valgus – Simple	$1,750 – $2,850	$430 – $770
Decompression of Nerve Entrapment Syndromes	$1,750 – $2,850	$430 – $770
Excision of Popliteal Cyst	$1,750 – $2,850	$430 – $770
Floating Osteotomy of two or more Metatarsals	$1,750 – $2,850	$430 – $770
Manipulation and "K" Wire fixation of Fractures/ Dislocation of the Foot	$1,750 – $2,850	$430 – $770
Minor Procedures for Club Foot, eg. Elongation of Tendons	$1,750 – $2,850	$430 – $770
Open Reduction and Internal Fixation of Wires, Single Screw or Tension Bands, eg. Malleolar Fracture	$1,750 – $2,850	$430 – $770
Open Reduction and Wound Debridement of Compound Fracture and Dislocations	$1,750 – $2,850	$430 – $770
Patellectomy	$1,750 – $2,850	$430 – $770
Primary Repair of Tendon – Multiple	$1,750 – $2,850	$430 – $770
Secondary Repair of Tendon and Primary Repair of Tendo-Achilles	$1,750 – $2,850	$430 – $770
Simple Drainage Procedures for Osteomyelitis	$1,750 – $2,850	$430 – $770

GROUP D

	Surgeon's Fees	Anaesthetist's Fees
Small Joint Arthroplasty, eg. Fowler's	$1,750 – $2,850	$430 – $770
Synovectomies of Small Joint	$1,750 – $2,850	$430 – $770
Wound Debridement of Major Crush Injuries to the Foot	$1,750 – $2,850	$430 – $770

GROUP E

	Surgeon's Fees	Anaesthetist's Fees
HEAD-FACE		
Maxilla, Alveolar Cleft (Complete), Bone Graft and Closure of Nasobuccal Fistula	$2,750 – $4,400	$660 – $1,200
UPPER LIMB		
Amputation Proximal to Metacarpals or Multiple Digits	$2,750 – $4,400	$660 – $1,200
Amputation of the Arm or Forearm	$2,750 – $4,400	$660 – $1,200
Arthroplasty of Small Joints – Replacement, eg. Silastic Joints or Total Joints	$2,750 – $4,400	$660 – $1,200
Arthroscopic Operations, eg. Removal of Loose Bodies, Shaving of Triangular Cartilage and Biopsy	$2,750 – $4,400	$660 – $1,200
Arthroscopic Shoulder Procedure, eg. Sub-Acromio Decompression	$2,750 – $4,400	$660 – $1,200
Correction of Syndactyly or Polydactyly	$2,750 – $4,400	$660 – $1,200
Corrective Surgery for Bone and Joint Deformities and Contractures, eg. Osteotomies	$2,750 – $4,400	$660 – $1,200
Extensive Currettage, Debridement and Irrigation for Osteomyelitis or Septic Arthritis	$2,750 – $4,400	$660 – $1,200
Fasciotomy for Dupuytren's Contractures	$2,750 – $4,400	$660 – $1,200
Fixation of Scaphoid Fractures	$2,750 – $4,400	$660 – $1,200
Major Excision of Benign Tumours, Hamartoma, eg. Large Haemangiomas	$2,750 – $4,400	$660 – $1,200
Major Soft Tissues, Muscles and Tendon Release in Deformities and Contractures of Cerebral Palsy	$2,750 – $4,400	$660 – $1,200
Open Reduction and Internal Fixation of Fractures with Plates, Nails, Rods, etc. Operation on the Clavicle (Fractures and Dislocation)	$2,750 – $4,400	$660 – $1,200
Primary Repair of Multiple Flexor Tendons (2 to 4)	$2,750 – $4,400	$660 – $1,200
Repair of Multiple Extensor Tendons	$2,750 – $4,400	$660 – $1,200
Synovectomies of Large Joints	$2,750 – $4,400	$660 – $1,200
Transposition of Nerve with or without Condylectomy	$2,750 – $4,400	$660 – $1,200
SPINE		
Removal of Spinal Implant – Complicated	$2,750 – $4,400	$660 – $1,200
Vertebroplasty – Multiple Level	$2,750 – $4,400	$660 – $1,200

GROUP E

	Surgeon's Fees	Anaesthetist's Fees
LOWER LIMB		
Amputation Proximal to Metatarsals	$2,750 – $4,400	$660 – $1,200
Ankle Fractures and Dislocations – Open Reduction and Internal Fixation	$2,750 – $4,400	$660 – $1,200
Arthroscopic or Open Synovectomies of Knees and Ankles	$2,750 – $4,400	$660 – $1,200
Arthroscopy – Therapeutic: Debridement	$2,750 – $4,400	$660 – $1,200
Arthroscopy – Therapeutic: Fixation of Osteochondritic Fragment	$2,750 – $4,400	$660 – $1,200
Arthroscopy – Therapeutic: Lateral Release	$2,750 – $4,400	$660 – $1,200
Arthroscopy – Therapeutic: Menisectomy	$2,750 – $4,400	$660 – $1,200
Arthroscopy – Therapeutic: Removal of Loose Body	$2,750 – $4,400	$660 – $1,200
Arthroscopy – Therapeutic: Synovectomy	$2,750 – $4,400	$660 – $1,200
Corrective Surgery for Hallux Valgus – Complex	$2,750 – $4,400	$660 – $1,200
Epiphysiodesis and Epiphysiolysis	$2,750 – $4,400	$660 – $1,200
Extensive Drainage, Currettage with Irrigation for Osteomyelitis or Septic Arthritis	$2,750 – $4,400	$660 – $1,200
External Fixation, Intramedullary Nailing High Tibial Osteotomy	$2,750 – $4,400	$660 – $1,200
External Fixation, Intramedullary Nail without Interlocking	$2,750 – $4,400	$660 – $1,200
Major Excision of Benign Tumours		
Major Soft Tissues, Muscle and Tendon Release, eg. Club Foot, Cerebral Palsy	$2,750 – $4,400	$660 – $1,200
Operations for Recurrent Dislocation of Patella and Chondromalacia Patella and Fixation of Patellar Fractures	$2,750 – $4,400	$660 – $1,200
Primary Reconstructive Procedures of Knee Ligaments	$2,750 – $4,400	$660 – $1,200
Reconstruction of Tendo-Achilles	$2,750 – $4,400	$660 – $1,200
Secondary Ligamentous Reconstructive Procedures around the Knee, eg. ACL Repairs	$2,750 – $4,400	$660 – $1,200

GROUP F

	Surgeon's Fees	Anaesthetist's Fees
HEAD-FACE		
Maxilla, Alveolar Cleft (Bilateral) Bone Graft and Closure of Bilateral	$3,500 – $5,500	$870 – $1,550
Nasobuccal Fistula	$3,500 – $5,500	$870 – $1,550
UPPER LIMB		
Arthrodesis of Large Joints	$3,500 – $5,500	$870 – $1,550
Arthroplasty of the Shoulder or Elbow Joints, eg. Skin Arthroplasty	$3,500 – $5,500	$870 – $1,550
Arthroscopic Shoulder Procedure, eg. Shoulder Stabilisation	$3,500 – $5,500	$870 – $1,550

GROUP F

	Surgeon's Fees	Anaesthetist's Fees
Corrective Surgery for Bone and Joint Deformities and Contractures – Osteotomy and Fixation	$3,500 – $5,500	$870 – $1,550
Major Excision of Malignant Tumours without Reconstruction	$3,500 – $5,500	$870 – $1,550
Nerve Grafting, Interfascicular Repair and Neurovascular Transfer	$3,500 – $5,500	$870 – $1,550
Neurovascular Island Flaps	$3,500 – $5,500	$870 – $1,550
Open reduction of All Unreduced Dislocation and Fractures	$3,500 – $5,500	$870 – $1,550
Operation for Delayed or Non-union with Bone Grafting with or without Plating	$3,500 – $5,500	$870 – $1,550
Primary Repair of Multiple Flexor Tendons (5 and above)	$3,500 – $5,500	$870 – $1,550
Reconstructive Procedures of the Shoulder – Putti-Platt, Bankart's Bristow, etc.	$3,500 – $5,500	$870 – $1,550
Repair of Single Major Nerve, eg. Median, Ulnar or Multiple Digital Nerves	$3,500 – $5,500	$870 – $1,550
Secondary Repair of Tendons, Tendon Graft and Tendon Transfer	$3,500 – $5,500	$870 – $1,550
Wrist Ligament Reconstruction for Instability	$3,500 – $5,500	$870 – $1,550
LOWER LIMB		
Arthrodesis of Large Joints	$3,500 – $5,500	$870 – $1,550
Arthroplasty of Large Joints – Excision or Interposition	$3,500 – $5,500	$870 – $1,550
Arthroscopy – Meniscal Repair/Menisectomy with Ligament Reconstruction	$3,500 – $5,500	$870 – $1,550
Corrective Surgery in Bone and Joint Deformities and Contractures, eg. Osteotomy and Fixation (other than High Tibial Osteotomy)	$3,500 – $5,500	$870 – $1,550
Disarticulation of the Hip	$3,500 – $5,500	$870 – $1,550
External Fixation, Intramedullary Nail with Interlocking Nail	$3,500 – $5,500	$870 – $1,550
Fixation with Plate and Pin and Screws of Intertrochanteric Fracture and other Bones	$3,500 – $5,500	$870 – $1,550
Hemi-Replacement Arthroplasty, eg. Moore's and Thomson Arthroplasty	$3,500 – $5,500	$870 – $1,550
Major Excision of Malignant Tumours without Reconstruction	$3,500 – $5,500	$870 – $1,550
Operations for Delayed and Non-union of the Femur and Tibia	$3,500 – $5,500	$870 – $1,550
Repair of Major Nerves, eg. Sciatic, Lateral and Medial Popliteal	$3,500 – $5,500	$870 – $1,550
Triple Fusion Arthrodesis	$3,500 – $5,500	$870 – $1,550

GROUP G

	Surgeon's Fees	Anaesthetist's Fees
HEAD-FACE		
Maxilla, Leforte III Fracture, Reduction and Fixation (excluding Cost of Implants)	$4,950 – $6,600	$1,300 – $1,850
Trauma, Craniofacial Approach Reduction and Fixation with Bone Graft (excluding Cost of Implants)	$4,950 – $6,600	$1,300 – $1,850
SPINE		
Discectomy – One Level	$4,950 – $6,600	$1,300 – $1,850
Posterior Spinal Fusion	$4,950 – $6,600	$1,300 – $1,850
UPPER LIMB		
Combination of Various Procedures, eg. Wrist Arthrodesis and Tendon Transfer, Muscle Slide and Bone Shortening of the Forearm	$4,950 – $6,600	$1,300 – $1,850
Forequarter Amputation	$4,950 – $6,600	$1,300 – $1,850
Major Excision of Malignant Tumours	$4,950 – $6,600	$1,300 – $1,850
Major Reconstructive Procedures of Hand Deformities, eg. Pollicization, Syndactyly or Hansen's Disease	$4,950 – $6,600	$1,300 – $1,850
Open Reduction and Fixation of Major Fractures with or without Arterial Injury	$4,950 – $6,600	$1,300 – $1,850
Total Joint Replacement of the Wrist, Elbow or Shoulder	$4,950 – $6,600	$1,300 – $1,850
SPINE		
One Stage Operations for Scoliosis, Spina Bifida and Kyphosis without Instrumentation	$4,950 – $6,600	$1,300 – $1,850
LOWER LIMB		
Combination of Various Procedures, eg. in Major Crush Injuries of Lower Limbs Requiring Fixation of Bones, Arterial, Neural and Tendon Repair	$4,950 – $6,600	$1,300 – $1,850
Hindquarter Amputation	$4,950 – $6,600	$1,300 – $1,850
Leg Lengthening and Shortening Procedures	$4,950 – $6,600	$1,300 – $1,850
Major Excision of Malignant Tumours	$4,950 – $6,600	$1,300 – $1,850
Nerve Grafting, Interfascicular Repair and Neurovascular Transfer	$4,950 – $6,600	$1,300 – $1,850
Open Reduction and Fixation of Major Fractures with or without Arterial Injury	$4,950 – $6,600	$1,300 – $1,850
Open Reduction and Fixation of the Fractures and Vascular Injury	$4,950 – $6,600	$1,300 – $1,850
Open Reduction of Dislocated Major Joints – Hips and Knees	$4,950 – $6,600	$1,300 – $1,850
Total Joint Replacement	$4,950 – $6,600	$1,300 – $1,850

GROUP H

	Surgeon's Fees	Anaesthetist's Fees
HEAD-FACE		
Maxilla, LeForte III, Reduction and Fixation Using Craniofacial Approach	$5,500 – $8,800	$1,400 – $2,550
LOWER LIMB		
Acetabular Fracture Fixation – Posterior Column/Posterior Wall	$5,500 – $8,800	$1,400 – $2,550
Complicated Total Joint Replacement	$5,500 – $8,800	$1,400 – $2,550
Pelvic Ring – Screw Fixation	$5,500 – $8,800	$1,400 – $2,550
Revision Total Joint Replacement	$5,500 – $8,800	$1,400 – $2,550
Sacro-iliac Joint Fixation	$5,500 – $8,800	$1,400 – $2,550
SPINE		
Anterior Drainage and Fusion	$5,500 – $8,800	$1,400 – $2,550
Anterior Spinal Fusion, Cervical or Lumbar	$5,500 – $8,800	$1,400 – $2,550
Artificial Disk Replacement	$5,500 – $8,800	$1,400 – $2,550
Decompression Laminectomy for Spinal Stenosis and Tumours	$5,500 – $8,800	$1,400 – $2,550
Discectomy – Two levels and above	$5,500 – $8,800	$1,400 – $2,550
Laminectomy and Fusion	$5,500 – $8,800	$1,400 – $2,550
Cervical Laminoplasty	$5,500 – $8,800	$1,400 – $2,550
Removal of Intraspinal Tumours	$5,500 – $8,800	$1,400 – $2,550
Revision Spinal Surgery	$5,500 – $8,800	$1,400 – $2,550
Spinal Instrumentation	$5,500 – $8,800	$1,400 – $2,550
UPPER LIMB		
Complicated Total Joint Replacement	$5,500 – $8,800	$1,400 – $2,550
Replantation Surgery of Upper Limb – Single Digit Replantation	$5,500 – $8,800	$1,400 – $2,550
Revision Total Joint Replacement	$5,500 – $8,800	$1,400 – $2,550

GROUP I

	Surgeon's Fees	Anaesthetist's Fees
HEAD-FACE		
Tumour, Craniofacial Resection with Reconstruction	$7,700 – $11,000	$1,950 – $3,050
Various Lesions, Craniofacial Resection	$7,700 – $11,000	$1,950 – $3,050
UPPER LIMB		
Complicated Total Joint Revision	$7,700 – $11,000	$1,950 – $3,050
Difficult Toe to Finger Transfer	$7,700 – $11,000	$1,950 – $3,050
Major Microsurgical Reconstruction	$7,700 – $11,000	$1,950 – $3,050

GROUP I

	Surgeon's Fees	Anaesthetist's Fees
Major Replantation (Bone, Muscle, Skin Using Micro-surgical Technique)	$7,700 – $11,000	$1,950 – $3,050
Tumour (Malignant) Major Resection and Reconstruction	$7,700 – $11,000	$1,950 – $3,050
SPINE		
Complicated Spinal Instrumentation	$7,700 – $11,000	$1,950 – $3,050
SOFT TISSUE		
Tumour (Malignant) Major Resection and Reconstruction	$7,700 – $11,000	$1,950 – $3,050
LOWER LIMB		
Acetabular Fracture Fixation – Anterior Column/ Both Column/T-Type	$7,700 – $11,000	$1,950 – $3,050
Complicated Total Joint Revision	$7,700 – $11,000	$1,950 – $3,050
Difficult Toe to Finger Transfer	$7,700 – $11,000	$1,950 – $3,050
Major Microsurgical Reconstruction	$7,700 – $11,000	$1,950 – $3,050
Major Replantation Surgery of the Lower Limb	$7,700 – $11,000	$1,950 – $3,050
Tumour (Malignant) Major Resection and Reconstruction	$7,700 – $11,000	$1,950 – $3,050

SECTION 12 – NERVOUS SYSTEM

GROUP A

	Surgeon's Fees	Anaesthetist's Fees
Nerve – Various Lesions, Biopsy	$330 – $550	$200 – $270

GROUP C

	Surgeon's Fees	Anaesthetist's Fees
Nerve – Cutaneous, Injury, Primary Suture	$990 – $1,650	$330 – $440
Nerve – Digital, Injury, Primary Repair	$990 – $1,650	$330 – $440
Nerve – Peripheral (Superficial), Tumour, Excision	$990 – $1,650	$330 – $440

GROUP D

	Surgeon's Fees	Anaesthetist's Fees
Brain – Hydrocephalus, Revision/Removal of Shunt	$1,750 – $2,850	$430 – $770
Brain – Intracranial Abscess, Drainage via Burr-hole	$1,750 – $2,850	$430 – $770
Brain – Tumour, Ventricular Puncture through Burr-hote	$1,750 – $2,850	$430 – $770
Brain – Various Lesions, Insertion of Ommaya Reservoir	$1,750 – $2,850	$430 – $770
Nerve – Defect, Peripheral Graft	$1,750 – $2,850	$430 – $770
Nerve – Various Lesions, Primary/Secondary Suture	$1,750 – $2,850	$430 – $770
Nerve-Trigeminal – Ganglion, Injection with alcohol/ Radiotherapy Ganglionotomy	$1,750 – $2,850	$430 – $770
Nerve-Ulnar – Entrapment, Transposition	$1,750 – $2,850	$430 – $770
Skull – Intracranial Haemorrhage, Burr-hole Craniotomy (Unilateral)	$1,750 – $2,850	$660 – $1,200
Spinal Cord – Intractable Pain, Injection of Alcohol/ Phenol	$1,750 – $2,850	$430 – $770

GROUP E

	Surgeon's Fees	Anaesthetist's Fees
Artery-Carotid – Aneurysm/Arteriovenous Fistula, Ligation	$2,750 – $4,400	$660 – $1,200
Brain – Hydrocephalus and Other Lesions, Ventriculoatrial/ Ventriculoperitoneal Shunt	$2,750 – $4,400	$660 – $1,200
Brain – Hydrocephalus, Spino-peritoneal Shunt	$2,750 – $4,400	$660 – $1,200
Brain – Intracranial Abscess Craniectomy and Drainage	$2,750 – $4,400	$660 – $1,200
Brain – Intracranial Tumour/Intracranial Cyst, Biopsy/ Drainage via Burr-hole	$2,750 – $4,400	$660 – $1,200
Meninges – Myelomeningocele, Excision of Sac	$2,750 – $4,400	$660 – $1,200
Nerve-Facial (Mastoid Portion) – Entrapment, Decompression	$2,750 – $4,400	$660 – $1,200
Nerve-Peripheral (Deep) – Tumour, Excision	$2,750 – $4,400	$660 – $1,200
Nerve-Sympathetic – Various Lesions, Sympathectomy (Unilateral)	$2,750 – $4,400	$660 – $1,200
Skull – Compound Fracture without Dural Penetration, Operation	$2,750 – $4,400	$660 – $1,200
Skull – Defect, Cranioplasty (Large)	$2,750 – $4,400	$660 – $1,200

GROUP E

	Surgeon's Fees	Anaesthetist's Fees
Skull – Defect, Cranioplasty (Small)	$2,750 – $4,400	$660 – $1,200
Skull – Depressed/Comminuted Fracture, Elevation	$2,750 – $4,400	$660 – $1,200
Skull – Intracranial Haemorrhage, Burr-hole Craniotomy (Bilateral)	$2,750 – $4,400	$660 – $1,200
Skull – Osteomyelitis, Craniectomy	$2,750 – $4,400	$660 – $1,200
Spinal Cord – Intractable Pain, Percutaneous Cordotomy	$2,750 – $4,400	$660 – $1,200

GROUP F

	Surgeon's Fees	Anaesthetist's Fees
Brain and Spine – Arachnoidal Cyst, Operation	$3,500 – $5,500	$870 – $1,550
Brain – Hydrocephalus, Ventriculo-Cisternostomy	$3,500 – $5,500	$870 – $1,550
Brain – Intracranial Abscess, Excision	$3,500 – $5,500	$870 – $1,550
Brain – Intracranial Extracerebral Tumour, Craniotomy & Removal/Hemispherectomy	$3,500 – $5,500	$870 – $1,550
Brain – Psychiatric Causes, Leucotomy/Lobotomy	$3,500 – $5,500	$870 – $1,550
Brain – Various Lesions, Chemopallidectomy/Other Stereotactic Procedure	$3,500 – $5,500	$870 – $1,550
Meninges – Myelomeningocele, Extensive Repair with Skin Flaps/Z-plasty	$3,500 – $5,500	$870 – $1,550
Nerve-Cranial – Various Lesions, Microvascular Decompression/Neurectomy	$3,500 – $5,500	$870 – $1,550
Nerve – Sympathetic-Various Lesions, Sympathectomy (Bilateral)	$3,500 – $5,500	$870 – $1,550
Plexus-Brachial – Injury, Exploration	$3,500 – $5,500	$870 – $1,550
Skull – Compound Fracture with Dural Penetration and Brain Damage, Operation	$3,500 – $5,500	$870 – $1,550
Skull – Craniostenosis (Multiple Suture), Operation	$3,500 – $5,500	$870 – $1,550
Skull – Craniostenosis (Single Suture), Operation	$3,500 – $5,500	$870 – $1,550
Skull – Fracture with Rhinorrhoea/Otorrhoea, Cranioplasty and Repair	$3,500 – $5,500	$870 – $1,550
Skull – Intracranial Haemorrhage, Osteoplastic Craniotomy/ Extensive Craniectomy	$3,500 – $5,500	$870 – $1,550
Spinal Cord – Aneurysm/Arteriovenous Malformation Clipping/Reinforcement of Sac	$3,500 – $5,500	$870 – $1,550
Spinal Nerve Roots – Various Lesions, Spinal Rhizolysis involving Exposure of Spinal Nerve Roots	$3,500 – $5,500	$870 – $1,550

GROUP G

	Surgeon's Fees	Anaesthetist's Fees
Artery-Carotid – Atherosclerosis, Carotid Endarterectomy	$4,950 – $6,600	$1,300 – $1,850
Brain – Carotico-Cavernous Fistula, Extracranial and Intracranial Trapping	$4,950 – $6,600	$1,300 – $1,850
Brain – Epilepsy, Craniotomy	$4,950 – $6,600	$1,300 – $1,850
Brain – Intracerebral Tumour, Biopsy and Decompression/ Removal via Craniotomy	$4,950 – $6,600	$1,300 – $1,850
Pituitary – Various Lesions, Transsphenoidal Hypophysectomy/Excision of Tumour	$4,950 – $6,600	$1,300 – $1,850

GROUP H

	Surgeon's Fees	Anaesthetist's Fees
Brain – Acoustic Tumour/Cerebello-Pontine Angle Tumour, Excision	$5,500 – $8,800	$1,400 – $2,550
Brain – Aneurysm/Arteriovenous Malformation, Clipping/ Reinforcement of Sac	$5,500 – $8,800	$1,400 – $2,550
Brain – Arteriovenous Malformation, Craniotomy and Excision	$5,500 – $8,800	$1,400 – $2,550
Brain – Stereotactic Radiosurgery	$5,500 – $8,800	$1,400 – $2,550

GROUP I

	Surgeon's Fees	Anaesthetist's Fees
Artery-Carotid – Carotid Body Tumour, Excision	$7,700 – $11,000	$1,950 – $3,050
Artery-Carotid – External Carotid-Internal Carotid, Bypass	$7,700 – $11,000	$1,950 – $3,050
Brian – Frameless Stetreotactic Image-guided Craniotomy	$7,700 – $11,000	$1,950 – $3,050
Brain – Tumours (Large) (excluding Biopsy) – Craniotomy, for Excision or Decompression	$7,700 – $11,000	$1,950 – $3,050
Brain – Posterior Giant Aneurysm/large Arteriovenous Malformation, Clipping or Excision	$7,700 – $11,000	$1,950 – $3,050

SECTION 13 – RESPIRATORY SYSTEM

GROUP A

	Surgeon's Fees	Anaesthetist's Fees
Nose – Foreign Body, Removal (Simple)	$330 – $550	$200 – $270
Nose – Polyp (Simple), Removal	$330 – $550	$200 – $270
Nose – Various Lesions (Postnasal Space), Direct Examination with Biopsy and Nasendoscopy	$330 – $550	$200 – $270
Nose – Various Lesions, Cauterisation/Diathermy	$330 – $550	$200 – $270
Sinuses – Nasal, Various Lesions of Antrum, Proof Puncture and/or Lavage	$330 – $550	$200 – $270
Thorax – Mediastinal Lesions, Cervical Exploration with/ without Biopsy	$330 – $550	$200 – $270
Thorax – Pleural Effusion, Aspiration and/or Paracentesis	$330 – $550	$200 – $270
Thorax – Various Lesions, Intercostal Drain (Insertion without Resection of Rib)	$330 – $550	$200 – $270

GROUP B

	Surgeon's Fees	Anaesthetist's Fees
Bronchus – Impaction by Secretions, Bronchoscopy with Bronchial Toilet	$500 – $820	$330 – $440
Bronchus – Various Lesions, Bronchoscopic Examination with/without Biopsy	$500 – $820	$330 – $440
Larynx – Various Lesions, Direct Examination without Biopsy	$500 – $820	$330 – $440
Lung – Various Lesions, Bronchoscopy with Bronchoalveolar Lavage	$500 – $820	$330 – $440
Lung – Various Lesions, Bronchoscopy with Transbronchial Lung Biopsy (without Screening)	$500 – $820	$330 – $440
Mouth – Various Lesions, Laser Application	$500 – $820	$270 – $380
Nose – Foreign Body, Removal (Complicated)	$500 – $820	$270 – $380
Nose – Haematoma/Abscess, Evacuation	$500 – $820	$270 – $380
Nose – Haemorrhage, Haemostasis (Packing)/Cryotherapy	$500 – $820	$270 – $380
Nose – Polyp (Complex), Removal	$500 – $820	$270 – $380
Nose – Simple Fracture, Manipulation	$500 – $820	$270 – $380
Nose – Various Lesions, Examination	$500 – $820	$270 – $380
Nose – Various Lesions, Cauterisation/ Diathermy (under General Anaesthesia)	$500 – $820	$270 – $380
Nose – Young's Operation (Unilateral)	$500 – $820	$270 – $380
Sinuses-Nasal – Foreign Body/Other Lesions, Intranasal Operation/Removal of Foreign Body	$500 – $820	$330 – $440
Sinuses-Nasal – Haemotoma/Abscess, Antral Drainage	$500 – $820	$270 – $380
Sinuses-Nasal – Various Lesions of Autran Proof Puncture and/or Lavage (under General Anaesthesia)	$500 – $820	$270 – $380

GROUP C

	Surgeon's Fees	Anaesthetist's Fees
Bronchus – Foreign Body, Removal (Bronchoscopic)	$990 – $1,650	$430 – $770
Bronchus – Various Lesions, Laser Application, each stage	$990 – $1,650	$430 – $770
Larynx – Stripping of Vocal Cords	$990 – $1,650	$330 – $440
Larynx – Various Lesions, Direct Examination with Removal of Tumour	$990 – $1,650	$430 – $770
Lung – Various Lesions, Bronchoscopy with Transbronchial Lung Biopsy (with Screening)	$990 – $1,650	$330 – $440
Nose-Choanal Atresia, Repair by Puncture and Dilatation (Simple)	$990 – $1,650	$330 – $440
Nose – Laceration Full Thickness, Repair	$990 – $1,650	$330 – $440
Nose – Rhinophyma, Excision	$990 – $1,650	$330 – $440
Nose – Various Lesions (Turbinates), Turbinectomy	$990 – $1,650	$330 – $440
Sinuses-Frontal – Various Lesions, Trephine	$990 – $1,650	$330 – $440
Sinuses-Nasal – Oro-antral Fistula, Closure	$990 – $1,650	$330 – $440
Sinuses-Nasal – Various Lesions, Intranasal Operation	$990 – $1,650	$330 – $440
Thorax – Various Lesions, Endolaryngeal Microsurgical Procedure	$990 – $1,650	$430 – $770
Thorax – Various Lesions, Thoracotomy (Exploration) with/without Biopsy	$990 – $1,650	$430 – $770
Trachea – Foreign Body, Removal	$990 – $1,650	$430 – $770
Trachea – Various Lesions, Tracheostomy	$990 – $1,650	$330 – $440

GROUP D

	Surgeon's Fees	Anaesthetist's Fees
Bronchus – Foreign Body, Removal via Bronchotomy	$1,750 – $2,850	$430 – $770
Larynx and Pharynx – Various Lesions, Laser Application	$1,750 – $2,850	$430 – $770
Lung – Various Lesions, Pneumonectomy/Lobectomy/ Segmental Resection	$1,750 – $2,850	$660 – $1,200
Lung – Various Lesions, Repeat/Multiple Resection	$1,750 – $2,850	$660 – $1,200
Lung – Various Lesions, Wedge Resection	$1,750 – $2,850	$660 – $1,200
Nose – Choanal Atresia, Plastic Repair	$1,750 – $2,850	$430 – $770
Nose – Post-Nasal Space, Laser Application	$1,750 – $2,850	$430 – $770
Nose – Various Lesions, Composite Graft (Chondro Cutaneous/Chondro-Mucosal)	$1,750 – $2,850	$430 – $770
Nose – Various Lesions, Rhinoplasty (Augmentation excluding Cost of Implants)	$1,750 – $2,850	$430 – $770
Nose – Various Lesions, Rhinoplasty (Correction of Bony Vault only)	$1,750 – $2,850	$430 – $770
Nose – Various Lesions, Rhinoplasty (Correction of Lateral and/or Alar Cartilages)	$1,750 – $2,850	$430 – $770
Nose – Various Lesions, Rhinoplasty (Secondary Revision)	$1,750 – $2,850	$430 – $770
Nose – Various Lesions, Septoplasty/Submucous Resection	$1,750 – $2,850	$430 – $770

GROUP D

	Surgeon's Fees	Anaesthetist's Fees
Sinuses-Nasal – Various Lesions, Antrostomy (Radical) Unilateral/Bilateral	$1,750 – $2,850	$430 – $770
Sinuses-Nasal – Various Lesions, Antrostomy (Radical) with Transantral Ethmoidectomy/Transantral Vidian Neurectomy/Transantral Ligation Internal Maxillary Artery (Unilateral)	$1,750 – $2,850	$430 – $770
Thorax – Empyema, Resection of Rib and Open Drainage	$1,750 – $2,850	$430 – $770
Thorax – Mediasturioscopy and Biopsy	$1,750 – $2,850	$430 – $770
Thorax – Various Lesions, Thoracoplasty (in stages – each stage)	$1,750 – $2,850	$430 – $770

GROUP E

	Surgeon's Fees	Anaesthetist's Fees
Larynx – Laryngofissure, External Operation	$2,750 – $4,400	$660 – $1,200
Laryngoplasty/Thyroplasty – Larynx, Open, Medialisation of Vocal Cord	$2,750 – $4,400	$660 – $1,200
Lung – Various Lesions, Repeat Multiple Resections	$2,750 – $4,400	$660 – $1,200
Nose – Various Lesions, Rhinoplasty (Secondary Revision)	$2,750 – $4,400	$660 – $1,200
Sinuses-Ethmoidal/Frontal – Various Lesions, External Operation	$2,750 – $4,400	$660 – $1,200
Sinuses-Frontal – Various Lesions, Radical Obliteration	$2,750 – $4,400	$660 – $1,200
Sinuses-Nasal – Functional Endoscopic Sinus Surgery	$2,750 – $4,400	$660 – $1,200
Sinuses-Nasal – Various Lesions, Fronto-Ethmoidectomy (Radical) with Osteoplastic Flap	$2,750 – $4,400	$660 – $1,200
Sinuses-Nasal – Various Lesions, Fronto-Ethmoidectomy with/without Sphenoidectomy	$2,750 – $4,400	$660 – $1,200
Sinuses-Sphenoidal – Various Lesions, Intranasal Operation	$2,750 – $4,400	$660 – $1,200
Thorax – Pectus Excavatum/ Pectus Carinatum, Radical Correction	$2,750 – $4,400	$660 – $1,200
Thorax – Tumour (Mediastinal), Resection	$2,750 – $4,400	$660 – $1,200
Thorax – Various Lesions, Chest Wall Resection and Major Reconstruction	$2,750 – $4,400	$660 – $1,200
Thorax – Various Lesions, Chest Wall Resection and Minor Reconstruction	$2,750 – $4,400	$660 – $1,200
Thorax – Various Lesions, Intrathoracic Operation on Lungs/ Bronchial Tree/Mediastinum	$2,750 – $4,400	$660 – $1,200
Thorax – Various Lesions, Thoracoplasty (Complete)	$2,750 – $4,400	$660 – $1,200
Thorax – Various Lesions, Thoracotomy for Pleurectomy/ Pleurodesis/Enucleation Hyatid Cysts	$2,750 – $4,400	$660 – $1,200
Thorax – Various Lesions, Thoracotomy with Pulmonary Decortication	$2,750 – $4,400	$660 – $1,200
Trachea – Tracheo-esophageal Fistula, Ligation and Division	$2,750 – $4,400	$870 – $1,550

GROUP E

	Surgeon's Fees	Anaesthetist's Fees
Trachea – Various Lesions, Laser Application	$2,750 – $4,400	$660 – $1,200
Trachea – Various Lesions, Trachea Reconstruction	$2,750 – $4,400	$660 – $1,200

GROUP F

	Surgeon's Fees	Anaesthetist's Fees
Bronchus – Various Lesions, Bronchoplastic Procedure	$3,500 – $5,500	$870 – $1,550
Diaphragm – Tumour, Excision	$3,500 – $5,500	$870 – $1,550
Diaphragm – Tumour, Excision with Wedge Resection of Lung	$3,500 – $5,500	$1,300 – $1,850
Larynx and Trachea – Various Lesions, Major Microsurgery without Reconstruction	$3,500 – $5,500	$870 – $1,550
Larynx and Trachea – Various Lesions, Major Plastic Operation	$3,500 – $5,500	$1,300 – $1,850
Larynx – Fractures, Operation	$3,500 – $5,500	$1,300 – $1,850
Larynx – Tumour, Laryngectomy (Total)	$3,500 – $5,500	$1,300 – $1,850
Larynx – Tumour, Partial Laryngectomy	$3,500 – $5,500	$1,300 – $1,850
Larynx – Various Lesions, Hemi/Partial Laryngectomy	$3,500 – $5,500	$1,300 – $1,850
Lung – Various Lesions, Pneumonectomy/Lobectomy/ Segmental Resection	$3,500 – $5,500	$870 – $1,550
Nose – Rhinophyma, Total Reconstruction	$3,500 – $5,500	$870 – $1,550
Nose – Various Lesions, Rhinoplasty (Restoration of the Face Involving Auto-genous Bone or Coastal Cartilage Graft)	$3,500 – $5,500	$870 – $1,550
Nose – Various Lesions, Rhinoplasty (Total) including Correction of all Bony and Cartilaginous Elements	$3,500 – $5,500	$870 – $1,550
Thorax – Decortication of Lung	$3,500 – $5,500	$870 – $1,550

GROUP G

	Surgeon's Fees	Anaesthetist's Fees
Larynx – Tumour, Laryngectomy with Radical Neck Dissection	$4,950 – $6,600	$1,300 – $1,850
Larynx – Tumour, Partial Larynectomy with Block Dissection	$4,950 – $6,600	$1,300 – $1,850
Larynx – Various Lesions, Hemi/Partial Laryngectomy with Radical Neck Dissection	$4,950 – $6,600	$1,300 – $1,850

GROUP H

	Surgeon's Fees	Anaesthetist's Fees
Larynx and Esophagus – Tumour, Esophagectomy (Total)/Laryngopharyngectomy with Restoration of Alimentary Continuity	$5,500 – $8,800	$1,400 – $2,550
Trachea – Resection and Reconstruction	$5,500 – $8,800	$1,400 – $2,550

SECTION 14 – URINARY SYSTEM

GROUP A

	Surgeon's Fees	Anaesthetist's Fees
Bladder – Retention of Urine, Suprapubic Cystostomy	$330 – $550	$200 – $270
Bladder – Various Lesions, Catheterisation	$330 – $550	$200 – $270
Kidney – Blocked Nephrostomy Tube, Change	$330 – $550	$200 – $270
Kidney – Various Lesions, Biopsy (Closed)	$330 – $550	$200 – $270
Urethra – Meatal Stenosis, Meatotomy	$330 – $550	$200 – $270
Urethra – Polyp/Carbuncle, Excision	$330 – $550	$200 – $270
Urethra – Prolapse, Excision	$330 – $550	$200 – $270
Urethra – Stricture, Dilatation	$330 – $550	$200 – $270

GROUP B

	Surgeon's Fees	Anaesthetist's Fees
Bladder – Calculus, Vesicolithotomy	$500 – $820	$270 – $380
Bladder – Cutaneous Fistula, Closure	$500 – $820	$270 – $380
Bladder – Various Lesions, Cystoscopy and Retrograde	$500 – $820	$270 – $380
Bladder – Various Lesions, Cystoscopy with Controlled Hydrodilatation of the Bladder	$500 – $820	$270 – $380
Bladder – Various Lesions, Cystoscopy with or without Biopsy	$500 – $820	$270 – $380
Bladder – Various Lesions, Cystoscopy, Removal of Foreign Body/Ureteric Stent	$500 – $820	$270 – $380
Urethra – Various Lesions, Urethrotomy	$500 – $820	$270 – $380

GROUP C

	Surgeon's Fees	Anaesthetist's Fees
Bladder Neck – Obstruction Neurogenic Bladder, Cystoscopy, External Sphincterotomy	$990 – $1,650	$330 – $440
Bladder Neck – Various Lesions, Cystoscopy with Endoscopic Resection/Incision	$990 – $1,650	$330 – $440
Bladder – Bladder Neck Contracture, (Acquired/Congenital), Wedge Excision	$990 – $1,650	$330 – $440
Bladder – Calculus, Litholapaxy/Ultrasonic Lithotripsy/ Electrohydraulic Lithotripsy/Laser)	$990 – $1,650	$330 – $440
Bladder – Tumour Cystoscopy with Resection of Bladder Tumour (less than 1.5 cm)	$990 – $1,650	$330 – $440
Bladder – Tumour, TUR Biopsy	$990 – $1,650	$330 – $440
Bladder – Urachal Fistula, Excision	$990 – $1,650	$330 – $440
Cystoscopy & Insertion of Double J Stent	$990 – $1,650	$330 – $440
Cystoscopy & Push Up of Ureteric Stone	$990 – $1,650	$330 – $440
Kidney – Cyst, Excision	$990 – $1,650	$330 – $440
Kidney – Nephroptosis, Nephropexy	$990 – $1,650	$330 – $440
Kidney – Perinephric Abscess, Drainage	$990 – $1,650	$330 – $440

GROUP C

	Surgeon's Fees	Anaesthetist's Fees
Kidney – Pyonephrosis, Drainage	$990 – $1,650	$330 – $440
Kidney – Pyonephrosis, Percutaneous Drainage	$990 – $1,650	$330 – $440
Kidney – Various Lesions, Biopsy (Open)	$990 – $1,650	$330 – $440
Kidney – Various Lesions, Exploration	$990 – $1,650	$330 – $440
Ureter – Calculus, Cystoscopy with Endoscopic Removal/ Manipulation	$990 – $1,650	$330 – $440
Ureter – Cutaneous Ureterostomy, Closure	$990 – $1,650	$330 – $440
Ureter – Various Lesions, Ureterostomy	$990 – $1,650	$330 – $440
Ureter – Various Lesions, Ureterotomy/Insertion of Double J-Stent	$990 – $1,650	$330 – $440
Ureteroscopy	$990 – $1,650	$330 – $440
Urethra – Diverticulum, Excision	$990 – $1,650	$330 – $440
Urethra – Fistula, Closure	$990 – $1,650	$330 – $440
Urethra – Valves/Membrane, Resection (Endoscopic)	$990 – $1,650	$330 – $440
Urethra – Various Lesions, Excision	$990 – $1,650	$330 – $440
Urethra – Various Lesions, Staged Urethroplasty (each stage)	$990 – $1,650	$330 – $440

GROUP D

	Surgeon's Fees	Anaesthetist's Fees
Bladder – Tumour, Cystoscopy with Resection of Bladder Tumour (more than 1.5 cm)	$1,750 – $2,850	$430 – $770
Bladder – Diverticulum, Excision	$1,750 – $2,850	$430 – $770
Bladder – Various Lesions, Partial Excision	$1,750 – $2,850	$430 – $770
Bladder – Vesico-Vaginal Fistula, Closure by Vaginal Route	$1,750 – $2,850	$430 – $770
Kidney – Calculus, Nephrolithotomy/Pyelolithotomy	$1,750 – $2,850	$430 – $770
Kidney – Injury, Repair	$1,750 – $2,850	$430 – $770
Kidney – Pyonephrosis, Nephrostomy/Pyelostomy	$1,750 – $2,850	$430 – $770
Prostate Gland – Various Lesions, Insertion of Stent	$1,750 – $2,850	$430 – $770
Prostate Gland – Various Lesions, Ablation (Microwave/ Laser/Radiofrequency)	$1,750 – $2,850	$430 – $770
Prostate – Hyperplasia, Balloon Dilatation	$1,750 – $2,850	$430 – $770
Ureter – Calculus, Ultrasound Lithotripsy/Electrohydraulic & Laser Lithotripsy	$1,750 – $2,850	$430 – $770
Ureter – Calculus, Ureterolithotomy	$1,750 – $2,850	$430 – $770
Ureter – Various Lesions, Cystoscopy with Ureteric Meatotomy/with Resection of Ureterocele	$1,750 – $2,850	$430 – $770
Ureter – Various Lesions, Reimplantation (Single)	$1,750 – $2,850	$430 – $770
Ureter – Various Lesions, Repair	$1,750 – $2,850	$430 – $770
Urethra – Injury, Repair/Urethroplasty of Anterior Urethra	$1,750 – $2,850	$430 – $770
Urethra – Stress Incontinence, Endoscopic Suspension of Bladder Neck	$1,750 – $2,850	$430 – $770

GROUP D

	Surgeon's Fees	Anaesthetist's Fees
Urethra – Stricture, Insertion of Urethral Wall Stent	$1,750 – $2,850	$430 – $770
Urethra – Valves/Membrane, Resection (Open)	$1,750 – $2,850	$430 – $770
Urethra – Various Lesions, Anterior Urethroplasty	$1,750 – $2,850	$430 – $770

GROUP E

	Surgeon's Fees	Anaesthetist's Fees
Bladder – Incontinence, Artificial Sphincter Insertion	$2,750 – $4,400	$660 – $1,200
Bladder – Incontinence, Correction	$2,750 – $4,400	$660 – $1,200
Bladder – Vesico-Intestinal Fistula, Closure	$2,750 – $4,400	$660 – $1,200
Bladder – Vesico-Vaginal Fistula, Closure by Abdominal Route	$2,750 – $4,400	$660 – $1,200
Kidney – Calculus, Extra-Corporeal Shockwave Lithotripsy	$2,750 – $4,400	$660 – $1,200
Kidney – Calculus, Percutaneous Ultrasound Lithotripsy	$2,750 – $4,400	$660 – $1,200
Kidney – Pelvi-Ureteric Junction Obstruction, Pyeloplasty/ Ureterocalycostomy	$2,750 – $4,400	$660 – $1,200
Kidney – Staghorn Calculus, Nephrolithotomy	$2,750 – $4,400	$660 – $1,200
Kidney – Various Lesions, Nephrectomy	$2,750 – $4,400	$660 – $1,200
Ureter – Various Lesions, Bilateral Reimplantation	$2,750 – $4,400	$660 – $1,200
Ureter – Various Lesions, Boari Flap Reimplantation	$2,750 – $4,400	$660 – $1,200
Ureter – Various Lesions, Intestinal Conduit	$2,750 – $4,400	$660 – $1,200
Ureter – Various Lesions, Reduction Ureteroplasty	$2,750 – $4,400	$660 – $1,200
Ureter – Various Lesions, Replacement by Bowel	$2,750 – $4,400	$660 – $1,200
Ureter – Various Lesions, Ureterocalycostomy	$2,750 – $4,400	$660 – $1,200
Ureter – Various Lesions, Ureteroureterostomy	$2,750 – $4,400	$660 – $1,200
Urethra – Urethro-Rectal Fistula, Closure	$2,750 – $4,400	$660 – $1,200
Urethra – Urethro-Vaginal Fistula, Closure	$2,750 – $4,400	$660 – $1,200
Urethra – Various Lesions, Posterior Urethroplasty	$2,750 – $4,400	$660 – $1,200

GROUP F

	Surgeon's Fees	Anaesthetist's Fees
Bladder – Tumour, Anterior Exenteration (Female) or Posterior Exenteration (Male)	$3,500 – $5,500	$870 – $1,550
Bladder – Various Lesions, Enlargement Cystoplasty with Bowel	$3,500 – $5,500	$870 – $1,550
Bladder – Various Lesions, Total Cystectomy	$3,500 – $5,500	$870 – $1,550
Kidney and Ureter – Various Lesions, Nephroureterectomy	$3,500 – $5,500	$870 – $1,550
Kidney – Carcinoma, Radical Nephrectomy	$3,500 – $5,500	$870 – $1,550
Ureter – Previous Diversion, Revision or Undiversion	$3,500 – $5,500	$870 – $1,550
Urethra – Various Lesions, Transpubic Urethroplasty	$3,500 – $5,500	$870 – $1,550

GROUP G

	Surgeon's Fees	Anaesthetist's Fees
Bladder – Ectopia Vesicae/Ectopia Cloacae with Congenital Incontinence, Sphincter Reconstruction	$4,950 – $6,600	$1,300 – $1,850
Kidney – Renal Failure, Transplant	$4,950 – $6,600	$1,300 – $1,850

SECTION 15 – PAIN MANAGEMENT PROCEDURES

GROUP A $330 – $550

Peripheral N Block – Anaesthetic up to 2 Levels
Intravenous – Anaesthetic

GROUP B $500 – $820

Epidural – Single Injection, Anaesthetic, Blood Transfusion, Therapeutic Substance (Lumbar), Simple
Facet Block – Anaesthetic 2 Joints
Sacroiliac Joint Injection – X-ray, Single
Brachial Plexus – Single
Cervical Plexus
Lumbar Plexus
Intercostal N Block – Anaesthetic up to 3 Levels
Paravertebral – Anaesthetic (without X-ray)
Trigeminal N Branches Block – Anaesthetic
Interpleural Block – Single
Stellate Ganglion Block – Anaesthetic
Intravenous – Sympathetic Block

GROUP C $990 – $1,650

Epidural – Single Injection, Anaesthetic, Therapeutic Substance (Lumbar), Complicated
Epidural – Single Injection, Anaesthetic, Therapeutic Substance (Thoracic)
Spinal/Epidural Catheter
Spinal/Epidural – Removal of Port, eg. Port-a-cath
Facet Block – Anaesthetic 4 Joints
Sacroiliac Joint Injection – X-ray, Bilateral
Brachial Plexus – Catheter
Intercostal N Block – Anaesthetic more than 3 Levels
Peripheral N Block – Anaesthetic up to 4 Levels
Peripheral N Block – Neurolytic, Cryo. RF, up to 2 Levels
Paravertebral – Anaesthetic with X-ray, up to 2 Levels
Sacral Root Block – Anaesthetic X-ray, up to 2 Levels
Interpleural Block – Catheter

GROUP D $1,750 – $2,850

Epidural Single Injection – Anaesthetic, Therapeutic Substance (Cervical)
Spinal/Epidural – Neurolytic
Spinal/Epidural Implant of Port, eg. Port-a-cath
Spinal/Epidural Implant of Reservoir Device, eg. PAR

GROUP D $1,750 – $2,850

Spinal/Epidural Removal of Implanted Reservoir Device, eg. PAR
Removal of Spinal Cord Stimulator (Permanent)
Replacement of Spinal Cord Stimulator Electrical Generator
Facet Block – Anaesthetic 6 Joints
Radio Frequency Denervation Facet Joint, 3 Joints
Dorsal Root Ganglion – Anaesthetic
Dorsal Root Ganglion – Neurolytic
Intercostal N Block – RF, Cryo, Neurolytic, up to or more than 2 Levels
Peripheral N Block – Neurolytic, Cryo, RF, up to 4 Levels
Sacral Root Block – Neurolytic, RF, Single or Multiple
Trigeminal N Branches Block – Neurolytic RF, Cryo
Trigeminal Ganglion Injection – Anaesthetic X-ray
Stellate Ganglion Block – Neurolytic, X-ray
Thoracic Sympathetic N – Anaesthetic
Lumbar Sympathetic – Anaesthetic, Unilateral/Bilateral
Lumbar Sympathetic – Anaesthetic, Catheter, Unilateral
Lumbar Sympathetic – Neurolytic, Unilateral
Coeliac Plexus – Anaesthetic

GROUP E $2,750 – $4,400

Spinal/Epidural – Removal of Implanted Computerised Reservoir Device
Percutaneous Implant of Spinal Cord Stimulator (Trial)
Radio Frequency Denervation Facet Joint, 6 Joints
Dorsal Root Ganglion – RF Thoracic Sympathetic N – Neurolytic
Lumbar Sympathetic – Anaesthetic, Catheter, Bilateral
Lumbar Sympathetic – Neurolytic, Bilateral
Coeliac Plexus – Neurolytic

GROUP F $3,500 – $5,500

Spinal/Epidural Implant of Computerised Reservoir Device, eg. Synchromed
Percutaneous Implant of Spinal Cord Stimulator (Permanent) and Electrical Generator
Trigeminal Ganglion RF – Neurolytic, X-ray

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Obstetrics & Gynaecology (O&G) Interest Group
Ophthalmology Interest Group
Orthopaedic Surgery Interest Group
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Urology & Renal Medicine Interest Group

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Singapore Cardiac Society
Singapore Infectious Diseases Society
Singapore Orthopaedic Association
Singapore Paediatric Society
Singapore Psychiatric Association
Singapore Radiological Society
Singapore Society for Clinical Hypnosis
Singapore Society for Hand Surgery
Singapore Society of Anaesthesiologists
Singapore Society of Cosmetic (Aesthetic) Surgeons
Singapore Society of Immunology, Allergy and Rheumatology
Singapore Society of Nephrology
Singapore Society of Occupational Medicine
Singapore Society of Ophthalmology
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Society for Emergency Medicine, Singapore
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Annex 2: Overseas Case Studies

ANNEX 2: OVERSEAS CASE STUDIES

1. The section provides a summary of medical fee recommendations/schedules considered by overseas competition authorities. It is important to note that value of any foreign competition case law depends very much on the overall facts and context of the case before CCS, as well as the extent to which the facts of these foreign cases are applicable to the local context. Overseas cases which are relevant to assessment of the GOF are stated directly in the main body of the Statement of Decision.

2. Based on a review of 9 overseas jurisdictions[1] in the Market Study, guidelines on fees and recommended fee schedules of a prospective nature are <u>generally considered to be anti-competitive</u> regardless of whether compliance is mandatory or voluntary.

3. CCS notes that there are instances where competition authorities in other jurisdictions have permitted price schedules/recommendations on medical services. However, CCS notes that the facts of these cases may not be similar to the Application for Decision by the Singapore Medical Association. Some of these permitted price schedules/recommendations consist of (i) surveys on actual price information that are sufficiently historical and aggregated, (ii) price schedules that are deemed necessary for the provision of medical services under partnership/associate-ship/cooperative arrangements where there is a certain amount of risk sharing between medical practitioners and (iii) price schedules set by the government.

United Kingdom

4. British Medical Association (BMA) Guidelines – The UK CC found that, notwithstanding BMA's claim that the BMA Guidelines consisted of only recommended fees, 50% or more of the medical practitioners charged at or within 2 percent of the recommended fees. The UK CC concluded that the BMA Guidelines had prevented, restricted or distorted competition in the supply of private medical services.

United States

5. The Statements of Antitrust Enforcement Policy in Health Care (Health Care Statements) issued jointly by the US Department of Justice (DOJ) and the Federal Trade Commission (FTC) set out the principles under which physician network ventures would be analysed by antitrust enforcement agencies:

"In accord with general antitrust principles, physician network joint ventures will be analysed under the rule of reason and will not be viewed as per se illegal, if the physicians' integrating through the network is likely to produce significant efficiencies that benefit consumers, and any price agreements (or other agreements that would otherwise be per se illegal) by network physicians are reasonably

[1] The 9 selected jurisdictions are Australia, Finland, Germany, Hong Kong, Ireland, New Zealand, South Africa, United Kingdom and United States.

necessary to realise those efficiencies.[2]"

6. Five separate cases[3] were deemed to be anticompetitive, mostly in the context of medical practitioners agreeing on prices for the purpose of negotiations with managed health care providers. In one case[4], the Supreme Court clearly stated that it considered the fee arrangement to be *per-se* illegal. The others were likely to have been assessed and rejected under a rule of reason approach. However, in three instances, price schedules were allowed[5].

Finland

7. Finnish Medical Association – the schedule of recommended maximum fees was prohibited as the Finnish Competition Authority's (FCA) studies showed that the use of the maximum fee schedule had led to uniform pricing where the recommended maximum prices were being used as minimum fees. The FCA further found that medical fees had increased rapidly in the 1980s which led the FCA to conclude that the fee recommendations had a harmful effect on price competition.

Ireland

8. Irish Hospital Consultants Association (IHCA) – the IHCA has an agreement with the health insurers on a schedule of benefits to be paid out by health insurers to medical practitioners. This effectively sets the fees for the treatment of patients. The Irish Competition Authority (ICA) considered that the agreement has the *object and/or effect* to either directly or indirectly fix prices.

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[2] DOJ and FTC, Statements of Antitrust Enforcement Policy in Health Care, Statement 8, B.1.

[3] The five cases are

1. *US v Mountain Healthcare, P.A. Civil No. 1:02CV288-T, District Court of North Carolina, filed 13 December 2002*
2. *Arizona v Maricopa County Medical Society, 457 U.S. 332 (1982)*
3. *FTC, Advisory Opinion to Maine Medical Association, 14 May 1984.*
4. *Minnesota Medical Association, 90 F.T.C. 337 (1977).*
5. *US vs Woman's Hospital Foundation and Woman's Physician Health Organisation, 15 U.S.C. §§ 1,2, filed April 23 1996.*

[4] Arizona v Maricopa County Medical Society, 457 U.S. 332 (1982).

[5] The three cases are

1. *FTC, Advisory Opinion to Maryland Medical Associates ("MMEA"), P.A. May 15, 1987*: Specifically, the FTC believed that competition might be enhanced by offering a package of services to purchasers of eye care services that could not be offered by the medical practitioners individually. Further, FTC that the programme had only affected only a small percentage of medical practitioners' total patients and MMEA did not appear to have sufficient market power to affect the market price for eye services in the Baltimore area, nor did the restriction of output appear to be in danger.
2. *FTC, Advisory Opinion to South East Managed Care Organisation ("SEMCO")/ Jackson Medical Cooperative ("JMC"), July 5, 1994*: FTC did not considered the proposed cooperation between SEMCO & JMC as anti-competitive as it appeared to involve substantial financial risk sharing between the participants and was within the 20% limit within the relevant market.
3. *US vs The American Society of Anesthesiologists ("ASA"), INC, No 75 Civ. 4640 (KYD), June 21, 1979*: The considerations taken by the District Court include that there is no monetary conversion factor to convert the Relative Value Guide ("RVG") to a schedule of prices. The RVG was developed for use to negotiate for acceptable fees with third party carriers. There was substantial evidence that the inputs of ASA were frequently sought from the third party carriers before the derivation of the RVG.

New Zealand

9. Fee surveys by New Zealand Dental Association (NZDA) – fee surveys of its members were conducted by NZDA on an annual basis and the results were distributed to participating members only. The NZCC considered this practice could influence dentistry prices by providing a yardstick for dentists to set prices. While NZCC did not have specific evidence that dentists were utilizing the NZDA survey to set prices, it considered that several characteristics of the surveys would give rise to anticompetitive concerns. Amendments were subsequently made to the survey to address the NZCC's concerns, resulting in NZCC dropping the case.

10. Dunedin City Primary Health Organisation – a group of GPs collectively put in place a maximum fee for patients of 6 to 17 years old. NZCC found that 8 out of 31 practices had been charging at the maximum fee level while the rest were mostly charging less. Nevertheless, NZCC considered that the maximum fee policy had the potential to lead to higher prices than otherwise. NZCC therefore issued a warning to all the GPs advising them that they were likely to have engaged in price fixing if they attended the meeting to discuss the maximum fee policy.

11. New Zealand Medical Association (NZMA) – NZMA has an agreement with the Minister of Health to publish at six-monthly intervals, the range of usual total fees for paediatric consultations charged by medical practitioners in the region. NZCC considered that arrangement would not contravene the New Zealand Commerce Act as it was unlikely to have the purpose or effect of fixing, controlling or maintaining prices.

South Africa

12. Benchmark tariffs for medical services – three separate associations were found by the South African Competition Commission (SACC) to determine, recommend and publish benchmark tariffs for medical services on an annual basis. SACC found that the benchmark tariffs which were arrived at through collusion between members of the associations had the *effect* of fixing a selling price notwithstanding the fact that some medical practitioners might have priced slightly below or above the guidelines. SACC was also concerned that new entrants would be disincentivised to price below the guidelines. Ultimately, SACC was of the view that fee guidelines were not problematic *per se* if they were prepared by an independent person that was not a competitor and would not have a personal interest in the pricing of the market.

Australia

13. The 'List of Fees' of the Australian Medical Association (AMA) – The List of Fees for more than 5000 medical procedures has been in place since 1973 in response to the recommendation of the Commonwealth Committee of Inquiry into Health Insurance. The List of Fees appears to have originated on direction of the Australian government for the purposes of calculating the Medical Benefits Schedule, a legislated requirement under the Australian Health Insurance Act 1973. The List of Fees is

updated annually by an independent consultant through an "indexing" of fees from the previous year, based on a number of cost and wage indices, without any involvement of medical practitioners. The ACCC has not made a formal decision on AMA's List of Fees.

14. Canberra After Hours Locum Medical Services – involving a fee cap (or ceiling) between the CALMS (a medical deputizing service owned and operated by a group of Canberra medical practitioners) and the Australian Capital Territories Health for the provision of after-hour medical services. The ACCC acknowledged that the arrangement was essentially a price fixing arrangement, but authorised the arrangement based on a number of mitigating factors.

15. Royal Australian College of General Practitioners (RACGP) – Authorisation was granted by ACCC to "GPs and other medical practitioners in general practice in associateships and partnerships, who operate as a team, where they share patient records, have common facilities, a common trading name and common policies and procedures".[6]

Germany

16. In Germany, there are two sets of medical fee schedules, namely the Catalogue of Tariffs for Physicians ("GOÄ") and Uniform Value Scale ("EBM"). The GOÄ is set by Germany's Ministry of Health and refers to the fees charged by medical practitioners to patients outside the Statutory Health Insurance ('SHI') system, while the EBM is set collectively through negotiations between the medical practitioners and the insurance plans involved in providing SHI-related services. They are not subject to competition law scrutiny because they were put in place statutorily by the German government which deemed such fee control to be necessary for patient protection

[6] See: ACCC Determination, Application for Revocation and Substitution of Determination A90795, 23 May 2007,

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标　　题：国务院反垄断反不正当竞争委员会关于行业协会的反垄断指南
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国务院反垄断反不正当竞争委员会
关于行业协会的反垄断指南

（2024年1月10日国务院反垄断反不正当竞争委员会印发）

第一条 目的和依据

为了预防和制止行业协会从事《中华人民共和国反垄断法》（以下简称《反垄断法》）禁止的行为，发挥行业协会在促进行业规范健康持续发展、维护市场竞争秩序等方面的积极作用，引导行业协会加强反垄断合规建设，根据《反垄断法》等法律规定，制定本指南。

第二条 基本概念

本指南所称行业协会，是指由同行业经济组织和个人组成，行使行业服务和自律管理职能的社会团体法人。

行业协会主要由具有竞争关系的经营者组成，也可能包括上下游经营者，或者具有其他业务联系的经营者。

第三条 总体要求

行业协会应当加强行业自律，引导本行业的经营者依法竞争，合规经营，维护市场竞争秩序。

行业协会不得违反《反垄断法》的规定，从事排除、限制竞争行为。

第四条 禁止组织从事垄断协议的一般规定

组织本行业的经营者从事垄断协议，是行业协会违反《反垄断法》的主要表现形式。行业协会不得违反《反垄断法》第二十一条的规定，组织本行业的经营者从事垄断协议行为。

前款所称从事，包括垄断协议的达成和实施。

第五条 垄断协议的形式

垄断协议是指排除、限制竞争的协议、决定或者其他协同行为。

协议、决定可以是书面、口头等形式。

其他协同行为是指经营者虽未明确订立协议或者决定，但实质上存在协调一致的行为，有关经营者基于独立意思表示所作出的价格跟随等平行行为除外。

第六条 横向垄断协议

行业协会不得组织本行业具有竞争关系的经营者达成《反垄断法》第十七条禁止的下列垄断协议：

（一）固定或者变更商品或者服务（以下统称商品）价格。行业协会不得以价格自律、行业整顿、维护市场秩序等名义为本行业的经营者设定商品价格或者限制其

自主定价权，也不得组织本行业的经营者固定或者变更价格水平、价格变动幅度、利润水平或者折扣、手续费等其他费用，约定采用据以计算价格的标准公式、算法、平台规则等。

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（五）联合抵制交易。行业协会不得组织本行业的经营者联合拒绝向特定经营者供应或者销售商品、联合拒绝采购或者销售特定经营者的商品，或者联合限定特定经营者不得与其具有竞争关系的经营者进行交易等。

（六）国务院反垄断执法机构认定的其他垄断协议。

第七条 纵向垄断协议

行业协会不得组织本行业的经营者与交易相对人达成《反垄断法》第十八条禁止的下列垄断协议：

（一）固定向第三人转售商品的价格。行业协会不得组织本行业的经营者固定向第三人转售商品的价格水平、价格变动幅度、利润水平或者折扣、手续费等其他费用。

（二）限定向第三人转售商品的最低价格。行业协会不得组织本行业的经营者限定向第三人转售商品的最低价格，或者通过限定价格变动幅度、利润水平或者折扣、手续费等其他费用限定向第三人转售商品的最低价格等。

（三）国务院反垄断执法机构认定的其他垄断协议。

对于前款第一项和第二项规定的协议，行业协会或者经营者能够证明协议不具有排除、限制竞争效果的，不予禁止。

经营者能够证明其在相关市场的市场份额低于国务院反垄断执法机构规定的标准，并符合国务院反垄断执法机构规定的其他条件的，不予禁止。

第八条 组织达成垄断协议的情形

行业协会不得通过下列行为组织本行业的经营者达成垄断协议：

（一）制定、发布含有排除、限制竞争内容的行业协会章程、规则、决定、通知、意见、标准、自律公约等；

（二）通过会议、邮件、电话、函件、即时通讯工具等，召集、组织、推动经营者以书面、口头等形式达成含有排除、限制竞争内容的协议、决议、纪要、备忘录等；

（三）通过会议、邮件、电话、函件、即时通讯工具等，召集、组织、推动经营者虽未订立协议或者决定，但达成排除、限制竞争的协调一致行为；

（四）其他组织经营者达成垄断协议的行为。

第九条 组织实施垄断协议的情形

行业协会不得通过下列行为组织本行业的经营者实施垄断协议：

（一）采取设置入会要求、没收保证金、设定违约金、限制会员权益、取消会员资格、通报批评、联合抵制、暂停经营活动等惩戒措施，强迫经营者实施垄断协议；

（二）采取将垄断协议实施情况与会员奖优评先挂钩等激励措施，引导经营者实施垄断协议；

（三）行业协会自身或者通过第三方机构对经营者实施垄断协议情况进行监督监测；

（四）采取搭建平台、设立专班、建立协调机制等保障措施，为经营者实施垄断协议提供便利性条件；

（五）其他组织经营者实施垄断协议的行为。

第十条 高风险行为

行业协会应当避免从事下列可能为本行业经营者达成、实施垄断协议提供便利性条件的行为：

（一）推动本行业的经营者交换、讨论竞争性敏感信息或者通报竞争性敏感信息；

（二）发布行业内指导价、基准价、参考价、推荐价、预测价等，或者制定供本行业经营者参考的价格计算公式，引导本行业的经营者协调商品价格；

（三）发布不实或者夸大的成本趋势、供求状况等市场行情信息，引导本行业的经营者协调商品价格。

前款所称竞争性敏感信息，是指商品的成本、价格、折扣、数量、质量、营业额、利润或者利润率以及经营者的研发、投资、生产、营销计划、客户名单、未来经营策略等与市场竞争密切相关的信息，但已公开披露或者可以通过公开渠道获取的信息除外。

第十一条 垄断协议豁免

行业协会组织本行业的经营者达成的垄断协议，符合《反垄断法》第二十条规定的情形和条件的，不予禁止。

行业协会可以就垄断协议是否符合《反垄断法》第二十条规定的情形和条件，为本行业的经营者提供指导，并支持本行业的经营者向反垄断执法机构提出豁免申请。

第十二条 行业协会的经营者身份

行业协会从事商品生产、经营或者提供服务，属于《反垄断法》第十五条规定的经营者时，不得违反《反垄断法》规定，从事垄断协议、滥用市场支配地位行为以及违法实施经营者集中。

第十三条 滥用行政权力排除、限制竞争

经法律、法规授权具有管理公共事务职能的行业协会不得违反《反垄断法》第五章的规定，滥用行政权力实施限定交易、通过签订合作协议或备忘录等方式妨碍经营者进入相关市场或对经营者实行不平等待遇、妨碍商品自由流通、排除或限制经营者参加招投标等经营活动、限制或强制经营者设立分支机构、强制经营者从事垄断行为、制定含有排除限制竞争内容的规定等排除、限制竞争行为。

第十四条 协助行政机关滥用行政权力排除、限制竞争

行业协会不得基于行政机关的要求、委托，或者通过与行政机关联合制定发布规定、办法、决定、公告、通知、意见、函件、会议纪要，签订合作协议、备忘录等方式，协助行政机关实施滥用行政权力排除、限制竞争行为。

第十五条 公平竞争审查

经法律、法规授权具有管理公共事务职能的行业协会制定涉及经营主体经济活动的规范性文件、其他政策性文件以及“一事一议”形式的具体政策措施时，应当按照《反垄断法》及相关规定的要求进行公平竞争审查，评估对市场竞争的影响，防止排除、限制竞争。

第十六条 自律合规倡导

行业协会应当借助连接政府与经营主体的独特优势，发挥提供服务、反映诉求、规范行为等职能，促进行业规范健康持续发展。

鼓励和支持行业协会充分发挥自律职能，加强自身反垄断合规建设，采取行业规则、公约以及市场自治规则等方式，指导、帮助会员建立健全反垄断合规管理制度，尽早识别、防范反垄断合规风险。

第十七条 内部合规管理

行业协会应当加强内部合规管理，避免从事或者被会员控制利用从事违反《反垄断法》的行为，破坏市场竞争秩序。鼓励行业协会建立有效的反垄断合规管理制度，或者在现有合规管理制度中加强反垄断合规管理，采取包括但不限于以下措施：

（一）制定反垄断合规行为准则；

（二）建立反垄断合规承诺机制；

（三）设置反垄断合规部门或者人员；

（四）建立反垄断合规奖惩制度；

（五）加强反垄断合规培训。

第十八条 合规风险识别与控制

行业协会可以根据法律规定、行业特征、市场情况等识别现实和潜在的反垄断合规风险，并采取相应的预防措施。

鼓励行业协会制修订行业协会章程、规则、决定、通知、意见、标准、自律公约等时，对是否涉嫌违反《反垄断法》及相关规定进行审查。涉嫌违反上述法律规定的，不予发布或者调整至符合要求后发布。

鼓励行业协会建立反垄断合规举报机制，为协会工作人员、会员等举报涉嫌违反《反垄断法》的行为提供便利，并承诺为举报人的信息保密、不因举报行为采取任何对其不利的措施。

第十九条 加强沟通

鼓励行业协会主动与反垄断执法机构沟通，提供行业市场竞争状况、经营者情况等材料，提出加强和改进反垄断执法的意见建议。

反垄断执法机构及其工作人员对执法过程中知悉的商业秘密、个人隐私和个人信息，依法负有保密义务。

第二十条 加强合规指导

行业协会可以通过以下方式，预防和制止会员从事违反《反垄断法》的行为：

（一）指导会员加强反垄断合规管理；

（二）对会员开展反垄断合规培训，提示会员不得以行业协会为平台或者媒介从事垄断行为；

（三）发现会员涉嫌从事垄断协议等违法行为时，采取告诫、通报、取消会员资格等措施进行教育惩戒；

（四）其他指导会员加强反垄断合规的措施。

发生前款第三项情形的，鼓励行业协会及时向反垄断执法机构举报，或者指导会员尽早向反垄断执法机构报告从事垄断协议的有关情况并提供重要证据，同时提醒会员停止涉嫌违法行为并配合调查。对符合宽大适用条件的经营者，反垄断执法机构可以依法减轻或者免除处罚。

第二十一条 配合调查

行业协会发现自身行为涉嫌违反《反垄断法》规定的，或者已被反垄断执法机构依法立案或者启动调查程序的，应当立即停止相关行为，主动向反垄断执法机构报告有关情况，并配合反垄断执法机构的后续调查，不得拒绝、阻碍反垄断执法机构的调查。

第二十二条 配合约谈

行业协会及其会员涉嫌违反《反垄断法》规定的，反垄断执法机构可以对其法定代表人或者负责人进行约谈。行业协会及其会员应当按照反垄断执法机构的要求予以整改，提出消除行为后果的具体措施、履行时限等，并提交书面报告。

反垄断执法机构可以将约谈情况通报行业管理部门、社会团体登记管理机关，也可以根据需要邀请上述部门共同实施约谈。

第二十三条 法律责任

行业协会从事或者组织本行业的经营者从事垄断行为，行业协会和经营者应当依据《反垄断法》的规定分别承担相应的法律责任。

反垄断执法机构确定行业协会和经营者的法律责任时，应当考虑违法行为的性质、程度、持续时间、消除违法行为后果的情况、行业协会发挥的作用、经营者发挥的作用、垄断协议实施的情况等因素。

行业协会具有主动消除或者减轻违法行为危害后果、配合反垄断执法机构查处垄断行为有立功表现等情形的，反垄断执法机构应当依法从轻或者减轻处罚。

行业协会具有胁迫会员达成垄断协议、阻止会员退出垄断协议、一年内因同一性质违法行为受过行政处罚等情形的，反垄断执法机构可以依法从重处罚。

第二十四条 信用惩戒

对因违反《反垄断法》被列入活动异常名录和严重违法失信名单的行业协会，反垄断执法机构可以将其作为重点监管对象。

第二十五条 加强部门协调

反垄断执法机构与社会团体登记管理机关、行业管理部门等加强沟通协调，推进竞争监管和市场准入、行业监管等更加紧密衔接，由监管执法的个案对接转向深层次制度对接，提高监管执法效能，形成协同规制合力。

第二十六条 指南的解释

本指南由国务院反垄断反不正当竞争委员会办公室解释，自发布之日起施行。

競爭事務委員會
COMPETITION COMMISSION

通訊事務管理局
COMMUNICATIONS AUTHORITY

Guideline

The First Conduct Rule

27 July 2015

2.33 The Commission considers that the prohibition in the First Conduct Rule of an undertaking making or giving effect to an anti-competitive decision of an association of undertakings is intended to prohibit indirect anti-competitive cooperation between undertakings through an association.

2.34 The reference to an association of undertakings in the First Conduct Rule is not limited to any particular kind of association. Examples of associations of undertakings include trade associations, cooperatives, professional associations or bodies, societies, associations without legal personality, associations of associations etc.[15] The mere fact that a professional association has statutory or regulatory functions does not mean that it is not an association of undertakings or that its decisions do not have the object or effect of harming competition.

2.35 The Commission considers a decision of an association of undertakings to include, without limitation, the constitution of the association, rules of the association, resolutions, rulings, decisions, guidelines or recommendations of the association, whether made by the board, members, a committee or an employee of the association.

2.36 A decision of an association may fall within the First Conduct Rule even if it is non-binding. For example, recommended fee scales and "reference" prices of trade and professional associations are decisions of associations of undertakings which the Commission would likely consider as having the object of harming competition.

2.37 Where undertakings, as members of an association of undertakings, make or give effect to a decision of the association of undertakings which has the object or effect of harming competition, the undertakings and the association may both incur liability under the Ordinance.

[15] An association of undertakings may also be an undertaking to the extent that it is engaged in economic activity (see paragraphs 2.2 and 2.3 of this Guideline), and may, in that capacity, contravene the First Conduct Rule by making or giving effect to an agreement or engaging in a concerted practice which has the object or effect of harming competition.

6.11 Horizontal price fixing may take a number of forms. It may, for example, involve directly agreeing upon a specified price, the amount or percentage by which prices are to be increased or a price range. Price in this context includes any element of price and, in particular, includes any discount, rebate, allowance, price concession or other advantage in relation to the supply of products. An agreement with respect to an element of price amounts to price fixing.

6.12 Price fixing can be achieved by indirect means. This includes where, for example, undertakings agree not to quote a price without consulting competitors, or not to charge less than any other price in the market. Similarly, the exchange of information on future price intentions may be assessed as price fixing.[24]

6.13 An agreement concerning price may still amount to price fixing even if it does not entirely eliminate all price competition. Competition may, for example, be harmed despite the ability to grant discounts up to a certain agreed level on a published list price or notwithstanding that parties only fix one price component while competing on others.

6.14 Price fixing might arise through the activities of a trade association or professional body. For example, the association might issue a recommendation to members on prices and/or publish (possibly non-binding) fee scales for members. The non-binding price recommendations or fee scales of a trade association will likely be assessed as having the object of harming competition, as ultimately these arrangements may not differ in substance to a direct agreement or concerted practice between the members of the association.

6.15 The Commission considers that horizontal price fixing agreements are Serious Anti-competitive Conduct under the Ordinance.

6.16 The Commission notes that certain legitimate commercial arrangements may involve parties agreeing on pricing within the context of the relevant arrangements. For example, the parties to a production joint venture might agree that the joint venture will sell its jointly produced products at a particular price. In this respect, the Commission takes the view that the joint setting of the price of such products will not be considered as having the object of harming competition if, for example, the joint sales are necessary for the joint production to be implemented.[25]

[24] See paragraphs 6.38 to 6.49 of this Guideline for a discussion of when exchanges of information may give rise to competition concerns.

[25] See also paragraphs 3.28 to 3.33 of this Guideline which concern restrictions necessary for a legitimate commercial purpose.

Competition (Application of Provisions) Regulation

(Cap. 619 sub. leg. A)

Contents

Competition (Application of Provisions) Regulation

(Cap. 619, section 5(1)(a))

(Enacting provision omitted—E.R. 2 of 2015)

[17 April 2015] *L.N. 39 of 2015*

1. *(Omitted as spent—E.R. 2 of 2015)*

2. Statutory bodies specified for purpose of section 3(2)(a) of Ordinance

The provisions referred to in section 3(1) of the Ordinance apply to the statutory bodies specified in the Schedule.

Schedule

[s. 2]

Statutory Bodies Specified for Purpose of Section 3(2)(a) of Ordinance

1. Ocean Park Corporation.

2. Matilda and War Memorial Hospital.

3. Kadoorie Farm and Botanic Garden Corporation.

4. The Helena May.

5. Federation of Hong Kong Industries.

6. The general committee of the Federation of Hong Kong Industries.