

LEGAL UPDATE

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COMPETITION LAW UPDATE

COMPETITION COMMISSION OF SINGAPORE (THE "CCS") INVESTIGATES POSSIBLE PRICE FIXING AGAIN

Facts of the Case

The CCS is currently investigating a suspected breach of the Competition Act (Cap. 50B) by four Singaporean suppliers of a traditional Chinese confectionery commonly used for prayers ("发糕"), according to a 2 April 2008 report in the bilingual Singapore newspaper, *My Paper*. This investigation was triggered by an announcement in the newspapers by these four main suppliers that they would be raising the prices of the confectionery.

An announcement on 20 March 2008 by the four main suppliers of the traditional Chinese confectionery stated that, from 1 April 2008, the four suppliers would increase their recommended retail prices of the 150g and 300g confectioneries by \$0.20 and \$0.30 respectively. This joint announcement was made purportedly to minimise the hassle of informing all their customers.

After the announcement, the CCS conducted an investigation into the matter, including visits to the suppliers' premises. The suppliers have since agreed not to implement the stated price increases on 1 April 2008 but, instead, decided to base individual price increases entirely on their own costs. The CCS has yet to comment on the matter at this stage as it is still under investigation.

On a separate note, the *My Paper* report stated that, as of 15 February 2008, the CCS has commenced 29 investigations in response to complaints of alleged breaches of the Competition Act.

The Law: Section 34 of the Competition Act

Section 34 of the Competition Act prohibits:

- agreements between undertakings;
- decisions by associations of undertakings; or
- concerted practices

which have as their object or effect the prevention, restriction or distortion of competition within Singapore unless they are excluded or exempted. This prohibition applies to both formal and informal agreements in written or oral form, including "gentlemen's agreements", regardless of whether the agreements can be legally enforced or not. What is important is whether the parties have reached a consensus on the actions they will or will not take.

The CCS Guidelines on the section 34 prohibition (the "**CCS Guidelines**") also explain that certain decisions or actions by associations of undertakings (such as trade associations and professional associations) may also infringe the section 34 prohibition. Examples of association decisions may include the association's constitution or rules, binding decisions of the association management or recommendations issued by an association to its members.

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The key consideration is whether the object or effect of the decision is to influence the conduct, or to co-ordinate the activity, of the members in some commercial matter, regardless of whether it binds the members or whether the members fully comply with it.

Examples of Agreements Caught by Section 34

Some common examples of agreements caught by section 34 include price-fixing, which may involve fixing either the price itself (eg., price increase or decrease or price range) or the components of a price, such as a discount (eg., volume or term discounts). Price-fixing may also take the form of an agreement to restrict price competition, such as an agreement to adhere to a set of price lists or to consult / inform potential competitors before making any quotes. Other agreements which will be caught by the section 34 prohibition include bid-rigging, market-sharing and output limitation.

The Agreement Must Have an Appreciable Adverse Effect

The CCS Guidelines state that an agreement will generally have no appreciable adverse effect on competition if:

- the aggregate market share of the parties to the agreement does not exceed 20% on any of the relevant markets affected by the agreement where the agreement is made between actual or potential competitors on any of the markets concerned; or
- the market share of each of the parties to the agreement does not exceed 25% on any of the relevant markets affected by the agreement where the agreement is made between parties which are neither actual nor potential competitors on any of the markets concerned.

Agreements between small or medium enterprises (“SMEs”) are rarely capable of distorting competition appreciably within the section 34 prohibition. To qualify as an SME, a manufacturing company must have Fixed Assets Investment of less than S\$15 million, while a service company must have fewer than 200 workers.

Any agreement involving price-fixing, bid-rigging, market-sharing or output limitations will always be deemed by the CCS as having an appreciable adverse effect on competition, notwithstanding that the market shares of the parties may be below the threshold levels mentioned above, or even if the parties to such agreements are SMEs.

Consequences of Infringement

If a business is found to be in breach of competition law, the consequences can be severe:

- **Agreements voided:** Provisions in an agreement that infringe the section 34 prohibition will be void and unenforceable.
- **Financial penalties:** The CCS has the ability to impose a fine on an infringing business of up to 10% of the turnover of the business in Singapore for each year of the infringement, up to a maximum of 3 years.

- **Cessation and/or modification orders:** Further, the CCS has the power to require a business to cease or modify certain business activity or conduct. It may make any directions as it considers appropriate, including requiring the business to suspend its agreements, make structural changes to its business, inform third parties that an infringement has been stopped, and report back periodically to the CCS. Further, directions may be given to any person(s) as the CCS considers appropriate, including the business' subsidiaries and/or parent companies.
- **Rights of private action:** In addition, it is quite possible that the business may face potential third party claims from a party that has suffered loss or damage directly as a result of an infringement of the Competition Act.

Key Lessons

With this latest cartel investigation following closely on the heels of the decision on the pest control cartel investigation, it is clear that the CCS is stepping up its investigation and enforcement activities in 2008. A report on the pest control cartel investigation is available at: http://www.drewnapier.com/pdf/10Jan2008_Legal_Update.pdf.

This case also highlights that SMEs are also capable of being caught by the Competition Act if they engage in activities such as price-fixing and bid-rigging. Compliance with the Competition Act is crucial for all businesses, including SMEs. All businesses should be proactive to prevent any risks of being found in breach of competition law. Ignorance of the law may result in severe consequences.

If you would like more information about the case or wish to discuss how it may potentially affect you or your business, please feel free to contact our Competition Law Business Group:

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Cavinder handles complex litigation spanning a wide area of corporate and commercial matters. One of his areas of expertise is competition law where he has represented various clients in investigations by competition law regulators both in Singapore and overseas. Cavinder previously practised anti-trust law in New York, working on cases like the Microsoft anti-trust litigation, and obtaining US Department of Justice approval for the merger between Grand Metropolitan and Guinness in one of the, then, world's largest mergers. Cavinder graduated from Oxford University with First Class Honours in Law. He worked for the Chief Justice of Singapore as a Justices' Law Clerk. Cavinder also has a Masters in Law from Harvard Law School which he attended on a Lee Kuan Yew Scholarship.

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Chong Kin practises corporate law with strong emphasis in the specialist area of competition law. Chong Kin played a key role in the development of sectoral competition regulation in the telecommunications, media and print industries in Singapore. Chong Kin regularly advises a number of large international clients on competition law, and was involved in the first merger notification filing to the Competition Commission of Singapore in 2007. He is recognised by The International Who's Who of Competition Lawyers 2008, The International Who's Who of Regulatory Communications Lawyers 2008, the Asia-Pacific Legal 500 (2008 edn) and the Practical Law Company's *Which Lawyer?* Survey 2008 for his achievements in Competition/Anti-trust and regulatory work.

The content of this update does not constitute legal advice and should not be relied on as such. Specific advice should be sought about your specific circumstances.

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