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Singapore's New Competition Law: the First Year

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The Singapore Competition Act came into force on 1 January 2006 and introduces a system of general competition law in Singapore. It seeks to regulate economic activities in sectors where there is no existing sector-specific competition regulation. The main provisions in the Competition Act seek to prohibit agreements that restrict competition, prohibit abuse of dominance and prohibit mergers that result in substantial lessening of competition.

To implement the Competition Act, the Competition Commission of Singapore (CCS) published a number of comprehensive Guidelines outlining how it would apply the substantive provisions of Singapore's new competition law including market definitions, leniency treatment for whistle blowers, filing of notifications for guidance or decisions, treatment of intellectual property rights and imposition of appropriate amounts of penalty. These Guidelines are available on the CCS website at: www.ccs.gov.sg

This article sets out a brief overview of Singapore's competition regime including the upcoming merger regime that will come into force on 1 July 2007. Finally, we will discuss the key competition law developments in Singapore over the past 12 months.

Singapore's competition regime

On 1 January 2006, the provisions of the Competition Act on anti-competitive agreements, decisions and practices (section 34) and the abuse of dominance (section 47) came into force. A slew of business activities, ranging from price fixing to predatory behaviour to exclusivity agreements could potentially find themselves on the wrong side of the law. However, to make the best use of available regulatory resources, the CCS is expected, for a start, to concentrate its enforcement activities on certain forms of conduct that are considered to be particularly injurious to the spirit of competition and harmful to the Singapore economy as a whole.

Section 34 of the Competition Act

Section 34 of the Competition Act prohibits agreements between undertakings, decisions by associations of undertakings or concerted practices that have as their object or effect the prevention, restriction or distortion of competition within Singapore (the Section 34 Prohibition) unless they are exempt in accordance with the provisions of part III of the Competition Act. The Section 34 Prohibition is similar to the United Kingdom's chapter 1 and the EC's article 81 prohibitions.

An agreement made outside Singapore, an agreement where any party to the agreement is outside Singapore or any other matter, practice or actions arising out of such agreement outside Singapore are prohibited provided that the agreement in question has as its object or effect the prevention, restriction or distortion of competition within Singapore.

Section 34(2) of the Competition Act provides an illustrative list of such agreements, those that:

- (a) directly or indirectly fix the 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; or

(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.

In its Guideline on the Section 34 Prohibition (the Section 34 Guideline), the CCS specified that an agreement will infringe the section if it has an appreciable adverse effect on competition in Singapore.

The CCS indicated in the Section 34 Guideline 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 per cent in any of the relevant markets affected by the agreement where the agreement is made between competing undertakings (ie, undertakings which are actual or potential competitors on any of the markets concerned);
- if the market share of each of the parties to the agreement does not exceed 25 per cent on any of the relevant markets affected by the agreement, where the agreement is made between non-competing undertakings (ie, undertakings that are neither actual nor potential competitors on any of the markets concerned); or
- in the case of an agreement between undertakings where each undertaking is a small or medium enterprise (SME). The Section 34 Guideline states that SMEs are defined as manufacturers that have fixed assets of less than S\$15 million and, for SMEs in the service industry, those which have less than 200 employees.

However, the Section 34 Guideline states that four activities will be considered 'hard-core' or 'per se' breaches of section 34 and will always have an appreciable adverse effect on competition. These are agreements to fix prices, share markets, rig bids or limit production.

The third schedule of the Competition Act specifically excludes certain categories of agreements from the Section 34 Prohibition. In particular, paragraph 8(1) of the schedule excludes "vertical agreements" from the Section 34 Prohibition, other than such vertical agreement as the minister of trade and industry (the minister) may by order specify. As of the date of this paper, the minister has only issued a block exemption order for liner shipping arrangements in the maritime industry.

Section 47 of the Competition Act

This section prohibits any conduct on the part of one or more undertakings, which is an abuse of a dominant position in any market in Singapore (Section 47 Prohibition).

Section 47(2) of the Act provides an illustrative list of such conduct:

- (a) predatory behaviour towards competitors;
- (b) limiting production, markets, or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or

- (d) *making 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.*

Exemptions and exclusions

The Competition Act provides a number of exclusions from the Section 34 and 47 Prohibitions in the third schedule of the Competition Act. Specifically, paragraph 4 of the third schedule empowers the minister to exclude a particular agreement or agreements of a particular description from the Section 34 Prohibition if there are exceptional and compelling reasons of public policy.

The third schedule of the Competition Act excludes agreements that have a net economic benefit. This is Singapore's equivalent to the European Commission's article 81(3) except for one important difference: Singapore's net economic benefit exclusion does not specifically require that consumers benefit from the agreement. The full extent to which the CCS will consider consumer benefit has yet to be seen. The CCS did consider consumer benefit in finding that the agreement in the Notification for Decision by Qantas Airways and British Airways of their Restated Joint Services Agreement (case No. CCS 400/003/06) (*Qantas/Orangestar* decision) resulted in net economic benefit. On the other hand, with no apparent consideration of benefit to consumers, the CCS also concluded that the agreement in the Notification for Decision by Qantas Airways and British Airways of their Restated Joint Services Agreement (case No. CCS 400/002/06) resulted in net economic benefit.

Other than exclusions, section 36 of the Competition Act introduces a system of block exemptions. Briefly, if the CCS is of the opinion that a particular category of agreements is likely to have net economic benefits based on the criteria in section 41 of the Competition Act, the CCS can make recommendations to the minister for a block exemption order to be made for this category of agreements. An agreement which infringes the Section 34 Prohibition is exempted if it satisfies the criteria in section 41 of the Act and the conditions and obligations set out in the block exemption order.

The block exemption provision only applies to the Section 34 Prohibition. It does not apply to conduct which is an abuse of dominance under section 47 of the Competition Act. As such, conduct which infringes the Section 34 Prohibition but which is exempted under a block exemption order may nonetheless be regarded as conduct amounting to an abuse of a dominant position under the Section 47 Prohibition.

Consequences of infringement

An agreement that is entered into prior to 1 January 2006 is void and unenforceable to the extent that it infringes the Section 34 Prohibition on 1 January 2006. An agreement entered into on or after 1 January 2006 is void and unenforceable to the extent that it infringes the Section 34 Prohibition. Pursuant to its powers under Section 69(2), the CCS can also direct the parties to the agreement to modify or terminate the infringing agreement. In the case of a Section 47 infringement, the CCS can direct the infringing undertaking to modify or cease its conduct.

Where there is an intentional or negligent infringement of the Section 34 Prohibition or Section 47 Prohibition, the CCS may impose a financial penalty not exceeding 10 per cent of the turnover of the business of the infringing undertaking in Singapore for each year of infringement up to a maximum of three years.

Lastly, under section 86 of the Competition Act, a party who has suffered any loss or damage directly as a result of an infringement of the Section 34 or Section 47 Prohibitions has a right of action in civil proceedings against the infringing undertaking. Such a right may

only be exercised after the CCS has determined that infringement has occurred and after the appeal process has been exhausted.

New merger regime in force in July

On 27 September 2006, the minister of state for trade and industry, S Iswaran, announced that the final prohibition of the Act – against anti-competitive mergers – will come into effect from 1 July 2007.

Section 54 of the Act will prohibit mergers that have or are expected to substantially lessen competition in any market in Singapore. However, where it can be shown that the economic efficiencies of a merger outweigh its anti-competitive detriment, it will be allowed to proceed. Owing to Singapore's small and open economy, the CCS noted that many industries will by default have high concentration levels and expects only a minority of mergers to raise competition concerns.

The CCS raised a number of key policy issues for public consultation and we highlight the more important outcomes of this consultation.

The Competition Act presently allows merger parties to notify their merger to the CCS for guidance or decision voluntarily. The CCS proposed retaining a voluntary regime as a mandatory one would likely increase business costs unnecessarily. In response to public consultation, the CCS stated that it will consider accepting requests for pre-notification discussions one month before the merger regime comes into force, ie from 1 June 2007. These discussions aim to help merger parties identify the information needed for a complete notification, and how the information can be provided to expedite the CCS's review of a merger situation with effect from 1 July 2007. In addition, the CCS clarified that mergers effected before the merger regime comes into force, will not be subject to the merger regime.

The Act currently provides only for the voluntary notification of completed mergers by the merger parties. The CCS proposed extending the Act to allow for the voluntary notification of anticipated mergers as well as to give businesses some measure of certainty before they invest significant resources in a merger. This CCS proposal to allow merger parties to notify an anticipated merger was well received. Further, the CCS is to be empowered to accept commitments proffered by merger parties to address competition concerns, thus enabling an otherwise anti-competitive merger to proceed.

Following public consultation, to balance the interests of all parties concerned, the CCS has advised that it will request that third parties submit their views on a merger situation which has been notified to the CCS within a stipulated time. The CCS pointed out the need to give third parties sufficient time to develop full submissions, while obviating a situation where views are deliberately submitted late, for example, by competitors, to frustrate a merger transaction.

The CCS proposed excluding ancillary restrictions relating to notified mergers from being examined under the Section 34 and 47 Prohibitions. In the interest of business certainty, section 54 will be wholly independent from Sections 34 and 47. Consequently, ancillary restrictions (defined as agreements directly related and necessary to the implementation of a merger) will be excluded from the Sections 34 and 47 Prohibitions.

Application for CCS decision

The Competition Act allows parties to apply for guidance (or a decision if they consider that an agreement could be in risk of breaching section 34. There is no obligation for a party to apply for guidance or a decision. The CCS received three applications for decisions in 2006. A decision will indicate whether the CCS considers that the notified agreement has infringed Section 34.

Visa International filed the first notification for decision in January 2006. Visa requested a decision from the CCS that its multi-

lateral interchange system (MIF system) does not infringe the Section 34 Prohibition, or in the alternative, that it meets the net economic benefit exclusion criteria set out under the third schedule to the Act. The CCS has not yet made a decision in this matter. However, the CCS has retained economists to undertake a general study of the payment cards sector and the MIF system in Singapore generally.

Qantas/British Airways and Qantas/Orangestar filed two notifications for decision in April 2006. The relevant agreements in each decision allow Qantas and British Airways, and Qantas and Orangestar respectively, to coordinate scheduling, capacity, prices, yields and marketing on all routes, including between Australia and Europe, Australia and Asia and Asia and Europe. In both decisions, the CCS considered that the relevant agreements fulfilled the net economic benefit criteria because they are likely to bring about improvements and cost savings in the operations of the parties. It also found that the agreements are likely to improve Singapore's air connectivity. Any anti-competitive detriment arising from cooperation is likely to be mitigated by the competitive presence of other airlines, and outweighed by the benefits flowing from the agreement. In the *Qantas/Orangestar* decision, the CCS was also of the view that the improvement in connectivity will increase employment and demand for services related to the aviation industry in Singapore.

The *Qantas/Orangestar* decision contained the CCS's approach to the single economic unit doctrine. An agreement between parties that form a single economic unit falls outside the Section 34 Prohibition. In determining whether the cooperation agreement between Qantas and Orangestar was in breach of section 34, it considered whether the parties formed a single economic entity. The parties relied on two grounds in support of the single economic entity argument. First, it was submitted that the entities had a 'unity of interest'

and therefore constituted a single enterprise incapable of conspiring in contravention of competition laws. The CCS took the view that it could be inferred from the rights conferred upon Qantas in the Orangestar shareholders' agreement, that the parties' interests may potentially diverge. The CCS also took the view that the potential for competition between Qantas and Orangestar exists. Second, the parties claimed that Qantas had 'decisive influence' over Orangestar's activities via blocking rights over the latter's material board decisions. As the Orangestar board of directors was not accustomed to or under an obligation to act in accordance with the directions of Qantas, the requisite control in establishing a single economic entity relationship was found to be absent.

Notably, the CCS appeared willing to consider cases from both the United States and the European Community in its assessment. However, the CCS cautioned that: "While some of the cases cited in this decision may be persuasive or useful in assisting the Commission in reaching its decision on the single economic entity argument, they are not binding. The value of any foreign competition case law will depend very much on the overall context and the extent to which the facts of these cases are applicable to the local context and the facts of the present application".

Block exemptions

In July 2006, the minister issued a block exemption order (BEO) to exempt liner shipping agreements relating to liner shipping services from section 34 of the Competition Act.

The BEO was based on the recommendation from the CCS that the order would maintain Singapore's position as a premier international maritime centre and ensure that businesses in Singapore will continue to have access to reliable and competitively-priced

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Drew's Competition team is among Singapore's foremost practices in this area. Having gained immense experience undertaking competition/regulatory work for both the communications and media regulators in Singapore, the dynamic team is more than well placed to take on generic competition law work for businesses and industries across all sectors.

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liner shipping services of adequate frequency. The BEO took effect retrospectively from 1 January 2006 and is valid for five years. The CCS may, where circumstances warrant, review the BEO before that period expires.

CCS studies

Along with a study into Singapore's payment cards sector discussed above, the CCS also commissioned a study on the effects of price recommendations in Singapore by trade and professional associations. The results of this study have not yet been made public.

Notably, however, the CCS issued a media release on 4 April 2007 endorsing the Singapore Medical Association's decision to withdraw its fee guidelines. The CCS stated that "competition authorities agree that fee guidelines are generally harmful to competition. The CCS believes that fee guidelines are inappropriate in today's circumstances." The CCS also noted that it would welcome other associations to replace their fee guidelines with a system of published prices.

The Competition Act came into force on 1 January 2006 and introduces a system of general competition law in Singapore. Singapore's merger regime will come into force in July 2007 after a successful public consultation period, which led to a number of positive changes to the merger procedures. The CCS's finalised merger Guideline should be published soon.

The CCS's first year was perhaps defined not by cartel-busting headlines, but by considering complex notifications for decisions, block exemptions, and the activities of trade and professional associations.