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THE QUEEN'S AWARDS
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Singapore: Competition Law Update 2008

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The provisions in the Competition Act 2004 (Cap 50B) (the Competition Act) that comprise Singapore's general competition regime came into force in three phases. While the Competition Commission of Singapore (CCS) was set up on 1 January 2005, the prohibitions against anti-competitive agreements and abuse of dominance only came into force on 1 January 2006. This was followed by the merger control provisions on 1 July 2007.

In this short period of time, businesses in Singapore are quickly becoming aware of the need to ensure that their business dealings comply with competition law. This is partly attributed to the intensive advocacy campaign undertaken by the CCS after the competition law came into effect, as well as the first cartel decision that was issued recently in January 2008.¹

This article serves to update the reader on recent developments. First, we explain the new merger control provisions. We then move on to outline key developments in competition law this past year. Finally, we make some observations on the attitudes of businesses towards competition law compliance.

Merger control

The law

On 1 July 2007, the Singapore merger control provisions came into effect to complement the existing two prohibitions relating to anti-competitive agreements and the abuse of a dominant position. The operative provision, set out in section 54 of the Competition Act, prohibits mergers that have resulted, or may be expected to result in a substantial lessening of competition within any Singapore market, where such a merger will not give rise to net economic efficiencies (the section 54 prohibition).

Contemporaneously, the CCS also introduced two guidelines on merger control – the CCS Guidelines on the Substantive Assessment of Mergers and the CCS Guidelines on Merger Procedures.

The definition of 'merger' under the Competition Act is wider than the common understanding of the term. Some common transactions that fall within this definition include:²

- mergers and acquisitions, as commonly understood;
- acquisitions of businesses as going concerns;
- substantial acquisitions of company assets; and
- joint ventures that are considered 'mergers' under the Competition Act.³

Under the Competition Act, a joint venture is considered a 'merger' if it:

- is jointly controlled by its parent companies;
- operates in the market and performs all the functions of an economic entity operating in that market; and
- is intended to operate on a lasting basis.

The section 54 prohibition does not apply to merger situations that:⁴

- result in net economic efficiencies;
- are approved by any minister, the Monetary Authority of Singapore or any regulatory authority;
- are governed by other competition legislation (eg, in the energy, telecommunications and media industries); or

- relate to the supply of postal services, piped potable water, wastewater management services, licensed bus services, licensed rail services and licensed cargo terminal operations.

The notification process is not mandatory.⁵ This decision was made to avoid unnecessarily increasing business costs.⁶ This means that parties contemplating mergers will have to self assess the risk from a competition law perspective to decide whether to file a notification. However, this is not an easy task for businesses to self undertake without instructing competition lawyers to assist. It is helpful that the CCS has issued four merger decisions to date and these serve as a useful guide to the CCS's approach in reviewing mergers.⁷

Developments

When the Competition Act was passed in 2004, it contained provisions relating to mergers that were intended to come into force during a later phase of Singapore's competition law development. However, before the section 54 prohibition came into force, these original provisions were amended following a review of best practices in various jurisdictions, including the US, UK, EU, Australia and Ireland. One key amendment resulting from this study was that the Act now excludes mergers that will give rise to net economic efficiencies that outweigh any adverse effect from the substantial lessening of competition arising from it.

The Guidelines also introduced a process for pre-notification discussions with the CCS to take place, in order for parties to identify information that would be helpful to the assessment of the CCS and allow, subsequently, for mergers to be assessed more quickly.⁸ However, the process of seeking a confidential guidance from the CCS in relation to mergers was removed, largely on the basis of the inherent problems foreseen in its application.⁹ Commonly in merger considerations, the views of market competitors, customers and suppliers are sought in order to fully appreciate the likely market impact of the merger. This market information is particularly useful and important to the decision of the competition authority. The inability to discuss matters with those industry participants would seriously jeopardise the ability to provide robust and sound guidance on the proposal and as such the ability to seek confidential guidance was removed before the merger provisions came into force.

The Competition Act also allows the CCS to accept commitments made by the merging parties to address competition concerns that may otherwise cause the merger to be considered anti-competitive. Such commitments would usually be in the form of structural or behavioural undertakings that are designed to alleviate potential competition issues. The exact approach of the CCS to such undertakings remains to be seen, with none of the four decided notifications¹⁰ giving rise to such considerations. However, the CCS is currently reviewing the merger between Thomson Corp and Reuters Group PLC, which has been cleared by competition authorities in the US, Canada and the EU on condition that both companies make financial data services divestments. It is likely that in considering such commitments the CCS will seek to ensure that their acceptance will not give rise to burdensome and ongoing regulation or cost. Such considerations have led other jurisdictions to the acceptance

only of structural undertakings in the form of divestments.

To date,¹¹ there have been six notified mergers considered by the CCS, of which one has moved to a more substantial 'phase 2' analysis, four have been cleared and one is still being considered under the preliminary 'phase 1' analysis.

The test of a 'substantial lessening of competition' is not a unique concept in relation to competition law, but just how it will be interpreted in the Singaporean context is an open question. It is normally equated with situations where there is an increase in market power such that the merged entity will have the ability to profitably raise prices above the current level or where the merger makes it more likely that the remaining firms in the market will coordinate their behaviour to raise prices, or reduce quality or output.

The boundaries of acceptable market consolidations will likely start to be drawn at the point that the CCS elects not to unconditionally clear a notified merger. Until that point, applicants will have to draw on overseas experiences for insights on the likely meaning of a 'substantial lessening of competition'.

While it may be too early to draw any general conclusions about the Singapore merger regime, it is likely that because of its similarity to other international regimes, lessons will be learned from them.

Prohibition against anti-competitive agreements

The law

Section 34 of the Competition Act prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices that have as their object or effect the prevention, restriction or distortion of competition within Singapore, where such agreements do not result in net economic benefit (the section 34 prohibition).

Developments

On 9 January 2008, the CCS issued its first infringement decision,¹² finding that six pest control companies had colluded in relation to the supply of pest control chemicals on particular projects and had therefore infringed the section 34 prohibition. This collusive tendering resulted in artificial prices that were in essence manufactured, rather than the result of a true competitive process.

The 16-month investigation resulted from a tip-off received by a procurement officer connected to one of the affected tenders and culminated in a landmark infringement decision. The officer had received an e-mail, which was copied to him accidentally, and which indicated that certain parties were colluding in respect of their tender pricing.

The total penalty handed down by the CCS was approximately S\$262,760, with the individual fines ranging between S\$4,332 and S\$92,634. The fines were calculated by factoring in the turnover of the companies, the duration of the infringement and its severity. A number of other factors were also given some weight. Notably, the parties' cooperation with the CCS during its investigation was also a factor.

The decision is important for a number of reasons, not least that it is the first of its kind in Singapore and is a strong signal to all businesses that competition law will be stringently enforced. In the course of the investigation the CCS executed surprise raids on the parties involved in an attempt to find and secure new evidence.

The CCS also pointed out that parties would not be excused from being penalised by reason of the fact that they did not, or did not intend to, abide by an agreement that is manifestly anti-competitive. Instead, a strict liability approach was taken and penalties imposed on all parties involved.

The CCS has also decided on two notifications for decision that were filed in relation to section 34, which concern airline alliances between *Qantas/British Airways*¹³ and *Qantas/Orangestar*.¹⁴

In both decisions, the CCS considered whether the arrangements qualified for exemption from the section 34 prohibition because they have 'net economic benefit'. In those cases, the parties wanted 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 were likely to bring about improvements and cost savings in the operations of the parties. It also found that the agreements would be likely to improve Singapore's air connectivity. Any anti-competitive detriment arising from cooperation was considered to be mitigated by the competitive presence of other airlines, and outweighed by the benefits flowing from the agreement.

The *Qantas/Orangestar* decision was also instructive because it contained the CCS's approach to the doctrine of the 'single economic entity'. An agreement between parties that form a 'single economic entity' 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'¹⁵ 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'-type relationship was found to be absent.

No further decisions were made by the CCS in 2007 relating to potentially anti-competitive agreements.

Prohibition against abuse of a dominant position

The law

Section 47 prohibits the abuse of a dominant position (the section 47 prohibition) and is the prohibition that is perhaps the most reliant on economic analysis. An abuse of dominance relies, by definition, on the infringing party holding a position of dominance within a relevant market and further that the conduct in question does actually amount to an abuse of that dominance. As such, abuse of dominance cases normally involve lengthy, complex investigations, which are commonly clothed in secrecy because of the damage that may be caused to business reputation if allegations or details about an investigation are leaked.

Developments

The CCS is yet to issue an enforcement decision in relation to a breach of the section 47 prohibition, but this provides no insight into whether the CCS may currently be considering or conducting ongoing investigations.

In 2007, two section 47 issues were reported relating to potential abuses of a dominant position by NETS,¹⁶ which provides an electronic funds transfer at point of sale system for a number of merchants in Singapore.

The first allegation related to an increase in NETS fees, which was referred to the CCS as a potential abuse of a dominant position by the Consumers Association of Singapore. The CCS discontinued the investigation, finding NETS not to be in breach of the section 47 prohibition. While only a short media release¹⁷ relating to the

matter was issued, it appears that the CCS considered the relevant market to be wider than that for debit card payment systems and accordingly that NETS was not dominant.

Further, even if NETS had been considered to be dominant, it is not clear that in increasing its fees it could be said to be acting in abuse of that dominance. The role of the CCS is not to regulate prices, nor to directly ensure the lowest possible prices to consumers. Accordingly, whilst the discontinuation of the investigation may appear to be fairly innocuous, in many respects it is a further reminder that simple pricing decisions, such as this one, are unlikely to be considered to fall within the purview of the CCS and its enforcement role. Instead, the focus must be whether the conduct would be detrimental to the competitive environment or process.

The second investigation involved the 'Affinity Programme' run by NETS. This essentially offered discounts to merchants that offered NETS and no other cashless payment system. In doing so, the scheme appeared to offer a rebate for loyalty, which would arguably affect competitors' ability to compete.

Again, the investigation was closed and a short media release was published.¹⁸ This explained that, 'taking into account relevant factors such as the terms of the programme as well as the amount of discount offered by the programme, the CCS is of the view that the programme is unlikely to exclude NETS' competitors'.

The CCS also acknowledged that the programme still allowed merchants to accept other forms of cashless payment, although they would have to forgo the discount offered, and that in many cases the programme would encourage the uptake of NETS resulting in increased consumer choice.

Large, potentially dominant, firms are likely to face a period of uncertainty in the next few years. Whilst self assessments will help to cast light on the issues of the relevant markets and whether they in fact actually hold a position of dominance, such assessments will only be indicative and not determinative.

Uncertainty also exists over what conduct will actually be held to be an abuse of dominance. Fortunately, the prohibitions in the Competition Act are largely similar to those in the EU and the appli-

cation and experiences of these jurisdictions are highly relevant in drawing conclusions about the likely outcomes.

Businesses are likely to proceed with caution as the period of uncertainty will inevitably continue for a while to come; at least until enough information is available to enable practitioners to advise with more certainty on the likely approach of the CCS.

The way forward

The process of adjusting business attitudes is not easy, nor is it something that can be achieved overnight. An awareness of the presence and reach of competition law is the key requirement, followed by an attitude of compliance.

Already, many businesses have seen value in auditing their business arrangements and conduct to ensure competition law compliance, particularly those potentially dominant companies that may be vulnerable to scrutiny under section 47 of the Act.

Notes

- 1 Section 68 of the Competition Act (Cap 50B) Notice of Infringement Decision issued by the Commission Collusive Tendering (Bid-Rigging) for Termite Treatment/Control Services by Certain Pest Control Operators in Singapore (hereafter, pest control decision), 9 January 2008, case No. CCS 600/008/06, at: www.ccs.gov.sg/NR/rdonlyres/9717BB75-C9A2-4390-8949 (last viewed: 11 March 2008). Following this decision, the CCS conducted a public symposium to educate businesses on how to spot collusive tendering and bid rigging. This is part of the CCS's efforts to combat cartels by enlisting the help of the public to assist in monitoring and reporting cartel activities.
- 2 Section 54 of the Competition Act.
- 3 Set out in section 54(5) of the Competition Act.
- 4 The fourth schedule of the Competition Act.
- 5 Paragraph 2.3 of CCS Guidelines on Merger Procedures.
- 6 Minister of State Lee Yi Shyan, Second Reading Speech for Competition (Amendment) Bill, 21 May 2007, at: <http://app.mti.gov.sg/default.asp?id=148&articleID=8561> (last viewed: 11 March 2008).

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Established in 1889, Drew & Napier LLC is a full service legal practice and one of the most established, largest and best-known legal practices in Singapore. Staffed by lawyers with a wide range of local and international competition regulatory experience and broad-based understanding of business concerns, we are ideally placed to advise on the full range of competition law matters, under the general Competition Act as well as the carved-out sectors of telecommunications, media, energy and post. In particular, the team boasts in-house competition economics expertise, led by the former director of economics at the Competition Commission of Singapore (CCS).

In particular, our lawyers undertook the drafting of the Telecoms Competition Code in 2000 and 2004 as well as the Media Market Conduct Code in 2003. Most recently, we advised the regulator on the liberalisation of the postal industry and drafted the proposed Postal Competition Code. The same team was also instructed by the CCS to conduct a study into the effects of price recommendations by trade and professional associations on competition in Singapore. The team was also credited for successfully obtaining merger clearance in M&As involving AT&T/SBC; AsiaNetcom/C2C; Pacific Internet/Connect Holdings; Reliance/FLAG, as well as the first-ever merger clearance under the Competition Act for Intel/STMicroelectronics/Francisco Partners.

Our dispute resolution team routinely handles cases involving CCS investigations into allegations of abuse of dominance, cartel price-fixing and bid-rigging, and we have acted for clients in investigations by the US Department of Justice and competition regulators in Asia. Moreover, we have represented the telecommunications and media regulators in appeals against their decisions as well as companies being investigated by sectorial competition law regulators.

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- 7 11 March 2008.
- 8 See paragraphs 3.7 to 3.9 of the CCS Guidelines on Merger Procedures.
- 9 Ibid, note 6.
- 10 As of 11 March 2008, the CCS has cleared four notified mergers or anticipated mergers.
- 11 11 March 2008.
- 12 Pest control decision, *ibid*, note 1.
- 13 Section 44 of the Competition Act Notice of Decision issued by the Commission, 'Notification for Decision by Qantas Airways and British Airways of their Restated Joint Services Agreement', 13 February 2007, case No. CCS 400/002/06, at: www.ccs.gov.sg/NR/rdonlyres/BE42846E-3D33-40F8-AF03-6D5CB37A7C0A/15002/JSA_FinalDecision20070212.pdf (last viewed: 11 March 2008).
- 14 Section 44 of the Competition Act Notice of Decision issued by the Commission, 'Notification for Decision by Qantas Airways and British Airways of their Restated Joint Services Agreement', 5 March 2007, case No. CCS 400/002/06, at: www.ccs.gov.sg/NR/rdonlyres/BE42846E-3D33-40F8-AF03-6D5CB37A7C0A/15259/FinalNoticeofDecisionQantasOrangestar05032007.pdf (last viewed: 11 March 2008).
- 15 *Ibid*, at paragraph 27.
- 16 Network for Electronic Transfers (Singapore) Pte Ltd.
- 17 Press release, 'CCS Responds to NETS' Fee Increase', 25 June 2007, at: www.ccs.gov.sg/NewsEvents/PressReleases/2007/CCS+responds+to+Nets.htm (last viewed: 11 March 2008).
- 18 Press release, 'The Competition Commission of Singapore Closes Its Inquiry into the NETS Affinity Programme', 19 December 2007 at: www.ccs.gov.sg/NewsEvents/PressReleases/2007/NETS+AP.htm (last viewed: 11 March 2008).