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Dawn Raid Hotline: +65 9726 0573**WELCOME MESSAGE**

In this issue, we round up some of the major developments in the competition law world from the third quarter of 2016.

In this issue, we include a feature article outlining the key amendments to the Guidelines of the Competition Commission of Singapore, and highlight some of the potential implications for businesses. Whilst we have focussed on some of the more significant changes, please let us know if you have questions on any other changes to the Guidelines.

In the first quarter of 2017, the head of our Competition Law and Regulatory Practice Group Mr Lim Chong Kin will again be co-chairing the 2017 GCR Live Asia-Pacific Law Leaders Forum, to be held on 2 March 2017 and 3 March 2017. The event will bring together some of the key competition law practitioners and authority representatives, in what promises to be another very interesting event. As well as an anticipated ASEAN forum, the event will also delve into current competition issues facing the technology sector in particular. Further details can be found here: <http://gcr.live/singapore2017>

For more details on the Drew & Napier Competition Law and Regulatory Practice, please click [here](#).

IN THE NEWS: AT A GLANCE**SINGAPORE****Competition Appeal Board reduces fine imposed on ball bearing manufacturers by one third**

On 1 September 2016, the Competition Appeal Board made public its decision to reduce the fine imposed by the Competition Commission of Singapore (“**CCS**”) on Nachi-Fujikoshi Corporation and its Singapore subsidiary (from S\$7,564,950 to S\$4,773,423) on the ground that CCS had used an incorrect starting revenue for the calculation of the financial penalty. For more details, please click [here](#).

AROUND THE WORLD

United States federal appellate court holds that London Interbank Offered Rate-rigging is a per se antitrust violation

On 23 May 2016, the United States Court of Appeals for the Second Circuit overturned a lower court's decision to dismiss a private antitrust lawsuit brought by several plaintiffs, who owned financial instruments linked to the London Interbank Offered Rate, against 16 of the world's largest banks for their collusion in manipulating its rates. These 16 banks are the Bank of Tokyo-Mitsubishi, Barclays, Citigroup, Credit-Suisse, Rabobank, Deutsche Bank, HSBC, Bank of America, JP Morgan Chase, Norinchukin Bank, Westdeutsche Immobilienbank, Lloyds, UBS, Royal Bank of Scotland, HBOS and the Royal Bank of Canada. For further details, please click [here](#).

ITW Ltd has been fined £2,298,820 for resale price maintenance

On 24 May 2016, the United Kingdom Competition and Markets Authority issued a decision concerning online resale price maintenance in the commercial refrigeration sector, which infringed section 2(1) of the Competition Act 1998 and Article 101 of the Treaty on the Functioning of the European Union, both of which prohibit cartels and other anti-competitive arrangements. For further details, please click [here](#).

European Commission raises further objections regarding Google's shopping services and advertising practices

On 14 July 2016, the European Commission ("EC") issued two statements of objections to Google – with the first being, a supplementary statement of objections regarding Google's comparison shopping service; and the second involving Google's advertising restrictions on third party websites. For further details, please click [here](#).

Nippon Yusen Kabushiki Kaisha pleads guilty to criminal cartel conduct in Australia

On 18 July 2016, Nippon Yusen Kabushiki Kaisha ("NYK") pleaded guilty to a criminal charge before the Australian Federal Court in relation to its participation in a criminal cartel involving price-fixing of shipping services for vehicles, including cars, trucks and buses, to Australia during the period of July 2009 to September 2012. NYK is a

global shipping company headquartered in Japan. For further details, please click [here](#).

EC imposes record-high cartel fine of €2.93bn on truck producers

On 19 July 2016, the EC issued an infringement decision involving several truck manufacturers alleged to have been involved in a cartel relating to the supply of medium and heavy trucks in the European Economic Area. Total penalties amounted to €2.93bn (approximately S\$4.45bn). For further details, please click [here](#).

European Court of Justice delivers judgement on liability for independent service providers

On 21 July 2016, the European Court of Justice ruled that undertakings cannot be held liable for infringements of competition law committed by an independent service provider, unless certain conditions are met. The ruling, delivered in response to a preliminary reference made by the Latvian Supreme Court, concerned the invitation for tenders for the supply of food to educational institutions. For further details, please click [here](#).

Philippine Long Distance Telephone Company and Globe Telecom, Inc. in dispute with Philippine Competition Commission over telecommunications deal

On 25 August 2016, the Philippine Competition Commission issued a Preliminary Statement of Concerns in respect of the joint acquisition by Philippine Long Distance Telephone Company and Globe Telecom, Inc. of San Miguel Corporation's telecommunications assets. For further details, please click [here](#).

FEATURE ARTICLE

Key amendments to CCS's Guidelines

On 1 November 2016, CCS released the revised versions of its guidelines ("**Revised Guidelines**") which provide guidance on how CCS will administer and enforce the Competition Act, and a practice statement on a new fast track procedure for cartel and abuse of dominance cases ("**Practice Statement**"). The Revised Guidelines and Practice Statement took effect from 1 December 2016. For more details, please click [here](#).

SINGAPORE COMPETITION LAW WATCH

Score Board	Number	Status	
		Concluded	Pending
Notified Agreements or Conduct	16	15	1
Notified Mergers or Anticipated Mergers	57	56	1
Infringement Decisions	12	11	1
Appeals	13	12	1

Table 1: Singapore Competition Law Watch Scoreboard (Accurate as at 7 December 2016)

ARTICLES & COMMENTARIES: UPDATES FROM AROUND THE WORLD

ANTI-COMPETITIVE AGREEMENTS

European Court of Justice delivers judgement on liability for independent service providers

On 21 July 2016, the European Court of Justice (“**ECJ**”) ruled that undertakings cannot be held liable for infringements of competition law committed by independent service providers, unless certain conditions are met. The ruling was made in response to a preliminary reference made by the Latvian Supreme Court under Article 267 of the Treaty of the Functioning of the European Union (“**TFEU**”).

The request for a preliminary ruling was made in view of the Latvian Competition Council’s decision to impose liability on three Latvian companies for engaging in bid-rigging activity pursuant to section 11(1) of Latvian Law on Competition of 2001. The three companies, DIV un Ko (“**DIV**”), Ausma grupa (“**Ausma**”) and Pärtikas Kompānija (“**Pärtikas**”), had responded to an invitation for tenders for the supply of food to educational institutions.

Specifically, Pärtikas had employed a subcontractor, MMD Lietas (“**Lietas**”), to prepare and submit a tender on its behalf, and was oblivious to the fact that Lietas was concurrently preparing the same tenders for the other two companies.

In particular, an employee of Lietas, who was privy to information contained in Pärtikas’ tender, had made use of the information contained in Pärtikas’ tender in preparing the tenders for the other two companies. This led to the coordination of all three bids. The Latvian Competition Council imposed liability on all three companies. On appeal, the Latvian Regional Administrative Court upheld the liability of DIV and Ausma, but removed liability in respect of Pärtikas. Both DIV and Ausma appealed to the Latvian Supreme Court, which referred the case to the ECJ under the preliminary reference procedure.

Against this backdrop, the ECJ established the criteria for liability arising out of an independent service provider’s breach of Article 101 of the TFEU. The ECJ established that an undertaking cannot be held liable for the anti-competitive conduct of an independent service provider it has engaged, unless one of the following conditions are met:

- (a) The service provider was in fact acting under the direction or control of the undertaking concerned.
- (b) The 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.
- (c) The 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.

Specifically, the ECJ noted that, an independent service provider who offers services in return for payment on an independent basis will generally not be considered part of the same economic unit as the undertaking, unless one of the three above conditions are met. This can be contrasted with an employee who performs duties for an undertaking, whereby an employee’s conduct will be attributable to the undertaking to which he belongs. Whether or not the conditions are fulfilled will be for National Courts to establish as a matter of fact.

In Singapore:

Liability under Singapore competition law for the actions of independent service providers has yet to be specifically considered by CCS. With that said, the concept of a “single economic entity”/ “single economic unit” has been acknowledged by CCS previously, and may apply to impose or excuse liability in appropriate cases.

United States federal appellate court holds that London Interbank Offered Rate-rigging is a per se antitrust violation

On 23 May 2016, the United States Court of Appeals for the Second Circuit overturned a lower court’s decision to dismiss a private antitrust lawsuit brought by several plaintiffs who owned financial instruments linked to the London Interbank Offered Rate (“LIBOR”), against 16 of the world’s largest banks for their collusion in manipulating Libor rates. These 16 banks are the Bank of Tokyo-Mitsubishi, Barclays, Citigroup, Credit-Suisse, Rabobank, Deutsche Bank, HSBC, Bank of America, JP Morgan Chase, Norinchukin Bank, Westdeutsche Immobilienbank, Lloyds, UBS, Royal Bank of Scotland, HBOS and the Royal Bank of Canada.

The plaintiffs had commenced the action against the banks on the ground that the rigging of the LIBOR had reduced their investment returns. This was dismissed in the lower court because the judge had found that the setting of the LIBOR was a collaborative, and not competitive, process among the banks. As the LIBOR-setting process was collaborative, there could not be any antitrust harm caused to the plaintiffs. The process of setting the LIBOR rates involves members of the British Bankers’ Association furnishing the interest rates for inter-bank borrowing, with the final rate being an average of the banks’ furnished rates after excluding the four highest and lowest rates.

The appeals court disagreed with the lower court’s position, holding that:

- (a) Horizontal price-fixing constitutes a *per se* antitrust violation.
- (b) A plaintiff alleging a *per se* antitrust violation need not separately plead harm to competition.
- (c) A consumer who pays a higher price on account of horizontal price-fixing suffers antitrust injury.

The court recognised that even though the LIBOR-setting process is collaborative and the process is governed by rules introduced to prevent collusion, the “crucial allegation” is that the banks “circumvented the LIBOR-setting rules, and that joint process thus turned into collusion”. It also clarified that:

- (a) A plaintiff is not required to prove an actual lessening of competition for *per se* antitrust violations, and hence there is no need for them to allege any harm to competition.
- (b) The antitrust injury is demonstrated if the plaintiffs show that they had paid artificially-fixed higher prices.

The appeals court’s decision brings this litigation in line with other similar actions involving the manipulation of other benchmark rates.

In Singapore:

Horizontal price-fixing is a restriction of competition “by object” under section 34 of the Competition Act. This means that in instances of price-fixing, CCS does not need to consider whether the conduct actually has the “effect” of restricting competition. Bid-rigging, market sharing, output limitation and the sharing of forward looking price information are other arrangements which constitute restrictions of competition by object in Singapore.

ITW Ltd has been fined £2,298,820 for resale price maintenance

On 24 May 2016, the United Kingdom Competition and Markets Authority (“CMA”) imposed a penalty on the refrigeration supplies division of ITW Ltd (“ITW”) for engaging in resale price maintenance (being the practice of restricting or controlling downstream resale prices).

The CMA found that ITW had engaged in the practice between 2012 and 2014 when it issued its “discounting policy” to all its resellers, prohibiting them from advertising any ITW products below a minimum advertised price both online and offline. Foster Refrigerator, a division of ITW, would enforce its policy against non-compliant resellers by threatening to increase their wholesale prices, ceasing supply of their products and even banning the reseller. The CMA determined that this had the effect of restricting their resellers’ ability to determine their selling prices.

Ultimately, the CMA imposed a penalty of £2,298,820 (approximately S\$4.14m) against ITW. The initial fine was reduced by 10% following ITW's agreement to introduce a comprehensive compliance programme and by a further 20% following ITW's cooperation with the CMA pursuant to a settlement agreement. The CMA also considered the following factors in imposing its financial penalties:

- (a) That resale price maintenance constitutes vertical "price-fixing" and a "hardcore" restriction, but is not the most serious of infringements of competition law.
- (b) The need for deterrence of similar conduct.
- (c) The importance of price in competition.
- (d) The importance of ITW as a market player.
- (e) The entry conditions for the refrigeration sector.
- (f) The impact of the resale price maintenance on competitors and third parties.

The CMA also took the chance to warn 20 other businesses in the commercial catering equipment sector suspected of engaging in similar online resale price maintenance practices.

In Singapore:

Agreements that are purely vertical in nature (i.e., between a manufacturer and a distributor) are excluded from consideration under section 34 of the Competition Act. This means that resale price maintenance arrangements are not likely to be considered contrary to section 34 of the Competition Act in the usual course. With that said, assessment of the application of the vertical exemption should be done with care, to ensure that it actually does apply in each individual case.

NYK pleads guilty to criminal cartel conduct in Australia

On 18 July 2016, NYK pleaded guilty to a criminal charge before the Australian Federal Court in relation to its participation in a criminal cartel involving price-fixing of shipping services for vehicles, including cars, trucks and buses, to Australia during the period of July 2009 to September 2012. NYK is a global shipping company headquartered in Japan.

The decision to prosecute NYK under the criminal cartel provisions of the Australian Competition and Consumer Act is considered a landmark case as it is the first time such a charge has been brought against a corporation since the regime's introduction in 2010.

Under these criminal provisions, the maximum fine for each offence is the highest of:

- (a) A\$10 million (approximately S\$10.6m);
- (b) three times the total illegal benefits that have been obtained by the accused from its cartel conduct; and
- (c) if the total value of the benefits cannot be determined, 10% of the accused's annual turnover connected with Australia.

The criminal charge brought against NYK is part of a wider investigation by the Australian Competition and Consumer Commission which is still in the midst of investigating other participants in the same cartel.

Elsewhere, NYK has been fined US\$54.9m (approximately S\$78.1m) for its criminal price-fixing conduct in the United States at the start of 2015 and ¥13.1bn (approximately S\$163m) by the Japan Fair Trade Commission in 2014. One of its executives was also jailed for 15 months earlier this year in the US.

In Singapore:

Singapore competition laws currently do not provide for criminal sanctions for anti-competitive conduct and do not provide for personal liability for individuals for the same. However, criminal charges can be brought against companies and individuals in the context of an investigation by CCS where they:

- (a) refuse to provide information pursuant to a requirement on them to do so;
- (b) destroy or falsify documents;
- (c) provide false or misleading information; or
- (d) obstruct an officer of CCS in the discharge of his or her duties.

The above is punishable by imprisonment not exceeding 12 months, a fine not exceeding S\$10,000, or both.

EC imposes record-high cartel fine of €2.93bn on truck producers

On 19 July 2016, the EC issued a decision concerning the supply of medium and heavy trucks in the European Economic Area (“**EEA**”), in respect of an infringement of Article 101 of the TFEU, which prohibits cartels and other anti-competitive arrangements. The parties involved were MAN, Volvo/Renault, Daimler, Iveco, and DAF (collectively referred to as “**Parties**”), and together account for 90% of all medium and heavy trucks produced in Europe.

The EC’s investigations, which commenced following an immunity application submitted by MAN, revealed that the Parties coordinated their actions in relation to the pricing of medium and heavy trucks, the timing for the introduction of emission technologies to comply with European emissions standards, and the passing on to customers of the costs incurred from these emissions technologies. In relation to the price coordination specifically, the Parties had coordinated prices at the “gross list” price level, which refers to the factory price of trucks before further adjustments that will determine the final price offered to consumers.

The anti-competitive contacts involved phone conversations and regular meetings held between senior managers. Subsequently, the cartel was organised through the Parties’ German subsidiaries, with participants mainly exchanging information via electronic means. The overall infringement period covered the entire EEA and lasted 14 years from 1997 to 2011.

In imposing the financial penalties, the EC referred to the EC’s 2006 Guidelines on the method of setting fines, and had regard to the following factors:

- (a) The Parties’ sales of medium trucks and heavy trucks in the EEA.
- (b) The grave nature of the infringement.
- (c) The high combined market share of the Parties.
- (d) The scope and the duration of the cartel.

Under the 2006 Leniency Notice, MAN received full immunity from fines. Volvo/Renault, Daimler and Iveco received a 40%, 40% and 10% reduction in their fines respectively, with the reductions mirroring the extent of their cooperation

and the quality of evidence provided by them. Under the 2008 Settlement Notice, all Parties were also granted a 10% reduction in fines in view of their acknowledgment of their participation in the cartel, and of their liability. Total penalties amounted to €2.93bn (approximately S\$4.45bn).

In Singapore:

Agreements that have as their object or effect the prevention, restriction or distortion of competition are prohibited under section 34 of the Competition Act. In setting penalties, CCS also has regard to a number of factors as set out in its Guidelines on the Appropriate Amount of Penalty. The basic calculation considers the relevant turnover of the undertaking, the seriousness of the offence, the duration of the offence, and whether there are aggravating and mitigating factors.

Competition Appeal Board Reduces Fine Imposed on Ball Bearings Manufacturers

On 1 September 2016, the Competition Appeal Board (“**CAB**”) made public its decision to reduce the fine imposed by CCS on Nachi-Fujikoshi Corporation and its Singapore subsidiary (“**Nachi**”) (from S\$7,564,950 to S\$4,773,423) on the ground that CCS had used an incorrect starting revenue for the calculation of the financial penalty.

This decision sheds light on how CCS Guidelines on the Appropriate Amount of Penalty (“**Penalty Guidelines**”) should be interpreted and is interesting in light of CCS’s recent amendments to the Penalty Guidelines (which took effect on 1 December 2016).

CCS’s decision

CCS had held, in its infringement decision released in May 2014, that Nachi had colluded with three other ball and roller bearing manufacturers to fix the prices of ball and roller bearings (“**Bearings**”) sold to aftermarket customers in Singapore by participating in price-fixing agreements and unlawful exchanges of information in relation to the prices and sale of ball and roller bearings.

In imposing a financial penalty, CCS had used turnover derived in 2012 as the starting point for its calculations, notwithstanding that the infringement decision was released in 2014.

On appeal, Nachi did not take issue with CCS’s finding of infringement and decision to impose a

financial penalty. However, it argued that CCS had miscalculated the financial penalty as it (i) had applied the turnover from the wrong financial year; and (ii) should have excluded Nachi's exclusive local distributor's export sales in determining the relevant turnover.

As regards the relevant financial year issue, the CAB agreed with Nachi that the turnover from the wrong financial year was applied. In arriving at its decision, the CAB found that the phrase rightfully referred to the infringement decision ("ID"), and not the proposed infringement decision as the latter is merely "a notice by the CCS informing the person concerned of its proposal to make an infringement decision". CCS should have relied on the turnover for financial year 2013 to derive the appropriate financial penalty to be imposed, financial year 2013 being the financial year immediately preceding the ID.

As regards the business model issue, the CAB disagreed that export sales by Nachi's exclusive local distributor were to be regarded as Nachi's own and therefore excluded.

A member of the CAB, G P Selvam, observed by way of an addendum that CCS ought not to state its proposed financial penalty in the preliminary decision. This is because section 69(1) of the Competition Act requires for "*directions concerning matters such as financial penalties ... to be made upon a finding of infringement in the [infringement decision] and not prior to the [infringement decision].*" He further highlighted that "*the issuance of a proposed financial penalty prior to the [infringement decision], as a matter of appearance, might raise some eyebrows in relation to prejudgment*".

ABUSE OF DOMINANCE

EC raises further objections regarding Google's shopping services and advertising practices

On 14 July 2016, the EC issued two statements of objections ("SOs") to Google – with the first being a supplementary SO regarding Google's comparison shopping service; and the second involving Google's advertising restrictions on third party websites.

Further to an investigation opened in November 2010, the EC had first issued a SO to Google in April 2015, alleging that the company had abused

its dominant position in the market for general internet search services in the EEA by systematically favouring its own comparison shopping product ("**Google Shopping**", and its predecessor "**Google Product Search**") over rival comparison shopping services.

In particular, the EC alleged that Google, which is also active in providing comparison shopping services, had displayed Google Shopping and Google Product Search prominently in its general search results pages, regardless of merit and without applying its system of penalties used to rank rival services. The EC's preliminary view was that such practices may artificially divert traffic from rival services, and restrict their ability to compete on the market, thereby affecting innovation and harming consumers who may not see the most relevant search results.

In this regard, the EC's view was that Google should treat its own service and rival services equally, in order to remedy such conduct.

The latest supplementary SO comes after the EC's further investigations, which followed Google's response to the first SO in August 2015. The supplementary SO sets out additional evidence and data supporting the EC's preliminary conclusions in the first SO.

Notably, the EC rejected Google's argument that merchant platforms such as Amazon and eBay should also be regarded as competitors of Google's shopping service. The EC maintained that comparison shopping services and merchant platforms belonged to separate markets, and added that Google's conduct would be found to have weakened or even marginalised competition, even if merchant platforms were included in the market definition.

The second SO relates to restrictions imposed by Google on the ability of third party websites to display search advertisements from Google's competitors. In particular, the EC found that Google had abused its dominant position in the market for online search advertising in the EEA to impose the following conditions on certain third party websites, on which Google places ads as an intermediary via its "AdSense for Search" platform:

- (a) Exclusivity: requiring third parties not to source search ads from Google's rivals.
- (b) Premium placement: requiring third parties to take a minimum number of search ads from Google and reserve the most prominent

space on their search results pages to Google search ads. In addition, competing search ads cannot be placed above or next to Google search ads.

- (c) Right to authorise competing ads: requiring third parties to obtain Google's approval before making any change to the display of competing search ads.

The EC's preliminary view is that Google's practices hinder competition in the online search advertising market, by artificially reducing the opportunities for Google's competitors on the commercially important market, and therefore the ability of third party websites to invest in providing consumers with greater choice and innovative services.

Nonetheless, the EC also noted that Google had recently modified certain conditions in its contracts with the third party websites, to give them more freedom to displace competing search ads, and indicated that it would assess these changes to assess their impact on the market.

In the US and Canada:

The EC's enforcement stance can be contrasted with those adopted by competition authorities in other jurisdictions. For example, in January 2013, the US Federal Trade Commission ("FTC") concluded investigations into Google's practices in the markets for online search and search advertising markets, after accepting commitments from Google to remove restrictions on the use of AdSense, which restricted advertisers' ability to use competing online search advertising platforms. In relation to allegations of Google's practice of "search bias", the FTC further concluded that Google's changes to its search algorithms, as well as its introduction of Universal Search, could be justified as pro-competitive innovations, and did not seek to remedy these practices.

Similarly, in April 2016, Canada's Competition Bureau announced the conclusion of its investigation against alleged anti-competitive conduct by Google in the markets for online search, search advertising and display advertising, after accepting a five-year commitment from Google to remove conditions on its AdWords advertising software that limited the ability of its customers to use rival advertising platforms. In respect of the other allegations, the Competition Bureau stated that did not find sufficient evidence of anti-competitive conduct.

MERGERS

Philippine Long Distance Telephone Company and Globe Telecom, Inc. in dispute with Philippine Competition Commission over telecommunications assets deal

On 25 August 2016, the Philippine Competition Commission ("PCC") issued a Preliminary Statement of Concerns in respect of the joint acquisition by Philippine Long Distance Telephone Company ("PLDT") and Globe Telecom, Inc. ("Globe") of San Miguel Corporation's ("SMC") telecommunications assets ("**Transaction**").

The Statement of Concerns sets out the PCC's preliminary finding that the 69.1bn peso (approximately S\$2bn) deal, which gives each of the two incumbent operators access to 17.5x2MHz of SMC's highly-prized 700MHz spectrum, has a "realistic prospect" of substantially lessening competition within the markets for:

- (a) retail supply of mobile services;
- (b) retail supply of fixed broadband services;
- (c) retail supply of fixed voice services;
- (d) wholesale supply of mobile services; and
- (e) wholesale supply of fixed broadband services.

On this basis, the PCC decided to proceed with a more detailed review of the Transaction.

The Transaction was notified to the PCC under the PCC's interim merger control regime on 30 May 2016 and publicly announced on the same day, shortly before the Philippine Competition Act's ("**PCA**") Implementing Rules and Regulations ("**IRR**") took effect on 18 June 2016.

The interim rules required any merger valued over 1bn pesos (approximately S\$28 million), and which was executed or implemented after the PCA came into force but before the IRR came into effect, to be notified to the PCC. The interim rules further provided that transactions notified to the PCC in accordance with the rules would be "deemed approved", and may not be challenged under the PCA unless such notification contained false material information.

On 17 June 2016, the PCC initiated a comprehensive review of the Transaction, after issuing statements to clarify that the mere filing of

a notification under the interim rules did not guarantee a “deemed approval”, and that it was within the PCC’s powers to evaluate the Transaction and determine whether a transaction is approved.

In response, the two incumbent operators maintained that their notification was in adherence with the interim merger control rules, and each filed an injunction with the Court of Appeals to restrain the PCC’s full review of the Transaction.

On 26 August 2016, a day after the PCC issued its Preliminary Statement of Concerns against PLDT and Globe, the Court of Appeals granted both operators’ application for a preliminary injunction against the PCC’s review of the Transaction. The Court said that the preliminary injunction was necessary to preserve the status quo and the rights of both companies, while ensuring that any future court decision would not be rendered ineffectual.

The PCC has since petitioned the Court of Appeals to lift the temporary restraining order on its review of the Transaction. In the meantime, the PCC has issued two Clarificatory Notes setting out additional guidance on its interpretation of the merger notification requirement in the IRR.

In Singapore:

Mergers are prohibited in Singapore if they substantially lessen competition. Mergers may be notified to CCS for a clearance decision; however, such notifications are voluntary, and it is incumbent on the merging parties to self-assess whether their transaction is likely to give rise to a substantive competition law concern.

enforcement of the major provisions in the Competition Act, notification procedures and processes, and CCS’s leniency and penalty frameworks. Specifically, CCS has issued the following:

- (a) CCS Guidelines on the Substantive Assessment of Mergers 2016.
- (b) CCS Guidelines on Lenient Treatment for Undertakings Coming Forward with Information on Cartel Activity 2016.
- (c) CCS Guidelines on the Section 34 Prohibition 2016.
- (d) CCS Guidelines on the Section 47 Prohibition 2016.
- (e) CCS Guidelines on Filing Notifications for Guidance or Decision with respect to the Section 34 Prohibition and Section 47 Prohibition 2016.
- (f) CCS Guidelines on the Appropriate Amount of Penalty 2016.
- (g) CCS Guidelines on the Powers of Investigation 2016.
- (h) CCS Guidelines on Enforcement 2016.
- (i) CCS Guidelines on the Major Provisions 2016.
- (j) CCS Practice Statement on the Fast Track Procedure for Section 34 and Section 47 Cases.

CCS considered comments from a total of 14 submissions from law firms, the business community, academia, professional consultancies, bar associations, government departments as well as members of the public in two public consultation exercises which were held from 25 September 2015 to 27 November 2015 and from 8 June 2015 to 8 July 2016. CCS has indicated that feedback received has been largely supportive of the changes made to the guidelines and the introduction of a fast track procedure for cartel and abuse of dominance cases.

Further to our legal update in July 2016, this update aims to briefly discuss the key amendments that have taken place since the publication consultation drafts and the potential impact of these amendments on businesses, where relevant.

FEATURE ARTICLE

KEY AMENDMENTS TO CCS’S GUIDELINES

On 1 November 2016, CCS released the Revised Guidelines, which provide guidance on how CCS will administer and enforce the Competition Act, and the Practice Statement. These Revised Guidelines and Practice Statement generally take effect from 1 December 2016, unless otherwise stated.

CCS’s comprehensive review included, among other things, a review of the guidance on CCS’s

In brief: Revised Guidelines

The Revised Guidelines discussed in this section do not deviate from the consultation drafts in any significant way and previous key amendments between the original guidelines and the public consultation drafts have been discussed in our previous legal updates.

(1) CCS Guidelines on the Major Provisions 2016

These Revised Guidelines provide an overview of the main provisions of the Competition Act and the approach of CCS in applying and enforcing the prohibitions against anti-competitive activities under the Competition Act. It contains consequential amendments arising from the other Revised Guidelines and Practice Statement.

(2) CCS Guidelines on the Section 34 Prohibition 2016

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 exempt in accordance with the provisions of Part III of the Competition Act

These Revised Guidelines contain clarifications on CCS's analytical framework and considerations in relation to the section 34 prohibition.

Businesses should take note that these Revised Guidelines will apply to all cases for which CCS has not issued a provisional infringement decision before 1 December 2016.

(3) CCS Guidelines on the Section 47 Prohibition 2016

Section 47 of the Competition Act prohibits any conduct on the part of one or more undertakings, which is an abuse of a dominant position, in any market in Singapore

These Revised Guidelines contain clarifications on CCS's analytical framework and considerations in relation to the section 47 prohibition.

(4) CCS Guidelines on Filing Notifications for Guidance or Decision with respect to the Section 34 Prohibition and Section 47 Prohibition 2016

These Revised Guidelines include clarifications on the administrative procedures and considerations when filing notifications for CCS's guidance or decision in relation the section 34 prohibition and section 47 prohibition.

(5) CCS Guidelines on the Substantive Assessment of Mergers 2016

These Revised Guidelines provide more elaboration on how CCS will review mergers which have been notified to it or mergers which it investigates unilaterally.

Businesses should take note that these Revised Guidelines will apply to:

- (a) All notifications filed after the publication of these Revised Guidelines.
- (b) All merger investigation cases for which CCS has not issued a provisional infringement decision before 1 December 2016.

(6) CCS Guidelines on Lenient Treatment for Undertakings Coming Forward with Information on Cartel Activity 2016

These Revised Guidelines provide greater clarity on the leniency programme, including the requirements for leniency, how a leniency marker or conditional immunity/leniency is secured, perfected and/or withdrawn, and the disclosure and use of information obtained from the leniency applicant by CCS.

It should be noted that these Revised Guidelines include new express requirements for leniency applications such as the need to:

- (a) Grant waivers of confidentiality to CCS in respect of other jurisdictions and regulatory authorities which have been notified of the conduct and/or from whom leniency has been sought.
- (b) Unconditionally admit liability to the conduct for which leniency is sought.

(7) CCS Guidelines on the Powers of Investigation 2016

These Revised Guidelines include minor amendments to reflect CCS's ability to exercise its powers of investigation and enforcement in respect of the section 34 prohibition, section 47 prohibition or section 54 prohibition (which is to be

read together with the CCS Guidelines on Merger Procedures 2012 (and which has not been amended)).

(8) CCS Guidelines on Enforcement 2016

The CCS Guidelines on Enforcement 2016 set out CCS's powers to enforce the sections 34, 47 and 54 prohibitions. In its Guidelines on Enforcement 2016, CCS has introduced amendments to:

- (a) Specify that it may exercise its powers of enforcement to the section 54 prohibition, which is to be read together with the CCS Guidelines on Merger Procedures 2012.
- (b) Clarify that the rights of private action will apply to breaches of the section 54 prohibition as well.

CCS Practice Statement on the Fast Track Procedure for Section 34 and Section 47 Cases

Updates to the public consultation draft

This Practice Statement confirms the fast track procedure set out in the public consultation draft and provides further clarifications on the rationale and the circumstances under which CCS would recommend parties to adopt the fast track procedure. The fast track procedure essentially provides an avenue for parties to admit liability for infringements of the Competition Act (and comply with various other conditions) in return for a reduction in the amount of financial penalty to be imposed.

CCS has confirmed that the fast track procedure exists in parallel to the leniency system and is distinct from the voluntary commitments process which does not involve any admission of liability by the parties under investigation and any finding of infringement under the Competition Act. That said, CCS has also clarified that admissions and documents provided by a party under the fast track procedure will be deemed to be withdrawn if the fast track procedure no longer applies.

CCS has further stated that it will provide parties with an indicative timetable at the start of the fast track procedure and may also request for parties to provide their financial information to assist in the determination of financial penalties. This is potentially helpful to parties as it would enhance the efficiency of proceedings and assist businesses in making the necessary arrangements to cooperate with CCS.

How the changes might impact you

While this procedure introduces an additional option for parties under investigation, businesses should be cognisant that in the event that the fast track procedure is aborted, CCS still retains the right to use its formal powers to request for documents disclosed under the fast track procedure (unless they were specifically created for the fast track procedure) at a later stage in the investigations. Business intending to submit to the fast track procedure should factor this in as a potential consequence, in addition to the points raised in our legal update on October 2015.

CCS Guidelines on the Appropriate Amount of Penalty 2016

Updates to the Penalty Guidelines

The CCS Guidelines on the Appropriate Amount of Penalty 2016 set out CCS's penalty framework. CCS has amended its Guidelines on the Appropriate Amount of Penalty to reflect changes to its approach and to provide more clarity on the same.

These changes include:

- (a) Basing an undertaking's relevant turnover on the turnover for the financial year *preceding the date when its participation in an infringement ends* instead of the turnover for the business year preceding the date on which CCS's decision is taken.
- (b) Clarifying that the relevant turnover excludes sales rebates, Goods and Services Tax and other taxes relating to the turnover.
- (c) Setting out the six-step approach that CCS will adopt when determining the amount of penalty to be imposed.
- (d) Clarifying that CCS will adjust the penalty to factor in the applicable discount for undertakings agreeing to the fast track procedure, which would be in addition to any applicable leniency discount.

The six-step approach comprises of the following:

- (a) Step 1: Calculation of the base penalty having regard to the seriousness of the infringement (expressed as a percentage rate) and the turnover of the business of the undertaking in Singapore for the relevant markets affected by the infringement in the financial year

preceding the date when the infringement ended.

- (b) Step 2: Adjustment for the duration of the infringement.
- (c) Step 3: Adjustment for other relevant factors.
- (d) Step 4: Adjustment for aggravating or mitigating factors.
- (e) Step 5: Adjustment if the statutory maximum penalty under section 69(4) of the Competition Act is exceeded.
- (f) Step 6: Adjustment for immunity, leniency reductions and/or fast track procedure discounts.

CCS has also clarified that:

- (a) It will not to reveal the starting point percentage range used in Step 1 to ensure that the confidential relevant turnover of the undertaking in question cannot be reverse engineered.
- (b) While the calculation of the relevant turnover has changed, the calculation of the statutory maximum penalty remains unchanged.
- (c) It would generally use the undertaking's audited accounts to determine the applicable financial penalties although there may be situations where it would need to exercise its discretion to use figures other than audited figures. Examples include where the audited accounts are unavailable or where they are not reflective of the undertaking's activities in the relevant market.
- (d) In cases where financial records have been destroyed due to the passage of time, CCS may rely on audited accounts rather than primary documents.
- (e) The six-step approach to the calculation of financial penalties can and will apply to cases involving multiple infringements.

The amendment to the determination of the relevant turnover is consistent with the approaches adopted in the European Union and the United Kingdom and demonstrates a closer connection between the method of calculating financial penalties and the actual anti-competitive conduct.

How the changes might impact you

Several advantages for businesses potentially arise in connection with the latest amendments:

- (a) The usage of the turnover for the financial year preceding the end date of the business' participation in an infringement reduces arbitrary outcomes in the quantum of the financial penalties imposed and enables businesses to better estimate their likely penalties in the event that they are found to have infringed the Competition Act. This is further aided by the financial penalties being limited by the maximum statutory penalty, and the quantum of such maximum statutory penalty being within the knowledge of the business.
- (b) Businesses found to have infringed the Competition Act would be spared the administrative burden of providing CCS with their updated financial records in the event that the financial records previously submitted for the preparation of the provisional infringement decision *before* the end of the business' financial year are rendered outdated due to the release of the infringement decision *after* the business' financial year has concluded.
- (c) The financial penalties may be further reduced on top of existing leniency discounts if the business participates in the fast track programme.

Businesses should also take note that the CCS Guidelines on the Appropriate Amount of Penalty 2016 will apply to all cases for which CCS has not issued a provisional infringement decision before 1 December 2016.

Conclusion

The introduction of the Revised Guidelines heralds a new chapter in the practice of competition law in Singapore. While the majority of the amendments made are incremental tweaks based on CCS's "*experience in administering the various provisions of the Act over the last ten years*", there were also significant amendments like the introduction of a fast track procedure and the revisions to the penalty framework. These amendments have the potential to benefit businesses under investigation for breaches of the Competition Act in terms of improving efficiency and clarity and we are hopeful that such benefits would be borne out in practice.

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Chong Kin played a key role in the development of competition regulation in the telecommunications, media and postal industries in Singapore, before moving on to undertake general competition work when the Competition Act was enacted in 2005. His diverse client portfolio spans the Competition Commission of Singapore, the sectoral competition regulators, and private sector companies. He undertakes a whole range of competition law matters including cartel investigations, merger filing, decisions and guidance, complex market studies, drafting competition legislation and enforcement work. Chong Kin has been widely acknowledged as the leading competition law expert in Singapore by major ranking publications. *Chambers Asia Pacific 2016* recognises Chong Kin's achievements. He is described as “*clever, able, bright and estimable man; he is terrific*”. *Who's Who Legal: Competition 2008 – 2016* also rank Chong Kin as a leading competition lawyer. Chong Kin is listed in *Asialaw Leading Lawyers 2016*. *Asia Pacific Legal 500 2017* lists Chong Kin as a leading individual in Antitrust and Competition in Singapore. Chong Kin is also an endorsed individual for Competition/ Antitrust and Regulatory Practice by *Best Lawyers International 2016*.



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Scott is the Deputy Head of Drew & Napier's Competition and Regulatory Practice Group and is admitted to both the Singapore bar and the New Zealand bar. Scott has extensive experience in all areas of competition law, including anti-competitive agreements, abuse of dominance, and mergers and acquisitions. Scott recently assisted SISTIC.com Pte. Ltd. in its appeal before the Competition Appeal Board in relation to the first and only abuse of dominance infringement finding made to date by CCS, and secured a 20% reduction in the financial penalty imposed. Scott was previously a senior investigator with the New Zealand Commerce Commission and was involved in leading investigations and analysing competition law and economic issues, including leading a number of high profile investigations into mergers and acquisitions. Scott was also involved in numerous investigations involving electricity matters. Scott was a key member of the team commissioned by the ASEAN Secretariat to conduct a review of competition law and policy in the ASEAN region and to propose best practices for the implementation of competition law in ASEAN. *Chambers Asia Pacific 2016* recognises Scott as a leading competition lawyer. He is described as "able to understand the business model very clearly and provide advice that is precise and to the point". Clients find Scott “wonderfully mature, excellent” and “smart, and very easy to work with.” *Asia Pacific Legal 500 2017* lists Scott as a recommended lawyer in Antitrust and Competition, describing him as “highly professional and responsive.”



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