10. COMPETITION LAW

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Introduction

10.1 2014 saw a number of important firsts for competition policy and law in Singapore as the Competition Commission of Singapore ("CCS") grew in assertiveness and sophistication and utilised an increasing repertoire of tools to regulate Singapore's increasingly dynamic and complex marketplace. This update examines the cases and developments in the last year, adopting a similar approach to the previous updates and touches on, *inter alia*, extraterritorial enforcement, price-fixing agreements, single economic entity, net economic benefit, dominance, merger notifications, behavioural and structural commitments, the failing firm defence, the new whistle-blower rewards programme and other developments.

Overview of cases and outcomes in 2014

10.2 In 2014, there was a sharp increase in the number of decisions issued by the CCS due to the spike in the number of merger notification decisions.

10.3 In relation to decisions concerning s 34 of the Competition Act (Cap 50B, 2006 Rev Ed) (the "Act") which deals with anti-competitive agreements, there was no significant increase in the number of decisions issued by the CCS in 2014 when compared to 2013. 2014 saw four notifications, all related to the airline industry, seeking and obtaining CCS's clearance of their proposed commercial arrangements. Significantly, the CCS investigated two international cartels, the first time it has done so and these investigations culminated in the issuing of two landmark infringement decisions in 2014, namely, *Infringement of the Section 34 Prohibition in Relation to the Provision of Air Freight Forwarding Services for Shipments from Japan to Singapore* CCS 700/003/11 (11 December 2014) ("*Freight Forwarding*") and *Infringement of the Section 34*

Prohibition in Relation to the Supply of Ball and Roller Bearings CCS 700/002/11 (27 May 2014) ("*Ball Bearings*") respectively.

10.4 Similar to the previous year, no new cases regarding the s 47 prohibition against the abuse of dominance were reported in 2014. Hitherto, the *Abuse of Dominant Position by SISTIC.com Pte Ltd* CCS 600/008/07 (4 June 2010) ("*SISTIC*") remains the first and only infringement decision concerning the abuse of a dominant position. While the CCS also investigated Coca-Cola in 2012 for abuse of dominance, this investigation, being the only other reported case, was ceased with no infringement decision issued as the CCS was satisfied with Coca-Cola's behaviourial commitments to amend some of its business practices.

10.5 In terms of merger notifications in 2014, the CCS received and cleared a record number of mergers notifications. Ten mergers were notified to the CCS, with eight cleared unconditionally compared to three in 2013. Three mergers (including one notified in 2013) were also subjected to Phase 2 reviews in 2014 although only two eventually remained as the 2013 merger notification application was withdrawn. Of the two remaining merger notifications, one was conditionally approved on the back of behavioural and divestiture commitments, the first time that the CCS has done so, while the decision for the other was blocked in a provisional decision by the CCS and the proposed merger subsequently abandoned. Besides merger notifications, a number of confidential advice requests were also made to the CCS. However, owing to the confidential nature of such requests, it is unclear whether such proposed mergers ultimately continued without further notification or were aborted.

Section 34 – Prohibition of anti-competitive agreements

Extraterritorial enforcement

10.6 A significant development in 2014 was CCS's exercise of its extraterritorial enforcement powers. In this regard, even though the CCS as the enforcing authority of the Act has had the power to investigate anti-competitive activities outside of Singapore since its inception, it was not until 2014 that the CCS exercised these extraterritorial powers when it investigated and issued infringement decisions in *Ball Bearings* and *Freight Forwarding* (above, para 10.3).

10.7 Under s 33(1) of the Act, ss 34, 47 and 54 prohibitions may be applied on agreements, parties and/or mergers made outside of Singapore so long as the elements of the respective prohibitions are made out. Specific to s 34, the CCS Guidelines on the Section 34

Prohibition at para 2.2 clearly states that notwithstanding the fact that "an agreement [is] made outside Singapore, [or] an agreement where any party to the agreement is outside Singapore or any other matter, practice or action arising out of such an agreement [is] outside Singapore", such an agreement will be prohibited if the agreement "has as its object or effect the prevention, restriction or distortion of competition within Singapore" [emphasis in original omitted].

10.8 In *Ball Bearings*, the first time that the CCS exercised its extraterritorial enforcement powers, the CCS disclosed that it investigated four Japanese ball and ring bearings manufacturers and their Singapore subsidiaries for "engaging in anti-competitive agreements and unlawful exchange of information in respect of the price and sale of ball and roller bearings sold to aftermarket customers in Singapore": CCS media release, "CCS Imposes Penalties on Ball Bearings Manufacturers Involved in International Cartel" (27 May 2014) at para 1. The CCS noted that the infringing activities took place both in and outside of Singapore and these infringing activities were carried out by both the parent companies in Japan and their respective subsidiaries in Singapore.

10.9 In *Freight Forwarding* where ten freight forwarding companies were investigated by the CCS for "collectively fixing certain fees and surcharges, and exchanging price and customer information in relation to the provision of air freight forwarding services for shipments from Japan to Singapore" (CCS media release, "CCS Fines 10 Freight Forwarders for Price Fixing" (11 December 2014) at para 1), the CCS stated in no uncertain terms that the fact that the infringing agreements took place only in Japan was no bar to the CCS investigating the companies for the s 34 prohibition.

10.10 In this regard, the CCS stated (at para 67) that the "section 34 prohibition applies notwithstanding that an agreement has been entered into outside Singapore or that any party to such agreement is outside Singapore" due to the operation of s 33(1) of the Act. Helpfully, the CCS also elaborated (at para 340) that:

> Section 33(1) of the Act provides that notwithstanding that an agreement referred to in section 34 has been entered into outside Singapore; any party to such agreement is outside Singapore; or any other matter, practice or action arising out of such agreement is outside Singapore, the Act applies if such an agreement infringes or has infringed the section 34 prohibition.

Price-fixing agreement

10.11 In *Freight Forwarding*, the CCS was posed with an interesting submission by some of the parties in relation to whether an agreement to pass on to shippers the fuel surcharges which were imposed by and with rates determined by airlines was a price-fixing agreement. On this, the CCS found that there was price fixing. It noted (at para 515) that by agreeing to uniformly pass through the fuel surcharge to shippers and "monitoring adherence to this [the agreement to pass through the fuel surcharge]", "[t]his in essence fixes the pricing of the JFS [that is, fuel surcharge imposed by the parties on shippers]". Specifically, the CCS elaborated in the same paragraph that the parties were:

> … informing one another of their success in imposing this agreed amount for the JFS [that is, the pass through surcharge] by reporting their respective collection ratio for the JFS [that is, the pass through surcharge] during JAFA meetings [that is, industry association meetings attended by the parties].

Hence, whilst the act of passing on fuel surcharges is not proscribed, the co-ordinated and agreed act of parties to pass on such surcharges is a form of price fixing caught by s 34 of the Act.

Object or effect of preventing, restricting or distorting competition

10.12 It is trite law that under s 34 of the Act, the CCS has the burden to prove that an infringing agreement or conduct in question has "as [its] object or effect the prevention, restriction or distortion of competition within Singapore". Specifically in making this assessment, the CCS Guidelines on the Section 34 Prohibition at para 2.18 has provided that:

> An agreement will fall within the scope of the section 34 prohibition [only] if it has as its object or effect the *appreciable* prevention, restriction or distortion of competition unless it is excluded or exempted. [emphasis in original]

Paragraph 2.20 has also provided that:

> An agreement involving price-fixing, bid-rigging, market-sharing or output limitations will always have an appreciable adverse effect on competition.

10.13 In *Ball Bearings* (above, para 10.3), the CCS concluded that the conduct amongst the parties fell within the s 34 prohibition as the conduct concerned involved, *inter alia*, price fixing, which the Act designated specifically in s 34(2) as having the "object or effect of preventing, restricting or distorting competition within Singapore". In particular, the CCS confirmed (at para 422) of the decision that "CCS

regards agreements or concerted practices involving price-fixing as always having an appreciable adverse effect on competition" and that:

> CCS is of the view that as a result of the agreement and/or concerted practice, the decision making independence of the Bearings suppliers has been appreciably reduced by the substitution of practical cooperation for the normal risks inherent in competition.

That there was evidence which demonstrated that there was implementation of the price increase agreements in Singapore, the cartelised product in issue was a homogenous product, and that the parties had a substantial share of the product market in Singapore, also further persuaded the CCS that the anti-competitive conduct concerned had the object or effect of appreciably restricting or distorting competition within Singapore. Consequently, the CCS concluded (at para 414) that the practical effect of the parties' infringing conduct was that it removed the need for "the Parties … to compete for market shares via more competitive prices or non-price strategies" and imposed on the parties a record fine of $9.3m.

10.14 In *Freight Forwarding* (above, para 10.3), the CCS, similar to the *Ball Bearings* decision, also concluded that the parties' conduct had the "object or effect of preventing, restricting or distorting competition within Singapore" on the basis of price fixing (see para 10.11 above). In this regard, the CCS reaffirmed (at para 515) that:

> … it is established case law that where it is shown that an agreement or concerted practice restricts competition by object such as price-fixing, there is no need to show that the conduct may have an anti-competitive effect or to take into account the agreement's actual effect and that price-fixing by its very nature has an appreciable adverse effect on competition.

Hence, the CCS concluded (at para 523) that:

> The agreement and/or concerted practice between the Parties, whereby the JFS [that is, fuel surcharge agreed and imposed by the parties] was quoted and charged to customers at the price charged to freight forwarders by the air carriers and information was exchanged regarding the application of the JFS [that is, fuel surcharge agreed and imposed by the parties], had as its object the prevention, restriction or distortion of competition within Singapore in the market for the provision of air freight forwarding services.

Notwithstanding the finding of "object", which was sufficient to establish the parties' conduct as falling under s 34, interestingly, the CCS did not elaborate further on the "effect" of the parties' conduct in this decision nor provided evidence of subsidiary companies co-ordinating these price-fixing agreements in Singapore. Consequently, the CCS imposed a total fine of $7.2m on the participants.

Single economic entity

10.15 Importantly, *Ball Bearings* and *Freight Forwarding* also highlighted and further explained CCS's application of the Single Economic Entity ("SEE") doctrine in cartel cases involving parent and subsidiary companies.

10.16 As a starting point, the CCS Guidelines on the Section 34 Prohibition states (at para 2.7) that:

> … between a parent and its subsidiary company, or between two companies which are under the control of a third company, … [the companies will form a SEE] if the subsidiary has no real freedom to determine its course of action in the market and, although having a separate legal personality, enjoys no economic independence.

The significance of establishing a SEE is that it can be used to impute liability on one entity for the anti-competitive conduct of another so long as the entities which are otherwise separate are deemed to be a single undertaking for the purposes of the s 34 prohibition.

10.17 In *Ball Bearings* (above, para 10.3), the CCS explained (at para 358) that:

> … where a parent company exercises decisive influence over the commercial policy of a legal entity that was directly involved in the infringement, whether directly or indirectly through other wholly-owned subsidiaries, CCS has found the parent entity and the legal entity to be jointly and severally liable for the infringement.

On the facts, the CCS found that while the Japanese parent companies agreed among themselves the overall strategies for their Singapore subsidiary companies to implement, amongst others, a market share and profit protection initiative, the respective Singapore subsidiary companies also discussed amongst themselves in Singapore the overall strategies decided by the Japan parent companies, and the methods to give effect to the initiative. Applying the SEE doctrine, the CCS held (at para 359) that the liability for the conduct carried out by the Singapore subsidiary companies could therefore be imputed to their Japanese parent companies as "evidence has also revealed that the Singapore Subsidiary Companies had to follow the instructions of their Japan Parent Companies".

10.18 In *Freight Forwarding* (above, para 10.3), the CCS found that discussions on price fixing and information exchange took place between freight forwarding companies in Japan and affected shipments from Japan to destinations overseas, including Singapore. In relation to activities in Singapore, the CCS found that the Singapore subsidiary companies carried out the pricing instructions of their respective parent

companies in Japan but, unlike *Ball Bearings*, did not find any evidence suggesting that the Singapore subsidiary companies knew of the anti-competitive arrangements reached by the Japan parent companies nor took part in any such infringing co-ordination amongst themselves in Singapore.

10.19 In view of this difference, the CCS noted that it took into "careful consideration" the arguments by several of the companies that "liability should only be imputed to their Japan company and not also to their related Singapore company" (*Freight Forwarding* at para 529) but ultimately rejected these arguments because (*Freight Forwarding* at para 530):

> … CCS is of the view that while each of the Parties' respective Japan company participated in the meetings, the agreements/concerted practices agreed at the JAFA meetings were carried out by each Parties' Japan company and Singapore company acting as a single economic unit.

Consequently, the CCS held that both the Japan parent companies and Singapore subsidiary companies were jointly and severally liable for the infringement.

10.20 In this regard, the CCS appears to have adopted a broader application of the SEE doctrine than how it was applied in the European Union, which the CCS considers to be persuasive in competition law matters. Decisions by the courts of the European Union in relation to SEE, such as *Akzo Nobel* Case C-97/08; [2009] ECR I-08237, *Viho Europe BV v Commission* Case C-73/95 P; [1996] ECR I-5457 and *Imperial Chemicals Industries Ltd v Commission (Dyestuffs)* Cases 48, 49, 51-7/69; [1972] ECR 619, have thus far only made clear that the SEE doctrine allows for the imputation of liability from the subsidiary entity onto the parent entity, in addition to the liability suffered by the subsidiary entity for its infringement. Specifically, it is unclear under the European Union's competition laws whether the SEE doctrine will allow the reverse situation of a subsidiary entity being imputed joint and several liability for the misconduct of its parent entity.

Net economic benefit

10.21 The CCS recognises that an agreement that falls within the scope of a s 34 prohibition may be exempted if it produces Net Economic Benefits ("NEB"). As explained in its Guidelines on the Section 34 Prohibition, the onus falls on the undertaking claiming an exemption to prove that it satisfies the requirements to produce net economic benefits. In its assessment, the CCS will determine, on balance, whether the anti-competitive practice will contribute to

improving production or distribution, promote technical or economic progress, and whether such benefits can be derived from other alternative methods without resorting to the anti-competitive practices.

10.22 In particular, NEB arguments arising from co-operation in the airline industry have traditionally been persuasive to the CCS. To date, the CCS has cleared 11 airline co-operation agreements, and such agreements form the majority of s 34 guidance/decision applications to the CCS.

10.23 In light of the relatively high volume of notifications concerning the airline industry, the CCS in 2012 commissioned ICF SH&E, an aviation consultant, to undertake a market study of the airline industry in Singapore. In February 2014, the summary report on the NEB of joint ventures in the industry was released by the CCS. A key finding of that report is that although "joint ventures between different airlines operating through Singapore do appear to have delivered net benefits, the benefits are not as large as those found in the literature for other markets": in this case, the comparison was with the European and American markets.

10.24 Given that the NEB test involves balancing the cost of the anti-competitive conduct with the benefits such conduct can bring, the finding above suggests that the CCS may scrutinise NEB arguments in the airline industry more closely. It, however, remains to be seen how much of an impact such a finding will factor in CCS's future considerations as only two airline co-operation agreements, namely, the *Proposed Strategic Alliance between Singapore Airlines Ltd and Air New Zealand Ltd* CCS 400/003/14 (17 April 2014) ("*SIA-ANZ*") and *Proposed Commercial Alliance between Etihad Airways PJSC and Jet Airways (India) Ltd* CCS 400/006/14 (16 October 2014) ("*Etihad-Jet*") were cleared since the publication of the market study report on NEB arguments.

10.25 In *SIA–ANZ*, the CCS approved the alliance even though it only admitted some of the arguments on NEB that parties have submitted. Specifically, the CCS rejected (at para 131) that "benefits such as premium customer handling, lounge and [frequent flyer programme] benefits … satisfy the NEB criteria" but agreed (at para 132) that the alliance will:

> … directly result in efficiencies, being an increase in the Relevant Market and the strengthening of Singapore's position as an aviation hub, which outweigh the anti-competitive effects of the Proposed Strategic Alliance.

10.26 In *Etihad–Jet*, the CCS cleared the alliance even though there was little NEB as there was only "minimal adverse impact on

competition" under the alliance: at para 110. Specifically, the CCS concluded (at paras 109 and 110) that "while the Proposed Commercial Alliance will bring production or distribution or promote technical or economic progress, the benefits accrued from the Proposed Commercial Alliance are not substantial", "on balance, the efficiencies of the Proposed Commercial Alliance outweighs the anti-competitive effect".

Section 47 prohibition – Abuse of dominance

10.27 Section 47(1) of the Act prohibits any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in any market in Singapore. To establish an infringement of an abuse of dominance, the undertaking must be in a dominant position, whether in Singapore or elsewhere, and the dominant undertaking must have abused this dominance. In relation to dominance, the CCS considers a market share of 60% or more as providing a benchmark that there may be dominance and also looks at other factors, including market power, the presence of strong buyer power and the intensity of entry barriers.

Dominance

10.28 Given the central role that dominance plays in the s 47 prohibition (that is, there can be no abuse of dominance without dominance), it is worth noting an interesting article written by two assistant directors from the Legal & Enforcement and the Business and Economics Divisions of the CCS respectively which explored the notion of buyer power in relation to, *inter alia*, the issue of dominance: Cindy Chang & Terence Seah, "Can Buyer Power Be Used as a Defence? A View from Singapore" (2014) 5(5) JECLAP 287. Specifically, the article contemplated (at 289) the presence of strong countervailing buyer power as a defence to the finding of dominance on the basis that "countervailing buyer power is an indication that [an undertaking] is not in a dominant position". While this article does not represent the official view of the CCS, it nevertheless presents an interesting and useful view on this subject given the lack of cases in Singapore relating to this area as the decision of *SISTIC* in 2010 remains the first and only public local case concerning the abuse of a dominant position to date.

Section 54 prohibition – Mergers and acquisitions

Merger notifications process overview

10.29 Section 54 of the Act prohibits mergers that are likely to result in a substantial lessening of competition in any market in Singapore.

There is no mandatory notification requirement in Singapore for pre-merger notification unlike the European Union and the US which set certain thresholds for mandatory pre-merger notification. The CCS leaves the discretion to the merger parties to assess whether their merger will lead to a substantial lessening of competition in Singapore and, accordingly, decide whether to notify and seek comfort from the CCS to ensure clearance of their proposed mergers. In this regard, the CCS Guidelines on the Substantive Assessment of Mergers states that, generally, competition concerns are unlikely to arise in a merger situation unless the merged entity will have a market share of 40% or more, or the merged entity will have a market share of between 20% to 40% and with a post-merger CR3 (which refers to the combined market share of the three largest firms) of 70% or more.

10.30 The CCS adopts "a two-phase approach in evaluating [merger notification] applications": CCS Guidelines on Merger Procedures 2012 at para 2.7. Upon receipt of a complete merger notification application, the CCS will carry out a Phase 1 review which is expected to be completed within 30 working days. The Phase 1 review entails a quick assessment of the merger and allows the CCS to give clearance to mergers that clearly do not raise any competition concerns under the Act. If the CCS is unable to conclude that the merger situation will not lead to a substantial lessening of competition after its Phase 1 review, it will provide the applicant with a summary of its key concerns and proceed to carry out a more detailed Phase 2 review which is expected to take up to another 120 working days. As a Phase 2 review will see the CCS apply a more detailed and extensive analytical framework to examine the proposed merger's effect, this often requires the gathering of more detailed information about the businesses of the merging parties, the conduct of in-depth market studies and the carrying out of market consultations with interested and possibly adverse parties to the proposed merger.

Merger notifications in 2014

10.31 In 2014, a record ten mergers were notified to the CCS compared to three in 2013. Of these ten notified mergers, eight were cleared unconditionally in the Phase 1 review, one was conditionally approved on the back of behavioural and divestiture commitments after the Phase 2 review and one was blocked by the CCS in a provisional decision after the Phase 2 review and the proposed merger was eventually abandoned. In addition, a merger notified in 2013 was also subjected to a Phase 2 review in 2014 although the application was subsequently withdrawn.

10.32 Specifically, the eight merger notifications cleared unconditionally in Phase 1 by the CCS were *Notification for Decision: Proposed Merger between Applied Materials, Inc and Tokyo Electron Ltd* CCS 400/001/14 (23 September 2014) ("*Applied Materials-Tokyo Electron*"), *Application for Decision: Acquisition by Cebu Air, Inc, of Southeast Asian Airlines (SEAir), Inc* CCS 400/005/14 (20 August 2014) ("*Cebu Air-Southeast Asian*"), *Notification for Decision: Proposed Merger between Holcim Ltd and Lafarge SA* CCS 400/007/14 (22 August 2014) ("*Holcim-Lafarge*"), *Notification for Decision: Proposed Acquisition by Ridgeback Acquisition LLC of the Pet Care Business of The Procter and Gamble Co in Certain Countries (including Singapore)* CCS 400/008/14 (28 October 2014) ("*Ridgeback-P&G*"), *Notification for Decision: Proposed Acquisition by Singapore Airlines Ltd of Tiger Airways Holdings Ltd* CCS 400/011/14 (17 October 2014) ("*SIA-TigerAir*"), *Application for Decision: Proposed Joint Venture between Airbus Asia and Singapore Airlines Ltd* CCS 400/012/14 (19 December 2014) ("*Airbus-SIA*"), *Notification for Decision: Proposed Acquisition by Daifuku Co Ltd of 80% of the Shares in BCS Group Ltd* CCS 400/014/14 (26 January 2015) ("*Daifuku-BCS*") and *Application for Decision: Proposed Joint Venture between The Boeing Co and SIA Engineering Co Ltd* CCS 400/013/14 (3 February 2015) ("*Boeing-SIA*").

10.33 In *Applied Materials-Tokyo Electron*, the relevant market was the worldwide manufacture and supply of dielectric etch (including bump) equipment to Singapore. In clearing the merger, the CCS assessed that the transaction was unlikely to lead to a substantial lessening of competition as the parties were not the largest players in the relevant market in Singapore and the parties' combined market share in the relevant market was less than 20%. Further, the CCS also considered the number of alternative suppliers which could supply to Singapore and the fact that switching costs was not substantial as reasons for clearing the merger.

10.34 In *Cebu Air-Southeast Asian*, the relevant market concerned the supply of international low-cost air passenger services on the Singapore–Clark Airport route. In clearing Cebu Air Inc's acquisition of Southeast Asian Airlines, the CCS found the re-entry of Tiger Airways on the Singapore–Clark Airport route as the main reason for the maintenance of competition on the route and consequently assessed that there would not be a substantial lessening of competition.

10.35 In *Holcim-Lafarge* (above, para 10.32), the relevant markets were the market for the manufacture and supply of ready-mix concrete in Singapore and the market for the regional supply of grey cement to Singapore. In this case, the CCS approved the merger as it assessed that the parties were not the largest players in Singapore despite their large size in Europe and there was significant localised competition in the

relevant markets in Singapore. In addition, the CCS also considered the presence of alternative suppliers, the lack of substantial switching costs when switching to alternative suppliers, strong countervailing buyer power and the fragmented nature of the local markets as further reasons to assess that there would not be a substantial lessening of competition post-merger.

10.36 In *Ridgeback-P&G* (above, para 10.32), the relevant markets were the markets for the global supply of dry food for general diets to Singapore for dogs and cats ("General Food") and the market for the global supply of prescription-only medicinal dry food to Singapore for dogs and cats ("Prescribed Food"). In assessing that the proposed merger would not lead to a substantial lessening of competition in the General Food market, the CCS noted that the loss of competition due to the merger would be limited due to the fact that the parties targeted different customer segments and there were other strong competing brands. For the Prescribed Food market, the CCS noted the fact that only one of the parties had a significant market presence and the presence of other strong competing brands as reasons for assessing that there would not be a substantial lessening of competition. Consequently, the CCS cleared the merger.

10.37 In *SIA-TigerAir* (above, para 10.32), the relevant markets concerned the supply of international air passenger transport services on economy-class for full-service airlines and all classes of seats for low-cost carriers on routes operated by both Singapore Airlines Ltd ("SIA") and its subsidiaries. As this notification clearance involved the first ever consideration of the failing firm defence by the CCS, this decision will be discussed with more details below (at para 10.52).

10.38 In *Airbus-SIA*, (above, para 10.32), the relevant market was the market for the provision of aircraft pilot training services for each of the Airbus family of aircraft on a regional or worldwide basis. In clearing the proposed joint venture, the CCS assessed that the proposed joint venture would not lead to a substantial lessening of competition as, *inter alia*, customers have significant countervailing buyer power given the number of players in the market for the provision of aircraft training services in the region and noted that there are excessive capacities in the market which make it harder for competitors to co-ordinate behaviour.

10.39 In *Daifuku-BCS* (above, para 10.32), the relevant market was the worldwide market for automated material handling systems. The CCS cleared Daifuku's acquisition of 80% of the shares of BCS Group Ltd as it assessed that the parties face keen competition from existing and potential automated material handling systems suppliers given the low barriers of entry into the Singapore market and the presence of strong

countervailing buyer power. Hence, the CCS concluded that the acquisition would not lead to a substantial lessening of competition.

10.40 In *Boeing-SIA*, (above, para 10.32), the relevant markets were the Singapore market for line maintenance, the worldwide market for heavy maintenance and the worldwide market for component maintenance. The CCS cleared the proposed joint venture as it assessed, *inter alia*, that there are strong and viable competitors in the relevant markets which could serve a competitive constraints and that there is considerable countervailing buyer power arising from airlines' ability to switch suppliers. Consequently, the CCS assessed that the proposed joint venture would be unlikely to lead to the substantial lessening of competition in Singapore and cleared the merger.

10.41 In relation to Phase 2 reviews, there were three mergers notifications that were subjected to this review, namely, the *Proposed Acquisition by SATS Airport Services Pte Ltd and SATS-Creuers Cruise Services Pte Ltd of Singapore Cruise Centre Pte Ltd* CCS 400/002/13 ("*SATS-Singapore Cruise*") (withdrawn), *Notification for Decision: Proposed Acquisition by Seek Asia Investments Pte Ltd of the JobStreet Business in Singapore* CCS 400/004/14 (13 November 2014) ("*Seek Asia-JobStreet*") and *Proposed Acquisition by Parkway Holdings Ltd of Radlink-Asia Pte Ltd* CCS 400/010/14 ("*Parkway-Radlink*") (abandoned).

10.42 In *SATS-Singapore Cruise*, a merger notified in 2013 and discussed in this update last year, the relevant market as defined by the parties in their submission to the CCS was the market for the provision of international cruise terminal operating services. The Phase 2 review of the merger was initiated on 21 November 2013 as the CCS noted in a press release that it was "unable to conclude that the proposed acquisition would not raise competition concerns, based on information furnished during the Phase 1 review". However, the merger notification was eventually withdrawn by SATS Airport Services Pte Ltd on 12 May 2014, citing "market developments in Asia".

10.43 In *Seek Asia-JobStreet*, the relevant market was the online recruitment advertising services in Singapore. In moving the merger notification into a Phase 2 review, the CCS noted (at para 5) that notwithstanding the fact that it "was unable to conclude, based on the information available at that time, that the Transaction did not raise competition concerns" in the Phase 1 review, certain competition concerns were identified and remained even though the parties proposed two separate commitments packages to address these concerns. Post the Phase 2 review, the CCS also concluded that the merger would likely result in a substantial lessening of competition in the relevant market. Specifically, the CCS noted (at para 7) that it viewed the merger as likely to give rise to non-coordinated effects like:

a. Ability / incentive to change the structure of the market by demanding exclusive, 'lock-in' contracts which prevent customers from switching away from the merged firm;

b. Ability / incentive to bundle and tie products across its two brands which would have the effect or likely effect of preventing customers from switching away from the merged firm; and

c. Ability / incentive to impose price increases post-merger.

10.44 Notwithstanding the above, *Seek Asia-JobStreet* was eventually cleared by the CCS on the back of behavioural and divestiture commitments given by the parties, the first time that the CCS has done so for merger notifications. This will be discussed in more detail below (at para 10.48).

10.45 In *Parkway-Radlink* (above, para 10.41), the relevant markets were markets for the supply of radiopharmaceuticals, the provision of radiology and imaging services, and the provision of primary care clinics and services. In moving the merger notification for Phase 2 review, the CCS raised concerns over the fact that the merger "significantly reduces the number of providers of radiology and imaging services and the number of suppliers of radiopharmaceuticals in Singapore". Post the Phase 2 review, the CCS issued a provisional decision on 11 March 2015 to block the merger. The CCS noted (CCS media release, "CCS's Provisional Decision to Block Parkway Holding Ltd's Proposed Acquisition of Radlink-Asia Pte Ltd" (16 March 2015) at para 10) that:

> … the merged entity would be able to restrict competition in the market for radiology and imaging services by controlling the supply, the prices and/or the range of radiopharmaceuticals available to its downstream competitors.

Subsequently, the proposed merger was abandoned as the sale and purchase agreement relating to the proposed merger lapsed and ceased to be of effect as of 13 March 2015.

Behavioural and structural commitments

10.46 Behavioural commitments constrain the scope of a merged company to behave anti-competitively. For example, they might include undertakings not increasing prices or increasing output for a defined period after the merger. On the other hand, structural commitments address the market structure issues that give rise to competition problems and such commitments typically include divestiture commitments which involve the complete or partial sale of one or more overlapping businesses that have led to competition concerns.

10.47 Behavioural and structural commitments are aimed at remedying, mitigating or preventing the competition concerns which have been identified as arising from the merger situation and may be offered by the merging parties and accepted by the CCS at any time before an infringement or notification decision is issued by the CCS. This may be during a Phase 1 review, a Phase 2 review or even during an investigation. Commitments are binding on parties on whom they are imposed and can be enforced by the CCS via the courts.

10.48 As mentioned (at para 10.43 above), the *Seek Asia-JobStreet* decision, which came on the back of behavioural and divestiture commitments by the parties, was the first conditionally approved merger notification by the CCS. Specifically, the behavioural commitments in this case included undertakings by Seek Asia Investments Pte Ltd ("Seek Asia") not to enter into exclusive agreements with employer and recruiter customers and to maintain the current prices of its services capped at present day rate cards or current day negotiated prices, subject to inflation, for three years after the merger. In this regard, the behavioural commitments were specifically targeted at factors which the CCS considered in its Phase 2 review (listed above at para 10.43) which would, in the absence of such commitments, lead to a substantial lessening of competition.

10.49 Interestingly, the divestiture commitment, which was to "divest, as a going concern, the complete assets of jobs.com.sg, including the domain name http://www.jobs.com.sg within six months of the merger", came later as Seek Asia had initially failed to disclose to the CCS its ownership of jobs.com.sg, an aggregator site which aggregates recruitment advertisements listed on other online job portals. In this regard, the CCS stated (at para 12) that it considered Seek Asia's ownership of "jobs.com.sg" "material to CCS's assessment of the merger" and this development delayed CCS's clearance of the merger.

10.50 Having considered the commitments, the CCS cleared the merger conditionally and stated (at para 16) that it found the commitments "to be sufficient to address the likely adverse effects arising from the Transaction".

10.51 Whilst *Seek Asia-JobStreet* was the first merger notification facilitated by both behavioural and divestiture commitments, it is not the first instance that behavioural commitments were accepted by the CCS. In March 2012, the CCS also accepted Coca-Cola Singapore Beverages' ("Coke") behavioural commitments and cease investigations against Coke (as mentioned above at para 10.4). More recently, in March 2013, the CCS also cleared a merger notification by Emirates and Qantas during a Phase 1 merger notification review on the back of the parties providing a commitment to ensure a certain number of seats

were available weekly on each of the Singapore–Melbourne and Singapore–Brisbane routes and to increase the seat capacities of these routes if certain thresholds were crossed in any given 12-month period.

Failing firm defence

10.52 In 2014, the failing firm defence was considered for the first time by the CCS in the merger notification decision of *SIA-TigerAir* (above, para 10.32).

10.53 The failing firm defence allows financially distressed firms to be rescued via mergers, which would otherwise be considered as substantially lessening competition. As noted in the CCS Guidelines on the Substantive Assessment of Mergers at para 7.24, the defence has three criteria:

> • … the firm must be in such a dire situation that without the merger, the firm and its assets would exit the market in the near future. …
>
> • … the firm must be unable to meet its financial obligations in the near future and there must be no serious prospects of re-organising the business …; and
>
> • … there should be no less anti-competitive alternative to the merger. …

10.54 In *SIA-TigerAir*, the CCS noted (at para 236) that "On balance, CCS [accepted] that the proposed merger would be more beneficial (or less detrimental) to competition in Singapore as compared to the scenario where Tigerair Holdings [exited] its operation". The CCS also noted (at para 235) that there was "no realistic alternative buyer or alternative means of financing" to the merger, and that Tiger Airways was likely to exit the market in the absence of this proposed acquisition. The exit of Tiger Airways from the market was viewed by the CCS to be detrimental to competition and consumers as there would be serious disruptions to passengers and the connectivity of the Singapore air hub.

Whistle-blowers reward programme and other developments

10.55 In 2014, the CCS also introduced a reward scheme offering up to $120,000 for whistle-blowers who provide information about competition infringements. This complements the existing leniency programme where whistle-blowing cartel members may receive immunity from, or a reduction in the amount of, financial penalties, and the leniency-plus initiative which encourages cartel members under investigations to report their involvement in a separate cartel to secure reduced financial penalties for the first cartel activity.

10.56 Separately in 2014, the CCS has also formed a new division, the Policy and Markets Division, which focuses on market monitoring. It is hence worth noting that the CCS made reference to the fact that it considered its foreign counterpart's investigations of these cartels during its own investigations in both *Ball Bearings* and *Freight Forwarders* (above, para 10.3). To this end, this shows that the CCS is alive to competition-related developments and investigations in other jurisdictions that might have an impact in Singapore and emphasises the serious view that the CCS takes in detecting and investigating cartel activity, be it in Singapore or abroad.