10. COMPETITION LAW

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Introduction

10.1 2015 marks the tenth year of establishment of the Competition Commission of Singapore ("CCS"). At the turn of the decade, CCS unveiled its new mission: "Making markets work well to create opportunities and choices for businesses and consumers in Singapore." It also unveiled its new vision: "A vibrant economy with well-functioning markets and innovative businesses." The new mission and vision represent the forward-looking approach which CCS is taking, and how it has been making an effort to adapt to the changing business landscape in Singapore. Change has always been the only constant in economies around the world, simply because businesses will be eliminated if they fail to keep up with the demands of evolving markets and consumers. Competition authorities should also be at the forefront of these changes, for when new business practices emerge, new forms of anticompetitive behaviour may surface as well. Indeed, this is what CCS aims to do.

Overview of CCS's decisions and work in 2015

10.2 Compared to the previous year, CCS issued a reduced number of decisions in 2015. There were two decisions (one of them was provisional and the other pursuant to a notification for decision) issued in relation to anticompetitive agreements under s 34 of the Competition Act (Cap 50B, 2006 Rev Ed) ("the Act"). There were no infringement decisions of abuse of dominance in 2015, although CCS did commence investigations and ultimately reached settlements with the relevant parties in such abuse investigations. Finally, CCS also received numerous merger notifications in 2015, with four of them cleared, one of them abandoned and three still in the process of review.

10.3 In line with its new mission, CCS has come up with some occasional papers detailing its views and analysis on various developments in competition law. These papers will also be discussed briefly so as to keep up to date with the areas of focus of CCS. CCS has also put out for public consultation proposed amendments to its existing

guidelines. These amendments are extensive, and are meant to streamline and provide greater clarity on CCS's enforcement of the Act. In particular, it has been suggested that a new fast track procedure be put in place for infringements falling under ss 34 and 47. Under this new procedure, undertakings who accept liability for violations under the aforesaid sections will be eligible for a reduction in their financial penalty.

Section 34 – Agreements with object or effect of restriction or distorting competition

10.4 Section 34 of the Act prohibits any agreements between undertakings "which have as their object or effect the prevention, restriction or distortion of competition within Singapore". Whilst a number of investigations were undertaken in 2015, CCS only issued one provisional infringement decision in 2015, namely, the decision against ten financial advisory companies for allegedly exerting pressure collectively on iFast Financial Pte Ltd ("iFast") to withdraw its online offer of a 50% rebate on commission for life insurance products. This agreement was concluded at a meeting of the Association of Financial Advisers (Singapore) and was found to have contravened s 34 of the Act, as the agreement had the object of preventing iFast from competing effectively by offering a more attractive product to potential customers. If these findings by CCS were to be confirmed, this would be the first decision issued against an agreement made between competitors to prevent a potential entrant from entering the market.

10.5 Separately, CCS reviewed the notification for decision made to it in *Proposed Strategic Alliance between Cebu Air, Inc and Tiger Airways Singapore Pte Ltd* (CCS 400/009/14) (21 September 2015). In this case, CCS had occasion to review the net economic benefits ("NEB"), an exemption contained in para 9 of the Third Sched to the Act, derived from the strategic alliance agreement ("SAA"). In 2014, Tiger Airways Singapore ("Tigerair") and Cebu Air, Inc ("Cebu Pacific") notified CCS of the existence of an SAA between them which provided for Tigerair and Cebu Pacific (collectively the "parties") to, among others, jointly operate on common routes between Singapore and the Philippines, conduct joint sales and marketing, as well as co-ordinate in terms of scheduling, pricing and more. CCS found that the SAA contravened s 34 of the Act as it had the object of preventing, restricting or distorting competition in the Singapore–Clark, Singapore–Cebu and Singapore–Manila routes on which both parties operated.

10.6 In assessing whether the SAA would generate NEB so as to qualify as an exception to s 34 under para 9 of the Third Sched to the Act, CCS found that the agreement was indispensable to producing the

following benefits: (a) improved scheduling on common routes; (b) enhanced connectivity and more integrated product offerings for passengers; and (c) strengthening of Singapore's position as an air hub. However, CCS was not convinced that the SAA would not potentially eliminate competition on two of the markets in which the parties overlap, namely, Singapore–Clark and Singapore–Cebu. This was because after the SAA took effect, the parties' combined market shares (including their affiliated airline companies) in these markets would be as high as 90% and 100% respectively.

10.7 Consequently, the parties amended the SAA such that co-operation on the Singapore–Clark and Singapore–Cebu route would be limited to co-ordinating the maximum and minimum connecting times so as to create joint itineraries in their booking systems. With this amendment, CCS's competition concerns were addressed; thus it decided that the revised SAA would not infringe s 34 of the Act. This decision shows that CCS conducts its affairs with a great deal of flexibility, and will not withhold its approval as long as undertakings take the initiative to ensure that agreements entered into are in accordance with competition law in Singapore.

10.8 Finally, CCS also had occasion to review the Block Exemption Order ("BEO") on Liner Shipping Agreements, and after market consultation, recommended to the Minister of Trade and Industry that it be extended for five years. The BEO will now expire on 31 December 2020. This is a strategic move by CCS, as trade brought about by the shipping industry is an important contributor to Singapore's economy. Furthermore, liner shipping agreements will generate tremendous cost savings and allow smaller market players to gain access to a larger fleet of liners, thereby increasing competition within the liner shipping markets and other interrelated markets.

Section 54 – Mergers that have resulted in or may result in substantial lessening of competition

10.9 It is a basic position that not all mergers will violate s 54 of the Act, but only those which substantially lessen competition in any market in Singapore. As provided for in the *CCS Guidelines on the Substantive Assessment of Mergers* ("Merger Guidelines"), CCS takes the view that horizontal mergers (mergers between competitors in the same market) are more problematic than non-horizontal mergers (mergers between undertakings operating at different levels of the production or distribution chain or in different markets). In assessing whether a merger substantially lessens competition, CCS will evaluate the effect on competition in the relevant market post-merger as well as consider the counterfactual, *ie*, what will happen if the merger does not take place,

taking into account key factors such as market definition, market power and market structure. Even if a merger is expected to reduce competition substantially, CCS will nonetheless look for any countervailing factors which may offset the anticompetitive effects.

10.10 In 2015, CCS had to deal with more complex merger notifications, requiring various forms of commitment to be imposed where parties intended to proceed with the merger, or where parties simply decided to abandon the merger.

***Proposed Acquisition by Parkway of RadLink* (CCS 400/010/14) (Provisional Decision issued on 11 March 2015)**

10.11 The anticipated merger between Parkway and Radlink was abandoned by the parties thereto following a provisional decision issued by CCS stating that it would oppose the merger after completing a Phase 2 review. CCS took the view that the merger would substantially lessen competition in the relevant markets served by Parkway and Radlink. First, in the market for radiopharmaceuticals ("upstream market"), CCS noted that Parkway would become the sole commercial supplier for radiopharmaceuticals with no potential competitors entering the market for a period of at least two to three years. Second, in the market for radiology and imaging services for private outpatients in Singapore ("downstream market"), CCS found that the combined market share of Parkway and Radlink after the merger would be substantial in an environment where the competitive pressure is relatively low given the high entry barriers and weak bargaining power of customers. Third, CCS found that the merged entity would have the ability to restrict competition in the downstream market by controlling the supply and prices of products in the upstream market.

***Proposed Acquisition by Daifuku Co Ltd of 80 percent of the Shares in BCS Group Limited* (CCS 400/014/14) (26 January 2015)**

10.12 CCS received a joint notification from Daifuku Co Ltd ("Daifuku") and BCS Group Limited ("BCS") regarding the former's acquisition of 80% of the shares in the latter. As set out in the Merger Guidelines, CCS holds the view that a merger is unlikely to raise competition concerns except in the case where the merged entity will (a) have a market share of 40% or more; or (b) have a market share of more than 20% with the post-merger CR3 (referring to the collective market shares of the three largest market players) at 70% or more.

10.13 CCS accepted the parties' submissions that the relevant market in question was the global market for automated material handling

systems ("AMHS"). It was satisfied that the parties' combined post-merger market shares in the global market for AMHS (an estimated 9.8%) did not exceed the aforesaid threshold. Further, the combined entity continued to face fierce competition from many existing competitors and there were other countervailing factors including low barriers to entry and the strong bargaining position of buyers. All these contributed to reinforcing CCS's position that competition would not be substantially lessened after the merger.

***Proposed Joint Venture between The Boeing Company and SIA Engineering Company Limited* (CCS 400/013/14) (3 February 2015)**

10.14 The Boeing Company ("Boeing") and SIA Engineering Company ("SIAEC") filed a joint notification for a proposed joint venture ("JV") to be assessed by CCS for compliance with competition law in Singapore. In conducting the merger assessment, CCS defined the relevant markets as those for inventory technical management ("ITM") and fleet technical management ("FTM") services in Singapore. In particular, CCS discovered that the presence of other strong competitors in the relevant markets ensured that the JV experienced competitive pressure, there was significant countervailing buyer power on the part of the airlines, which could switch suppliers easily, and the JV did not intend to restrict competition on other related markets. In other words, there would not be a substantial lessening of competition after the JV and hence s 54 of the Act would not be infringed.

***Proposed Merger between China CNR Corporation Limited and CSR Corporation Limited* (CCS 400/001/15) (17 February 2015)**

10.15 This case concerned a notification filed by China CNR Corporation Limited ("CNR") and CSR Corporation Limited ("CSR"), both being companies incorporated in the People's Republic of China ("PRC"). CCS determined that the relevant market was the global market for supply of metro trains to Singapore. In its analysis of the relevant market, CCS found that (a) the increase in market shares post-merger was insignificant; (b) CSR and CNR supplied metro trains to Singapore as part of associations headed by other suppliers; (c) other metro train manufacturers could compete effectively with the merged entity to supply metro trains to Singapore; and (d) the Land Transport Authority of Singapore possesses considerable negotiating power as the major buyer of metro trains in Singapore, and it conducts open tenders which have attracted many bidders to participate. For these reasons, CCS was not concerned that the merger would have the effect of substantially reducing competition in the relevant market.

***Proposed Acquisition by Joint Venture between Denka and Mitsui of DuPont's Global Neoprene Business* (CCS 400/002/15) (7 May 2015)**

10.16 In the acquisition by Denka Performance Elastomer LLC of EI du Point de Nemours and Company, CCS considered the relevant market to be the market for the global supply of chloroprene rubber ("CR") into Singapore. Given the lack of high barriers to entry in the relevant market, CCS noted that existing CR manufacturers or new entrants could expand production or begin supplying into the Singapore market. An excess of global supply of CR coupled with Singapore's relatively low demand for the product restrict the ability of the merged entity to charge high prices. In addition, buyers were in a strong bargaining position and could switch suppliers easily. Co-ordinated behaviour was also found to be highly unlikely with the existing market conditions. Overall, CCS decided that there would not be a substantial reduction in competition after the merger.

***Proposed Acquisition by ADB BVBA of Safegate International AB* (CCS 400/003/15) (Phase 2 Review)**

10.17 CCS raised competition concerns over the acquisition of Safegate International AB by ADB BVBA ("ADB"), which were seen as the closest competitors in the market for the supply of airfield lighting ("AFL") systems in Singapore. The main problems highlighted by CCS were that the merged entity would acquire significant market power post-merger and other AFL suppliers might find it hard to enter the market in the short to medium term due to extensive testing requirements imposed by buyers. The merger could therefore substantially reduce competition in the relevant market and lead to higher prices for buyers as well as products and services of lower quality. In response, ADB provided commitments relating to pricing, availability of spare parts and non-exclusive contracts, which eventually lead to CCS approving the merger subject to the commitments being accepted.

Other notifications

10.18 CCS also received notifications for the *Acquisition of GAPL Pte Ltd by Heineken International BV* (CCS 400/004/15) and *Proposed Acquisition of the Sole Control by Western Digital Corporation of SanDisk Corporation* (CCS 400/005/15), both of which are still in Phase 1 of the review process (paras 2.7–2.10 of the *CCS Guidelines on Merger Procedures 2012* set out the relevant review procedures).

Occasional papers published by CCS

Most favoured nation clauses

10.19 A most favoured nation ("MFN") clause is a clause contained in an agreement between parties operating at different levels of the value chain, where the one demands that the other will always ensure terms which are no less favourable than those offered to others in the same business. CCS gives the specific example of an agreement between a seller and an intermediary, which requires the seller not to price its goods at a lower level for other intermediaries. The paper is timely given that MFN clauses are used extensively in business. It thus provides a degree of guidance through the thinking of CCS. In 2015, the US Department of Justice had also issued a decision against Apple for using MFN clauses as a tool to fix prices of e-books in violation of antitrust laws.

10.20 Depending on the way MFNs are used, MFN clauses may give rise to both pro-competitive and anticompetitive effects. CCS cautioned that MFN clauses may be caught under the s 34 prohibition if it is a guise for horizontal anticompetitive agreements. Alternatively, an MFN clause may cause an abuse of dominance to be established under s 47 of the Act where it is used as an exclusionary measure to maintain or strengthen the dominant position of the undertaking in question.

E-commerce in Singapore

10.21 With multiple new entrants like Zalora, RedMart and more entering and growing in the e-commerce market, it is clear that the nature of competition between businesses has been evolving rapidly. The e-commerce world allows businesses to bypass traditional barriers to entry and expansion in various markets, such as high rental costs and manpower shortages. CCS also recognises that a striking feature of e-commerce markets is that they are highly dynamic. Any market power gained or lost in these markets, more often than not, are of a temporal nature.

10.22 In its review, CCS expressed concern that excessive intervention or any intervention for that matter, in e-commerce markets may pose the risk of stifling long-term innovation. However, this is not to say that competition authorities should stay out of the picture. CCS has taken a very proactive and positive view to keep abreast of changing market conditions so as to maintain a robust regulatory framework that can keep pace with these changes and will continue to monitor this market.

Abuse of dominance

10.24 On abuse of dominance cases, there have been no infringement decisions issued by CCS in 2015. However, CCS has taken a hard stand against exclusive relationships, as reflected by the two potential infringements it reviewed. In June 2015, following an investigation by CCS, Cordlife Group Limited, a service provider of umbilical cord blood and cord lining banking in Singapore, voluntarily committed to removing its existing exclusive arrangements with baby fair organisers and private maternity hospitals which may restrict competition in the cord blood bank industry.

10.25 Similarly, in October 2015, Asia Pacific Breweries (Singapore) Pte Ltd agreed to put an end to its exclusive practice of preventing retail outlets from selling draught beers from its competitors, which had the effect of limiting consumer choice.