10. COMPETITION LAW

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Overview of the Competition Commission of Singapore's decisions and work in 2016

10.1 The year 2016 was an important year for the Competition Commission of Singapore ("CCS"). It marked its tenth year of enforcement, with the Competition Act[1] ("Act") coming into force in 2006. CCS also hosted the annual conference of the International Competition Network ("ICN"), which saw enforcers and competition professionals congregate in Singapore. Various papers were presented including discussions on government advocacy and disruptive innovation.

10.2 The year 2016 also saw CCS breaking new grounds in its enforcement work. In March 2016, CCS issued an infringement decision against ten financial advisory companies, the first ever finding of infringement under s 34 of the Act involving an anti-competitive agreement to prevent a potential competitor from entering a market. CCS also commenced several investigations into potential abuses of dominance under s 7 of the Act, with two being made public. One of the investigations pertained to an investigation in the online food-delivery industry in Singapore – the very first investigation within the e-commerce space. This investigation perhaps should have come as less of a surprise, since CCS had indicated its interest in the e-commerce market in Singapore through a study conducted in 2015. The investigation was eventually closed by CCS.

10.3 CCS received several merger notifications throughout the year, and in 2016, it cleared a total of seven mergers (some of which were notified earlier in 2015) with one merger still pending clearance as at the end of 2016. In addition, CCS had made extensive revisions to its existing guidelines, and the revised guidelines had come into effect on 1 December 2016. Of particular note is the new fast track procedure introduced by CCS for ss 34 and 47 cases, which allows entities under investigation to enter into agreements with CCS to admit their liability

1 Cap 50B, 2006 Rev Ed.

for anti-competitive conduct at an early stage. In return, these entities will receive a reduction on the financial penalty to be imposed on them.

Focus on government advocacy and disruptive innovation

10.4 In 2016, CCS hosted the 15th annual conference of ICN, which saw more than 500 participants from over 80 jurisdictions. During the ICN conference, the ICN special project team 2016 from CCS presented a report titled *Government Advocacy and Disruptive Innovations*[2] ("report"). The report presented survey results based on responses received from ICN members on their perspectives on disruptive innovation and government advocacy experiences in relation to the same (one of the themes of the ICN conference). Disruptive innovation is a term coined by Prof Clayton M Christensen of Harvard Business School in his book, *The Innovator's Dilemma*,[3] and is used to describe innovation that creates new markets by finding new types of customers, partly through the use of modern technology and partly through devising new business models and exploiting old technology in novel ways.

10.5 The report identified three key challenges in disruptive innovation-related government advocacy efforts. Firstly, government agencies may not regularly assess the effects of their proposed policies on competition. Hence, they should be made aware of the importance of competition and keep it in mind throughout the policy-making process. Secondly, there are insufficient information and studies on disruptive innovation to provide evidential support for advocacy efforts. The current practice is to obtain such information through enforcement work, market studies, and collaborations with government agencies. Lastly, government agencies and competition authorities face political pressures over disruptive innovation, which could lead to defensive behaviour from incumbents. Therefore, advocacy must be targeted at key decision-makers in order to be effective.

10.6 The report further summarised the learning points from the survey responses in relation to government advocacy efforts in disruptive innovation. The content of the such advocacy must be clear, with well-defined competition objectives that are supported by adequate

2 International Competition Network, "Government Advocacy and Disruptive Innovation" (20 June 2016) <https://www.ccs.gov.sg/~/media/custom/ccs/files/media%20and%20publications/publications/occasional%20paper/final%20icn%202016%20special%20project%20report%20on%20government%20advocacy%20and%20disruptive%20innovations.ashx> (accessed 27 April 2017).

3 Clayton M Christensen, *The Innovator's Dilemma: The Revolutionary Book That Will Change the Way You Do Business* (Harper Business, 2011).

knowledge of the key areas of concern. Government advocacy ought to be conducted using suitable tools, in a co-operative and open-minded manner, and with a reliable source of expertise on competition matters. Advice must be given to government agencies in a timely fashion, so as to allow them sufficient time to consider the competition authority's views in their decision-making.

10.7 Many businesses may feel intimidated or restricted in their conduct, when they are being monitored by competition authorities or when they learn about the heavy penalties imposed against their counterparts for infringing competition law. However, these are crucial elements of the regulatory framework for competition law, with the ultimate aim of creating a level playing field for the development of competitive markets and innovative businesses. Competition authorities are fully aware of the need of keeping up with the evolving business landscape and have demonstrated their eagerness in doing so, for instance, by exploring the relatively new concept of disruptive innovation during the ICN conference. As what Mr Lim Hng Kiang, Minister for Trade and Industry, highlighted during his opening address at the ICN conference, it may only be a matter of time before people begin to see "competition policy and law as a key enabler for economic growth".

Anti-competitive agreements, decisions of associations of undertakings, and concerted practices (s 34)

10.8 Agreements between undertakings, decisions by associations of undertakings, and concerted practices which have as their "object or effect the prevention, restriction or distortion of competition within Singapore" are considered anti-competitive under s 34 of the Act. Typical examples of arrangements between competitors which are by their very nature anti-competitive include price-fixing, market-sharing, output control, and bid-rigging agreements.

10.9 In January 2016, the Competition Appeal Board ("CAB") handed down its decision[4] on an appeal filed by Nachi-Fujikoshi Corporation and its subsidiary (collectively, "the appellants") against an infringement decision issued by CCS in *CCS Imposes Penalties on Ball Bearings Manufacturers Involved in International Cartel*,[5] which relates to a price-fixing agreement between various ball bearings manufacturers. In its appeal before CAB, the appellants contended that CCS should have imposed a lower penalty on them for two reasons:

4 *Re Nachi-Fujikoshi Corp and Nachi Singapore Pte Ltd* [2016] SGCAB 1.
5 CCS 700/002/11 (27 May 2014).

(a) CCS had erroneously applied the turnover of the appellants for fiscal year ("FY") 2013 instead of FY 2012 to determine the appropriate financial penalty; and

(b) having regard to the appellants' unique business model, CCS should have excluded their turnover from export sales by their exclusive local distributor.

10.10 In relation to argument (a), CAB noted that para 2.5 of the CCS Guidelines on the Appropriate Amount of Penalty (note that this refers to the old guidelines from 2007,[6] which have now been amended), as well as para 3(1) of the Competition (Financial Penalties) Order 2007,[7] provide that the turnover to be used for the calculation of financial penalty is the financial year "preceding the date on which the *decision* of [CCS] is taken or, if figures are not available for that business year, the [one] immediately preceding it" [emphasis added]. CAB clarified that the word "decision", as it is used in the aforesaid provisions, refers to an infringement decision (in this case, issued in 2014) rather than a proposed infringement decision (which was issued in 2013) by CCS. Thus, it agreed with the appellants that CCS should have relied on their turnover for FY 2013 in calculating the appropriate financial penalty, this being the financial year immediately preceding the date of the infringement decision.

10.11 However, CAB rejected argument (b), which was grounded on the fact that the appellants operated a different business model from the other companies which were also the subject of the infringement decision. The appellants sold their ball bearings to an exclusive distributor in Singapore, which in turn sold them to customers in Singapore and elsewhere; and, these sales had accounted for the whole turnover figure used by CCS in calculating the financial penalty for the appellants. In view of the fact that the appellants' exclusive distributor was a victim of their anti-competitive conduct, CAB held that CCS did not err in using the turnover figure from the sale of ball bearings by the appellants to their exclusive distributor to derive the financial penalty imposed on them. Ultimately, CAB reduced the amount of financial penalty imposed on the appellants from S$7,564,950 to S$4,773,423, as their turnover for FY 2013 was lower than that for FY 2012, which was used by CCS in its previous calculation.

6 Competition Commission of Singapore, CCS Guidelines on the Appropriate Amount of Penalty (June 2007) <https://www.ccs.gov.sg/legislation/~/media/custom/ccs/files/legislation/ccs%20guidelines/ccsguidelinepenalty20071033.ashx> (accessed 15 May 2017).

7 S 372/2007.

10.12 In February 2016, CCS received an application for a decision[8] pursuant to s 44 of the Act from Singapore Airlines Limited ("SIA") and Deutsche Lufthansa AG ("Lufthansa"), for CCS to decide whether a joint venture between SIA and Lufthansa ("SIA–Lufthansa Proposed JV") would infringe the s 34 prohibition. Under the SIA–Lufthansa Proposed JV, SIA and Lufthansa would collaborate with each other on pricing, inventory management, sales, and marketing. The SIA–Lufthansa Proposed JV also involved co-ordination between the parties on schedule and capacity, as well as revenue-sharing on the following routes: Singapore–Frankfurt; Singapore–Munich; Singapore–Dusseldorf; and Singapore–Zurich.

10.13 During its assessment of the SIA–Lufthansa Proposed JV, CCS discovered that the parties were the only airlines operating direct flights on the Singapore–Frankfurt and Singapore–Zurich routes ("routes"), with a combined market share of more than 80%. As such, CCS expressed the view that the agreement between the parties to co-ordinate their prices and capacity on the routes would raise concerns such as a potential decrease in capacity and an increase in fares after the commencement of the SIA–Lufthansa Proposed JV. To address these concerns, SIA and Lufthansa have provided the following commitments to CCS: to maintain capacity levels on the routes at levels that existed before the SIA–Lufthansa Proposed JV; to increase capacity on the routes by a specified number by a certain date; to carry a minimum number of Singapore passengers each year; and to appoint an independent auditor to monitor compliance with these commitments and submit periodical reports to CCS. These commitments were accepted by CCS, who reserved the right to investigate the SIA–Lufthansa Proposed JV in the event that the parties fail to adhere to the aforesaid undertakings.

10.14 CCS in a rare set of facts in the infringement decision, *Financial Advisers Penalised by CCS for Pressurising a Competitor to Withdraw Offer from the Life Insurance Market*,[9] held that exerting pressure on a competitor to prevent it from competing in the market was a contravention of the Act. On 30 April 2013, iFast Financial Pte Ltd ("iFast") launched an offer on Fundsupermart.com for a 50% commission rebate on its life insurance products ("Fundsupermart Offer"). Investigations by CCS revealed that on 2 May 2013, a group of financial advisory companies ("FACs") had, during a meeting of the Association of Financial Advisers (Singapore), appointed a representative to contact iFast to remove the Fundsupermart Offer from the website.

8 *Proposed Joint Venture between Deutsche Lufthansa AG and Singapore Airlines Ltd* (CCS 400/001/16) (12 December 2016).

9 CCS 500/003/13 (17 March 2016).

As a result of the pressure exerted by these FACs, iFast removed the Fundsupermart Offer on 3 May 2013.

10.15 In its decision, CCS stated that the conduct of the FACs were anti-competitive, because instead of responding independently to the Fundsupermart Offer, they had co-operated with one another to pressurise iFast into removing it. Thus, CCS took the view that the FACs had infringed the s 34 prohibition by participating in an agreement and/or concerted practice which had the object of restricting competition in the market for the distribution of certain individual life insurance products in Singapore. A total penalty of S$909,302 was imposed on the ten infringing FACs. This is a landmark decision by CCS, as it was the first time it established an infringement of s 34 of the Act on the basis that a competitor was prevented from entering the market.

10.16 In March 2016, CCS issued a proposed infringement decision ("PID") against 13 fresh chicken distributors (that is, the parties) for their alleged involvement in agreements to co-ordinate the amount and timing of price increases, and not to compete with one another for customers in the market for the supply of fresh chicken products in Singapore ("anti-competitive agreements"). The investigations were triggered by a complaint received by CCS on the alleged anti-competitive conduct. CCS provisionally found that the parties had engaged in discussions from at least 2007 to 2014, which formed the background of the anti-competitive agreements. According to CCS, the anti-competitive agreements had the effect of distorting the prices of fresh chicken products and restricting the choices available to customers in Singapore. Having received the representations made by the parties, CCS reopened its investigations to gather further evidence and interview parties. CCS also called for a state-of-play meeting in this matter to allow a discussion with the parties on various aspects of the case without, of course, going into the merits of case *vis-à-vis* each party. The approach of calling for a state-of-play meeting is to be welcomed. CCS will issue its final decision shortly.

Abuse of dominance (s 47)

10.17 As a preliminary point, being dominant is not in itself a violation of s 47 of the Act. What is prohibited is leveraging on such dominance (in this regard, as a guidance, a market share of 60% or more is an indication of dominance) to restrict competition in any market in Singapore. While there is a dearth of decisions on abuse of dominance in Singapore, CCS has sent a reminder to dominant businesses, through its recent enforcement actions, that businesses must always ensure that they cannot use their strong market position to abuse. Further, with

increased awareness of competition law in Singapore, complaints about anti-competitive practices to CCS have become more common and in fact, both of CCS' investigations in 2016 which were made public into allegations of abuse of dominance were results of complaints received by CCS.

10.18 CCS launched an unprecedented investigation into the e-commerce space, after receiving complaints regarding an alleged anti-competitive practice by an online food-delivery provider in Singapore ("provider"). During the investigation, CCS found that the provider had entered into exclusive agreements with a number of restaurants, to prevent these restaurants from entering into partnerships with other online food-delivery providers.

10.19 Despite these exclusive arrangements, CCS closed its investigation into the matter as competition it accepted submissions from the provider that competition had not been harmed in the online food-delivery market. In fact, the market had become more competitive in recent years with the entry and expansion of players such as Deliveroo, Foodpanda, Gourmet To Go, and UberEats. However, CCS indicated that it would continue to monitor the market, because such exclusive agreements may become problematic in the future. While competition law does not prohibit businesses from acquiring market power, such power may not be used to prevent competitors from entering or expanding in the market. In order to mitigate the risk of infringing competition law, CCS encouraged businesses to compete based on merits rather than rely on exclusive agreements to gain market shares.

10.20 In the later part of 2016, CCS investigated allegations against various companies providing lift-maintenance services for their alleged refusal to supply lift spare parts in Housing & Development Board ("HDB") estates.[10] These spare parts are necessary for the maintenance and servicing of lifts installed in HDB estates, which are managed by town councils in Singapore. The town councils may either appoint the original suppliers of the lifts to provide maintenance services, or invite companies, including third-party lift maintenance contractors ("TP contractors"), by way of a tender, to provide maintenance services for all the lifts within an HDB estate. The TP contractors had, in some instances, needed to source for brand-specific lift spare parts in order to perform these maintenance services. The inability of TP contractors to

10 Competition Commission of Singapore, "CCS Investigates Restrictive Industry Practices in the Supply of Lift Spare Parts in HDB Estates" (14 July 2016) <https://www.ccs.gov.sg/media-and-publications/media-releases/investigation-of-lift-spare-parts-industry-em-services> (accessed 28 April 2017).

obtain brand-specific lift spare parts could place them at a disadvantage in tenders called by the town councils, even if they could provide the lift maintenance services at lower prices and with better service quality as compared to the original suppliers.

10.21 Although companies are free to decide on how to conduct their business, it may be an abuse of dominance in contravention of s 47 of the Act for a dominant or sole supplier to refuse to supply essential products or services that cannot be obtained from other supply channels in a downstream market. Applying this to the present case, CCS held the view that the refusal to provide essential lift spare parts to the TP contractors by the original suppliers or distributors of the lifts may curtail competition for contracts to maintain and service lifts of particular brands in Singapore.

10.22 One of the companies under investigation by CCS, EM Services Pte Ltd ("EMS"), provided an undertaking to CCS to supply the lift spare parts of the BLT brand, on the understanding that certain terms and conditions, including, amongst others: purchasing terms such as pricing, delivery time and warranty period; adequate qualification of the purchaser to service the lifts; and the purchaser assuming liability in the event of any injuries or loss that arise through its negligence, are satisfied. CCS accepted the commitments proposed by EMS, as they fully addressed the competition concerns that it had over the refusal to supply lift spare parts. This is but one of many instances where CCS decided to close its investigation into a potential abuse of dominance, upon receiving voluntary commitments from the undertaking concerned to terminate its anti-competitive practices. This is because the focus of CCS is generally to ensure that any competition harm in a market is removed. Hence, to ensure compliance with competition law, dominant undertakings should take special care not to engage in restrictive practices and take the initiative to cease any conduct which may be regarded as anti-competitive by CCS.

Mergers that (may) result in substantial lessening of competition (s 54)

10.23 Section 54 of the Act contains a prohibition on mergers that substantially lessen competition in any market in Singapore. The assessment of whether a merger will substantially lessen competition involves a comparison between the anticipated state of competition in the market after the merger and the counterfactual (that is, the state of competition should the merger not take place). Notwithstanding that a merger may substantially lessen competition, the presence of countervailing factors may operate to offset these anti-competitive effects; in which case, CCS will not object to the merger.

10.24 Singapore does not have a mandatory merger notification regime in place, so parties to a merger, strictly speaking, are not compelled to notify the merger to CCS. However, this means that the parties place themselves under the risk, after proceeding with the merger, of CCS raising objections to the merger. Given that a merger usually involves much time, effort, and costs, and spans across many jurisdictions, it would be an extremely arduous, not to mention expensive, task to reverse the effects of a merger once the process has commenced. Therefore, the more conservative approach would be to notify CCS of the merger before it takes place, especially if the merger could potentially lessen competition in the relevant market. Indeed, many businesses are now taking this prudent approach, as seen from the number of merger notifications received by CCS each year.

Proposed Acquisition of the Sole Control by Western Digital Corp of SanDisk Corp[11]

10.25 Western Digital Corporation ("WDC") and SanDisk Corporation ("SanDisk") filed a joint notification in December 2015 for CCS to determine whether the acquisition of the sole control of SanDisk by WDC would infringe s 54 of the Act. The operations of WDC and SanDisk overlapped in the supply of enterprise class solid state drives ("Enterprise SSDs"). The parties concerned submitted that the relevant market for the purposes of the acquisition is the global supply of all Enterprise SSDs. On the other hand, based on feedback received by CCS during the public consultation, third parties took the view that the relevant market could be further narrowed down to interface-specific Enterprise SSDs ("narrow market"). However, CCS thought it was unnecessary to define the exact product market, because of the absence of concerns that competition would be substantially lessened, even in the narrow market, after the acquisition.

10.26 CCS provided several reasons for clearing the acquisition after a Phase 1 review. First, the existing conditions of competition are likely to persist post-acquisition, because of the presence of strong competitors to the merged entity, such as Samsung, Intel, and Toshiba, even in the narrow market. Second, the barriers to entry into the narrow market are relatively low, as Enterprise SSDs are not regulated in Singapore and there is no need for potential entrants to establish a physical presence in Singapore to supply the Enterprise SSDs to local customers. Third, there is strong countervailing buyer power in the narrow market, because buyers of Enterprise SSDs are typically large, sophisticated original equipment manufacturers or distributors with a high level of technical

11 CCS 400/005/15 (19 January 2016).

knowledge or expertise, including EMC, IBM, HP, and Dell. Therefore, CCS concluded that there would not be a substantial lessening of competition in the relevant market post-acquisition.

Proposed Acquisition by ADB BVBA of Safegate International AB[12]

10.27 This notification concerned the acquisition of Safegate International AB ("Safegate") by ADB BVBA ("ADB") from Fairford Holdings Private AB. Following a Phase 1 review of the proposed merger, CCS raised several concerns it had over competition in the market for the supply of airfield lighting systems to the parties. CCS has now cleared the merger, subject to the commitments provided by ADB to CCS for the purpose of addressing the competition concerns that were identified during the Phase 1 review.

10.28 To allay the fear that the merged entity might raise prices substantially in the short to medium term, having obtained significant market power post-merger, ADB undertook to place a cap on the prices of certain ADB and Safegate products and spare parts which were sold directly or indirectly to any airport operator for use in Singapore during the commitment period. To address the concern that the merged entity might reduce supply of spare parts and technical support, ABD promised to supply all required spare parts and technical support to airport operators for a period of ten years from the completion of the acquisition.

10.29 To prevent the merged entity from "locking in" third-party contractors and suppliers in Singapore with exclusive agreements, and hence creating obstacles for the entry of its competitors into the Singapore market, ADB and Safegate committed not to enter into any agreements with any contractor or supplier in Singapore that would restrict their ability to provide or market competing products and services of competitors, within a four-year period commencing on the completion date of the acquisition. ABD and Safegate also agreed not to terminate any existing contracts entered into between either party and an airport operator in Singapore prematurely, and such contracts were to continue in full force following the acquisition. Finally, ADB would submit annual independent audit reports to CCS, for CCS to, effectively, monitor ADB's compliance with the aforesaid commitments.

12 CCS 400/003/15 (29 January 2016).

Proposed Joint Venture Between SIA Engineering Co Ltd and Airbus Services Asia Pacific Pte Ltd[13]

10.30 SIA Engineering Company Limited and Airbus Services Asia Pacific Pte Ltd proposed to enter into a joint venture ("SIA–Airbus Proposed JV") for the provision of heavy maintenance services for commercial aircrafts in Singapore. In conducting the merger assessment, CCS defined the relevant market as the provision of heavy maintenance services globally. In clearing the SIA–Airbus Proposed JV, CCS found that the presence of various competitors who provide heavy maintenance services globally exerted significant competitive pressures on the SIA–Airbus Proposed JV. In addition, barriers to entry and expansion are not insurmountable despite the high capital investments needed, seeing as how there have been various instances of entry and expansion by players in the relevant market. Finally, CCS found that customers of heavy maintenance services are sophisticated and have strong bargaining power, and do not face significant difficulties in switching suppliers. Thus, the JV did not give rise to concerns over a substantial lessening of competition in the relevant market.

Acquisition of GAPL Pte Ltd by Heineken International BV[14]

10.31 On 12 November 2015, Heineken International BV ("HIBV") notified CCS of its (already completed) acquisition of all the issued and outstanding ordinary share capital ("Transaction") of GAPL Pte Ltd ("GAPL"). For the purpose of assessing the competitive effects of the Transaction, CCS defined the relevant market as the production, marketing, sale, distribution, and global supply of duty-paid and duty-free beer (which includes all ales, lagers, and stouts) to Singapore.

10.32 CCS took the view that HIBV faced limited competitive pressures from actual and potential competitors and, hence, it was necessary to consider the level of increment in its market power after the Transaction. In its assessment on competition in the relevant market post-Transaction, CCS found that the additional market power acquired by HIBV was insignificant and was unlikely to increase HIBV's ability or provide incentives for it to increase the prices of its beers. While CCS observed that branding may pose a significant barrier to entry in the relevant market, the Transaction had not brought about a change in branding, so barriers to entry remained unaffected in this regard. Hence, CCS concluded that the Transaction would not lead to any substantial lessening of competition.

13 CCS 400/003/16 (14 June 2016).
14 CCS 400/004/15 (30 June 2016).

Proposed Acquisition by Tullet Prebon plc of ICAP plc global wholesale broking business[15]

10.33 Tullet Prebon plc ("TP") and ICAP plc ("ICAP") filed a joint notification to CCS for a decision on whether the acquisition of ICAP's global wholesale broking business by TP would result in a violation of s 54 of the Act. For the purposes of this notification, CCS identified two relevant markets: the provision of wholesale hybrid broking services in Singapore; and the APAC-wide or worldwide provision of real-time and periodic pricing data into Singapore, separately for each of interest rate derivatives, forward foreign currency exchange, cash deposits, and oil ("Overlapping Products").

10.34 In arriving at the conclusion that there was no substantial lessening of competition, CCS noted that TP and ICAP continued to face competition from other brokers and trading channels in the provision of broking services for the Overlapping Products after the acquisition. While CCS found that the barriers to entry to the wholesale hybrid broking business were high, the same could not be said for the barriers to expansion, as existing players could expand their broking services by relying on existing relationships with customers, who could then switch brokers without incurring substantial costs. Further, buyers of hybrid broking services possess strong bargaining powers, as they control the liquidity to brokers like TP and are able to switch to other brokerage firms or alternative trading channels fairly quickly and easily. The same analysis would apply to the provision of pricing data, as it was linked to the provision of the underlying hybrid broking services.

Proposed Acquisition by ASML Holding NV of Hermes Microvision, Inc[16]

10.35 CCS received a joint notification from ASML Holding NV ("ASML") and Hermes Microvision, Inc ("HMI") in relation to the acquisition by ASML of 100% of the voting securities in HMI and the sole control of all businesses of HMI. In determining the competitive effects of the acquisition, CCS conducted an assessment in the markets for the worldwide supply of lithography equipment, overlay metrology equipment, process control software, and wafer inspection equipment to Singapore ("Relevant Markets"). CCS took the view that there were barriers to entry into the Relevant Markets due to the requirement of significant capital expenditure, specialised expertise, and the long period of time involved in developing new products. However, these

15 CCS 400/004/16 (18 July 2016).
16 CCS 400/005/16 (10 August 2016).

barriers could be overcome by potential entrants through the investment of substantial amounts of time and resources.

10.36 Importantly, CCS did not find that the merger would give rise to any co-ordinated or non-co-ordinated effects in the Relevant Markets because the parties to the merger were not direct competitors with each other and there were no overlaps between the products supplied by them worldwide. Moreover, the merged entity would continue to experience competitive constraints from their existing competitors in the Relevant Markets. Given a lack of evidence that a substantial lessening of competition would result from the merger, CCS gave the green light for the merger.

Proposed Acquisition by Samwoh Premix Pte Ltd of certain property and assets from Ley Choon Constructions and Engineering Pte Ltd[17]

10.37 Samwoh Corporation Pte Ltd ("Samwoh") notified CCS of its intention to acquire, through its wholly-owned subsidiary, Samwoh Premix Pte Ltd ("SWPPL"), a piece of land and the building and asphalt premix manufacturing plant situated on that land ("Property") from a competitor and wholly-owned subsidiary of Ley Choon Group Holdings Limited ("Ley Choon"), Ley Choon Constructions and Engineering Pte Ltd ("LCCE"). CCS approved the transaction, concluding that it would not infringe s 54 of the Act. In support of its decision, CCS observed that the sale and purchase of the Property only involved the transfer of asphalt premix production capacity, and not customers or employees from LCCE to SWPPL. As such, the transaction did not affect the ability of Ley Choon to compete with Samwoh in the market for the production of asphalt premix in Singapore, since Ley Choon owns another asphalt premix manufacturing plant. Additionally, the homogenous nature of asphalt premix means that customers could switch suppliers with minimal or no costs. There is also excess capacity in the market, such that Samwoh's competitors could quickly respond to any change in demand in the market, for instance, where Samwoh's customers decided to buy from another supplier.

Other notifications

10.38 CCS received a joint notification filed by Nissan Motor Co Ltd ("Nissan") and Mitsubishi Motors Corporation ("MMC"),[18] in relation to a strategic alliance entered into between Nissan and MMC. Under

17 CCS 400/006/16 (24 August 2016).

18 See *Acquisition by Nissan Motor Co Ltd of Shares in Mitsubishi Motors Corp* (CCS 400/007/16) (23 January 2017).

this strategic alliance, Nissan acquired 34% of the shareholding in MMC, as well as sole control over MMC. CCS has conducted a public consultation on this strategic alliance, and will make a decision as to whether to approve the merger after assessing its effects on competition in Singapore.

Revision of guidelines

10.39 In November 2016, CCS announced that it has completed an extensive review and revision of its existing guidelines, following a public consultation on the proposed changes to these guidelines. The purpose of these revisions is to enable businesses, consumers, and other stakeholders to gain a better understanding of the approach taken by CCS to enforce the Act. The revised guidelines, which came into effect on 1 December 2016, are as follows:

(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; and

(i) CCS Guidelines on the Major Provisions 2016.

Fast track procedure for ss 34 and 47 cases

10.40 Broadly speaking, the new fast track procedure ("FTP") consists of four stages: initiation; discussion; agreement; and acceptance. At the initiation stage, if CCS considers a case to be suitable for the FTP, it will notify each party to whom it contemplates issuing a PID or an infringement decision ("ID") by way of letter, requesting them to indicate in writing their willingness to engage in discussions with CCS under the FTP within a stipulated time.

10.41 During the discussion phase, CCS will discuss with the parties concerned the scope and gravity of the infringing conduct and the possible financial penalties that may be imposed on them. The purpose of these discussions is to allow each party and CCS to assess the pros and cons of the FTP from their own perspectives and to decide whether to proceed with the FTP or go through the normal procedure. Even if a party decides not to utilise the FTP offered by CCS, this will not be considered an aggravating factor in the calculation of penalties or seen as a lack of co-operation by a leniency applicant.

10.42 Where a party decides to proceed with the FTP, it has to make a fast track procedure submission ("FTP submission") to CCS. In the FTP submission, each party must: admit its liability to the infringement and to an agreed set of facts; state that it has been informed of CCS' proposed decision and given adequate opportunity to be heard during discussions with CCS; and confirm that it will not make extensive written representations, any request to make oral representations, or any request to inspect documents and evidence in CCS' possession.

10.43 Subsequently, each party that has provided an FTP submission will enter into an agreement with CCS, setting out the terms of the FTP submission as well as other agreed terms at the end of the discussion phase. At the final stage, and after the said agreement has been signed, CCS will issue a PID or ID, depending on the stage at which CCS initiated the FTP, which will provide for a reduction of 10% on the financial penalty that would otherwise be imposed on the party if it had not acceded to the FTP. Where a party to the FTP is also a leniency applicant, the reduction in financial penalty given under the FTP will be cumulative to that allowed pursuant to the leniency application.

Guidelines on the appropriate amount of penalty 2016 ("penalty guidelines")

10.44 The revisions to the Penalty Guidelines are much welcomed, as they provide greater clarity and guidance on how CCS calculates financial penalties imposed on infringing undertakings. A key change to the Penalty Guidelines is that CCS will calculate the financial penalty using the turnover of an infringing undertaking during the financial year preceding the date at which the infringement had ceased, as opposed to its turnover during the financial year preceding the date of CCS' infringement decision. The new approach creates a greater correlation between the amount of financial penalty imposed and the infringement itself, as it is based on the turnover of the infringing undertakings during the period of infringement.

10.45 CCS has also helpfully outlined the steps that it will take in calculating the financial penalty in the Penalty Guidelines:

> (a) calculation of the base penalty with regard to the seriousness of the infringement and the turnover of the undertaking in Singapore for the relevant market;
>
> (b) adjustment for duration of infringement;
>
> (c) adjustment for other relevant factors, such as deterrence;
>
> (d) adjustment for aggravating or mitigating factors;
>
> (e) adjustment to comply with the statutory maximum penalty; and
>
> (f) adjustment for immunity or leniency applications and/or reductions under the FTP.

This does not only provide greater transparency over the process of arriving at the financial penalty, but also allows parties to make a more informed decision on whether to file an appeal on the quantum of the financial penalty, should it wish to do so.

Studies conducted by CCS

Interim findings from CCS's retail petrol study

10.46 CCS is currently conducting a study into the retail petrol market, in relation to the factors which affect retail petrol prices ("RPP") from 2010 to 2016. In February 2017, CCS published its interim findings from the study. With regards to pricing, it was found that petrol companies used the price at which they purchased refined wholesale petrol from refineries (also known as the Mean of Platts Singapore or "MOPS" prices), which are generally higher than the price of crude oil, to determine their RPP. Other components of RPP include: operating costs; taxes and duties; land costs; discounts; and rebates ("non-fuel components"), which have generally increased over the past few years.

10.47 CCS observed that the RPP moved in tandem with MOPS prices over a six-year period between January 2010 and January 2016. While any increase or decrease in MOPS prices were not completely or immediately passed on to consumers, as reflected in the movements of the RPP, this could be a result of changes in non-fuel components of the RPP instead. Based on the information gathered by CCS, it did not find any evidence of collusion in relation to the RPP, even though petrol companies would consistently monitor and respond to price movements of competitors. CCS intends to administer a consumer survey on petrol

demand in Singapore and will release the final report on the study once the survey is completed.

Post-action evaluation of CCS's merger clearance in the dialysis market[19]

10.48 In 2012, CCS gave clearance for the acquisition by Asia Renal Care (SEA) Pte Ltd of 70% of the shares in Orthe Pte Ltd, and this resulted in the formation of a merged entity named Fresenius Medical Care Singapore ("FMC").[20] In its decision, CCS identified the relevant market as the outpatient haemodialysis ("HD") treatment in dialysis centres operated by restructured hospitals and private sector service providers, including joint ventures between restructured hospitals and private operators in Singapore ("HD market"). Although the parties had a combined market share of 70% to 90%, CCS had concluded that the merger would not cause a substantial lessening of competition in the HD market.

10.49 Four years later, CCS published a report on a study of the after effects of the merger, during the period from December 2012 to June 2015 ("reference period"), to assess whether the merger had substantially lessened competition in the HD market. During the study, CCS found that there was an increase in the overall supply of HD services during over the reference period, with the number of dialysis centres increasing from 39 to 60, and the number of treatment slots per week increasing from approximately 2,000 to 3,000. Consequently, capacity utilisation decreased for FMC and its competitors, which is likely to have improved patient welfare by making it easier for patients to get their preferred time slots for treatment. Further, FMC's market share had decreased from 70% to 53% over the reference period, due to the expansion and entry of competitors in the HD market. It was found that new dialysis centres had emerged across Singapore, an observation which corroborates CCS's previous assessment that barriers to entry and expansion in the HD market were not high.

10.50 In addition, the average prices of HD services remained the same over the reference period, and in fact, the prices for HD services had reduced in comparison to the prices for other medical treatments. These findings provide evidence and support for the position taken by

19 Ministry of Communications and Information, "CCS's Study Finds No Adverse Effect on Competition in the Kidney Dialysis Market After Merger" (26 April 2016) <https://www.gov.sg/resources/sgpc/media_releases/ccs/press_release/P-20160426-1#sthash.gNYuYVEQ.dpuf> (accessed 28 April 2017).

20 See *Proposed Acquisition by Asia Renal Care (SEA) Pte Ltd of Orthe Pte Ltd* (CCS 400/008/12) (26 December 2012).

CCS that the merger did not result in any adverse effects on competition in the HD market.

10.51 A word of caution, in view of these post-action evaluations which may be undertaken by CCS periodically, is that merged entities should be mindful not to take advantage of their increased market power post-merger to, unduly, restrict competition in the market in which it operates. Such behaviour could make the regulator think twice about its decision to clear the merger.