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10. COMPETITION LAW

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I. Overview

10.1 The year 2019 saw the conclusion of the Competition and Consumer Commission of Singapore's ("CCCS") investigations in both areas of competition and consumer protection. This follows the CCCS taking on the role of consumer protection in 2018, pursuant to which it now has new powers to take action under the Consumer Protection (Fair Trading) Act[1] ("CPFTA") against errant retailers.

10.2 While the CCCS issued only one infringement decision relating to anti-competitive agreements in 2019, a substantially reduced number compared to previous years, it was nevertheless an important decision. The decision was against four hotels in Singapore for exchanging commercially sensitive information. Importantly, the CCCS clarified the doctrine of single economic entity ("SEE") in the context of principal-agent relationships. No infringement decisions were issued on abuse of dominance. Nonetheless, the CCCS managed to conclude its investigations against two lift spare parts suppliers after accepting the commitments offered by the parties.

10.3 With regard to notifications, the CCCS received two notifications in relation to s 34 of the Competition Act,[2] both in the context of airline alliances, and three merger notifications. For merger review, the CCCS issued three unconditional clearances following the Phase 1 review and one conditional clearance after commitments were offered during the Phase 2 review period. The CCCS also announced that it was unable to clear the proposed acquisition of Daewoo Shipbuilding & Marine Engineering Co Ltd by Korea Shipbuilding & Offshore Engineering Co Ltd after its Phase 1 review. It remains to be seen as to whether the parties will offer commitments or commence the Phase 2 review.

1 Cap 52A, 2009 Rev Ed.
2 Cap 50B, 2006 Rev Ed.

10.4 On the consumer protection front, the CCCS has been active in its new role and commenced legal proceedings in three of the consumer protection cases. In summary, it managed to successfully obtain an injunction from the State Courts against the SG Vehicles group of companies ("SG Vehicles") and its director; commenced investigations against Charcoal Thai 1 and ultimately obtained an undertaking from the company to cease its unfair practices; and filed an injunction against an e-commerce retailer, Fashion Interactive ("FI").

10.5 As part of its statutory duties and functions, the CCCS has also published various papers and its market study report on the online travel booking sector. These papers are important, as they provide insights into the CCCS's areas of focus and its enforcement approach. A set of draft guidelines on price transparency has also been put up by the CCCS for public consultation. It offers guidance to retailers on their display and advertisement of prices, thus ensuring that they comply with the CPFTA.

10.6 At the international level, the trend towards increasing co-operation between competition authorities continues. Regionally, the CCCS concluded a memorandum of understanding ("MOU") with the Asian Law and Economics Association in relation to their collaboration on ASEAN competition policy and law. Beyond the region, the CCCS signed a MOU with the Competition Bureau Canada on the enforcement of competition and consumer protection laws. This marks the first MOU entered into by the CCCS that encompasses both competition and consumer protection.

II. Anti-competitive agreements, decisions of associations of undertakings and concerted practices (section 34)

10.7 Section 34 of the Competition Act prohibits agreements entered into by 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". In 2019, the CCCS issued one infringement decision. The CCCS also received two separate notifications for decisions, both of which relate to airline alliances.

A. CCCS penalises owners/operators of four hotels for exchanging commercially sensitive information[3]

10.8 On 30 January 2019, the CCCS issued an infringement decision against the former and current owners and operators of four hotels, Capri by Fraser Changi City Singapore ("Capri Hotel"), Village Hotel Changi, Village Hotel Katong (collectively "Village Hotels") and Crowne Plaza Changi Airport Hotel ("Crowne Plaza"). The parties were found to have exchanged commercially sensitive information in the market of providing hotel room accommodation to corporate customers in Singapore.

10.9 The investigations conducted by the CCCS revealed that two separate bilateral exchanges of commercially sensitive information took place. The first was between Capri Hotel and Village Hotels, and the second was between Capri Hotel and Crowne Plaza. In both exchanges, parties swapped information in relation to their corporate customers, rates, bid prices and pricing strategies. The information exchanges were carried out by sales representatives pursuant to instructions received from the operators to request for customer information from competitors.

10.10 In holding both the owners and operators equally liable for the anti-competitive conduct, the CCCS relied on the doctrine of SEE and found that the owners and operators were in principal–agent relationships. This was because the operators were the sole and exclusive managers of their respective hotels, and were wholly entrusted with the daily operations of the hotels. There was no evidence indicating that the owners expressly prohibited the exchange of commercially sensitive information; the owners were in fact being kept apprised of the operators' marketing strategies. Significantly, the CCCS pronounced that ignorance was no defence under competition law, even if the anti-competitive activities carried out by the operators fell outside the scope of activities entrusted to them.

10.11 The CCCS ultimately imposed a total fine of $1.5m on the parties. As the owners and/or operators of Village Hotels and Crowne Plaza successfully submitted leniency applications, the CCCS reduced their penalties to $286,610 and $225,293 respectively. For Capri, its owner and operator received a penalty of $793,925.

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3 *CCCS Issues Infringement Decision against the Exchange of Commercially Sensitive Information between Competing Hotels* CCCS 700/002/14 (30 January 2019).

B. CCCS approves Emirates' application to remove its capacity commitments

10.12 The first airline alliance notification related to an application by Emirates to remove the capacity commitments which it undertook in 2013 pursuant to its alliance with Qantas Airways Ltd ("Qantas").[4] Emirates' application was approved by the CCCS on 14 November 2019.

10.13 By way of background, the parties sought a decision from the CCCS as to whether their proposed alliance would infringe s 34 of the Competition Act ("the Alliance") in 2013. The Alliance involved a global co-ordination of certain aspects of the flight services offered by the parties. This included planning, operating and capacity, sales, pricing, connectivity and integration of certain routes, and code sharing arrangements. As the Alliance allowed for the parties to co-ordinate on prices, scheduling, planning, operating and capacity, the CCCS viewed the Alliance as being effectively both pricing and production control agreements. The CCCS further rejected the parties' net economic benefit claims on the grounds that the purported economic benefits (for example, promotion of Singapore as an Aviation Hub, increase in Qantas' dedicated capacity to Singapore, increase in tourism and employment) did not result from the Alliance. In any event, the Alliance was not indispensable to achieving these benefits. To address the CCCS's competition concerns, the parties provided a voluntary undertaking to maintain minimum dedicated capacities on the Singapore–Melbourne and Singapore–Brisbane routes. The undertaking was to be in force for the duration of the Alliance.

10.14 On 16 April 2019, Emirates sought to vary the undertaking by removing the capacity commitment for the Singapore–Brisbane route. This was because Emirates had intentions to cease operating on that route due to capacity under-utilisation, declining revenue levels and rising costs. After carrying out its assessment and one round of public consultation, the CCCS concluded that even without Emirates' seat capacity commitment, sufficient competitive constraint was exerted on the parties, thus approving the removal of Emirates' capacity commitment.

4 Competition and Consumer Commission Singapore, "CCCS Approves the Application by Emirates to Remove Its Capacity Commitments" (14 November 2019) <https://www.cccs.gov.sg/public-register-and-consultation/public-consultation-items/emirates-capacity-commitments-2019?type=public_register> (accessed July 2020).

C. Notification on the Proposed Commercial Cooperation between Singapore Airlines Limited and Malaysia Airlines Berhad[5]

10.15 The second airline alliance notification received by the CCCS was from Singapore Airlines Limited ("SIA") and Malaysia Airlines Berhad ("MAB") regarding their proposed commercial co-operation. The proposed commercial co-operation was to also apply to SIA's wholly owned subsidiaries (SilkAir (Singapore) Private Limited and Scoot Tigerair Pte Ltd) and MAB's sister company (FlyFirefly Sdn Bhd).

10.16 According to the parties' submissions, the proposed commercial co-operation related to the provision of international air passenger transport services between Singapore and Malaysia. The parties overlapped on seven routes, including those where the parties offered the services both directly and indirectly. However, the parties submitted that the relevant market should only consist of routes where only direct services were provided. This would only amount to two routes.

10.17 As for the scope of the proposed commercial co-operation, it included scheduling, pricing, sales and marketing co-operation, as well as other commercial areas (for example, expanded code sharing and special prorate arrangements). Further, the parties were of the view that the proposed commercial co-operation would give rise to various net economic benefits. For instance, they would be able to offer an enhanced air travel product for Singapore to Malaysia routes, and that there would be an expanded virtual network of airlines and competitive pricing.

10.18 At the time of writing, the CCCS had yet to issue its decision.

III. Abuse of dominance (section 47 of the Competition Act)

10.19 Section 47 of the Act prohibits one or more undertakings with a dominant position from engaging in conduct that amounts to abuse of dominance. Similar to s 34 of the Competition Act, the prohibition against abuse of dominance has extraterritorial reach. Specifically, an undertaking with a dominant position in a market outside of Singapore may be liable for infringing s 47 of the Competition Act, should it engage in abusive conduct that affects a Singapore market.

10.20 For an undertaking to be liable for infringing s 47 of the Competition Act, the CCCS must first show that it is dominant in the

5 CCCS/400/110/2019/002.

relevant market. It has been widely accepted that an undertaking holds a dominant position if it possesses substantial market power. In assessing whether a particular undertaking is dominant, the CCCS will consider various factors, such as market shares, barriers to entry and expansion, and the extent of competitive constraints exerted by competitors and customers. As an indicative threshold, the CCCS uses a 60% market share as a proxy for dominance.

10.21 At this juncture, it is apposite to highlight that being dominant in itself is not forbidden by s 47 of the Competition Act; what is prohibited is the conduct of the dominant undertaking, which the CCCS must establish as being abusive. Examples of abusive conduct include predatory pricing, price discrimination, refusal to supply, exclusive dealing and margin squeeze.

10.22 Presently, there is only a single infringement decision on abuse of dominant position. That being said, the CCCS is active in its enforcement actions, a reminder to dominant businesses that they must not abuse their strong market positions to the detriment of their smaller competitors.

10.23 In recent years, the CCCS has focused its investigative efforts on the market for the supply of lift spare parts. Since 2016, the CCCS has commenced investigations against several lift spare parts suppliers in response to allegations that they have been refusing to supply lift spare parts to their competitors (that is, the third-party lift maintenance contractors) in the downstream market for the provision of lift maintenance services.

10.24 As background, the lifts in the Housing and Development Board estates can be maintained by either the original installers (who were the lift spare parts suppliers) or third-party lift maintenance contractors. Brand-specific lift spare parts are therefore essential for the carrying out of lift maintenance work, and these were only supplied by the original installers. The refusal to supply lift spare parts to the third-party lift maintenance contractors by the original installers hence prevented the third-party lift maintenance contractors from providing lift maintenance services. This effectively foreclosed the third-party lift maintenance contractors from the downstream market of providing lift maintenance services. The CCCS was of the view that such conduct amounted to an abuse of dominant position by the lift spare parts suppliers.

10.25 To address the CCCS's competition concerns, several lift spare parts suppliers offered voluntary commitments to the CCCS. Generally, the commitments involved selling the lift spare parts of the relevant brands to purchasers on a fair, reasonable and non-discriminatory basis, subject to certain terms and conditions. The first supplier to offer the commitments was E M Services Pte Ltd, who did so in 2016. Most

recently, in May 2019, the CCCS accepted the voluntary commitments offered by Chevalier Singapore Holdings Pte Ltd and Fujitec Singapore Corporation Ltd,[6] thereby ceasing its investigations.

IV. Mergers that (may) result in substantial lessening of competition (section 54 of the Competition Act)

10.26 Section 54 of the Competition Act prohibits mergers that substantially lessen competition in any market in Singapore. This applies to both completed and anticipated mergers, unless they are excluded or exempted under the Competition Act.

10.27 In Singapore, the merger notification regime is a voluntary one. Nevertheless, the CCCS takes the view that where a merger crosses thresholds in Singapore, then it is likely to be viewed as having a substantial lessening of competition; hence, a notification will be required. This also means that where a merger crosses thresholds and the merger parties nevertheless choose to proceed with the merger without submitting a notification, they assume the risk of CCCS raising objections and commencing investigations. In the event the CCCS finds that the completed merger has the effect of substantially lessening competition in the market pursuant to its merger investigations, it has the power to impose directions and/or financial penalties on the merger parties, as with the case in *Grab/Uber*.

10.28 It is worth emphasising that the CCCS wields the draconian power of unwinding of a completed merger. Should the CCCS choose to exercise this power, it will be extremely arduous and expensive to reverse a completed merger. In light of the global trend of competition authorities adopting a more aggressive approach to the failure of merger parties to notify transactions and their premature implementation of mergers, it will be more prudent to notify the CCCS prior to implementing the merger so as to avoid an unfavourable decision.

10.29 In 2019, the CCCS carried out four Phase 1 merger reviews, three of which resulted in unconditional clearances.

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6 Competition and Consumer Commission Singapore, "Lift Part Suppliers Provide Commitments to CCCS to Facilitate Lift Maintenance in HDB Estates" (28 May 2019) <https://www.cccs.gov.sg/media-and-consultation/newsroom/media-releases/lift-suppliers-chevalier-fujitec-commitment-acceptance> (accessed July 2020).

A. Proposed Acquisition by Gebr Knauf KG of USG Corp[7]

10.30 Following a joint notification submitted by the merger parties on 28 August 2018, the CCCS issued its clearance decision regarding the proposed acquisition by Gebr Knauf KG of USG Corp on 8 February 2019.

10.31 The CCCS considered the relevant markets in this case to be (a) the supply of gypsum boards in Singapore; and (b) the global supply of modular suspended ceilings using mineral fibre tiles to Singapore. In clearing the proposed acquisition, the CCCS concluded that the merger parties were not each other's closest competitors and that the post-merger increment in market shares were insubstantial. Moreover, the merged entity would face substantial competitive constraints from the other competitors that its customers could easily switch to. In particular, the competitive constraints from suppliers of modular suspended ceilings using tiles of other materials (for example, metal and gypsum) was significant, as these were viable substitutes to modular suspending ceilings using mineral fibre tiles.

B. Proposed Acquisition by DKSH Holding (S) of Auric Pacific Marketing and Centurion Marketing[8]

10.32 On 22 February 2019, the CCCS unconditionally cleared the proposed acquisition by DKSH Holding (S) of Auric Pacific Marketing and Centurion Marketing, which relates to the provision of distribution services for packaged food and beverage products in Singapore.

10.33 Following its merger assessment, the CCCS took the view that (a) the parties were not each other's closest competitors in the relevant market; (b) the combined market shares of the parties and the incremental market shares fell below the indicative thresholder; (c) the barriers to entry and expansion were not insurmountable; and (d) customers were able to exercise significant countervailing buyer power, as seen from their ability to negotiate for more favourable terms.

10.34 In light of these findings, the CCCS found that neither non-coordinated effects nor co-ordinated effects were likely to arise from the proposed acquisition, and hence unconditionally cleared the merger.

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7 CCCS400/003/18 (8 February 2019).
8 CCCS 400/140/2019/001 (22 February 2019).

C. Proposed Acquisition by Bread Talk Group Limited of Food Junction Management Pte Ltd[9]

10.35 The merger in this case involved an acquisition of 100 per cent of the issued share capital in Food Junction Management Pte Ltd by Topwin Investment Holding Pte Ltd, a subsidiary of Bread Talk Group Limited. After carrying out its Phase 1 review, the CCCS issued an unconditional clearance decision on 15 October 2019.

10.36 In this case, the CCCS defined the relevant markets to be (a) the rental of stalls in food court premises to food vendors within Singapore; and (b) the sale of hot meals to individual consumers in food court premises within a 500-m radius. Notably, the geographic market for the rental of stalls in food court premises differed from that in *NTUC Enterprise/Kopitiam*.[10] In *NTUC Enterprise/Kopitiam*, while the CCCS took a cautious approach and adopted a narrower geographic definition of 500-m to 1-km radius, it was also cognisant to the fact that the food vendors recognised a wider geographic market. Further, it appears that, in this case, a significant percentage of the third-party food vendors operating in the parties' food court premises were body corporates, thus warranting a wider geographic market.

10.37 As for the market for the rental of stalls in food court premises, the CCCS found that the parties' combined market shares were between 10–20%. This did not cross the CCCS's indicative threshold of 40%. With regards to the barriers to entry and expansion, the CCCS viewed them to be low as there was at least one new food court operator that managed to enter into and expand in the past five years. There was also sufficient existing competition from other food court operators, and the food vendors were able to exert sufficient competitive constraints, given their lack of brand loyalty, price sensitivity and the low switching costs involved.

10.38 In relation to the market for the sale of hot meals to individual consumers, the CCCS found that the parties directly operated only a minimal number of stalls. This rendered it unnecessary for the CCCS to estimate the parties' market shares. The CCCS also viewed the barriers to entry and expansion to be low, especially given the feedback from the public consultation indicating that it was not difficult to set up a food stall in food courts.

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9 CCCS 400/140/2019/003 (15 October 2019).

10 *Proposed Acquisition by NTUC Enterprise Co-Operative Ltd of Kopitiam Investment Pte Ltd* CCCS 400/008/18 (28 September 2018).

10.39 Given the above findings, the CCCS was of the view that the proposed acquisition would not give rise to non-coordinated and co-ordinated effects in both relevant markets.

D. Proposed Acquisition by Korea Shipbuilding & Offshore Engineering Co Ltd of Daewoo Shipbuilding & Marine Engineering Co Ltd[11]

10.40 As for the fourth Phase 1 merger review that the CCCS conducted in 2019, it was unable to clear the merger following its Phase 1 review due to competition concerns. Specifically, on 29 November 2019, the CCCS announced that it was unable to clear the proposed acquisition of sole control over Daewoo Shipbuilding & Marine Engineering Co Ltd by Korea Shipbuilding & Offshore Engineering Co Ltd in Phase 1 and since moved it into a Phase 2 review. The merger parties were involved in the supply of commercial vessels, such as oil tankers, containerships, liquefied natural gas carriers and liquefied petroleum gas carriers, in Singapore.

10.41 After assessing the information received from the parties and the feedback from its public consultation, the CCCS was concerned that the proposed acquisition could remove competition between the two largest suppliers of commercial vessels. Moreover, competitors might be unable to exert sufficient competitive constraints on the merger parties and that relevant market was characterised by significant barriers to entry and expansion, especially for liquefied natural gas carriers. In light of these competition concerns, the CCCS did not clear the proposed acquisition.

10.42 The CCCS is currently continuing with its Phase 2 review.

E. Acquisition of Innovative Diagnostic Pte Ltd and Quest Laboratories Pte Ltd by Pathology Asia Holdings Pte Ltd[12]

10.43 The CCCS conditionally approved the proposed acquisition of Innovative Diagnostics Private Ltd ("Innovative") and Quest Laboratories Pte Ltd ("Quest") by Pathology Asia Holdings Pte Ltd ("PAH") on 18 October 2019 ("*Innovative/Quest* merger"). This conditional approval came after the CCCS accepted the commitments offered by PAH during the Phase 2 review period.

11 CCCS 400/140/2019/002.
12 CCCS 400/007/18 (9 November 2018).

10.44 The CCCS adopted very narrow market definitions in this case, holding that the relevant market was the supply of in vitro diagnostic ("IVD") test (with directly-related ancillary services only) by private laboratories to non-affiliated customers (that is, those without an in-house or integrated laboratory) in Singapore. At the end of its Phase 1 review, the CCCS found that Innovative and Quest were the two largest market players and each other's closest competitors. The competitive constraint exerted by the other existing competitors was deemed as insufficient, given that it was in relation to only specific types of customers, or could only arise over time. Further, customers were unable to switch effectively to alternative suppliers as well, in particular health screening companies and private hospitals without their own in-house laboratories. As such, it was unable to clear the merger.

10.45 During the Phase 2 review period, PAH offered a set of behavioural commitments that sought to resolve the competition concerns identified by the CCCS. A public consultation on the commitments offered was conducted from 21 June 2019 to 5 July 2019, and the commitments were subsequently finalised based on the feedback received and negotiations between PAH and the CCCS.

10.46 The finalised set of commitments were to be in effect for four years from 18 October 2019. It included the following undertakings by PAH to:

> (a) supply send-out-tests ("SOTs") (namely, IVD tests that the laboratory receiving the request from customers were unable to perform, but were sent out to and performed by third-party laboratories) to other laboratories ("SOT customers") at fair, reasonable and non-discriminatory ("FRAND") prices, based on the prices charged to the parties' direct non-SOT customers;
>
> (b) ensure that the service standards offered to SOT customers for all SOTs were consistent with that offered to non-SOT customers;
>
> (c) remove all existing exclusivity obligations from existing agreements and to refrain from including exclusivity obligations in new agreements, with the exception of agreements entered into pursuant to public tenders;
>
> (d) allow customers to terminate their fixed term contracts early without cause, subject to a prior specific written notice period and the right of the parties to recoup unrecoverable expenditure that had been incurred; and
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> (e) maintain the existing prices, as well as terms and conditions, in existing agreements with health screening

companies and private hospitals without their own in-house laboratories.

10.47 Notably, unlike previous commitments in other merger cases, this set of commitments did not include an obligation on PAH to appoint a monitoring trustee. Instead, to demonstrate compliance with the commitments, PAH undertook to conduct internal audits and submit the audit report to the CCCS on an annual basis. Nonetheless, the CCCS retained the right to request PAH to appoint a monitoring trustee where it had reasonable grounds to suspect that the commitments had not been adhered to.

V. Consumer protection

10.48 The CPFTA regulates consumer transactions (excluding the sale of immovable property and employment contracts) in Singapore. It was enacted with a view to protect consumers against unfair trade practices, as well as allow consumers to seek redress in relation to non-conforming goods. Under the CPFTA, the CCCS has the power to conduct investigations against reasonably suspected unfair practices. If the CCCS is satisfied that a retailer has engaged, or is likely to engage, in an unfair practice, it may apply to the courts for a declaration that the said practice is unfair and/or an injunction to restrain the retailer from engaging in the unfair practice. Unlike its competition law function, it does not have the power to impose financial penalties on errant retailers.

10.49 As set out in s 4 of the CPFTA, "unfair practice" is broadly defined to include reasonably deceiving or misleading a consumer, making a false claim and taking advantage of a consumer. The Second Schedule to the CPFTA sets out specific unfair practices, such a making false or misleading misrepresentations on the availability, characteristics and condition of the good, and taking advantage of a consumer by, for instance, unconscionably including oppressive or one-sided terms and exerting undue pressure or undue influence on a consumer to enter into the transaction.

10.50 In its first full year of administering the CPFTA, the CCCS was involved in three consumer protection cases.

A. SG Vehicles to cease unfair trade practices[13]

10.51 Following an application for an injunction, the State Courts issued a court order on 18 April 2019, directing SG Vehicles to cease their unfair trading practices.

10.52 Over the years, the Consumers Association of Singapore ("CASE") had received several complaints made against SG Vehicles, alleging that SG Vehicles had misrepresented the terms and conditions of the sale agreements. In particular, it was found that the delivery dates of the motor vehicles and bidding of the Certificates of Entitlement ("COEs") were misrepresented. Further, some consumers revealed that they were required by SG Vehicles to pay additional fees due to unforeseen circumstances. Following initial review and negotiations, CASE mandated SG Vehicles to sign a voluntary compliance agreement which SG Vehicles did not do.

10.53 As a result, investigations were commenced by the CCCS against SG Vehicles, which showed that SG Vehicles was liable for engaging in unfair trade practices under the CPFTA. Following investigations, an injunction application was filed against SG Vehicles on 19 December 2017 and a court order was issued pursuant to the parties' mutual agreement. The court order directed, amongst other matters, that SG Vehicles and its director refrain from (a) engaging in unfair practices under the CPFTA; (b) deceiving consumers that the purchase price or COE are fixed or guaranteed; (c) misrepresenting the delivery date of a motor vehicle; and (d) taking advantage of consumers. Additionally, SG Vehicles was required to display the court order outside their shop(s) in a prominent manner, for a duration of six months.

B. Misleading representations on discount period by Charcoal Thai 1 Restaurant[14]

10.54 On 16 August 2019, the CCCS announced that pursuant to its investigations, Charcoal Thai 1 Restaurant was found to have contravened the CPFTA for unfairly representing in 2016 that its discounts for certain

13 Competition and Consumer Commission Singapore, "SG Vehicles to Cease Unfair Trade Practices", media release (19 April 2019) <https://www.cccs.gov.sg/media-and-consultation/newsroom/media-releases/sg-vehicles-to-cease-unfair-trade-practices> (accessed July 2020).

14 Competition and Consumer Commission Singapore, "Charcoal Thai 1 Restaurant Ends Unfair Practice of Misleading Representations on Discount Period Following CCCS's Investigation" (updated 16 August 2019) <https://www.cccs.gov.sg/public-register-and-consultation/public-consultation-items/charcoal-thai-1-ends-unfair-practice?type=public_register> (accessed July 2020).

meals were available for a "limited time only" or were ending soon, even though these discounts continued to be available for at least another two years. In fact, no expiry date on the discounts was specified.

10.55 By engaging in such conduct, consumers would have been tricked into thinking that there was a price benefit, and that the discounted price was for a limited time period. Moreover, as the discounts were not genuine, consumers were unable to carry out accurate price comparisons with other alternatives.

10.56 In response to the CCCS's findings, Charcoal Thai 1 agreed to end its unfair practice and refrain from engaging in other unfair practices on a moving forward basis. Specifically, it undertook to always expressly state the expiry date of future discounts and promotions. The CCCS then closed its investigations.

C. "Subscription traps" by E-Commerce Retailer Fashion Interactive[15]

10.57 Since April 2016, CASE had received multiple complaints from consumers against Fashion Interactive ("FI"), as well as its owner Magaud Olivier Georges Albert. The complaints alleged that FI had engaged in "subscription traps" on its footwear e-commerce website by running a membership programme on its website, the details of which were hidden in fine print. Due to the website's layout, consumers were unaware that they had automatically signed up for a membership when they made one-off purchases on the website. As such, these unknowing consumers were charged a monthly membership of $49.95 to $59.95.

10.58 While CASE had intervened and managed to assist the affected consumers in obtaining refunds, new complaints were still made against FI. This led CASE to issue a consumer advisory against FI in January 2019. As FI was persistent in its unfair trade practice against consumers, the CCCS took the matter into its own hands and applied to the State Courts for an injunction under the CPFTA.

15 Competition and Consumer Commission Singapore, "CCCS Seeks Court Order to Stop E-commerce Retailer Fashion Interactive from Using 'Subscription Traps'", media release (29 November 2019) <https://www.cccs.gov.sg/media-and-consultation/newsroom/media-releases/fashion-interactive-filing-injunction> (accessed July 2020).

VI. Regulatory action by the CCCS

A. CCCS market study report – Online Travel Booking Sector in Singapore[16]

10.59 On 30 September 2019, the CCCS issued its market study report on the Online Travel Booking Sector in Singapore following an extensive study into the market. The market study was conducted with the aim to better understand both the competition and consumer protection issues arising from the commercial arrangements and practices adopted by online travel booking providers. This is especially pertinent, given that consumers more frequently now utilise online travel bookings as opposed to offline channels. During its market study, the CCCS identified the key industry players of the online travel booking sector to be service providers (including passenger airlines and hotels), online travel agents and web aggregators ("online travel booking providers").

10.60 Through its market study, the CCCS flagged out four common practices that may give rise to consumer protection concerns: (a) drip pricing (the adding of mandatory or optional fees to the advertised price, thus resulting in the final price to be higher); (b) pre-ticked boxes that automatically include certain products or services in consumers' purchases, resulting in consumers having to deliberately opt-out from these add-ons; (c) strikethrough pricing (that is, the practice of placing the discounted price next to the crossed-out price, when the latter in fact does not reflect the actual original price); and (d) pressure selling techniques that create unwarranted pressure and/or urgency for consumers to make immediate purchases.

10.61 On the competition law front, the CCCS also evaluated several other practices, such as price and non-price parity clauses, search rankings and ownership, misleading user reviews, tying and bundling, the usage of pricing algorithms, and the withholding of information. Ultimately, the CCCS did not find evidence demonstrating that such commercial practices would give rise to competition concerns in the online travel booking market in Singapore. Nonetheless, the CCCS indicated that it would keep a lookout for any potential anti-competitive issues arising in this market.

16 Competition and Consumer Commission Singapore, *Market Study Report: Online Travel Booking Sector in Singapore – Finding and Recommendations* (30 September 2019).

B. Draft Guidelines on Price Transparency[17]

10.62 On a related note, the CCCS has also released its *Draft Guidelines on Price Transparency* on 30 September 2019 ("Draft Guidelines"), which sought to provide guidance on certain price practices in relation to the CCCS's administration of the CPFTA.

10.63 The underlying principle for the Draft Guidelines is that in aiding consumers to make proper and informed choices, retailers must always ensure that their prices, as well as the relevant terms and conditions, are accurately represented and disclosed clearly. These guidelines are intended to apply to both online and physical retailers.

10.64 The Draft Guidelines focuses on the four different types of price displays/advertisements": (a) drip pricing; (b) price comparisons with competitors with the aim of representing a price advantage over other retailers; (c) discounts, so as to represent a price benefit; and (d) the usage of the term "free". It also sets out the CCCS's approach, positions and recommended courses of actions that retailers can take.

10.65 At the time of writing, the CCCS had concluded its public consultation, and was conducting an internal review and revision of the findings.

VII. Publications by the CCCS

A. CCCS Occasional Paper – "Are Fair, Reasonable and Non-Discriminatory Commitments Application Outside the Standard Essential Patents Domain?"

10.66 On 20 December 2019, the CCCS issued a research paper on the use of FRAND commitments outside the context of standard essential patents ("SEPs"). The paper posits an important point that while FRAND commitments are more commonly used in the SEP context, it may also be appropriate to use FRAND commitments as behavioural remedies outside the SEP context. This is because non-SEP cases may have features like SEP cases that justify the usage of FRAND commitments.

17 Competition and Consumer Commission Singapore, "Public Consultation on CCCS Draft Guidelines on Price Transparency" (30 September 2019) <https://www.cccs.gov.sg/public-register-and-consultation/public-consultation-items/price-transparency-guidelines?type=public_register> (accessed July 2020).

10.67 The CCCS identified the features of SEP cases that warranted the usage of FRAND commitments: (a) the underlying value, or future value, of the focal product is intangible or uncertain; (b) the necessity to maintain the motivation for market players to invest and innovate; and (c) a substantial change in market power post-event (for example, a merger), such that FRAND commitments are able to constrain the misuse of such market power. In the context of non-SEP cases, the CCCS observed that these may be present. At the time of writing of the paper, there were only a limited number of cases that involved the use of FRAND commitments. One example is the *Time Publishing/Penguin Group* merger[18] in 2017 and a second is CCCS's investigations in 2016 against lift spare parts suppliers for alleged abuse of dominance. In these two cases, the CCCS identified all three features to be present, hence illustrating the appropriateness of utilising FRAND commitments in certain non-SEP cases.

10.68 Nonetheless, despite the apparent benefits of using FRAND commitments, the CCCS acknowledged that the purported flexibility of FRAND commitments comes at the expense of certainty in interpreting what FRAND means. To resolve this difficulty, the CCCS has put forth a proposal that has three key aspects. First, competition authorities can consider applying and adapting the "ping-pong framework" used in actions against SEP infringements, such as establishing a formal process through which complainants can alert the parties offering the commitments ("Offering Parties") of their non-compliance. At this stage, only the complainants and Offering Parties are involved. Second, the CCCS suggested appointing an independent monitoring trustee to aid in the resolution of the dispute and to ensure that the Offering Parties will take the necessary remedial steps to comply with the FRAND commitments. The monitoring trustee may choose to use benchmarks to assess compliance. Third, the process can also include alternative dispute resolution mechanisms, such as mediation, neutral evaluation or arbitration, which can be the final resort where the dispute fails to reach a resolution.

10.69 While such research papers are not binding on the CCCS, they are indicative of the CCCS's willingness to use FRAND commitments as behavioural remedies in non-SEP cases. Indeed, FRAND commitments were used in the *Innovative/Quest* merger.[19] As mentioned above, the CCCS did not require the appointment of a monitoring trustee in this case, contrary to the proposals set out in the research paper. Instead, it

18 *Proposed Acquisition by Times Publishing Ltd of Penguin Random House Pte Ltd and Penguin Books Malaysia Sdn Bhd CCS* 400/001/17 (18 January 2017).

19 See para 10.43 above.

deemed self-compliance, together with the use of certain benchmarks, as appropriate. This case is therefore illustrative of the CCCS not treating FRAND commitments as a one-size-fits-all solution; the suitability of FRAND commitments will be evaluated by the CCCS on a case-by-case basis. Where FRAND commitments are considered as appropriate, it may be tailored depending on the particular facts of the case, as with *Innovative/Quest*.

B. CCCS Occasional Paper – "Quantitative Closeness of Rivalry Assessment"

10.70 On 2 September 2019, the CCCS published its research paper on the usage of two price-quantitative tools in assessing the closeness of rivalry between competitors. They are (a) the price co-movement analysis; and (b) the diversion ratio analysis.

10.71 Briefly, the price co-movement analysis is based on the principle that identical products should be priced similarly to prevent arbitrage. Even where certain products may be differentiated and are priced differently, they may still be considered as close substitutes if they have similar changes in price. As for the diversion ratio analysis, it calculates the ratio of the quantity of the sales lost by the focal product to the substitute product, when the price of the focal product increases. The greater the ratio (that is, the higher the quantity of sales lost), the closer the substitutability of the products.

10.72 The CCCS considered how the above two tools may be used in its competition assessment framework. At the market definition stage, the CCCS noted that the two tools are useful in determining whether a particular product is a viable substitute to the focal product, thus falling within the relevant product market. They can also be used to determine the relevant geographic market. For merger assessments, the CCCS considered that the closeness of rivalry of products and/or competing firms is indicative of the competitive constraints that the merged entity may face post-merger. It is also helpful in evaluating the extent to which competition is lost between merger parties, especially whether the merger will remove a particularly aggressive competitor from the market.

10.73 Although the two price-quantitative tools are helpful in the CCCS's competition assessments, the CCCS recognised that they are subject to certain limitations. For instance, the usage of these tools requires accurate price and volume data. However, such data may not always be readily available. Nonetheless, as long as parties are mindful of the limitations, these tools still remain useful in anticipating how the

CCCS may conduct its assessments, thereby aiding them in crafting their responses and submissions to the CCCS appropriately.

C. PDPC–CCCS Discussion Paper on Data Portability

10.74 In 2018, the Personal Data Protection Commission ("PDPC") and CCCS launched a joint study on data portability as part of the ongoing review of the Personal Data Protection Act 2012[20] ("PDPA"). The results of the joint study were published in the *Discussion Paper on Data Portability* ("Discussion Paper"), which was published on 25 February 2019. This is an area that touches on both competition and consumer concerns.

10.75 Data portability gives consumers the right to request from an organisation holding their personal data a copy of such data in a machine-readable format that is structured and commonly used. At the request of the consumer, the organisation will also be required to transfer the data to another organisation. This can be contrasted with the present position under the PDPA, where organisations are not under the legal obligation to transfer personal data of its consumers to another organisation, even if upon the request of consumers.

10.76 In view of the increasing recognition that the use of data as a key parameter of non-price competition, the introduction of a data portability requirement will undoubtedly have implications on the competition law landscape. This is because data portability operates to enable ease of movement of data between organisations and allow consumers to exercise greater control over their own personal data, thus inevitably affecting the structure of markets.

10.77 An area that will see a marked change is the barriers to entry and expansion for competitors, which will likely be lowered. This is especially so for digital and online markets, where data is considered as an essential input. With data portability, new entrants and smaller players will be able to access data more easily as large incumbents may be required by consumers to transfer their personal data to these new or smaller players. In turn, new and smaller players will be able to reach out to a larger customer base, thus facilitating their entry or expansion in the market.

10.78 From the consumers' perspective, a data portability requirement will minimise their switching costs, thereby allowing them to exert significant countervailing buyer power over the incumbents. Without

20 Act 26 of 2012.

data portability, consumers are unable to port over their data to another organisation smoothly as they are likely to face significant switching costs, such as the need to resubmit their information. In this respect, consumers may find themselves "locked in" with the incumbent organisation. With data portability, consumers can simply request for the organisation to transfer their personal data to a new organisation, while incurring minimal costs in the process. Consumers will then have enhanced bargaining strength against organisations as they can now credibly threaten to switch to an alternative organisation, thus intensifying competition in the markets.

10.79 Although the Discussion Paper recognises the massive benefits that can be brought about by data portability, it also explored the various issues that may arise at the implementation level, which are as follows:

(a) identifying the types of data to be subject to the data portability requirement and to ensure proportionality *vis-à-vis* organisations that do not possess much data in the first place;

(b) clarifying the type of data portability format and technical standards, especially since there are no internationally defined format specifications;

(c) whether the introduction of a data portability requirement will result in onerous implementation and compliance costs to be incurred, and whether organisations ought to impose a fee for the transfer of data; and

(d) data protection and security concerns, which may be addressed by establishing an accreditation system for trusted data recipients; circumstances under which refusal to transfer data may be warranted; and the specific timeframe within which data must be ported over by.

10.80 Ultimately, while data portability is an impetus for more competitive markets, regulators and stakeholders must be astute to the risk of over-regulation, which may inadvertently result in excessive amounts of compliance costs incurred by businesses. What is critical is that the right balance be struck between realising the potential of data portability and ensuring that the costs imposed on businesses remains reasonable and manageable.

VIII. International developments

A. CCCS signs MOU with the Asian Law and Economics Association on collaborating on ASEAN competition policy and law

10.81 On 24 June 2019, the CCCS and the Asian Law and Economics Association ("AsLEA") signed an MOU which will be in force for a period of two years. This MOU recognises the CCCS's support for the 2019 and 2020 AsLEA Conferences.

10.82 The AsLEA Conferences have the objective of promoting ASEAN competition policy and law research, with the 15th AsLEA Annual Conference "Law and Economics in a Disruptive World" being most recently held on 28 June 2019 in Bangkok, Thailand.

B. CCCS signs MOU with the Competition Bureau Canada on the enforcement of competition and consumer protection laws

10.83 On 16 September 2019, the CCCS and the Competition Bureau Canada entered into a MOU, which enhanced joint enforcement of each country's national competition and consumer protection laws. This MOU is the first inter-agency agreement that the CCCS had entered into which covers both competition and consumer protection.

10.84 Amongst other things, the MOU provides for notification obligations on enforcement activities that will materially affect the interests of the other authority, technical co-operation initiatives such as research, training courses and workshops, and exchange of information pertaining to enforcement, economic sectors of common interests and any proposed changes to each party's laws.