10. COMPETITION LAW

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Overview

10.1 Competition Law has been in Singapore since January 2006. In the last seven years, the Competition Commission of Singapore ("CCS") has issued numerous cases which touch on various aspects of competition law. This update addresses the cases according to the multiple areas, including market definition, anti-competitive agreements, abuse of dominance, substantial lessening of competition and penalties.

Market definition

10.2 Market definition is critical in any competition analysis. The CCS employs the small but significant and non-transitory increase in price test or hypothetical monopolist test to define markets. From a practical perspective, the CCS has acknowledged that the hypothetical monopolist test only provides "an appropriate frame of reference for competition analysis" (Competition Commission of Singapore, *CCS Guidelines on Market Definition* (June 2007) at para 2.9). The CCS recognises that the presumptions employed in the hypothetical monopolist test cannot be applied mechanically in its market analysis and will adjust the test to suit the qualitative and quantitative characteristics of each specific focal product and market.

Application to s 34 prohibition

10.3 In the context of a s 34 prohibition of the Competition Act (Cap 50B, 2006 Rev Ed), market definition serves two main purposes: (a) to determine whether an agreement and/or concerted practice has an "appreciable effect on competition"; and (b) to identify the relevant turnover of the infringing party in order to calculate the appropriate penalty.

10.4 In its assessment of the Singapore Medical Association's ("SMA") Guidelines on Fees (*Application for Decision by the Singapore Medical Association in Relation to its Guideline on Fees Pursuant to*

Section 44 of the Competition Act CCS 400/001/09 (18 August 2010) ("*SMA Guidelines on Fees*")), the CCS used market definition as a tool to assess whether the SMA's Guidelines would restrict competition appreciably, as well as to determine whether the exception of net economic benefit applied.

10.5 In most of the cases involving price-fixing and bid-rigging, *ie*, *Collusive Tendering (Bid-rigging) for Termite Treatment/Control Services by Certain Pest Control Operators in Singapore* CCS 600/008/06 (9 January 2008) ("*Pest Control Services*"), *Price Fixing in Bus Services from Singapore to Malaysia and Southern Thailand* CCS 500/003/08 (3 November 2009) ("*Express Bus Operators*"), *Collusive Tendering (Bid-rigging) in Electrical and Building Works* CCS 500/001/09 (4 June 2010) ("*Electrical Works*"), *Fixing of Monthly Salaries of New Indonesian Foreign Domestic Workers in Singapore* CCS 500/001/11 (30 September 2011) ("*Employment Agencies*") and *Price-fixing in Modelling Services* CCS 500/002/09 (23 November 2011) ("*Modelling Agencies*"), the CCS stated that a distinct market definition is not necessary for the CCS to establish an infringement of a s 34 prohibition. The very nature of price-fixing, collusive tendering or bid-rigging, market sharing or output limitations are regarded to prevent, restrict or distort competition appreciably. In such instances, the purpose of defining the market is to determine the appropriate level of penalties to be meted out.

10.6 The CCS has routinely recognised in all of its decisions relating to co-operative agreements between airlines that the starting point for market definition in relation to the provision of air passenger transport services is the origin and destination pair. A typical origin and destination pair is a pairing of cities, with one city being the point of origin and another city being the point of destination. This market definition was derived from the observation and analysis of air passengers' behaviour: passengers generally want to travel to a specific destination point and will not resort to substitutes even when faced with a small, non-transitory increase in price. However, in *Notification for Decision by Qantas Airways and British Airways of their Restated Joint Services Agreement* CCS 400/002/06 (13 February 2007) ("*Qantas and British Airways Restated Joint Services Agreement*"), the CCS also noted that there could be other appropriate market definitions if certain distinctions were made, *ie*, types of passengers and types of flights.

10.7 In *Infringement of the Section 34 Prohibition in Relation to the Price of Ferry Tickets between Singapore and Batam* CCS 500/006/09 (18 July 2012) ("*Ferry Operators*"), the CCS adopted the approach it took in relation to the airlines notifications and held that the general preliminary position for the definition of scheduled transport services is the origin and destination pair.

Application to a s 47 prohibition

10.8 In the context of a s 47 prohibition, the purpose of defining the market is to ascertain an undertaking's market share and identify whether that particular undertaking is dominant in the relevant product market, either in Singapore or overseas.

Application to a s 54 prohibition

10.9 In the context of a s 54 prohibition, the CCS will define the market to evaluate likely changes in the competitive landscape after the merger. There is a key difference in the way the CCS will assess the likely competitive effects arising from a merger compared to the s 34 and s 47 prohibitions. In a merger evaluation, the CCS will focus on the areas of overlap in the merger parties' activities and ascertain whether the merger will result in an increase in prices, reduction in supply or poorer quality of services to the detriment of consumers. Further, the CCS will assess whether any anti-competitive effects will affect or spill over to related markets such as complementary upstream or downstream markets.

10.10 In *Notification for Decision: Merger between The Thomson Corp and Reuters Group plc* CCS 400/007/07 (23 May 2008), the CCS used the hypothetical monopolist test to further narrow the market for the provision of financial information products to three separate markets, aftermarket broker research, earning estimates and fundamentals, and carried out their competitive assessment on each separate market.

10.11 There have been instances where the CCS considered it unnecessary to determine the precise relevant market and left open the point of exact delineation. In *Notification for Decision: Proposed Acquisition by Glencore International AG of Chemoil Energy Ltd* CCS 400/005/09 (24 February 2010), the CCS considered that it was unnecessary to determine whether the product market constituted fuel oil or marine oil since the eventual outcome of the competition analysis would be identical under both definitions. In *Re Notification for Decision of the Proposed Acquisition by SIF Group Pte Ltd of Penguin Ferry Services Pte Ltd Pursuant to Section 57 of the Competition Act* CCS 400/002/11 (6 June 2011) ("*Proposed Acquisition by SIF Group Pte Ltd of Penguin Ferry Services Pte Ltd*"), SIF Group Pte Ltd was a newly incorporated company with no existing business. Hence, the CCS found that there was no need to precisely define the product market since there would be no overlapping products or merging of competitors.

10.12 The CCS stated in *Notification for Decision: Anticipated Merger Involving Acquisition by Chartered Semiconductor Manufacturing Ltd of Hitachi Semiconductor Singapore Pte Ltd* CCS 400/009/08 (28 March 2008) that it was unnecessary to define the product market precisely

since there were no competition concerns arising from the various alternative product market definitions. The CCS reached the same conclusion in *Re Notification for Decision of the Proposed Acquisition by Accenture Pte Ltd of NewsPage Pte Ltd Pursuant to Section 57 of the Competition Act* CCS 400/003/12 (31 October 2012) and did not define a precise product or geographic market as it found that the merger was unlikely to lead to competition concerns under other possible alternative product and geographic market definitions.

10.13 In *Notification for Decision: Acquisition of Singapore Computer Systems Ltd by Computer Systems Holdings Pte Ltd* CCS 400/004/08 (30 September 2008), the CCS decided that a precise market definition was not necessary in this case and conducted its assessment on the subcategories in the IT services industry. The CCS attempted to explore various methods of market definition but came to the conclusion that determining an exact market definition was irrelevant since the market definition would not affect the findings relating to competitive concerns. Likewise, in *Re Notification for Decision of the Proposed Acquisition by Seagate Technology Public Ltd Co of Certain Assets of the Hard Disk Drive Business of Samsung Electronics Co Ltd Pursuant to Section 57 of the Competition Act* CCS 400/003/11 (29 November 2011), the CCS left open the exact scope of the relevant product markets for hard disk drives. The CCS had followed the European Commission's approach (as evidenced from various European Commission decisions, including *Seagate/Maxtor* COMP/M.4100 (27 April 2006), *Quantum HDD/Maxtor* COMP/M.2199 (8 December 2000), *Hitachi/IBM Harddisk Business* COMP/M.2821 (11 May 2009), *Toshiba/Fujitsu HDD Business* COMP/M.5483 (11 May 2009)) by leaving the market definition open and considering subcategories according to end-use instead.

Section 34 – Prohibition of anti-competitive agreements

10.14 Section 34 of the Competition Act prohibits agreements between undertakings, decisions by associations of undertakings or concerted practices which have as their object or effect the prevention, restriction or distortion of competition within Singapore.

Agreements and concerted practices

10.15 An agreement is formed once parties mutually agree on their course of behaviour in the market, whether formally, informally or through concerted practice. In most of its investigations in relation to price-fixing or bid-rigging, the CCS has clarified that the s 34 prohibition applies to agreements and concerted practices either disjunctively or conjunctively. This European Union (*SA Hercules Chemicals NV v Commission* Case T-7/89 [1991] ECR II-1711) and UK

(*JJB Sports plc and Allsports Ltd v Office of Fair Trading* [2004] CAT 17) position has been endorsed by the CCS in *Pest Control Services* and later reiterated in *Express Bus Operators*, *Electrical Works*, *Employment Agencies* and *Modelling Agencies* (above, para 10.5), *ie*, that it is not necessary to characterise anti-competitive conduct as one that is exclusively an agreement or concerted practice since the two concepts may overlap with each other.

10.16 The CCS decision in *Pest Control Services* is notable for the fact that it was the first time the CCS had imposed a fine, two years after the enactment of the Competition Act. The CCS imposed an aggregate fine of almost $260,000 on six pest control operators who had fixed the prices of pest control services through collusive tendering or bid-rigging in the provision of termite control and treatment services. In its investigation, the CCS found that *the conduct of the parties were not independent, but rather subject to collusion*. In each of the projects or tenders for the provision of pest control services, the parties would exchange e-mails beforehand detailing who should be awarded the tender and discussing the proposed tender price. The CCS held that this satisfied the elements of an agreement, or at least, a concerted practice against the s 34 prohibition since it infringed the core principle of competition laws that each undertaking must independently decide *on its own market behaviour*.

10.17 In *Express Bus Operators*, the CCS found that an agreement existed between 16 bus operators, together with the Express Bus Agencies Association ("EBAA"), to fix the prices of bus tickets for travelling between Singapore and destinations in Malaysia through the imposition of a minimum selling price and setting a fuel and insurance charge ("FIC"). Representatives of the bus operators had attended EBAA meetings and agreed to impose the ticket prices together. Despite claims of independence in determining the pricing of coach fares and/or FIC rates, the CCS found that an agreement, or at the very least, a concerted practice existed since the EBAA members would regularly consult each other in order to prevent any price competition and meet to consider the ongoing sales of the fuel and insurance charge by other members.

10.18 In *Electrical Works*, the CCS found 14 electrical and building works companies to have engaged in price-fixing through collusive tendering or bid-rigging in the provision of electrical and building works for properties in Singapore. Whenever a tender project was open for bidding, the company that was interested in winning the project would ask a colluding company to submit a higher bid, among various other approaches. To give a false impression of competition, the company seeking to win the bid would sometimes prepare its competitors' cover bids for submission. This, to the CCS, amounted to concerted practice and/or agreement.

10.19 Further, the CCS made reference to a European Union case (*Cimenteries CBR SA v Commission* Cases T-25/95 *etc*, [2000] ECR II-491; [2000] 5 CMLR 204) and endorsed the holding that the mere act of one party letting its competitor know of its intention would constitute a form of concerted practice. Reciprocal contacts are established when a party discloses its prospective intentions or behaviour in the market to a competitor when requested by the competitor, or if accepted by the same. The presumption that concerted practice exists is that the undertakings' future market conduct will be inevitably influenced by their competitors' plans.

10.20 In *Employment Agencies* (above, para 10.5), the CCS found 16 employment agencies to have breached s 34 of the Competition Act by collectively fixing the monthly salaries of new Indonesian foreign domestic helpers. The employment agencies were involved in a meeting to discuss the new regulatory framework for employment agencies implemented by the Ministry of Manpower. However, the CCS obtained evidence that during the course of the meeting, the employment agencies had also discussed and agreed to increase the overall monthly salary of new Indonesian foreign domestic workers. The CCS countered the various defences put forth by the employment agencies and held that all parties at the meeting had breached the s 34 prohibition through an agreement and/or concerted practice, despite some parties disagreeing with the quantum of the price increase and not implementing the higher salaries. The fact that such a meeting had occurred raised the presumption that the undertakings' future commercial plans would be affected and dependent on the information and opinions shared during the meeting.

10.21 In *Ferry Operators* (above, para 10.7), the CCS found two ferry operators guilty of exchanging and providing sensitive and confidential price information in relation to the sale of ferry tickets to various destinations in Batam. One of the parties had "blind copied" the other party in e-mails providing ticket price information to clients. The CCS rejected the argument that concerted practice cannot arise from a unilateral flow of information. The presumption of concerted behaviour will arise from a mere receipt of information without any reciprocal exchange and even where there is only a one-way provision of information from an undertaking to its competitor.

Object or effect of preventing, restricting or distorting competition

10.22 The CCS found in *Pest Control Services* (at para 49), which was subsequently applied in *Express Bus Operators* at para 71, *Electrical Works* at para 49 and *Employment Agencies* at para 61 (above, para 10.5), that the object of an agreement or concerted practice is not based on the "subjective intention of the parties when entering into an agreement,

but [rather on] the objective meaning and purpose of the agreement considered in the economic context in which it is to be applied". Where an agreement has as its object the restriction of competition, the CCS can find an infringement of s 34 without having to prove an anti-competitive effect.

10.23 In *Pest Control Services*, the CCS pointed out that a party who participated in an anti-competitive agreement is not absolved from responsibility just because it did not implement or fully abide by the agreement. One of the parties had claimed that it gave the other parties the impression that it was participating in the concerted practice so that it could use the information on the tenders that it received from the other pest-control operators to gain a competitive advantage. However, the CCS adopted a very strict position and found that the party's conduct was still caught by the s 34 prohibition even if it did not have the intention to carry out the terms of the anti-competitive agreement.

10.24 Further to this point, the CCS stated in *Electrical Works* that in determining whether there was an infringement, the fact that the customer decided not to proceed with the project and that no contractor was ultimately appointed was irrelevant. The agreement to fix prices already constituted conduct that had as its object the prevention, restriction or distortion of competition.

10.25 The CCS reiterated its strict stance against price-fixing activity in *Employment Agencies* (at para 52) and held that "mere participation by an undertaking in a meeting with an anti-competitive purpose, without expressing manifest opposition to or publicly distancing itself from [such purpose] is tantamount to a tacit approval of that unlawful initiative". The CCS clarified that merely keeping silent or disagreeing with the substance of a price-fixing proposal is not sufficient. To avoid liability, the onus falls on the undertaking to clearly and explicitly inform the other undertakings that it disapproves of the anti-competitive agreement and will not participate in it.

10.26 In *Ferry Operators* (above, para 10.7), the CCS noted that the quality of the information provided and exchanged is a relevant factor in determining whether an agreement and/or concerted practice had the object or effect of preventing, restricting or distorting competition. In that case, the CCS found that the price information provided was not publicly available and was of a strategic and confidential nature. Thus, the exchange and provision of such information had the object or effect of preventing, restricting or distorting competition.

Appreciable adverse effect on competition

10.27 In its decision on *Ferry Operators*, the CCS noted that an appreciable adverse effect is not a legal requirement. Nevertheless, the CCS made reference to the s 34 Guidelines and stated that an agreement between competing undertakings will generally have no appreciable adverse effect on competition if the aggregate market share of the parties does not exceed 20% on any of the relevant markets affected by the agreement. Given the combined market share of both parties in the sale of ferry tickets to Batam, the CCS found that the sharing of information had an appreciable effect on competition in the market.

10.28 However, the CCS has routinely stated in both the s 34 Guidelines and all its infringement decisions that any anti-competitive conduct involving price-fixing, bid-rigging, market sharing or output limitations would always be regarded to have an appreciable adverse effect on competition. This holds true even if the market shares of the infringing parties are below the threshold levels, and/or the parties are merely small and medium enterprises.

Trade associations

10.29 The s 34 prohibition applies to decisions made by trade or industry associations, since the CCS deems them to constitute "associations of undertakings".

10.30 In the 2011 *Employment Agencies* case (above, para 10.5), the CCS held (at para 52) that the very presence of an undertaking in a meeting with an anti-competitive object would constitute "tacit approval of the unlawful initiative" since it raises the presumption that the party's future market behaviour would be inevitably influenced by any exchange or discussion during the meeting. As such, this decision serves as a lesson to undertakings attending association meetings – if any anti-competitive agreements were to be raised, the undertakings will have to expressly disapprove of the practice in order to escape or limit their liability under the Competition Act.

10.31 In 2009, the SMA applied for a decision by the CCS as to whether their issued guidelines on fees would breach the Competition Act (*SMA Guidelines on Fees* (above, para 10.4)). The guidelines recommended ranges of professional fees for an array of services provided by private sector doctors in Singapore. However, the CCS held that the guidelines could be viewed as an explicit form of price recommendation by a professional association and was likely to harm the competitive process by restricting independent pricing decisions and signalling to market players what their competitors were likely to charge. The CCS noted that it was no defence that the guidelines were voluntary

since the Singapore Medical Association had an objective mechanism through its Ethics and Complaints Committee to foster compliance with its recommendations.

10.32 In the same year, the CCS found 16 coach operators and their trade association, the EBAA, guilty of price-fixing (*Express Bus Operators* (above, para 10.5)). The CCS investigation revealed that through meetings arranged regularly under the EBAA, the bus operators had agreed to fix prices by establishing minimum selling prices of the bus tickets sold and imposing fuel and insurance charges on ticket prices. The CCS again emphasised that the s 34 prohibition was equally applicable to associations of undertakings, in addition to the individual infringing parties. The CCS held that the EBAA had also contravened the s 34 prohibition by playing an instrumental role in facilitating and administering the co-ordination of the FIC. As the EBAA had also benefitted financially from the sale of the fuel and insurance coupons sold to its members, it was held responsible and penalised for its independent involvement in the price-fixing agreements. On the other hand, where the trade association had a limited role in the cartel such as providing secretarial or administrative support, it will not be independently liable from its members.

10.33 In 2011, the CCS held in *Modelling Agencies* (above, para 10.5) that 11 modelling agencies had collectively agreed to fix the rates for a number of modelling services such as advertorials, fashion shows and editorials. The CCS found that through the establishment of the Association of Modelling Industry Professionals ("AMIP"), the modelling agencies colluded to decide on rates to be charged for modelling services. Contrary to the arguments raised by some of the modelling agencies, the CCS was of the view that the rates implemented by the AMIP were not a result of price recommendations but price-fixing. The parties were found to have compiled and circulated the agreed modelling rates in secret and AMIP members sought to enforce these rates against each other. Such conduct ultimately constitutes price-fixing behaviour. Unlike *Express Bus Operators*, the CCS found that the AMIP did not play a separate and significant role in facilitating and administering the agreement. Whether an association is a party to an agreement in its own right is a matter of fact. Based on the facts, the CCS was of the view that the AMIP, in and of itself, did not play a significant role in the operation of the agreement by monitoring compliance with the agreement. The AMIP was essentially a cartel since it was established with the primary purpose of co-ordinating and raising the rates for modelling services. Consequently, CCS did not find the AMIP to be party to the infringing conduct.

Net economic benefit

10.34 The CCS recognises that an agreement that falls within the scope of a s 34 prohibition may be exempted if it produces net economic benefits. The onus falls on the undertaking claiming for an exemption to prove that it satisfies the requirements to produce net economic benefits. In its assessment, the CCS will determine, on balance, whether the anti-competitive practice will contribute to improving production or distribution, promote technical or economic progress and whether such benefits can be derived from other alternative methods without resorting to the anti-competitive practices.

10.35 In *Express Bus Operators* (above, para 10.5), the infringing parties submitted that the benefits from setting a minimum selling price outweighed its anti-competitive effects. The parties claimed that a minimum selling price resulted in fair competition for public consumers since it prevented drastic fluctuation of fare prices. Further, the parties argued that the establishment of a price floor actually encouraged competition, on the basis that they had not set price ceilings, which would have been more detrimental since competitors could have been driven out of the market. The CCS rejected these arguments, deeming them "entirely misconceived" and "not substantiated". The CCS found that there was clear evidence that most of the EBAA members were charging below the minimum selling price before the agreement was implemented, and the subsequent "price floor … reduced price competition with no redeeming benefits" (at para 180).

10.36 In relation to the imposition of the fuel and insurance surcharge, the parties likewise argued that it produced net economic benefits. The collective surcharge had allowed EBAA members to buy insurance in bulk at a much cheaper price. Further, the parties claimed that the agreement did not have any adverse appreciable effects on the industry since the market remained competitive and "no competitor had been driven out of the market as a direct consequence of the FIC coupons" (at para 417). The CCS again rejected these arguments and held that its members could have collectively purchased the insurance coverage without colluding on the price to be charged to passengers.

10.37 In *Modelling Agencies* (above, para 10.5), the parties had argued (at para 225) that the infringing agreement conferred net economic benefits as it had the effect of "'uplift[ing] and upgrad[ing] the image and professionalism of the local modelling industry' by forming a collective voice to resolve concerns and problems related to the industry". This was rejected by the CCS since the parties failed to adduce any specific evidence of the claims or how these efficiencies outweighed the anti-competitive effects of their price-fixing agreements.

10.38 Similarly, in *SMA Guidelines on Fees* (above, para 10.4), the CCS rejected the SMA's assertion that the recommended price guidelines had the benefits of preventing overcharging or improving information asymmetry. The CCS was of the view that the SMA failed to adduce sufficient evidence to justify their claims. Further, the CCS found that there were non-infringing practices that could be adopted to produce the same benefits such as publishing their actual fees for their services in an itemised manner or assisting the Singapore Medical Council in peer review disciplinary hearings.

10.39 *Qantas and British Airways Restated Joint Services Agreement* (above, para 10.6) concerned a joint services agreement which had been in operation since 1995, prior to the enactment of the Competition Act in Singapore. The joint agreement allowed both airlines and their subsidiaries to co-ordinate scheduling, capacity, prices, yields and marketing on all routes, with Singapore acting as the primary hub for their activities in Asia. With the enactment of the Competition Act in 2006, the parties sought the CCS's approval that the joint agreement did not infringe the s 34 prohibition as it fell under the net economic benefit exclusion. The CCS found that the combined market share of Qantas Airways Limited ("Qantas") and British Airways plc ("British Airways") for the Singapore–Australia and Singapore–Europe routes had exceeded the indicative threshold of 20%. This demonstrated that the joint agreement may have had an appreciable effect on competition. However, the joint agreement had the effect of improving the air passenger transport markets in Singapore through better scheduling, more flight connections and efficiencies through joint activities such as purchasing and marketing. The CCS noted that such benefits were dependent on the full integration of Qantas and British Airways' networks and services on the specified routes. As such, these net economic benefits arising from the joint agreement effectively excluded it from the s 34 prohibition.

10.40 The case of *Notification by Qantas Airways and Orangestar Investment Holdings of their Co-operation Agreement* CCS 400/003/06 (5 March 2007) ("*Qantas and Orangestar Co-operation Agreement*") provided for the co-ordination of both parties' flying operations and activities, allowing Qantas to effectively deal with Orangestar Investment Holdings ("Orangestar") as if it were one of the Qantas Group's flying businesses. Through this agreement, Qantas and Orangestar would likely engage in the prohibited conduct of fixing prices, allocating markets, joint purchasing, joint selling and exchanging price and non-price information. However, Qantas and Orangestar sought exclusion from the s 34 prohibition on the twin basis that both parties formed a single economic entity, and that the agreement fell within the net economic benefit exclusion. The CCS found that the economic benefit arising from the agreement was likely to outweigh

its anti-competitive effects and excluded the agreement from the s 34 prohibition. The CCS agreed that the agreement would increase employment and demand for aviation-related services in Singapore, and benefit consumers in Singapore through the cost savings arising from both parties enjoying economies of scale.

10.41 *Application for Decision by Japan Airlines International Co Ltd and American Airlines Inc of their Alliance Agreement and Joint Business Agreement* CCS 400/008/10 (4 July 2011) set out the initiative by Japan Airlines International Co Ltd ("Japan Airlines") and American Airlines Inc ("American Airlines") to integrate their transpacific operations by acting as a single carrier and jointly schedule and price their flights, as well as share revenue on co-ordinate flights. The CCS noted that the two agreements would contravene the s 34 prohibition since both parties would effectively cease to compete in respect of their transpacific services. However, the CCS exempted the agreements on grounds of their net economic benefit. The CCS acknowledged that the increased integrated co-operation between the parties would bring about significantly greater efficiencies for Singaporean passengers such as increased routes, improved connectivity across networks, better scheduling and cost savings resulting from higher load factors and fare combinability. Interestingly, neither Japan Airlines nor American Airlines was a Singapore flag carrier and had its hub in Singapore. Further, American Airlines did not operate its own aircraft to and from Singapore, instead offering services through code sharing. Hence, the efficiencies derived from the agreements arguably did not directly benefit Singapore passengers. Nevertheless, the CCS still found that there were benefits because passengers on behind–beyond routes such as Singapore would benefit from the optimisation of network schedules resulting from the agreements. This decision highlights the willingness of the CCS to identify a net economic benefit, even though the benefits may only be indirectly enjoyed by Singaporeans.

10.42 In *Application for Decision by United Air Lines Inc, Continental Airlines Inc and All Nippon Airways Co* CCS 400/001/11 (4 July 2011), United Air Lines Inc, Continental Airlines Inc and All Nippon Airways Co negotiated a joint venture agreement which had the objective of bringing together the routes of all three airlines to jointly co-operate on revenue sharing, pricing and revenue management, co-ordination, route and capacity planning and schedule co-ordination. Effectively, the three airlines would act as a single carrier and cease to compete with respect to their transpacific business. Given the level of integration on the parties' transpacific operations and close level of co-ordination, the CCS found that the joint venture agreement by its very nature had the object of appreciably preventing, restricting or distorting competition in the relevant market. However, the CCS was satisfied that the net economic benefits to be accrued from the joint venture agreement outweighed its

anti-competitive effects. The CCS was of the view that the efficiencies generated by the joint venture agreement would improve the production and distribution of air passenger transport in Singapore through optimised scheduling options for customers, reduction in fares and increases in capacity.

10.43 *Re Application for Decision by Singapore Airlines Ltd and Virgin Australia Airlines Pty Ltd* CCS 400/005/11 (17 April 2012) saw the two parties entering into an alliance agreement to execute reciprocal codeshare agreements on international and domestic flights, offer reciprocal frequent-flyer programme benefits and co-ordinate and implement joint scheduling, marketing, distribution, sales representation, compatible service policies and product innovation. Due to the fact that there were no overlaps between the routes operated by Singapore Airlines Ltd ("SIA") and Virgin Australia Airlines Pty Ltd, the CCS found that the proposed alliance increased competition by creating new routes via Singapore. The alliance agreement thus enhanced Singapore's competitiveness as an aviation hub in Singapore and did not result in any anti-competitive effect.

10.44 In *Application for Decision by Singapore Airlines Ltd and Scandinavian Airlines System* CCS 400/001/12 (7 November 2012), SIA and Scandinavian Airlines System ("SAS") proposed a joint venture aimed to enhance both parties' reciprocal codeshare arrangements on international flights between Singapore and Scandinavia, co-ordinate flight schedules, harmonise service and product offerings between Singapore–Scandinavia routes and engage in joint sales, marketing and promotional activities. The CCS noted that the joint venture would result in SIA and SAS co-operating on sales, pricing and scheduling, as well as engaging in revenue-sharing arrangements. As such, there was a possibility that such co-operation may amount to price-fixing, output control and/or market sharing, leading to the prevention, restriction or distortion of competition in the market. On its assessment, the CCS found that there was minimal impact on existing competition in the relevant market since the two parties did not overlap in the provision of direct services. Rather, the joint venture agreement would create new routes as a result of flight connections, better flight scheduling and more competitive fare products. The CCS further noted that the joint venture would benefit Singapore's position as an air hub by providing greater connectivity to Scandinavian countries. As such, the CCS held that the proposed joint venture was unlikely to raise significant competition concerns.

Leniency applications

10.45 *Electrical Works* (above, para 10.5) was significant for being the first public case where an infringing party blew the whistle on the cartel

and was granted total immunity under the CCS leniency programme. The whistle blower was the first undertaking to voluntarily approach and provide the CCS with evidence of a s 34 infringement, allowing the CCS to commence investigations against the remaining 13 companies. The CCS emphasised that in order to enjoy total immunity, the undertaking must not have been one of the ringleaders of the cartel, and must not have applied physical or economic pressure on other undertakings to participate in the cartel.

Section 47 prohibition – Abuse of dominance

10.46 Section 47(1) of the Competition Act prohibits any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in any market in Singapore. To establish an infringement of an abuse of dominance, the undertaking must be in a dominant position, whether in Singapore or elsewhere, and the dominant undertaking has abused this dominance. To show dominance, a market share of 60% or more is taken as a ball park indicator, although it is not conclusive.

10.47 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* CCS 600/008/07 (4 June 2010) ("*SISTIC*") is the first and remains the only public local case concerning the abuse of a dominant position to date. In June 2010, the CCS held that SISTIC.com Pte Ltd ("SISTIC") had contravened s 47 of the Competition Act through the execution of exclusive agreements. These agreements bound event promoters and venue operators to SISTIC as the sole ticketing provider, resulting in ticket buyers with no choice but to purchase tickets through SISTIC. The CCS found that SISTIC was the dominant ticket service provider in Singapore for both event promoters and concert buyers, with an approximate market share of 85%–95%. SISTIC had abused their dominant position by initiating and imposing exclusive agreements which were anti-competitive as they restricted the economic freedom of venue operators, event promoters and ticket buyers. The CCS imposed a financial penalty on SISTIC and ordered it to modify the exclusive agreements by removing the exclusivity clauses. SISTIC appealed against the finding of liability and level of financial penalties. The Competition Appeal Board upheld the CCS's decision but reduced SISTIC's financial penalty to $769,000 after considering the aggravating and mitigating factors of the case.

10.48 In determining whether the exclusive agreements had the effects of foreclosing competition, the CCS stated that it would apply the various tests set out in the s 47 Guidelines in a holistic manner and not be bound by any test in isolation. Further, the CCS highlighted that the scope and duration of the exclusive agreements were two very important

dimensions in determining foreclosure. The CCS held that the restrictions under the exclusive agreements were harmful to competition since they artificially perpetuated SISTIC's dominant position. The exclusive agreements were an integral part of SISTIC's holistic strategy of concurrent foreclosure, recoupment and perpetuation of dominance. Event promoters were restricted in their choice of ticketing service providers, other ticket service providers could not gain a foothold in the market as they were blocked out through the exclusive agreements and ticket buyers had no choice but to pay the higher prices charged by SISTIC since they could not switch to an alternative ticket provider.

10.49 In its defence, SISTIC submitted several objective justifications, including, among others, that the exclusive agreements were needed to recoup investments, that the exclusive agreements arose from mutually negotiated agreements with its contractual parties and that there were substantial efficiencies which resulted from the exclusive agreements. The CCS consistently rejected SISTIC's defences on the basis that SISTIC had failed to sufficiently establish their claims.

10.50 It is important to note that in its finding, the CCS stated that it is no defence that the customer willingly entered into an exclusive agreement, or even that the customer was the party who had requested exclusivity. The pertinent issue is not whether the agreement is oppressive to the customer, but whether it has the effect of foreclosing competition in the relevant market. Further, in relation to the efficiencies defence, the CCS acknowledged that the pursuit of volume, in and of itself, is not anti-competitive and may even create efficiencies. However, where a dominant undertaking generates or protects business volume through artificial means, there is the risk of foreclosure. On balance, the CCS will consider the necessity and proportionality of total and explicit restrictions with individualised incentives as a means for SISTIC to achieve efficiencies. The CCS found that SISTIC failed to establish why the exclusive agreements were objectively necessary given the size and structure of the ticketing market in Singapore. In addition, the fact that competition in the ticketing market has been lacklustre, coupled with SISTIC's persistently high market share and anti-competitive behaviour, indicated that there was overwhelming imbalance between the harms and benefits in the present case.

10.51 Notably, the CCS clarified that the s 47 prohibition would remain applicable even if an undertaking abuses its dominance through clauses in an agreement with a statutory body. Specifically, SISTIC's unilateral conduct in imposing exclusive dealing obligations on a statutory body cannot be excluded under s 33(4) of the Competition Act.

Section 54 prohibition – Mergers and acquisitions

10.52 Section 54 of the Competition Act prohibits mergers that are likely to result in a substantial lessening of competition in any market in Singapore. As to what amounts to a merger, the CCS has in various cases held the following transactions to amount to mergers under the Competition Act: the acquisition of one company through a cash-and-stock deal (*Notification for Decision: Proposed Acquisition of Solectron Corp by Flextronics International* CCS 400/005/07 (2 October 2007)), the setting up of a full function joint venture (*Notification for Decision: Anticipated Joint Venture between Intel Corp and STMicroelectronics NV* CCS 400/004/07 (2 October 2007)); the acquisition of a combination of shares and assets (*Notification for Decision: Proposed Acquisition of Groupe Danone SA's Worldwide Biscuits, Snacks and Cereals Business by Kraft Foods Global Inc* CCS 400/006/07 (12 November 2007); *Notification for Decision: Proposed Acquisition by WC Heraeus GmbH of the Bonding Wire Business of Kulicke and Soffa Industries Inc* CCS 400/003/08 (26 September 2008); *Notification for Decision: Anticipated Merger between National Oilwell Varco Ltd and South Seas Inspection (S) Pte Ltd* CCS 400/004/09 (15 September 2009)); cash offer for assets (*Notification for Decision: Anticipated Merger Involving Acquisition by Air Liquide Electronics US LP of Certain of the Assets of the Chemical Management Division of Edwards Vacuum Inc* CCS 100/1302/08 (8 July 2008)); and a two-step legal procedure consisting of a share exchange followed by an absorption-type merger on the same day (*Re Notification for Decision of the Proposed Merger between Nippon Steel Corp and Sumitomo Metal Industries Ltd Pursuant to Section 57 of the Competition Act* CCS 400/010/11 (10 February 2012)).

10.53 There is no mandatory notification requirement in Singapore. The CCS leaves discretion to the merger parties to assess the potential anti-competitive threat arising from their merger and decide whether to notify and seek comfort from the CCS *vis-à-vis* their transaction or otherwise. To date, the CCS has received 36 merger notifications since the merger regime came into force on 1 July 2007. With the exception of two withdrawn applications (*Proposed Acquisition by Prudential plc of AIA Group Ltd* CCS 400/002/10 and *Proposed Joint Venture between Mount Kawi Pte Ltd, Poly Resources Pte Ltd, Samwoh Resources Pte Ltd and Zhan Chang Holdings Pte Ltd* CCS 400/001/10) and one pending decision (*Proposed Acquisition by Fincantieri–Cantieri Navali SpA of STX OSV Holdings Ltd* CCS 400/001/13), the CCS has cleared all the merger notifications received.

Substantial lessening of competition

10.54 In assessing whether there is a substantial lessening of competition, indicative thresholds have been provided, namely, where

the merged entity has a post-merger market share of 40% or where the merged entity has a post-merger share of between 20% and 40%, and the post-merger combined market share of the three largest firms is 70% or more. In modifications to the merger guidelines issued in June 2012, the CCS has indicated that there will be no substantial lessening of competition where in the financial year preceding the transaction, the Singapore turnover for the merger parties is below $5m, and their combined worldwide turnover is below $50m. This was introduced at the same time the CCS indicated that it would take a more proactive stance of reviewing mergers which are not notified in Singapore.

10.55 In ascertaining whether the relevant thresholds have been crossed, the CCS has indicated that the relevant geographic market can go beyond Singapore. In *Notification for Decision: Proposed Acquisition of Solectron Corp by Flextronics International* ("*Proposed Acquisition of Solectron Corp by Flextronics International*") (above, para 10.52), the CCS found that the merged entity crossed the indicative threshold of 40% in the worldwide market for the provision of electronic manufacturing services to the telecommunications segment of original equipment manufacturers. Similarly, in *Notification for Decision: Proposed Acquisition of Groupe Danone SA's Worldwide Biscuits, Snacks and Cereals Business by Kraft Foods Global Inc* (above, para 10.52), the CCS found that while the geographical market for biscuits was wider than Singapore, the merged parties' market shares for the broader worldwide market was lower than their market share in Singapore. As such, the outcome of the CCS's assessment would reach the same conclusion whether the wider or narrower geographical market was used.

10.56 Apart from the indicative thresholds, in its assessment of whether a horizontal merger might lead to a substantial lessening of competition, the CCS will analyse whether non-coordinated or co-ordinated effects would arise as a result of the merger.

10.57 In the first merger notification made to the CCS regarding the *Proposed Acquisition of Solectron Corp by Flextronics International*, the CCS cleared the merger even though the merged entity's market share marginally crossed the threshold levels. The CCS found that there were low barriers to entry, being evident from the ability of a competitor to increase their market share by 6% in one year, and the buyer's market share falling by 3% in the same year. Further, there were limited non-coordinated or co-ordinated effects, due to strong buyer power and fierce price competition in the market.

10.58 A notable example where the CCS cleared a transaction despite the merger parties having an overwhelming share of the market is *Re Notification for Decision of the Proposed Acquisition by United Parcel Service Inc of TNT Express NV Pursuant to Section 57 of the Competition*

Act CCS 400/004/12 (21 August 2012). The CCS found that the merged entity would have 30%–40% of the market share in the provision of logistic services for international small package services and that high barriers to entry existed. However, the CCS held that there was no significant lessening of competition as the non-coordinated and co-ordinated effects were limited in view of the totality of the following factors: (a) strong bargaining power of the merged entity's customers; (b) existing competitors' significant market shares and their ability to meet increased demand; and (c) the non-transparent nature of the market.

10.59 In *Notification for Decision: Anticipated Merger between The Manitowoc Co Inc and Enodis plc* CCS 400/002/08 (29 September 2008) ("*Anticipated Merger between The Manitowoc Co Inc and Enodis plc*"), the merged entity was found to have 60%–70% of the market share in the market for ice machines. The CCS was concerned that the strong position of the merged entity would lead to non-coordinated effects and reduce the ability of customers to switch in the short term. However, the CCS found that there were sufficient competitive constraints on the ability of the merged entity to exploit its market share and cleared the merger. There were low barriers to entry since excess production capacity existed in the market and production lines were flexible. Accordingly, any attempt by the merged entity to reduce output or raise prices was likely to be met by potential or existing competitors increasing production to capture their market share. Further, co-ordinated effects were unlikely and difficult to achieve due to the low entry barriers and product differentiation in the market.

10.60 In its review of *Re Notification for Decision of the Anticipated Merger between Greif International Holding BV and GEP Asia Holdings Pte Ltd Pursuant to Section 57 of the Competition Act* CCS 400/003/09 (14 April 2011), the CCS was concerned that the merger would lead to a substantial lessening of competition in the supply of large steel drums in Singapore since the merged entity will have a post-merger market share of more than 75%. However, the CCS found that the imminent expansion of a credible competitor in the market was sufficient to constrain any non-coordinated and/or co-ordinated effects to exploit the reduced competition after the merger.

Impact of commitments

10.61 A notable characteristic of *Notification for Decision: Merger between The Thomson Corp and Reuters Group plc* (above, para 10.10) is the CCS's analysis of the merged entity's divestment commitments, which had been earlier accepted by the European Commission and US Department of Justice. In that transaction, the CCS noted that the merged entity's combined market share in all three relevant markets

exceeded the indicative threshold. Further, as the merger parties were reputable parties in the supply of provision of financial information products, there were limited alternative competitors, and non-coordinated effects may arise since the merged entity could unilaterally increase prices post-merger without significant competitive constraints. There were also vertical concerns since the merger parties sold content sets directly to end-users downstream as well as redistributors upstream. There was the risk that the merged entity could cease upstream supply, resulting in higher prices yet reduced choices for end-users. Accordingly, the CCS noted that these factors tend to indicate that the merger may substantially lessen competition in Singapore.

10.62 The turning point in the CCS's assessment appeared to be the fact that the merger parties had offered commitments which were accepted by the European Commission and US Department of Justice. These commitments would essentially create another competitor that could supply the merged entity's products worldwide. The CCS stated (at para 47) that "[w]here commitments accepted overseas have an international impact, [these commitments will] be relevant in the [CCS's] assessment of the competitive impact of the [anticipated] merger in Singapore". However, the CCS clarified that such accepted commitments on their own will not necessarily result in an automatic clearance of the merger in Singapore. Commitments made in foreign jurisdictions will be assessed on the facts and circumstances of each case, taking into account the competition concerns particular to Singapore. The merger parties submitted that the products falling under the commitments were offered in the same manner in Singapore and throughout the world. As such, the CCS was of the view that these commitments would impact the Singapore market and any competition concerns arising in Singapore would be sufficiently addressed by the commitments offered in the European Union and the US.

10.63 This approach was echoed in the CCS's analysis of *Anticipated Merger between The Manitowoc Co Inc and Enodis plc* (above, para 10.59). In addition to its analysis that non-coordinated and co-ordinated effects were unlikely to arise, the CCS also considered that divestment commitments offered by the merger parties were accepted by the European Commission. The CCS held that since the divestment of Enodis plc's global ice machine businesses had worldwide effect, any competition concerns arising in Singapore from the merger would also be sufficiently addressed.

Vertical mergers

10.64 Vertical mergers are mergers between parties that operate at different but complementary levels in the production or distribution chain. While the CCS notes that non-horizontal mergers are less likely

to create competitive concerns compared to horizontal mergers, it remains mindful that competitive concerns may arise regardless.

10.65 In *Re Notification for Decision of the Completed Acquisition by Samwoh Corp Pte Ltd of Highway International Pte Ltd Pursuant to Section 58 of the Competition Act* CCS 400/004/10 (27 January 2011), Highway International Pte Ltd was involved in the laying of asphalt premix in Singapore while Samwoh Corp Pte Ltd ("Samwoh") was a company involved in the supply of and laying of all types of asphalt premix, the supply of specialised construction materials and products, the trading of construction materials and equipment and pavement consultancy services. Asphalt premix is an important component in the provision of asphalt laying services and civil engineering works. With Samwoh being a supplier of asphalt premix, the CCS recognised that there was a risk of vertical effects since Samwoh could foreclose the market by refusing to supply the asphalt premix to its competitors which provide asphalt laying services and civil engineering works after the merger. However, the CCS noted that market foreclosure effects were limited since market records showed that prices of asphalt premix have largely remained constant. Furthermore, Samwoh's competitors had won significant tender projects and were thus capable of self-supply.

10.66 In *Notification for Decision: Proposed Acquisition by Fresenius Medical Care Beteiligungsgesellschaft mbH and Fresenius Medical Care AG & Co KGaA of Asia Renal Care Ltd* CCS 400/005/10 (14 July 2010), Fresenius Medical Care AG & Co KGaA ("Fresenius") was in the business of providing both dialysis products and dialysis services while Asia Renal Care Ltd was a leading provider of dialysis services in Asia. Since providers of dialysis services would purchase dialysis products, the CCS was initially concerned that the merger would enhance Fresenius' market position in the dialysis products market and foreclose other dialysis product distributors from the market. However, the CCS was of the view that it would have limited foreclosure effect since the National Kidney Foundation, being the largest buyer of dialysis products, has strong countervailing buyer power to constrain the merged entity, and there was strong competitor presence in the existing market for dialysis products.

10.67 In *Notification for Decision: Proposed Acquisition by WC Heraeus GmbH of the Bonding Wire Business of Kulicke and Soffa Industries Inc* ("*Proposed Acquisition by WC Heraeus GmBH of the Bonding Wire Business of Kulicke and Soffa Industries Inc*") (above, para 10.52), both parties were involved in the bonding wire industry, amongst other businesses. The CCS identified potential vertical concerns as WC Heraeus GmbH ("WC Heraeus") was also involved in the precious metals trading business, being an upstream market relative to the bonding wire industry. In its assessment, the CCS concluded that it was

unlikely that any non-horizontal effects would arise since WC Heraeus' market share in the trading market was minimal and the buyer was already involved in both upstream and downstream markets before the transaction.

Ancillary restrictions

10.68 Ancillary restrictions concluded in conjunction with a merger are excluded from the ss 34 and 47 prohibitions under the Competition Act. To qualify for this exclusion, the restriction must be directly related and necessary for the implementation of the merger. In its assessment of *Proposed Acquisition by WC Heraeus GmbH of the Bonding Wire Business of Kulicke and Soffa Industries Inc* (at para 51), the CCS stated that a restriction would be deemed necessary if, in its absence, "the merger would not go ahead or could only go ahead at substantially higher costs, over an appreciably longer period, or with considerably more difficulty".

10.69 Generally, the CCS will not exempt restrictions that appear to go beyond the protection of the legitimate interest of one or more of the merger parties, either in scope or duration. While the CCS cleared the acquisition by CommScope Inc of Argus Technologies (Australia) Pty Ltd and Argus Technologies (International) Ltd in *Re Notification for Decision of the Proposed Acquisition by CommScope Inc of Argus Technologies (Australia) Pty Ltd and Argus Technologies (International) Ltd Pursuant to Section 57 of the Competition Act* CCS 400/006/11 (31 August 2011), it was of the view that despite the restrictions being reasonable and directly related, the restraint period should only last three years. Similarly, in the CCS decision regarding *Proposed Acquisition by SIF Group Pte Ltd of Penguin Ferry Services Pte Ltd* (above, para 10.11), the CCS took the view that the restriction prohibiting the seller and its subsidiaries from carrying on any similar or competitive business for a period of five years was not ancillary to the merger since the duration of the non-compete clause was beyond the protection of the buyer's legitimate interest. The CCS, however, cleared the non-compete clause after the merger parties reduced its duration to a period of three years.

10.70 While these decisions have indicated that the CCS typically deems a restraint period of more than three years to be beyond the protection of legitimate interest, the CCS has approved a longer five-year restraint period in *Proposed Acquisition by WC Heraeus GmbH of the Bonding Wire Business of Kulicke and Soffa Industries Inc*. In that notification, the merger parties entered into a Master Sale and Purchase Agreement where the seller agreed to a non-compete clause of five years. The CCS considered the fact that the merged parties will no longer be competitors in the same market after the merger and took the view that five years was a reasonable time for the buyer to establish a distinct and

separate reputation for reliability with the seller's customers in the highly technical semiconductor industry.

Concept of a single economic entity

10.71 In its assessment of the *Qantas and Orangestar Co-operation Agreement* (above, para 10.40), the CCS recognised that there are several contexts in which the single economic entity doctrine has been applied in the US and European Union. In relation to anti-competitive agreements, it can be applied defensively to exclude parent companies and their subsidiaries or principals and agents from the purview of the s 34 prohibition, or as justification for the competition authority to render one undertaking liable for another undertaking's anti-competitive actions.

10.72 Transtar Pte Ltd ("Transtar") and Regent Star Travel Pte Ltd ("Regent Star") appealed against the CCS's decision (Appeal No 3 of 2009) in *Express Bus Operators* (above, para 10.5), arguing that the CCS had incorrectly calculated the financial penalties imposed on Transtar and Regent Star by disregarding the overlap in revenue between the two companies. The two parties sought to rely on the single economic entity doctrine since Regent Star served as an authorised agent for Transtar, but the Competition Appeal Board rejected this defence. However, the Competition Appeal Board agreed that there was a relationship of agency between the two companies and reduced the financial penalty, taking into account the overlap in revenue.

10.73 The *SISTIC* case (above, para 10.47) indicated that the "single economic entity" doctrine may be applied in appropriate circumstances as an exclusion from the prohibition against abuse of dominance. Although SISTIC did not make reference or rely on the single economic doctrine in its submissions, the CCS considered the single economic entity concept since the Singapore Sports Council ("SSC") and Esplanade's joint ownership of SISTIC meant that SISTIC's exclusivity agreements with the SSC and Esplanade constituted agreements between related entities.

10.74 However, the CCS found that a single economic entity did not exist between SISTIC and the SSC or Esplanade. Although the SSC owned 65% of SISTIC, it had only nominated two out of seven of SISTIC's board of directors and dealt with SISTIC at arm's length. In the case of Esplanade, it held 35% of SISTIC's shareholding, making it even less likely for a single economic entity to be formed. Further, Esplanade had only nominated one director on SISTIC's board, and its commercial relationship indicated that SISTIC did not comply with Esplanade's

directions on critical matters. As such, the exclusive agreements fell under the ambit of the s 47 prohibition.

Penalties

10.75 Under s 69 of the Competition Act, the CCS is empowered to impose a financial penalty on any party that is found to have been involved in a price-fixing agreement, once it has found that the infringement was committed intentionally or negligently.

10.76 Ignorance or a mistake of law regarding Singapore's competition laws is not a bar to a finding of intentional infringement. In *Pest Control Services* (above, para 10.5), the CCS stated that it considers collusive tendering or bid-rigging arrangements to be serious infringements of the s 34 prohibition, their very nature indicating that the infringement was committed intentionally. In *SISTIC* (above, para 10.47), the CCS noted that in general, exclusive purchasing is not considered to be the most severe class of abuse, due to some counteracting benefits in terms of discounts given to customers. However, exclusive agreements are more serious than loyalty rebates with sale targets, due to the mandatory purchase commitment.

10.77 The fact that an infringing agreement was initiated or entered into before the Competition Act came into force in Singapore (being 1 January 2006) is no defence if the price-fixing arrangements continued beyond 30 June 2006, as indicated by *Express Bus Operators*. Therefore, the CCS will find that the infringing parties must have been aware or could not have been unaware of the illegality of the price-fixing arrangements.

Calculation of financial penalty for price-fixing practices

10.78 In calculating the financial penalty, the CCS will start with a base figure, which is determined by taking a percentage of the infringing party's relevant turnover, applying a multiplier for the duration of the infringement and then adjusting that figure to take into account similar factors such as deterrence and aggravating and mitigating considerations. For ease of reference, the calculation of the penalty can be represented using the following formula: Penalty = [(relevant turnover × base figure × duration of infringement) × adjustment factor] + (aggravating factors – mitigating factors).

Relevant turnover

10.79 What constitutes an infringing party's relevant turnover is dependent on the CCS's definition of the relevant product and

geographical markets of the goods and services provided by the infringing party. As stated in *Modelling Agencies* and *Express Bus Operators* (above, para 10.5), the CCS will usually consider the infringing party's focal product and focal area only.

10.80 The CCS adopted the UK's position set out in *Argos Ltd & Littlewoods Ltd v Office of Fair Trading* [2005] CAT 13 in *Modelling Agencies* and held that where the anti-competitive conduct involves price-fixing, the definition of the relevant product market is not intrinsic to the determination of liability. Thus, it will be sufficient for the CCS to show that it had a reasonable basis for identifying a certain product market for the purposes of calculating the financial penalty.

10.81 In *Employment Agencies case* (above, para 10.5), the CCS stated that where a party is unable or unwilling to provide information to determine the relevant turnover, the CCS will impose a penalty that will reflect the seriousness of the infringement and with a view to deterring the undertaking as well as other undertakings from engaging in similar practices. The CCS will consider the turnover of the other parties that are party to the infringement in estimating the same of those undertakings that were unable or unwilling to provide CCS with the necessary information on their relevant turnover.

10.82 Parties have sought to define their relevant turnover as narrowly as possible in a bid to reduce the financial penalties imposed by the CCS. In *Modelling Agencies*, the CCS found the relevant turnover to be the sale and provision of modelling services in Singapore. An infringing party submitted that the relevant turnover should exclude amounts received by the model agency which were collected on behalf of and/or as beneficiary for the model in question and the model's foreign mother agent. However, the CCS noted that the contractual relationship was between the client and modelling agency and that the client would look to and hold the modelling agency responsible for breach of contract. Thus, it rejected this argument as it found that the model agencies were not mere intermediaries but the responsible entity for modelling services rendered to clients.

10.83 Similarly in *Employment Agencies*, the infringing parties sought to limit the relevant turnover. The CCS had found the relevant turnover to be the turnover arising from the provision of placement services of new Indonesian foreign domestic workers in Singapore. The infringing parties submitted that since a portion of the placement fee collected from the employer is paid to its Indonesian supplier, the relevant turnover should not include the placement fee collected on behalf of the Indonesian supplier. Another similar argument claimed that the fee paid to recruiters in Indonesia amounted to expenses incurred in Indonesia and should not be included in the relevant turnover. These arguments

were rejected by the CCS as they deemed such costs to be business costs incurred by the infringing party in sourcing for Indonesian foreign domestic workers and the cost of biodata.

10.84 In *Express Bus Operators*, the CCS defined the relevant product market as the sale of express and excursion bus services between Singapore and Malaysia or Southern Thailand (sold in Singapore) in the form of either standalone tickets or as part of coach package tours to pinpoint the relevant turnover. Although there were two separate price-fixing agreements, that is, the imposition of a minimum selling price and setting a FIC, the CCS considered that the relevant turnover for both agreements to be the same, since the sale of any ticket affected by the minimum selling price was also subject to the FIC. On appeal (Appeals No 1, 2 and 3 of 2009), several of the infringing parties argued that the CCS's basis for defining the relevant product market was flawed since it did not properly distinguish the sales of tickets to which the minimum selling price and fuel and insurance surcharge applied and the sales of tickets to which only the fuel and insurance surcharge applied. This resulted in a much higher than warranted starting point for the financial penalties. The Competition Appeal Board agreed that in relation to the fixing of the minimum selling price, the CCS should have based the relevant turnover on the sale of one-way bus tickets from Singapore to Malacca, Genting, Ipoh, Simpang/Taiping and Butterworth/Penang, rather than the broader definition adopted. However, the Competition Appeal Board rejected the appellants' contention that in relation to the fuel and insurance surcharge, the relevant turnover should be based on the sale of the fuel and insurance coupons alone, rather than the overall bus ticket price. The Competition Appeal Board agreed with the CCS that the coupons were "intrinsically tied with the sale of the standalone bus tickets or coach package tours" (at para 96).

Duration of the infringement

10.85 Once the base penalty sum has been determined, the CCS will see if this sum should be adjusted to take into account the duration of the infringement. The duration to be factored in will depend on when the infringing party became involved in the price-fixing agreement and when the involvement ceased. Notably, the CCS has stated in *Konsortium Express and Tours Pte Ltd v Competition Commission of Singapore* (Appeal No 1 of 2009) and *Modelling Agencies* (above, para 10.5) that once the CCS has fulfilled its burden of establishing the infringing act, there is a presumption that the act continues to remain in existence unless there are circumstances indicating otherwise. The onus then falls on the infringing party to show that the infringing act has ceased.

10.86 Where the duration of the infringement is less than a year, the CCS may treat and calculate the infringement as lasting a full year. In both the *Pest Control Services* and *Electrical Works* (above, para 10.5) cases, the CCS noted that even though the actual collusive tendering or bid-rigging arrangements lasted for significantly less than one year, the effects of the infringements were not limited to the actual period during which the collusion took place. Once a project had been awarded owing to an anti-competitive tender, the anti-competitive effect was irreversible and would affect future tendering processes by the same tenderees if an infringing party wins and gains the advantage of incumbency. As such, the CCS did not make any downward adjustments in relation to the duration of the infringement.

10.87 However, there have been instances where CCS has rounded down the duration to the nearest month on the basis of affording infringing parties an incentive to terminate their infringements as soon as possible. The CCS exercised their discretion to round down the duration in *Modelling Agencies* and *Employment Agencies*.

10.88 Where an infringing agreement had been initiated or entered into before the Competition Act came into force and continued after 30 June 2006, the CCS will take the duration (for the purposes of calculating the financial penalty) to have started from 1 January 2006. In *Express Bus Operators* (above, para 10.5), the CCS pointed out that while the anti-competitive agreements were instituted in 2005, the agreements continued into 2006 and beyond. As such, the penalty imposed on the bus operators and EBAA was calculated from 1 January 2006.

Aggravating and mitigating factors

10.89 The CCS will consider whether any aggravating or mitigating factors exist and either increase or reduce the financial penalties accordingly. In *Express Bus Operators* and *Pest Control Services*, the CCS cited the involvement of the infringing parties' directors and management to be an aggravating factor in increasing their financial penalties. In the *SISTIC* (above, para 10.47) appeal (Appeal No 1 of 2010), however, the Competition Appeal Board reduced SISTIC's financial penalty from $989,000 to $769,000, noting mitigating factors.

10.90 Interestingly, on appeal, the Competition Appeal Board disagreed with the CCS's view that the involvement of directors and senior management automatically constituted an aggravating factor. The Competition Appeal Board appeared to indicate that while directors or senior management are involved in most s 47 cases, it would depend on the facts and circumstances of each case before it decides whether their involvement applies as an aggravating factor. The Competition Appeal Board considered that there was also genuine uncertainty on SISTIC's

part on whether its exclusive agreements were anti-competitive and as such, no aggravating factors were applicable. Further, the Competition Appeal Board considered genuine uncertainty to be a mitigating factor and increased the discount applicable to SISTIC.

Adjustment factor

10.91 The penalty may be adjusted as appropriate to achieve policy objectives, in particular, to pose as a deterrent against future anti-competitive conduct. Other relevant considerations include:

(a) whether the financial penalty calculated after adjusting for duration represents a relatively low proportion of an infringing party's total turnover;

(b) the economic or financial benefit derived by the infringing party from the infringement; or

(c) the special characteristics of each case, such as the size and financial position of the infringing party in question.

10.92 In *Modelling Agencies* (above, para 10.5), the CCS stated that it would be slow to reduce the financial penalty merely because the infringing party may have economic difficulties as this would have the effect of conferring an unfair competitive advantage on the infringing parties least well-adapted to the conditions of the market.

10.93 In *Employment Agencies* (above, para 10.5), the CCS stated that while the financial position of the parties is a relevant consideration in determining whether the penalty imposed will be sufficiently deterrent, the parties should not rely on their economic difficulties and those of the market in seeking a reduction of the penalties imposed. The mere finding of an adverse or loss-making financial position is not sufficient reason to justify a reduction in the financial penalty. A party seeking more lenient treatment because of its financial position must provide CCS with all information and documentation it wishes to have taken into account.