

# RECENT DEVELOPMENTS IN ANTITRUST ENFORCEMENT IN SINGAPORE

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## I. INTRODUCTION

The enforcement of competition law in Singapore has grown in scope and complexity in recent years, reflecting the development of the Competition Commission of Singapore (“CCS”) from a nascent competition authority to one whose capabilities match the challenges posed by complex issues faced by other more experienced competition authorities such as extra-territoriality, the scope of object infringements and the single economic entity doctrine. This article provides an update on recent case developments in Singapore, spotlighting interesting aspects of international leniency cases and a novel domestic case. It further illustrates how CCS has expanded its enforcement toolkit by accepting, in appropriate cases, voluntary undertakings which directly address the anti-competitive harm, at the early stages of an investigation.

## II. INTERNATIONAL LENIENCY CASES

In the past five years, CCS has received multiple leniency applications involving international cartels. Infringement decisions were issued for two of the cartels, namely against ball bearings manufacturers and freight forwarders.

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### A. Ball Bearings Manufacturers Cartel

CCS’s first international cartel infringement decision was issued against four Japanese bearings manufacturers and their Singapore subsidiaries for infringing section 34 of the Competition Act (Cap. 50B) (“the Act”) by engaging in anti-competitive agreements and unlawful exchange of information in respect of the price for the sale of ball and roller bearings sold to aftermarket customers in Singapore. Apart from Singapore, the Japanese Fair Trade Commission (“JFTC”), the European Commission (“EC”) and the Australian Competition and Consumer Commission (“ACCC”) also looked into similar conduct, and CCS cooperated with the JFTC and the ACCC at various stages of the investigation. The information gathered provided CCS with a good understanding of the status and scope of related investigations into similar conduct in other jurisdictions. The parent companies and their respective Singapore subsidiaries were found to be jointly and severally liable for the infringement.

#### 1. Brief Facts

The parties involved in the anti-competitive conduct were:

- (a) JTEKT Corporation and its Singapore subsidiary, Koyo Singapore Bearing (Pte.) Ltd. (collectively referred to as “Koyo”),
  - (b) NSK Ltd. and its Singapore subsidiary, NSK Singapore (Pte.) Ltd. (collectively referred to as “NSK”),
  - (c) NTN Corporation and its Singapore subsidiary, NTN Bearing-Singapore (Pte.) Ltd. (collectively referred to as “NTN”), and
  - (d) Nachi Fujikoshi Corp. and its Singapore subsidiary, Nachi Singapore Private Limited (collectively referred to as “Nachi”).
- Investigations commenced after CCS received an application for immunity from Koyo.

The parent companies discussed and agreed on the overall strategies for the Singapore subsidiary companies to maintain each participant’s market share and protect their profits and sales. These discussions took place at meetings in Japan from as early as 1980 until 2011. At the meetings in Singapore which took place from at least 1998 until March 2006, the Singapore subsidiaries discussed the overall strategies decided by their parent companies, and the methods by which to give effect to these strategies. After the meetings in Singapore ended in March 2006, the meetings between the parties continued in Japan.

The actions by the parties included setting an agreed price, making a minimum price agreement for Singapore and agreeing on relevant exchange rates to be applied to derive the minimum prices for Singapore. Further, when the price of steel began to increase, the parties agreed on percentage price increases and exchanged information on percentage price increases to be applied to the after-market customers in Singapore.

CCS found that the conduct of the parties, which included price-fixing and the exchange of strategic information including future pricing intentions, amounted to a single overall infringement with the object of preventing, restricting and distorting competition. CCS also found that the parties had intentionally infringed the section 34 prohibition, but noted in mitigation that the parent companies took immediate steps to implement compliance programs to ensure that their officers and employees ceased anti-competitive activities with their competitors.

## 2. Penalties

When determining the appropriate financial penalties for this case, CCS set the starting point at a relatively higher level as CCS noted that the cartelized product in issue was a homogenous product, and that the parties had substantial share of the product market in Singapore. Further, the infringing conduct amounted to a secretive and sophisticated cartel where the participants engaged in covert conduct, including referring to each participant by codenames. Penalties totaling SGD \$9,306,877, after granting full immunity to Koyo and applying leniency discounts for other leniency applicants, were imposed on the parties.

## 3. Appeal by Nachi

An appeal concerning the quantum of the financial penalties was brought by Nachi, arguing that a lower financial penalty ought to have been imposed as:

- (a) In calculating the financial penalty, CCS should have applied the turnover for FY 2013 and
- (b) In light of the appellant's unique business model, CCS should have excluded the export sales by their exclusive local distributor.

The Competition Appeal Board found that for the derivation of the appropriate financial penalty to be imposed, CCS should have used the financial figures for the financial year immediately preceding the issuance of the infringement decision. Consequently, as Nachi's relevant turnover for FY 2013 was lower than that for FY 2012 (which were the figures used by CCS as these were available at the time the proposed infringement decision was issued), the revised financial penalty calculated based on the turnover figures from FY 2013 was accordingly reduced.

However, the Competition Appeal Board disagreed with the Nachi's contention that the turnover for the purposes of calculating financial penalties should exclude the turnover from its ball bearings sales through the Singapore distributor where the ball bearings were re-exported. The Competition Appeal Board found that the relationship between Nachi and the third-party Singapore distributor was one of seller and buyer, and not that of principal and agent. The distributor in Singapore bore the inventory risks and associated business costs, and was a victim of the anti-competitive behavior of the cartel. CCS had properly determined that the turnover from export sales should therefore be included in the penalty calculations. The Competition Appeal Board further found that CCS had properly exercised its discretion in determining the starting percentage used in calibrating the financial penalties, given the seriousness of the infringement and the impact of the infringement on the relevant market in Singapore. This ruling by the Competition Appeal Board on the relevant turnover affected by the cartel conduct is significant as Singapore is a trading hub where many goods and services are both imported and subsequently re-exported.

## B. Price Fixing by Freight Forwarders

CCS's second international cartel case involving foreign-registered companies and their Singapore subsidiaries or affiliates was in relation to the provision of freight forwarding services for shipments from Japan to Singapore by eleven freight forwarders and their Singapore subsidiaries or affiliates.<sup>2</sup> During the investigation, CCS spoke to the United States Department of Justice, and the JFTC. The cooperation with these other agencies provided CCS with valuable insights into the aspects of the investigation that CCS should focus its resources on. Upon completion of the investigations, CCS found that the parties had collectively fixed certain fees and surcharges, and had exchanged price and customer information for services related to the air freight forwarding of shipments from Japan to Singapore. The Japanese companies and their related or affiliated Singapore subsidiaries were found to be jointly and severally liable for the infringement.

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<sup>2</sup> The companies are: (i) Deutsche Post A.G., DHL Global Forwarding Japan K.K., DHL Global Forwarding Management (Asia Pacific) Pte. Ltd. and DHL Global Forwarding (Singapore) Pte. Ltd.; (ii) Hankyu Hanshin Express Co., Ltd. and its wholly-owned subsidiary Hankyu Hanshin Express (Singapore) Pte. Ltd.; (iii) "K" Line Logistics, Ltd. and its subsidiary "K" Line Logistics (Singapore) Pte. Ltd.; (iv) Kintetsu World Express Inc. Japan and its wholly-owned subsidiary KWE-Kintetsu World Express (S) Pte. Ltd.; (v) MOL Logistics (Japan) Co., Ltd. and its subsidiary MOL Logistics (Singapore) Pte. Ltd.; (vi) Nippon Express Co., Ltd. and its subsidiary Nippon Express (Singapore) Pte. Ltd.; (vii) Nishi-Nippon Railroad Co., Ltd. and its subsidiary NNR Global Logistics (S) Pte. Ltd.; (viii) Nissin Corporation and its wholly-owned subsidiary Nissin Transport (S) Pte. Ltd.; (ix) Vantec Corporation and Vantec World Transport (S) Pte. Ltd.; (x) Yamato Holdings Co., Ltd.; Yamato Global Logistics Japan Co., Ltd. and Yamato Asia Pte. Ltd.; and (xi) Yusen Logistics Co., Ltd. and its subsidiary Yusen Logistics (Singapore) Pte. Ltd.

## 1. Brief Facts

In 2011, CCS became aware that international freight forwarders may have been involved in anti-competitive activity with an impact in Singapore, and consequently made enquiries into the sector. CCS commenced investigations into anti-competitive agreements and/or concerted practices in respect of fees and surcharges related to the supply of air freight forwarding services for cargo shipped from Japan to Singapore following an application for immunity received from DHL Global Forwarding on March 28, 2012.

Investigations revealed that the Japanese freight forwarders, during meetings held in Japan, agreed on minimum charges for the Japanese Security Surcharge, the Japanese Explosives Examination Fee and the Japanese Fuel Surcharge. These fees and surcharges associated with the air shipment of freight from Japan to Singapore were levied on customers based in Singapore who were shipping cargo from Japan to Singapore.

## 2. Single Economic Entity

Following CCS's investigation and representations from the parties, CCS found that the Japanese companies and their related Singapore entities constituted a single economic entity even in cases where the related Singapore entities were not wholly-owned by the related Japanese companies. When assessing whether the Japanese companies and the related Singapore companies constituted a single economic entity, CCS analyzed the economic, organizational and legal links between the entities, including whether the related company is wholly-owned or effectively controlled by the parent company, whether there was unity on the market or whether the subsidiary complied with the directions of the parent company on critical matters such as sales and marketing activities and investment matters.

Penalties totaling approximately SGD \$7 million, after granting full immunity and taking into account leniency discounts, were imposed on the parties.

## 3. Conclusion

Section 33(1) of the Act provides for the extra-territorial application of the section 34 prohibition notwithstanding that an agreement and/or concerted practice has been entered into outside Singapore or that any party to such agreement is outside Singapore. Section 34 of the Act targets agreements which have as their object or effect the prevention, restriction or distortion of competition within Singapore. The extra-territorial nature of the prohibition means that CCS is able to proceed against foreign companies that are involved in anti-competitive conduct having an impact on customers in Singapore. This was highlighted in the Ball Bearings Manufacturers Case, where the representatives attending the meetings held in Singapore noted that the Act was coming into force, and so ceased the meetings in Singapore. However, CCS found evidence of the meetings in Japan continuing and considered the last known meeting in Japan to be relevant as to when the anti-competitive conduct ceased. As demonstrated in the above cases, the anti-competitive conduct itself need not have occurred in Singapore, and foreign companies and

their related Singapore companies may be held jointly and severally liable for the infringement even where the related company is not wholly-owned by the foreign parent.

# III. DOMESTIC CASE

## A. The Financial Advisers Case

On March 17, 2016, CCS issued an Infringement Decision against ten financial advisers in Singapore. The ten financial advisers were found to have infringed the Act by engaging in an anti-competitive agreement to pressure their competitor, iFAST Financial Pte. Ltd. ("iFAST"), to remove its offer of a 50 percent commission rebate on competing life insurance products on an online platform, Fundsupermart.com (the "Fundsupermart Offer").

This Infringement Decision was CCS's first enforcement action in the financial services sector. The conduct, which concerned the collective pressure to remove a competing offer, was a novel issue for competition enforcement in Singapore. Another first for competition enforcement in Singapore was the application of the principle that parties can be held liable for the entire infringement in respect of their participation in the conduct even if they were not involved from the beginning. In total, CCS imposed financial penalties of SGD \$909,302 on the ten financial advisers.

## 1. Brief Facts

On April 30, 2013, iFAST launched its Fundsupermart Offer. The Fundsupermart Offer was an offer of a 50 percent rebate on commissions received by iFAST to life insurance clients for sales enquiries made through the Fundsupermart website. This new model differed from those of other financial advisers, which generally relied on having its employees or representatives actively solicit sales leads, e.g. through referrals or activities such as roadshows to reach out to the masses. iFAST's competitive advantage stemmed from being able to reach over 50,000 existing clients of Fundsupermart as well as other visitors to the Fundsupermart website, without incurring high costs to solicit life insurance sales leads. iFAST was able to pass on substantial cost savings to clients who purchase life insurance policies via iFAST by giving them rebates using part of the resulting commissions that iFAST would receive from the insurance providers. A few days later, on May 3, 2013, iFAST withdrew its Fundsupermart Offer.

CCS's investigation revealed that on May 2, 2013, a group of eight financial advisers met as part of the Association of Financial Advisers (Singapore). During this meeting, the Fundsupermart Offer was discussed and one of the financial advisers, Financial Alliance Pte. Ltd. ("Financial Alliance"), was appointed as their representative to contact and pressure iFAST into removing the Fundsupermart Offer. From May 2, 2013 to May 3, 2013, Financial Alliance continually pressured iFAST. During this time, two other financial advisers, namely IPP Financial Advisers Pte. Ltd. ("IPP") and Professional Investment Advisory Services Pte Ltd ("PIAS"), who were copied in

the communications from Financial Alliance to iFAST, declared their support of Financial Alliance. Further, IPP and PIAS contacted iFAST directly in furtherance of Financial Alliance's efforts to have iFAST remove the Fundsupermart Offer.

Generally, the financial advisers' use of iFAST's distribution platform collectively contributed significantly to iFAST's revenues in Singapore. Under considerable pressure, iFAST removed the Fundsupermart Offer. iFAST only reintroduced a new offer for life insurance products on Fundsupermart.com in August 2015, more than a year after the withdrawal of the Fundsupermart Offer. This was also shortly after CCS issued a Proposed Infringement Decision to the financial advisers.

## 2. Collective Pressure: Anti-competitive Object and Impact

CCS found that the financial advisers were party to an agreement and/or concerted practice that had the object of pressuring a competitor, iFAST, into removing the Fundsupermart Offer, thus preventing, restricting or distorting competition in the market for the distribution of the relevant individual life insurance products. In the Infringement Decision, CCS drew guidance from European law regarding the finding of an object infringement, particularly that the categories of restrictions by object are not closed, and that the essential legal criterion is whether the agreement reveals in itself a sufficient degree of harm to competition.<sup>3</sup>

CCS observed that iFAST had adopted an innovative distribution model and had sought to pass on cost savings to clients through a significant commission rebate when there was no such practice among the financial advisers to do so. However, the financial advisers' commercial relationship with iFAST in its unit trust business contributed significantly to iFAST's revenues and placed the former in a position to exert pressure on the latter to remove the Fundsupermart offer. Had iFAST's offer remained on the market, the financial advisers might have had to make similar or new offers to respond to the competitive threat of commission rebates from the Fundsupermart Offer.

## 3. Participation by Conduct

The case was also novel in Singapore's competition jurisprudence as two of the financial advisers who were not present at the meeting where the anti-competitive conduct was agreed upon were found to nonetheless be party to the overall infringement. It is well-established in European case law that an undertaking can be found to be a party to an agreement and/or concerted practice where the undertaking knew, or should have known, that it was participating in an overall plan agreed by the other undertakings, and knew, or should have known, the general scope and the essential characteristics of the overall plan.<sup>4</sup> Further, where an undertaking can be established

to be a party to a single agreement and/or concerted practice, it may be found to be responsible also in respect of the conduct of other undertakings in the context of the same infringement throughout the period of its participation in the infringement. The two financial advisers were copied into all correspondence between Financial Alliance and iFAST during the implementation of the anti-competitive conduct and thus knew of the overall plan to pressure iFAST to remove the competing offer, including the general scope and essential characteristics of the said plan, and actively contributed to the conduct.

## 4. Conclusion

This case demonstrates that CCS approaches its enforcement of competition law in Singapore in a dynamic and robust manner, being sufficiently nimble to adapt to new factual situations and novel points of law. One financial adviser, IPP, has filed an appeal against the quantum of financial penalties imposed.

# IV. EXPANDING THE ENFORCEMENT TOOLKIT

Besides issuing Infringement Decisions and imposing financial penalties for anti-competitive behavior, CCS has, in recent years and in appropriate cases, accepted commitments and undertakings which would remedy the harm of anti-competitive behavior in the market. This is illustrated in several cases which have generated significant public and media interest, namely F&N/Heineken, Cordlife, APBS and restrictive practices in the supply of lift spare parts.

## A. F&N/Heineken

Following Heineken International B.V.'s ("Heineken") purchase of the entire interest in Asia Pacific Breweries Limited and other assets in Asia Pacific Investment Pte. Ltd. held by Fraser & Neave Limited ("F&N"), CCS commenced an investigation into a contractual clause in the Share Purchase Agreement entered into by Heineken and F&N which restricted Heineken from engaging in the manufacture, distribution and sales of soft drinks, for a period of two years (the "Soft Drinks Non-Compete Clause"). The Soft Drinks Non-Compete Clause was due to expire in November 2014. In November 2013, CCS announced that it had accepted a voluntary signed undertaking from F&N not to enforce the clause with respect to Singapore and closed the investigation into F&N. This undertaking removed the contractual impediment to Heineken to enter the local soft drinks market in a timely manner, restoring the market to its natural competitive state.

## B. Cordlife

In June 2014, CCS commenced an investigation into the exclusive agreements Cordlife Group Limited ("Cordlife") had with baby fair organizers and hospitals. The competition concern identified by CCS was that the exclusive agreements potentially infringed the prohibition against an abuse of a dominant position by limiting competition from other providers of cord blood bank services in Singapore.

3 Case C-67/13 Groupement des cartes bancaires v. European Commission [2014] 5 CMLR 2, at [57].

4 Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P Aalborg Portland A/S and Others v. Commission [2004] ECR I-0123 at [332] to [333].

In response to CCS's concerns, Cordlife provided CCS with voluntary commitments to remove the existing exclusive arrangements that were the subject of the investigation, and to ensure that it does not enter into such exclusive arrangements with any baby fairs or private maternity hospitals in Singapore going forward. Cordlife was also required to provide CCS with documentary proof that the affected baby fair organizers and hospitals had been informed of the change in Cordlife's business practices. Following these commitments, CCS closed its investigation into Cordlife.

### C. APBS

Acting on complaints received, CCS investigated Asia Pacific Breweries (Singapore) Pte. Ltd. ("APBS") in relation to its practice of supplying draught beer to retail outlets solely on an exclusive basis ("Outlet-Exclusivity Practice"). In the course of its investigation, CCS obtained information on the beer market in Singapore from retailers and beer suppliers, and also commissioned a market survey to gather information on market practices. The Outlet-Exclusivity Practice had prevented retail outlets from selling draught beers from competing suppliers and restricted the choices of draught beers available to retailers and consumers.

In 2015, following the competition concerns raised by CCS, APBS provided CCS with voluntary commitments to cease its Outlet-Exclusivity Practice. APBS undertook in its commitments that it would not impose outlet-exclusivity conditions in its supply of draught beer contracts to retailers. These commitments were extensively consulted upon with market participants and positive feedback was received regarding the removal of the Outlet-Exclusivity Practice. As the voluntary commitment adequately addressed CCS's competition concerns, the investigation ceased.

### D. Restrictive Industry Practices in the Supply of Lift Spare Parts

CCS commenced an investigation into restrictive industry practices in the supply of lift spare parts for lifts installed in public housing estates in Singapore after receiving a complaint.

In Singapore, town councils are required to carry out regular lift maintenance for lifts installed in public housing estates. There are typically multiple brands of lifts installed in each public housing estate, and town councils could either engage the original lift installer for maintenance services, or call for a tender to invite companies, including third-party lift maintenance contractors, to provide lift maintenance services for all the lift brands of lifts within a particular public housing estate.

CCS understood that there were potential cost savings to engaging a third-party lift maintenance contractor as compared to engaging the original lift installer for each lift brand. Lift maintenance contractor may require certain brand-specific lift spare parts in the process of maintenance. In the event the third-party lift maintenance

contractor is unable to obtain certain brand specific lift parts, the town councils are likely to engage the third-party lift maintenance contractor even if the contractor is able to provide lift maintenance services at lower cost and better service quality.

In light of the above, CCS was of the view that refusal to supply proprietary but essential lift spare parts to third-party lift maintenance companies by any lift company or distributor may prevent other lift maintenance companies from effectively competing for contracts to maintain and service lifts of that particular brand in Singapore, and may be an abuse of a dominant position infringing section 47 of the Act.

Following investigations into several companies for refusal to supply lift spare parts, E M Services Pte. Ltd. came forward to CCS to provide commitments to supply BLT lift spare parts in Singapore to third-party lift maintenance contractors in Singapore. After feedback from a public consultation, CCS considered the commitments fully addressed the competition concerns raised by CCS.

While these undertakings and commitments remedied the harm within the affected market in a timely manner without the need for a finding of infringement, CCS has continued to monitor practices in each market, and reserved the right to investigate any breach of the undertaking or commitment, as well as any other anti-competitive practices by the relevant parties.

## V. CONCLUSION

Developments in CCS's enforcement actions, illustrated in the cases highlighted above, are in line with recent trends observed, touching on novel issues created by cross-border trades and in markets involving technological advances.

CCS's recent enforcement actions dovetail with CCS's new mission: Making markets work well to create opportunities and choices for businesses and consumers in Singapore, and new vision: A vibrant economy with well-functioning markets and innovative businesses, which was unveiled at CCS's 10th anniversary dinner on July 23, 2015. It was noted by CCS's Chairman, Mr. Aubeck Kam, that market structures and business conduct are becoming increasingly complex with technological changes within Singapore, and beyond Singapore. CCS is also seeing more cross-border business conduct, some of which may have anti-competitive impact on Singapore markets such as international cartels.

The analyses and approach taken in the cases highlighted above encapsulate the developments in competition enforcement in Singapore. More importantly, it also provides a glimpse of and sets the tone for CCS's enforcement work in future cases, allowing for speedier resolution to restore the market to a competitive state, to realize CCS's vision of a vibrant economy with well-functioning markets and innovative businesses.