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Paper by Toh Han Li

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COMPETITION LAW, FREEDOM OF ASSOCIATION AND FIXING SALARIES

-- Paper by Toh Han Li * --

1. Introduction

1. The Competition Act¹ of Singapore (“the Act”) contains the usual three key prohibitions, namely the section 34 prohibition against anti-competitive agreements, the section 47 prohibition against the abuse of a dominant position, and the section 54 prohibition against mergers that substantially lessen competition.² The Act is largely based on the competition provisions of the Treaty of the Functioning of the European Union (“TFEU”) and the United Kingdom Competition Act 1998.

2. As an enforcement regime, entities found to have infringed the competition act may have financial penalties or other directions visited upon them by the competition authority or the courts as the case may be. To this end, human rights, to the extent that they involve due process and natural justice, will inevitably be embedded into the competition enforcement process to ensure that entities are treated fairly in the process³.

3. For the purposes of this paper however, I will focus on the interaction between competition law, freedom of association and fixing salaries, and deal with the question of whether competition enforcement is inimical to freedom of association for the purposes of avoiding salary competition. In this regard, labour unions are typically exempted from antitrust liability such that they may coordinate actions of workers for the purposes of protecting their salaries or avoiding salary competition⁴. Under Singapore law, employees in a single firm associating for the purposes of collective bargaining will not fall foul of the law because they are not considered undertakings⁵. The Industrial Relations Act⁶ further provides for recognized trade

* This paper was written by Han Li TOH, Chief Executive, Competition Commission of Singapore.

¹ Competition Act, Cap. 50B.

² <https://www.ccs.gov.sg/legislation/key-prohibitions>

³ Parties under investigation by CCS have the right to legal representation during the investigative process. Upon the issuance of the Proposed Infringement Decision, Parties are given access to the investigation files and can make written and oral representations on CCS’s decision. Upon issuance of the Infringement Decision, Parties have the right of appeal to the Competition Appeal Board, and subsequently to the High Court, and Court of Appeal.

⁴ Section 6 of the US Clayton Act provides that labour unions are not illegal combinations or conspiracies in restraint of trade, under the antitrust laws. In the EU, case law supports that collective bargaining agreements that involve employees are typically excluded from the application of Article 101(1) of the TFEU.

⁵ By definition, an undertaking means any person, being an individual, a body corporate, an unincorporated body of persons of any other entity, capable of carrying on commercial or economic activities relating to goods or services. For an example of undertakings, please refer to the *CCS Guidelines on the Section 34 Prohibition* at www.ccs.gov.sg/legislation/~media/custom/ccs/files/legislation/ccs%20guidelines/s34jul07final.ashx

⁶ Industrial Relations Act, Cap. 136

unions to initiate collective bargaining on behalf of employees. The collective bargaining process is prescribed under the Industrial Relations Act and can be initiated by the employer or trade union⁷.

4. However, independent contractors who associate and try to protect their salary levels would fall foul of competition law since they are considered undertakings who are competitors that supply services. The definition of employee under the Industrial Relations Act may also not be broad enough to cover self-employed persons or independent contractors as it only applies to a person who has entered into or works under a contract of service with an employer as opposed to a contract *for* service⁸.

2. Employee vs self-employed: A meaningful distinction?

5. As such, for the purposes of competition enforcement there is an important distinction between an employee and a self-employed person in relation to collective bargaining agreements under the EU competition law. While case law supports that collective bargaining agreements that involve employees are typically excluded from the application of Article 101(1) of the TFEU⁹, self-employed service providers who may perform the same activities as employees are, in principle, “undertakings” within the meaning of Article 101(1) TFEU, and collective agreements involving them cannot be excluded from the Article 101(1) regime. The CCS adopts a similar view with regards to employees and self-employed personnel in relation to the Act and this will be discussed in our cases below.

6. Some may criticise such a distinction and approach as being too formalistic, such that self-employed personnel, especially in the services industry, associating for the purposes of a collective bargaining agreement will fall within the purview of competition law. The European Court of Justice (“ECJ”) had to grapple with this issue in *FNV Kunsten Informatie en Media v Staat der Nederlanden* (Case C-413/13), a case involving associations representing both employees and self-employed persons. The associations entered into a collective agreement with an employers’ association, which included terms for self-employed musicians who were called upon to substitute members of an orchestra. The collective agreement set out minimum fees for both the employees (hired under contracts of employment) as well as the self-employed musicians who were contracted for services albeit on an ad-hoc basis.

7. The ECJ held that the self-employed musicians were, in principle, “undertakings” within the meaning of EU law as they offer their services for remuneration on a given market and perform their activities as independent economic operators in relation to their principal (i.e. the employer). However, the ECJ noted the formalistic classification of a “self-employed” person under national law does not prevent that person being classified as an employee (and therefore not an “undertaking”) for the purposes of EU law. The ECJ suggested that there may be circumstances where a self-employed person is in fact “false self-employed” by carrying out work comparable to the employed thereby disguising an employment relationship. This may arise depending on factors such as the degree of control the self-employed worker has over his work; whether or not he shares the commercial risks of his employer; and whether or not he forms an integral part of the employer’s undertaking creating a single economic unit of employer plus self-employed.

⁷ <http://www.mom.gov.sg/employment-practices/trade-unions/industrial-relations>

⁸ Section 2 of the Industrial Relations Act, Cap.136 - “employee” means a person who has entered into or works under a contract of service with an employer and includes an officer or servant of the Government included in a category, class or description of such officers or servants declared by notification in the *Gazette* by the President of Singapore to be employees for the purposes of this Act, but does not include any person or class of persons whom the Minister may from time to time by notification in the *Gazette* declare not to be employees for the purposes of this Act.

⁹ *Albany International BV v Stichting Bedrijfspensioenfonds textielindustrie* Case C-67/96 [1999] ECR I-5751

8. While the ECJ has paved the way for self-employed workers to avoid the treatment of being “undertakings”, whether or not a person is “false self-employed” is not always easy to determine as the factual situation will necessarily differ from case to case. In a recent ruling by a London employment tribunal¹⁰, Uber drivers won the right to be classed as workers rather than self-employed workers. The ruling meant that the Uber drivers would be entitled to holiday pay, paid rest breaks and the national minimum wage¹¹. The employment tribunal examined the working relationship and service agreements between the drivers and the ride-hailing app in detail, such as the fact that Uber drivers do not and cannot negotiate with passengers and are offered and accept trips strictly on Uber’s terms, in concluding that Uber drivers are workers. This is in contrast the formalistic approach taken by some competition regulators.

9. Assuming the self-employed workers are indeed undertakings, there is good reason why as competing businesses, they should not come together to form collective agreements as it may result in adverse impact to competition, especially if this impacts consumers. Having said that, where the collective agreements may result in benefits that outweigh the adverse impact on competition, the Act allows for CCS to exclude these agreements from the section 34 prohibition on the grounds that they constitute agreements with Net Economic Benefit (“NEB”).

3. Freedom of association and salaries under the competition law

10. Section 34 of the 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, unless they are excluded or exempted. The section 34 prohibition is largely similar to Article 101 of the TFEU¹².

11. The section 34 prohibition also applies to decisions by an association of undertakings, even if the association does not engage in commercial or economic activities relating to goods and services. In this regard, where undertakings are involved, freedom of association rules would be proscribed by competition law, especially cartel rules.

12. The OECD Guidelines for Multinational Enterprises state that “the goal of competition policy is to contribute to overall welfare and economic growth by promoting market conditions in which the nature, quality, and price of goods and services are determined by competitive market forces. In addition to benefiting consumers and a jurisdiction’s economy as a whole, such a competitive environment rewards enterprises that respond efficiently to consumer demand.”¹³ In a similar vein, the objective of competition law in Singapore is to promote the efficient functioning of our markets¹⁴ towards enhancing the competitiveness of the Singapore economy.

13. A key point to note here is that although competition enforcement may lead to better choice and lower prices, whether or not society’s welfare as a whole is enhanced is more complex question as other policy measures such as education and retraining, tax, trade, and anti-corruption policies will come into

¹⁰ <https://www.judiciary.gov.uk/wp-content/uploads/2016/10/aslam-and-farrar-v-uber-reasons-20161028.pdf>
- Note that Uber is appealing the decision

¹¹ Workers’ rights under the Employment Rights Act 1996, read with the National Minimum Wage Act 1998 and associated Regulations.

¹² Also, Chapter 1 of the United Kingdom Competition Act 1998.

¹³ OECD Guidelines for Multinational Enterprises, 2011 Ed., (Competition) Part X, Para 97.

¹⁴ Includes both goods and services markets.

play, for instance to alleviate poverty or create jobs in order to take advantage of the greater choices and lower prices created through competition enforcement.¹⁵

14. For instance, while competition in the services markets can promote greater innovation and enhance productivity, it can also lead to disruptions by the creation of new business models, resulting in a lowering of salaries of service providers or loss of jobs where old services are disrupted by new services (e.g. taxi drivers vs Uber drivers). To this end, competition law enforcement in the services markets may not contribute to a net increase in the overall enhancement of societal welfare if no policies are in place for reskilling of displaced jobs.

15. Given that competition law regimes exist in an institutional setting, competition enforcement can operate in an environment where other policy goals such as job creation, reskilling and minimum wages take place. These policies can complement competition law enforcement to achieve a balanced economic outcome and overall increased in societal welfare.¹⁶ In the case of Singapore, the Act specifies the scope and purview of the CCS's enforcement which complement the policy considerations of salaries and jobs determined by other government agencies

16. To illustrate, there are various provisions in the Act that do not cause competition enforcement to conflict with other policy goals. Firstly, the section 34 prohibition only applies to undertakings which are capable of engaging, or are engaged, in commercial and economic activity. Therefore, collective bargaining and/or agreements entered into by employees seeking to improve salaries and working conditions are not prohibited under the Act. There is also a regulatory framework to facilitate such agreements by labour/trade unions under the Industrial Relations Act which is under the purview of the Ministry of Manpower.

17. Where the agreement is entered into on the part of the Government, any statutory board, or any person acting on behalf of the Government or that statutory board, the agreement is excluded from the section 34 prohibition pursuant to section 33(4) of the Act. Examples of some of these agreements include prescription of recommended wages by other government agencies, such as the Progressive Wage Model for the security sector that was incorporated into the licensing regime for security agencies as of 1 September 2016.¹⁷

18. An agreement can also be excluded from the section 34 prohibition if it results in a NEB, as mentioned earlier. To be excluded on the basis of NEB, the agreement must contribute to i) improving production or distribution or ii) promoting technical or economic progress but which does not:

- Impose on the undertaking concerned restrictions which are not indispensable to the attainment of those objectives; or
- Afford the undertakings concerned the possibility of eliminating competition in respect of the goods or services in question.

¹⁵ OECD Global Forum on Competition 2013 Roundtable Report: Competition and poverty reduction. For an in-depth discussion on this issue, please refer to <http://www.oecd.org/daf/competition/competition-and-poverty-reduction2013.pdf>

¹⁶ "Economic Growth Through Innovation And Entrepreneurship" by Wong Poh Kam and Ho Yuen Ping, Macroeconomic Review, Monetary Authority of Singapore Economic Policy Group, Pg 98

¹⁷ <http://www.mom.gov.sg/newsroom/press-releases/2014/progressive-wage-model-for-the-security-sector-to-be-incorporated-into-licensing-regime>

19. Agreements that promote social objectives can also be excluded in the framework set out by the Act if they are made to comply with legal requirements, or if the Minister orders that such agreements are to be excluded from the section 34 prohibition on the grounds of exceptional and compelling reasons of public policy.¹⁸

4. Case studies

20. We now turn to look at some cases that CCS took enforcement action in the services market in relation to infringements of the section 34 prohibition. Two of the cases which involve price (wage) fixing agreements and the other involves a price guideline by issued by an association.

4.1 *Price-fixing in modeling services*¹⁹

21. On 23 November 2011, CCS issued an Infringement Decision (“ID”) against 11 modelling agencies in Singapore for infringing section 34 of the Act by engaging in the fixing of rates of modeling services in Singapore. In the ID, it was noted that the 11 modelling agencies were at that time members of the Association of Modelling Industry Professionals (“AMIP”). CCS found that the AMIP was formed to collectively raise the rates for modelling services charged by the agencies, and served as a front for the agencies to continue to meet, discuss and agree upon the prices for modeling services from 2005 to 2009.²⁰ By doing so, the agencies were restricting competition between themselves, to the detriment of their clients.

22. The modelling agencies submitted that the agreement between the AMIP members was to improve the image and raise the professional standards of the modeling industry by forming a collective voice to resolve concerns and problems related to the industry, such as to collectively counter errant clients²¹, and as such the agreement conferred NEB and should be excluded from the section 34 prohibition.²² However, the agencies did not provide specific evidence to support the claimed efficiencies and why these claimed efficiencies outweighed the anti-competitive effects of the infringing agreement and CCS did not accept the agencies’ NEB arguments.

23. The rates of the modeling services quoted by the agencies forms the wages that accrue to the models, and the CCS’s enforcement indirectly affected the models’ wages. However, the models were employees of the various modelling agencies and there was an avenue for the models themselves to come to a collective agreement on wages and other working conditions, or have a union represent them on their behalf.

24. Some of the modelling agencies argued that some of the large clients had strong bargaining power and could dictate rates, hence the rates set by the AMIP had no impact or could not be

¹⁸ Exclusions under the Third Schedule to the Act.

¹⁹ *CCS 500/002/09 Price-Fixing in Modelling Services*, Infringement Decision can be found here: https://www.ccs.gov.sg/public-register-and-consultation/public-consultation-items/price-fixing-of-rates-of-modelling-services-in-singapore-by-modelling-agencies?type=public_register

²⁰ Paragraphs 204 to 206 of the ID.

²¹ Clients of modeling agencies include magazines, advertising agencies, photographers, fashion designers and fashion show organisers. For more information, please refer to Paragraph 52 of the ID.

²² Paragraph 225 of the ID. The section 34 prohibition does not apply to the matters as specified in the Third Schedule of the Act, of which one is if the agreement confers NEB. In order to be deemed to confer NEB, the conduct would have to fulfill three cumulative conditions.

implemented.²³ The Competition Appeal Board (“CAB”), in its decision²⁴, stated that the “[the] Appellants’ substantial reliance on the 2 witness statements to contend that the AMIP rates were unlikely to have a significant effect on the market, does not add further to their arguments, as the undisputed fact is that there was a 60% increase in rates for fashion shows and editorials since the inception of the AMIP from 2005 to 2009.”²⁵ It is noteworthy that an agreement to fix prices is a restriction of competition by object (i.e. hardcore cartel infringement), and hence the only real defence is the satisfaction of the NEB requirements under the Third Schedule of the Act. Where the NEB requirements are not met, buyer power cannot in itself be used as a justification for agreements which restrict competition by object.²⁶

4.2 *Singapore Medical Association Guideline on Fees*²⁷

25. On 5 February 2009, CCS received an application for decision from the Singapore Medical Association (“SMA”) seeking a decision from CCS as to whether the SMA’s Guideline on Fees (“GOF”) infringed section 34 of the Act. The SMA GOF recommended a range of fees for an array of services provided by doctors in private practice in Singapore.²⁸ According to SMA, the objective of the GOF was to safeguard the interests of patients by providing them with greater transparency of medical fees and healthcare costs so as to reduce the information asymmetry between patients and medical practitioners.

26. The SMA comprised of self-employed medical practitioners (each of which was an undertaking) as well as employees of hospitals and healthcare groups in Singapore. In relation to the GOF, the SMA had acted as an association of undertakings when it acted on behalf of medical practitioners in the private sector, with respect to the formulation, issuance and revision of the GOF.²⁹ CCS was of the view that the GOF had the object of restricting competition and issued a Statement of Decision (“SD”) to that effect.³⁰ CCS was of the view that GOF would create focal points for prices to converge, restrict independent pricing decisions and signal to market players what their competitors are likely to charge.

27. SMA had argued that the GOF fell within the NEB exclusion to the Act as the GOF prevented overcharging and promoted the consumption of medical services at the socially and economically optimal levels.³¹ However, CCS found that overcharging in the primary care market and public sector hospital care were not major concerns, as there was evidence to suggest that prices were transparent and easily accessible. In addition, the hospital in-patient and specialist outpatient services provided by the public sector did not refer to the GOF in setting prices. Further, the GOF would be of limited use in the private

²³ Paragraph 263 of the ID.

²⁴ Appeal No. 2 of 2012

²⁵ Paragraph 103 of the Competition Appeal Board’s Decision on Appeal No. 2 of 2012. Decision can be found here: <https://www.mti.gov.sg/legislation/Documents/Appeal%20no.%20of%202012.pdf>

²⁶ For an in-depth review, see Chang, C. and Seah, T., ‘Can Buyer Power be used as a Defence? A View from Singapore’, *Journal of European Competition Law & Practice* (2014) 5 (5): 287-293.

²⁷ *CCS 400/001/09 Application for Decision by the Singapore Medical Association in relation to its Guideline on Fees pursuant to section 44 of the Competition Act*, Statement of Decision can be found here: https://www.ccs.gov.sg/public-register-and-consultation/public-consultation-items/singapore-medical-association--guidelines-on-fees?type=public_register

²⁸ Please refer to Annex 1 of the SD for the full range of services and associated fees.

²⁹ Paragraph 53 of the SD.

³⁰ As SMA had withdrawn the GOF since 1 April 2007, no further action or direction was undertaken by CCS.

³¹ Paragraph 102 of the SD.

sector hospital care market due to its use of highly technical medical terminologies and the fact that patients who seek treatment in this market were likely to depend on referrals and thus would be in a good position to estimate the fees involved. CCS also found evidence to suggest that the GOF was not useful in constraining doctors from overcharging, and thus it did not satisfy the first limb of the NEB test, which is that it contributes to improving production or distribution or promoting technical or economic progress.³² Given that the GOF did not satisfy the first of the cumulative conditions of the NEB exclusion, the question of indispensability and elimination of competition in respect of a substantial part of the relevant markets did not arise. Nevertheless, CCS found that the GOF also did not satisfy these other conditions.³³

28. In contrast, CCS noted that the special outpatient clinics in restructured hospitals were publishing their fees on their websites for comparison, and that the Ministry of Health (“MOH”) also publishes on its website actual historical bill sizes of the restructured hospitals for certain medical procedures. CCS was of the view that these efforts to improve pricing transparency were more effective, unrestrictive and unbiased ways to deal with the issues of information asymmetry, overcharging and optimal consumption of healthcare services. As such, CCS concluded that SMA could have contributed to these efforts by encouraging its members in the private sector to publish their actual fees for their services.

29. SMA had also applied to the Minister for Trade and Industry (“Minister”) to exclude the GOF from the application of the section 34 prohibition on grounds of exceptional and compelling reasons of public policy, but the application was eventually declined by the Minister after careful consultation with the Ministry of Health.

30. It should be noted that medical and healthcare services, despite the social issues surrounding it, are not treated differently under the Act in this case as these relate to fees charged by private sector doctors. CCS’s decision on the GOF did not affect fees charged by the public sector. As such, if the state wishes to regulate prices, the Act allows it to do so. Whether or not that is good competition policy for the state to regulate prices for medical and healthcare services is a question of advocacy for CCS and not enforcement.

4.3 *Fixing of monthly salaries of new Indonesian Foreign Domestic Workers*³⁴

31. In this case, CCS found that 16 employment agencies (“EAs”) had infringed the section 34 prohibition of the Act by entering into an agreement to raise and fix the monthly salaries of new Indonesian Foreign Domestic Workers (“FDWs”) at \$450. An FDW is charged a placement fee by the EA for finding her an employer in Singapore. The placement fee, which typically ranges between \$2,400 to \$3,500, is divided between the Singapore EA and the Indonesia supplier in accordance with the commercial agreement between them. The CCS found that the placement fee is usually expressed in terms of a number of months of the FDW’s salary. The Ministry of Manpower (“MOM”) requires that the amount of placement fee retained by a Singapore EA be capped at 2 months of the FDW’s salary, while that retained by the Indonesia supplier is largely determined by the suppliers themselves. It is to be noted that the salary of the FDW forms part of the fee that will be retained by the Singapore EAs.³⁵

³² Paragraphs 105 to 119 of the SD.

³³ Paragraphs 133 to 144 of the SD.

³⁴ *CCS 500/001/11 Fixing of monthly salaries of new Indonesian Foreign Domestic Workers in Singapore*, Infringement Decision can be found here: https://www.ccs.gov.sg/public-register-and-consultation/public-consultation-items/price-fixing-of-monthly-salaries-of-new-indonesian-foreign-domestic-workers-by-employment-agencies?type=public_register

³⁵ Paragraphs 27 to 29 of the ID.

32. According to the EAs, the industry was facing a shortage of supply of new Indonesian FDWs to Singapore, and adjustments to the placement fee and the FDW's monthly salary would affect the supply. A decrease in the placement fee or an increase in the monthly salary of the FDW would attract more supply of FDWs by effectively raising the net salary. However, as the Indonesia suppliers largely determine the quantum of their placement fees obtained, a decrease in the placement fees would squeeze the EAs' margins.³⁶ The EAs therefore entered into an agreement to raise and fix the monthly salary of the FDWs at \$450. It should be noted that while the agreement was in relation to the monthly salary of FDWs, the effect was also to increase the placement fee retained by the Singapore EAs, as the placement fee was usually expressed in terms of a number of months of the FDW's salary. The agreement therefore reduced competition among the EAs by reducing lower costs options available to employers and hence benefitted the EAs themselves.³⁷

33. While the CCS found that the agreement to fix the salary of FDWs was an infringement of the Act, the CCS did not take a position on what should be the appropriate salary for the new Indonesian FDWs, and was of the view that EAs should independently determine the salaries of the FDWs.³⁸ The enforcement action undertaken by CCS in this case directly affected the monthly salary of the FDWs and the FDWs salary might have been lower as a result.

34. In this regard, the MOM has oversight of the welfare of FDWs and can initiate policies on wages. In 2013, the MOM introduced a new requirement for employers to provide a mandatory rest day per week for the FDWs. Those who do not do so would have to compensate the FDW for the rest day forgone, either in the form of a day's salary, or a day off-in-lieu. The MOM also introduced a new grant for employers who might have difficulty giving their FDW a weekly rest day, such as those with elderly family members.³⁹ Further, where there is a problem of low wages in a particular industry, the Government is able to step in by prescribing recommended wages and/or other working conditions.

5. Conclusion

35. Competition law enforcement in Singapore restricts freedom of association and collective agreements where undertakings are involved and are not considered employees. Where undertakings want to collectively fix their salaries, this can only be allowed if they satisfy the NEB test. The cases discussed in this paper show that these associations and collective agreements generally result in an adverse effect on the competitive process and on consumers. Further, it is noteworthy that competition law enforcement in Singapore does not differentiate between the relative salary levels of undertakings. If there is a statutory minimum wage set by law, salary competition would operate above the minimum wage.

36. As such, it is important to recognise that competition law enforcement in Singapore operates in an institutional setting where various Government agencies have different mandates which addresses various socio-economic issues such as jobs, reskilling and salaries. These broader socio-economic issues may not necessarily be addressed under the competition regime, and perhaps it should not, as competition law may not be the appropriate tool to address such issues. In this regard the competition law regime should be seen as complementary to various policies and Government initiatives to support and achieve the goal of increasing overall societal welfare.

³⁶ Paragraph 30 of the ID.

³⁷ Paragraph 75 of the ID.

³⁸ Paragraph 75 of the ID.

³⁹ <http://news.asiaone.com/News/Latest+News/Singapore/Story/A1Story20120305-331728.html>