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INVESTIGATIVE POWER IN PRACTICE - Breakout Session 2: Requests for Information – Limits and Effectiveness - Contribution from Singapore

- Session IV -

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This contribution is submitted by Singapore under Session IV of the Global Forum on Competition to be held on 29-30 November 2018.

More documentation related to this discussion can be found at: oe.cd/invpw.

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Investigative Powers in Practice

Breakout Session 2: Requests for Information – Limits and Effectiveness

- Contribution from Singapore –

1. Competition Law in Singapore

1. Competition law in Singapore is administered and enforced by the Competition and Consumer Commission of Singapore[1] ("CCCS"), a statutory body established under the Competition Act (Cap. 50B) ("Competition Act") and which operates under the purview of Singapore's Ministry of Trade and Industry ("MTI").

2. Section 6(1) of the Competition Act sets out CCCS's functions and duties. Under section 6(1)(b) of the Competition Act, one of the key functions of CCCS is to eliminate or control practices having an adverse effect on competition in Singapore. The three key prohibitions in the Competition Act are as follows:

- **The section 34 prohibition** – section 34 of the Competition Act prohibits agreements, decision and concerted practices which have as their object or effect the prevention, restriction or distortion of competition within Singapore.
- **The section 47 prohibition** – section 47 of the Competition Act prohibits any conduct which amounts to the abuse of a dominant position in any market in Singapore.
- **The section 54 prohibition** – section 54 of the Competition Act prohibits mergers and acquisitions that substantially lessen competition with any market in Singapore.

2. CCCS's Investigative Powers and Requests for Information

3. Under the Competition Act, CCCS has various powers to conduct an investigation if it has reasonable grounds for suspecting that any of the three prohibitions above has been infringed by any agreement, conduct, anticipated merger, or completed merger.[2] For example,

[1] Previously, CCCS was known as the Competition Commission of Singapore ("CCS") and assumed its current name on 1 April 2018 after it became the administering agency of the Consumer Protection (Fair Trading) Act (Cap. 52A) ("CPFTA"), which aims to protect consumers against unfair trade practices in Singapore. For consistency, the name "CCCS" will be used throughout this contribution, even in relation to work undertaken by CCS prior to 1 April 2018.

[2] Section 62(1) of the Competition Act.

CCCS has the power to require the production of specified documents or specified information,[3] enter premises without a warrant,[4] and enter and search premises with a warrant.[5]

4. On 19 March 2018, the Competition (Amendment) Act, which amended section 63 of the Competition Act as well as other provisions, was passed by Singapore's Parliament. Under the new section 63(4A) of the Competition Act, CCCS officers who are empowered to enter premises without a warrant or to enter and search premises with a warrant may now orally examine any person on the premises who appears to be acquainted with the facts and circumstances relevant to the investigation, and require the person to answer any question on the investigation. Without the proposed amendments, if the scope of investigation is on bid-rigging for Project X and CCCS uncovers an email correspondence chain relating to the rigging of a tender for another Project during an inspection, CCCS officers would only be able to require any person to explain what the email correspondence is about, but would not be able to ask about what other related projects the parties in the email may also have been involved in. For CCCS to be able to do that, a separate section 63 notice must be served on the individual. This prolongs the duration of the inspection or search, and results in a longer than necessary disruption to the business being investigated.

5. Requests for information ("RFIs") are issued under section 63 of the Competition Act (the "section 63 power") by service of a written notice ("section 63 notice"), and must comply with the requirements in that section.[6] Such notices differ from CCCS's informal requests for information at the pre-investigative stage of a matter, or where information is requested for under section 61A of the Competition Act for the purpose of market inquiries or notifications. Section 63 notices must state the subject matter and purpose of the investigation, specify the documents or information required, and inform the person who receives the notice of the offences relating to non-compliance in sections 75 to 78 of the Competition Act.[7] The notice must also state the time and place, and manner and form in which the document is to be produced or provided.[8]

6. The section 63 power may be used prior to an inspection of premises by CCCS, and may also be used during or after an inspection, for the purpose of clarifying facts that have emerged in the course of an inspection.[9] Further, CCCS may issue a section 63 notice to a person on more than one occasion during the course of an investigation, such as if clarifications are needed on that person's responses to a previous section 63 notice, for instance.[10] Section 63 notices will either be issued to a person in hard copy or delivered to

[3] Section 63 of the Competition Act.

[4] Section 64 of the Competition Act.

[5] Section 65 of the Competition Act.

[6] *CCCS Guidelines on the Powers of Investigation in Competition Cases 2016*, www.cccs.gov.sg/legislation/cccs-guidelines (accessed 2 November 2018), at [3.1].

[7] Section 63(2) of the Competition Act.

[8] Section 63(3) of the Competition Act.

[9] *CCCS Guidelines on the Powers of Investigation in Competition Cases 2016*, www.cccs.gov.sg/legislation/cccs-guidelines (accessed 2 November 2018), at [3.2].

[10] *Ibid.*, at [3.3].

him by pre-paid post to his last known address.[11] Service by email is only permitted with the consent of the intended recipient of the section 63 notice.[12]

7. A section 63 notice can be issued to the undertakings suspected of infringement and/or their officers (past and present).[13] Notably, CCCS may also issue section 63 notices to third parties such as complainants, suppliers, customers and competitors, given that its power extends to the issuance of such notices to "any person", with "person" defined in section 2 of the Competition Act to include any undertaking.[14] If a written notice is addressed to an undertaking, a person who is authorised to respond on an undertaking's behalf must respond to the same. On the other hand, if a notice is issued to a person in his individual capacity, that person must respond to the notice. Persons who are obliged to respond to section 63 notices are entitled to be accompanied by their legal advisers.

8. When requiring the production of a document, CCCS can take copies of or extracts from it, require the person who is served the notice to produce the document, to provide an explanation of the said document, and to translate all documents into English.[15] If the person is unable to produce the document, CCCS may require him to state, to the best of his knowledge or belief, where the document can be found.[16]

3. Penalties for Non-Compliance

9. As stated above, section 63 notices must draw the attention of the recipient to the offences in sections 75 to 78 of the Competition Act.

10. Under section 75 of the Competition Act, it is an offence for a person to fail to comply with any requirement imposed on him under sections 61A, 63, 64 or 65 of the Competition Act. In relation to a failure to provide a document, it is a defence for the person charged to prove that the document was not in his possession or under his control, and that it was not reasonably practicable for him to comply with the requirement.[17] If the offence relates to a failure to provide information, an explanation of a document, or to state where a document is to be found, it is a defence for him to prove that he had a reasonable excuse for failing to comply with the requirement.[18]

11. Section 76 of the Competition Act makes it an offence for a person who is required to produce a document under sections 61A, 63, 64 or 65 to intentionally or recklessly destroy, dispose of, falsify or conceal it, or to cause any such conduct.

[11] Regulation 25 of the Competition Regulations 2007.

[12] Regulation 25(1)(c) of the Competition Regulations 2007.

[13] Section 63(1) of the Competition Act.

[14] Section 63(1) of the Competition Act.

[15] Section 63(4) of the Competition Act, regulation 23(2) of the Competition Regulations 2007.

[16] Section 63(4)(b) of the Competition Act.

[17] Section 75(2) of the Competition Act.

[18] Section 75(3) of the Competition Act.

12. Similarly, if a person who is the subject of a formal notice obstructs CCCS's investigations by providing information which is he knows is false or misleading in a material particular or is reckless as to the truth of such information, he would have committed an offence under section 77(1) of the Competition Act. Any attempt to absolve oneself of potential criminal liability by providing information to CCCS through a third party legal adviser or agent would not succeed, as section 77(2) of the Competition Act makes it an offence to provide false information to another person, if the provider of the information knows that this will be subsequently provided to CCCS.

13. Finally, section 78 of the Competition Act makes it an offence for any person who refuses to give access to, assaults, hinder or delays any CCCS officer in the discharge of his duties under the said Act.

14. The offences above are punishable under section 83 of the Competition Act with a fine of up to $10,000 or to imprisonment of up to 12 months, or both. It bears highlighting that if an offence by a body corporate, a partnership, an unincorporated association is committed due to the consent, connivance or neglect of any individual within these undertakings, the undertaking's offence is attributable to the individual and he would be guilty of an offence in his personal capacity.[19]

15. If CCCS suspects that an offence under sections 75 to 78 of the Competition Act has been committed, it would have to refer the matter to the Singapore Police Force for it to conduct the necessary investigations. Thereafter, the Police would have to refer the matter to the Attorney-General's Chambers,[20] which would then determine whether charge(s) should be preferred against the offending undertaking and/or individual. To date, CCCS has not referred any cases of this nature to the Police or the Attorney-General's Chambers.

4. Determining whether to issue an RFI

16. The use of coercive powers of investigations and a decision to conduct unannounced inspections by CCCS is not taken lightly in view of the disruptions to an undertaking's business operations and the possible consequential financial losses or opportunity costs for the duration of the inspection at the undertaking's premises. As a general rule, CCCS's decision on whether to issue a section 63 notice or conduct an unannounced inspection of an undertaking's premises would depend on whether there is a chance that the information sought would be destroyed or concealed by the undertaking after the undertaking realises that its conduct is under scrutiny by CCCS. If the suspected undertakings are likely to delete or remove incriminating pieces of evidence, or to coordinate their responses to CCCS's queries after receiving a section 63 notice from CCCS, an unannounced inspection would be preferred.

[19] Section 81 of the Competition Act.

[20] In Singapore, the Attorney-General is *ex officio* the Public Prosecutor under section 35(8) of the Constitution of the Republic of Singapore.

17. For example, in recent CCCS cases involving bid-rigging in the tenders for electrical services for the Formula 1 Singapore Grand Prix[21] ("Electrical Services case") and price-fixing in the market for fresh chicken products in Singapore ("Broiler Cartel case"),[22] CCCS conducted simultaneous inspections at the business premises of the suspected undertakings.[23] These inspections enabled CCCS to uncover incriminating pieces of evidence that were eventually relied upon on CCCS's infringement decisions.[24] However, it bears highlighting that CCCS's powers to conduct simultaneous inspections and issue RFIs are not mutually exclusive and may be used in a complementary manner, particularly in relation to information like turnover figures or customer data that would necessitate extraction and compilation by the undertakings and which cannot be produced at short notice during an unannounced inspection. For instance, in the abovementioned cases, CCCS issued section 63 notices to the parties under investigation after the simultaneous inspections to obtain information relating to price lists, tender preparation processes, and turnover for past financial years that was not obtained in the course of the said inspections.[25]

5. Limitations of RFIs

18. As a section 63 notice must state the subject matter and purpose of the investigation and specify the documents or information required, an undertaking which receives such a RFI would reasonably know whether or not it is the subject-of-interest in the investigation. The use of RFIs may therefore affect the outcome of the investigation. As discussed above, one of the fundamental limitations of RFIs is that they put parties on notice that their conduct is under investigation by CCCS, which affords them the opportunity to either conceal, destroy or tailor their evidence. For example, in a previous merger notification that was assessed by CCCS, CCCS noticed that the parties had provided an internal deck of slides with missing slides in response to an RFI. This came to light as the parties failed to redact the slide numbers in the deck of slides, which enabled CCCS to realise that some potentially incriminating slides were missing. CCCS eventually issued formal notices under section 61A of the Competition Act to the parties, which required them to produce the missing slides. While this example relates to a merger notification and not to a section 63 notice issued during an investigation, one can envisage that a similar problem could arise in the investigative context as well.

[21] CCS 700/003/15: *Infringement Decision for Bid-Rigging in Electrical Services and Asset Tagging Tenders* (28 November 2017), www.cccs.gov.sg/public-register-and-consultation/public-consultation-items/ccs-issues-infringement-decision-for-bidrigging-in-electrical-services-and-asset-tagging-tenders (accessed 2 November 2018).

[22] CCCS 500/7002/14: *Infringement Decision in Relation to the Sale and Distribution of Fresh Chicken Products in Singapore* (12 September 2018), www.cccs.gov.sg/public-register-and-consultation/public-consultation-items/cccs-penalises-fresh-chicken-distributors-for-price-fixing-and-non-compete-agreements (accessed 2 November 2018).

[23] Electrical Services case, at [17]-[22]; Broiler Cartel case, at [55]-[56].

[24] For reasons of confidentiality, the specific details of such information will not be set out as they were not detailed in CCCS's public versions of the infringement decisions.

[25] Electrical Services case, at [20]; Broiler Cartel case, at [58].

19. In addition, RFIs will only be effective if the scope of the information sought is sufficiently clear, given that section 63 notices may sometimes require parties to provide a large amount of data. For example, in the recent Grab/Uber merger investigation ("Grab/Uber case"),[26] a large quantity of data was required to understand the organisational structures of the merger parties due to the fact that they operated in many different countries and industries. In particular, Grab operated not just in the transport industry, but also in the provision of food delivery and payment services.[27] It follows that it is of utmost importance not to undertake a 'fishing expedition' for information and thereby require the undertakings to utilise considerable resources in sieving through the information provided (and lengthening the investigation), which would in turn impose unnecessary business costs to the detriment of the undertakings and third parties.

20. Another limitation of section 63 notices is that the information obtained can only be directly relied upon in related cases with the express consent of the parties involved. This stems primarily from CCCS's statutory duty to preserve the secrecy of all matters which come to its officers' knowledge in the performance of their duties and functions under the Competition Act.[28] However, CCCS can use the information from RFIs (whether formal or informal) obtained in previous cases on a purely internal basis to enable its officers to draft the section 63 notices for related case in a more tightly-scoped manner or for internal reference, although such information cannot be directly referenced in external documents . For example, in two related cases concerning the food industry, CCCS utilised some information obtained from responses to RFIs in an investigation to reduce the amount of data required in the RFIs issued in a separate notification case. In another case involving the transport industry, CCCS also used information obtained in the course of a notification case to draft its section 63 notices in a related investigation case. It bears mention that the use of information obtained in previous cases by CCCS would also be to the benefit of the parties, as the business costs that they incur would generally increase in tandem with the amount of data sought in a section 63 notice. Be that as it may, if CCCS intends to rely upon information obtained from a separate case in its eventual decision, the information would be requested for again in a fresh section 63 notice, in order to comply with, *inter alia*, the requirements in section 63 and 75(4) of the Competition Act.

21. Finally, as a recipient of a section 63 notice would reasonably know whether or not it is the subject-of-interest in the investigation, third parties who receive RFIs may be reluctant to respond to CCCS, particularly if they are of the view that the matters under investigation do not have a direct impact on them. For example, in a recent merger assessed by CCCS,[29] only 13 of the 114 third party retailers consulted by CCCS responded to the RFIs issued. Although this was in the context of a merger notification and did not involve the exercise of CCCS's formal investigative powers, it is conceivable that third parties who

[26] *CCCS 500/001/18: Infringement Decision on the Sale of Uber's Southeast Asian Business to Grab in consideration of a 27.5% Stake in Grab* (24 September 2018), www.cccs.gov.sg/public-register-and-consultation/public-register-items/uber-grab-merger (accessed 2 November 2018).

[27] Grab/Uber case, at [16].

[28] Section 89 of the Competition Act.

[29] CCS 400/006/17: *Proposed Merger of Essilor International (Compagnie Generale d/Optique) S/A/ and Luxottica Group S.p.A* (12 April 2018), www.cccs.gov.sg/public-register-and-consultation/public-consultation-items/proposed-merger-of-essilor-and-luxottica (accessed 2 November 2018).

receive section 63 notices in the course of notifications may be reluctant to incur business costs to respond to CCCS, and may provide responses that are of limited utility to CCCS.

6. Conclusion

22. CCCS recognises that RFIs, despite their limitations, are a useful tool for obtaining evidence in the course of investigations, particularly where large amounts of data are required, or if such data has to be processed and compiled into a form that is useful for CCCS. CCCS will continue to deploy its investigative tools as appropriate to ensure that anti-competitive conduct in Singapore is brought to light and appropriately penalised.