Interview with Mr Toh Han Li, Assistant Chief Executive (Legal & Enforcement), Competition Commission of Singapore

1. Please give us some background on the Competition Commission of Singapore ("CCS") and the Competition Act.

The Competition Act was enacted on 1 January 2005 but the prohibitions under the Act were rolled out in phases. On 1 January 2006, the prohibitions against anti-competitive agreements (s 34) and abuse of dominance (s 47) came into effect whilst on 1 July 2007, the merger provisions (s 54) came into effect. CCS is constituted as a statutory board under the Act with the power to investigate, conduct market studies, make a finding of an infringement as well as impose directions, commitments and financial penalties.

2. CCS recently imposed a fine on SISTIC of almost S$1 million for abuse of its dominant position, its first case under the s 47 prohibition. On the same day, fines totalling close to S$190,000 were imposed on electrical companies for bid-rigging. Are abuses of dominance considered more serious infringements under s 47 than anti-competitive agreements under s 34 to warrant such a disparity in the amount of fines imposed?

As the SISTIC decision is subject to appeal, it would not be appropriate for me to discuss it specifically here.

Having said that, it would not be meaningful to make a general statement that abuse of dominance (s 47) cases are more serious infringements than cases involving anti-competitive agreements (s 34) as CCS takes a serious stand against all forms of infringements of the Competition Act; and the seriousness of each infringement is case specific. To take an example, all things being equal, if all the cartelists combined in a price-fixing case had a very high market share in the relevant market, the effect of the collusion would be more serious than cartelists with a lower market share. To cite another example, a dominant undertaking whose abusive conduct has resulted in a high degree of foreclosure in the relevant market would be viewed more seriously as opposed to one which resulted in a lower degree of foreclosure, all things being equal.

Section 69(4) of the Act provides that the statutory maximum of a financial penalty which CCS may impose is 10 per cent of the total turnover of the undertaking in Singapore. For example, if CCS determines that the infringement in a particular case is extremely serious, regardless of whether it has infringed s 34 or 47 of the Act, it may impose on that undertaking up to the maximum allowable financial penalty under s 69(4) of the Act. Having said that, the absolute quantum of the financial penalty does not always reflect the seriousness of the infringement. This is because the main factor that determines the quantum of the financial penalty is the relevant turnover (relevant turnover is the undertaking's turnover affected by the anti-competitive conduct) of the infringing undertaking.

In fixing the appropriate amount of financial penalty, CCS also takes into account the seriousness and duration of the infringement, the turnover of the infringing party, aggravating and mitigating factors amongst other considerations. These factors can be found in *CCS' Guidelines on the Appropriate Amount of Penalty* available on our website.

The first competition appeals from the price-fixing Bus Operators case have just have been argued and concluded before the five-person Competition Appeals Board which is chaired by former Judge of Appeal Mr L P Thean. The Board has reserved its decision on the matter and the Board's decision will no doubt be a landmark decision on the setting of fines as it will be the first decision issued by the Board on Singapore's competition law.

3. The bid-rigging decision issued on 4 June 2010 was further to one of the parties to the anti-competitive conduct blowing the whistle. In your view, is the Leniency Program put in place by the CCS starting to bear fruit?

Definitely, as leniency programmes have been found to be very effective in many developed competition law regimes in the detection of cartels. Leniency creates a "race to CCS' door" and the first one in will be granted total immunity subject to various terms and conditions. We hope that as businesses become more aware of the serious implications of being involved in a cartel activity, they will choose to report the activity to CCS as soon as possible to be entitled to the benefits of our leniency programme. More details on our leniency programme can be found in *CCS' Guidelines on Lenient Treatment for Undertakings Coming Forward with Information on Cartel Cases 2009* available on our website.

4. The CCS has no obligation to impose a fine when it rules

that the Competition Act has been infringed. The CCS may, for instance, decide to issue a direction to bring the infringement to an end. To the extent that it is not confidential, what factors do the CCS take into account in deciding whether to impose (or not to impose as the case may be) a financial penalty on a party who participates in an anti-competitive agreement or abuses its dominance?

In imposing any financial penalty, CCS' twin objectives are to reflect the seriousness of the infringement and to deter undertakings from engaging in anti-competitive practices. The assessment of an appropriate penalty to be imposed for all types of infringements will depend on the facts of each case. In particular, CCS will consider the seriousness of the infringement, the turnover of the business of the undertaking in Singapore for the relevant product and relevant geographic markets affected by the infringement in the undertaking's last business year, the duration of the infringement, and other relevant factors such as deterrent value.

Although CCS has exercised its discretion to impose a financial penalty in all cases where an infringement decision has been issued to date, CCS may consider not imposing a financial penalty in wholly exceptional circumstances. In addition to or as an alternative to the imposition of fines, CCS also has the power to impose structural or behavioural remedies or seek commitments in order to remedy the anti-competitive conduct.

Further, CCS may take pre-emptive action to prevent anti-competitive agreements right from the outset instead of issuing an infringement decision and imposing financial penalties on the undertakings if that provides a better outcome. For example, in 2008, CCS prevented a joint price increase agreement between four "*Fa Gao*" manufacturers from taking effect instead of issuing an infringement decision and imposing financial penalties on the manufacturers.

5. In an article published on CCS' website ("Fixing the Problem of Price Fixing", *The Straits Times*), you mentioned that "Fee guidelines are not our general position unless you can put forward a case to demonstrate benefits". What and how are those benefits to be demonstrated? Were you referring in the interview to a need to demonstrate Net Economic Benefit as defined in the Third Schedule to the Act or to something else?

Fee guidelines will be excluded from the Competition Act if they have net economic benefit, as set out in para 9 of the Third Schedule to the Act. In order to benefit from the exclusion, the association who seeks to have the guidelines in place bears the burden of proving that the guidelines contribute to improving production or distribution, or promoting technical or economic progress, but does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives.

If an association wishes to claim that their fee guidelines have such net economic benefits, they can apply to CCS under our Notification regime for Guidance or for a Decision accordingly for our assessment. During the period of assessment by CCS, they will get immunity from financial penalties.

6. Where an association of undertakings such as a trade association issues recommended fee guidelines which are eventually followed by members, couldn't a fair argument be made that this falls under the Vertical Agreement exclusion under the Third Schedule?

In competition law parlance, a "vertical agreement" is typically used to denote agreements between firms up or down the supply chain from one another. Hence, a fee guideline issued by a trade association would fall into the category of "decisions by associations of undertakings" instead of that of an "agreement", thereby excluding the application of the Vertical Agreement exclusion set out in the Third Schedule of the Competition Act.

7. Where fee guidelines were in existence for members of an association and then subsequently withdrawn, practically speaking, the members of such association are likely (for a reasonable time period) to continue to follow the "withdrawn" guidelines for reference purposes. In doing so, are they at risk of breaching Singapore competition law?

Depending on the market structure and the competitive landscape of the industry in question, prices may be sticky and take a while to come down. But the sooner a firm moves towards competitive pricing, the sooner it can compete effectively against its slower competitors. CCS encourages members of an association to set their own prices individually taking into account their own cost structures rather than blindly following a withdrawn guideline.

8. If an association has fee guidelines publicly in place for a long time and is investigated by the CCS, what should it do? Withdraw the guidelines although there might be Net Economic Benefit accruing from these fee guidelines? Temporarily "suspend" the effect of the guidelines pending conclusion of CCS' investigations? Continue to publicise the fee guidelines until the CCS concludes its investigation? In short, what would you recommend to associations which currently and publicly have non-binding fee guidelines in place? And what would you recommend to the members of such association? Is there anything they should do from a practical legal perspective to ensure that they will not fall foul of competition laws?

Generally, price guidelines dampen competition and facilitate price co-ordination. CCS would encourage companies or associations to consider applying to CCS under its Notification regime for Guidance or a Decision on whether any agreement or conduct

is likely to infringe the Competition Act. As for associations already under investigation for their guidelines and who do not think that they are excluded under the Act, they may wish to consider withdrawing the said guidelines in the interim so that it can be taken as a mitigating factor for CCS' consideration in assessing the amount of financial penalty to be imposed should CCS subsequently makes a finding of an infringement against them.

9. Competition law is relatively new in Singapore. How do you see its impact on the legal profession moving forward?

Competition law has been growing at a phenomenal rate in recent years and there are now more than 100 systems of competition law around the world in all types of economies, including India and China, which recently enacted its own competition laws. Malaysia has just passed its own competition law and Hong Kong's competition law is already at the Bill stage.

As a result of its open trade and investment policies, businesses in Singapore have been subject to global competition for decades and are continually striving to strengthen their competitiveness. As such, competition has and continues to be a key tenet of Singapore's economic strategy, and competition law and the effective enforcement of it is a critical component to support this strategy. Although our Competition Act is only five years old, and the legislative framework had been put in place prior to the enactment of our Competition Act for the liberalisation of specific sectors under the supervision of a sectoral regulator such as the telecommunications market, the gas import and retail markets and the electricity retail market, our lawyers would have advised clients on competition issues in these areas. With the advent of the Competition Act, the scope for competition legal advice has widened dramatically.

The reality is that competition law is becoming increasingly transnational in scope, with cross-border cartels or global mergers which impact many different jurisdictions taking place. As such, we are now seeing more and more local and foreign firms being engaged in competition work, where in many cases a foreign firm would instruct a local firm on the matter and the legal team would also include the local, regional or even global in-house counsel of the undertakings concerned.

Moving forward, CCS sees competition law making a bigger impact in Singapore, especially for businesses and consumers, and lawyers will play a key role in advising their clients on the Competition Act.

Gregory Vijayendran*
Rajah & Tann LLP

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Ravindran Associates (Bottom half-pg; repeat SLG March 2010 "woman's face" from Pg 5)