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INDEPENDENCE OF COMPETITION AUTHORITIES - FROM DESIGNS TO PRACTICES

Contribution by Singapore

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INDEPENDENCE OF COMPETITION AUTHORITIES – FROM DESIGNS TO PRACTICES

-- Singapore –

1. Introduction

1. The Competition Commission of Singapore (“CCS”) welcomes the opportunity to provide an overview of its structural framework and share its experience and practice with the OECD Competition Committee at its global forum on the topic of the “*Independence of Competition Authorities*”.

2. In summary, CCS was established as an independent statutory body with the ability to both investigate and adjudicate possible infringements of the Competition Act (Cap. 50B) by businesses including government-linked companies. Decisions of CCS can be appealed on the merits to the Competition Appeal Board and subsequently on points of law to the Singapore High Court. There exists only limited scope for Ministerial direction in relation to CCS’s decisions and to date this has not been exercised.

2. Legal and Structural Framework

2.1 Background

3. CCS is a statutory body¹ established under section 3 of the Competition Act. CCS began operations on 1 January 2005. The need for an independent body to administer and enforce the provisions of the Competition Act was recognised from the outset, so while other models could have been adopted, the need for independence, integrity and impartialness drove the choice of a separately constituted body.² CCS, while under the purview of the Ministry of Trade and Industry (“MTI”), is not a department of nor a policy arm of MTI.³

4. The Competition Act and its subsidiary legislation⁴ are administered and enforced by CCS. The Competition Act was promulgated as a generic law to regulate the conduct of market players. Its objective is to promote the efficient functioning of the markets in Singapore to enhance the competitiveness of Singapore’s economy. To this end, it contains three prohibitions against anti-competitive behaviour; it

¹ A statutory board is established by an Act of Parliament with a separate legal personality from the Government to enable greater independence and flexibility in their operations and performance of functions.

² Competition Bill, Second reading speech, column 911.

³ Competition Bill, Second reading speech, column 911.

⁴ Competition Regulations 2007, Competition (Notification) Regulations 2007, Competition (Financial Penalties) Order 2007, Competition (Fees) Regulations 2007, Competition (Appeals) Regulations, Competition (Composition of Offences) Regulations, Competition (Transitional Provision for Section 34 Prohibition) Regulations and Competition (Block Exemption for Liner Shipping Agreements) Order.

prohibits anti-competitive agreements (“section 34 prohibition”), an abuse of a dominant position (“section 47 prohibition”) and mergers that substantially lessen competition (“section 54 prohibition”).

2.2 Purview of CCS

5. The Competition Act, and hence the purview of CCS, applies to the activities of all businesses whether being an individual, a body corporate, an unincorporated body of persons capable of carrying on commercial or economic activities related to goods or services, save for those activities either exempted or excluded under the Competition Act. This includes private sector entities in all sectors, regardless of whether the undertaking is owned by a foreign entity, a Singapore entity, the Government or a statutory body.⁵ The economic activities of Government linked companies (“GLCs”) are hence within the Competition Act’s purview. GLCs, which were estimated to comprise up to 37% of stock market value on the local bourse from 2008 to 2013⁶, are consequently within the oversight of CCS and CCS has in the past taken enforcement action in relation to anti-competitive conduct by GLCs.⁷

6. The Competition Act does not apply to the government, statutory bodies or persons acting on their behalf as the intent of Singapore’s competition law is to regulate the conduct of market players in the economy⁸ - it is not meant to fetter the discretion or the obligation of the government to make policy and to perform public functions. Other exclusions from the Competition Act are set out in the Third and Fourth Schedules.⁹ The Third Schedule provides for exclusions from the section 34 (anti-competitive agreements) and section 47 (abuse of a dominant position) prohibitions. The Fourth Schedule provides for exclusions from the section 54 (mergers that substantially lessen competition) prohibition.

7. The Competition Act empowers the Minister (Trade) of MTI, to exclude or exempt conduct from the purview of the Competition Act. The Minister may exclude conduct from the section 34 prohibition or section 47 prohibition where he is satisfied that there exist exceptional and compelling reasons of public policy why they should not apply¹⁰ or where he is satisfied that the exclusion is necessary to avoid a conflict with an international obligation of Singapore¹¹. The Minister is also empowered to exclude mergers from the section 54 prohibition where it is in the “public interest”. Public interest is defined as “national or public security, defence and such other considerations as the Minister may, by order

⁵ Competition Bill, Second reading speech, column 866.

⁶ Sim, Thomsen & Yeong, “The State as Shareholder: The Case of Singapore”, Centre for Governance, Institutions & Organizations, NUS Business School Institutions, Final Report, 1 July 2014 at page 6. Figures based on 2008 to 2013 market capitalization data obtained from Bloomberg Professional Services.

⁷ *Re Abuse of a Dominant Position by SISTIC.com Pte. Ltd.* [2010] SGCCS 3, *Re Abuse of a Dominant Position by SISTIC.com Pte. Ltd.* [2012] SGCAB 1, and CCS Media Release, “CCS Investigates Restrictive Industry Practices in the Supply of Lift Spare Parts in HDB Estates”, 14 July 2016.

⁸ Competition Act, section 33(4).

⁹ Conduct can be excluded from the section 34 prohibition where there exist net economic benefits and from the section 54 prohibition where there exist net economic efficiencies. Excluded regulated industries include piped potable water, waste water management, scheduled bus services, rail services, cargo terminal operations, armed security services, media, clearing houses activities, gas, electricity, telecommunications, ordinary letter and postcard services. These specified activities are instead regulated by other bodies such as the Energy Markets Authority, the Monetary Authority of Singapore, and the Info-communications Media Development Authority of Singapore.

¹⁰ Competition Act, Third Schedule, paragraph 4.

¹¹ Competition Act, Third Schedule, paragraph 3.

published in the gazette prescribe).¹² At present, no other public interest considerations have been gazetted. To date, the Minister has not sought exercise his powers to apply public considerations to competition matters.

8. The Minister may, upon a recommendation of the Commission, make an order to exempt certain categories of agreements from the section 34 prohibition (“block exemptions”).¹³ Block exemptions must however meet a net economic benefits test.¹⁴ Currently there exists one such order, the Competition (Block Exemption for Liner Shipping Agreements) Order. This recommendation was made following CCS’s assessment that the economic benefits from liner shipping agreement are significant and enough to outweigh any such possible anti-competitive effects.¹⁵ The current block exemption order will end on 31 December 2020 unless the varied or revoked earlier.¹⁶

2.3 Constitution of CCS

9. The Commission is constituted by a Chairman and between two and sixteen members¹⁷ who are appointed by the Minister for a term of between three and five years.¹⁸ Members are appointed for their ability and experience in industry, commerce or administration or their professional qualifications or their suitability otherwise for appointment.¹⁹ Currently, the Commission consists of twelve members with a diverse range of backgrounds from both the public and private sectors including civil service, business and academia.²⁰

10. Under paragraph 14(3) of the First Schedule to the Competition Act, decisions of the Commission are passed by a simple majority of members being present at any given meeting. However, no less than one half of the members must be present to constitute a quorum.²¹ Commission members are bound by the Competition Act itself to declare any conflicts of interest and recuse themselves where this may occur.²² None of the appointed members are full-time members save for the Chief Executive - each of these members are either retired or hold permanent positions and posts in other organisations or ministries.

¹² Competition Act, section 2(1).

¹³ Competition Act, section 36.

¹⁴ Section 41 provides that section 36 shall apply to agreements which contribute to either improving production or distribution; or promote technical or economic progress, but which does not impose on the undertakings 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 a substantial part of the goods or services in question.

¹⁵ CCS’s response to the public consultation of May 2015 on the proposed recommendation to the Minister on the Competition (Block Exemption for Liner Shipping Agreements) Order.

¹⁶ CCS Media Release “CCS Recommends Extending the Block Exemption Order for Liner Shipping Agreements for another five years”, 25 November 2015.

¹⁷ Competition Act, section 5.

¹⁸ Competition Act, First Schedule, paragraphs 1 and 3.

¹⁹ Competition Act, First Schedule, paragraph 1.

²⁰ <https://www.ccs.gov.sg/about-ccs/organisation-structure/commission-members>

²¹ Competition Act, First Schedule, paragraph 14(1).

²² Competition Act, First Schedule, paragraph 11.

11. The Commission delegates the daily discharge of CCS's duties and functions to its staff. CCS's staff are employed by the Commission.²³ MTI play no role in the selection or recruitment process. CCS currently consists of 62 staff members of which 36 are professional full time staff handling case work.

2.4 Role and functions of CCS

12. The functions and duties of CCS under the Competition Act are broad. Section 6 of the Competition Act provides that CCS shall:

- maintain and enhance efficient market conduct and promote overall productivity, innovation and competitiveness of markets in Singapore;
- eliminate or control practices having adverse effect on competition in Singapore;
- promote and sustain competition in markets in Singapore;
- promote a strong competitive culture and environment throughout the economy in Singapore;
- to act internationally as the national body representative of Singapore in respect of competition matters generally;
- to advise the Government or other public authority on national needs and policies in respect of competition matters generally; and
- to perform such other functions and discharge such other duties as may be conferred on the Commission by or under any other written law.

13. The Minister can give such general directions, not inconsistent with the provisions of this Act, which CCS must give effect to relating to the policy that CCS is to observe in the exercise of its powers, the performance of its functions and the discharge of its duties.²⁴ Although provided for by the Competition Act, no such directions have been given by the Minister to date.

14. The application of the Competition Act has been left to CCS to independently administer and enforce. To guide businesses, CCS published its first set of guidelines in 2005. These Guidelines were subsequently revised in 2007 to include the *CCS Guidelines on the Substantive Assessment of Assessment of Mergers* and the *CCS Guidelines on Merger Procedures*. Following two public consultations in late 2015 and earlier this year on proposed changes to the CCS Guidelines, CCS has now completed the review of its Guidelines. A media release announcing the revised CCS Guidelines was made on 1 November 2016. The revised CCS Guidelines will come into effect on 1 December 2016.

15. For its enforcement role, CCS is given broad powers to investigate, adjudicate and impose sanctions on undertakings that engage in activities that transgress the provisions of the Competition Act. This follows the adoption of the administrative model as Singapore's Competition Act is modelled on the UK Competition Act 1998. While MTI are given notice of any infringement decision via a media release prior to it being made public, this limited notice is given only after the infringement decision has already been made by the Commission.

²³ Competition Act, section 10(3).

²⁴ Competition Act, section 8.

16. CCS independently decides whether or not there is a “reasonable suspicion” that an infringement has occurred and merits investigation, whether an undertaking’s conduct has infringed the Competition Act and what directions to impose on the infringing undertaking including the payment of a financial penalty. CCS does not do so without due process. In built within the Competition Act are various statutory safeguards to ensure the proper exercise of its powers. For example, CCS can only investigate where it has a “reasonable grounds for suspicion” that an infringement has occurred;²⁵ should CCS propose to find an infringement, CCS must give written notice to person(s) likely affected by its decision and provide the opportunity for representations; and any proposed infringement decision must state the facts on which CCS relies and its reasons for a decision²⁶. CCS’s infringement decisions are also subject to appeal before the Competition Appeal Board, the Chairman of whom is a retired High Court Judge.

17. Parties who are dissatisfied with CCS’s infringement decisions have no right of appeal to the Minister save in relation to mergers (either anticipated or completed) insofar as the Parties may apply to the Minister for an exemption from the section 54 prohibition.²⁷ There has only been one instance where merging parties applied to the Minister for a merger to be exempted from the section 54 prohibition on the ground of public interest considerations. In the anticipated merger of *Greif International Holding B.V. & GEP Asia Holding Pte Ltd*²⁸, the Parties sought to argue that their joint venture should be exempted on the grounds of public interest, which they submitted would be the “wider economic progress and public benefits” that the joint venture would generate for the Singapore economy and society at large.²⁹ The Parties’ appeal was rejected by the Minister on the basis that the grounds relied upon by the Parties did not fall within the existing definition of “public interest considerations” set out in paragraph 7 above, which refers to matters of national or public security and defence.³⁰

18. Furthermore in practice, CCS has sought to administer the provisions of the Competition Act in an open and transparent manner. For example, CCS provides detailed reasons for its decisions that can be found on CCS’s public register.³¹

2.5 CCS’s funding

19. CCS obtains its funds for the performance of its functions and discharge of its duties from monies collected under the Competition Act³² or by way of grants allocated by the Parliament.³³ CCS also retains fees paid by businesses who seek guidance or a decision from CCS in relation to whether its conduct

²⁵ Competition Act, section 62.

²⁶ Competition Act, section 68; Competition Regulations 2007, regulation 9.

²⁷ Competition Act, section 57 (anticipated mergers) and section 58 (completed mergers).

²⁸ *Re Proposed Joint Venture between Greif International Holding B.V and GEP Asia Holdings Pte. Ltd. Notification* [2011] SGCCS 15.

²⁹ *Re Proposed Joint Venture between Greif International Holding B.V and GEP Asia Holdings Pte. Ltd. Notification* [2011] SGCCS 15, paragraph 3.4.

³⁰ *Re Proposed Joint Venture between Greif International Holding B.V and GEP Asia Holdings Pte. Ltd. Notification* [2011] SGCCS 15, paragraph 3.6.

³¹ CCS’s Public Register can be found at www.ccs.gov.sg/public-register-and-consultation/public-register.

³² Competition Act, section 13(1).

³³ CCS is required to prepare an annual estimate of income and expenditure, which is sent to the Minister of MTI. Upon approval, CCS is bound by it and the relevant amount will be funded by the Government - Competition Act, section 12.

infringes the Competition Act.³⁴ However, CCS does not retain the financial penalties that it directs infringing undertakings to pay. Where CCS finds an infringement, any financial penalties and interest payable collected by CCS and paid into the Consolidated Fund.³⁵

3. Singapore's Experience

20. Institutional design aside, discussed below are case examples that highlight the independence of CCS, namely the *SISTIC* case³⁶ and the commitments by *EM Services*³⁷. In the *SISTIC* case, CCS issued an infringement Decision (“ID”) against *SISTIC.com Pte. Ltd.* (“*SISTIC*”), a ticketing service provider, for abusing its dominant position in the market for the provision of open ticketing services in Singapore to both event promoters and ticket buyers.³⁸

21. *SISTIC* was set up in 1991 under the Singapore Sports Council, a statutory body, to serve the ticketing needs of the Singapore Indoor Stadium. On 28 July 2000, *SISTIC* was corporatised to provide ticketing services to a wide range of arts, sports and entertainment venues held in Singapore.³⁹ At the time of CCS’s decision, *SISTIC* operated as an independent body but was owned 65% by the Singapore Sports Council and 35% by *The Esplanade Co. Ltd.*⁴⁰

22. Specifically, CCS found *SISTIC* had infringed section 47 of the Competition Act by entering into a series of exclusive agreements that were harmful to competition by restricting the choices of venue operators, event promoters and ticket buyers.

23. The exclusive agreements were with key venues in Singapore such as the Esplanade and Singapore Indoor Stadium, who were required to use *SISTIC* exclusively for its ticketing services. Consequently Event promoters who wish to hold their events at these two venues have no choice but to sell tickets through *SISTIC*. This, together with seventeen other event promoters who were also required to use *SISTIC* exclusively, left ticket buyers with no choice but to buy tickets through *SISTIC* as well. The exclusive agreements are detailed below:

- The Application Service and Ticketing Agreement (“*ASTA*”) between *SISTIC* and *The Esplanade Co. Ltd* (“*TECL*”) which contains explicit restrictions requiring that all events held at the Esplanade venues use *SISTIC* as the sole ticketing service provider;

³⁴ For example, fees paid by undertakings who notify conduct to CCS seeking a decision or guidance on the application of sections 34 or 47 are retained by CCS. Likewise any fees paid for notifying CCS to seek a decision on whether a merger has infringed section 54 are retained by CCS.

³⁵ Competition Act, section 13(2). The Consolidated Fund is a fund established under Article 145 of Constitution of the Republic of Singapore into which all revenues of Singapore not allocated to specific purposes by any written law shall be paid.

³⁶ *Re Abuse of a Dominant Position by SISTIC.com Pte. Ltd.* [2010] SGCCS 3 (“*SISTIC Decision*”) and *Re Abuse of a Dominant Position by SISTIC.com Pte. Ltd.* [2012] SGCAB 1.

³⁷ CCS Media Release, “CCS Investigates Restrictive Industry Practices in the Supply of Lift Spare Parts in HDB Estates”, 14 July 2016.

³⁸ *SISTIC Decision*, paragraph 5.8.1.

³⁹ *SISTIC Decision*, paragraph 2.2.1.

⁴⁰ *SISTIC Decision*, paragraph 2.2.2.

- The Agreement for Ticketing Services (“ATS”) between SISTIC and Singapore Sports Council (“SSC”) which contains explicit restrictions requiring that all events held at the Singapore Indoor Stadium (“SIS”) use SISTIC as the sole ticketing service provider; and
- Seventeen other agreements that contain explicit restrictions requiring the event promoters concerned to use SISTIC as the sole ticketing service provider for all their events.

24. CCS directed SISTIC to modify the Exclusive Agreements with immediate effect, to remove any clause(s) that require SISTIC’s contractual partners to use SISTIC exclusively and imposed a financial penalty of \$989,000. While the CAB upheld CCS’s finding of liability, it reduced the financial penalty to S\$769,000 for infringing section 47 of the Competition Act.⁴¹

25. Another case example is CCS’s investigation into restrictive industry practices in the supply of lift spare parts in estates developed by the Housing and Development Board (a statutory body), whereby several companies refused to supply lift spare parts to third-party lift maintenance contractors.⁴² Following CCS’s action, EM services, which is a joint venture between the Housing Development Board and Keppel Land Limited⁴³ came forward to provide commitments to address the competition concerns raised by CCS.

4. Conclusion

26. In this paper, we have provided an overview of CCS’s institutional framework and design and set out how these have in practice been applied with case examples. CCS, while a relatively young institution, has established robust processes to ensure its independence, integrity and impartialness in discharging its responsibilities which contribute to the enhanced functioning of Singapore’s economy.

⁴¹ *Re Abuse of a Dominant Position by SISTIC.com Pte. Ltd.* [2012] SGCA 1, paragraph 356.

⁴² CCS Media Release, “CCS Investigates Restrictive Industry Practices in the Supply of Lift Spare Parts in HDB Estates”, 14 July 2016.

⁴³ <http://www.emservices.com.sg/em/about-us.aspx>