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COMMITMENT DECISIONS IN ANTITRUST CASES

-- Note by Singapore --

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This document reproduces a written contribution from Singapore submitted for Item 9 of the 125th meeting of the OECD Competition Committee on 15-17 June 2016.

More documents related to this discussion can be found at www.oecd.org/daf/competition/commitment-decisions-in-antitrust-cases.htm

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SINGAPORE

1. Introduction

1. The Competition Commission of Singapore ("CCS") welcomes the opportunity to share its experience with the OECD Competition Committee at its roundtable on "*Commitment Decisions in Antitrust Cases*" at the 125th meeting of the Competition Committee.

2. As noted by the OECD Secretariat, there has been a significant increase in the reliance on commitment decisions to close non-cartel antitrust investigations in recent years[1]. This paper provides an overview of the framework and practice on the use of commitment decisions in Singapore, and also seeks to provide some underlying reasons for the increasing use of such tools by competition authorities like CCS.

3. As the terminology varies across different jurisdictions, OECD has provided a broad definition of 'commitment decisions' as any negotiated remedies offered by the parties to an antitrust proceeding, and accepted by the competition authority to resolve cases raising anti-competitive concerns[2]. Based on this definition, commitment decisions in Singapore have taken the forms of legally binding commitments, non-binding undertakings and re-filing of notifications with amended scope.

4. In terms of the types of cases, OECD noted that commitment decisions are typically adopted in investigations for alleged abuses of a dominant position and investigations of vertical anti-competitive agreements[3]. In this regard, however, Singapore has adopted commitment decisions on all types of cases[4], including horizontal agreements, abuse of dominance and mergers. Readers may refer to the case statistics below for more details.

2. Legal power to adopt commitment decisions in Singapore

5. In Singapore, CCS is empowered to accept legally binding commitments only for merger cases. Section 60A of the Competition Act sets out the mechanism for CCS to accept a commitment from merging parties; section 60B provides for a clearance decision on a merger to be issued upon acceptance of a commitment; and section 85 sets out the mechanism for enforcing a merger commitment via the District Court[5]. The practical significance is that, when a legally binding commitment is breached, enforcement action can be taken directly against the breach.

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1 DAF/COMP(2016)7 OECD Directorate for Financial and Enterprise Affairs, Competition Committee, Commitment Decisions in Antitrust Cases, Background paper by the Secretariat, 30 March 2016 (the OECD Background Paper) at Paragraph 3.

2 Ditto, at Paragraph 1.

3 OECD Background Paper, at Paragraph 1.

4 Expect for vertical agreements which are excluded from the application of the provision against anticompetitive agreements under section 34 of the Competition Act (Cap.50B), by virtue of the Third Schedule of the Competition Act.

5 Once a merger commitment is registered in the District Court, the commitment has the same force and effect as if it had been an order originally obtained in the District Court and the District Court shall have the power to enforce it accordingly.

In the *ADB/Safegate* merger[6] , the merged entity would have a market share of more than 80% in the supply of airfield lighting systems in Singapore. In response to competition concerns raised by CCS, ADB offered commitments pertaining to 'price formula', 'obligation to supply', 'no exclusives', 'honour existing contracts' and 'submit audit report'. The merged was cleared on these conditions, pursuant to section 60A and 60B of the Competition Act.

6. For other types of antitrust cases, including anti-competitive agreements and abuses of dominance, no equivalent powers exist under the Competition Act for CCS to accept legally binding commitments. However, parties under investigation in such cases may still offer non-binding undertakings, which CCS may accept. More precisely, CCS may close an investigation on the ground that the undertaking addresses the competition concerns. The main difference between binding commitments and non-binding undertakings is that, when a non-binding undertaking is breached, CCS would need to re-open an investigation and prove an antitrust infringement, as opposed to enforcing directly against the breach of a binding commitment. Such a re-investigation would be conducted on the basis of a material change of circumstance arising from the breach of the non-binding undertaking[7].

In the *Coca-Cola* case[8], CCS conducted an investigation against a potential abuse of dominance in relation to exclusivities and conditional rebates in Coca-Cola's supply agreements with retailers. Coca-Cola removed these clauses from its supply agreements, and gave non-binding undertakings to CCS not to impose exclusivities, loyalty-inducing rebates or right of first refusal, and to open up to 20% of space of its coolers provided to retailers for storage of other beverages. CCS ceased its investigation after taking these undertakings into consideration.

7. There is a third type of commitment decisions for prospective conduct with a good faith intention[9] to be carried into effect. In Singapore, such conduct may be notified to CCS for decision or guidance[10]. Where CCS expresses a competition concern, the parties may choose to re-file the notification with an amended scope of conduct that seeks to address the concern identified by CCS. Where the amended scope of the conduct does not give rise to competition concerns, CCS may issue a clearance decision or guidance, thus granting antitrust immunity on the amended scope of the conduct. In the event of a 'breach', i.e. the parties carry out the conduct beyond the notified scope, CCS may open a fresh investigation against the actual conduct, which does not benefit from immunity[11]. Considering that a notification is voluntary, and that a full antitrust investigation is needed to deal with a breach, this form of 'commitment' should also be classified as non-binding.

In *the Cebu Air/Tigerair* case [12], CCS identified competition concerns in relation to the parties' agreement to jointly operate their passenger air transport services in the Singapore-Clark and Singapore-Cebu routes. After deliberation, the parties revised their agreement to reduce the level of cooperation along these routes from a 'metal neutral' basis to an 'interline' basis. CCS cleared the revised notification.

6 CCS 400/003/15.

7 Section 45(2)(a), 46(2)(a), 52(2)(a), 53(2)(a) of the Competition Act.

8 CCS media release , Coca-Cola Singapore Beverages changes business practices in local soft drinks market following enquiry by CCS, 10 January 2013.

9 Such as a concluded agreement to be implemented on a specified date, subject to CCS approval.

10 Section 43, 44, 50, 51 of the Competition Act.

11 For guidances, even CCS's opinion is non-binding, and accordingly, antitrust immunity does not apply in the first instance, whether to the prospective or actual conduct.

12 CCS 400/009/14

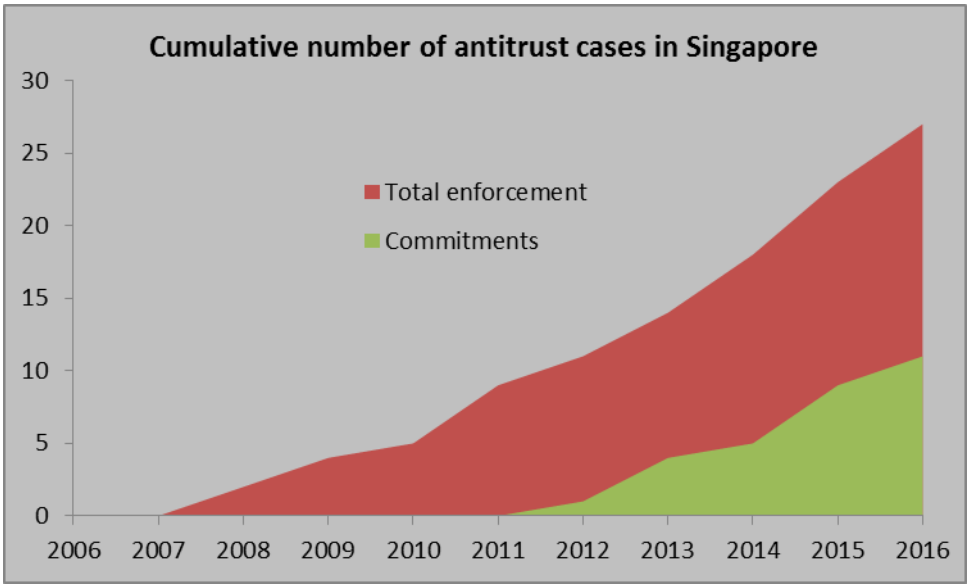
8. It should be noted that the offering of commitments by the parties is always voluntary for all the above forms of commitments, including binding ones for mergers, non-binding ones for anticompetitive agreements and abuse of dominance, as well as amendment of scope for prospective conduct in good faith.

3. Case statistics for commitment decisions in Singapore

9. Since the Competition Act came into force in 2006, CCS has adopted 11 commitment decisions to date, out of 28 enforcement cases[13], or 39% of total. This compares to 23% in the European Union (EU)[14]. 6 out of 11 of the commitment decisions came from abuse of dominance cases, two from mergers and the remaining three from horizontal agreements. Commitment decisions account for 86% of abuse of dominance cases, 40% of merger cases and 16% of horizontal agreement cases.

Type of enforcement cases	Number of commitment decisions	Total	Percentage
Horizontal agreements	3	16	19%
Abuses of dominance	6	7	86%
Mergers	2	5	40%
Overall	11	28	39%

10. From a historical perspective, CCS adopted the first commitment decision in 2012, four years after its first enforcement case in 2008. Since then, the number of commitment decisions has grown broadly in proportion to the number of enforcement cases. There was a spike in 2015, during which 4 out of 5 enforcement cases were commitment decisions.



11. Of the 15 commitments[15] accepted by CCS to date, only one of which was structural (divestment), with the rest being behavioural. The most common form of behavioural commitment was 'no exclusives' (six commitments). There were two 'price formulae' and one 'minimum capacity' commitments. Two other commitments involved 'obligations to supply'. Other forms included 'unbundling', 'reduced cooperation' and 'void non-compete'.

13 An enforcement case is defined as an infringement decision, a commitment decision, an unfavourable decision or guidance for notifications, or a withdrawal of notification upon concerns expressed by CCS.

14 The OECD Background Paper, Paragraph 15.

15 Some commitment decisions involved more than one commitment.

12. A diverse range of industries were involved in the 11 commitment decisions. The only sectors with multiple cases were aviation (three[16]) and food & beverage (three[17]). From a broader perspective, four cases involved 'network industries' – airlines, payment system and job portal[18]. Functionally, two cases involved 'aftermarkets'[19]. There has only been one case involving the online/digital sector[20], unlike in the EU where an uptrend has been observed in recent years[21].

13. So far, CCS has not encountered any breach of binding or non-binding commitments.

4. Substantive assessment for adopting commitment decisions in Singapore

14. In considering whether to adopt a commitment decision, the first important issue is to identify a suitable case for commitments. In general, cases under effects-based assessment (or the rule of reason) are more likely to be suitable, for two main reasons. First, the business practices involved are often controversial, and require complex legal and economic analysis to determine whether the law is infringed. This implies a lengthy process of investigation (and possibly litigation), which can be avoided by adopting a commitment decision, resulting in substantial cost savings for both the parties and the authority, as well as significant benefits to the market due to an earlier resolution of the competition issues. Second, such business practices often cause both harm and benefits at the same time. While the authority may conclude that the harm outweighs the benefits, it may not be able to achieve the best outcome using a straightforward cease-and-desist order coupled with penalties, and may not have the information or knowledge to design effective remedies. A more sophisticated solution may be needed in order to rectify the harm while preserving the benefits. Commitment is often a good way of extracting such a solution from the parties.

15. Traditionally, horizontal agreement cases, especially hardcore cartels, are seldom regarded as suitable for commitments, given the obviously harmful nature of the conduct, clarity of evidence

16 Emirates/Qantas (CCS/400/006/12), Cebu/Tiger (CCS 400/009/14) and ADB/Safegate (CCS 400/003/15)

17 Coca Cola (10 January 2013), Fraser & Neave (4 November 2013) and Asia Pacific Breweries (28 October 2015)

18 Emirates/Qantas, Cebu/Tiger, SEEK/Jobstreet and an undisclosed case on payment systems.

19 ADB/Safegate and E M Services.

20 SEEK/Jobstreet

21 OECD Background Paper, paragraph 17.

and lack of efficiencies. This may not be true in the modern business world, where sophisticated modes of horizontal cooperation between competitors have emerged. One good example is a 'metal-neutral alliance'[22] in the aviation industry, which involves complete alignment of prices between the partner airlines who would otherwise be competitors. However, it is also demonstrable that such alignment of prices creates incentives to generate efficiencies, such as improving the scheduling and connectivity of flights. In such cases, adopting a commitment decision allows efficiencies to be reaped while mitigating the harm on competition, vis-à-vis strict enforcement which would negate both harm and benefits. In Singapore, it is not a coincidence that two out of three commitment decisions on horizontal agreements involved metal-neutral aviation alliances[23].

In the *Emirates/Qantas* case, CCS identified competition concerns over the price and capacity coordination of passenger flight services between the parties on the Singapore-Melbourne and Singapore-Brisbane routes. To address these concerns, the parties provided a voluntary undertaking pertaining to a set of capacity commitments. CCS cleared the alliance on condition of these commitments. The alliance resulted in an increase in seat capacity along these two routes, which would not otherwise be realisable if CCS prohibited the alliance altogether.

16. On a related note, the conventional wisdom that structural remedies are preferable over behavioural ones[24] needs to be contextualized in each specific economic setting. While structural remedies are clear-cut, one-off, more easily enforceable and do not require ongoing monitoring, they neutralise both the harm and the benefits, as opposed to behavioural remedies which may allow benefits to be realised without causing harm. This is particularly important for a small economy like Singapore, where a general lack of minimal efficient scale calls for a competition policy with tighter conduct rules and more permissive structure rules[25]. This may explain why Singapore has accepted more behavioural remedies than structural ones.

17. When a commitment is offered by the parties, CCS typically considers whether the commitment is sufficient to address the competition concerns identified. CCS also considers whether the commitment can be effectively and readily implemented, as well as whether it is easy to monitor. Further, the commitment must not give rise to new competition concerns. Ideally, the commitment should be proportionate to the competition concern it addresses. However, given that the commitment is volunteered by the parties who possess better information on the practicalities and costs associated, CCS is not averse to a commitment that goes beyond what is minimally necessary, so long as it is the preference of the parties, implementable, sufficient to address competition concerns, and does not give rise to new competition concerns.

In the *SEEK/Jobstreet* merger, CCS found that the merging parties are the closest competitors to each other, and therefore the merger would lead to price increases and/or exclusive contracts in the market of online recruitment services. In response, the parties offered two behavioural commitments, pertaining to 'price formula' and 'no exclusives' respectively, which CCS determined to be sufficient in addressing the respective competition concerns. During market testing, a peripheral issue was revealed in relation to SEEK's ownership of an online recruitment aggregator. The merging parties offered to divest this business to resolve the matter swiftly. CCS assessed and concluded that the divestment was sufficient to address any competition concern, but did not go further to consider if it was more than necessary. CCS cleared the merger upon accepting the above commitments.

22 ICAO Air Transport Regulation Panel 13th Meeting, Competition in International Air Transport, Paper by the Secretariat, 1-4 September 2015, paragraph 3.9

23 Emirates/Qantas and Cebu/Tiger.

24 OECD Background Paper, paragraph 20

25 Competition Policy for Small Market Economies, Michal S. Gal (2003)

5. Procedures for adopting commitment decisions in Singapore

18. Since commitments are offered by the parties on a voluntary basis, the process should be initiated by the parties. Technically, CCS is not in a position to ask for a commitment. In practice, however, CCS does remind the parties on suitable occasions that such avenues are available for offering commitments. For example, when a merger case proceeds to Phase 2 review[26], CCS typically sends an 'issues letter' to the parties to communicate the competition concerns identified. The parties are often reminded of the option of offering commitments at this juncture. As the legal practitioners become more experienced over time, the parties also become increasingly aware of such an option.

19. In Singapore, a commitment may be offered at any stage of a case proceeding before an infringement or prohibition decision is issued. It may take place during a preliminary enquiry, an investigation, a Phase 1 or Phase 2 merger review, after a notification, or even after a provisional decision. In practice, in all 11 commitment decisions taken by CCS, the commitments were offered by the parties during the 'middle phase', i.e. after some 'escalation'[27] by CCS but before a provisional decision. This can be considered as the 'sweet spot' for offering commitments, because at an earlier stage, CCS might not have identified specific competition concerns for the parties to address, while at an advanced stage, the incremental benefits of accepting commitments vis-à-vis taking enforcement actions might be limited. On average, the median time taken between an escalation by CCS and a commitment offered by the parties has been 8 months[28].

20. As in the case of all enforcement actions of CCS, the authority to make a decision to accept a commitment rests with the Commission[29], which is currently a board of nine members. Before accepting a commitment, CCS usually conducts a 'market testing' to solicit industry and/or public feedback on whether the commitment offer would likely be sufficient in addressing the competition concerns. This applies to both binding and non-binding commitments. CCS would not market-test an offer unless it is satisfied that the commitment has a reasonable prospect of addressing competition concerns sufficiently. In practice, this is often an iterative process involving multiple rounds of discussion and modification before an offer is eventually market-tested.

> In the *E M Services* case, CCS investigated a potential abuse of dominance in relation to a refusal to supply spare parts to third-party providers of lift maintenance services in Singapore. In response, E M Services offered a commitment to supply all its lift spare parts to third parties. CCS conducted market testing in February 2016 before concluding that the commitment was sufficient to resolve the competition issues, and has ceased its investigation as of May 2016.

21. Where CCS decides to accept a binding commitment, it issues a conditional clearance decision upon the implementation of the commitment. For accepting non-binding undertakings, CCS will close the antitrust investigation after considering the undertaking. An important legal consequence is that in both scenarios, the opportunity for private actions is closed. In Singapore, private actions are 'follow-on' only, which means that they can only be taken against an infringement of the substantive provisions of the Competition Act[30]. Since the acceptance of a commitment does not lead to an infringement decision, no private action can be taken. While it remains open for an aggrieved party to apply for judicial review against the no-infringement/clearance decision by CCS,

26 CCS Guidelines on Merger Procedures, Paragraph 2.8

27 'Escalation' includes launching an investigation after a preliminary enquiry, moving a merger review from Phase 1 to Phase 2, sending an issues letter to the parties expressing competition concerns, or verbally communicating competition concerns to the parties at a state-of-play meeting.

28 The mean time is longer at 12 months due to a few outliers.

29 Section 5 of the Competition Act

30 Section 86 of the Competition Act

the hurdle for taking private actions does reduce the deterrence value of commitment decisions in Singapore.

22. A commitment decision is also of lower precedent value, as compared to an infringement/prohibition decision where the full grounds of decision are published[31] and subject to full-merit appeal in front of the Competition Appeal Board[32] as well as appeals on points of law in front of the appellant courts. To mitigate this concern, CCS has endeavoured to make the process as transparent as possible: market tests are conducted publicly; decisions are publicised by a media release containing the reasons for accepting a commitment; and the content of the undertaking is often published, subject to commercial confidentiality.

23. In terms of monitoring, CCS sometimes requires that the parties appoint an auditor, at their expense, to produce regular compliance reports for CCS. However, CCS has been conscious of the need to help businesses reduce their regulatory costs.

In the *Emirates/Qantas* case, CCS accepted the appointment of the same auditor to audit the respective commitments offered to the Australian Competition and Consumer Commission (ACCC) and CCS, even though the auditing process conformed to the Australian standards rather than the Singapore standards.

6. Commitments and Remedies Unit (CRU)

24. In 2013, driven by operational needs, CCS established the CRU, which is an internal functional body comprising lawyers, economists and business professionals across different divisions of CCS with experience in antitrust investigations. The scope of work for CRU includes building capabilities for CCS to deal with commitments, keeping track of international best practices on commitments, formalising principles and work processes for evaluating commitments, advising or participating in case teams where commitments are involved, as well as monitoring the compliance of accepted commitments.

25. Since the establishment of the CRU, CCS has adopted eight commitment decisions. In 2015, a set of internal procedures was implemented, and the CRU was formally introduced to the law practitioners in Singapore at the CCS Legal Roundtable. In 2016, the work plan of CRU includes formalising the framework and procedures for market testing to ensure consistency, as well as staff training on negotiation skills.

7. Conclusion and way forward

26. In this paper, we have provided an overview of CCS's framework, principles and processes on commitment decisions. We have also reviewed the benefits and risks in adopting commitment decisions, shared CCS's practical experience and explained the rationale for various positions taken. Since CCS is still a relatively young agency, this area of work will continue to evolve. One obvious drawback of the current system is the lack of legal power to accept binding commitments for anticompetitive agreements and abuses of dominance. It is plausible that this gap be plugged via legislative amendment in the foreseeable future.

[31] Section 68 of the Competition Act.

[32] Section 72 of the Competition Act.