Competition & Antitrust and Trade

Trends in Cartel Enforcement in Singapore

Introduction

Enforcement against cartels has been relatively quiet as of late, with the number of leniency applications and cartel decisions worldwide having declined in 2020 as compared to 2015. The Organisation for Economic Co-operation and Development ("**OECD**"), in its OECD Competition Trends Report 2022, posits that the COVID-19 pandemic could have dented enforcement due to government intervention and limited competition authority resources, although it is not possible to determine the pandemic's precise impact. The pandemic had also resulted in some jurisdictions withholding or delaying the imposition of cartel fines to preserve the viability of businesses.

However, with the world gradually adapting to the 'new normal' and the removal of pandemic-era restrictions, competition authorities worldwide, including the Competition and Consumer Commission of Singapore ("**CCCS**"), are looking at cartel enforcement with a renewed interest.

It is therefore critical for businesses in Singapore to be alert to possible infringements under Singapore's competition laws and review their business practices accordingly. This is particularly since the trend in CCCS's cartel enforcement prior to the pandemic demonstrate its increasingly strict stance and stiff penalties for infringing businesses.

This Update highlights the trends in CCCS's cartel enforcement with reference to case statistics, and provides practical pointers for businesses to consider.

Overview of the Section 34 Prohibition

In Singapore, Section 34 of the Competition Act 2004 (the "**Act**") prohibits agreements, decisions and practices that have the object or effect of preventing, restricting or distorting competition within Singapore (the "**Section 34 Prohibition**"). This includes the prohibition of cartel activities, which are agreements between competitors that have the object of preventing, restricting or distorting competition, such as price-fixing, bid-rigging, market sharing agreements and agreements to limit output or control production/investment.

Cartel agreements are viewed by CCCS as the most serious type of infringement of the Section 34 Prohibition, as they restrict or remove competition between competitors in the market by their very nature.

Therefore, unlike other agreements between business entities which may be assessed to be anti-competitive only where the market shares of the parties to the agreement exceed certain thresholds, CCCS will find that all entities in a cartel agreement have infringed the Act, regardless of their market shares and their effect on competition (e.g. whether the agreement was eventually implemented). The base penalty for cartel infringements is also set at a higher level, given that they are regarded as serious infringement of the Section 34 Prohibition.

Section 34 investigations may be initiated by CCCS on its own initiative (e.g. through CCCS's market monitoring efforts or third party complaints), or pursuant to a leniency application from one of the participating cartelists.

When CCCS has reasonable grounds for suspecting that cartel activities have been or are being carried out, it has substantial investigative powers that it may exercise, such as the power to require people to provide CCCS with information/documents that are relevant to the investigation, and the power to enter premises with/without a warrant. Several of the Section 34 cases involved CCCS conducting unannounced inspections at the parties' places of business (i.e. dawn raids) to obtain information and documents for its investigations.

Caseload and Nature of Section 34 Infringement Decisions

In terms of numbers, since the establishment of CCCS on 1 January 2005, CCCS has published 16 infringement decisions relating to the Section 34 Prohibition. The bulk of these cases involved price fixing, bid-rigging and anti-competitive information exchange.

Financial Penalties

In the event of an infringement of the Section 34 Prohibition, CCCS may impose substantial financial penalties of up to 10% of the turnover of the infringing party in Singapore for each year of infringement, up to a maximum of three years. To date, CCCS has imposed a total of S$59.4 million in financial penalties on parties found to infringe the Section 34 Prohibition. Aside from financial penalties, CCCS also has the power to issue directions requiring infringing parties to stop or modify the activity or conduct.

In determining the quantum of financial penalties, CCCS takes into account the relevant turnovers of the infringing parties, the nature, duration and seriousness of the infringement, mitigating and aggravating factors, as well as representations made by the parties. Examples of mitigating factors include, *inter alia*, the cooperativeness of infringing parties with the investigation, and whether the parties had adequate competition compliance measures in place during the period of infringement. Examples of aggravating factors include, *inter alia*, the infringing party being the leader or instigator of the cartel, and the same infringement being repeated by the same undertaking or other undertakings in the same group.

An important point to note is that CCCS has become increasingly aggressive in its imposition of penalties for anti-competitive conduct, including cartel cases. In 2018, CCCS had issued its largest financial penalty to date – S$26.9 million (reduced to S$20.1 million upon appeal) – against fresh chicken distributors who had agreed to fix prices and not to compete for each other's customers in the market for the supply of fresh chicken products in Singapore for a seven-year period. In the same year, CCCS had also issued the second largest financial penalty to date (S$19.6 million) against an international cartel involving capacitor manufacturers who had agreed to fix prices for Aluminum Electrolytic Capacitors ("**AECs**") and had exchanged sensitive commercial information in relation to AECs amongst themselves.

Appeal

If businesses are not satisfied with CCCS's decision, the infringing parties have the right to appeal against it to the Competition Appeal Board ("**CAB**"). The appeal may be against liability or the quantum of financial penalties payable. Infringing parties can also appeal against a decision of CAB to the High Court and subsequently to the Court of Appeal on a point of law, or as to the amount of a financial penalty.

To date, CAB has reviewed appeals relating to seven CCCS infringement decisions involving the Section 34 Prohibition. Most of these appeals had only succeeded in reducing the amount of penalty payable by the infringing parties. The only one case where an appeal against CCCS's decision on liability was allowed (albeit partially) was the chicken cartel case referred to above, in which our team had represented one of the parties on appeal.

Leniency

To incentivise infringing parties to admit to their anti-competitive behaviour, CCCS operates a leniency programme. Leniency is available in respect of agreements which, by their object, prevent, restrict or distort competition within Singapore.

Under the leniency programme, if an undertaking is part of a cartel and is the first to notify CCCS, it will be entitled to immunity from financial penalties (if CCCS has not commenced investigations) or a reduction of up to 100% of the financial penalties (if CCCS has already commenced investigations), subject to relevant criteria being met. Subsequent leniency applicants which are not first in line may also be granted a reduction of up to 50% in the amount of the financial penalty.

The leniency programme has proven to be an important tool in CCCS's enforcement of the Section 34 Prohibition. It enables CCCS to uncover the existence of cartels while providing CCCS with strong evidence of the infringement from the cartel participants themselves. CCCS had published in its FY2020/21 Annual Report that it had handled 33 leniency cases as of 31 March 2021, and had seen an increase in the number of leniency cases between FY2017 to FY2020. The leniency programme has

led to the issuance of infringement decisions and the impositions of financial penalties in nine out of 16 (i.e. more than 50%) of CCCS's Section 34 infringement decisions.

Note that confidentiality waiver clauses in leniency programmes have enabled competition authorities worldwide to exchange information and uncover large worldwide cartels. For example, in Singapore, when an infringing party participates in CCCS's leniency programme, they are required to waive confidentiality in respect of any jurisdiction where the applicant has also applied for leniency or any other regulatory authority which it has informed of the conduct.

Fast Track Procedure

Under the Fast Track Procedure, parties who admit liability for their infringement of the Act will be eligible for a 10% reduction in the amount of financial penalty that would otherwise be imposed. This procedure is distinct from making voluntary commitments and the leniency programme. If a leniency applicant undergoes the Fast Track Procedure, it can benefit from the discounts of the Fast Track Procedure in addition to the discounts on penalties that it would be entitled to as a successful leniency applicant.

When determining whether a case is suitable for the Fast Track Procedure, CCCS considers a variety of factors including the number of parties involved in the investigation, the number of parties who have proactively indicated their willingness to engage in a fast track discussion, foreseeable divergences in the parties' relative positions, possibility of parties' contradicting positions regarding the attribution of liability, as well as the predicted margin for argument and extent to which facts may be contested. The Fast Track Procedure cannot be initiated by CCCS after an infringement decision has been issued.

Since the inception of the Fast Track Procedure in December 2016, there has only been one published case where the procedure was applied. In this case involving bid rigging in tenders for maintenance services of swimming pools and other water features, two out of the three parties benefited from an additional 10% reduction in financial penalties as a result of their admissions to the infringing conduct and their cooperation with CCCS's investigations under the Fast Track Procedure, in addition to their leniency discounts.

Length of Investigation

For the 16 Section 34 infringement cases, the average length of investigation (from commencement of formal investigations to the issuance of CCCS's infringement decision) was 34.25 months. Notably, the length of investigations appears to have increased as compared to the past – the average duration of investigation for infringement decisions issued in the last 5 years (from 2016 to date) was 45.6 months compared to 25.4 months for infringement decisions issued before 2016.

Whilst this is only a general trend and the length of investigation will vary on a case-by-case basis depending on *inter alia*, the number of parties involved, the availability of evidence depending on whether there was a leniency applicant and the duration of the infringement, a longer investigation

period would mean, all else equal, that CCCS' investigations are increasingly demanding and potentially disruptive to businesses under investigation.

Scope of Liability for Infringement

The Section 34 Prohibition is extraterritorial in scope, and will apply to agreements made outside Singapore or where parties to the agreement are outside Singapore, as long as the agreement has the object or effect of preventing, restricting or distorting competition within Singapore. This has been reflected in CCCS's decisions, with CCCS having prosecuted three cartels involving foreign jurisdictions. For example, in 2018, during the investigation process against manufacturers of AECs who were involved in an international price-fixing and information exchange cartel, CCCS had exchanges with and cooperated with the competition authorities of the United States, European Union, Japan and Taiwan.

In addition, liability under the Section 34 Prohibition can be attributed to all entities that make up a Single Economic Entity ("**SEE**") (e.g. a parent and its subsidiary company will make up a SEE if the subsidiary has no real freedom to determine its course of action in the market and, although having a separate legal personality, enjoys no economic independence). In past cases, CCCS has taken the position that a parent can be liable for conduct of the subsidiary even where the parent did not participate in the infringement when the presumption of an SEE arises or where the parent exercises "decisive influence" over the subsidiary. Conversely, when an foreign parent is involved in cartel conduct, even if the Singapore subsidiary which implemented the agreement had no knowledge of the cartel conduct, CCCS has taken the position that the anti-competitive agreements are carried out by the parent and Singapore subsidiary acting as a SEE, and found both parent and subsidiary to be liable for the infringing conduct. Such position was taken in CCCS's 2014 cartel decision involving freight forwarders, for example. Where such attribution occurs, the quantum of penalties can be much higher, since CCCS will impose financial penalties based on a percentage of the turnover in Singapore of both the foreign parent and the local subsidiary.

Practical Pointers for Businesses

The strict enforcement by CCCS against cartels reflects CCCS's increasingly zero-tolerance approach against cartel conduct. Businesses found to have infringed the Section 34 Prohibition by participating in cartel agreements are likely to incur sizeable financial penalties, particularly given the general upward trend in the quantum of penalties imposed. Therefore, businesses should be cautious of any discussions or exchanges with competitors (including at trade association meetings) and routinely self-assess whether their conduct will raise any competition concerns.

In doing so, businesses may refer to the Business Collaboration Guidance Note ("**Guidance Note**") issued by CCCS in December 2021 on the assessment factors that CCCS would generally consider in determining whether a collaboration complies with Section 34 of the Act. The Guidance Note covers seven common types of business collaborations that businesses and trade associations should look out for and provides guidance on when competition concerns are less likely to arise. If in doubt as to whether

an agreement infringes the Section 34 Prohibition, businesses may obtain independent legal advice or apply to CCCS for guidance or decision. The additional guidance issued by CCCS in this respect also makes it more difficult for infringing businesses to plead ignorance.

To further protect themselves, it is also critical for businesses to put in place a competition compliance programme to ensure that management and employees have the requisite knowledge of competition law to identify and avoid potentially problematic conduct. In the case of cartels, early detection is crucial if the business is to benefit fully from the leniency programme, which as mentioned can offer up to 100% immunity from financial penalties. The existence of a competition compliance programme may also be viewed by CCCS as a mitigating factor when calculating financial penalties if CCCS deems it to be effective.

Given the prevalence of dawn raids for cartel investigations, it is also important for businesses to have a dawn raid protocol in place so that employees are well-prepared and know the steps to take (e.g. who to call, what CCCS officers can do, what information they are obligated to provide, etc) if they are faced with an unannounced inspection from CCCS.

Should you have any concerns in relation to cartels or competition law in general, please feel free to reach out to our team below.

To learn more about the trends in cartel enforcement in Singapore and the region, we invite you to join us at the Rajah & Tann Asia 9th Regional Competition Conference taking place on 14 September 2022 in Singapore, where our competition law experts from across Southeast Asia will discuss competition enforcement trends. To register, please click here.

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