Client Update
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Competition & Antitrust

Singapore Competition Appeal Board Reduces Financial Penalties Imposed On Modelling Agencies

Introduction

On 22 April 2013, the Singapore Competition Appeal Board ("**CAB**") published its decision in two appeals made against a decision by the Competition Commission of Singapore ("**CCS**") that a number of modelling agencies had fixed the rates of various modelling services between 2005 and 2009, and to impose financial penalties on the participating modelling agencies. In this Update, we provide you with a brief overview of the issues raised in the appeals and some thoughts on the implications for Singapore businesses.

Background To The Appeals

On 23 November 2011, the CCS issued its decision following an investigation into the operations of 11 Singapore modelling agencies and an association, the Association of Modelling Industry Professionals ("**AMIP**"). In the CCS decision, 10 modelling agencies were imposed with financial penalties for infringing section 34 of the Competition Act (Cap. 50B) ("**Act**") by fixing the price and rates of modelling services in Singapore between 2005 to 2009, using the AMIP as a front for individual members to coordinate rates.

Following from the above, three appeals were brought to the CAB. The first appeal was brought by a director of one of the infringing companies in his own personal capacity. This appeal was dismissed by the CAB on 31 May 2012 on the basis that the appellant director had no right of appeal. The CAB found that the mere mentioning by the CCS of the director's central role in the price fixing arrangement between the various modelling agencies was not sufficient to give that director such a right of appeal. Given that this appeal has been dismissed, it is not discussed further in this Update.

The second appeal was filed collectively by four of the modelling agencies fined by the CCS ("**Second Appeal**"), while the third appeal was filed separately by a fifth modelling agency fined by the CCS ("**Third Appeal**"). The decisions issued by the CAB on 10 April 2013 and published on 22 April 2013 are the focus of this Update. Both appeals were made against the quantum of the financial penalty imposed by the CCS, but did not challenge the CCS' decision that there had been an infringement of the Act. While there were some differences in the types of issues raised in each appeal, the grounds that were accepted by the CAB in reducing the financial penalties were common to both, which we discuss in greater detail below.

Summary Of The CAB's Decision In The Appeals

By way of background, when the CCS calculates the amount of financial penalty to be imposed, the CCS would first start with a base figure calculated by taking a percentage of the relevant sales or turnover, i.e. the turnover achieved in the relevant product and geographic market. This percentage depends, among other factors, on the seriousness of the infringement. Next, a multiplier will be applied to the base figure based on the duration of the infringement. Further adjustments will then be made to account for any aggravating or mitigating factors, as well as other factors such as deterrence.

In both of the appeals, the appellants contended that in applying the methodology described above, the CCS had either failed to take sufficient notice of, or gave undue weight to several issues and grounds in assessing the amount of financial penalty to be imposed. As mentioned earlier, the CAB ended up dismissing most of the issues raised in both appeals, with the exception of two grounds common to both appeals. These two grounds were:

(a) that the CCS should not have considered as an aggravating factor, the involvement of the directors or senior management of the modelling agencies, and

(b) that the CCS should have considered as a mitigating factor, the fact that the modelling agencies experience a high turnover but low profit margin.

We analyse these two grounds as well as an important issue relating to the determination of relevant turnover in the following section.

Discussion Of Grounds For Reduction Of Penalty And Determination Of Relevant Turnover

Involvement Of Directors Or Senior Management As An Aggravating Factor

In the CCS Guidelines on the Appropriate Amount of Penalty ("**CCS Penalty Guidelines**"), it is stated that in assessing the amount of financial penalty to be imposed, the CCS will consider any aggravating factors, such as 'the involvement of directors or senior management'.

The directors or senior management of three modelling agencies in the Second Appeal had knowledge of the infringing conduct and participated in the discussions as well as affirmed the anti-competitive agreements. The director of the fourth modelling agency in the Second Appeal was alleged to be the leader and instigator of the infringement. In the Third Appeal, the appellant's director was alleged to have been involved in the infringing actions, although no specifics were provided by the CCS. Following from the CCS Penalty Guidelines, the CCS stated in its infringement decision that each of the director's or senior management's involvement was an aggravating factor and consequently increased the penalty imposed on all of the Appellants by a certain percentage.

However, in both of the appeals, the CAB took a different view from the CCS. In arriving at its decision on this point, the CAB referred to its decision in the case of *SISTIC v The Competition Commission* ("**SISTIC**"). There, the CAB had stated that as directors or members of senior management would usually be involved in some way in the alleged infringement, a mere involvement of the directors or members of senior management should not be systematically taken as an aggravating factor. This departs from the CCS' view, which appears to be that involvement of directors or senior management, without more, would be sufficient to qualify as a general aggravating factor.

Consequently, the CAB disallowed in both appeals the CCS' uplift of the financial penalties imposed on the modelling agencies based on the alleged involvement of directors or senior management of the modelling agencies. Whilst not setting out in a precise manner the circumstances in which the involvement of directors or senior managers could lead to an increase in the financial penalty, the CAB's decision in the Second Appeal suggests that the involvement of directors or senior managers may only constitute an aggravating factor when it is further established 'that they took an active role as leaders in the price-fixing agreement'. This is a welcome clarification as, until now, the CCS has applied this aggravating factor each time a director or senior manager was involved, without more.

A point to note here is that it is the CAB itself which raised the point of the involvement of directors as an aggravating factor for consideration by the Appellants and the CCS in the Second Appeal, as the point had not been raised by the Appellants. This clearly illustrates the power of the CAB to raise and review issues on its own volition in the appeal process, which can be to the benefit of the Appellants or otherwise.

A further point to note is that, apart from the involvement of senior management, another aggravating factor is the fact of an undertaking being the leader or the instigator of an infringing activity. For being so, the undertaking can see its financial penalty being increased. To illustrate, in the CCS infringement decision, the modelling agency, Looque Models Singapore Pte Ltd ("**Looque**"), was imposed a financial penalty which was uplifted twice to take into account both the involvement of its director Calvin Cheng in the infringement and the fact that Looque acted, through its director, as a leader or instigator of the infringement. In this case, the CAB agreed with the CCS that the financial penalty imposed on Looque had validly been increased to take into account Looque's role as a central figure in the anti-competitive agreement. However, the CAB considered that this was the only aggravating factor to be applied here, i.e. this role could not, in addition, be further penalised on the basis that a director was involved in the infringing conduct.

The Determination Of Relevant Turnover For Assessing The Amount Of Penalties To Be Imposed

The appellant in the Third Appeal, Ave Management ("**Ave**"), argued that the proper determination of its relevant turnover ought to be based on net turnover and not gross turnover. Thus, the modelling fees that the appellant received on behalf of its models and other agents ought to have been excluded from the assessment of penalties as this revenue, in fact, only 'passed-through' the appellant. In support of this argument, the appellant turned to a United Kingdom Competition Appeal Tribunal ("**CAT**") decision known as the 'Hays' case, which concerned an appeal by a recruiting agency, Hays, for the construction industry, against a finding by the United Kingdom's Office of Fair Trading's ("**OFT**") that Hays had engaged in price-fixing on the 'target fees', a type of referral fee, with other recruiting consultants.

By way of background, Hays recruited two types of workers for its clients; namely temporary and permanent workers. In the case of temporary workers, Hays would receive their wages, on their behalf, from clients, and pass the money to the temporary workers. In the case of permanent workers, Hays was not involved at all in the payment of wages as the clients would pay the permanent workers directly. Hays would, in any event, receive from its clients a target fee for the referral of both temporary and permanent workers. In Hays, one of the issues investigated by the OFT involved price-fixing of such target fees.

In calculating the penalty to be imposed on the recruitment agency, the OFT had used Hay's gross turnover. On appeal, the CAT disagreed with the OFT's calculation and chose to use net turnover instead. The effect of this was to exclude from the relevant turnover, payments that 'passed through' Hays from their clients to temporary workers. It was this point in the Hays case that Ave sought to rely on to argue that the payments it received on behalf of its models should similarly be excluded from the calculation of the relevant turnover for assessing the appropriate penalty amount.

However, the CAB did not agree with Ave. In considering the Hays case, the CAB identified several points in Hays that were not present in Ave's situation, which justified the use of the net turnover instead of the gross turnover approach. The key points were:

(a) the fees received by the recruitment agency for procuring the workers were clearly separate and distinct from the wages that were 'passed through' the recruitment agency to the temporary workers;

(b) the wages of both the temporary and permanent workers were determined by the clients and not the recruitment agency; and

(c) the infringement concerned only the fees paid by clients for procurement of workers and did not include the wages payable to the workers procured.

In contrast to the above factors, the fees that were the subject of price-fixing by Ave and the other modelling agencies covered rates in all aspects of the sale and provision of modelling services in Singapore, and not only one area such as the commission rates payable by the clients. Further, the fees of the models were all negotiated and solely determined by Ave and other modelling agencies. Following from the above, the CAB concluded that the Hays case could be clearly distinguish from that of Ave. Thus, the CAB concluded that the CCS was correct in using the gross turnover of the appellant in the Third Appeal.

It is clear from this that when it comes to determination of relevant turnover, the mere fact that a business simply 'passes through' monies received on behalf of other parties will not automatically result in these amounts being carved out from the relevant turnover. However, as discussed further below, if due to the quantum of monies 'passing through', the business investigated has a very low margin as compared to a high turnover, it may be possible to raise this as a mitigating factor to reduce the amount of penalty imposed.

Presence Of High Turnover But Low Profit Margin As A Mitigating Factor

In both the Second and Third Appeals, the appellants raised an argument that although they had a relatively high turnover, their profit margin was very low because a large portion of their turnover was effectively 'passed back' to their models. Therefore, the appellants argued that their low profit margin should be taken as a mitigating factor to reduce the amount of penalties to a more proportionate level.

The CAB, referring to several cases in the construction industry from the CAT, agreed with the appellants (and the CAT) that the turnover of an entity was not the only indicator of financial status and may be subject to distortion. In particular, the CAB recognised that where profit information such as the typical margin on turnover is available, account should be taken of such information to ensure that the ultimate penalty is proportionate and not unjust.

The CCS noted in its infringement decision that while it recognised such a similar situation of a high turnover with low profit margin existed among the modelling agencies, the CCS did not find evidence that the businesses were entirely unprofitable. Further, the CCS also noted that the mere finding of an adverse financial situation was not a sufficient reason to justify a reduction in financial penalties. Thus, the CCS did not accept the fact of a high turnover with low profit margin as a relevant mitigating factor in its infringement decision.

However, the CAB did not agree with the CCS' assessment. In both of the appeal cases, the CAB felt that it was necessary to consider the turnover and profit characteristic in determining whether the final penalty imposed was excessive or disproportionate. On that basis, the CAB further reduced the financial penalties imposed on the appellants by the CCS in first instance.

What is especially noteworthy is that although the situation of a high turnover but low profit margin is not mentioned in the CCS Penalty Guidelines as being a mitigating factor, this did not prevent the CAB from considering this specific circumstance as one to be taken into account when determining the amount of the penalty to be imposed. This is of particular importance as there are a number of industries in similar situations which may benefit from the precedent set by the CAB in its two decisions.

Implications for Singapore Businesses

First, it is important to note that price-fixing agreements are taken very seriously by the competition authorities including in Singapore. This was reiterated by the CAB in both appeals as a justification for setting a higher percentage in calculating the base penalty.

Second, it seems clear from the CAB's decision in both appeals that participation by directors or senior management would not automatically qualify as an aggravating factor in the calculation of financial penalties. The decisions suggest that the CCS will have to clearly establish, on the facts, that the involvement was an active one and yet separate from the possible role as a leader of the undertaking concerned.

Last, while the CAB felt that the Hays case did not apply to the Third Appeal, they did not rule out the application of Hays altogether. While this is likely to turn on the closeness or similarity of the factual matrix to Hays, it nonetheless remains an interesting point to consider as the impact of being penalised on net rather than gross turnover may make a huge difference for a number of businesses.

Concluding Words

These two appeal decisions provide a well needed insight into the thought process of the CAB, as well as some useful guidance on how the CCS may, in the future, apply aggravating and / or mitigating factors when determining the amount of financial penalties to be imposed.

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