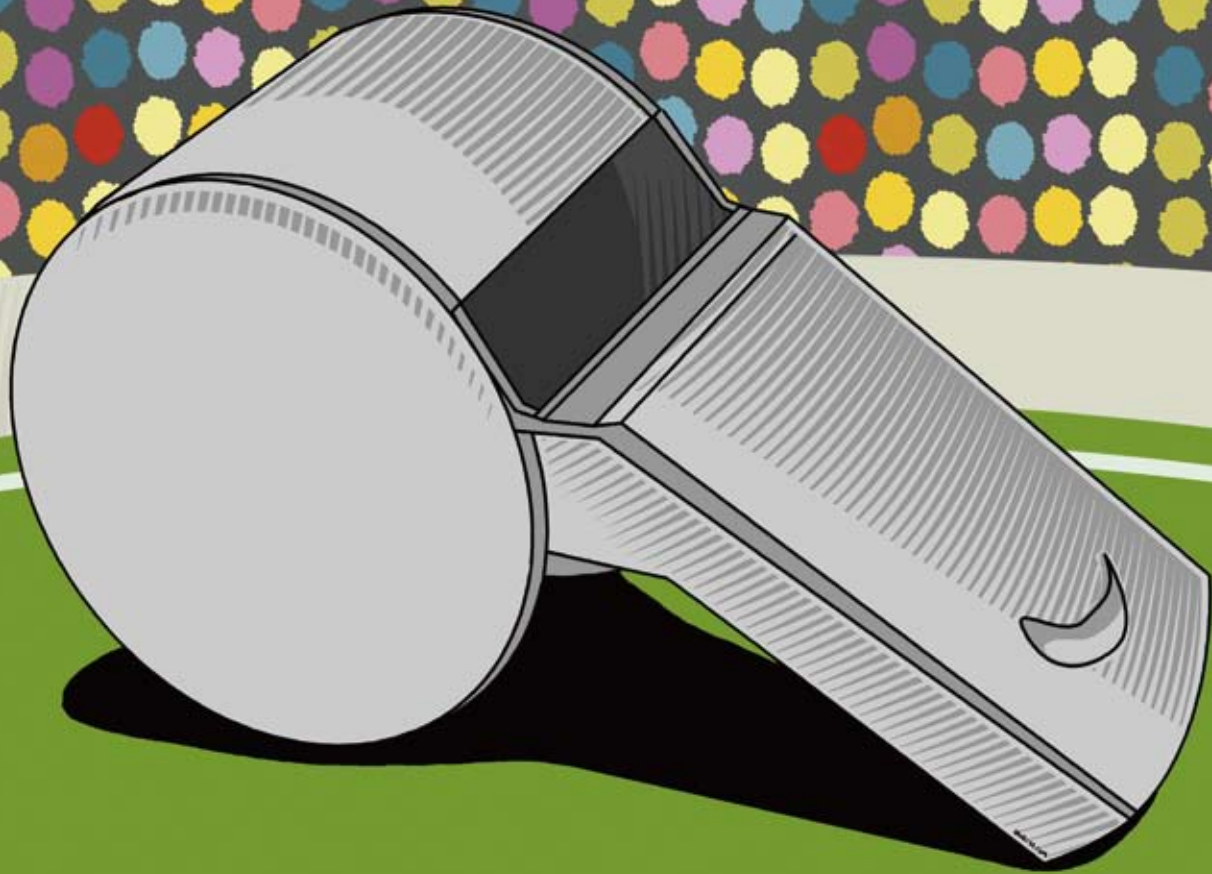


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# Counting on competition

*Lim Chong Kin, Ng Ee-Kia and Scott Clements of Drew & Napier LLC examine the latest competition developments in Singapore, and take a look at what might be expected in 2010.*



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Competition law has been a hot topic globally in 2009 as difficult financial conditions cause businesses to review strategic decisions and motivations. Singapore conditions are perhaps no exception, with the Competition Commission of Singapore (CCS) choosing to run two seminars in February and June entitled “Staying Competitive in a Downturn – How the Competition Act Can Help You”.

Although economic conditions have made (and continue to make) life uncertain for businesses, the parameters of healthy competition and legitimate business interactions remain unaffected and investigation of violations and enforcement activities continue with full steam. In Singapore, this has been punctuated by the recent announcement of the CCS’s second infringement finding on 3 November 2009, where fines were imposed totaling nearly S\$1.7 million (approximately US\$1.23 million). Below, we canvass the major competition law developments in Singapore for 2009, and what we might expect as Singapore approaches her fifth year with such laws in place.

## **Procedural approach**

On 12 January 2009, the CCS demonstrated its continued

determination to eradicate cartel activities by introducing two changes to its leniency programme, in an attempt to increase the ease and effectiveness of the system.

The previous leniency programme offered cartel participants the potential to benefit from immunity from prosecution in relation to their involvement in the cartel, if that participant was the first to approach the CCS with sufficiently supported information about the cartel, and such action was taken before the initiation of an investigation (and where the participant could satisfy a number of other qualifying conditions). Subsequent applicants could possibly benefit from reduced penalties. However, if a party were first to approach the CCS in relation to the cartel but was unable to provide the relevant information to the Commission in support of its application before the approach of another cartel participant, they might lose their position in the queue and thereby lose the ability to possibly benefit from full immunity from prosecution.

To address this, and to further incentivise cartel participants to approach the CCS as quickly as possible, a ‘marker system’ was introduced to effectively protect an applicant’s place in the queue for a limited period to enable it to gather the information required to support its application. The change is meant to remove any inertia on

the part of cartel participants and encourage them to approach the CCS at the earliest possible time.

The second substantive change to the leniency programme was the introduction of a 'leniency plus' programme, a system already being used in the United States. The programme offers incentives for participants in multiple cartels to disclose information about all such cartels, and to benefit from greater-than-usual reductions in respect of the applicable financial benefits as a consequence of doing so. Again, this should motivate cartel participants to be forthcoming about all cartel arrangements they are involved in.

The leniency system is likely to grow in attractiveness as the levels of cartel enforcement fines, and the frequency of infringement decisions, continue to rise. Whilst the ultimate effect of these initiatives in exposing and undermining cartel activities will need to be watched over the following few years, the simple message is that time is of the essence when considering leniency applications.

### Mergers

Three merger filings have been made thus far in 2009, two of which were cleared, and one of which is still pending. Whilst it may not be wholly surprising that structural changes have been limited in 2009, the fact that only three such filings have been made this year represents a considerable drop-off in activity when compared with earlier activity levels (five applications were made in the second half of 2007, and seven applications were made in 2008).

On 13 February 2009, UCB SA (UCB) and GSK Trading Services Limited (GSK) jointly applied for clearance for GSK to acquire certain rights to distribute and market selected pharmaceutical products (which were at that point under the control of UCB), with clearance granted on 23 March 2009. Similarly, the CCS gave clearance on 15 September 2009 for National Oilwell Varco Pte Ltd to acquire 100 percent of the shares in South Seas Inspection (S) Pte Ltd, and also in respect of a related asset acquisition in Brazil.

However, the proposed joint venture between Greif International Holding B.V. and GEP Asia Holdings Pte Ltd appears to be slightly more problematic to the CCS, on the basis that it has progressed to a "phase 2" assessment which involves a much more thorough analysis. The parties, which are both involved in the manufacture and sale of rigid packaging products, had jointly applied to the CCS for clearance in respect of the creation of a joint venture company, Greif

Eastern Packaging Pte Ltd. The application was submitted on 20 July 2009 and remains pending.

In such uncertain financial times, the level of filing fees applicable for merger notifications could discourage parties to seek merger clearance since such notification is not mandatory in Singapore. Presently, the filing fees for a merger clearance application are linked to the net aggregate turnover of the parties to the merger, and can be as high as S\$100,000 (approximately US\$72,000). In the case of international mergers, parties may be tempted to skip seeking clearance in Singapore if the merger has been cleared elsewhere.



Lim Chong Kin  
*Drew & Napier LLC*

**"Although economic conditions have made (and continue to make) life uncertain for businesses, the parameters of healthy competition and legitimate business interactions remain unaffected . . ."**

### Anti-competitive arrangements

The number of section 34 investigations (pertaining to anti-competitive arrangements) undertaken by the CCS in 2009 seems to have increased on previous years, if judged simply by the number of clients we have advised in this respect.

Perhaps the most significant development during the course of 2009 was the CCS's recent infringement decision, issued on 3 November 2009, which found that sixteen express tour bus operators/agents and the Express Bus Agencies Association (EBAA) had contravened section 34 of Singapore's Competition Act 2004 (the express bus decision). In total, the CCS handed down fines of S\$1.69 million (approximately US\$1.23 million), a noticeable increase in financial penalties compared to those handed down to six

pest-control companies in 2008 (the only other infringement finding in Singapore to date) where fines totalled little more than S\$260,000 (approximately US\$187,576).

The CCS found that the bus operators had entered into an

arrangement on the minimum selling prices (MSP) of certain bus tickets on routes between Singapore and Malaysia. The CCS also found that there had been a collective agreement between the operators on the fuel and insurance surcharge to be added to such tickets. The CCS determined that both arrangements were in breach of the Act, and fined the bus operators in accordance with their involvement in the two arrangements. In relation to the EBAA, the CCS determined that it had played an instrumental role in facilitating and administering the fuel and insurance charges arrangement, and therefore it was also deemed to have contravened the Act.

#### Abusive conduct

There were no proposed infringement decisions issued by the CCS in 2009 relating to potential abuses of dominance. However, we are aware that a few investigations into potential abusive conduct have been closed without the CCS coming to an infringement decision in 2009, while others are ongoing and will continue into the new year. One might expect the Commission's attention to be particularly tuned to investigating any potential abuses in difficult economic conditions where the resulting consequences on the competitive conditions within certain markets may be even more severe than usual. We anticipate that the CCS's first infringement decision in relation to an abusive conduct might be made next year.

#### Other developments

On 5 February 2009, the Singapore Medical Association (SMA) submitted a Notification seeking a Decision from the CCS in respect of its set of "Guidelines on Fees for Doctors in Private Practice in Singapore" (GOF). The GOF, which essentially recommended a range of fees (e.g. consultation fees and surgical fees) for medical services and procedures in Singapore, had been retracted by SMA in 2007 to avoid any potential conflict with the country's competition laws.

According to the SMA, the purpose of the GOF was to "safeguard the interests of patients through greater transparency of medical fees and to reduce the information asymmetry between patients and medical practitioners." The SMA also claims that the use of a GOF would give rise to net economic benefits and public interest considerations, and accordingly that it would benefit from certain exclusions to the Act (pursuant to its Third Schedule).

The Application of SMA has thrust the issue of recommended fees made by associations back into the spotlight. The CCS considered the issue in 2006 through a market study, and has since issued a number of press releases which generally condemn the practice. One such announcement was in respect of the Application for Guidance made by the Institute of Estate Agents regarding its non-binding recommendations on agent fees, as the CCS considered that the practice would likely be anti-competitive. Resolution of the

**"...ignorance or a mistake of the law will not excuse liability, as long as it can be shown that the infringements were negligent...."**



Ng Ee-Kia  
*Drew & Napier LLC*

**The plausible application of any such arguments will continue to become more remote as Singapore competition law matures"**

The decision acts as a reminder to parties involved in anti-competitive arrangements that the consequences may be particularly severe. It is also clear that in conducting the investigation, the CCS performed dawn raids on a number of the parties involved, which should in turn highlight the importance of the formulation of internal guidelines for handling such unannounced searches.

Another learning point that is clear from the decision is that ignorance or a mistake of the law will not excuse liability,

SMA's Application should clarify whether the operation of the GOF in the context of the medical industry is an exception to the general position so far taken by the CCS.

### The year ahead

One would hesitate to predict anything other than an increase in competition law activity by the CCS in 2010. The express bus decision also suggests that the days of the CCS being lenient on infringements of competition law, with regard to the youth of the overall system, are all but over. A particular area likely to see an increase in activity in 2010 is in relation to merger clearances conducted by the CCS. The lower-than-usual structural activity in 2009 might suggest that acquisition plans which were put on hold might be revitalised during the new year.

One notable date is 4 January 2010, which is the date by which appeals to the CCS's infringement decision relating to express bus services will need to be lodged with the Competition Appeal Board. If any such appeals are lodged, the Competition Appeal Board will be called into action for the first time since the introduction of general competition law in 2006. Other things to watch will be whether the CCS issues its first infringement notice for an abusive practice,

and whether 2010 will see the CCS issue a Decision in relation to the pending notification of Visa International regarding its multilateral interchange fee.

Developments in the ASEAN region will also stay clearly on the agenda, both through the work of the ASEAN Experts Group on Competition, and as ASEAN countries move towards the ASEAN blueprint of 2015. We also look forward to the introduction of general competition law in Malaysia and possibly Hong Kong whilst further afield, it will be interesting to watch the growth of competition law in India. Overall, 2010 promises to be a busy year for competition law policy and enforcement, which serves as a reminder to businesses in the region to ensure that their house is in order.

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