

# LEGAL UPDATE

A DREW &amp; NAPIER PUBLICATION

## COMPETITION LAW UPDATE

### CCS FINES 16 COACH OPERATORS AND BUS ASSOCIATION S\$1.69 MILLION FOR PRICE-FIXING

The Competition Commission of Singapore (the “**CCS**”) has today imposed fines totalling S\$1.69 million on 16 coach operators and their trade association, the Express Bus Agencies Association (the “**EBAA**”), for engaging in price-fixing of coach tickets. This decision was reached almost five months after the CCS issued its proposed infringement decision (“**PID**”) to the parties in June 2009. Please click [here](#) to read our firm’s earlier update on the PID.

#### Facts of the case

Following publication in the *Lianhe Zaobao* on 6 June 2008 of an article regarding the EBAA’s announced increase in the charges for fuel and insurance, the CCS decided that there were reasonable grounds for suspecting that there was a breach of the Competition Act (Cap. 50B). The CCS proceeded to commence formal investigations and authorised its officers to concurrently conduct unannounced dawn raids at the premises of several parties. Through the course of its investigation, the CCS obtained further information indicative of price-fixing arrangements between the 17 parties.

The CCS stated that the coach operators, facilitated by the EBAA, had agreed to fix the prices of coach tickets for travelling between Singapore and various destinations in Malaysia from 2006 to 2008. Through regular EBAA meetings, the coach operators agreed to fix the coach prices in two ways:

- by establishing the Minimum Selling Prices (“**MSP**”) of the coach tickets sold. The coach operators adjusted ticket prices either to the MSP or above it, resulting in higher ticket prices; and
- by imposing Fuel and Insurance Charges (“**FIC**”) to further mark up ticket prices.

The introduction of the MSP was intended to eliminate price wars amongst competing coach operators. Prior to the introduction of the MSP, most coach operators were selling coach tickets at prices lower than the MSP. The FIC was used subsequently to increase prices of coach tickets several times. Investigations by the CCS showed that the coach operators marked up the FIC by at least 300%. During this period, it is estimated that the coach operators gained over S\$3.65 million from the FIC.

Financial penalties totalling S\$1.69 million were levied on the 17 infringing parties. In assessing the financial penalty, the CCS took into account factors such as the nature and structure of the market, market shares of the parties and the impact and effect of the infringement.

### Section 34 of the Competition Act

Section 34 of the Competition Act prohibits agreements, decisions by associations or concerted practices which have as their object or effect the prevention, restriction or distortion of competition within Singapore.

Price-fixing in any form (including an agreement not to charge below a certain price level) is prohibited under Section 34 of the Competition Act. The CCS may impose fines of up to 10 per cent of the turnover of the business of the undertaking in Singapore for each year of infringement, up to a maximum of 3 years.

### Interesting Learning Points

#### *Dawn raids not an urban legend*

Companies that have wondered whether dawn raids are conducted in Singapore should take note that in this case, the CCS had authorised its officers under section 64 of the Competition Act to concurrently conduct unannounced dawn raids at the premises of several parties in order to obtain information regarding a possible price-fixing agreement.

This is not the first time that the CCS has conducted such dawn raids. Drew & Napier's Competition Law Practice Group has previously assisted several clients when such raids were carried out on their premises. Companies should put in place the necessary arrangements so that they are prepared in the event of a surprise visit by the CCS.

#### *Public announcements may trigger investigations*

In this case, the CCS had initiated its own formal investigation following an article regarding the EBAA's announced increase in the charges for fuel and insurance in the Chinese newspapers. This is different from the previous bid-rigging case by the pest control operators whereby the investigation was triggered off by a complaint.

Companies should therefore be aware that the CCS is able to initiate its own investigation even without any complaints or leniency applications. One potential source of information for the CCS is reports in the media, especially statements by groups of competitors or associations announcing price increases or other forms of cooperation. For example, the CCS investigated and stopped four "Fa Gao" producers from implementing a price increase agreement in April last year after they had made a public announcement that they would increase prices uniformly.

It is therefore important for companies to pay special attention to how their public announcements are worded so as not to create unnecessary competition concerns or fall under the adverse scrutiny of the competition authorities.

#### *Trade associations can be separately liable*

The EBAA argued that the EBAA is not an undertaking for the purposes of section 34, given that it has no economic activity and is not active in any market. In this case, the EBAA's employees were merely following the instructions of its Executive Committee and performing mere secretarial activities with no discretionary powers of any sort. As such, it was submitted that the EBAA's conduct should not be viewed separately from its members.

The CCS, however, found these arguments untenable. It considered that the EBAA had independently participated in the FIC agreement between its members by facilitating and administering the performance of the agreement. For example, it circulated information on the FIC rates to EBAA members, issued authorisation letters and monitored the sales of the FIC coupons. Further, the EBAA benefitted financially by making a profit from the sales of the FIC coupons. The CCS also cautioned that the limited participation of a trade association in a cartel in the form of secretarial and administrative support does not preclude a finding that it is separately liable for its involvement in a cartel.

#### *Ignorance is not bliss*

Before imposing a financial penalty, the CCS must be satisfied that the infringement has been committed intentionally or negligently. While various parties had tried to argue that they did not intentionally or negligently infringe the Competition Act as they were genuinely uncertain that they were in violation, the CCS took the position that ignorance or a mistake of law is "*no bar to a finding of intentional infringement*" under the Competition Act. The CCS would likely consider an infringement has been committed negligently where a party "*ought to have known*" that its agreement or conduct would result in a restriction or distortion of competition. By extension, claims of ignorance are very unlikely to be accepted as a mitigating factor in the calculation of penalties. Being passive or a mere follower would probably not justify a reduction in the quantum of penalty either.

#### *Financial difficulties as a mitigating factor*

The CCS indicated that while the financial positions of the infringing parties and their ability to pay is a relevant consideration in the assessment of financial penalties, it cautioned cartelists that they should not generally rely on their economic difficulties and those of the market to seek a reduction in the penalties. It is therefore clear from this decision that the onus is on the party making the claim to establish the exceptional circumstances to the satisfaction of the CCS.

## **Conclusion**

Commenting on the implications of this decision on businesses in Singapore, Lim Chong Kin, Director and Co-Head of Drew & Napier's Competition Law Practice Group, observed, "The fine of S\$1.69 million is a jump from the CCS' first infringement decision on bid-rigging by

pest control companies, where fines totalled just over S\$260,000. Today's decision sends a clear message from the CCS to businesses: the CCS is able and will wield its enforcement powers to break down cartels. Dawn raids by the CCS are no longer an urban legend. The CCS has become more experienced and expedient in its investigations."

To limit potential exposure to competition law risks, companies are encouraged to carry out compliance audits. A compliance audit typically forms part of a compliance programme that is designed not only to review the current status of a company's existing agreements and business conduct, but also provide the company and its staff with the knowledge and tools to ensure that it continues to be "competition-compliant", through the use of training sessions and periodic self-assessment.

For more information on compliance audits, please click [here](#) to refer to Drew & Napier LLC's publication on Competition Law Compliance.

If you wish to discuss how this update may potentially affect you, or simply wish to find out more about competition law compliance, please feel free to contact the Competition Law Practice Group:

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