

CaseWatch

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Bid-Riggers Found in Violation of Competition Act

On 9 January 2008, the Competition Commission of Singapore ('CCS') issued its decision on Collusive Tendering (Bid-Rigging) for Termite Treatment/Control Services by Certain Pest Control Operators in Singapore. It found six companies liable for anti-competitive conduct. Specifically, it found that these companies had engaged in bid-rigging. As the first decision by the CCS where it has found that the Competition Act was infringed, it provides useful insight into the CCS's thinking. This update considers that decision.

Facts

The six companies involved were each pest control operators. They were the sole operators authorised in Singapore to use Agenda, a termite pesticide manufactured by Bayer Environment Science.

The CCS receives a complaint of bid-rigging

In late September 2006, the CCS received a complaint about bid-rigging by three of these companies: PestBusters Pte Ltd ('PestBusters'), Aardwolf Pestkare (S) Pte Ltd ('Aardwolf'), and Rentokil Initial (S) Pte Ltd ('Rentokil'). The bid-rigging had been in respect of a tender for termite treatment at Raffles Hotel. The complaint alleged that PestBusters had asked Aardwolf and Rentokil to support PestBusters by submitting tender proposals to Raffles Hotel, with prices higher than PestBusters. Before submission of the proposals, Aardwolf and Rentokil agreed to support PestBusters.

The CCS investigates and carries out raids

The CCS investigated the complaint. Its investigations included carrying out surprise raids on the offices of the three companies. With the information obtained, further companies were identified and more surprise raids were conducted. Eventually, the CCS targeted the initial three companies plus an additional three others, Alliance Pest Management Pte Ltd ('Alliance'), Elite Pest Management Pte Ltd ('Elite'), and Killem Pest Pte Ltd ('Killem').

Understanding to cooperate

It turned out that these six companies, as the sole authorised operators of Agenda, had an understanding amongst each other that

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if any of them was providing pest control services to an existing customer who was calling for Agenda treatment or termite treatment services, that company might ask the other five companies not to compete for that project.

Submission of higher bids

If any of these companies received a request to put in a bid for the tender, it would then put in a cover bid or a 'support quote'. This was a quote with a price above the price that would be given by the requesting operator. While this arrangement applied to existing customers, it could also be used in other situations depending on the circumstances of the tender.

Background

Section 34 of the Competition Act

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

Price fixing and market sharing clearly prohibited

Section 34(2) of the Competition Act further provides that agreements, decisions or concerted practices may, in particular, have the object or effect of preventing, restricting or distorting competition within Singapore if, among other things, they:

- directly or indirectly fix purchase or selling prices or any other trading conditions;
- limit or control production, markets, technical development or investment; or
- share markets or sources of supply.

Rationale Behind the CCS's Decision

General approach to concerted practices

Generally speaking, the CCS will not regard an agreement and/or concerted practice as having an appreciable adverse effect on competition if the aggregate market share of the parties does not exceed 20% on any of the relevant markets affected by the agreement or concerted practice. Accordingly, agreements between small or medium enterprises ('SMEs') will rarely be capable of distorting competition appreciably.

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Bid-rigging among practices that will be treated severely

However, agreements or concerted practices involving price-fixing, bid-rigging, market-sharing or output limitations are different. The CCS made it clear that it takes a strict view of such practices. This is because collusive tendering or bid-rigging arrangement is restrictive of competition by its very nature. Tendering procedures are designed to provide competition in areas where it might otherwise be absent, and an essential feature of the system is that tenderers prepare and submit bids independently. Any tenders submitted as a result of collusion or co-operation between tenderers will, therefore, undermine this system of fostering competition.

As the facts show, this was a clear case of bid-rigging. In that sense, the decision did not break any new ground. However, it usefully demonstrates the limits of what constitutes acceptable conduct. The implications of the strict approach adopted by the CCS are also interesting, and these are considered below.

Further Implications of the Decision

CCS's focus is on the conduct and not its effect

In its decision, the CCS also took note of UK and EU decisions on anti-competitive practices. Some of the principles applied merit highlighting:

- The mere fact that a party does not abide fully by an agreement that is manifestly anti-competitive does not exonerate it.
- There can be concerted practice in the absence of an actual effect on the market.

Approach addresses inherent problem of secrecy

Liability, in other words, is strict. As long as parties were involved in the agreement, they may be found liable. This will be regardless of any lack of follow-up acts on their part or of any actual effect on the market. While apparently harsh, this approach is perhaps needful given the fact that collusive conduct is, by definition, carried out in secret.

The whistle-blowing safe harbour

Such a strict approach encourages whistle-blowing, being the principle means by which a party can seek exculpation. This is because whistle-blowers can obtain total immunity from financial penalties. This is provided, however, that they come forward with

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information that the CCS does not already have. In other words, whistle-blowing immunity is only available if infringers act in a timely manner, and not after the wrongdoings have already come to light.

While the CCS will likely continue to adopt a light approach to enforcement and regulation, this decision makes it clear that this does not mean that it will tolerate anti-competitive conduct. The lines have started to be drawn, and companies should be aware that these lines should not be crossed.

If you would like information on this or any other area relating to competition law, you may wish to contact the lawyer at WongPartnership LLP that you normally deal with or contact the following partners from the Competition Practice:

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