CLIENT NOTE

FREIGHT FORWARDERS GROUNDED BY S$7.15M PENALTY

1. The Competition Commission of Singapore ("**CCS**") recently imposed fines amounting to S$7.15m against 11 freight forwarders in Japan (the "**Parties**") and their Singapore subsidiaries for contravening section 34 of the Competition Act (the "**Act**") by collectively fixing fees and surcharges as well as unlawfully exchanging information in relation to freight forwarding services from Japan to Singapore.

2. In this Client Note, we summarise the salient points of the CCS's decision (the "**Infringement Decision**").

Section 34 of the Act

3. Section 34(1) of the Act prohibits "*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*" (the "**Section 34 Prohibition**").

4. To attract liability under the Section 34 Prohibition, a key consideration by the CCS is whether the agreement or arrangement in question has the object or effect of preventing, restricting or distorting competition *within* Singapore. This extends to agreements and arrangements which, although, entered into *outside* Singapore or amongst foreign entities, have an anti-competitive effect *within* Singapore.

5. The extra-territorial reach of the Act is manifest in the Infringement Decision in that the CCS held the Japanese parent companies (in addition to their Singapore subsidiaries) to be liable for their anti-competitive conduct. This is because the CCS found the conduct to have the object or effect of affecting competition within Singapore, although the conduct took place outside Singapore.

Infringement Decision

6. The CCS found that the Parties had agreed to fix prices by entering into anti-competitive agreements and/or concerted practices relating to:

   (a) the Japanese Security Surcharge and the Japanese Explosives Examination Fee; and
   (b) the Japanese Fuel Surcharge

   (collectively, the "**Surcharges**").

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7. They also exchanged sensitive pricing information and information regarding the success in the implementation of the Surcharges.

8. The agreements and/or concerted practices were coordinated and decided upon through regular meetings and systemic exchanges of information by the Parties in Japan. They occurred because of

   (a) new security measures introduced by the Japanese Ministry of Land, Infrastructure and Transport (specifically, the requirement that all cargo freight be subject to a security inspection and all cargo from "unknown shippers" be required to undergo an explosives examination inspection); and
   (b) additional fuel surcharges levied by airlines on freight forwarders.

9. The Parties discussed at their various meetings the costs impact of the additional security requirements and fuel surcharges, how they could avoid competing on the Surcharges, how they could transfer the costs to their customers and the implementation of plans to effect the transfer.

10. The CCS found that the meetings had the overall common objective of ensuring:

   (a) the Parties' commitment to a fixed level of minimum prices for the security measures;
   (b) that the Japanese Security Surcharge and Japanese Explosives Examination Fee were implemented for freight shipped from Japan to overseas destinations, including Singapore;
   (c) the Parties' commitment to passing on the Japanese Fuel Surcharge (for cargo shipped from Japan to overseas destinations including Singapore);
   (d) the dampening of price competition between the Parties in relation to the Surcharges; and
   (e) that the reactions of customers were monitored and shared.

11. In the CCS's view, the agreements between the Parties in Japan prevented, restricted or distorted competition within Singapore for the provision of air freight forwarding services from Japan to Singapore. The Parties either quoted or indicated to each other that they would quote customers, for shipments exported from Japan to countries such as Singapore, the agreed prices for the

Surcharges and agreed that the prices agreed upon would be similarly implemented by their Singapore subsidiaries.

12. A number of the Parties argued that liability should not be imputed to their Singapore subsidiaries. The CCS rejected this argument on the basis that the agreements and/or concerted practices agreed to by them at the meetings in Japan were carried out by them and the Singapore subsidiaries acting as single economic units.

Commentary

13. There are four points of note from the Infringement Decision.

14. First, the heavy financial penalties levied by the CCS, including fines exceeding S$2m for two of the Parties, reinforce the CCS's strong stance against anti-competitive conduct, whether it occurred in Singapore or elsewhere, if it has an anti-competitive effect in Singapore. The total quantum of S$7.15m represents the second highest financial penalty levied by the CCS, after the financial penalty imposed on the Japanese ball bearings manufacturers earlier this year.

15. Secondly, several Parties had their financial penalties reduced due to their leniency applications. In particular, DHL Global Forwarding obtained 100% reduction in financial penalty. The later leniency applicants (namely, Hankyu Hanshin, Kinetsu World Express, Nishi-Nippon Railroad and Vantec) were granted reductions in accordance with

    (a) the stage at which they applied for leniency;
    (b) the evidence that was already in the CCS's possession; and
    (c) the quality of the information provided by each of them.

16. Thirdly, the single economic entity doctrine was invoked by the CCS to find that the Parties and their Singapore subsidiaries were liable for the anti-competitive conduct, having regard to the economic, legal and organisational links between the companies. These links include the reporting structure between the Japanese and Singapore companies, the parent companies' influence on their subsidiaries' commercial and pricing policies, the existence of common directors and agency agreements, and arrangements on revenue and profit sharing. This aspect of the Infringement Decision indicates that foreign entities which share extensive links with their Singapore subsidiaries can be made liable for the anti-competitive conduct of their

subsidiaries.

17. Fourthly, in relation to the calculation of financial penalties, the CCS rejected the Parties' submission that the principle of double jeopardy was applicable so as to warrant a reduction of penalties for Parties which had already been penalised under the Japanese Antimonopoly Act. The reason for the rejection was that the procedure conducted and the penalties imposed in Japan served to protect competition in Japan. In contrast, the penalties imposed by the CCS were to protect competition in Singapore. Businesses which have companies based outside Singapore would therefore do well to consider this when making decisions that may have an impact on competition in Singapore.