Competition

High Court Clarifies Test for "By Object" Infringements, Reverses CAB's Decision in First Competition Act Appeal

In the first-ever appeal to the General Division of the High Court (**High Court**) under the Competition Act 2004 (**Act**), Philip Jeyaretnam J allowed the Competition and Consumer Commission of Singapore (**CCS**)'s appeal against the Competition Appeal Board (**CAB**)'s decision and restored a finding that warehouse operators at Keppel Distripark infringed section 34 of the Act by exchanging WhatsApp messages about a proposed price surcharge. In doing so, the High Court has, in *Competition and Consumer Commission of Singapore v CNL Logistic Solutions Pte Ltd and another* [2026] SGHC 139, laid out the relevant factors that should be considered in determining whether the conduct of competitors amounts to a restriction of competition "by object" under the Act.

This update takes a look at, and distils the key takeaways from, this landmark decision.

Background

Keppel Distripark is a multi-tenanted free trade zone cargo complex in Singapore with approximately 26 warehouse operators.

On 15 June 2017, two of the largest operators announced a new "FTZ Surcharge" on import cargo stored within the free trade zone. Other operators at the free trade zone followed in short order.

CCS's investigations revealed that the respondents in this appeal, CNL Logistic Solutions Pte Ltd (**CNL**) and Gilmon Transportation & Warehousing Pte Ltd (**Gilmon**), together with two other operators (Penanshin (PSA KD) Pte Ltd and Mac-Nels (KD) Terminal Pte Ltd) (collectively, **Undertakings**), had exchanged WhatsApp messages and phone calls about whether they would each impose the surcharge. Messages listed which operators would be "joining" and others confirmed they would "follow". Some operators used the information to persuade customers to accept the surcharge.

The four Undertakings together held about 16% of the relevant market. CNL and Gilmon together held only about 5.75%.

In 2022, the CCS issued an Infringement Decision (**ID**) finding that the Undertakings had engaged in an agreement and/or concerted practice to fix prices contrary to section 34 of the Act – specifically, the CCS found that the agreement and/or concerted practice had the object of restricting competition.

The CAB's Decision

The respondents appealed to the CAB, which allowed the appeal in full on 16 July 2025 and set aside the ID. The CAB found that there was no agreement between the Undertakings. More significantly, it found that while the communications between the parties amounted to a concerted practice, the CCS had not proved that the concerted practice in question was a restriction of competition by object.

The CAB explained that:

- Only the "most well-established, egregious and obviously harmful" forms of conduct qualify as "by object" restrictions of competition;
- The CCS wrongly equated "information sharing" with "price fixing" and that the concerted practice in this case did not amount to price fixing. As such, the surrounding market context (structure, participants, nature of the information) had to be adequately examined in order to find that it amounted to a restriction of competition by object, which the CCS did not do; and
- The CCS's market observations in the ID were "disparate" and did not amount to a coherent analysis. Given the respondents' small share in the relevant market, the CCS had not explained why the communications were so obviously injurious as to dispense with any effects analysis.

Decisions of the CAB may be appealed to the High Court, and thereafter the Court of Appeal, but only on points of law or the quantum of a financial penalty, i.e., one cannot appeal findings of fact or economic assessments made by the CAB. The CCS thus appealed to the High Court against only the finding that the CCS had not proved that the concerted practice was a restriction of competition by object.

The High Court's Decision

Allowing the CCS's appeal, the High Court held that the operators' conduct was a restriction of competition "by object" and that the CCS had sufficiently examined the economic context, restoring the CCS's original finding of an infringement. As the first appeal under the Act to the High Court, the decision provides welcome clarity on several important issues: how a restriction of competition "by object" is identified, how far the CCS must go in examining the economic context, and when an exchange of information between competitors crosses into an unlawful concerted practice. We highlight the key points below.

The "manifest anti-competitive economic rationale" test

Conduct that has a "manifest anti-competitive economic rationale" (**Manifest Rationale Test**) may be sanctioned as a "by object" restriction of competition. The High Court offered a helpful framing of the test as a question: *"what else could this be for?"*. In this regard:

- Conduct which can only be explained as being for the **sole or primary purpose** of preventing, restricting or distorting competition would likely be assessed as a "by object" restriction of competition; and
- Conduct which could have **some other possible, non-anti-competitive purpose** (for example, reducing common costs, or enabling a new competitor to enter the market) would likely be assessed on whether it has the effect of restricting competition.

Businesses should note that a finding that conduct is *not* a restriction of competition "by object" is not the end of the matter. The CCS may still establish an infringement by showing that it has (or would have) anti-competitive effects.

Subjective intention not completely irrelevant

The Manifest Rationale Test calls for an objective assessment: whether conduct has an anti-competitive rationale does not turn on the undertakings' subjective intention. That said, subjective intention is not completely irrelevant.

While lack of anti-competitive intention will not, on its own, prevent a "by object" finding, absence of anti-competitive intention, or presence of a pro-competitive purpose, may indicate that the conduct has some alternative non-anti-competitive purpose, such that a "by object" finding would be inappropriate.

A "sufficient degree of harm" to competition

The "by object" category is not limited to conduct that is obviously injurious to competition – the CAB's "egregious and obviously harmful" formulation was too high a bar. Conversely, a mere "potential to have a negative impact" test (which was put forth based on certain European Union cases) set the bar too low, since almost any arrangement could technically be caught.

The High Court held that the correct standard was somewhere in between – specifically, that the CCS had to show a "sufficient degree of harm" to competition in the relevant market. This is a qualitative characteristic: it identifies the *kind* of harm that the conduct is inherently liable to cause, not the degree to which that harm has materialised or can be measured.

The High Court also clarified that the appropriate focus should be on the functioning of the relevant market and harm to competition, rather than on other types of harm, e.g., to consumers, or other economic outcomes.

Single exchange of information sufficient to be a concerted practice / Reciprocity may be presumed through silence

The High Court confirmed that a single instance of information exchange is sufficient to form a concerted practice. While the High Court clarified that there must be reciprocity or tacit approval to establish a concerted practice, it also indicated that such reciprocity or tacit approval may be presumed through silence of the recipient.

On a related point, undertakings which participate in a concerted practice, and remain active on the market thereafter, are presumed to have taken into account the information exchanged. However, the High Court did highlight that this is a rebuttable presumption, leaving it open for undertakings to show that the information exchanged played no part in their future conduct.

Necessity for assessment of the economic context: qualitative and case-specific

While the High Court agreed that the economic context of the conduct in question must be considered, the extent of the assessment required is not fixed and would be specific to the circumstances of each case. The standard is one of "sufficient examination" – a brief "reality check" may suffice in straightforward markets, while a more detailed assessment may be required in more complex cases.

On the facts in the ID, the High Court held that the CCS had sufficiently considered the economic context in this case. In particular, the CCS had identified that:

- The respondents lacked market power to impose the surcharge unilaterally;
- Uncertainty persisted and imposition of the surcharge carried risk; and
- The communications reduced that uncertainty and made imposition of the surcharge more likely.

For completeness, the High Court also clarified that, while this would help with analytical clarity, the CCS is not required to set out its evaluation of the economic context in a dedicated section of the decision. Instead, it would suffice that the CCS's reasoning can be identified and assessed by an appellate tribunal or court.

Small market share not a safe harbour

There is no safe harbour for anti-competitive conduct based on market share: the respondents' small, combined share (about 5.75%) did not absolve them of liability. While the High Court did not rule out a very small market share as mitigating against a finding of a "by object" infringement where price fixing was concerned – emphasising that parties are free to raise this in representations to the CCS and, if necessary, on appeal – it acknowledged that this was likely to be a "rarity".

Here, the small market share of the respondents was not sufficient: the communications between the operators reduced uncertainty as to the timing and extent of the imposition of the surcharge and the High Court found that they rightly amounted to a restriction of competition by object.

Key Takeaways

Informal, one-off exchanges are enough. Even one-off WhatsApp messages or calls about future pricing between competitors can be a restriction "by object". No formal agreement or established cartel is required.

You are presumed to have acted on information if you continue to be present in the market. While the High Court has confirmed that the recipient must have acted on the information received, a company that continues operations after the exchange is presumed to have acted on the information. This is a rebuttable presumption.

Discussing whether to "follow the market leader" is not a defence. An argument that "we were just checking what others would do" is unlikely to succeed. Any pricing-related discussions that reduce uncertainty as to the timing and extent of market actions are likely to be problematic.

Silence is not safety. Receiving a competitor's pricing information and carrying on can be treated as tacit agreement; staff should reject and report such approaches, not merely stay quiet.

Small market shares are not a safe harbour. A small market share is unlikely to be a defence where price fixing / exchange of pricing information is concerned. In this case, the respondents only had a combined share of less than 6%.

Reducing uncertainty is the mischief. The anti-competitive harm lies in removing uncertainty about the timing, extent or details of competitors' pricing. As such, it is irrelevant even if prices might have moved anyway.

If you would like information and/or assistance on the above or any other area of law, you may wish to contact the Partner at WongPartnership whom you normally work with or any of the following Partners:

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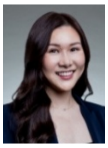

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