COMPETITION & CONSUMER COMMISSION SINGAPORE

THE COMPETITION AND CONSUMER COMMISSION OF SINGAPORE

GUIDELINES

MAIN CONTENTS

INTRODUCTION

The Competition and Consumer Commission of Singapore* ("CCCS") administers and enforces the *Competition Act 2004* ("the Act"), which was passed by the Singapore Parliament in October 2004.

On 1 January 2006, the prohibition against anti-competitive agreements, decisions and practices under Section 34 of the Act and the prohibition against the abuse of dominance under Section 47 of the Act came into effect. The Section 54 prohibition against mergers that substantially lessen competition came into effect on 1 July 2007. The coming into effect of Section 54 was the third and final phase in the implementation of the Act.

The guidelines published by the CCCS indicate how it will interpret and give effect to the Act. They provide an insight into the conceptual and analytical framework adopted by the CCCS in the analysis and evaluation of its cases.

Any future updates or revised guidelines will be posted on the CCCS's website at **www.cccs.gov.sg.**

*CCCS was also designated as the administrating agency of the *Consumer Protection (Fair Trading) Act 2003* with effect from 1 April 2018.

CCCS GUIDELINES ON THE MAJOR PROVISIONS

Effective from: 1 February 2022

1 INTRODUCTION

What these guidelines are about

1.1 These summary guidelines provide an overview of the main provisions of the *Competition Act 2004* ("the Act") and explain how the Competition and Consumer Commission of Singapore ("CCCS") will apply and enforce the prohibitions against anti-competitive activities under the Act with the aim of promoting healthy competitive markets in Singapore. The Act applies to "undertakings". This covers any natural or legal person who is capable of engaging in economic activity, regardless of its legal status and the way in which it is financed. It includes individuals operating as sole proprietorships, companies, firms, businesses, partnerships, co-operatives, societies, business chambers, trade associations and non-profit-making organisations.[1] CCCS has published more detailed guidelines on most of the topics covered in these guidelines and CCCS would encourage interested parties to refer to the detailed guidelines.

1.2 Part 2 of these guidelines sets out the purpose, structure and scope of the Act. Part 3 explains the functions and duties of CCCS. Details of the section 34 prohibition on agreements that appreciably prevent, restrict or distort competition ("the section 34 prohibition") and section 47 prohibition on abuse of a dominant position ("the section 47 prohibition") are to be found in parts 4 and 5 respectively. The section 34 and section 47 prohibitions came into force on 1 January 2006. The section 54 prohibition on mergers and acquisitions ("the section 54 prohibition") came into force on 1 July 2007. Details of the section 54 prohibition on mergers that result, or will result in a substantial lessening of competition are found in Part 6 of these guidelines.

1.3 The procedure for notification for guidance or decision and anti-competitive complaints are highlighted in Parts 7 and 8 respectively. A description of the provisions relating to confidentiality and disclosure of information appears in Part 9. The powers under the Act for investigation of undertakings believed to be involved in anti-competitive activities, and of enforcement, are described in Part 10 of these guidelines. The consequences of an infringement and the power to impose financial penalties on undertakings are discussed in Part 11. Part 12 explains the leniency programme provided for undertakings coming forward with information on cartel activity cases. Part 13 explains the fast track procedure, while Part 14 explains the appeal system and rights of private action.

Further Information

1.4 Other guidelines provide more details on specific areas and we have included references to these where appropriate. The current list of CCCS guidelines appears at Part 15 of these guidelines. The guidelines will be revised and re-issued from time to time and new ones may be published. An up-to-date list of our publications is always available on our website at www.cccs.gov.sg.

1.5 These guidelines do not purport to be a full or binding statement of law. They are intended to be an introductory text and guide to other sources of relevant information. In the event that any of the provisions in these guidelines are inconsistent or incompatible with the provisions of specific guidelines issued by CCCS, the provisions of that latter relevant guidelines will take precedence. Anyone in doubt about how they may be affected by the Act may wish to seek legal advice.

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[1] A parent and its subsidiaries will usually be treated as a single undertaking if they operate as a single economic unit, depending on the facts of the case. As the intent of the Act is to regulate the conduct of market players, it will not apply to any agreement entered into or any conduct on the part of the Government, statutory bodies or any entity acting on their behalf.

2 PURPOSE, STRUCTURE AND SCOPE OF THE ACT

Purpose

2.1 Competition is a key tenet that underpins Singapore's economic policies. Open and vigorous competition not only spurs firms to be more efficient and innovative, but also more responsive to consumer needs. Consumers in turn enjoy more choices, lower prices, and better products and services. The economy as a whole benefits from greater productivity gains and more efficient resource allocation.

Structure

2.2 The Act is divided into six parts:

- Part 1 introduces the Act and defines the terms used in the Act.
- Part 2 establishes CCCS as a corporate body and sets out its general functions.
- Part 3 makes provisions for a new competition regime and prohibits anti-competitive agreements, such as cartel agreements, the abuse of a dominant position and mergers and acquisitions that substantially lessen competition. It sets out the criteria for block exemption orders and outlines the procedures for notification for guidance and decision. CCCS's investigatory powers and powers to make decisions and issue directions are also dealt with in this part.
- Part 4 establishes the Competition Appeal Board ("CAB") and makes provisions for appeal proceedings before the CAB and the Courts.
- Part 5 makes non-compliance with the exercise of CCCS's investigatory powers criminal offences and provides for the composition of offences.
- Part 6 deals with a number of miscellaneous provisions, including provisions for the rights of private action once it has been determined that a party has engaged in anti-competitive activities and the appeal process has been exhausted.

Scope

2.3 Unless they are excluded or exempted, there are three types of prohibited activities under the Act:

- Anti-competitive agreements which appreciably prevent, restrict or distort competition in Singapore ("the section 34 prohibition");
- Abuse of a dominant position ("the section 47 prohibition"); and
- Mergers and acquisitions that substantially lessen competition in Singapore ("the section 54 prohibition").

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Exclusions from the Section 34[2] and Section 47 Prohibitions

2.4 The Act provides for certain exclusions from the section 34 and section 47 prohibitions in the Third Schedule to the Act ("Third Schedule"). These are:

- an undertaking entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly, insofar as the prohibition would obstruct the performance, in law or fact, of the particular tasks assigned to that undertaking;

- an agreement/conduct to the extent to which it is made in order to comply with a legal requirement, that is any requirement imposed by or under any written law;

- an agreement/conduct which is necessary to avoid conflict with an international obligation of Singapore, and which is also the subject of an order by the Minister for Trade and Industry ("Minister");

- an agreement/conduct which is necessary for exceptional and compelling reasons of public policy and which is also the subject of an order by the Minister;

- an agreement/conduct which relates to any goods or services to the extent to which any other written law, or code of practice issued under any written law, relating to competition gives another regulatory authority jurisdiction in the matter;

- an agreement/conduct which relates to any of the following specified activities:

  - the supply of ordinary letter and postcard services by a person licensed and regulated under the *Postal Services Act 1999;*

  - the supply of piped potable water;

  - the supply of wastewater management services, including the collection, treatment and disposal of wastewater;

  - the supply of bus services by any person licensed and regulated under the *Bus Services Industry Act 2015;*

  - the supply of rail services by any person licensed and regulated under the *Rapid Transit Systems Act 1995;* and

  - cargo terminal operations carried out by a person licensed and regulated under the *Maritime and Port Authority of Singapore Act 1996;*

- an agreement/conduct which relates to the clearing and exchanging of articles undertaken by the Automated Clearing House established under the *Banking (Clearing House) Regulations;* or any activities of the Singapore Clearing Houses Association regarding the Automated Clearing House;

- any agreement or conduct that is directly related and necessary to the implementation of a merger;

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[2] The section 34 prohibition also does not apply to vertical agreements and agreements which have net economic benefit. Please refer to Part 4 of these guidelines for more details.

- any agreement (either on its own or when taken together with another agreement) to the extent that it results, or if carried out would result, in a merger; and

- any conduct (either on its own or when taken together with other conduct) to the extent that it results in a merger.

Exclusions from the Section 54[3] Prohibitions

2.5 The Act also provides for certain exclusions from the section 54 prohibition in the Fourth Schedule to the Act ("Fourth Schedule"). These are:

- A merger:
  - approved by any Minister or regulatory authority[4] pursuant to any requirement for such approval imposed by any written law;
  - approved by the Monetary Authority of Singapore pursuant to any requirement for such approval under any written law; or
  - under the jurisdiction of another regulatory authority[4] under any written law relating to competition, or code of practice relating to competition issued under any written law;
- Any merger involving any undertaking relating to any of the following specified activities:
  - The supply of ordinary letter and postcard services by a person licensed and regulated under the *Postal Services Act 1999;*
  - The supply of piped potable water;
  - The supply of wastewater management services, including the collection, treatment and disposal of wastewater;
  - The supply of bus services by a licensed bus operator under the *Bus Services Industry Act 2015;*
  - The supply of rail services by any person licensed and regulated under the *Rapid Transit Systems Act 1995;* and
  - Cargo terminal operations carried out by a person licensed and regulated under the *Maritime and Port Authority of Singapore Act 1996.*

2.6 The Minister has the power to amend the exclusions by order at any time.

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[3] The section 54 prohibition also does not apply to agreements with net economic efficiencies. Please refer to Part 6 of these guidelines for more details.

[4] Other than CCCS.

3 THE COMPETITION AND CONSUMER COMMISSION OF SINGAPORE AND ITS GENERAL FUNCTIONS

The CCCS

3.1 The Act established CCCS on a statutory basis as a body corporate on 1 January 2005.

3.2 The CCCS consists of a Chairman and no fewer than four other members, appointed by the Minister. The Act provides for a Chief Executive to be appointed, who may also be appointed as a member of the CCCS. CCCS appoints staff as required to carry out its functions.

The CCCS Annual Report

3.3 Following the end of each financial year, CCCS will give the Minister a report on its activities and performance throughout the year. The annual report will contain information on the proceedings and policy of CCCS as the Minister may direct.

Functions and Duties of CCCS

3.4 The functions and duties of CCCS under section 6 of the Act include the following:

- maintain and enhance efficient market conduct and promote overall productivity, innovation and competitiveness of markets in Singapore;
- eliminate or control practices having adverse effect on competition in Singapore;
- promote and sustain competition in markets in Singapore;
- promote a strong competitive culture and environment throughout the economy in Singapore;
- act internationally as the national body representative of Singapore in respect of competition matters;
- advise the Government or other public authority on national needs and policies in respect of competition matters generally; and
- perform any other functions or discharge any other duties as conferred on CCCS by or under any other written law.

These provide the context within which CCCS will investigate possible infringement of the prohibitions under the Act, give guidance and make decisions.

3.5 In performing the functions and discharging its duties, CCCS will consider the following:

- the differences in the nature of various markets in Singapore;
- the economic, industrial and commercial circumstances of Singapore; and
- how to best maintain the efficient functioning of the markets in Singapore.

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Administrative Priorities

3.6 CCCS will set its strategic priorities and consider each case on its merits, to see if it warrants an investigation.

Co-operation between CCCS and Other Regulatory Authorities on Competition Matters

3.7 On cross-sectoral competition cases, CCCS will work out with the relevant sectoral regulator on which regulator is best placed to handle the case in accordance with the legal powers given to each regulator. CCCS will work closely with other regulators where necessary to prevent double jeopardy and minimise regulatory burden in dealing with the case.

4 SECTION 34 PROHIBITION – ANTI-COMPETITIVE AGREEMENTS

The Prohibition

4.1 The section 34 prohibition covers agreements between undertakings which have the object or effect of appreciably preventing, restricting or distorting competition within Singapore. An agreement covers agreements between undertakings, decisions by associations of undertakings and concerted practices (which may include co-operation without any agreement or decision). These may be oral or written agreements and need not necessarily be legally binding (for example, unwritten 'gentlemen's agreements'). An agreement made outside Singapore or where any party to the agreement is outside Singapore, is also prohibited if it has the same object or effect within Singapore.

4.2 The Act provides a list of examples of prohibited agreements, namely those which:

a. directly or indirectly fix purchase or selling prices or any other trading conditions;

b. limit or control production, markets, technical development or investment;

c. share markets or sources of supply;

d. apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or

e. make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

4.3 This list is not exhaustive and is for illustration only. It does not set a limit on the investigation and enforcement activities of CCCS. An agreement that appreciably prevents, restricts or distorts competition is likely to fall within the section 34 prohibition although it is not covered in the list. An agreement will not be prohibited if it falls within an exclusion in the Third Schedule or meets all of the requirements specified in a block exemption order.

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4.4 A review of the types of agreements which would generally fall within the section 34 prohibition and guidance on CCCS's approach towards these types of agreements, and other potentially anti-competitive agreements can be found in the *CCCS Guidelines on the Section 34 Prohibition.*

The Appreciable Effect on Competition Test

4.5 The *CCCS Guidelines on the Section 34 Prohibition* set out, using indicative market share thresholds, CCCS's view as to what is generally not an appreciable restriction of competition under section 34. As Singapore is a small and open economy, an agreement will generally have no appreciable adverse effect on competition:

- if the aggregate market share of the parties to the agreement does not exceed 20% on any of the relevant markets affected by the agreement where the arrangement made is between competing undertakings (i.e. undertakings which are actual or potential competitors on any of the markets concerned);

- if the market share of each of the parties to the agreement does not exceed 25% on any of the relevant markets affected by the agreement, where the agreement is made between non-competing undertakings (i.e. undertakings which are neither actual nor potential competitors on any of the markets concerned);

- in the case of an agreement between undertakings where each undertaking is a small or medium enterprise ("SME").[5]

The 20% threshold will be applicable where it is difficult to classify an agreement as an agreement between competitors or an agreement between non-competitors. Further details on market definition are available in the *CCCS Guidelines on Market Definition.*

4.6 However, the fact that the market shares of the parties exceed the threshold levels set out in paragraph 4.5 does not necessarily mean that the effect of the agreement on competition is appreciable. This will depend on other factors such as the content of the agreement and the structure of the market.

4.7 The approach in paragraph 4.5 does not apply to agreements containing the various hard core restrictions involving:

- direct or indirect price fixing

- bid-rigging (collusive tendering)

- sharing the market, and

- limiting or controlling production or investment.

Agreements containing any of the above restrictions will always be regarded as having an appreciable adverse effect on competition even where the market shares of the parties fall below the threshold levels indicated in paragraph 4.5.

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[5] SMEs in Singapore are defined as follows: Undertakings having annual sales turnover of not more than S$100 million or employment size of not more than 200 workers.

Exclusion[6] from the Section 34 Prohibition

4.8 The section 34 prohibition does not apply to vertical agreements, other than such vertical agreement as the Minister may by order specify. The exclusion applies to agreements that contain intellectual property rights (IPRs) provisions, provided that they do not constitute the primary object of such agreements, and are directly related to the use, sale or resale of products.[7] However, IPR agreements such as licensing agreements are not excluded from the section 34 prohibition.

4.9 The section 34 prohibition does not apply to agreements with net economic benefit. Accordingly, the section 34 prohibition does not apply to any agreement which contributes to:

- improving production or distribution; or
- promoting technical or economic progress, and
- does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; and
- does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question.

An agreement, which does not fall within any of the earlier categories as stipulated in paragraph 2.4 or the purview of a sectoral regulator and which have an appreciable adverse impact on competition may, nonetheless, be excluded if it satisfies the criteria enumerated, that is the agreement has net economic benefit. Such an agreement will be excluded by virtue of section 35 of the Act, no prior decision to the effect by CCCS being required. Please refer to **Annex C** of the *CCCS Guidelines on the Section 34 Prohibition* for details on the analytical framework.

In the event of an investigation by CCCS, it will be for the undertaking claiming the benefit of any exclusion to prove that it satisfies the requirements.

Block Exemptions

4.10 Under the Act, the Minister may, acting on CCCS's recommendation, make an order to exempt particular categories of agreements which CCCS considers are likely to satisfy the conditions set out in section 41 of the Act ("block exemption"). These conditions in section 41 are the same as that set out in paragraph 4.9, i.e. that such category of agreements have net economic benefit.

4.11 Block exemptions are designed to clarify the application of section 41 for specific categories of agreements. No notification of individual agreements which meet the criteria for block exemption is required. However, in the event of an investigation by CCCS, parties to an agreement seeking to rely on a block exemption will be required to demonstrate that the agreement falls within the scope of the block exemption.

4.12 An agreement which falls within a category specified by a block exemption will not infringe the section 34 prohibition. Any such block exemption may impose conditions or obligations subject to which that block exemption will have effect.

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[6] Please refer to paragraph 2.4 for more details on the other exclusions from the section 34 prohibition.

[7] On the assessment of provisions relating to IPRs in agreements which do not fall under the exclusion under paragraph 8 of the Third Schedule, please refer to the *CCCS Guidelines on the Treatment of Intellectual Property Rights.*

4.13 A block exemption may provide for a party to an agreement which does not qualify for the block exemption but satisfies the criteria specified in the order, to notify CCCS of the agreement. If CCCS does not give notice of its opposition within the specified period, the agreement is treated as falling within a category specified in the block exemption. If CCCS exercises the right to oppose, the notification is treated as a notification for decision.

Transitional Period for Section 34 Prohibition

4.14 Should CCCS determine that an agreement, which was made on or before 31 July 2005, infringes the section 34 prohibition, CCCS will not impose a financial penalty on the undertaking for a 6-month transitional period from 1 January 2006 to 30 June 2006.[8]

5 SECTION 47 PROHIBITION – ABUSE OF A DOMINANT POSITION

The Prohibition

5.1 The section 47 prohibition covers conduct by one or more undertakings which amounts to the abuse of a dominant position in any market in Singapore.

5.2 The prohibitions under section 47 relate to the abuse of a dominant position: there is no prohibition on being in a dominant position.

5.3 The Act gives examples of conduct that may constitute the abuse of a dominant position. The examples are:

a. predatory behaviour towards competitors;

b. limiting production, markets, or technical development to the prejudice of consumers;

c. applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

d. making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.

5.4 This list is not exhaustive and is for illustration only. It is not necessary for the dominant position, the abuse and the effect of the abuse to be in the same market. More detailed examples of conduct which may be considered to be an abuse of a dominant position are given in the *CCCS Guidelines on the Section 47 Prohibition.*

5.5 There are two tests to assess whether the section 47 prohibition applies:

- is an undertaking dominant in a relevant market, either in Singapore or elsewhere, and
- if it is, whether it is abusing that dominant position in a market in Singapore.

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[8] This transitional period is provided for under the *Competition (Transitional Provisions for Section 34 Prohibition) Regulations.*

Dominance and Market Definition

5.6 An undertaking will not be deemed dominant unless it has substantial market power. Market power arises when an undertaking does not face sufficiently strong competitive pressure. It can be thought of as the ability to profitably sustain prices above competitive levels or to restrict output or quality below competitive levels. Market power can also be the ability and incentive to harm the process of competition in other ways, for instance, by weakening existing competition, raising entry barriers or slowing innovation.

5.7 To assess whether an undertaking is dominant, it is useful to identify the relevant market. The definition of the relevant market usually starts with two dimensions:

- the relevant goods or services ("the product market"), and
- the geographic scope of the market ("the geographic market").

5.8 The *CCCS Guidelines on the Section 47 Prohibition* set out, using indicative market share thresholds, CCCS's view as to what constitutes dominance. Generally, as a starting point, CCCS considers a market share above 60% as likely to indicate that an undertaking is dominant in the relevant market. However, this starting point does not preclude dominance being established at a lower market share. An undertaking's market share does not, on its own, determine whether that undertaking is dominant. Other determinants of competition such as entry barriers, the degree of innovation, product differentiation, the responsiveness of buyers and competitors to price increases, the strength of network effects, and the control or ownership of key inputs also need to be considered.

5.9 Two undertakings can be considered collectively dominant if they adopt a common policy in the relevant market. This is sometimes called tacit coordination.

5.10 While SMEs are, in general, unlikely to be capable of conduct that would have an appreciable adverse effect on competition (due to its lack of market power), CCCS reserves the right to investigate any anti-competitive conduct (including infringement of the section 47 prohibition) on the part of SMEs.

5.11 Further details are available in the *CCCS Guidelines on the Section 47 Prohibition* and *CCCS Guidelines on Market Definition.*

Abuse

5.12 Where it is established that an undertaking is dominant in the relevant market, the second part of the test is to assess whether the undertaking's behaviour might be regarded as an abuse of its dominant position. Section 47(2) of the Act lists broad categories of business behaviour within which particular examples of abusive conduct are most likely found.

5.13 In assessing cases of alleged abuse, CCCS may consider if the dominant undertaking is able to objectively justify its conduct. Further, the dominant undertaking will have to show that it has not taken more restrictive measures than are necessary to defend its legitimate commercial interest. CCCS may also consider if the dominant undertaking is able to demonstrate any benefits arising from its conduct and that the conduct is proportionate to the benefits claimed.

5.14 A review of the types of conduct which would generally fall within the section 47 prohibition and guidance on CCCS's approach towards these types of conduct can be found in the *CCCS Guidelines on the Section 47 Prohibition.*

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6 SECTION 54 PROHIBITION – MERGERS AND ACQUISITIONS

The Prohibition

6.1 The section 54 prohibition covers mergers, which have resulted, or may be expected to result, in a substantial lessening of competition ("SLC") within any market in Singapore. The prohibition applies to both mergers and anticipated mergers. An anticipated merger refers to any arrangement that is in progress or in contemplation that, if carried into effect, will result in the occurrence of a merger.

6.2 A merger occurs when:

- two or more undertakings, previously independent of each other, merge;
- one or more persons or other undertakings acquire direct or indirect control of the whole or part of one or more other undertakings; or
- the result of an acquisition by one undertaking of the assets, or a substantial part of the assets, of another undertaking is to place the first undertaking in a position to replace or substantially replace the second undertaking in the business or the part concerned of the business in which that undertaking was engaged immediately before the acquisition.

6.3 The creation of a joint venture to perform, on a lasting basis, all the functions of an autonomous economic entity also constitutes a merger.

6.4 The determination of whether a merger exists under the Act is based on qualitative rather than quantitative criteria, focusing on the concept of control. These criteria include considerations of both law and fact. A merger may therefore occur on a legal or a de facto basis. There are four situations where the acquisition of a controlling interest does not constitute a merger under the Act:

- the person acquiring control is acting in its capacity as a receiver or liquidator, or an underwriter;
- all of the undertakings involved in the merger are, directly or indirectly, under the control of the same undertaking;
- control is acquired solely as a result of a testamentary disposition, intestacy or right of survivorship under a joint tenancy; or
- securities are acquired on a temporary basis by an undertaking whose normal activities include the carrying out of transactions and dealing in securities for its own account or for the account of others, where any exercise by the acquiring undertaking of voting rights in respect of the securities is:
  - with a view to the disposal of the acquired undertaking or its assets or securities within twelve (12) months (or such longer period as CCCS may determine) of the acquisition; and
  - not for the purpose of determining the strategic commercial behaviour of the acquired undertaking.

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Substantial Lessening of Competition

6.5 Not all mergers give rise to competition issues. CCCS believes that many mergers are either pro-competitive (because they positively enhance levels of rivalry) or are competitively neutral. Some mergers may lessen competition but not substantially, because sufficient post-merger competitive constraints will exist to ensure that competition (or the process of rivalry) continues to discipline the commercial behaviour of the merged entity. The section 54 prohibition is only applied to mergers which substantially lessen competition and do not have net economic efficiencies.

6.6 The focus of CCCS's analysis is on evaluating how the competitive incentives and abilities of the merger parties and their competitors might change as a result of the merger. In applying the SLC test, CCCS will evaluate the competitive situation, with and without the merger. Typically, where the substantive assessment is conducted prior to the completion of the merger situation or shortly thereafter, the relevant counterfactual is forward looking.

Market Definition and Concentration

6.7 In merger assessment, market definition is focused on the areas of overlap in the merger parties' activities. The main competitive concern is whether the merger will result in an increase in prices above the prevailing level. As a result, in defining the market for merger purposes, the relevant price level is the current price rather than the competitive price.

6.8 As a guide, CCCS is generally of the view that competition concerns are unlikely to arise in a merger situation unless:

- the merged entity will have a market share of 40% or more; or
- the merged entity will have a market share of between 20% to 40% and the post-merger combined market share of the three largest firms is 70% or more.

Exclusions

6.9 The section 54 prohibition does not apply to mergers with net economic efficiencies. Such efficiencies should arise in markets in Singapore, and must also be shown to be sufficient to outweigh the competition detriments caused by the merger. Any claimed efficiencies must also be demonstrable and merger-specific.

6.10 The Minister may also exempt the merger from the section 54 prohibition on the ground of any public interest consideration. Merger parties may apply to the Minister for exemption where CCCS proposes to make a decision that a merger infringes, or an anticipated merger if carried into effect will infringe, the section 54 prohibition.

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Exclusion for Ancillary Restrictions from the Section 34 and Section 47 Prohibitions

6.11 Any agreement or conduct that is directly related and necessary to the implementation or the attainment of the merger (also known as an "ancillary restriction") is excluded from the section 34 prohibition and section 47 prohibition under the Third Schedule. Similarly, any agreement or conduct is also excluded from the section 34 prohibition and section 47 prohibition to the extent that it results in a merger.

6.12 A more comprehensive explanation of the substantive assessment of mergers as well as the procedures relating to merger assessment is available in the *CCCS Guidelines on the Substantive Assessment of Mergers* and the *CCCS Guidelines on Merger Procedures.*

7 NOTIFICATION FOR GUIDANCE OR DECISION

Notification

7.1 There is no statutory requirement to notify agreements, conduct, mergers or anticipated mergers to CCCS. It is for parties to ensure that their agreements, conduct, mergers or anticipated mergers are lawful. However, parties may notify their agreements or conduct to CCCS for guidance or a decision if they have concerns as to whether they are infringing the section 34 prohibition or section 47 prohibition. Notification provides parties to an agreement with immunity from financial penalties for infringements of the section 34 prohibition occurring between the point of notification to such date as may be specified by CCCS following its determination. This immunity does not apply to conduct notified under the section 47 prohibition. Parties may also notify their mergers or anticipated mergers for a decision if they have concerns as to whether their merger infringes, or their anticipated merger if carried into effect will infringe, the section 54 prohibition.

7.2 Notification cannot be made in respect of prospective agreements (i.e. agreements where the parties have yet to enter into the agreement) or prospective conduct. Anticipated mergers may be notified if they can be made known to the public. A fee will be charged. Undertakings also should not notify agreements, conduct, mergers or anticipated mergers that do not raise any real concerns of possible infringement of the Act. CCCS has the discretion not to give guidance or make a decision.

7.3 Details of how an undertaking may notify CCCS of its agreement or conduct and seek guidance or a decision from CCCS on whether there has been an infringement of the section 34 prohibition and/or section 47 prohibition can be found in the *CCCS Guidelines on Filing Notifications for Guidance or Decision with respect to the Section 34 Prohibition and Section 47 Prohibition 2016.* Details of how merger parties may notify their merger or anticipated merger and seek a decision on whether the merger has infringed or whether the anticipated merger if carried into effect will infringe the section 54 prohibition can be found in the *CCCS Guidelines on Merger Procedures.* Further details can also be found in the *Competition (Notification) Regulations 2007.*

Application for Guidance or Decision with respect to the Section 34 or Section 47 Prohibitions

7.4 On an application for guidance or decision with respect to the section 34 prohibition or section 47 prohibition, CCCS may indicate as to –

- whether the relevant prohibition is likely to be (has been) infringed;
- in the case of the section 34 prohibition, if it is not likely to be (has not been) infringed, whether it is because of the effect of an exclusion or because the agreement is exempt from the prohibition; or

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- in the case of the section 47 prohibition, if it is not likely to be (has not been) infringed, whether that is because of the effect of an exclusion.

7.5 CCCS will not reopen a case once favourable guidance/decision has been given unless:

- it has reasonable grounds for believing that there has been a material change of circumstance since the guidance was given;
- it has reasonable grounds for suspecting that materially incomplete, misleading or false information had been given;
- in the case of the section 34 prohibition, one of the parties to the agreement applies for a decision; or
- a complaint is received from a third party.[9]

Application for Decision with respect to the Section 54 Prohibition

7.6 On an application for decision with respect to the section 54 prohibition, CCCS may indicate as to –

- whether the merger has infringed or whether the anticipated merger if carried into effect will infringe, the section 54 prohibition; and
- if the section 54 prohibition has not been or will not be infringed, whether that is because of the effect of an exclusion, an exemption or the acceptance of a commitment.

7.7 CCCS will not reopen a case once a favourable decision has been given unless:

- it has reasonable grounds for suspecting that materially incomplete, misleading or false information had been given;
- it has reasonable grounds for suspecting that a party who has given a commitment has failed to adhere to one or more of the terms of the commitment; or
- (where the favourable decision is given in respect of an anticipated merger) the merger resulting from a purported carrying into effect of the anticipated merger is materially different from the anticipated merger.

7.8 Where a merger or anticipated merger has been notified for decision, CCCS may impose interim measures prior to completing its assessment of the application, to prevent any action that may prejudice CCCS's ability to assess the merger situation or its ability to impose the appropriate remedies. Interim measures may also be imposed as a matter of urgency to prevent serious, irreparable damage to persons or to protect the public interest.

Public Register

7.9 CCCS will maintain a public register containing details of each notification for a decision and a record of the outcome of the notification. The register will contain a summary of the nature and objectives of the agreement, conduct, merger or anticipated merger. The register will be accessible via the Internet. The register will not capture applications for guidance.

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[9] Unlike favourable guidance, a favourable decision cannot be reopened solely on the basis of a complaint made by a third party.

Confidentiality

7.10 Further details are given in the *CCCS Guidelines on Filing Notifications for Guidance or Decision with respect to the Section 34 Prohibition and Section 47 Prohibition 2016,* the *CCCS Guidelines on Merger Procedures* and the *Competition (Notification) Regulations 2007.* Applicants should refer to the above guidelines and regulations before completing the Forms. They may also wish to consider the self-assessment criteria in the Forms to ascertain if their application is necessary.

8 COMPLAINTS ON ANTI-COMPETITIVE ACTIVITY

Procedure

8.1 CCCS accepts complaints alleging an infringement of the section 34 prohibition, section 47 prohibition and/or section 54 prohibition. Complainants are highly encouraged to use the CCCS complaint form available on the CCCS website to make their complaints.

8.2 While CCCS will consider anonymous complaints, there may be practical difficulties in doing so when full information is not available and clarification cannot be sought from the complainant. Complainants should endeavour to provide all the information requested in the complaint form.

8.3 CCCS may pursue the complaint (and may need to seek further information from the complainant) or it may consider that there are no grounds for action in respect of the complaint because it does not give CCCS reasonable grounds for suspecting a possible infringement of the section 34 prohibition, section 47 prohibition and/or section 54 prohibition. CCCS will consider each case on its merits to see if it warrants an investigation. If CCCS decides that the prohibitions have been infringed, or that the section 54 prohibition will be infringed if the anticipated merger is carried into effect, appropriate enforcement action will be taken.

Confidentiality

8.4 If CCCS decides to pursue a complaint, it will usually seek further information from the undertaking which is the subject of the complaint. If a complainant does not want to be identified to the undertaking, it should make this clear at the earliest opportunity. However, for effective handling of complaints, it must be noted that it is sometimes necessary to reveal information which may identify the source of the complaint to the target. When providing information or documents to CCCS, complainants should:

- clearly identify any confidential information;
- provide this information in a separate annex clearly marked "confidential information", and
- explain why this information should be treated as confidential.

8.5 CCCS recognises the importance of complainants voluntarily supplying information and also recognises their interest in confidentiality. If CCCS proposes to disclose any of the information in the confidential annexes, it will, to the extent that is practicable to do so, consult the person who provided the information. Confidentiality and disclosure of information are also discussed in Part 9 below.

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9 CONFIDENTIALITY AND DISCLOSURE OF INFORMATION

9.1 CCCS recognises the importance of maintaining the confidentiality of commercially sensitive information and details of an individual's private affairs.

9.2 Section 89 of the Act provides that all matters

- relating to the business, commercial or official affairs of any person;
- which have been identified as confidential; or
- relating to the identity of persons furnishing information to CCCS;

coming to the knowledge of CCCS in the course of performance of its functions and duties must not be disclosed, unless disclosure is necessary for the performance of the function or duty or is lawfully required by the CAB or the Courts, or unless disclosure is lawfully required or permitted under the Act or any written law.

9.3 However, section 89 of the Act sets out the following exceptions under which disclosure is authorised:

- where consent has been obtained from the person to whom the information relates;
- for the purposes of a prosecution under the Act;
- for the purpose of investigating a suspected offence or enforcing a provision under the Act;
- for the purpose of complying with an agreement between Singapore and a foreign state (the conditions in section 89(7) of the Act must be satisfied in order for this exception to be applicable); and
- for the purpose of giving effect to any provision of the Act.

9.4 If disclosure is sought to be made under the last category stipulated in the preceding paragraph, i.e. to give effect to a provision of the Act, CCCS must have regard to the extent to which disclosure is necessary for the purpose of the proposed disclosure. CCCS is also to have regard to the need for excluding, so far as is practicable:

- information the disclosure of which would, in CCCS's opinion, be contrary to the public interest;
- commercial information the disclosure of which would, in CCCS's opinion, significantly harm the legitimate business interests of the undertaking to which it relates; or
- information relating to the private affairs of an individual, the disclosure of which would, in CCCS's opinion, significantly harm that individual's interest.

As a matter of prudence, CCCS may, where relevant, have regard to these factors even when proposing to make disclosures under the other exceptions.

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10 INVESTIGATION AND ENFORCEMENT

10.1 The Act gives CCCS powers to investigate infringements of the prohibitions under the Act as well as the power to enforce the Act.

10.2 It should be noted that CCCS may also obtain information about undertakings, agreements, practices and markets through informal enquiries, either before or during the course of an investigation. They may be made in addition to, or instead of, using the formal powers of investigation set out in the Act. Undertakings are encouraged to co-operate.

Powers of Investigation

10.3 The following paragraphs set out the powers that can be exercised by authorized officers where CCCS has reasonable grounds for suspecting that the prohibitions under the Act have been infringed. Further details are given in the *CCCS Guidelines on the Powers of Investigation in Competition Cases 2016.*

Production of Documents and Information

10.4 When there are reasonable grounds for suspecting that the section 34, 47 or 54 prohibitions under the Act have been infringed or that the section 54 prohibition will be infringed if an anticipated merger is carried into effect, CCCS can, by written notice, require any person to produce documents or information that it considers relate to any matter relevant to the investigation. CCCS can take copies of, or extract from, or seek an explanation of, any document produced, or if a document is not produced, to ask where it is believed to be.

Entry of Premises Without A Warrant

10.5 An authorised officer of CCCS can enter any premises without a warrant after giving advance notice in writing. Prior written notice need not be given under the Act if the premises are suspected to be or have been occupied by an undertaking under investigation. The CCCS officer will produce proof of identity and documents indicating the subject matter and purpose of the investigation upon entry.

Entry of Premises With A Warrant

10.6 An application can be made to a District Court for a warrant for a named officer of CCCS and other authorised officers to enter premises without notice using such force as necessary, and search the premises.

Offences

10.7 The Act sets out a number of criminal offences which may be committed where a person fails to co-operate when the above powers of investigation are exercised.

Privileged Communications

10.8 The power to require the disclosure of information or documents under Part 3 of the Act, does not extend to communications which would be protected from disclosure on grounds of legal professional or litigation privilege.

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Self-Incrimination

10.9 A person or undertaking is not excused from disclosing information or documents to CCCS under a requirement made of him or her pursuant to the Act on the ground that the disclosure might tend to incriminate him or her.

10.10 Where a person claims before making a statement disclosing information that the statement might tend to incriminate him or her, that statement is admissible in evidence against him or her in civil proceedings including proceedings under the Act. The statement is not admissible in evidence against him or her in criminal proceedings other than proceedings under Part 5 of the Act relating to ancillary offences such as providing false or misleading information.

Enforcement Powers

Infringement Decision and Directions

10.11 Please refer to paragraphs 11.8 and 11.9 for details.

Interim Measures Directions

10.12 CCCS has the power to impose interim measures directions before it has completed its investigation. Interim measures directions may be imposed when CCCS has reasonable grounds to suspect that the section 34, 47 or 54 prohibitions have been infringed or that the section 54 prohibition will be infringed if an anticipated merger is carried into effect and it considers that it is necessary for it to act urgently either to prevent serious, irreparable damage to a particular person or category of persons, or to protect the public interest. When CCCS has reasonable grounds to suspect that the section 54 prohibition has been infringed by a merger or will be infringed if an anticipated merger is carried into effect, interim measures directions may also be imposed for the purpose of preventing any action that may prejudice CCCS's investigations or its ability to impose remedies.

10.13 When the investigation is completed and CCCS has decided that an infringement has taken place, it may replace the interim measures direction with a final direction. Otherwise, an interim measures direction has effect until CCCS has discontinued or completed its investigation into the matter or until CCCS considers there is no longer any necessity to act as a matter of urgency to prevent any serious, irreparable damage to a particular person or category of persons or for the protection of public interest.

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11 ADDRESSING COMPETITION CONCERNS

11.1 The Act empowers CCCS to address competition concerns identified in the course of investigations or notifications either through remedies offered voluntarily or via directions. CCCS may also seek to deter future anti-competitive conduct by imposing financial penalties for infringements of the Act.

Remedies

11.2 Remedies may be implemented either by CCCS's acceptance of commitments which address competition concerns arising from an investigation or notification, or by directions issued by CCCS. There are broadly two types of remedies which CCCS may consider: structural remedies and behavioural remedies. Structural remedies are preferable to behavioural ones because they address the market structure issues that give rise to the competition problems, given that a structural remedy is likely to address the very source of the competition concerns, and they require little on-going monitoring by CCCS. Behavioural remedies can also constrain the scope for parties to behave anti-competitively[10] or constrain them from exploiting their market power[11]. CCCS will consider behavioural remedies in situations where structural remedies will be impractical, or inappropriate, in relation to the nature of the concerns identified.

11.3 The remedial action to be taken by CCCS will depend on the facts and circumstances of each case. In addressing the question of which remedies would be appropriate and would provide as comprehensive a solution as is reasonable and practicable, CCCS will take into account how adequately the action would prevent, remedy or mitigate the competition concerns caused by the activity in question.

11.4 For further information, see Part 2 of the *CCCS Guidelines on Directions and Remedies.*

Commitments

11.5 Commitments are generally proposed, where competition concerns have been identified, by an applicant that has made a notification to CCCS or an undertaking under investigation by CCCS. CCCS has the discretion to accept commitments at any time before making a decision pursuant to applications under sections 44, 51, 57, 58 or investigations under section 62(1).

11.6 CCCS has the discretion to decide whether to accept commitments during investigations on a case by case basis. CCCS is generally not inclined to accept commitments in cases involving restrictions of competition by object (e.g., bid-rigging) with no accompanying net economic benefit.

11.7 For further information, see Part 3 of the *CCCS Guidelines on Directions and Remedies.*

Infringement Decision and Directions

11.8 Where CCCS proposes to make a decision that the section 34 and/or 47 prohibitions under the Act has been infringed ("an infringement decision"), or that the section 54 prohibition has been infringed by a merger or will be infringed if an anticipated merger is carried into effect ("an unfavourable decision") it will send the party(s) a written statement. CCCS will allow the party receiving the notice an opportunity to make written representations and a reasonable opportunity to inspect the documents in CCCS's file relating to the proposed decision. The party receiving the written notice may request in his written representations a meeting with CCCS to make oral representations to elaborate on the written representations already made in this regard.

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[10] For example, a commitment to remove exclusivity clauses imposed by a dominant supplier of beer to retail outlets.

[11] For example, a commitment to supply proprietary spare parts by a dominant lift manufacturer to third party lift maintenance companies.

11.9 When an infringement/unfavourable decision is made, CCCS will notify the relevant parties and will publish the decision on a public register on CCCS's website. CCCS may give a direction to the parties concerned, or to such persons as it considers appropriate, to bring the infringement or, in the case of an anticipated merger, the impending infringement, to an end. CCCS may register the direction as a court order to enforce the direction if a person fails to comply with it without reasonable excuse. Breach of such an order would be punishable as a contempt of court.

Penalties

11.10 The Act provides that CCCS may impose a financial penalty for an infringement of any prohibition under the Act provided that infringement has been committed intentionally or negligently. The amount of penalty imposed may be up to 10% of the turnover of the business of the undertaking in Singapore for each year of infringement, up to a maximum of three (3) years.

11.11 When setting the amount of any penalty, CCCS will take into account the factors set out as follows:

- the seriousness of the infringement;
- the turnover of the business of the undertaking in Singapore for the relevant product and geographic markets affected by the infringement in the undertaking's last business year or, in the case of an infringing merger, the turnover of the relevant parties in Singapore for the relevant product and relevant geographic markets where competition is substantially lessened;
- the duration of the infringement or, for an infringing merger, the duration of time over which the merger parties took steps to carry the infringing merger into effect and over which the merged entity has been in place;
- aggravating or mitigating factors;
- other relevant factors e.g. deterrent value; and
- immunity, leniency reductions and/or fast track procedure discounts.

Further details are given in the *CCCS Guidelines on the Appropriate Amount of Penalty in Competition Cases, the CCCS Guidelines on Lenient Treatment for Undertakings Coming Forward with Information on Cartel Activity 2016, the CCCS Practice Statement on the Fast Track Procedure for Section 34 and Section 47 Cases and the CCCS Guidelines on Merger Procedures.*

11.12 Any provision of an agreement which falls within the section 34 prohibition (and does not satisfy the conditions set out in section 41) is void to the extent that it infringes the section and cannot be enforced.

11.13 Third parties adversely affected by an infringement of any of the prohibitions under the Act may take action in the courts to seek relief. Further details on enforcement and infringement are also given in the *CCCS Guidelines on Directions and Remedies.*

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12 LENIENCY

Cartels

12.1 The section 34 prohibition extends to prohibit cartel activities. Cartel activities include, amongst other things, the following:

- price fixing: e.g. where parties agree, directly or indirectly, on the prices;
- establishment of restrictions/quotas on output: e.g. agreements which restrict output or production;
- bid-rigging: e.g. arrangements where parties collude when submitting their tenders; and
- market sharing agreements.

Further information on the section 34 prohibition can be found in the *CCCS Guidelines on the Section 34 Prohibition.*

12.2 As cartel activities infringe the section 34 prohibition, undertakings participating or which have participated in them are liable under section 69 of the Act to a financial penalty. Such undertakings may wish to inform CCCS of the existence of the cartel activity but might be deterred from doing so because of the risk of incurring large financial penalties.

12.3 Due to the secret nature of cartels, undertakings participating or which have participated in them should be given an incentive to come forward and inform CCCS of the cartel's activities. The policy of granting lenient treatment to these undertakings which cooperate with CCCS outweighs the policy objectives of imposing financial penalties on such cartel participants.

12.4 More details on how CCCS will administer its leniency programme as part of its enforcement strategy can be found in the *CCCS Guidelines on Lenient Treatment for Undertakings Coming Forward with Information on Cartel Activity 2016.*

Immunity

12.5 Under section 69(4) of the Act, an undertaking which has intentionally or negligently infringed the Act's prohibitions faces a financial penalty of up to 10% of its business turnover of the business of these undertakings in Singapore for each year of infringement up to a maximum of three (3) years.

12.6 An undertaking which is the first to provide CCCS with evidence of cartel activity before the commencement of an investigation will be granted total immunity from financial penalties if it fulfils certain conditions. Such conditions include rendering full and complete co-operation to CCCS until the conclusion of any action arising as a result of the investigation and not being an initiator of the cartel.

12.7 If an investigation has already commenced, the undertaking may still benefit from a reduction in the financial penalty of up to 100% if the relevant conditions are met.

12.8 Subsequent leniency applicants which are not first in line may be granted a reduction of up to 50% in the amount of the financial penalty.

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13 FAST TRACK PROCEDURE

13.1 Once an investigation has commenced, CCCS offers a fast track procedure which will enable undertakings under investigation to enter into an agreement with CCCS under which they will acknowledge their participation in an anti-competitive activity and their liability for it in exchange for a reduced financial penalty and a shorter and expedited investigative timeframe.

13.2 More details on how CCCS will administer its fast track procedure as part of its enforcement strategy can be found in the *CCCS Practice Statement on the Fast Track Procedure for Section 34 and Section 47 Cases.*

14 APPEALS AND RIGHTS OF PRIVATE ACTION

Appealable Decisions

14.1 An appeal against the decision of CCCS (including a direction/imposition of a financial penalty) can be made to the CAB. Such an appeal must be brought within the specified time period.

14.2 Except in the case of an appeal against the imposition, or the amount, of a financial penalty, the appeal does not suspend the effect of the decision to which the appeal relates.

Appeals

14.3 The CAB has wide powers in determining appeals and may:

- confirm or set aside all or part of the decision;
- remit the matter to CCCS;
- impose or revoke, or vary (either increase or decrease) the amount of a penalty;
- give such directions, or take other steps as CCCS itself could have given or taken; or
- make any other decision which CCCS itself could have made.

Further Appeal from the CAB's Decisions

14.4 A further appeal from a decision can be made to the High Court and Court of Appeal either on a point of law arising from a decision of the CAB or from any decision of the CAB as to the amount of a financial penalty.

Rights of Private Action

14.5 Parties suffering loss or damage directly arising from an infringement of any of the prohibitions under the Act are entitled to commence a civil action against the infringing undertaking seeking relief.

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14.6 Such rights of private action will only arise after CCCS has made a decision of infringement in respect thereof, and in the event the decision is subject to an appeal, upon expiry of the appeal period or upon determination of the appeal if an appeal is brought. The court will be bound in such proceedings by the relevant infringement decisions.

14.7 There is a two (2) year limit for the taking of such private actions from the time that CCCS made the decision or from the determination of the appeal, whichever is the later.

15 LIST OF GUIDELINES PUBLISHED BY CCCS

1 CCCS Guidelines on the Major Provisions (these guidelines)

2 CCCS Guidelines on the Section 34 Prohibition

3 CCCS Guidelines on the Section 47 Prohibition

4 CCCS Guidelines on the Substantive Assessment of Mergers

5 CCCS Guidelines on Merger Procedures

6 CCCS Guidelines on Market Definition

7 CCCS Guidelines on the Powers of Investigation in Competition Cases 2016

8 CCCS Guidelines on Directions and Remedies

9 CCCS Guidelines on Lenient Treatment for Undertakings Coming Forward with Information on Cartel Activity 2016

10 CCCS Guidelines on Filing Notifications for Guidance or Decision with respect to the Section 34 Prohibition and Section 47 Prohibition 2016

11 CCCS Guidelines on the Appropriate Amount of Penalty in Competition Cases

12 CCCS Guidelines on the Treatment of Intellectual Property Rights

All CCCS guidelines are available for download at www.cccs.gov.sg.

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CCCS GUIDELINES ON THE SECTION 34 PROHIBITION

Effective from: 1 February 2022

1 INTRODUCTION

1.1 Section 34 of the *Competition Act 2004* ("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 within Singapore unless they are excluded or exempt in accordance with the provisions of Part 3 of the Act ("the section 34 prohibition"). The section 34 prohibition came into force on 1 January 2006.

1.2 These guidelines set out some of the factors and circumstances which the Competition and Consumer Commission of Singapore ("CCCS") may consider in determining whether agreements are anti-competitive. They indicate the manner in which CCCS will interpret and give effect to the provisions of the Act when assessing agreements between undertakings.

1.3 CCCS will set its strategic priorities and consider each case on its merits to see if it warrants an investigation.

1.4 These guidelines are not a substitute for the Act, the regulations and orders. They may be revised should the need arise. The examples in these guidelines are for illustration. They are not exhaustive, and do not set a limit on the investigation and enforcement activities of CCCS. In applying these guidelines, the facts and circumstances of each case will be considered. Persons in doubt about how they and their commercial activities may be affected by the Act may wish to seek legal advice.

1.5 A glossary of terms used in these guidelines is attached.

2 SECTION 34: THE PROVISIONS

Scope of the Provisions

2.1 The section 34 prohibition applies to agreements between undertakings which have as their object or effect the prevention, restriction or distortion of competition within Singapore.

2.2 An agreement made outside Singapore, an agreement where any party to the agreement is outside Singapore or any other matter, practice or action arising out of such agreement outside Singapore is prohibited provided the agreement has as its object or effect the prevention, restriction or distortion of competition within Singapore.

2.3 Section 34(2) of the Act provides an illustrative list of such agreements which:

a. directly or indirectly fix purchase or selling prices or any other trading conditions;

b. limit or control production, markets, technical development or investment;

c. share markets or sources of supply;

d. apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or

e. make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

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2.4 An agreement will not be prohibited if it falls within an exclusion in the Third Schedule to the Act ("the Third Schedule") or meets all of the requirements specified in a block exemption order.

Terms Used in the Section 34 Prohibition

Undertaking

2.5 "Undertaking" means any person, being an individual, a body corporate, an unincorporated body of persons or any other entity, capable of carrying on commercial or economic activities relating to goods or services. It includes individuals operating as sole proprietorships, companies, firms, businesses, partnerships, co-operatives, societies, business chambers, trade associations and non-profit-making organisations, whatever its legal and ownership status (foreign or local, government or non-government), and the way in which it is financed.

2.6 The key consideration in assessing whether an entity is an undertaking for the application of the section 34 prohibition is whether it is capable of engaging, or is engaged, in commercial or economic activity. An entity may engage in commercial or economic activity in some of its functions but not others.

2.7 The section 34 prohibition does not apply to agreements where there is only one undertaking, that is, between entities which form a single economic unit. In particular, an agreement between a parent and its subsidiary company, or between two companies which are under the control of a third company, will not be agreements between undertakings if the subsidiary has no real freedom to determine its course of action in the market and, although having a separate legal personality, enjoys no economic independence.

2.8 Some of the factors that may be considered in assessing whether a subsidiary is independent of or forms part of the same economic unit with its parent include:

- the parent's shareholding in the subsidiary;
- whether or not the parent has control of the board of directors of the subsidiary; and
- whether the subsidiary complies with the directions of the parent on sales and marketing activities and investment matters.

Ultimately, whether or not the entities form a single economic unit will depend on the facts and circumstances of each case.

2.9 As the intent of the Act is to regulate the conduct of market players, it will not apply to any activity carried on by, any agreement entered into or any conduct on the part of the Government, statutory bodies or any person acting on their behalf.

Agreement

2.10 Agreement has a wide meaning and includes both legally enforceable and non-enforceable agreements, whether written or oral; it includes so-called gentlemen's agreements. An agreement may be reached via a physical meeting of the parties or through an exchange of letters or telephone calls or any other means. All that is required is that parties arrive at a consensus on the actions each party will, or will not, take.

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2.11 The fact that a party may have played only a limited part in the setting up of the agreement, or may not be fully committed to its implementation, or participated only under pressure from other parties does not mean that it is not party to the agreement (although these factors may be taken into account in deciding on the level of any financial penalty).

2.12 However, vertical agreements, as defined in the Third Schedule are excluded from the section 34 prohibition in the first instance. These are agreements entered into between two or more undertakings each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain products. For example, an undertaking produces a raw material which the other undertaking uses as an input, or the first undertaking is a manufacturer, the second undertaking is a wholesaler and the third undertaking is a retailer. This does not preclude an undertaking from being active at more than one level of the production or distribution chain.

2.13 The fact that undertakings are in a vertical relationship and/or have a vertical agreement does not, however, preclude the finding of a horizontal agreement which has as its object or effect the prevention, restriction or distortion of competition within Singapore.

2.14 The vertical agreement exclusion further applies to agreements that contain intellectual property rights ("IPRs") provisions, provided that they do not constitute the primary object of such agreements, and are directly related to the use, sale or resale of products.[1] However, IPR agreements such as licensing agreements are not excluded from the section 34 prohibition. In general, vertical agreements have pro-competitive effects that more than outweigh the potential anti-competitive effects. However, there may be situations where this is not the case. If so, the Act provides that the Minister for Trade and Industry ("the Minister") may, by order, specify that the section 34 prohibition applies to such vertical agreement.

Decisions by Associations of Undertakings

2.15 The section 34 prohibition also covers decisions by associations of undertakings. Trade associations are the most common form of association of undertakings but the provisions are not limited to any particular type of association. Trade and other associations generally carry out legitimate functions intended to promote the competitiveness of their industry sectors. However, undertakings participating in such associations may in some instances collude and coordinate their actions which could infringe the section 34 prohibition. The association itself may also make certain decisions or perform actions which could infringe the section 34 prohibition. A decision by an association may include the constitution or rules of an association of undertakings or its recommendations. In the day-to-day conduct of the business of an association, resolutions of the management committee or of the full membership in general meetings, binding decisions of the management or executive committee of the association, or rulings of its chief executive, may all be "decisions" of the association. The key consideration is whether the object or effect of the decision, whatever form it takes, is to influence the conduct or coordinate the activity of the members in some commercial matter. An association's coordination of its members' conduct in accordance with its constitution may also be a decision even if its recommendations are not binding on its members, and may not have been fully complied with. It will be a question of fact in each case whether an association of undertakings is itself a party to an agreement.

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[1] On the assessment of provisions relating to IPRs in agreements which do not fall under the exclusion under paragraph 8 of the Third Schedule, please refer to the *CCCS Guidelines on the Treatment of Intellectual Property Rights.*

2.16 Where there has been an infringement of the section 34 prohibition, the individual members (undertakings) of the association may be fined if membership coincides with participation in the agreement. Further, it is also the case that where there has been a decision by the association, the association may be fined independently.

2.17 **Annex A** sets out some examples of decisions, rules, recommendations or other activities of associations of undertakings that may, or may not, appreciably prevent, restrict or distort competition for the purposes of the section 34 prohibition.

Concerted Practices

2.18 The section 34 prohibition applies to both concerted practices and agreements. The key difference between a concerted practice and an agreement is that a concerted practice may exist where there is informal co-operation, without any formal agreement or decision. A concerted practice would be found to exist if parties, even if they did not enter into an agreement, knowingly substituted the risks of competition with co-operation between them.

2.19 Similarly, the fact that undertakings are in a vertical relationship and/or have a vertical agreement, does not however, preclude the finding of a horizontal concerted practice which has as its object or effect the prevention, restriction or distortion of competition within Singapore. In particular, while dual distribution agreements[2] may generally be considered as vertical agreements, a horizontal concerted practice is likely to be found in agreements of a hub-and-spoke nature.

2.20 The following may be considered in establishing if a concerted practice exists:

- whether the parties knowingly entered into practical co-operation;
- whether behaviour in the market is influenced as a result of direct or indirect contact between undertakings;
- whether parallel behaviour results from contact between undertakings leading to conditions of competition which do not correspond to normal conditions of the market;
- the structure of the relevant market and the nature of the product involved;
- the number of undertakings in the market, and where there are only a few undertakings, whether they have similar cost structures and outputs.

The Prevention, Restriction or Distortion of Competition

2.21 The section 34 prohibition applies where the object or effect of the agreement is to prevent, restrict or distort competition within Singapore. Any agreement between undertakings might be said to restrict the freedom of action of the parties. That does not, however, necessarily mean that the agreement is prohibited. CCCS does not adopt such a narrow approach and will assess an agreement in its economic context. An agreement will fall within the scope of the section 34 prohibition if it has as its object or effect the appreciable prevention, restriction or distortion of competition unless it is excluded or exempted.

2.22 The words "object or effect" are alternative, and not cumulative, requirements. Once it has been established that an agreement has as its object the appreciable restriction of competition, CCCS need not go further to demonstrate anti-competitive effects. On the other hand, if an agreement is not restrictive of competition by object, CCCS will examine whether it has appreciable adverse effects on competition.

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[2] An agreement where only one party is active on the upstream manufacturing segment but both are active on the downstream, wholesale segment. In dual distribution agreements, strategic information is typically shared by an undertaking with another undertaking which is both a competitor and a customer.

Restriction of Competition by Object

2.23 The assessment of whether or not an agreement has as its object the restriction of competition is based on a number of factors. The factors include, in particular, the content of the agreement and the objective aims pursued by it. CCCS will also consider the context in which the agreement is (to be) applied and the actual conduct and behaviour of the parties on the relevant market(s). In other words, an examination of the facts underlying the agreement and the specific circumstances in which it operates may be required before it can be concluded whether a particular restriction constitutes a restriction of competition by object. The way in which an agreement is actually implemented may reveal a restriction by object even where the formal agreement does not contain an express provision to that effect.

2.24 Agreements involving restrictions of competition by object, for example, an agreement involving price fixing, bid-rigging, market sharing or output limitations, will always have an appreciable adverse effect on competition, notwithstanding that the market shares of the parties are below the threshold levels mentioned in paragraph 2.25 and even if the parties to such agreements are small or medium sized enterprises ("SMEs")[3].

The Appreciable Adverse Effect on Competition Test

2.25 As Singapore is a small and open economy, an agreement will generally have no appreciable adverse effect on competition:

- if the aggregate market share of the parties to the agreement does not exceed 20% on any of the relevant markets[4] affected by the agreement where the agreement is made between competing undertakings (i.e. undertakings which are actual or potential competitors on any of the markets concerned);

- if the market share of each of the parties to the agreement does not exceed 25% on any of the relevant markets affected by the agreement, where the agreement is made between non-competing undertakings (i.e. undertakings which are neither actual nor potential competitors on any of the markets concerned);

- in the case of an agreement between undertakings where each undertaking is an SME. In general, agreements between SMEs are unlikely to be capable of distorting competition appreciably within the section 34 prohibition. Nevertheless, CCCS will assess each case on its own facts and merits and the markets concerned.

Where it may be difficult to classify an agreement as an agreement between competitors or an agreement between non-competitors, the 20% threshold will be applicable.

2.26 The fact that the market shares of the parties to an agreement exceed the threshold levels mentioned in paragraph 2.25 does not necessarily mean that the effect of that agreement on competition is appreciable. Other factors may be considered in determining whether the agreement has an appreciable effect, for example, market power of the parties to the agreement, the content of the agreement and the structure of the market or markets affected by the agreement, such as entry conditions or the characteristics of buyers and the structure of the buyers' side of the market.

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[3] SMEs in Singapore are defined as an undertaking having an annual sales turnover of not more than $100 million or having not more than 200 employees.

[4] Please refer to the *CCCS Guidelines on Market Definition*.

2.27 When applying the market share thresholds mentioned in paragraph 2.25, the relevant market share will be the combined market share not only of the parties to the agreement but also of other undertakings belonging to the same group of undertakings as the parties to the agreement. These will include, in the case of each party to the agreement, (i) undertakings over which it exercises control, and (ii) undertakings which exercise control over it as well as any other undertakings which are controlled by those undertakings. Further details on defining the relevant market are given in the *CCCS Guidelines on Market Definition.*

2.28 Please refer to **Annex B** for details on market power and market shares.

Net Economic Benefit

2.29 An agreement that falls within the scope of section 34 of the Act may, on balance, have a net economic benefit if it contributes to improving production or distribution or promoting technical or economic progress and it does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives or afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question. Individual agreements possessing these characteristics are excluded under the Third Schedule. Agreements falling within this exclusion will be excluded by virtue of section 35 of the Act, no prior decision by CCCS to that effect being required.

2.30 In the event of an investigation by CCCS, it will be for the undertaking claiming the benefit of the exclusion for individual agreements under the Third Schedule to prove that it satisfies the requirements. **Annex C** sets out the analytical framework within which CCCS will determine whether an agreement meets the criteria for the exclusion of individual agreements under the Third Schedule.

3 EXAMPLES OF AGREEMENTS THAT MAY INFRINGE THE SECTION 34 PROHIBITION

3.1 This part contains a discussion of the various types of agreements which might adversely affect competition appreciably.

3.2 The examples that follow are not exhaustive; the facts and circumstances of each case will need to be considered. Equally, there will be other agreements which are prohibited because of their particular conditions or restrictions but which are not listed in section 34(2) of the Act or below:

- directly or indirectly fixing prices;
- bid-rigging (collusive tendering);
- sharing markets;
- limiting or controlling production or investment;
- fixing trading conditions;
- joint purchasing or selling;
- sharing information;
- exchanging price information;

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- exchanging non-price information;
- restricting advertising;
- setting technical or design standards.

The first four types of agreements are, by their very nature, regarded as restrictive of competition to an appreciable extent. Other restrictions of competition, if found to be restrictive of competition by object will similarly be regarded as restrictive of competition to an appreciable extent.

Directly or Indirectly Fixing Prices

3.3 There are many ways in which prices can be fixed. It may involve fixing either the price itself or the components of a price such as a discount, establishing the amount or percentage by which prices are to be increased, or establishing a range outside which prices are not to move.

3.4 Price fixing may also take the form of an agreement to restrict price competition. This may include, for example, an agreement to adhere to published price lists or not to quote a price without consulting potential competitors, or not to charge less than any other price in the market. An agreement may restrict price competition even if it does not entirely eliminate it. Competition may, for example, be restricted despite the ability to grant discounts or special deals on a published list price or ruling price.

3.5 Recommendations of a trade association in relation to price, or collective price fixing or price coordination of any product, may be considered to be price fixing, regardless of the form it takes. This could include a decision that requires members to post their prices at the association's premises or on the association's website etc., as well as any recommendation on prices and charges, including discounts and allowances. In general, price recommendations by trade or professional associations may be harmful to competition because they create focal points for prices to converge, restrict independent pricing decisions and signal to market players what their competitors are likely to charge.

3.6 An agreement may also fix prices by indirectly affecting the prices to be charged. It may cover the discounts or allowances to be granted, transport charges, payments for additional services, credit terms or the terms of guarantees, for example. The agreement may relate to specific charges or allowances or to the ranges within which they fall or to the formulae by which prices or ancillary terms are to be calculated.

3.7 Agreements that have the object to fix or effect of fixing prices of any product will, by their very nature, be regarded as restricting competition appreciably.

Bid-rigging

3.8 Tendering procedures are designed to provide competition in areas where it might otherwise be absent. 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, by their very nature, be regarded as restricting competition appreciably.

Agreements to Share Markets

3.9 Undertakings may agree to share markets, whether by territory, type or size of customer, or in some other ways. Such agreements will, by their very nature, be regarded as restricting competition appreciably.nature, be regarded as restricting competition appreciably.

3.10 However, there can be agreements which have the effect (rather than the object) of sharing the market to some degree as a consequence of the main object of the agreement. Each party may agree, for example, to specialise in the manufacture of certain products in a range, or of certain components of a product, in order to be able to produce in longer runs and therefore compete more efficiently. Depending on the facts and circumstances of the case, such an agreement may/may not have an appreciable adverse effect on competition.

Agreements to Limit Output or Control Production or Investment

3.11 An agreement which limits output or controls production, in the form of fixing production levels or quotas, or dealing with structural overcapacity will, by its very nature, be regarded as restricting competition appreciably. In some cases, it may be linked to other agreements which may affect competition.

3.12 Competitive pressures may be reduced if undertakings in an industry agree to limit or at least to coordinate future investment plans.

Agreements to Fix Trading Conditions

3.13 Undertakings may agree to regulate the terms and conditions on which products are to be supplied. If an association imposes on its members an obligation to use common terms and conditions of sale or purchase, this may restrict competition.

3.14 Associations may also be involved in the formulation of standard terms and conditions to be applied by members. Depending on the facts of the case, this may be no more than a useful simplification of what might otherwise be complex and, to the buyer, potentially confusing conditions. Standard conditions are less likely to have an appreciable effect on competition where members remain free to adopt different conditions if they wish.

Joint Purchasing/Selling

3.15 An agreement between buyers with market power to fix (directly or indirectly) the price that they are prepared to pay, or to purchase only through agreed arrangements, limits competition within the market. An example of the type of agreement which might be made between buyers is an agreement on sellers with whom they will deal.

3.16 The same issues potentially arise in agreements between sellers with market power, in particular, where sellers agree to boycott certain buyers.

Information Sharing

3.17 As a general principle, the more informed buyers are, the more effective competition is likely to be and so making information publicly available to buyers does not usually harm competition.

3.18 In the normal course of business, undertakings exchange information on a variety of matters legitimately and with no risk to the competitive process. Indeed, competition may be enhanced by the sharing of information, for example, on new technologies or market opportunities, particularly where consumers are also informed.

3.19 There are circumstances where there can be no objection to the exchange of information between competitors or the exchange of information under the aegis of a trade association or otherwise.

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3.20 The exchange of information may however have an appreciable adverse effect on competition, where it serves to reduce or remove uncertainties inherent in the process of competition. The fact that the information could have been obtained from other sources is not necessarily relevant. Whether or not exchange of information has an appreciable effect on competition will depend on the circumstances of each individual case: the market characteristics, the type of information and the way in which it is exchanged. As a general principle, it is more likely that there would be an appreciable adverse effect on competition the smaller the number of undertakings operating in the market, the simpler and more transparent the market, the more stable the market, the more frequent the exchange, the more sensitive and confidential the nature of the information which is exchanged, and where information exchanged is limited to certain participating undertakings to the exclusion of their competitors and buyers. For example, where the exchange of market information is liable to enable undertakings to be aware of market strategies of their competitors, it may lead to appreciable adverse effect on competition as it can create mutually consistent expectations regarding the uncertainties present in the market and enable undertakings to reach a common understanding on the terms of coordination of their competitive behaviour, even without an explicit agreement on coordination.

3.21 A unilateral disclosure of information by one undertaking to another as opposed to an exchange of information per se, may also constitute a concerted practice between undertakings to restrict competition where the latter requests it, or at the very least, accepts it. Such disclosure where it relates to strategic information, for example, information concerning its future commercial policy, which can occur via email, mail, phone calls, meetings etc., reduces strategic uncertainty as to the future operation of the market for the competitors involved and increases the risk of limiting competition and of collusive behaviour. In fact, simply attending a meeting where a company discloses its pricing plan to its competitors is likely to be caught under the section 34 prohibition, even in the absence of an explicit agreement to raise prices. When an undertaking receives strategic information from a competitor, it will generally be presumed to have accepted the information and adapted its market conduct accordingly unless it responds with a clear statement that it does not wish to receive such information.

Exchange of Price Information

3.22 The exchange of information on prices may lead to price coordination and therefore diminish competition, which would otherwise be present between the undertakings. This will be the case whether the information exchanged relates directly to the prices charged or to the elements of a pricing policy, for example, discounts, costs, terms of trade and rates and dates of change. Price announcements made in advance to competitors may be anti-competitive where it facilitates collusion. Price announcements made directly to buyers, on the other hand, may be pro-competitive. In general, any information exchange with the objective of restricting competition on the market will be considered as a restriction of competition by object. For example, the exchange of information on an undertaking's individualised data regarding intended future prices will be considered a restriction of competition by object. In addition, private exchanges between competitors of their individualised intentions regarding future prices will normally be considered a restriction of competition by object as they generally have the object of fixing prices.

3.23 The more recent or current the information exchanged, the more likely that the exchange could have an appreciable adverse effect on competition. The circulation of purely historical information or the collation of price trends is not likely to have an appreciable adverse effect on competition. One example is where the exchange forms part of a structured scheme of inter-business comparison intended to spread best industrial practices such as in a benchmarking exercise, where the information is collected, aggregated and disseminated by an independent body.

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Exchange of Non-Price Information

3.24 The exchange of information on matters other than price may have an appreciable adverse effect on competition depending on the type of information exchanged and the structure of the market to which it relates. For example, the exchange of aggregated statistical data, market research, and general industry studies are unlikely to have an appreciable adverse effect on competition, since the exchange of such information is unlikely to reduce individual undertakings' commercial and competitive independence.

3.25 In general, the exchange of information on output and sales should not affect competition provided that it is aggregated. Even if it enables participants to identify individual undertakings' competitive behaviour, it should be sufficiently historic. In such circumstances, it is unlikely that an agreement to exchange such information would influence the participants' competitive market behaviour. There may however be an appreciable adverse effect on competition if the information exchanged is current or recent, or concerns future plans, and if it can be ascribed to particular undertakings, whether because it is broken down in this way or because it can be disaggregated. In general, any information exchange with the objective of restricting competition on the market will be considered as a restriction of competition by object. For example, the exchange of information on an undertaking's individualised data regarding intended future output or production will be considered a restriction of competition by object. In addition, private exchanges between competitors of their individualised intentions regarding future output or production will normally be considered a restriction of competition by object as they generally have the object of fixing output or production.

Advertising

3.26 Restrictions on advertising, whether relating to the amount, nature or form of advertising, have the potential to restrict competition. Whether the effect is appreciable depends on the purpose and nature of the restriction, and on the market in which it is to apply.

3.27 Decisions by associations, for example, aimed at curbing misleading advertising, or at ensuring that advertising is legal, truthful, honest and decent, are unlikely to have an appreciable adverse effect on competition.

Standardisation Agreements

3.28 An agreement on technical or design standards may lead to an improvement in production by reducing costs or raising quality, or it may promote technical or economic progress by reducing waste and consumers' search costs. The agreement may, however, have an appreciable adverse effect on competition, in particular, if it includes restrictions on what the parties may produce or is, in effect, a means of limiting competition from other sources, for example by raising entry barriers. Standardisation agreements which prevent the parties from developing alternative standards or products that do not comply with the agreed standard may also have an appreciable adverse effect on competition.

Other Anti-Competitive Agreements

3.29 Competition in a market can be restricted in less direct ways than by the fixing of prices or the sharing of markets or the other examples set out above – for example, a scheme under which a customer obtains better terms the more business he or she places with all the parties to the scheme. The circumstances of each case will be considered.

3.30 Other types of agreements where the parties agree to co-operate may have an appreciable adverse effect on competition.

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4 EXCLUSIONS

4.1 The section 34 prohibition does not apply to the matters specified in the Third Schedule by virtue of section 35 of the Act. These are:

- an undertaking entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly, insofar as the prohibition would obstruct the performance, in law or fact, of the particular tasks assigned to that undertaking. **Annex D** sets out how this exclusion will be applied;

- an agreement to the extent to which it is made in order to comply with a legal requirement, that is any requirement imposed by or under any written law;

- an agreement which is necessary to avoid conflict with an international obligation of Singapore, and which is also the subject of an order by the Minister;

- an agreement which is necessary for exceptional and compelling reasons of public policy and which is also the subject of an order by the Minister;

- an agreement which relates to any product to the extent to which any other written law, or code of practice issued under any written law, relating to competition gives another regulatory authority jurisdiction in the matter;

- an agreement which relates to any of the following specified activities:

  - the supply of ordinary letter and postcard services by a person licensed and regulated under the *Postal Services Act 1999;*

  - the supply of piped potable water;

  - the supply of wastewater management services, including the collection, treatment and disposal of wastewater;

  - the supply of bus services by a licensed bus operator under the *Bus Services Industry Act 2015;*

  - the supply of rail services by any person licensed and regulated under the *Rapid Transit Systems Act 1995;* and

  - cargo terminal operations carried out by a person licensed and regulated under the *Maritime and Port Authority of Singapore Act 1996;*

- an agreement which relates to the clearing and exchanging of articles undertaken by the Automated Clearing House established under the *Banking (Clearing House) Regulations;* or any activities of the Singapore Clearing Houses Association regarding the Automated Clearing House;

- vertical agreements entered into between two or more undertakings each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain products,[5] other than such vertical agreement as the Minister may by order specify;

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[5] The definition of "vertical agreement" also includes provisions contained in agreements which relate to the assignment to the buyer or use by the buyer of IPRs, provided that those provisions do not constitute the primary object of the agreement and are directly related to the use, sale or resale of products by the buyer or its customers.

- an agreement with net economic benefit where such agreement contributes to:
    - improving production or distribution; or
    - promoting technical or economic progress, but which does not:
    - impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; or
    - afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question;
- any agreement that is directly related and necessary to the implementation of a merger; and
- any agreement (either on its own or when taken together with another agreement) to the extent that it results, or if carried out would result, in a merger.

4.2 The Minister may at any time, by order, amend the Third Schedule.

5 BLOCK EXEMPTIONS

5.1 Section 36 of the Act empowers the Minister, acting on a recommendation of CCCS, to exempt, by order, categories of agreements from the section 34 prohibition. Such an exemption is known as a block exemption. Section 39 of the Act provides for the procedure which CCCS and the Minister are to follow in making block exemption orders.

5.2 Section 41 of the Act sets out the criteria for block exemption orders. Block exemption may be considered for any category of agreements which contribute to:

a. improving production or distribution; or

b. promoting technical or economic progress, but which does not:

i. impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; or

ii. afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question.

Annex C sets out the analytical framework on how CCCS will assess if agreements meet the criteria for the exclusion of individual agreements under the Third Schedule. These criteria mirror section 41 of the Act, and are also applicable for block exemptions.

5.3 There is no need to notify agreements which fall within the categories of agreements specified in a block exemption order. A block exemption order may impose conditions or obligations subject to which the block exemption has effect. Parties to an agreement covered by a block exemption order will be required to demonstrate that the agreement falls within the scope of the block exemption order should a need arise.

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5.4 Breach of a condition imposed by a block exemption order has the effect of cancelling the block exemption for an agreement from such date as CCCS may specify. Failure to comply with an obligation imposed by a block exemption order enables CCCS to cancel the block exemption for an agreement from such date as CCCS may specify. If CCCS considers that an agreement is not one to which section 41 of the Act applies, CCCS may cancel the block exemption for such agreement from such date as CCCS may specify.

5.5 A block exemption order may provide for a party to an agreement which does not qualify for the block exemption but satisfies criteria specified in the order, to notify CCCS of the agreement. If CCCS does not give notice of its opposition within the specified period, the agreement is treated as falling within a category specified in the block exemption order. If CCCS exercises the right to oppose, the notification is treated as a notification for decision.

6 NOTIFICATION FOR GUIDANCE/DECISION

6.1 There is no requirement for undertakings to notify agreements to CCCS. It is for the parties to an agreement to ensure that their agreements are lawful and decide whether it is appropriate to make a notification for guidance or decision.

6.2 Guidance may indicate whether an agreement would be likely to infringe the section 34 prohibition. If CCCS considers that the agreement is not likely to infringe the section 34 prohibition, its guidance may indicate whether that is because of the effect of an exclusion or because the agreement is exempt from the prohibition.

6.3 CCCS will generally take no further action once guidance has been given that the section 34 prohibition is unlikely to be infringed, unless there are reasonable grounds for believing that there has been a material change of circumstance since the guidance was given; or CCCS has a reasonable suspicion that information on which it had based its guidance was materially incomplete, misleading or false; or a complaint is received from a third party, or where one of the parties to the agreement applies for a decision with respect to the agreement.

6.4 A decision will indicate whether the agreement has infringed the section 34 prohibition. CCCS will state reasons for its decision. If the section has not been infringed, the decision may indicate whether it is because of the effect of an exclusion or because the agreement is exempt from the prohibition.

6.5 CCCS will generally take no further action once a decision has been given that the section 34 prohibition has not been infringed unless there are reasonable grounds for believing that there has been a material change of circumstance or there is a reasonable suspicion that information on which it had based its decision was materially incomplete, misleading or false. Unlike guidance, a decision cannot be reopened because a complaint is made by a third party.

6.6 Notification of an agreement to CCCS by an undertaking provides immunity from financial penalty in respect of infringements of the section 34 prohibition by the notified agreement, occurring during the period beginning from the date on which the notification was given to such date as may be specified in a notice given by CCCS following its determination of the notification. This date cannot be earlier than the date of the notice.

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6.7 If CCCS determines a notification by giving guidance that the agreement is unlikely to infringe the section 34 prohibition, or by giving a decision that the agreement does not infringe the section 34 prohibition, the agreement will receive immunity from financial penalties for infringements of the section 34 prohibition. CCCS may remove the immunity conferred by the favourable guidance or decision if it takes further action under one of the circumstances described in paragraph 6.3 (in a case for guidance) or paragraph 6.5 (in a case for decision), and considers that the agreement will likely infringe the section 34 prohibition. In doing so, CCCS will issue a notice informing the applicant that the immunity is being removed as from the date specified in the notice. If CCCS removes the immunity because of materially incomplete, false or misleading information supplied by the parties to the agreement, the effective date of the immunity removal may be earlier than the date of the notice.

6.8 Please refer to the *CCCS Guidelines on Filing Notifications for Guidance or Decision with respect to the Section 34 Prohibition and Section 47 Prohibition 2016* on how undertakings may notify CCCS of its agreement and seek guidance or decision from CCCS.

7 CONSEQUENCES OF INFRINGEMENT

Voidness

7.1 Any provision of an agreement entered into before 1 January 2006, is void and unenforceable to the extent that it infringes the section 34 prohibition on or after 1 January 2006. Any provision of an agreement entered into on or after 1 January 2006 is void and unenforceable to the extent that it infringes the section 34 prohibition.

Financial Penalties

7.2 A financial penalty not exceeding 10% of the turnover of the business of an undertaking in Singapore for each year of infringement may be imposed for a maximum period of three (3) years, where there is an intentional or negligent infringement of the section 34 prohibition.

Rights of Private Action

7.3 A party who has suffered any loss or damage directly as a result of an infringement of the section 34 prohibition has a right of action in civil proceedings against the relevant undertaking.

7.4 This right of private action can only be exercised after CCCS has determined that an undertaking has infringed the section 34 prohibition and after the appeal process has been exhausted.

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8 SOME EXAMPLES OF DECISIONS, RULES, RECOMMENDATIONS OR OTHER ACTIVITIES OF ASSOCIATIONS OF UNDERTAKINGS THAT MAY, OR MAY NOT, APPRECIABLY PREVENT, RESTRICT OR DISTORT COMPETITION FOR THE PURPOSES OF THE SECTION 34 PROHIBITION

Examples	Likely to have an appreciable effect on competition.	Unlikely to have an appreciable effect on competition.
a. Pricing	☑ Any recommendation as to prices and charges, including discounts and allowances is likely to have an appreciable effect on competition.	
b. Information sharing	☑ More likely to have an appreciable effect on competition the smaller the number of undertakings operating in the market, the more frequent the exchange and the more sensitive, detailed and confidential the nature of the information which is exchanged. ☑ There is also more likely to be an appreciable effect on competition where the exchange of information is limited to certain participating undertakings to the exclusion of their competitors and consumers.	☒ Generally no objection to the exchange of historical information even between competitors, whether or not under the aegis of a trade association. For example, the collection and publication of statistics are legitimate functions of associations of undertakings. There is no predetermined threshold when data becomes historic, that is to say, old enough not to pose risks to competition. Whether data is genuinely historic depends on the specific characteristics of the relevant market and in particular the frequency of price re-negotiations in the industry.

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Examples	Likely to have an appreciable effect on competition.	Unlikely to have an appreciable effect on competition.
c. Exchange of price information	☑ The more recent or current the information exchanged, the more likely that the exchange could have an appreciable effect on competition. ☑ The exchange of information may lead to price coordination and therefore diminish competition which would otherwise be present between the undertakings.	☒ The circulation of purely historical information or the collation of price trends is unlikely to have an appreciable effect on competition, particularly if the exchange forms part of a scheme of inter-business comparisons which is intended to spread best industrial practice, or if the information is collected, aggregated and disseminated by an independent body to both consumers and businesses.
d. Exchange of non-price information	☑ There may be an appreciable effect on competition if it is possible to disaggregate the information and identify the participants.	☒ The exchange of historical statistical data, market research, and general industry studies on output and sales are unlikely to have an appreciable effect on competition, since exchange of such information is unlikely to inhibit individual undertakings' commercial and competitive independence. For example, data can be considered as historic if it is several times older than the average length of contracts in the industry if the latter are indicative of price re-negotiations.
e. Advertising	☑ Rules or decisions of associations of undertakings prohibiting members from soliciting for business, from competing with other members, or from advertising prices, or pricing below a minimum or recommended level, are likely to have an appreciable effect on competition.	☒ Rules or decisions of associations of undertakings aimed at curbing misleading advertising, or at ensuring that advertising is legal, truthful, honest and decent are unlikely to have an appreciable effect on competition.

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Examples	Likely to have an appreciable effect on competition.	Unlikely to have an appreciable effect on competition.
f. Joint purchasing	☑ An agreement between purchasers to fix (directly or indirectly) the price that they are prepared to pay, or to purchase only through agreed arrangements, limits competition between them.	☒ Joint purchasing, joint selling or joint research are unlikely to have an appreciable effect on competition, and therefore not explicitly prohibited.
g. Codes of conduct A code of conduct seeks to introduce best practices and may include provisions e.g. for dealing with consumer complaints and a redress procedure.		☒ If the structure of the market is competitive, and the code does not deal with prices or involve any element of market sharing or customer sharing, the effects on competition are less likely to be appreciable.
h. Technical standards An association of undertakings may play a role in the negotiation and promulgation of technical standards in an industry.	☑ If entry barriers were to be significantly raised as a result of adoption of the standard, the effects on competition could be appreciable.	
i. Standard terms and conditions An association of undertakings may be involved in the formulation of standard terms and conditions and impose on its members an obligation to use such common terms and conditions of sales or purchases.	☑ Standard conditions may have an appreciable effect on competition if a large proportion of members adopt those standard conditions leaving customers little choice in practice.	☒ Standard conditions are less likely to have an appreciable effect on competition where members remain free to adopt different conditions if they so wish.

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Examples	Likely to have an appreciable effect on competition.	Unlikely to have an appreciable effect on competition.
j. Terms of membership Rules of admission as a member of an association of undertakings should be transparent, proportionate, non-discriminatory and based on objective standards.	☑ Terms of membership will have an appreciable effect on competition where the effect of exclusion from membership is to put the undertaking(s) concerned at a competitive disadvantage. ☑ Similarly, procedures for expelling members of an association may have an appreciable effect on competition, particularly where they are not based on reasonable and objective standards or where there is no proper appeal procedure in the event of refusal of membership or expulsion.	
k. Certification An association of undertakings may certify or award quality labels to its members to demonstrate that they have met minimum industry standards.	☑ A scheme is likely to have an appreciable effect on competition where manufacturers must accept additional obligations governing the products which they can buy or sell, or restrictions as to pricing or marketing.	☒ A scheme is less likely to have an appreciable effect on competition where certification is available to all manufacturers that meet objective and reasonable quality requirements.

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9 MARKET POWER AND MARKET SHARES

9.1 This part considers the extent to which market shares indicate whether an undertaking possesses market power, how market shares may be measured, the sort of evidence likely to be relevant, and some potential problems. These issues are important when considering the intensity of existing competition.

9.2 In general, market power is more likely to exist if an undertaking (or group of undertakings) has a persistently high market share. Likewise, market power is less likely to exist if an undertaking has a persistently low market share. Relative market shares can also be important. For example, a high market share might be more indicative of market power when all other competitors have very low market shares.

9.3 The history of the market shares of all undertakings within the relevant market is often more informative than considering market shares at a single point in time, partly because such a snapshot might not reveal the dynamic nature of a market. For example, volatile market shares might indicate that undertakings constantly innovate to get ahead of each other. This is consistent with effective competition. Evidence that undertakings with low market shares have grown rapidly to attain relatively large market shares might suggest that barriers to expansion are low, particularly when such growth is observed for recent entrants.

9.4 While the consideration of market shares over time is important when assessing market power, an analysis of other factors is also important. The following factors may be considered:

- **Low entry barriers:** An undertaking with a persistently high market share may not necessarily have market power where there is a strong threat of potential competition. If entry into the market is easy, the incumbent might be constrained to act competitively so as to avoid attracting entry over time by potential competitors.

- **Bidding markets:** Sometimes buyers choose their suppliers through procurement auctions or tenders. In these circumstances, even if there are only a few suppliers, competition might be intense. This is more likely to be the case where tenders are large and infrequent (so that suppliers are more likely to bid), where suppliers are not subject to capacity constraints (so that all suppliers are likely to place competitive bids), and where suppliers are not differentiated (so that for any particular bid, all suppliers are equally placed to win the contract). In these types of markets, an undertaking might have a high market share at a single point in time. However, if competition at the bidding stage is effective, this currently high market share would not necessarily reflect market power.

- **Successful innovation:** In a market where undertakings compete to improve the quality of their products, a persistently high market share might indicate persistently successful innovation and so would not necessarily mean that competition is not effective.

- **Product differentiation:** Sometimes the relevant market will contain products that are differentiated. In this case, undertakings with relatively low market shares might have a degree of market power because other products in the market are not very close substitutes.

- **Responsiveness of customers:** Where undertakings have similar market shares, this does not necessarily mean that they have similar degrees of market power. This may be because their customers differ in their ability or willingness to switch to alternative suppliers.

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- **Price responsiveness of competitors:** Sometimes an undertaking's competitors will not be in a position to increase output in response to higher prices in the market. For example, suppose an undertaking operates in a market where all undertakings have limited capacity (for example, they are at, or close to, full capacity and so are unable to increase output substantially). In this case, the undertaking would be in a stronger position to increase prices above competitive levels than an otherwise identical undertaking with a similar market share operating in a market where its competitors were not close to full capacity.

- **Strength of network effects:** Network effects occur where users' valuations of the network increase as more users join the network.[6] Network effects may be relevant in the assessment of the market power of an undertaking. In the context of multi-sided platforms[7], indirect network effects may occur when a user's valuation of the multi-sided platform increases with the increase in the number of users on the other side(s) of the platform. Besides the number of users on the other side of the platform, the quality of users and the intensity of their usage can also affect the valuation of the platform to users on other side(s) of the platform. In certain circumstances, a platform may be able to harness such network effects to the extent that the market tips in its favour. In assessing the strength of network effects, CCCS may consider factors such as the prevalence of multi-homing[8], and switching costs.

- **Control or ownership of key inputs:** The control or ownership of a key input by an undertaking may be a relevant factor in CCCS's consideration of the undertaking's market power. Such inputs could include physical assets, proprietary rights or data. In its assessment, CCCS may take into consideration the relative ease of obtaining such inputs or the relative availability of alternative inputs.

9.5 In markets characterised by innovation and rapidly changing competition dynamics, the assessment of dominance may focus less on market shares and more on other factors such as barriers to entry, the degree of innovation, the strength of network effects, and the control or ownership of key inputs such as data.

Measuring Market Shares

Evidence

9.6 Data on market shares may be collected from a number of sources including:

- information provided by undertakings themselves. Undertakings are usually asked for data on their own market shares, and to estimate the shares of their competitors;

- trade associations, customers or suppliers who may be able to provide estimates of market shares; and

- market research reports.

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[6] For example, as new customers enter a telephone network, this might add value to existing customers because they would be connected to more people on the same network.

[7] A multi-sided platform refers to an undertaking acting as a platform that facilitates interactions between two or more groups of users and creates value for sellers or buyers on one side of the platform by matching or connecting them with sellers or buyers on the other side of the platform. For a detailed explanation of how a market definition exercise may be performed in a case involving multi-sided platforms, please refer to paragraphs 5.14 to 5.19 of the *CCCS Guidelines on Market Definition*.

[8] Multi-homing refers to the practice by suppliers or consumers of using more than one platform simultaneously to buy or sell.

9.7 The appropriate method of calculating market shares depends on the case at hand. Usually sales data by value and by volume are both informative. Often value data will be more informative, for example, where goods are differentiated. Other measures, such as production volumes, capacity or reserves may be used as appropriate. Where the undertaking involved is a multi-sided platform, additional measures may include the number of monthly active users (including buyers and sellers on each side of the platform), number of transactions and gross merchandise value.

9.8 The following issues may arise when measuring market shares:

- **Production, sales and capacity:** Market share is usually determined by an undertaking's sales to customers in the relevant market. Market share is normally measured using sales to direct customers in the relevant market rather than an undertaking's total production (which can vary when stocks increase or decrease). Sometimes market shares will be measured by an undertaking's capacity to supply the relevant market: for example, where capacity is an important feature in an undertaking's ability to compete or in some instances where the market is defined taking into account supply-side considerations.

- **Sales values:** When considering market shares on a value basis, market share is valued at the price charged to an undertaking's direct customers. For example, when a manufacturer's direct customers are retailers, it is more informative to consider the value of its sales to retailers as opposed to the prices at which the retailers sell that manufacturer's product to final consumers.

- **Choice of exchange rates:** Where the relevant geographic market is international, this may complicate the calculation of market shares by value as exchange rates vary over time. It may then be appropriate to consider a range of exchange rates over time, including an assessment of the sensitivity of the analysis to the use of different exchange rates.

- **Imports:** If the relevant geographic market is international, market shares will be calculated with respect to the whole geographic market. If the relevant geographic market is not international, it is possible that imports will account for a share of that market. If so, and if information is available, the sales of each importing undertaking are usually considered and market shares calculated accordingly, rather than aggregating shares as if they were those of a single competitor. Where the relevant geographic market is domestic, the share of an undertaking that both supplies within and imports into that market[9] would usually include both its domestic sales and its imports.

- **Internal production:** In some cases, a supplier may be using some of its capacity or production to meet its own internal needs. In the event of a rise in price on the open market, the supplier may decide to divert some or all of its "captive" capacity or production to the open market if it is profitable to do so, taking into account effects on its downstream business that is now deprived of the captive supply. The extent to which "captive" capacity or production is likely to be released onto the open market (or might otherwise affect competition on the open market) will be taken into account in assessing competitive constraints.

9.9 Please refer to the *CCCS Guidelines on the Section 47* Prohibition for a more comprehensive discussion on how CCCS may assess market power and market shares.

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[9] This includes situations where the undertaking in question is part of the same group as an importer into that market.

10 THE ANALYTICAL FRAMEWORK TO ASSESS IF AGREEMENTS MEET THE CRITERIA FOR THE EXCLUSION OF INDIVIDUAL AGREEMENTS UNDER THE THIRD SCHEDULE

10.1 In general, the assessment of benefits flowing from agreements would be made within the confines of each relevant market to which the agreements relate. However, where two (or more) markets are closely related, efficiencies generated in these separate markets may be taken into account.

10.2 Each of the criteria set out in the exclusion of individual agreements under the Third Schedule is considered below:

"Contributes to improving production or distribution; or promoting technical or economic progress"

10.3 The purpose of the above criteria is to define the types of efficiency gains that can be taken into account. These will then be subject to the further tests in paragraphs 10.8 to 10.13. The aim of the analysis is to ascertain what are the objective benefits created by the agreement and the economic importance of such efficiencies. The efficiencies are not assessed from the subjective viewpoint of the parties.

10.4 The efficiency claims must therefore be substantiated as follows:

- the claimed efficiencies must be objective in nature;
- there must normally be a direct causal link between the agreement and the claimed efficiencies; and
- the efficiencies must be of a significant value, enough to outweigh the anti-competitive effects of the agreement.

In evaluating the third factor, the likelihood and magnitude of the claimed efficiencies will need to be verified. The undertakings will have to substantiate each efficiency claimed, by demonstrating how and when each efficiency will be achieved. Unsubstantiated claims cannot be accepted. Further, the greater the increase in market power that is likely to be brought about, the more significant benefits will have to be.

10.5 The types of efficiencies stated in the criteria are broad categories intended to cover all objective economic efficiencies. There is considerable overlap between the various categories. There is no need therefore to draw clear and firm distinctions between the various categories.

10.6 Examples of improvements in production or distribution include lower costs from longer production or delivery runs, or from changes in the methods of production or distribution; improvements in product quality; or increases in the range of products produced.

10.7 Examples of the promotion of technical or economic progress include efficiency gains development with the prospect of an enhanced flow or speed of innovation.

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"But which does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives"

10.8 This criterion implies a two-fold test. Both the agreement itself, and the individual restrictions of the agreement, must be reasonably necessary to attain the efficiencies.

10.9 The first consideration is whether more efficiencies are produced with the agreement in place than in its absence. The agreement will not be regarded as indispensable if there are other economically practical and less restrictive means of achieving the efficiencies, or if the parties are capable of achieving the efficiencies on their own.

10.10 Where the agreement is deemed necessary to achieve the efficiencies, the second consideration is whether more efficiencies are produced with the individual restriction(s) in place than in their absence. A restriction is indispensable if its absence would eliminate or significantly reduce the efficiencies that flow from the agreement, or make them much less likely to materialise. Restrictions relating to price fixing, bid-rigging, market sharing and output limitation agreements are unlikely to be considered indispensable.

10.11 The assessment of indispensability is made within the actual context in which the agreements operate and must in particular take account of the structure of the market, the economic risks related to the agreements, and the incentives facing the parties. The more uncertain the success of the products covered by the agreements, the more restrictions may be required to ensure that the efficiencies will materialise. Restrictions may also be indispensable in order to align the incentives of the parties and ensure that they concentrate their efforts on the implementation of the agreement.

"Afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question"

10.12 Under this criterion, CCCS will take into account the degree of competition *prior* to the agreements, and also the reduction in competition that the agreements bring about. Accordingly, in a market where competition is already relatively weak, this factor may be more important.

10.13 In assessing whether there might be substantial elimination of competition, the appropriate definition of the relevant market is important. Evaluation under this criterion may require an analysis of the degree of market power that parties enjoy, before and after the agreements. This involves a study of the various sources of competitive constraints, such as other competitors (using market share as an indicator), entry barriers and buyer power etc. Where the products sold by the parties to the agreements are viewed to be close substitutes, the agreements would be more likely to result in a substantial elimination of competition.

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11 EXCLUSION FROM THE SECTION 34 PROHIBITION FOR AN UNDERTAKING ENTRUSTED WITH THE OPERATION OF SERVICES OF GENERAL ECONOMIC INTEREST OR HAVING THE CHARACTER OF A REVENUE-PRODUCING MONOPOLY (PARAGRAPH 1 OF THE THIRD SCHEDULE)

11.11 CCCS intends to apply this exclusion very narrowly. The onus is on the undertaking seeking to benefit from the exclusion, to demonstrate that all the requirements of the exclusion are met. The undertaking will have to (i) satisfy CCCS that it has been entrusted with the operation of a service of general economic interest or has the character of a revenue-producing monopoly; and (ii) show that the application of the section 34 prohibition would obstruct the performance, in law or in fact, of the particular task entrusted to it.

Entrusted

11.2 The undertaking will need to demonstrate that it has been entrusted with the service in question by a public authority. The public authority can be part of the Government, or one of the statutory boards. The act of entrustment can be made by way of legislative measures such as regulation, or the grant of a licence governed by public law. It can also be done through an act of public authority, such as by way of ministerial orders. Mere approval by a public authority of the activities carried out by the undertaking will not suffice.

11.3 The exclusion applies only to the particular tasks entrusted to the undertaking and not to the undertaking or its activities generally. Further, the exclusion applies only to obligations linked to the subject matter of the service of general economic interest in question and which contribute directly to that interest.

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Services of General Economic Interest

11.4 Services of general economic interest are different from ordinary services in that public authorities consider they should be provided in all cases, whether or not there is sufficient economic incentive for the private sector to do so.

11.5 The term "economic" refers to the nature of the service itself, rather than the interest. Further, to be considered a service of general economic interest, the service must be widely available and not restricted to managing private interests or to a certain class, or classes, of customers. However, this does not exclude selective criteria in the supply of service.

Restrictions on Competition

11.6 Restrictions on competition from other economic operators must be allowed only insofar as they are necessary to enable the undertaking entrusted with the service of general economic interest to provide the service in question. It would be necessary to consider the economic conditions in which the undertaking operates and the constraints placed on it, in particular the costs which it has to bear.

11.7 It would not be sufficient for the undertaking to show that it has been entrusted with the provision of a public service in order to benefit from this exclusion. An undertaking seeking to benefit from this exclusion would have to show that the application of the section 34 prohibition would require it to perform the task entrusted to it in economically unacceptable conditions. For instance, the undertaking may be required to meet a "universal service obligation".[10] Without the benefit of the exclusion, competition would allow new entrants to cherry-pick and target the profitable customers, while leaving unprofitable customers to the incumbent. Such a risk may compromise the incumbent's economic viability and thus obstruct the performance of its obligations.

Character of a Revenue-producing Monopoly

11.8 To benefit under this exclusion, the undertaking must have as its principal objective, the raising of revenue for a public authority in Singapore through the provision of a particular service. It must have been granted an exclusive right to provide the service, rendering it the monopoly provider of that service. As in the case of services of general economic interest, the undertaking must show that the application of the section 34 prohibition would obstruct the performance, in law or in fact, of the particular tasks assigned to it.

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[10]This refers to an obligation to provide a minimum set of services of specified quality to all users at an affordable price, independent of their geographical locations. This includes guaranteeing services to non- profitable areas.

12 GLOSSARY

Agreement	Includes decisions by associations of undertakings and concerted practices unless otherwise stated, or as the context so demands.
Buyer	Refers to the end-user consumer, and/or an undertaking that buys products as inputs for production or for resale, as the context demands.
Market Power	Refers to the ability to profitably sustain prices above competitive levels or to restrict output or quality below competitive levels. An undertaking with market power might also have the ability and incentive to harm the process of competition in other ways, for example by weakening existing competition, raising entry barriers or slowing innovation. Market power arises where an undertaking does not face sufficiently strong competitive pressure.
Product	Refers to goods and/or services.
Seller	Refers to the primary producer, an undertaking that sells products as inputs for further production, and/or an undertaking that sells goods and services as a final product, as the context demands.
Undertaking	Refers to any person, being an individual, a body corporate, an unincorporated body of persons or any other entity, capable of carrying on commercial or economic activities relating to goods or services, as the context demands. Includes individuals operating as sole proprietorships, companies, firms, businesses, partnerships, co-operatives, societies, business chambers, trade associations and non-profit-making organisations.

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CCCS GUIDELINES ON THE SECTION 47 PROHIBITION

Effective from: 1 February 2022

1 INTRODUCTION

1.1 Section 47 of the *Competition Act 2004* ("the Act") prohibits any conduct on the part of one or more undertakings, which is an abuse of a dominant position, in any market in Singapore ("the section 47 prohibition"). The section 47 prohibition came into force on 1 January 2006.

1.2 These guidelines set out some of the factors and circumstances which the Competition and Consumer Commission of Singapore ("CCCS") may consider in determining whether an undertaking has engaged in conduct amounting to an abuse of a dominant position in a market. They indicate the manner in which CCCS will interpret and give effect to the provisions of the Act when assessing abuse of dominance.

1.3 CCCS will set its strategic priorities and consider each case on its merits to see if it warrants an investigation.

1.4 These guidelines are not a substitute for the Act, the regulations and orders. They may be revised should the need arise. The examples in these guidelines are for illustration. They are not exhaustive, and do not set a limit on the investigation and enforcement activities of CCCS. In applying these guidelines, the facts and circumstances of each case will be considered. Persons in doubt about how they and their commercial activities may be affected by the Act may wish to seek legal advice.

1.5 A glossary of terms used in these guidelines is attached.

2 SECTION 47: THE PROVISIONS

Scope of the Provisions

2.1 Conduct that constitutes an abuse of a dominant position in a market, includes conduct that protects, enhances or perpetuates the dominant position of an undertaking in ways unrelated to competitive merit. The section 47 prohibition only prohibits abuse of a dominant position. It does not prohibit undertakings from having a dominant position or striving to achieve it. In considering whether there has been an abuse of dominance, CCCS will conduct a detailed examination of the relevant markets concerned and the effects of the undertaking's conduct.

2.2 The section 47 prohibition also applies to undertakings in a dominant position outside Singapore, and which abuse that dominant position in a market in Singapore.

2.3 Section 47(2) of the Act provides an illustrative list of such conduct:

a. predatory behaviour towards competitors;

b. limiting production, markets, or technical development to the prejudice of consumers;

c. applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or

d. making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.

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Undertakings

2.4 Undertaking means any person, being an individual, a body corporate, an unincorporated body of persons or any other entity, capable of carrying on commercial or economic activities relating to goods or services. It includes individuals operating as sole proprietorships, companies, firms, businesses, partnerships, co-operatives, societies, business chambers, trade associations and non-profit-making organisations, whatever its legal and ownership status (foreign or local, government or non-government), and the way in which it is financed.

2.5 The key consideration in assessing whether an entity is an undertaking for the application of the section 47 prohibition is whether it is capable of engaging, or is engaged, in commercial or economic activity. An entity may engage in commercial or economic activity in some of its functions but not others. The term "undertaking" has the same meaning for the section 47 prohibition as for the section 34 prohibition.

2.6 The section 47 prohibition will also apply where the conduct is engaged in by entities which form a single economic unit, where the single economic unit is dominant in a relevant market. Whether or not the entities form a single economic unit will depend on the facts and circumstances of each case.[1]

2.7 The section 47 prohibition extends to conduct on the part of two or more economically independent undertakings, where there is an abuse of a collective dominant position. Please refer to paragraphs 3.17 to 3.22 for more details on collective dominance.

2.8 As the intent of the Act is to regulate the conduct of market players, it will not apply to any activity carried on by, any agreement entered into or any conduct on the part of the Government, statutory bodies or any person acting on their behalf.

3 CONCEPT OF DOMINANCE

3.1 There is a two-step test to assess whether the section 47 prohibition applies:

- whether an undertaking is dominant in a relevant market, either in Singapore or elsewhere; and
- if it is, whether it is abusing that dominant position in a market in Singapore.

Market Definition

3.2 To assess whether an undertaking is dominant, it is useful to identify the relevant market[2]. The relevant market usually starts with two dimensions:

- the relevant product ("the product market"); and
- the geographic scope of the market ("the geographic market").

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[1] See paragraphs 2.7 and 2.8 of the *CCCS Guidelines on the Section 34 Prohibition* for more details on the term "single economic unit".
[2] Please refer to the *CCCS Guidelines on Market Definition*.

3.3 Please also refer to the *CCCS Guidelines on Market Definition* for details on how market definition may be performed for cases involving multi-sided platforms[3], and how CCCS may assess whether products that are not considered complementary or from adjacent markets should be included in a relevant market.[4]

Assessing Dominance

3.4 An undertaking will not be deemed dominant unless it has substantial market power. Market power arises where an undertaking does not face sufficiently strong competitive pressure and can be thought of as the ability to profitably sustain prices above competitive levels or to restrict output or quality below competitive levels. An undertaking with market power might also have the ability and incentive to harm the process of competition in other ways, for example by weakening existing competition, raising entry barriers or slowing innovation. Both buyers and sellers can have market power.

3.5 In assessing whether an undertaking is dominant, the extent to which there are constraints on an undertaking's ability to profitably sustain prices above competitive levels will be considered. Such constraints include:

- Existing competitors: This refers to competition from undertakings already in the relevant market, to whom buyers might switch if the alleged dominant undertaking sustained prices above competitive levels. The market shares of competitors in the relevant market are one measure of the competitive constraints from existing competitors;

- Potential competitors: This refers to the possibility that undertakings will enter the relevant market and gain market share at the expense of an alleged dominant undertaking seeking to sustain prices above competitive levels. The strength of potential competition is affected by barriers to entry; and/or

- Other factors, such as the existence of powerful buyers and economic regulation.

Extent of Existing Competition: Market Shares

3.6 There are no market share thresholds for defining dominance under the section 47 prohibition. An undertaking's market share is an important factor in assessing dominance but does not, on its own, determine whether an undertaking is dominant. For example, it is also important to consider the positions of other undertakings operating in the same market and how market shares have changed over time. An undertaking is more likely to be deemed as dominant if its competitors have relatively weak positions and it has enjoyed a persistently high market share over time.

3.7 The history of the market shares of all the undertakings within the relevant market is often more informative than considering market shares at a single point in time, partly because such a snapshot might not reveal the dynamic nature of the market. For example, volatile market shares might indicate that undertakings constantly innovate to get ahead of each other. This is consistent with effective competition. Evidence that undertakings with low market shares have grown rapidly to attain relatively large market shares might suggest that barriers to expansion are low, particularly when such growth is observed for recent entrants.

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[3] Paragraphs 5.14 to 5.19 of the *CCCS Guidelines on Market Definition*.

[4] Paragraph 5.12 of the *CCCS Guidelines on Market Definition*.

3.8 Market shares, by themselves, may not necessarily be a reliable guide to market power, such as when the market is characterised by innovation and rapidly changing competition dynamics. Other determinants of competition, such as entry barriers, the degree of innovation, product differentiation, the responsiveness of buyers to price increases, the price responsiveness of competitors, the strength of network effects, and the control or ownership of key inputs may need to be considered as well. High market shares are not necessarily an indication that competition in the market is not effective. For example, a persistently high market share could be the result of persistently successful innovation in a market, where undertakings compete to improve the quality of their products.

3.9 Generally, as a starting point, CCCS will consider a market share above 60% as likely to indicate that an undertaking is dominant in the relevant market. However, the starting point does not preclude dominance being established at a lower market share. An undertaking's market share does not, on its own, determine whether that undertaking is dominant. Other factors, as set out in paragraph 3.8 above, where relevant, may be considered in determining if an undertaking is dominant.

3.10 In general, an undertaking which is a small or medium sized enterprise ("SME")[5] is unlikely to be capable of conduct that has an appreciable adverse effect on competition in Singapore. Nevertheless, CCCS will assess each case on its own facts and merits and the markets concerned.

3.11 Please refer to **Annex A** for details on market power and market shares.

Extent of Potential Competition: Entry Barriers

3.12 Entry barriers are important in the assessment of potential competition. The lower the entry barriers, the more likely it will be that potential competition will prevent undertakings already within a market from profitably sustaining prices above competitive levels. Even an undertaking with a large market share would be unlikely to have market power in a market where there are very low entry barriers. An undertaking with a large market share in a market protected by significant entry barriers is likely to have market power.

3.13 There are many ways in which different types of entry barriers can be classified, but it is useful to distinguish between the following factors which, depending on the circumstances, can contribute to barriers to entry:

- Sunk costs;
- Limited access to key inputs and distribution outlets;
- Regulation;
- Economies of scale;
- Economies of scope;
- Network effects;
- Purchasing efficiencies; and
- Exclusionary behaviour by incumbents.

3.14 Please refer to **Annex B** for details on entry barriers.

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[5] With effect from 1 April 2011, SMEs in Singapore are defined as enterprises with annual sales turnover of not more than S$100 million; or enterprises with employment size of not more than 200 workers.

Other Constraints

3.15 The strength of buyers and the structure of the buyers' side of the market may constrain the market power of a seller. Buyer power requires that the buyer has a choice between alternate sellers. A buyer's bargaining strength might be enhanced if:

- the buyer is well-informed about alternative sources of supply and could readily, at little cost to itself, switch substantial purchases from one seller to another while continuing to meet its needs;
- the buyer could commence production of the item itself, or "sponsor" new entry by another seller relatively quickly, for example, through a long-term contract, without incurring substantial sunk costs (i.e. irretrievable costs);
- the buyer is an important outlet for the seller, that is, the seller would be willing to cede better terms to the buyer in order to retain the opportunity to sell to that buyer; and/or
- the buyer can intensify competition among sellers through establishing a procurement auction or purchasing through a competitive tender.

3.16 In some sectors, the economic behaviour of undertakings (such as the prices they set or the level of services they provide) is regulated by the Government or an industry sector regulator, and an assessment of market power may need to take that into account. Although an undertaking might not face effective constraints from existing competitors, potential competitors or buyer power in the market, it may still be constrained from profitably sustaining prices above competitive levels by the Government or an industry sector regulator. However, that is not to say that market power cannot exist when there is economic regulation. It is feasible, for example, that regulation of the average price or profit level across several markets supplied by an undertaking may still allow for the undertaking to profitably sustain prices above competitive levels in (one or more of) these markets and/or to engage in exclusionary behaviour of various kinds.

Collective Dominance

3.17 The section 47 prohibition extends to conduct on the part of two or more undertakings, where there is an abuse of a collective dominant position. A collective dominant position may be held when two or more legally independent undertakings, from an economic point of view, present themselves or act together on a particular market as a collective entity. Essentially, undertakings holding a collective dominant position are able to adopt a common policy on the market and, to a considerable extent, act independently of their competitors, customers and consumers. It is not necessary that they adopt identical conduct on the market in every respect.

3.18 For the purpose of analysing whether undertakings have engaged in conduct that amounts to an abuse of a collective dominant position, it is necessary to consider:

- whether the undertakings concerned together constitute a collective entity vis à vis their competitors, their trading partners and consumers on a particular market;
- if so, whether that collective entity is dominant in a relevant market, either in Singapore or elsewhere; and
- if it is, whether there is/has been an abuse of that dominant position in a market in Singapore.

3.19 In order to assess whether the undertakings concerned together constitute a collective entity, CCCS will examine whether there are links or factors that give rise to a connection between the undertakings concerned.

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3.20 CCCS may find that an agreement between undertakings, or the way in which an agreement is implemented, leads the undertakings concerned to present themselves or act together as a collective entity. For example, the undertakings may have entered into cooperation agreements that lead them to adopt a common policy on the market. Connecting factors may also be structural, i.e. they may arise from ownership interests and other links in law that lead the undertakings concerned to coordinate their conduct on the market. That said, the existence of an agreement or of other links in law is not indispensable to a finding that the undertakings concerned constitute a collective entity.

3.21 The structure of the market as well as the way in which the undertakings concerned interact on the market may also lead to a finding that the undertakings concerned constitute a collective entity. For instance, there might be a relationship of interdependence between firms in an oligopolistic market, where those parties become aware of common interests and consider it economically rational to adopt a common policy that might protect, enhance or perpetuate their collective position in the market.

3.22 Once it is assessed that the undertakings together constitute a collective entity, CCCS will consider whether that collective entity actually holds a dominant position (as explained in paragraphs 3.4 and 3.5 above), and whether there is/has been an abuse of that dominant position (as explained in section 4 below).

4 ABUSE

Legal Test for Abuse of Dominance

4.1 Where it is established that an undertaking is dominant in the relevant market, the second part of the test is to assess whether the undertaking's behaviour might be regarded as an abuse of its dominant position. The conduct of a dominant undertaking has the potential to significantly impact competitive conditions in Singapore. However, where a dominant position is achieved or maintained through conduct arising from efficiencies, such as through successful innovation or economies of scale or scope, such conduct will not be regarded as an abuse of dominance. Section 47(2) of the Act lists broad categories of business behaviour within which particular examples of abusive conduct are most likely found.

4.2 The legitimate exercise of an intellectual property right, even by a dominant undertaking, will not, in general, be regarded as an abuse. It is however possible that the way in which an intellectual property right is exercised may give rise to concerns if it goes beyond the legitimate exploitation of the intellectual property right, for example, if it is used to leverage market power from one market to another. More details can be found in the *CCCS Guidelines on the Treatment of Intellectual Property Rights*.

4.3 Exclusionary behaviour may include excessively low prices, certain discount schemes, refusals to supply, vertical restraints, or the leveraging of market power which foreclose(s) (or are likely to foreclose) market(s) or weaken competition. Such conduct may be abusive to the extent that it harms competition, for example, by removing an efficient competitor, limiting competition from existing competitors, or excluding new competitors from entering the market. However, the likely effect of each particular kind of behaviour will be assessed on the particular facts of each case.

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4.4 In conducting an assessment of an alleged abuse of dominance, CCCS will undertake an economic effects-based assessment in order to determine whether the conduct has, or is likely to have, an adverse effect on the process of competition.[6] The process of competition may be adversely impacted, for instance, by conduct which would be likely to foreclose, or has foreclosed, competitors in the market. CCCS considers that factors which would generally be relevant to its assessment include: the position of the allegedly dominant party and its competitors; the structure of, and actual competitive conditions on, the relevant market; and the position of customers and/or input suppliers.

4.5 If the conduct has, or is likely to have, an adverse effect on the process of competition, CCCS may consider if the dominant undertaking is able to objectively justify its conduct. For example, a refusal to supply might be justified by the poor creditworthiness of the buyer. However, the dominant undertaking will still have to show that it has behaved in a proportionate manner in defending its legitimate commercial interest. It should not take more restrictive measures than are necessary to do so. CCCS may also consider if the dominant undertaking is able to demonstrate any benefits arising from its conduct. It will still be necessary for a dominant undertaking to show that its conduct is proportionate to the benefits claimed. Such conduct will not be allowed if its primary purpose is to harm competition.

4.6 Please refer to **Annex C** for examples of conduct that may amount to an abuse.

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[6] *Re Abuse of a Dominant Position by SISTIC.com Pte Ltd* [2012] 1 SGCAB 1 at [290] to [291], the CAB agreed with CCCS that the "correct and proper test" in determining an abuse of dominance is as follows:

"..an abuse will be established where a competition authority demonstrates that a practice has, or likely to have, an adverse effect on the process of competition. In particular:

(a) It is sufficient for the competition authority to show a likely effect, and is not necessary to demonstrate an actual effect on the process of competition.

(b) If an effect, or likely effect, on restricting competition by the dominant undertaking is establish[sic], the dominant undertaking can advance an objective justification. If it can adduce evidence to demonstrate that its behaviour produces countervailing benefits so that it has the net positive impact on welfare. However, the burden is on the undertaking to demonstrate an objective justification."

Abuse in Related Markets

4.7 It is not necessary for the dominant position, the abuse and the effects of the abuse, to be in the same market. The table below sets out the different possible scenarios where the section 47 prohibition may apply to the undertaking Y. The scenarios set out below are for illustration; whether such conduct will amount to an abuse will depend on the facts and circumstances of each case.

Dominance, Abuse and Related Markets

Scenarios	Market A	Market B
Y may be dominant in Market A and use a predatory strategy to eliminate competitors from Market A.	Dominance Abuse Effect	
Y may be dominant in Market A, and it provides the raw material essential to production in Market B, in which it is also a market player. To strengthen its own position in Market B, it may abuse its dominant position in Market A, by refusing to supply the raw material in question to its competitors in Market B.	Dominance Abuse	Effect
Y may be dominant in Market A, but not dominant in the related Market B. Y may offer special discounts in Market B, to buyers who remain loyal to it in Market A, so as to help maintain its dominant position in Market A.	Dominance Effect	Abuse
Y may be dominant in Market A. It may try to leverage its market power in Market A to Market B, by tying the sale of its products in Market A to the sale of its products in the related Market B.	Dominance	Abuse Effect

Counterfactual

4.8 Counterfactual analysis serves as a means of assessing whether a given conduct has restrictive effects on competition by considering whether an alternative realistic situation from which the relevant conduct has been removed would be more competitive. The Competition Appeal Board in its decision in the *SISTIC* appeal stated that a counterfactual assessment is not a legal requirement in the assessment of an abuse of dominance.[7] However, CCCS will, where appropriate, use counterfactual analysis as a tool for assessing abuse of dominance.

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[7] *Re Abuse of a Dominant Position by SISTIC.com* Pte Ltd [2012] SGCAB 1 at [315].

5 EXCLUSIONS

5.1 The section 47 prohibition does not apply to the matters specified in the Third Schedule to the Act ("the Third Schedule") by virtue of section 48. These are:

- an undertaking entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly, insofar as the prohibition would obstruct the performance, in law or fact, of the particular tasks assigned to that undertaking. **Annex D** sets out how this exclusion will be applied;

- conduct to the extent to which it is engaged in order to comply with a legal requirement, that is any requirement imposed by or under any written law;

- conduct which is necessary to avoid conflict with an international obligation of Singapore and which is also the subject of an order by the Minister for Trade and Industry ("the Minister");

- conduct which is necessary for exceptional and compelling reasons of public policy and which is also the subject of an order by the Minister;

- conduct which relates to any product to the extent to which any other written law, or code of practice issued under any written law, relating to competition gives another regulatory authority jurisdiction in the matter;

- conduct which relates to any of the following specified activities:

  - the supply of ordinary letter and postcard services by a person licensed and regulated under the *Postal Services Act 1999;*

  - the supply of piped potable water;

  - the supply of wastewater management services, including the collection, treatment and disposal of wastewater;

  - the supply of bus services by a licensed bus operator under the *Bus Services Industry Act 2015;*

  - the supply of rail services by any person licensed and regulated under the *Rapid Transit Systems Act 1996;*

  - cargo terminal operations carried out by a person licensed and regulated under the *Maritime and Port Authority of Singapore Act 1996;*

  - conduct which relates to the clearing and exchanging of articles undertaken by the Automated Clearing House established under the *Banking (Clearing House) Regulations;* or any activities of the Singapore Clearing Houses Association regarding the Automated Clearing House;

- any conduct that is directly related and necessary to the implementation of a merger; and

- any conduct (either on its own or when taken together with other conduct) to the extent that it results in a merger.

5.2 The Minister may at any time, by order, amend the Third Schedule.

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6 BLOCK EXEMPTIONS

6.1 The provision for block exemptions does not apply to the section 47 prohibition.

7 NOTIFICATION FOR GUIDANCE/DECISION

7.1 There is no requirement for undertakings to notify conduct to CCCS. It is for an undertaking to ensure that its conduct is lawful and decide whether it is appropriate to make a notification for guidance or decision.

7.2 Guidance may indicate whether an undertaking's conduct would be likely to infringe the section 47 prohibition. If CCCS considers that the conduct is not likely to infringe the section 47 prohibition, its guidance may indicate whether that is because of the effect of an exclusion.

7.3 CCCS will generally take no further action once guidance has been given that the section 47 prohibition is unlikely to be infringed, unless there are reasonable grounds for believing that there has been a material change of circumstance since the guidance was given; or CCCS has a reasonable suspicion that the information on which it had based its guidance was materially incomplete, misleading or false; or a complaint is received from a third party.

7.4 A decision will indicate whether an undertaking's conduct has infringed the section 47 prohibition. CCCS will state reasons for its decision. If the section has not been infringed, the decision may indicate whether it is because of the effect of an exclusion.

7.5 CCCS will generally take no further action once a decision has been given that the section 47 prohibition has not been infringed unless there are reasonable grounds for believing that there has been a material change of circumstance or there is a reasonable suspicion that the information on which it had based its decision was materially incomplete, misleading or false. Unlike guidance, a decision cannot be reopened because a complaint is made by a third party.

7.6 Unlike the notifications of agreements under section 43 or section 44 of the Act, notification of conduct to CCCS by an undertaking does not give rise to any immunity from financial penalty in respect of the infringements by the conduct occurring between the giving of the notification and CCCS's determination of the notification.

7.7 If CCCS determines a notification by giving guidance that the conduct is unlikely to infringe the section 47 prohibition, or by giving a decision that the conduct does not infringe the section 47 prohibition, the conduct will receive immunity from financial penalties for infringements of the section 47 prohibition. CCCS may remove the immunity conferred by the favourable guidance or decision if it takes further action under one of the circumstances described in paragraph 7.3 (in a case for guidance) or paragraph 7.5 (in a case for decision), and considers that the conduct will likely infringe the section 47 prohibition. In doing so, CCCS will issue a notice to the undertaking informing it that its immunity is removed as from the date specified in the notice. If CCCS removes the immunity because the information supplied by the undertaking was materially incomplete, false or misleading, the effective date of the immunity removal may be earlier than the date of the notice.

7.8 Please refer to the *CCCS Guidelines on Filing Notifications for Guidance or Decision with respect to the Section 34 Prohibition and Section 47 Prohibition 2016* on how undertakings may notify CCCS of its conduct and seek guidance or decision from CCCS.

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8 CONSEQUENCES OF INFRINGEMENT

Financial Penalty

8.1 A financial penalty not exceeding 10% of the turnover of the business of an undertaking in Singapore for each year of infringement may be imposed for a maximum period of three (3) years, where there is an intentional or negligent infringement of the section 47 prohibition.

Remedies

8.2 Once CCCS has made a decision that any conduct has infringed the section 47 prohibition, CCCS may require such a person as it thinks appropriate, to take such action as is specified in the direction to remedy, mitigate or eliminate any adverse effects of such infringement or circumstances and to prevent the recurrence of such infringements or circumstances. Different remedies will have varying administrative and compliance/monitoring costs. However, the design of remedies for abuse cases must be done on a case by case basis and take into account the features of each case, including the severity and duration of the abusive conduct, the structure of the relevant market and existing competition, and the possible impact of the remedies on efficiency and innovation.

8.3 Remedies can take the form of prohibitory conduct remedies, affirmative conduct remedies, structural remedies, or a combination of these remedies where appropriate.[8]

Rights of Private Action

8.4 A party who has suffered any loss or damage directly as a result of an infringement of the section 47 prohibition has a right of action in civil proceedings against the relevant undertaking.

8.5 This right of private action can only be exercised after CCCS has determined that an undertaking has infringed the section 47 prohibition and after the appeal process has been exhausted.

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[8] Refer to section 69 of the Act for CCCS's powers to enforce its infringement/unfavourable decisions.

9 MARKET POWER AND MARKET SHARES

9.1 This part considers the extent to which market shares indicate whether an undertaking possesses market power, how market shares may be measured, the sort of evidence likely to be relevant, and some potential problems. These issues are important when considering the intensity of existing competition.

9.2 In general, market power is more likely to exist if an undertaking (or group of undertakings) has a persistently high market share. Likewise, market power is less likely to exist if an undertaking has a persistently low market share. Relative market shares can also be important. For example, a high market share might be more indicative of market power when all other competitors have very low market shares.

9.3 The history of the market shares of all undertakings within the relevant market is often more informative than considering market shares at a single point in time, partly because such a snapshot might not reveal the dynamic nature of a market. For example, volatile market shares might indicate that undertakings constantly innovate to get ahead of each other. This is consistent with effective competition. Evidence that undertakings with low market shares have grown rapidly to attain relatively large market shares might suggest that barriers to expansion are low, particularly when such growth is observed for recent entrants.

9.4 While the consideration of market shares over time is important when assessing market power, an analysis of other factors affecting competition is also important. The following factors may be considered:

- **Low entry barriers:** An undertaking with a persistently high market share may not necessarily have market power where there is a strong threat of potential competition. If entry into the market is easy, the incumbent might be constrained to act competitively so as to avoid attracting entry over time by potential competitors.

- **Bidding markets:** Sometimes buyers choose their suppliers through procurement auctions or tenders. In these circumstances, even if there are only a few suppliers, competition might be intense. This is more likely to be the case where tenders are large and infrequent (so that suppliers are more likely to bid), where suppliers are not subject to capacity constraints (so that all suppliers are likely to place competitive bids), and where suppliers are not differentiated (so that for any particular bid, all suppliers are equally placed to win the contract). In these types of markets, an undertaking might have a high market share at a single point in time. However, if competition at the bidding stage is effective, this currently high market share would not necessarily reflect market power.

- **Successful innovation:** In a market where undertakings compete to improve the quality of their products, a persistently high market share might indicate persistently successful innovation and so would not necessarily mean that competition is not effective.

- **Product differentiation:** Sometimes the relevant market will contain products that are differentiated. In this case undertakings with relatively low market shares might have a degree of market power because other products in the market are not very close substitutes.

- **Responsiveness of customers:** Where undertakings have similar market shares, this does not necessarily mean that they have similar degrees of market power. This may be because their customers differ in their ability or willingness to switch to alternative suppliers.

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- **Price responsiveness of competitors:** Sometimes an undertaking's competitors will not be in a position to increase output in response to higher prices in the market. For example, suppose an undertaking operates in a market where all undertakings have limited capacity (e.g. are at, or close to, full capacity and so are unable to increase output substantially). In this case, the undertaking would be in a stronger position to increase prices above competitive levels than an otherwise identical undertaking with a similar market share operating in a market where its competitors are not close to full capacity.

- **Strength of network effects:** Network effects occur where users' valuations of the network increase as more users join the network.[9] Network effects may be relevant in the assessment of the market power of an undertaking. In the context of multi-sided platforms[10], indirect network effects may occur when a user's valuation of the multi-sided platform increases with the increase in the number of users on the other side(s) of the platform. Besides the number of users on the other side of the platform, the quality of users and the intensity of their usage can also affect the valuation of the platform to users on other side(s) of the platform. In certain circumstances, a platform may be able to harness such network effects to the extent that the market tips in its favour. In assessing the strength of network effects, CCCS may consider factors such as the prevalence of multi-homing[11], and switching costs.

- **Control or ownership of key inputs:** The control or ownership of a key input by an undertaking may be a relevant factor in CCCS's consideration of the undertaking's market power. Such inputs could include physical assets, proprietary rights or data. In its assessment, CCCS may take into consideration the relative ease of obtaining such inputs or the relative availability of alternative inputs.

9.5 In markets characterised by innovation and rapidly changing competition dynamics, the assessment of dominance may focus less on market shares and more on other factors such as barriers to entry, the degree of innovation, the strength of network effects, and the control or ownership of key inputs.

Measuring Market Shares

Evidence

9.6 Data on market shares may be collected from a number of sources including:

- information provided by undertakings themselves. Undertakings are usually asked for data on their own market shares, and to estimate the shares of their competitors;

- trade associations, customers or suppliers who may be able to provide estimates of market shares; and

- market research reports.

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[9] For example, as new customers enter a telephone network, this might add value to existing customers because they would be connected to more people on the same network.

[10] A multi-sided platform refers to an undertaking acting as a platform that facilitates interactions between two or more groups of users and creates value for sellers or buyers on one side of the platform by matching or connecting them with sellers or buyers on the other side of the platform. For a detailed explanation of how a market definition exercise may be performed in a case involving multi-sided platforms, please refer to paragraphs 5.14 to 5.19 of the *CCCS Guidelines on Market Definition*.

[11] Multi-homing refers to the practice by suppliers or consumers of using more than one platform simultaneously to buy or sell.

9.7 The appropriate method of calculating market shares depends on the case at hand. Usually sales data by value and by volume are both informative. Often value data will be more informative, for example, where goods are differentiated. Other measures, such as production volumes, capacity or reserves may be used as appropriate. Where the undertaking involved is a multi-sided platform, additional measures may include the number of monthly active users (including buyers and sellers on each side of the platform), number of transactions or gross merchandise value.

9.8 The following issues may arise when measuring market shares:

- **Production, sales and capacity:** Market share is usually determined by an undertaking's sales to customers in the relevant market. Market share is normally measured using sales to direct customers in the relevant market rather than an undertaking's total production (which can vary when stocks increase or decrease). Sometimes market shares will be measured by an undertaking's capacity to supply the relevant market: for example, where capacity is an important feature in an undertaking's ability to compete or in some instances where the market is defined taking into account supply side considerations.

- **Sales values:** When considering market shares on a value basis, market share is valued at the price charged to an undertaking's direct customers. For example, when a manufacturer's direct customers are retailers, it is more informative to consider the value of its sales to retailers as opposed to the prices at which the retailers sell that manufacturer's product to final consumers.

- **Choice of exchange rates:** Where the relevant geographic market is international, this may complicate the calculation of market shares by value as exchange rates vary over time. It may then be appropriate to consider a range of exchange rates over time, including an assessment of the sensitivity of the analysis to the use of different exchange rates.

- **Imports:** If the relevant geographic market is international, market shares will be calculated with respect to the whole geographic market. If the relevant geographic market is not international, it is possible that imports will account for a share of that market. If so, and if information is available, the sales of each importing undertaking are usually considered and market shares calculated accordingly, rather than aggregating shares as if they were those of a single competitor. Where the relevant geographic market is domestic, the share of an undertaking that both supplies within and imports into that market[12] would usually include both its domestic sales and its imports.

- **Internal production:** In some cases, a supplier may be using some of its capacity or production to meet its own internal needs. In the event of a rise in price on the open market, the supplier may decide to divert some or all of its "captive" capacity or production to the open market if it is profitable to do so, taking into account effects on its downstream business that is now deprived of the captive supply. The extent to which "captive" capacity or production is likely to be released onto the open market (or might otherwise affect competition on the open market) will be taken into account in assessing competitive constraints.

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[12] This includes situations where the undertaking in question is part of the same group as an importer into that market.

10 ENTRY BARRIERS

10.1 This part considers barriers to entry and expansion and how they may be assessed in practice.

10.2 Entry barriers are important in the assessment of potential competition. The lower the entry barriers, the more likely it will be that potential competition will prevent undertakings already within a market from profitably sustaining prices above competitive levels.

10.3 Entry barriers are factors that allow an undertaking to profitably sustain supra-competitive prices in the long term, without being more efficient than its potential rivals. Even if there are no existing competitors, an undertaking is unlikely to be able to sustain supra-competitive prices in the long term, in the absence of entry barriers.

10.4 Even an undertaking with a large market share in a market with very low entry barriers would be unlikely to have market power. However, an undertaking with a large market share in a market protected by significant entry barriers is likely to have market power.

10.5 Entry barriers arise when an undertaking has an advantage (not solely based on superior efficiency) over potential entrants from having already entered the market and/or from special rights (e.g. to production or distribution) or privileged access to key inputs. Entry barriers may make new entry less likely or less rapid by affecting the expected sunk costs of entry and/or the expected profits for new entrants once they are in the market, or by establishing physical, geographic or legal obstacles to entry.

10.6 There are many ways in which different types of entry barriers can be classified, but it is useful to distinguish between the following factors which, depending on the circumstances, can contribute to barriers to entry:

- Sunk costs;
- Limited access to key inputs and distribution outlets;
- Regulation;
- Economies of scale;
- Economies of scope;
- Network effects;
- Purchasing efficiencies; and
- Exclusionary behaviour by incumbents.

10.7 For simplicity, most of the following examples refer to a situation where there is one incumbent already in the market and one potential entrant or "rival". Although in reality the existence of several incumbents and several potential entrants may complicate the analysis, the principles outlined remain valid.

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Sunk Costs

10.8 Entry will occur only if the expected profit from being in the market exceeds any sunk costs of entry.

10.9 Sunk costs of entry are those costs which must be incurred to compete in a market, but which are not recoverable on exiting the market. When a new entrant incurs sunk costs when entering a market, it is as if that entrant has paid a non-refundable deposit to enable it to enter.

10.10 Sunk costs might give an incumbent a strategic advantage over potential entrants. Suppose an incumbent has already made sunk investments necessary to produce in a market while an otherwise identical new entrant has not. In this case, even if the incumbent charges a price at which entry would be profitable (if the price remained the same following entry), entry may not occur. This would be the case if the entrant does not expect the post-entry price to be high enough to justify incurring the sunk costs of entry.

10.11 It is useful to consider the extent to which sunk costs give an incumbent an advantage over potential new entrants and to what extent sunk costs might affect entry barriers. The mere existence of sunk costs in any particular industry, however, does not necessarily mean that entry barriers are high or that competition within the market is not effective.

Limited Access to Key Inputs and Distribution Outlets

10.12 Entry barriers may arise where key inputs (including physical assets, proprietary rights or data) or distribution outlets are scarce, and where an incumbent obtains an advantage over a potential entrant due to privileged access (or special rights) to those inputs or outlets.

Essential Facilities

10.13 At one extreme, an incumbent might own or have privileged access to an essential facility, which its rival does not. Although the assessment of whether a particular facility is essential must be on a case by case basis, essential facilities are rare in practice. A facility will only be viewed as essential where it can be demonstrated that access to it is indispensable in order to compete in a related market and where duplication is impossible or extremely difficult owing to physical, geographic, economic or legal constraints (or is highly undesirable for reasons of public policy). Generally, if a rival does not have access to an essential facility, it cannot enter the market.

10.14 There will be circumstances in which difficulties accessing inputs or resources constitute an entry barrier without those assets or resources meeting the strict criteria required to be defined as "essential facilities".

Intellectual Property Rights

10.15 Intellectual property rights ("IPRs") can be entry barriers, although this is not always the case. In particular, when an IPR does not prevent others from competing with the IPR holder in the relevant market, it would not normally be a barrier to entry. In those cases where IPRs do constitute a barrier to entry, it does not always imply that competition is reduced. Although an IPR may constitute an entry barrier in the short term, in the long term a rival undertaking may be able to overcome it by its own innovation. The short term profit which an IPR can provide acts as an incentive to innovate and can thus stimulate competition in innovation.

Regulation

10.16 Regulation may affect barriers to entry. For example, regulation may limit the number of undertakings which can operate in a market through the granting of licences. Also, licences may be restricted so that there is an absolute limit to the number of undertakings that can operate in the market. In this case a licence can be thought of as a necessary input before production can take place and so regulation will act as an entry barrier.

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10.17 Sometimes regulation sets objective standards. Where these apply equally to all undertakings, such as health and safety regulations, they might not affect the costs for new entrants any more than they affect the costs for incumbents. However, regulation can lead to entry barriers when it does not apply equally to all undertakings. For example, incumbents might lobby for standards that are relatively easy for them to meet, but harder for a new entrant to achieve.

Economies of Scale

10.18 Economies of scale exist where average costs fall as output rises. In the presence of large economies of scale, a potential entrant may need to enter the market on a large scale (in relation to the size of the market) in order to compete effectively. Large scale entry might require relatively large sunk costs and might be more likely to attract an aggressive response from incumbents. These factors may in some circumstances constitute barriers to entry.

10.19 Attaining a viable scale of production may take time and so require the new entrant to operate in the market for some time at a loss. For example, a new entrant at the manufacturing level might need to secure many distribution outlets to achieve a viable scale. If, perhaps due to long term contracts, many input suppliers or distributors are locked-in to dealing with the incumbent, the new entrant might not be able to achieve an efficient scale of production over the medium term. This could deter entry.

10.20 Even when entry is not completely deterred, entrants may take time to achieve efficient levels of production, obtain the relevant information, raise capital and build the necessary plant and machinery. In this case, even if entry occurs, the incumbent could nevertheless retain market power for a substantial period of time.

Economies of Scope

10.21 Economies of scope arise where an undertaking's average cost of production falls as it produces more types of products. These typically result from commonality of production processes and expertise. Cost savings are achieved by sharing an undertaking's resources and know-how across the production of multiple types of products. This means that it may be cheaper for a single supplier to produce the multiple products compared to having one supplier producing each of the product.

10.22 In the presence of economies of scope, a potential entrant may find it difficult to enter and compete effectively with an incumbent that produces multiple products. For example, if the potential entrant only produces one product, it is not able to enjoy the same economies of scope as the incumbent and may not be able to reap the same cost savings as the incumbent. A potential entrant who wishes to enter and produce multiple types products simultaneously in order to reap the economies of scope may also find that it faces large sunk costs, which may deter entry. In such cases, economies of scope may constitute barriers to entry.

Network Effects

10.23 Network effects occur where users' valuations of the network increase as more users join the network. For example, as new customers enter a telephone network, this might add value to existing customers because they would be connected to more people on the same network. If customers benefit from being on the same network (e.g. due to incompatibility with other networks), an incumbent with a well-established network might have an advantage over a potential entrant that is denied access to the established network and so has to establish its own rival network.

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10.24 Network effects, just like economies of scale, may make new entry harder where the minimum viable scale (e.g. in terms of users of the network) is large in relation to the size of the market.

10.25 In cases involving multi-sided platforms, indirect network effects may occur when a user's valuation of the multi-sided platform increases with the increase in the number of users on the other side(s) of the platform. Besides the number of users on the other side of the platform, the quality of users and the intensity of their usage can also affect the valuation of the platform to users on other side(s) of the platform. The strength of network effects may be impacted by the extent of multi-homing. In particular, where users commonly multi-home across competing suppliers, network effects may not represent a significant barrier to entry for new entrants. Conversely, where users do not or are not able to multi-home across competing suppliers, a new entrant may find it hard to grow the size of its platform to overcome the network effects enjoyed by the incumbent platform. The new entrant may therefore not be able to achieve sufficient scale to become a viable competitor to the incumbent platform. The presence and strength of existing and possible network effects may be taken into account by CCCS in the assessment of barriers to entry.

Purchasing Efficiencies

10.26 Buyers may derive efficiencies from purchasing[13] a package of multiple products, including products that are not considered complementary or from adjacent markets. These efficiencies typically include benefits such as convenience, savings in transaction costs and time, which result in buyers deriving greater value from purchasing these products as a package as compared to purchasing each product from different suppliers. These efficiencies could contribute to barriers to entry.

10.27 For instance, where there are strong efficiencies enjoyed by buyers from purchasing a package of products from an incumbent, buyers may find that the costs of switching to a potential entrant's products may be higher than the benefits derived from continuing to purchase the products from the incumbent. The potential entrant may hence find it difficult to attract buyers and to compete effectively with the incumbent.

Exclusionary Behaviour

10.28 The term "exclusionary behaviour" refers to anti-competitive behaviour which harms competition, for example, by removing an efficient competitor, limiting competition from existing competitors, or excluding new competitors from entering the market. The following paragraphs set out some examples of how exclusionary behaviour can create barriers to entry.

Predatory Response to Entry

10.29 An undertaking contemplating entering a market weighs up its expected profit from being in the market with the expected sunk costs of entering. Expected profits from being in the market may depend on how the entrant expects the incumbent to react when it enters the market: the potential entrant might believe that the incumbent would, for example, reduce prices substantially if it entered and so reduce the prospective profits available.

10.30 While low prices are generally to be encouraged, if a new entrant expected an incumbent to respond to entry with predatory prices, this could deter entry. For example, if an incumbent has successfully engaged in predatory behaviour in the past, it may have secured a reputation for its willingness to set predatory prices. Any future potential entrants to this market (or to any other market where the incumbent operates) might then be deterred from entering due to the likelihood of facing an aggressive response.

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[13] For the avoidance of doubt, purchasing a package of multiple products may include products without a positive price.

Vertical Restraints

10.31 In general, vertical restraints are restrictions imposed by either a buyer or seller operating at different stages of the production and distribution chain. Many vertical restraints may be beneficial or benign, especially if there is effective competition at both the upstream and downstream levels. However, a vertical restraint imposed by a dominant undertaking may also affect entry.

10.32 For example, a dominant manufacturer might have a series of exclusive purchasing agreements with most retailers in a particular geographic market. This might limit the ability of a new manufacturer to operate on a viable scale in that market and therefore deter entry.

Other Exclusionary Practices

10.33 Discounts designed to foreclose markets, margin squeezes, and refusals to supply might also be used in a way that raises entry barriers.

Assessing Entry Barriers

10.34 Assessing the effects of entry barriers and the advantages they give to incumbents can be complex. A variety of steps may be involved. For example, incumbents and potential entrants might be asked for their views on: the sunk costs associated with a commitment to entry; the relative ease of obtaining the necessary inputs and distribution outlets; how regulation affects the prospect of entry; the cost of operating at a minimum viable scale; and any other factors that may impede entry or expansion in the market.

10.35 Claims that potential competition is waiting in the wings are more persuasive if there is fully documented evidence of plans to enter a market or where hard evidence of successful entry in the recent history of the market is provided. In the latter case, such evidence might include a historical record of entry into the market (or closely related markets), including evidence that new entrants had attained in a relatively short period of time a sufficient market share to become effective existing competitors.

10.36 It is important, but not necessarily straightforward, to assess the time that may elapse before successful entry would occur. Some producers, most likely those in neighbouring markets, may be able to enter speedily (e.g. in less than a year) and without substantial sunk costs by switching the use of existing facilities. Where this is possible, it will sometimes be taken into account in defining the market (as supply-side substitutability). New entry from scratch tends to be slower than entry from a neighbouring market, for a variety of reasons, which depend on the market concerned – obtaining planning permission, recruiting and training staff, ordering equipment, appointing distributors and so on. The nature of the market may also limit the times at which entry may occur. For example, where customers award long-term contracts, a potential entrant may have to wait until these contracts are renewed before it has an opportunity to enter the market. It may be also important to assess whether enough contracts would come up for renewal to allow the entrant to attain a viable scale.

10.37 Sometimes the relevant geographic market will be international. Where this is not the case, foreign suppliers may nevertheless exert a constraint on domestic undertakings, in the absence of entry barriers, as potential competitors. However, trade barriers – whether tariff or non-tariff – are an example of a barrier to entry that could impede international competition and shield market power.

10.38 Growth, or prospective growth, of a market will usually have a bearing on the likelihood of entry. Entry will usually be more likely in a growing market than in a static or declining one because it will be easier for an entrant to achieve a viable scale, for example by selling to new customers.

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10.39 In markets where products are differentiated, undertakings compete not only on price but also on features such as quality, service, convenience and innovation. Where there is a scope for differentiation, this may facilitate entry, for example where a new entrant targets untapped demand by differentiating itself from incumbents (provided that incumbents have not already pre-empted all possible niches in the market).

10.40 In markets where brand image is important, a new entrant may have to invest heavily in advertising before it can attain a viable scale. However, even where advertising expenditure is a sunk cost, this does not necessarily mean that entry barriers are high. For example, incumbents may have had to establish their brands and may also have to advertise heavily to maintain them, and so will not necessarily have a cost advantage over potential entrants.

10.41 The rate of innovation is also important. In markets where high rates of innovation occur, or are expected, innovation may overcome product market barriers to entry relatively quickly (provided that there are no barriers to entry into innovative activity). Indeed, any profits that result from an advantage created by successful innovation (e.g. from intellectual property rights) may be an important incentive to innovate.

10.42 In the context of multi-sided platforms, multi-homing by users may have an impact on entry. In particular, where users commonly multi-home across competing suppliers, network effects may not represent a significant barrier to entry for new entrants. Conversely, where users do not or are not able to multi-home across competing suppliers, a new entrant may find it hard to grow the size of its platform to overcome the network effects enjoyed by the incumbent platform. The new entrant may therefore not be able to achieve sufficient scale to become a viable competitor to the incumbent platform. Users may not be inclined to multi-home due to a number of factors, which may include the inability to transfer transaction and search histories across multiple service providers, the inability to transfer endorsements such as customer feedback, ratings, or trusted scores for businesses, technical barriers[14], inertia[15], and exclusivity restrictions. Further, the degree of multi-homing may be dependent on the costs to consumers, and pricing structure adopted by both the incumbent and the new entrant. For example, if a registration fee is collected from consumers, this tends to make multi-homing less attractive. In contrast, if prices are only levied on successful transactions, then consumers may tend to multi-home. The degree of multi-homing may also depend on the level of differentiation between the products. In particular, when there is no product differentiation, users may not be motivated to multi-home due to the perceived lack of additional value in doing so.

Barriers to Expansion

10.43 New entry is not simply about introducing a new product to the market. To be an effective competitive constraint, a new entrant must be able to attain a large enough scale to have a competitive impact on undertakings already in the market. This may entail entry on a small scale, followed by growth. Barriers to entry are closely related to barriers to expansion and can be analysed in a similar way. Many of the factors discussed above that may make entry harder might also make it harder for undertakings that have recently entered the market to expand their market shares and hence their competitive impact.

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[14] This refers to a scenario wherein systems and technical standards are not interoperable. For example, a user of a mobile messaging app can only communicate with contacts that are using the same app, but not users of other services.

[15] For example, where consumers display strong preferences for default options and loyalty to brands they know.

11 EXAMPLES OF CONDUCT THAT MAY AMOUNT TO AN ABUSE

11.1 This part provides more details on how CCCS may assess certain types of conduct by dominant undertakings (whether individually or collectively dominant) that may infringe the section 47 prohibition. The examples are not exhaustive, and conduct not covered by or referred to in this part should not be assumed to be beyond the scope of the section 47 prohibition. In order to assess whether a dominant undertaking's conduct amounts to an abuse of a dominant position, CCCS will undertake an economic effects-based assessment in order to determine whether the conduct has, or is likely to have, an adverse effect on the process of competition. This assessment is based on the specific facts and circumstances of each case. If the conduct has, or is likely to have, an adverse effect on the process of competition, the dominant undertaking may adduce evidence to objectively justify or demonstrate any benefits arising from its conduct.

11.2 This part covers various categories of conduct, including predatory behaviour, discount schemes, price discrimination, margin squeezes, vertical restraints and refusals to supply (and essential facilities). This part will also elaborate upon some of the considerations for assessing if the conduct could amount to an abuse.

Predatory Behaviour

11.3 An undertaking may engage in predatory behaviour, for example, by setting prices so low that it forces one or more undertakings out of the market. The undertaking may deliberately incur losses in the short run, in order to harm competition, so as to be able to charge higher prices in the longer run. While consumers may benefit in the short run from lower prices, in the longer term, consumers will be worse off due to weakened competition which in turn leads to higher prices, reduced quality and less choice. Factors relevant to an assessment of whether predation is taking (or has taken) place may include: pricing below cost, intention to eliminate a competitor, and the feasibility of recouping losses.

Pricing Below Cost

11.4 In assessing if predation is taking (or has taken) place, CCCS will usually first consider the question of whether the dominant undertaking is pricing below the relevant measure of cost. While the cost benchmarks to be used may differ according to the facts of each case[16], in general, the following benchmarks may be applied in determining predation:

- Price is below the average variable cost ("AVC") of production - Predation may be presumed in the absence of objective justification for this pricing strategy.

- Price is above AVC but below average total cost ("ATC") of production – This pricing strategy may be evidence of predation; in determining if predation is taking (or has taken) place, CCCS may consider other evidence on whether the conduct is intended to harm competition.

- Price is above ATC - Evidence on costs does not indicate predation.

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[16] For example, in some cases, incremental costs may be a more appropriate cost benchmark.

Price is Below AVC

11.5 Pricing below AVC is unlikely to be rational, because an undertaking that does so is, on average, making losses on each unit of output it produces. The undertaking could increase its profitability by reducing its output, or by ceasing supply altogether. Thus, if a dominant undertaking sets prices below AVC, it may be presumed that it is doing so for predatory purposes unless it can prove otherwise.

11.6 However, CCCS will consider any evidence that the undertaking's behaviour may be objectively justified. Some possible legitimate commercial reasons for such conduct may include loss leading, where a retailer cuts the price of a single product in order to increase sales of other products, short-run promotions, which involves selling below AVC for a limited period, especially where a new product is introduced to a market, or option value, where in response to an unexpected fall in demand, an undertaking incurs short-run losses so as to maintain a presence in the market, in case demand returns to profitable levels.

Price is Above AVC but Below ATC

11.7 Where an undertaking prices above its AVC but below its ATC, CCCS may consider other evidence on whether an undertaking has the intention to harm competition. CCCS may consider, for example, if the undertaking's strategy makes commercial sense only because it harms competition. It may also be relevant to consider if there might be other strategies open to the dominant undertaking that would have met its other commercial objectives just as well, while being less likely to harm competition.

11.8 Direct documentary evidence may be used to determine whether an undertaking intended to engage in predatory behaviour. Internal documents or evidence from a credible witness may prove that an undertaking intended to harm competition.

11.9 The behaviour of the undertaking may also provide indirect evidence of its intention to engage in predatory behaviour. For example, if the dominant undertaking targeted price cuts against a competitor, while maintaining higher prices elsewhere, that might indicate predatory intent. Or, if the alleged predatory behaviour was part of a pattern of aggressive pricing or other conduct that harms competition, then it is more likely to provide evidence of predatory intent than if it had been isolated.

The Feasibility of Recouping Losses

11.10 It may also be relevant to consider the effect of the alleged predatory behaviour, i.e. whether it would be likely to harm competition. In determining predation, CCCS may consider the feasibility of recouping losses.

Discounts

11.11 Discount schemes are commonly employed as a form of price competition and are generally to be encouraged. However, certain discount schemes offered by dominant undertakings may have the effect of harming competition and thereby constitute an abuse. In assessing the effects of a dominant undertaking's discount scheme, it is important to consider if the scheme is commercially rational only because it has the effect (or likely effect) of foreclosing all, or a substantial part, of the market to competition.

11.12 CCCS will consider whether the dominant undertaking's discount scheme simply reflects competition to secure orders from valued buyers or whether it has beneficial effects. For example, the discount scheme may:

- expand demand and thereby help to cover fixed costs efficiently;
- lower input costs for downstream undertakings and thereby encourage them to compete more effectively on price;
- reflect efficiency savings resulting from supplying particular buyers; or
- provide an appropriate reward for the efforts of downstream undertakings to promote the dominant undertaking's product.

However, it will still be necessary for the dominant undertaking to show that its conduct is proportionate to the benefits produced.

11.13 There are many different types of discount schemes, but it is important to note that it is the effect of the discount scheme on competition, rather than its form, which will determine whether or not it is an abuse. For example, discounts may be used to bring prices down to predatory levels. Examples of discount schemes which may similarly have exclusionary effects, include schemes where discounts are conditional on buyers making all or a large proportion of their purchases from the dominant undertaking (fidelity discounts), that may produce effects which are akin to that of an exclusive purchasing requirement (see paragraph 11.25 below). Similarly, discount schemes that are conditional on the buyer purchasing products as a bundle, even though these products can be purchased separately may be viewed as a form of mixed bundling (see paragraph 11.29 below).

Price Discrimination

11.14 Price discrimination is the application of dissimilar conditions to equivalent transactions with other trading parties. An undertaking may charge different prices to different buyers, or different categories of buyers, for the same product - where the differences in prices do not reflect any differences in relative cost, quantity, quality or any other characteristic of the products supplied. Conversely, an undertaking may charge different buyers, or categories of buyers, the same price even though the costs of supplying the product, are in fact very different. Price discrimination is only possible where the undertaking is able to differentiate between different buyers or categories of buyers, and there is no arbitrage between them. It should be noted that price discrimination is a usual business practice in a wide range of industries, including industries where competition is effective.

11.15 Price discrimination may raise issues under the section 47 prohibition only where there is evidence that it is used to harm competition. For example, a dominant undertaking may use a discriminatory pricing structure to set predatory prices (see paragraphs 11.3 to 11.10) and/or to set discounts which have the effect (or likely effect) of foreclosing all, or a substantial part of a market (see paragraphs 11.11 to 11.13). The use of such discriminatory pricing structures may also take place, for example, in the context of a standard essential patent holder licensing its technology on terms and conditions that are not fair, reasonable or non-discriminatory ("FRAND").[17] Where a vertically integrated undertaking is dominant in an upstream market and a competitor in a related downstream market, it may use discriminatory pricing to apply a margin squeeze that distorts competition in the downstream market (see paragraphs 11.18 to 11.19).

11.16 When considering whether price discrimination is an abuse, it may often be relevant to consider whether such a practice can generate efficiencies or benefits, such as the efficient recovery of fixed costs, the substantial expansion of demand or the opening up of new market segments. This might occur, for example, in industries characterized by relatively high fixed costs, where in order to efficiently recover those fixed costs, buyers are split into groups according to their willingness to pay, and where groups with low willingness to pay would not buy in the absence of price discrimination.

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[17] For a more detailed discussion on standard essential patents and licensing on FRAND terms, please refer to paragraphs 4.9 to 4.11 of the *CCCS Guidelines on the Treatment of Intellectual Property Rights*.

11.17 Discrimination does not have to take place on the basis of price only. For example, an undertaking which controlled the supply of a key input might supply a downstream undertaking with a poorer quality of service than it provides to its own business competing in the same downstream market (longer delivery times, for instance). If the difference in service quality were not reflected in the pricing by the upstream undertaking, the undertaking could be regarded as acting in a discriminatory way. As with the analysis for price discrimination, non-price discrimination will not necessarily be abusive. It would be abusive only where it harms (or is likely to harm) competition.

Margin Squeeze

11.18 A vertically integrated undertaking may be dominant in the supply of an important input for a downstream market in which it also operates. In such a case, the vertically integrated undertaking could potentially harm competition by setting such a low margin between its input price (e.g. wholesale price) and the price it sets in the downstream market (e.g. retail price) such that an equally efficient downstream competitor is forced to exit the market or is unable to compete effectively. This is known as a "margin squeeze", and is likely to constitute an abuse of a dominant position where it harms (or is likely to harm) competition.

11.19 In testing for a margin squeeze, CCCS will generally determine whether an efficient downstream competitor would earn (at least) a normal profit when paying input prices set by the vertically integrated undertaking. The test is typically applied to the downstream arm of the vertically integrated undertaking. The test asks whether the integrated undertaking's downstream business would make (at least) a normal profit if it paid the same input price that it charged its competitors, given its revenues at the time of the alleged margin squeeze.

Vertical Restraints

11.20 Vertical restraints are restrictions imposed by either a buyer or seller operating at different stages of the production and distribution chain. Most vertical restraints are beneficial or benign, especially if there is effective competition at both the upstream and downstream levels. For example, vertical restraints can generate benefits through the promotion of efficiencies, non-price competition (to the benefit of consumers) and investment and innovation. CCCS will consider evidence of such benefits in its assessment; however, it will still be necessary for the dominant undertaking to show that its conduct is proportionate to the benefits produced.

11.21 A vertical restraint imposed by a dominant undertaking may be abusive where it harms (or is likely to harm) competition. Vertical restraints can take many forms, and again, it is important to note that it is the effect of the vertical restraint on competition, rather than its form, which will determine whether or not it is abusive.

11.22 A vertical restraint can be an agreement between a manufacturer and a retailer, a manufacturer and a wholesaler, a wholesaler and a retailer, a retailer and an end buyer or between two manufacturers (or wholesalers or retailers) which for the purposes of the agreement, operate at different stages in the production and distribution chain.

11.23 Vertical restraints can either be imposed unilaterally by the dominant firm or made by agreement. While vertical agreements[18] are excluded from the section 34 prohibition in the first instance, they are not excluded from the section 47 prohibition. Vertical restraints involving dominant undertakings may still be prohibited.

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[18] The section 34 prohibition does not apply to vertical agreements entered into between 2 or more undertakings each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain products, other than such vertical agreement as the Minister may by order specify.

Exclusive Purchasing Requirements

11.24 Where a dominant manufacturer has an exclusive purchasing requirement with a retailer, this may amount to an abuse. There are other types of vertical restraints that may have a similar effect to exclusive purchasing agreements. For example, a dominant manufacturer might require that its retailers purchase a minimum quantity of its product or implement fidelity discounts[19]. If the minimum quantity is set close to each retailer's total input requirement, the effect may be equivalent to that of an exclusive purchasing arrangement (i.e. quantity forcing). Another similar example of a vertical restraint that may be considered under the section 47 prohibition is full-line forcing[20]. Whether such exclusive purchasing agreements (or vertical restraints with similar effect) will amount to an abuse will depend on the facts and circumstances of each case.

11.25 Where a dominant manufacturer requires that its retailers give it the opportunity to match any price offered by a rival, this might harm competition among the manufacturers as it reduces rivals' incentives to compete on price. However, there may be no effect on competition if only a small proportion of the retail market is subject to this restraint.

Tying and Bundling

11.26 Supplying products as part of a tied or bundled arrangement is a common commercial arrangement which may be intended to provide buyers with products in more cost-effective ways. However, in certain circumstances, an undertaking that is dominant in one product market (or more) of a tie or bundle (referred to as the tying market or tying product) can harm (or likely harm) competition by leveraging on its market power through tying or bundling to foreclose the market for the other products that are part of the tie or bundle (referred to as the tied market or tied product) and, potentially, the tying market.

11.27 Tying occurs when buyers that purchase one product are required also to purchase another product from the dominant undertaking. Tying can take place on a technical[21] or contractual[22] basis.

11.28 Bundling refers to the way that products are offered and priced by the seller. In the case of mixed bundling, a seller offers a lower price (through a discount for instance) if two products are purchased as a package. The two products may be available separately, but the sum of the prices when sold separately is higher than when sold in a package. In the case of pure bundling, the two products are only sold together in a fixed proportion and are not available for purchase on a standalone basis[23].

11.29 In determining whether the tie or bundle infringes the section 47 prohibition, CCCS may consider whether the products that are sold in a tie or bundle are distinct products. Two products are distinct if, in the absence of tying or bundling, a substantial number of customers would purchase or would have purchased the tying product without also buying the tied product from the same supplier, thereby allowing stand-alone production for both the tying and the tied products. Evidence that two products are distinct could include direct evidence that, when given a choice, customers purchase the tying and the tied products separately from different sources of supply, or indirect evidence, such as the presence in the market of undertakings specialising in the manufacture or sale of the tied product without the tying product or of each of the products bundled by the dominant undertaking, or evidence indicating that undertakings with little market power, particularly in competitive markets, tend not to tie or not to bundle such products.

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[19] An explanation of a fidelity discount is found at paragraph 11.13 above.

[20] Full-line forcing is a form of tie-in sales where, in order to obtain one product in the manufacturer's range, the retailer is required to stock all the products in that range.

[21] Technical tying occurs when the tying product is designed in such a way that it only works with the tied product and not with the alternatives offered by competitors.

[22] Contractual tying entails that the buyer, when purchasing the tying good, undertakes only to purchase the tied product and not the alternatives offered by competitors.

[23] This may be contrasted with tying, where the tied product may be purchased on a standalone basis but not the tying product.

11.30 CCCS may also consider the anti-competitive effects in the tied market, the tying market or both at the same time. The risk of anti-competitive foreclosure is expected to be greater where the dominant undertaking makes its tying or bundling strategy a lasting one. For example, the dominant undertaking could tie its products on a technical basis, which could be costly to reverse, and could reduce the opportunities for resale of the individual products.

11.31 In the case of bundling, the undertaking may have a dominant position for more than one of the products in the bundle. The greater the number of such products in the bundle, the stronger the likelihood that a competitor is unable to compete effectively against such a bundle. This is particularly true if the bundle is difficult for a competitor to replicate, either on its own or in combination with others, for reasons such quality or functionality.

11.32 Competition concerns may, depending on the specific facts and circumstances of each case, arise in the following scenarios:

- If the tying and the tied product can be used in variable proportions as inputs to a production process, customers may react to an increase in price for the tying product by increasing their demand for the tied product while decreasing their demand for the tying product. By tying the two products, the dominant undertaking may seek to avoid this substitution and as a result be able to raise its prices;

- If the prices the dominant undertaking can charge in the tying market are regulated, tying may allow the dominant undertaking to raise prices in the tied market in order to compensate for the loss of revenue caused by the regulation in the tying market; and

- If the tied product is an important complementary product for customers of the tying product, a reduction of alternative suppliers of the tied product and hence a reduced availability of that product can make entry to the tying market alone more difficult.

Preferential Leveraging of Market Power

11.33 It is not necessary for the dominant position, the abuse or the effects of the abuse to be in the same market. Indeed, it is possible for abusive preferencing to occur when a dominant undertaking leverages its market power in one market, and accords favourable treatment to itself or other undertakings, resulting in harm (or likely harm) to competition in another market. For example, a dominant undertaking that is vertically integrated may leverage its market power in an upstream market by giving preferential treatment to its own downstream products, to the exclusion of competing sellers that utilise the dominant undertaking's upstream products. Using a dominant e-commerce platform that (i) provides platform services to connect sellers of goods and services with buyers, and (ii) acts as a competing seller downstream on the same platform as an illustration – the dominant e-commerce platform may leverage its market power at the upstream level by giving preferential treatment to the products it sells downstream through better placement of its products as compared to other competing sellers. Where the preferential conduct of the dominant e-commerce platform harms (or is likely to harm) competition in the downstream market, such conduct may be an abuse of a dominant position.

Refusals to Supply

11.34 Undertakings generally have the freedom to decide whom they will deal, or not deal with. Therefore, a refusal to supply, even by a dominant undertaking, would not normally be an abuse. However, in certain circumstances, a refusal to supply by a dominant undertaking may be considered an abuse if there is evidence of (likely) substantial harm to competition and if the behaviour cannot be objectively justified. Objective justifications might include the buyer's poor creditworthiness, or capacity constraints.

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11.35 A refusal to supply may constitute an abuse, for example, where a dominant undertaking stops supplying an existing buyer, withholds supplies from a new buyer, or refuses to supply or provide access to key inputs (including physical assets, proprietary rights or data), with the result of (likely) substantial harm to competition. For example, the refusal by a standard essential patent holder to license its technology on FRAND terms may give rise to competition concerns[24]. A refusal to supply could result from a refusal to allow access to an essential facility.

11.36 It may also be possible for a dominant undertaking to engage in a constructive refusal to supply. For example, the dominant undertaking may do so by engaging in a "margin squeeze", as discussed at paragraphs 11.18 and 11.19.

Essential Facilities

11.37 Facilities are rarely considered to be "essential". A facility, which may comprise a physical asset, a proprietary right or data, will be viewed as essential only where it can be demonstrated that access to it is indispensable in order to compete in a related market, and where duplication is impossible or extremely difficult owing to physical, geographic, economic or legal constraints (or is highly undesirable for reasons of public policy).

11.38 Market definition will be important in determining if a particular facility is essential. A facility will not be regarded as essential, if other similar facilities compete within the same relevant market (i.e. if there are potential substitutes), or if the facility is not indispensable to the provision of the product in question. A standard essential patent may also constitute an essential facility even if similar products exist, since substitution is made impossible by the standardisation process[25].

11.39 As with refusals to supply in general, a refusal to allow access to an essential facility will constitute an abuse only if there is evidence of (likely) substantial harm to competition and there is no objective justification for the dominant undertaking's behaviour.

11.40 In determining whether a refusal to allow access to an essential facility constitutes an abuse, and if so, on what terms access should be granted, care must be taken not to undermine the incentives for undertakings to make future investments and innovations, especially where the essential facility is a result of a previous innovation.

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[24] For a more detailed discussion on standard essential patents and licensing on Fair, Reasonable and Non-Discriminatory terms, please refer to paragraphs 4.9 to 4.11 of the *CCCS Guidelines on the Treatment of Intellectual Property Rights*.

[25] For a more detailed discussion on standard essential patents, please refer to paragraphs 4.9 to 4.11 of the *CCCS Guidelines on the Treatment of Intellectual Property Rights*.

12 EXCLUSION FROM THE SECTION 47 PROHIBITION FOR AN UNDERTAKING ENTRUSTED WITH THE OPERATION OF SERVICES OF GENERAL ECONOMIC INTEREST OR HAVING THE CHARACTER OF A REVENUE-PRODUCING MONOPOLY (PARAGRAPH 1 OF THIRD SCHEDULE TO THE ACT)

12.1 CCCS intends to apply this exclusion very narrowly. The onus is on the undertaking seeking to benefit from the exclusion, to demonstrate that all the requirements of the exclusion are met. The undertaking will have to (i) satisfy CCCS that it has been entrusted with the operation of a service of general economic interest or having the character of a revenue-producing monopoly; and (ii) show that the application of the section 47 prohibition would obstruct the performance, in law or in fact, of the particular task entrusted to it.

Entrusted

12.2 The undertaking will need to demonstrate that it has been entrusted with the service in question by a public authority. The public authority can be part of the Government, or one of the statutory boards. The act of entrustment can be made by way of legislative measures such as regulation, or the grant of a licence governed by public law. It can also be done through an act of public authority, such as by way of ministerial orders. Mere approval by a public authority of the activities carried out by the undertaking will not suffice.

12.3 The exclusion applies only to the particular tasks entrusted to the undertaking and not to the undertaking or its activities generally. Further, the exclusion applies only to obligations linked to the subject matter of the service of general economic interest in question and which contribute directly to that interest.

Services of General Economic Interest

12.4 Services of general economic interest are different from ordinary services in that public authorities consider they should be provided in all cases, whether or not there is sufficient economic incentive for the private sector to do so.

12.5 The term economic refers to the nature of the service itself, rather than the interest. Further, to be considered a service of general economic interest, the service must be widely available and not restricted to managing private interests or to a certain class, or classes, of customers. However, this does not exclude selective criteria in the supply of service.

Restrictions on Competition

12.6 Restrictions on competition from other economic operators must be allowed only insofar as they are necessary to enable the undertaking entrusted with the service of general economic interest to provide the service in question. It would be necessary to consider the economic conditions in which the undertaking operates and the constraints placed on it, in particular the costs which it has to bear.

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12.7 It would not be sufficient for the undertaking to show that it has been entrusted with the provision of a public service in order to benefit from this exclusion. An undertaking seeking to benefit from this exclusion would have to show that the application of the section 47 prohibition would require it to perform the task entrusted to it in economically unacceptable conditions. For instance, the undertaking may be required to meet a "universal service obligation"[26]. Without the benefit of the exclusion, competition would allow new entrants to cherry-pick and target the profitable customers, while leaving unprofitable customers to the incumbent. Such a risk may compromise the incumbent's economic viability and thus obstruct the performance of its obligations.

Character of a Revenue-Producing Monopoly

12.8 To benefit under this exclusion, the undertaking must have as its principal objective, the raising of revenue for a public authority in Singapore through the provision of a particular service. It must have been granted an exclusive right to provide the service, rendering it the monopoly provider of that service. As in the case of services of general economic interest, the undertaking must show that the application of the section 47 prohibition would obstruct the performance, in law or in fact, of the particular tasks assigned to it.

13 GLOSSARY

Agreement	Includes decisions by associations of undertakings and concerted practices unless otherwise stated, or as the context so demands.
Buyer	Refers to the end-user consumer, and/or an undertaking that buys products as inputs for production or for resale, as the context demands.
Product	Refers to goods and/or services.
Seller	Refers to the primary producer, an undertaking that sells products as inputs for further production, and/or an undertaking that sells goods and services as a final product, as the context demands.
Undertaking	Refers to any person, being an individual, a body corporate, an unincorporated body of persons or any other entity, capable of carrying on commercial or economic activities relating to goods or services, as the context demands. Includes individuals operating as sole proprietorships, companies, firms, businesses, partnerships, co-operatives, societies, business chambers, trade associations and non-profit-making organisations.

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[26]This refers to an obligation to provide a minimum set of services of specified quality to all users at an affordable price, independent of their geographical locations. This includes guaranteeing services to non-profitable areas.

CCCS GUIDELINES ON THE SUBSTANTIVE ASSESSMENT OF MERGERS

Effective from: 1 February 2022

1 INTRODUCTION

1.1 These guidelines set out the analytical framework the Competition and Consumer Commission of Singapore ("CCCS") applies in assessing mergers and acquisitions and are intended to assist merger parties in conducting a self-assessment, as well as other interested parties that may be affected by a merger.

1.2 The merger provisions of the *Competition Act 2004* ("the Act") will apply to mergers that have infringed, or anticipated mergers that if carried into effect will infringe, the section 54 prohibition, unless they are excluded or exempt under the Act. A merger infringes the section 54 prohibition if it has resulted, or may be expected to result, in a substantial lessening of competition ("SLC"). The focus of CCCS's analysis is on evaluating the impact of the merger in Singapore and how competition between the merger parties and their competitors may change as a result of the merger.

1.3 For ease of reference, the term "merger situation" is used in these guidelines to refer to both mergers and anticipated mergers. An anticipated merger refers to any arrangement that is in progress or in contemplation that, if carried into effect, will result in the occurrence of a merger.

1.4 In addition to these guidelines, the following guidelines published by CCCS are also relevant to the framework for merger control:

- *CCCS Guidelines on Merger Procedures:* These set out the procedures for notifying a merger situation to CCCS for a decision and for investigations of merger situations by CCCS.
- *CCCS Guidelines on Market Definition:* These explain the methodology CCCS may use to define the relevant product market and geographic market.
- *CCCS Guidelines on the Powers of Investigations in Competition Cases 2016:* These explain CCCS's use of its statutory powers to investigate suspected anticompetitive behaviour under the Act. These powers also apply to merger situations pursuant to section 62 of the Act.
- *CCCS Guidelines on Directions and Remedies:* These explain CCCS's powers to give directions and remedies, accept and vary commitments and to impose financial penalties. These powers also apply to merger situations.
- *CCCS Guidelines on the Appropriate Amount of Penalty in Competition Cases:* These explain the basis on which CCCS will calculate penalties for infringements of the section 34, 47 and 54 prohibitions.

1.5 The following regulations and orders are also relevant to the framework for merger control:

- *The Competition (Notification) Regulations 2007:* These regulations relate, inter alia, to applications to CCCS for a decision in respect of merger situations.
- *The Competition (Fees) Regulations 2007:* These regulations state, inter alia, the fees that are payable in respect of merger situations that are notified to CCCS for decision.
- *The Competition (Financial Penalties) Order 2007:* These orders relate, inter alia, to the calculation of the level of any financial penalty that CCCS can impose, including in the context of a section 54 infringement arising from merger situations.

1.6 All of the above guidelines, regulations and orders are available on CCCS's website. Interested parties should read the relevant guidelines, regulations and orders to better understand the merger framework. CCCS's issued merger decisions, which are also available on CCCS's website, also provide useful information on how it has assessed mergers in the past.

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1.7 The guidelines are not a substitute for the Act, the regulations and orders. They may be varied from time to time should the need arise. In applying the guidelines, the facts and circumstances of each case will be considered. The examples in the guidelines are for illustration. They are not exhaustive, and do not set a limit on the investigation and enforcement activities of CCCS. Persons in doubt about how they and their commercial activities may be affected by the Act may wish to seek legal advice.

1.8 A glossary of terms used in these guidelines is attached.

2 SUMMARY OF THE SUBSTANTIVE ASSESSMENT FRAMEWORK

2.1 CCCS assesses whether a merger situation results or may be expected to result in a SLC in a market by comparing the likely state of competition if the merger situation proceeds (the scenario with the merger situation), with the likely state of competition if the merger situation does not proceed (the scenario without the merger situation, often referred to as the counterfactual). CCCS conducts this assessment by identifying what would happen if the merger situation does not go ahead, namely, the appropriate counterfactual. CCCS also assesses what would happen if the merger situation does go ahead and develops theories of harm that could arise. This is discussed in further detail in Part 4.

2.2 A useful analytical tool to assess competitive effects is market definition, which provides a framework to help identify and assess the close competitive constraints a merged firm would likely face. CCCS defines markets in the way that best isolates the key competitive constraints on the parties to a merger situation. In many cases this may not require CCCS to precisely define the boundaries of a market. Part 5 discusses market definition in greater detail.

2.3 CCCS analyses the extent of competition in each relevant market both with and without the merger situation to determine whether the acquisition results or may be expected to result in a SLC. Generally, CCCS assesses the following factors when considering whether this is likely to be the case.

- Market shares and concentration - the number and size of firms in a market can be an indicator of competitive pressure pre and post-merger.

- Barriers to entry and expansion - the extent to which existing competitors would expand their sales or new competitors would enter and compete effectively if prices were increased. Competition from potential competitors involves assessing whether entry is likely, timely and sufficient in extent.

- Countervailing buyer power – the potential for a seller to be sufficiently constrained by the ability of one or more buyer(s) to exert substantial influence on negotiations due to the commercial significance of the buyer(s) to the seller.

2.4 CCCS will assess the above factors when assessing the non-coordinated effects of the merger situation, which arise when there is a loss of competition between the merger parties and the merged entity finds it profitable to raise prices and/or reduce output, quality or innovation. In so doing, CCCS will consider the extent to which the merger parties are close competitors. The above factors are also considered in assessing whether a merger situation raises or leads to increased scope for "coordinated effects", which arise if the merger situation raises the possibility of firms in the market coordinating their behaviour to raise prices, reduce quality, output or innovation.

2.5 A comparison of the extent of competition both with and without the merger situation enables CCCS to assess the degree by which the merger situation might lessen competition. If the lessening of competition is likely to be substantial, the merger situation may infringe the section 54 prohibition. In the event that CCCS finds that a merger situation results or may be expected to result in a SLC in a market, CCCS will consider the presence of any economic efficiencies in markets in Singapore that could outweigh the SLC arising from the merger situation. In such cases, CCCS will also consider any possible merger remedies that could remedy, mitigate or prevent the SLC or any adverse effects resulting from the SLC.

2.6 A flowchart summarising how the various factors fit can be found in **Annex A.**

3 WHAT IS A MERGER?

Introduction

3.1 Section 54(2) of the Act provides that a merger situation occurs where:

- two or more undertakings, previously independent of each other, merge;
- one or more persons or other undertakings acquire direct or indirect control of the whole or part of one or more other undertakings; or
- one undertaking acquires the assets (including goodwill), or a substantial part of the assets, of another undertaking, with the result that the acquiring undertaking is placed in a position to replace or substantially replace the second undertaking in the business (or the part concerned of the business) in which the second undertaking was engaged immediately before the acquisition.

An undertaking that buys or proposes to buy a majority stake in another undertaking is the most obvious example of a merger. However, the transfer or pooling of assets may also give rise to a merger. The Act also provides that the creation of a joint venture to perform, on a lasting basis, all the functions of an autonomous economic entity, constitutes a merger falling within section 54(2)(b) of the Act.

3.2 The determination of whether a merger exists for the purposes of section 54 of the Act is based on qualitative rather than quantitative criteria, focusing on the concept of control. These criteria include considerations of both law and fact. It follows, therefore, that a merger may occur either on a legal or on a de facto basis.

3.3 Parties will be able to notify their merger situations to CCCS for a decision. Anticipated mergers may be notified only if they may be made known to the public. However, to assist parties with the planning and consideration of mergers, in particular at the stage when the merger parties are concerned with preserving the confidentiality of the transaction, parties may obtain confidential advice from CCCS on whether or not a merger is likely to raise competition concerns in Singapore, subject to the merger meeting certain conditions. More information on the process of obtaining confidential advice is available in the *CCCS Guidelines on Merger Procedures.*[1]

Mergers between Previously Independent Undertakings

3.4 A merger within the meaning of section 54(2)(a) of the Act occurs when two or more independent undertakings amalgamate into a new undertaking and cease to exist as separate legal entities. A merger may also occur when an undertaking is absorbed by another, with the latter retaining its legal identity while the former ceases to exist as a legal entity.

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[1] Paragraphs 3.18 to 3.29 of the *CCCS Guidelines on Merger Procedures.*

Acquisition of Control

3.5 Section 54(2)(b) of the Act provides that a merger occurs in the case of an acquisition of control. Such control may be acquired by one undertaking acting alone or by two or more undertakings acting jointly. The control acquired may be over one or more other undertakings or over the whole or part of the assets of an undertaking. These assets include brands or licences.

3.6 Control may be acquired over an undertaking when the acquiring party becomes the holder of the rights, contracts or other means that entitle the holder to exercise decisive influence over the activities of that undertaking (see section 54(4) of the Act).

3.7 There may, however, be situations where the formal holder of a controlling interest differs from the party having the real power to exercise the rights conferred by that interest. An example would be where Party X uses Party Y to acquire a controlling interest in an undertaking and to exercise the rights conferred by that interest. In such a situation, control is acquired by Party X, who is behind the operation and who in fact enjoys the power to control the undertaking, even though it is Party Y who is the formal holder of the rights (see section 54(4)(b) of the Act). The evidence needed to establish such indirect control may include factors such as the source of financing for the acquisition, or family links.

3.8 Control over an undertaking is defined by section 54(3) of the Act to exist if decisive influence may be exercised over the activities of that undertaking by reason of any rights, contracts or other means. The existence of control is determined by whether decisive influence is capable of being exercised, rather than the actual exercise of such influence. In determining whether decisive influence exists, CCCS will consider all the relevant circumstances and not only the legal effect of any instrument, deed, transfer, assignment or other act.

3.9 Assessment of whether decisive influence is capable of being exercised requires a case by case analysis of the entire relationship between the merger parties and is dependent on a number of legal and/or factual elements. In making this assessment, CCCS will have regard to all the circumstances of the case. The variety of commercial arrangements entered into by undertakings makes it difficult to state what will (or will not) give rise to decisive influence.

Legal Control

3.10 Generally, CCCS considers that decisive influence is deemed to exist if there is ownership of more than 50% of the voting rights. Where the ownership is between 30% and 50% of the voting rights of the undertaking, there is a rebuttable presumption that decisive influence exists. "Voting rights" refers to all the voting rights attributable to the share capital of an undertaking which are currently exercisable at a general meeting.[2] However, these thresholds are only indicative, and control could potentially be established at levels below these thresholds if other relevant factors provide strong evidence of control. Examples of these factors are referred to in paragraphs 3.11 to 3.18 below. Other forms of voting rights will also be taken into account in assessing control.

De Facto Control

3.11 Besides establishing legal ownership through the acquisition of property rights and securities, the presence of dependency by one undertaking on another may also confer de facto control. As there are no precise criteria for determining when an acquirer gains "de facto" control of an undertaking's activities, a case by case approach in the light of the particular circumstances will be adopted.

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[2] These thresholds generally correspond to the thresholds for mandatory offers prescribed in the Singapore Code on Take-overs and Mergers.

3.12 Generally, in assessing whether a party has de facto control over an undertaking, CCCS may consider whether any additional agreements with the undertaking allow the party to influence the undertaking's activities that affect its key strategic commercial behaviour. These might include the provision of consultancy services to the undertaking or might, in certain circumstances, include agreements between undertakings that one will cease production and source all its requirements from the other.

3.13 Pure economic relationships may also play a significant role in certain circumstances in determining whether de facto control exists. For example, in very important long-term supply agreements, the supplier may be able to exercise decisive influence over a customer by creating a situation of economic dependence. Further, financial arrangements may confer decisive influence where the conditions are such that an undertaking becomes so dependent on the lender that the lender gains decisive influence over the undertaking's activities (e.g. where the lender could threaten to withdraw loan facilities if a particular activity is not pursued, or where the loan conditions confer on the lender the ability to exercise rights over and above those necessary to protect its investment, say, by options to take control of the undertaking or veto rights over certain strategic decisions). CCCS is likely to be concerned with such financial arrangements only when the loan takes on a larger strategic purpose which goes beyond that of protecting the lender's interest, and has an effect on competition.

3.14 Transactions by venture capitalists and private equity investors may also raise possible competition concerns, particularly if they result in coordination of conduct among firms within their portfolios in the same market in which they have stakes and are able to influence their commercial behaviours.

3.15 The examples cited in **Annex B** to illustrate situations which may give rise to joint control also serve to illustrate when de facto control may exist.

3.16 An option to purchase or convert shares cannot, in and of itself, confer control unless the option will be exercised in the near future according to legally-binding agreements. However, the likely exercise of such an option can be taken into account as an additional factor which, together with other factors, may lead to the conclusion that control exists.

Minority Shareholdings

3.17 Control may also be acquired in the case of a minority shareholder if the shareholding confers decisive influence with regard to the activities of an undertaking. This can be established on a legal and/ or de facto basis. Legally, it can occur where minority shareholders have additional rights which allow them to veto decisions that are essential for the strategic commercial behaviour of the undertaking, such as the budget, business plans, major investments, the appointment of senior management or market-specific rights. The latter would include decisions on the technology to be used where technology is a key feature of the merged undertaking. In markets characterised by product differentiation and a significant degree of innovation, a veto right over decisions relating to new product lines to be developed may also be an important element in establishing control.

3.18 A minority shareholder may also be deemed to have sole control on a de facto basis. This is the case, e.g. where a minority shareholder is highly likely to achieve control over decisions made at any shareholders' meeting, due to patterns of attendance and voting at such meetings and the fact that the remaining shares are widely dispersed. In such a situation where it is highly unlikely that all the other shareholders will be present or represented at the shareholders' meeting, the determination of whether or not control exists in a particular case may be based on the attendance of other shareholders in previous years. Where, on the basis of the number of shareholders attending the shareholders' meeting, a minority shareholder has a stable majority of the votes at this meeting, then the minority shareholder may be taken to have decisive influence and thus control.

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3.19 In situations where acquisition of a minority shareholding confers decisive influence, and hence control of an undertaking, it could amount to a merger within the meaning of section 54(2) of the Act that is reviewable by CCCS.

Joint Ventures

3.20 Joint ventures, as broadly defined, refer to collaborative arrangements by which two or more undertakings devote their resources to pursue a common objective.

3.21 In practice, joint ventures encompass a broad range of operations, from merger-like arrangements to cooperation for particular functions such as research and development ("R&D"), production, or distribution.

3.22 Section 54(5) of the Act defines that a joint venture constitutes a merger if it performs, on a lasting basis, all the functions of an autonomous economic entity. Joint ventures[3] which satisfy these requirements bring about a lasting change in the structure of the undertakings concerned.

3.23 A joint venture must thus fulfil the following criteria before falling within the definition of a merger under section 54 of the Act:

- it must be subject to joint control;
- it must perform all the functions of an autonomous economic entity; and
- it must do so on a lasting basis.

Joint Control

3.24 The creation of a joint venture may fall within the scope of the merger provisions where the joint venture is one entailing joint control by two or more parent undertakings (see section 54(2)(b) of the Act). Please refer to the paragraphs under the heading "Acquisition of Control" above, for a discussion of the concept of "control".

3.25 Joint control over an undertaking exists where two or more parties have the possibility of exercising decisive influence over that undertaking. Decisive influence in this context includes the power to block actions which determine the strategic commercial behaviour of an undertaking. Unlike sole control, which confers the power upon a specific shareholder to determine the strategic decisions in an undertaking, joint control is characterised by the possibility of a deadlock resulting from the power of two or more parent companies to reject proposed strategic decisions. It follows, therefore, that these shareholders must reach a consensus in determining the commercial activities of the joint venture.

3.26 Please refer to **Annex B** for examples of situations that give rise to joint control.

Performing the Functions of an Autonomous Economic Entity

3.27 Performing all the functions of an autonomous economic entity essentially means that a joint venture must operate on a market and perform the functions normally carried out by undertakings operating on that market. In order to do so, the joint venture must have a management dedicated to its day-to-day operations and access to sufficient resources, including finance, staff and assets (tangible and intangible), in order to conduct on a lasting basis its business activities within the area provided for in the joint venture agreement.

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[3] A joint venture which may not constitute a merger under section 54(2)(b) may be subject to section 34 of the Act.

3.28 A joint venture does not perform all the functions of an autonomous economic entity if it only takes over one specific function within the parent companies' business activities without access to the market. This is the case, e.g. for joint ventures limited to R&D or production. Such joint ventures are auxiliary to their parent companies' business activities. This is also the case where a joint venture is essentially limited to the distribution or sales of its parent companies' products and, therefore, acts principally as a sales agency. However, the fact that a joint venture makes use of the distribution network or outlet of one or more of its parent companies normally will not disqualify it from being considered as performing all the functions of an autonomous economic entity, as long as the parent companies are acting only as agents of the joint venture.

3.29 The fact that the joint venture relies almost entirely on sales to its parent companies or purchases from them for an initial start-up period may still be consistent with the joint venture performing all the functions of an autonomous economic entity. Such arrangements during the start-up period may be necessary in order for the joint venture to establish itself on a market. The essential question is whether, in addition to these sales, the joint venture is geared to play an active role on the market. In this respect, the relative proportion of these sales compared with the total production of the joint venture is an important factor. Another factor is whether sales to the parent companies are made under normal commercial conditions.

3.30 Where the joint venture is making purchases from its parent companies, it may not be performing all the functions of an autonomous economic entity if little value is added to the purchased products or services at the level of the joint venture itself. In such a situation, the joint venture may be closer to a joint sales agency.

3.31 However, where a joint venture is active in a trade market and performs the normal functions of a trading company in such a market, it will normally be considered to perform all the functions of an autonomous economic entity rather than an auxiliary sales agency. A trade market is characterised by the existence of companies which specialise in the selling and distribution of products without being vertically integrated, in addition to those which are integrated, and where different sources of supply are available for the products in question. In addition, many trade markets may require operators to invest in specific facilities such as outlets, stockholding, warehouses, depots, transport fleets and sales personnel. In order to perform all the functions of an autonomous economic entity in a trade market, an undertaking must have the necessary facilities and be likely to obtain a substantial proportion of its supplies not only from its parent companies, but also from other competing sources.

Lasting Basis

3.32 The joint venture must be intended to operate on a lasting basis. The fact that the parent companies commit to the joint venture the resources to carry out the functions described above in paragraph 3.27 above normally demonstrates that this is the case.

3.33 Agreements setting up a joint venture often provide for certain contingencies, e.g. the failure of the joint venture or fundamental disagreement between the parent companies. This may be achieved by the incorporation of provisions for the eventual dissolution of the joint venture itself or the possibility for one or more parent companies to withdraw from the joint venture. Such provisions do not prevent the joint venture from being considered as operating on a lasting basis.

3.34 The same is normally true where the agreement specifies a period for the duration of the joint venture which is sufficiently long in order to bring about a lasting change in the structure of the undertakings concerned, or where the agreement provides for the possible continuation of the joint venture beyond this period.

3.35 On the other hand, the joint venture will not be considered to operate on a lasting basis where it is established for a short, finite duration. This would be the case, e.g. where a joint venture is established in order to construct a specific project such as a power plant, but will not be involved in the operation of the plant once its construction has been completed.

Exceptions

3.36 Section 54(7) of the Act sets out four exceptional situations where the acquisition of a controlling interest does not constitute a merger under the Act:

- control is acquired by a person acting in his capacity as a receiver or liquidator or an underwriter;
- all of the undertakings involved in the merger are, directly or indirectly, under the control of the same undertaking. In particular, a merger between a parent and its subsidiary company, or between two companies which are under the control of a third company, will not be subject to the merger provisions if, prior to the acquisition or merger, the subsidiary concerned has no real freedom to determine its course of action in the market and, although having a separate legal personality, enjoys no economic independence. Internal restructuring within a group of companies will therefore not constitute a merger;
- the acquisition of control results from a testamentary disposition or an intestacy. In other words, the controlling interest is obtained after the death of the original owner by operation of the probate or intestacy laws. Likewise, if the controlling interest is obtained as a result of a right of survivorship in a joint tenancy, it will not constitute a merger; or
- control is acquired by parties whose normal activities include carrying out transactions and dealing in securities for their own account or for the account of others,[4] under the following circumstances:
    - the control is constituted by the holding of securities in the acquired undertaking on a temporary basis; and
    - any exercise by the acquiring party of the voting rights in respect of the securities is:
        - for the purpose of arranging the disposal of the acquired undertaking or its assets or securities, where the disposal is to take place within twelve (12) months of the acquisition of control (or such longer period as CCCS determines);[5] and
        - not with a view to determining the strategic commercial behaviour of the acquired undertaking.

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[4] E.g. credit or other financial institutions or insurance companies may engage in such activities in the normal course of business.

[5] Extension may be granted by CCCS where the acquiring undertaking can show that the disposal was not reasonably possible within the one (1) year period.

4 THE SUBSTANTIAL LESSENING OF COMPETITION TEST

4.1 Competition is a process of rivalry between firms seeking to win a customer's business. This process of rivalry, where it is effective, impels firms to deliver benefits to customers in terms of price, quality, choice and innovation. For instance, rivalry creates incentives for firms to reduce price, increase output, improve quality, enhance efficiency or innovate to introduce new and better products because it provides the opportunity for successful firms to take business away from competitors and poses the threat that firms will lose business to others if they do not compete. The strength (or weakness) of the incentive for rivalry can depend not only on the presence of competitors, and the credible prospect of customer switching, but also on the anticipated entry of potential competitors.

4.2 When the level of rivalry is reduced (e.g. because of the creation, maintenance or increase in market power arising from a merger transaction or coordinated behaviour between firms), the effectiveness of this process may diminish, to the likely detriment of customers. When a merger leads to a significant effect on rivalry over time, and reduces the competitive pressure on firms to improve their offerings to customers or become more efficient or innovate, the merger results or may be expected to result in a SLC.

4.3 However, not all merger situations give rise to competition issues. CCCS believes that many mergers are either pro-competitive (because they positively enhance levels of rivalry) or are competitively neutral. Some merger situations may lessen competition but not substantially, because sufficient post-merger competitive constraints exist to ensure that competition (or the process of rivalry) continues to discipline the commercial behaviour of the merged entity. Only mergers that result or may be expected to result in a SLC and have no net economic efficiencies will infringe the Act.

What is a Substantial Lessening of Competition?

4.4 A SLC test is applied by comparing the extent of competition in the relevant market with and without the merger.

4.5 The determination of whether there is a SLC is a judgement on the degree to which competition is affected and depends on the facts and circumstances of each merger. There is no precise threshold, whether in qualitative or quantitative terms as to what constitutes a substantial lessening. However, a merger is more likely to substantially lessen competition if it leads to a significant and sustainable reduction of rivalry between firms over time to the likely detriment of customers. For example, a merger will substantially lessen competition if it creates, maintains or enhances market power.

4.6 Market power may generally be described as the ability to sustain price profitably above competitive levels (or where a customer has market power, the ability to obtain prices lower than their competitive levels). For instance, this might occur through the elimination of an effective source of competition which weakens the rivalry among the players left in the market after the merger.

4.7 Firms with market power may, instead of raising price, simply opt not to compete as aggressively as they otherwise might. In so doing, they allow costs to rise, reduce quality, restrict the diversity of choice and/or slow the rate of innovation.

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4.8 A merger situation can lead to a SLC if it creates, maintains or enhances the following types of market power:

- raises or leads to "non-coordinated effects" – which arise when there is a loss of competition between the merging parties and the merged entity finds it profitable to raise prices and/or reduce output, or quality or innovation;

- the merger raises or leads to increased scope for "coordinated effects" – which arise if the merger raises the possibility of firms in the market coordinating their behaviour to raise prices, reduce quality, or output or innovation.

Further elaboration of non-coordinated and coordinated effects can be found in paragraphs 6.4 to 6.15 and 6.16 to 6.28 respectively under Part 6.

4.9 A lessening of competition does not need to be felt across an entire market, or relate to all dimensions of competition in a market for the effect to be substantial. A lessening of competition that adversely affects a significant section of the market may be enough to amount to a SLC.

4.10 In applying the SLC test, CCCS will not only examine the competitive effects on the immediate customers of the merged entity but also effects on subsequent, intermediate and final customers. For example, a merger between parties operating upstream of the retail level may affect the downstream retailers or the final end-customers.

Different Types of Mergers

4.11 There are different types of merger situations, each of which affects competition in different ways. A brief explanation of the different types is provided below.

Horizontal Mergers:

- These are mergers between undertakings that operate in the same economic market. Horizontal mergers can reduce competitive pressure on the merged entity to the extent that the merged entity could unilaterally impose a profitable post-merger price increase or otherwise behave anti-competitively. In response, other firms in the market might unilaterally raise their prices, without any collusion among participants. Also, a merger might increase the likelihood (or stability) of coordination, either tacit or explicit, between the firms remaining in the market.

  Horizontal mergers can also involve competing buyers of a product or service. For example, a merger between two competing distributors would not only be a merger between two competing suppliers to retailers, but it would also result in the merged entity being a larger buyer of products from a manufacturer. CCCS's assessment of horizontal mergers is explained in further detail in Part 6.

- Mergers between competing buyers:

  Similar to a merger between competing suppliers, a merger between competing buyers may also create or enhance the merged firm's ability, unilaterally or in coordination with other firms, to exercise market power when buying products or services. This is known as "monopsony power".

For example, the merged firm may have the ability to profitably depress prices paid to suppliers to a level below the competitive price for a significant period of time such that the amount of input sold is reduced. That is, the price of the input is depressed so low that (some) suppliers no longer cover their supply costs and so withdraw supply (or related services) from the market. Such an outcome would reduce the amount of product being supplied.

Non-horizontal Mergers:

- Vertical mergers:

  These are mergers between an upstream supplier and a downstream customer. Although vertical mergers are often pro-competitive, they may in some circumstances reduce the competitive constraints faced by the merged entity by foreclosing a substantial part of the market to competitors[6] or by increasing the likelihood of post-merger collusion. This risk is, however, unlikely to arise except in the presence of existing market power at one level in the production or supply chain at least, or in markets where there is already significant vertical integration or restraints. An example of a vertical merger would be a merger between a manufacturer and a wholesaler.

- Conglomerate mergers:

  These are mergers between undertakings in different markets. Conglomerate mergers typically do not lessen competition substantially. However, in some cases, such mergers can reduce competition. For example, competition concerns may arise in mergers between parties in closely related markets.

  CCCS's assessment of vertical and conglomerate mergers is explained in further detail in Part 7.

Theories of Harm

4.12 In conducting a merger assessment and applying the SLC test, CCCS may develop a theory or theories of harm. Developing theories of harm provides a framework for assessing potential changes arising from the merger, including impact or expected harm from the loss of rivalry between the merging firms and also, for assessing the appropriate merger remedies in the event a merger leads to SLC concerns.

4.13 In formulating theories of harm, CCCS will consider how rivalry might be affected post-merger. A merger between two competing firms may harm the rivalry process in terms of price, the quantity sold, service quality, product range, product quality or innovation. For example, if evidence indicates that in addition to price, the merging firms compete strongly on quality (for example, if data protection is a significant parameter of competition), CCCS will consider the harm to the rivalry process in relation to quality. CCCS will also seek to understand the commercial rationale for the merger. However, the development of a theory or theories of harm will be based on objective assessment of the circumstances surrounding the transaction and not the subjective intentions of the merging parties.

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[6] For example, this may arise from the merged entity's refusal to supply, enhanced barriers to entry, facilitation of price discrimination and increase in rivals' costs.

Identification of the Appropriate "Counterfactual"

4.14 In applying the SLC test, CCCS will evaluate the competitive situation with and without the merger situation. The competitive situation without the merger is referred to as the "counterfactual".

4.15 The counterfactual is an analytical tool used to determine whether the merger gives rise to a SLC. Typically, where the substantive assessment is conducted prior to the completion of the merger situation or shortly thereafter, the relevant counterfactual is forward looking. The description of the counterfactual is affected by the extent to which events or circumstances and their consequences are foreseeable. A counterfactual should not involve a violation of competition law. For example, if the state of the market pre-merger involves a price fixing and/or market sharing cartel, this would not be an appropriate counterfactual as competition in such a situation would have been artificially reduced due to the anti-competitive activity. Since the counterfactual may be either more or less competitive than the prevailing conditions of competition, the selection of the appropriate counterfactual may increase or reduce the prospects of a SLC.

4.16 In most cases, the best guide to the appropriate counterfactual will be prevailing conditions of competition, as this may provide a reliable indicator of future competition without the merger. However, in some cases, status quo may not be the appropriate counterfactual. CCCS may need to take into account likely and imminent changes in the structure of competition in order to reflect as accurately as possible the nature of rivalry without the merger. For example, in cases where one of the parties is genuinely failing, pre-merger conditions of competition might not prevail even if the merger were prohibited as the failing party may exit the market in the event that the merger does not occur. In such cases, the counterfactual might need to be adjusted to reflect the likely failure of one of the parties and the resulting loss of rivalry. This is generally known as the failing firm defence.

Failing Firm

4.17 To qualify for the failing firm defence, the following conditions have to be met:

- first, the firm must be in such a dire situation that without the merger, the firm and its assets would exit the market in the near future. Firms on the verge of judicial management may not meet this criterion, whereas firms in liquidation will usually do so;

- second, the firm must be unable to meet its financial obligations in the near future and there must be no serious prospect of re-organising the business, e.g. a liquidator has been appointed pursuant to a creditor's winding up petition; and

- third, there should be no less anti-competitive alternative to the merger. Even if a sale is inevitable, there may be other realistic buyers whose acquisition of the firm and its assets would produce a more competitive outcome. Any offer to purchase the assets of the failing firm at a commercially reasonable price, even if the price is lower than that which the acquiring party is prepared to pay, will be regarded as a reasonable alternative offer. It may also be better for competition that the firm fails and the remaining players compete for its customers and assets than for them to be transferred wholesale to a single purchaser.

4.18 The party relying on the failing firm defence would thus need to provide evidence that:

- the undertaking is indeed about to fail imminently under current ownership (including evidence that trading conditions are unlikely to improve);

- all re-financing options have been explored and exhausted; and

- there are no other credible bidders in the market (by demonstrating that the firm has made good faith and verifiable efforts to elicit reasonable alternative offers of acquisition).

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4.19 A non-exhaustive list of evidence that CCCS may consider when assessing failing firm scenarios could include:

- timelines of critical events and decisions of the failing firm;
- internal documents, such as briefing and board papers for the Board and/or senior management;
- audited financial statements, including notes and qualifications in the auditor's report;
- projected cash flows, projected operating or losses, projected net worth;
- credit status;
- reduction in the firm's relative position in the market; and
- changes in the firm's share price or publicly-traded debt of the firm.

4.20 A similar argument can be made for "failing divisions". The following conditions will need to be met. First, upon applying appropriate cost allocation rules, the division must have a negative cash flow on an operating basis.[7] Second, absent the acquisition, the assets of the division would exit the relevant market in the near future if not sold. Evidence to demonstrate negative cash flow and the prospect of exit from the relevant market will need to be provided. Third, the owner of the failing division must also demonstrate that it has undertaken a careful business evaluation, and has explored all possible options (including that there are no alternative credible bidders in the market) to lend credibility to the prospect of exit.

Other Possible Counterfactual Scenarios

4.21 A non-exhaustive list of examples of counterfactuals other than status quo could include:

- where there are concurrent merger transactions that are likely to occur or are occurring in the same relevant market, regardless of whether these transactions may or may not have been notified to CCCS;
- where a firm is about to enter or exit the market. Similarly, CCCS may also take into account committed expansion plans by existing competitors. For example, one of the merging firms may have been planning to develop a product to compete with the other merging firm; and/or
- where changes to the regulatory structure of the market, such as market liberalisation, or tighter environmental constraints, will change the nature of competition.

4.22 However, there may be instances where there could be multiple counterfactuals. In these instances, CCCS will generally adopt the most likely scenario as the counterfactual.

4.23 CCCS will consider all available evidence to decide on the relevant counterfactual. In doing so, CCCS will assess the credibility of the counterfactual proposed by the merging firms and may request for supporting evidence. Such evidence must be consistent with the firm's own internal pre-merger assessments.

4.24 The focus of CCCS's analysis is on the effects that the merger situation has on competition. Competition concerns that do not result from the merger situation under consideration and are likely to exist in the counterfactual are outside CCCS's remit in merger assessment. However, they may be matters which are appropriate for CCCS to consider in relation to the section 34 prohibition and/or section 47 prohibition.

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[7] CCCS may consider whether the negative cash flow is sustainable, e.g. as a means to support other parts of the business.

5 MARKET DEFINITION AND MARKET SHARE ANALYSIS

5.1 The focus of CCCS's analysis is on evaluating how the competitive constraints on the merger parties and their competitors might change as a result of the merger. The starting point is to define the relevant market, then review the changes in the market structure resulting from the merger.

Market Definition

5.2 Proper examination of the competitive effects on a merger rests on a sound understanding of the competitive constraints under which the merged entity will operate. The scope of those constraints, if any, is identified through a market definition analysis. It is important to emphasise that market definition is not an end in itself. It is a conceptual framework for analysing the direct competitive pressures faced by the merged entity.

5.3 Relevant economic markets have two main dimensions: products (or services) scope and geographic scope. CCCS has published the *CCCS Guidelines on Market Definition*, which explains its methodology for identifying the scope of relevant product and geographic markets. Given that broadly similar methodology is used to define markets in merger cases, reference should be made to those guidelines. It is important to note a fundamental difference between the nature of the competitive analysis undertaken in assessing the likely competitive effects of a merger and that generally undertaken in the case of anti-competitive agreements or abuses of dominance. In assessing a merger, the main competitive concern is whether the merger will result in an increase in prices above the prevailing level. As a result, in defining the market for merger purposes, the relevant price level is the current price rather than the competitive price.

5.4 It must be emphasised that the calculation of market shares is highly dependent on market definition. Parties should be aware that CCCS may not necessarily accept their identification of the relevant market.

5.5 Market definition focuses attention on the areas of overlap in the merger parties' activities. This is particularly the case in differentiated product markets, where the merger parties' products or services may not be identical, but may still be substitutes for each other. In this context, the analytical discipline of market definition is helpful in identifying the extent of the immediate competitive interaction between the parties' products. Once the overlap in the merger parties' products or services has been identified, along with the market in which those products or services compete, CCCS can focus attention on the competitive assessment.

5.6 In analysing market definition, the same evidence may be relevant and contribute to both the definition of relevant markets and the assessment of the competitive effects of the merger. Merger review is often an iterative process in which evidence with respect to the relevant market and market shares is considered alongside other evidence of competitive effects, with the analysis of each informing and complementing the other.

5.7 In cases where it may be apparent that the merged entity will not possess any market power or that the merger will not maintain or enhance its market power within any sensible market definition, it may not be necessary to establish a market definition.

5.8 Market definition depends on the specific facts, circumstances, and evidence of the particular merger under assessment or investigation. Decisions relating to market definition in previous merger decisions by CCCS may provide limited guidance.

Market Shares and Concentration

5.9 Where CCCS has defined a relevant market or markets, the level of concentration in that market(s) can be an indicator of competitive pressure within that market(s). Market concentration generally depends on the number and size of the participants in the market. A merger which increases the level of concentration in a market may reduce competition by increasing the unilateral market power of the merged entity and/or increasing the scope for coordinated conduct among the competitors in the market post-merger.

5.10 A merged entity with substantial market power may be able to increase prices or decrease quality or output without being threatened by competitors. It may also undertake strategic behaviour such as predation, which may in turn affect market structure and market power. A reduction in the number of firms in the market may also increase the scope for coordinated conduct, as it becomes easier for competitors to reach agreement on the terms of coordination, signal intentions to one another and monitor one another's behaviour.

5.11 The two principal measures used by CCCS in examining market structure are market shares and concentration ratios. Since market shares may be more readily available than other information, they are a relatively low-cost means for businesses to screen out mergers which are not likely to result in a SLC. It must be emphasised that the calculation of market shares is highly dependent on market definition.

5.12 Market shares are usually measured by sales revenue. Other measures, such as production volumes, sales volumes, capacity or reserves, may be used as appropriate. Where one or more of the merging parties are multi-sided platforms, additional measures may include the number of monthly active users (including buyers and sellers on each side of the platform), number of transactions and gross value of the product or service. Current market shares may be adjusted to reflect expected and reasonably certain future changes, such as a firm's likely exit from the market or the introduction of additional capacity.

5.13 Comparison of the merged entity's market shares with those of other players in the market may give an indication of rivalry and potential market power and whether the other players are able to provide any competitive constraint. Historical market shares can also provide useful insights into the competitive dynamics of a market: e.g. volatile market shares might suggest that there has been effective competition. That said, continuing high market shares are not always indicative of market power.

5.14 Concentration ratios ("CR") measure the aggregate market share of a few of the biggest firms in a market. For example, CR3 refers to the combined market share of the three largest firms. These are absolute measures of concentration, taking no account of differences in the relative size of the firms that make up the leading group.

5.15 CCCS is generally of the view that competition concerns are unlikely to arise in a merger situation unless:

- the merged entity will have a market share of 40% or more; or
- the merged entity will have a market share of between 20% to 40% and the post-merger CR3 is 70% or more.

5.16 The thresholds set out in the preceding paragraph are simply indicators of potential competition concerns, but they do not give rise to a presumption that such a merger results or may be expected to result in lessening of competition substantially. Market shares, per se, do not provide deep insight into the nature of competition between firms in a market, that is whether they compete on price, service or innovation. Further investigation is required to determine whether a merger results or may be expected to result in a SLC. Similarly, a SLC could potentially be established at thresholds below that set out in the preceding paragraph if other relevant factors provide strong evidence of any SLC.

6 ASSESSMENT OF A HORIZONTAL MERGER

6.1 A horizontal merger is a merger between two firms active (or potentially active) in the same market at the same level of business (e.g. between two manufacturers, two distributors or two retailers). When horizontal mergers occur, competition may be affected in a number of ways. This loss of a competitor (actual or potential) can change the competitive incentives of the merger parties, their rivals and their customers. This will lead to changes in the intensity of competition.

6.2 There are two conceptually distinct means by which a horizontal merger might be expected to result in a SLC: non-coordinated effects and coordinated effects. Although they are conceptually distinct, it is possible that a merger might raise both types of concern. Non-coordinated effects arise when two close competitors merge and find it profitable to raise prices and there are no other or limited competitive constraints on the merged entity to prevent it from raising prices. Coordinated effects may arise when the merger increases the incentive for some or all of the firms in the market to collude to increase prices and such collusion is sustainable due to no or little competition from other sources.

6.3 In assessing whether a merger situation results or may be expected to result in a SLC in the relevant market, CCCS would assess the following:

- The extent to which the merger parties are close competitors;
- Competition from existing competitors operating in the relevant market;
- This includes assessing the extent to which existing competitors can expand their sales and prevent the merged entity from raising prices;
- Competition from potential competitors which involves assessing barriers to entry and whether entry is likely, timely and sufficient in extent; and
- The degree of countervailing buyer power of customers, such that some or all customers are able to prevent the merged entity from raising prices.

Each of these factors is discussed in further details in this section. An overview of CCCS's analytical framework is also available in **Annex A.**

Assessment of Non-coordinated Effects[8]

6.4 A horizontal merger between competing firms can have the likely effect of a SLC through non-coordinated effects (also known as unilateral effects). Non-coordinated effects may arise when a firm merges with an existing competitor that would otherwise provide a significant competitive constraint. In such cases, as part of its merger assessment, CCCS may focus its assessment on the closeness of competition between the merging parties.

6.5 When a firm merges with its closest competitor, the merged entity could find it profitable to raise prices, or reduce output, quality or innovation because of the loss of competition between the merged entities. Pre-merger, any increase in the price of the acquiring firm's products would have led to a reduction in sales. However, post-merger, any sales lost as a result of a price increase in the acquiring firm's products will be partially recaptured by increased sales of the acquired undertaking's products,[9] such that the lost sales are not completely foregone. In addition, the acquiring firm may find it profitable to also raise the price of the acquired firm's products since some of the lost sales will be recaptured through higher sales of the acquiring firm's products.

6.6 Non-coordinated effects may also arise when an existing firm merges with a potential or emerging competitor. In such situations, the merged entity may be able to preserve the market power of the existing firm that would have otherwise been threatened by the potential or emerging competitor.

6.7 Non-coordinated effects may also occur in markets where innovation is an important feature of competition, and where one or more of the merging parties is an important innovator in ways not reflected in market shares. For example, one of the merging parties may be an innovative and fast-growing new entrant that has the potential to exert significant competitive pressure in the future on the other firms in the market. Another example may involve a merger between two important competing innovators that have "pipeline" products relating to a specific product market. A merger involving such firms may change the competitive dynamics even if the firms do not have a large market share.

6.8 When CCCS assesses whether a merger situation is likely to give rise to non-coordinated effects, CCCS will consider whether the profitability of any price increase is likely to be defeated by competitors repositioning their products in the market, or expanding their sales and having sufficient capacity, by customers being able and/or willing to switch from one competitor to another easily, or by new competitors entering the market.

6.9 Non-coordinated effects may occur in any markets and may include markets:

- where the products or services are relatively similar ("homogeneous products") such that customers are largely indifferent about which firm they source from;
- where the product or service is characterised by differences in characteristics ("differentiated products") such as product quality, branding, after sales service, geographic location and product availability; or
- in which suppliers compete for customers through a bidding process.

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[8] The term "non-coordinated effects" is used instead of "unilateral effects" to emphasise that the analysis will cover the change in the market structure and the resulting impact of the merger on the behaviour of other firms in the market.

[9] In assessing whether a price increase would be profitable, it may also be necessary to take into account whether any reduction in sales would adversely affect a firm's cost base and so render the price increase unprofitable (e.g. because economies of scale will be lost).

6.10 In markets involving homogeneous products, the competition analysis will focus on the strategic interaction between rivals competing on output or capacity. In such cases, it is possible for the merging firms to affect price by varying the quantity of product they produce or make available to the market. For instance, non-coordinated effects may arise where the merged entity has a large market share and sets its post-merger output significantly below the level of output that would have prevailed without the merger and, despite the response of competitors, bring about a higher price than would have prevailed without the merger. The merged entity may find it profitable to restrict output:

- if any of the remaining competitors do not have sufficient capacity (or ability to expand capacity) to replace the output the merged firm removes;
- the merged entity has a large share of the market;
- its customers are relatively insensitive to price increases. That is, customers will not buy fewer products when price increases; and/ or
- it would not forego much profit by selling less output.

6.11 In markets involving differentiated products, non-coordinated effects may arise where a merger between firms previously supplying close substitutes is likely able to cause an increase in the price of either or both of the close substitutes. In this case, consideration will be given to the nature and proportion of substitution that would occur. For example, if more customers switch to product B after an increase in the price of product A, than to product C or product D, then product B is a closer competitor to product A as compared to products C and D. In such cases, if the merged entity now produces both products A and B, then the sales that firm X would have lost to firm Y pre-merger if it had raised prices may now be retained by the merged entity. This reduces the cost of increasing prices and increases the merged entity's incentive to increase prices. The larger the volume of sales diverted between the merging firms, the greater the incentive to increase prices. Similarly, the larger the profit margins on these diverted sales, the greater the incentive to increase prices.

6.12 In markets that involve a bidding process, a merger between two competing suppliers could reduce the alternatives available to a customer and reduces the ability for a customer to negotiate between both firms in order to obtain a better price through the bidding process. The loss of two competing choices could enhance the merged entity's ability to profitably increase prices.

6.13 The factors listed under each market highlighted in paragraphs 6.9 to 6.12 above are non-exhaustive examples of what CCCS may consider in each market but the same factors can be applied in other markets as well. To summarise, non-coordinated effects may arise where the market(s) concerned possess some of the following characteristics:

- there are few firms in the affected market(s);
- the merger parties have large market shares. The larger the market share of the merged entity, the more likely it is that a merger will lead to a significant increase in market power. Although market shares and increases in market shares provide only an indication of market power and an increase in market power, they are normally important factors in the assessment;
- the merger parties are close rivals. The higher the degree of substitutability between the merging firms' products, the more likely it is that the merging firms will raise prices significantly. If the merging firms represent, for a substantial number of customers, the "next best alternative" to each other's products, those customers would be prevented from switching to the best rival product, in the event of a post-merger price increase;
- one or more merging parties are important innovators in ways not reflected in market shares;

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- customers have little choice of alternative suppliers that they are able to switch to, whether because of the absence of alternatives, substantial switching costs, or the ability of suppliers to price discriminate;

- it is difficult for rivals to react quickly to changes in price, output, or quality, e.g. through product repositioning or supply-side substitution;

- there is little spare capacity in the hands of the merged entity's competitors that would allow them to expand to supply customers in the event that the merged entity reduces output, and there is little prospect of expansion of existing capacity. Spare capacity is likely to be considered in greater detail in those markets which have homogenous products;

- there is no strong competitive fringe capable of sustaining sufficient levels of post-merger rivalry; or

- one of the merger parties is a recent new entrant or a strong potential new entrant that may have had a significant competitive effect on the market since its entry or which was expected to grow into an effective competitive force. Its elimination may thus mean an important change in the competitive dynamics.

6.14 The above factors are intended to provide a broad indication of the circumstances under which CCCS may consider the risk of such anti-competitive effects to be high. They should, however, not be taken as a checklist of factors or characteristics that must all be present before non-coordinated anti-competitive effects are likely to arise.

6.15 Though the profits from non-coordinated effects are generally captured by the merger parties, rival firms can also benefit from reductions in competitive pressure as a result of a merger. Even if rival firms pursue the same competitive strategies as they did prior to the merger, they may be able to increase their prices in the wake of a merger. In such cases, the firms in the market are not tacitly or explicitly coordinating their competitive behaviour; they are simply reacting independently to expected changes in one another's commercial behaviour. Such instances of anti-competitive effects are still termed non-coordinated effects since they are based on the independent actions of firms. The change in the structure of the market may result in other firms behaving differently and reacting to an increase in prices in the market by raising their own prices.

Assessment of Coordinated Effects

6.16 A merger situation may also lessen competition substantially by increasing the possibility that, post-merger, some or all firms in the same market may find it profitable to coordinate their behaviour by raising prices, or reducing quality or output. This is in contrast to non-coordinated effects, where the merged entity acts on its own to affect price, quality and output.

6.17 This does not necessarily mean explicit collusion (which is generally an infringement of the section 34 prohibition). Given certain market conditions, and without any explicit agreement, tacit collusion may arise merely from an understanding that it will be in the firms' mutual interests to coordinate their decisions. CCCS's analysis of coordinated effects will include both the incentive to explicitly or tacitly collude, post-merger. A common feature of all types of collusion is a set of formal or informal rules by which each participating firm generally understands how it should behave and how it can expect other participating firms to behave.

6.18 Coordinated effects may arise where a merger reduces competitive constraints from actual or potential competition in a market, thus increasing the probability that competitors will collude or strengthening a tendency to do so. For example, coordinated effects are not likely if there continues to be competition from non-participating competitors and/or if the threat of entry is credible.

6.19 If a merger removes a particularly aggressive or destabilising competitor, it may make coordinated behaviour more likely.

6.20 Coordinated effects can arise as a result of a merger, even if not all competitors in a given market are involved. The number and proportion of competitors sufficient to give rise to coordinated effects will vary according to the relevant circumstances.

6.21 The creation of a joint venture merger may also increase the probability that post-joint venture, the economically independent parents of the joint venture may tacitly or explicitly coordinate their behaviour so as to raise prices, reduce quality or output, or curtail output in markets outside the joint venture market. In such cases, the coordination that takes place outside the approved joint venture will be assessed in accordance with the criteria in section 34(1) of the Act and paragraph 9 of the Third Schedule to the Act ("the Third Schedule"), with a view to establishing whether or not the behaviour poses competition concerns.

6.22 In order for tacit or explicit coordination to be successful or more likely as a result of a merger, three conditions should be met or be created by a merger:

- participating firms should be able to align their behaviour in the market;
- participating firms should have the incentive to maintain the coordinated behaviour. This means, for example, that any deviation from the coordination should be detectable, and the other participating firms should be able to inflict credible "punishment" on the deviating firm through retaliatory behaviour; and
- the coordinated behaviour should be sustainable in the face of other competitive constraints in the market.

6.23 CCCS will examine whether each of these three conditions which are favourable to coordination may be expected to arise by virtue of a merger situation. In its assessment, CCCS will also consider the structure of the market, its characteristics, and any history of coordination in the market concerned.

Ability to Align Behaviour in the Market

6.24 In order to coordinate their behaviour, firms need to have an understanding on how to do so. This need not involve an explicit agreement on what price to charge, market share quotas or the quality of products to be attained. Nor is it necessary for the firms concerned to coordinate prices around the monopoly price, or for the coordination to involve every single firm in the market. However, it is sometimes possible for firms to find a "focal" point around which to coordinate behaviour. For example, firms may find it in their interests to similarly increase their prices, without explicit coordination, in response to a price increase by a market leader. CCCS may consider the following when assessing the ability for firms to align their behaviour:

- the level of concentration in the market. In some markets it may be easier to coordinate behaviour when there are a smaller number of competitors;
- the degree of homogeneity of the firms' products. Prices for close or perfect substitutes will be easier to coordinate than prices for imperfect substitutes. Complex products and differences in product offerings and cost structures tend to make it more difficult for firms to reach profitable terms of coordination;
- the degree of similarity of firms (e.g. with respect to their size, market shares, cost structures, business strategies and attitudes to risk). Such firms are more likely to reach a consensus to coordinate than dissimilar firms;

- the degree of market transparency. The more transparent the market, the easier it is for firms to monitor one another;

- the existence of institutions and practices that may aid coordination (e.g. information sharing agreements, trade associations, regulations, meeting-competition or most-favoured-customer clauses, cross-directorships, participation in joint ventures). For instance, the exchange of information will be easier for connected firms than for unconnected firms; and

- the stability of the market. If demand and supply is stable, coordination will be easier than if the market faces volatile market conditions like innovation, or the entry and exit of firms.

It should be noted that not all of these factors need to exist in order for the firms to be able to align their behaviour in the market post-merger.

Incentives to Maintain Coordinated Behaviour

6.25 The incentive for firms participating in coordinated behaviour is to compete less intensively than in a competitive market in exchange for increased profits. The larger the increase in profit, the greater will be the incentive for coordination. Further, the strength of the incentive to coordinate also depends on the credibility of the detection and punishment by other participating firms of deviation from the terms of coordination.

6.26 Though coordination is in the collective interest of the firms involved, it is often in each firm's short-term individual interest to "cheat" on the coordination by cutting price, increasing market share, or selling outside of "accepted" territories. If coordinated behaviour is to be maintained, such "cheating" should be observable directly or indirectly. For coordination to be sustainable, the market concerned should be sufficiently transparent such that firms can monitor pricing and other terms of coordination with a view to detecting cheating in a timely way and responding to it. Firms should have credible ways of "punishing" any deviation from the tacit coordination, e.g. by rapidly cutting prices or expanding output. It should be pointed out that it may be sufficient that participating firms have a strong incentive not to deviate from the coordinated behaviour, rather than that there is a particular punishment mechanism. CCCS may consider the following when assessing possible incentives for firms to maintain their coordinated behaviour:

- the degree of market transparency. The more transparent the market, the easier it is for firms to monitor one another and detect deviations from the terms of coordination;

- the existence of institutions and practices that may aid coordination (e.g. information sharing agreements, trade associations, regulations, meeting-competition or most-favoured-customer clauses, cross-directorships, participation in joint ventures). Such connections make it easier to monitor and detect cheating;

- the stability of demand and costs. Unpredictable changes in demand or costs may make it more difficult for firms to decipher whether a change in volume sold, for instance, is due to the cheating actions of another firm or due to demand changes in the market as a whole;

- whether there is any evidence of a long-term commitment to the market by firms. The presence of the long-term commitments by the firms may be seen as a way for firms to signal to each other the intentions to maintain the aligned behaviour;

- whether the firms face any short-term financial pressures. Short-term financial pressures may encourage firms to depart from any common patterns of long-term behaviour making it difficult to sustain coordinated behaviour;

- the degree of excess capacity in the market (e.g. a high level of excess capacity will make coordination more difficult if some firms have a strong incentive to utilise their excess capacity). However, in other instances, excess capacity may make coordination easier because firms could use the spare capacity as a credible threat to participating firms thinking of deviating from the coordinated behaviour; and

- whether there is multi-market contact, i.e. the presence of the same firms in several markets. Where firms compete in more than one market, it is easier for them to maintain a tacit understanding because the costs of deviating from the agreement are greater. For example, deviation from the understanding in one market could be met by rival firms retaliating not only in that market but also in the other markets in which they compete.

Neither the presence nor the absence of one or more of the above conditions is conclusive as an indicator of coordinated effects and consumer harm.

Sustainability of Coordinated Behaviour

6.27 Overall, the conditions of competition in the market should be conducive to coordination in order to sustain the relevant behaviour. Typically, this means that the market should be sufficiently mature, stable and with limited potential competition, such that the coordination is not likely to be disrupted. For example, a strong fringe of smaller competitors (or perhaps a single maverick firm[10]) or a strong customer (with buyer power) might be enough to render coordination impossible. CCCS may consider the following when assessing the sustainability of the firms' coordination behaviour:

- whether any significant entry barriers exist. The presence of significant entry barriers limits likely entry by potential entrants who may disrupt coordination between incumbents and render any coordination unsustainable;

- presence of strong countervailing buyer power. Customers can threaten to enter the market themselves or sponsor market entry, thereby introducing new players into the market and disrupt any coordination;

- the stability of market shares over time. This is an indication of whether the market is stable due to market conditions, such that coordination is likely to be sustained;

- the extent to which small firms on the fringe of the market (e.g. those producing specialist "niche" products) might embark on large-scale or more developed production;

- the extent to which there is strategic intervention by interested third parties such as customers and suppliers. Coordination aimed at reducing overall capacity in the market will only work if non-coordinating firms are unable or have no incentive to respond to this decrease by increasing their own capacity. Increase in capacity by the non-coordinating firms may either prevent a net decrease in capacity or at least render the coordinated capacity decrease unprofitable for the coordinating firms; and

- whether there is scope for, or pressure on, firms to bring new products into the market. Pressure to innovate means that current products are likely to become obsolete more quickly, hence reducing the profitability of collusion.

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[10] A maverick firm may include a firm with a history of preventing or disrupting coordination, e.g. by failing to follow price increases by its competitors, or has characteristics that gives it an incentive to favour different strategic choices than its competitors would prefer.

6.28 CCCS will seek to assess whether, in the circumstances of the case, the above factors interact with the structural changes resulting from the merger to make coordinated effects a likely outcome of the merger. When considering the likelihood of future coordination, CCCS will also consider any existing relationship between the firms and the past market conduct - e.g. whether the market has been characterised by price fixing or vigorous price competition - and how such conduct is likely to be affected by the merger situation.

Assessment of Mergers between Competing Buyers

6.29 Similar to a merger between competing suppliers, a merger between competing buyers may also create or enhance "monopsony power", i.e. the merged firm's ability, unilaterally or in coordination with other firms, to exercise market power when buying products or services.

6.30 For such merger situations, CCCS will first assess whether it involves two competing buyers of a product or service. CCCS will then assess the competition effects of the merger in those relevant markets in which the merger parties are buyers. CCCS will conduct this assessment by considering the following:

- the number of other buyers purchasing the product(s) or service(s) in the relevant market;
- the market shares of the merger parties and the other buyers, based on the share of products purchased;
- the extent to which a new buyer or an existing buyer would increase its purchases if prices of the product or service decreased; and/or
- the possibility of suppliers exiting the market or reducing production, or reducing innovation or investment in new products and processes, in response to any price decrease.

Assessment of Barriers to Entry and Expansion

Entry

6.31 Entry by new competitors may be sufficient in likelihood, scope and time to deter or defeat any attempt by the merger parties or their competitors to exploit the reduction in rivalry flowing from the merger (whether through coordinated or non-coordinated strategies).

6.32 New entry and the threat of entry can represent important competitive constraints on the behaviour of merger parties. If entry is particularly easy and likely, then the mere threat of entry may be sufficient to deter the merger parties from raising their prices, since any price increase or reduction in output or quality would incentivise new entry to take place.

6.33 For new entry (actual or threatened) to be considered a sufficient competitive constraint, three conditions must be satisfied conjunctively: The entry must be likely, sufficient in extent and timely.

6.34 The likelihood of entry depends on whether firms can profitably enter the market in light of any entry conditions. This could depend on the revenue that a firm expects to earn, post entry prices, costs and quantities, or the return the firm might otherwise earn using its resources elsewhere (opportunity cost), or the relative risk of entry compared to alternative investments.

6.35 In assessing the likelihood of entry, CCCS will consider the experience of any firm (or firms) that have entered or withdrawn from the relevant market or markets in recent years and evidence of planned entry by third parties. The type of market may also be relevant, as a mature market with stable or declining demand may mean that profitable entry is difficult. The firm would have to win its competitor's existing customers, rather than target new customers coming into the market. Alternatively, in markets with growing/rapid demand, it is possible that any barriers to entry are less likely to have a lasting effect. Similarly, in markets characterised by innovation, product cycles may be shorter, which may decrease the probability that some barriers will have a lasting effect. CCCS would also gather information on the costs involved in entry.

6.36 Entry barriers allow an undertaking to profitably sustain supra-competitive prices in the long term. Barriers to entry can take a variety of forms, including structural, regulatory and strategic barriers. Further details on how CCCS assesses entry barriers, can be found in the *CCCS Guidelines on the Section 47 Prohibition*, **Annex B.** In assessing the extent of any barriers to entry, CCCS will take the following considerations into account.

- Regulatory barriers provide incumbents with absolute cost advantages over potential entrants which may make successful entry less likely. Such barriers include situations where government regulations such as licensing, intellectual property rights, preferential access to essential facilities, environmental regulations, planning consent requirements, or regulations governing standards and quality, limit the number of competitors that are able to enter a market.

- Structural barriers arise from the technologies, resources or inputs a firm would need to enter or expand. These include the following:

    - The costs of entering a market are more likely to deter entry if a significant proportion of those costs are sunk, i.e. the costs cannot be recovered if the entrant fails and is forced to exit. Sunk costs may include set-up costs (such as market research, finding an office location and getting planning permission), costs associated with investment in specific assets, research and advertising, and other promotion costs.

    - Economies of scale arise where average costs fall as the level of output rises.[11] In some circumstances, such scale economies can act as a barrier to entry, particularly where the fixed costs are sunk. As a result, a new entrant may be deterred from attempting to match the costs of the incumbent by entering on a large scale, because of the risk that it would be unable to recover its sunk costs.

    - Economics of scope arise when average costs fall when more than one product is produced. Economies of scope may require an entrant to produce a minimum range of products in order to be an effective competitive constraint on the merged entity.

    - The costs of entry must be considered against the expected revenues from sales and the time period over which costs might be recovered, to assess whether firms wanting to enter the market will find entry profitable and whether or not it may be difficult for them to raise the necessary funds to enter the market. In assessing whether entry would be profitable, CCCS will generally refer to pre-merger prices since this is the price at which the merged entity would need to be constrained to avoid an indication of a SLC.

    - The costs faced by customers in switching to a new supplier are also important in determining whether new entry would be an effective and timely competitive constraint.

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[11] Economies of scope, where average costs fall as more types of products are supplied, may have similar implications as economies of scale.

- Difficulties in accessing key production or supply inputs (including physical assets, proprietary rights or data), important technologies, or distribution channels.

- Direct or indirect network effects[12] may make customers reluctant to switch, thereby making it more difficult for new entrants to gain a sufficient customer base to be profitable. In markets characterised by network effects, a likely entrant will need to take the risk of developing new infrastructure but may not succeed in creating the necessary demand to make it profitable.

- Purchasing efficiencies refer to efficiencies derived from purchasing multiple distinct products or services together from the same supplier. These efficiencies typically include benefits such as convenience, savings in transaction costs and time, which result in buyers deriving a greater value from purchasing the products or services from the same supplier instead of purchasing each product or service from different suppliers. These purchasing efficiencies could contribute to barriers to entry. For instance, where there are strong purchasing efficiencies for a merged entity's products or services, buyers may find that the costs of switching to a potential entrant's products or services may be higher than the benefits derived from remaining and purchasing the products or services from the merged entity. The potential entrant may hence find it difficult to attract buyers and to compete effectively with the incumbent.

- Strategic barriers may arise when incumbent firms have advantages over new entrants because of their established position (first-mover advantages). These advantages can flow, e.g. from the experience and reputation which incumbents have built up, or from the loyalty which they may have attracted from customers and suppliers. Incumbent firms may sometimes behave strategically by responding to the threat of entry, e.g. by lowering price or by investing in excess capacity or additional brands to deter entry. Such firms could increase customer switching costs, e.g. by establishing long term contracts (with exclusivity clauses, automatic renewals, rights of first refusal) or establishing strong customer loyalty through points programmes, thereby making it difficult for new entrants to gain a sufficient customer base to be profitable or to gain access to essential inputs. Incumbent firms could also signal through present or past conduct that entry would provoke an aggressive response.

6.37 CCCS's analysis of entry conditions also includes considering whether the merged entity would face competition from imports or supply-side substitution, to the extent that these have not already been taken into account in market definition. What is important is that competitive constraints posed by imports and possible supply-side substitutes are considered in the analysis (whether they are considered under the heading of market definition or that of entry). Given the open nature of Singapore's economy, the competitive constraints posed by imports are likely to be an important factor in analysis.

Extent of Entry

6.38 Any new entry should be of sufficient scope to constrain any attempt to exploit increased post-merger market power. Small-scale entry may be insufficient to prevent a SLC, even when the entry may provide the basis for later expansion. For entry to be sufficient, it must be likely that incumbents would lose significant sales to new entrants.

6.39 Sufficient scale will depend in part on the characteristics of the market under review. For instance, for a differentiated product, the sufficiency of entry will depend in part on whether the products supplied by the entrant or existing competitors are a sufficiently close substitute to the product supplied by the merged firm. Entry that is small-scale, localised or targeted at niche segments is unlikely to be an effective constraint post-merger.

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[12] Direct network effect occurs when an increase in the usage of a product increases the demand for that product. Indirect network effect occurs when an increase in the usage of a product increases the demand for another complementary product.

6.40 Sufficiency does not require that one entrant alone duplicates the size and scale of the merged entity. It is possible that new entry or expansion of existing competitors is sufficient in extent but remains smaller than either of the merging firms pre-merger.

Timely Entry

6.41 Any such prospective new entry, in response to any exercise of market power by the merged entity, would have to be sufficiently timely and sustainable to provide lasting and effective post-merger competition. The assessment of whether entry would be sufficiently timely would depend on the facts of each specific merger and the particular characteristics of the market(s) in question. For instance, the appropriate timeframe may vary from market to market. In some markets where products are supplied and purchased on a long-term contractual basis, customers may not immediately be exposed to the detrimental effects stemming from a potential SLC. In such cases, the competition assessment would have to take into account the renewal dates of these contracts. As an indication, CCCS may consider entry within two (2) years as timely entry, but this is assessed on a case by case basis depending on market characteristics and dynamics, as well as the specific capacities of potential entrants.

6.42 When determining whether potential entry is likely to be timely, CCCS may consider the barriers listed in paragraph 6.36 above, as well as factors such as the frequency of transactions, the nature and duration of contracts between buyers and sellers, lead times for production and the time required to achieve the necessary scale. Not all of these factors need to be assessed to determine the timeliness of potential entry. Nor should this be considered an exhaustive list.

6.43 The effect of a merger on the likelihood of new entry might itself contribute to a SLC if it increases barriers to entry or reduces/ eliminates the competitive constraint represented by new entry. This might arise, e.g. where the acquired entity was or was genuinely perceived to be one of the most likely entrants.

Expansion

6.44 The ability of rival firms in the market to expand their capacity quickly can also act as an important competitive constraint on the merger parties' behaviour. When considering the likelihood of such expansion in response to price increases, CCCS will similarly consider the factors which have been set out for new market entry.

Assessment of Countervailing Buyer Power

6.45 The ability of a merged entity to raise prices may be constrained by the countervailing buyer power of its customers. Countervailing buyer power refers to the bargaining strength that the buyer has vis-à-vis the seller in commercial negotiations due to the buyer's commercial significance to the seller. Customers who are commercially significant to the merged entity may be able to discipline supplier pricing by:

- switching, or credibly threatening to switch their demand or a part thereof to another supplier, especially if the customers are well-informed about alternative sources of supply;
- imposing substantial costs on the merged entity, e.g. by refusing to buy other products produced by the merged entity or by delaying purchases;
- imposing costs on the merged entity through their own retail practices, e.g. by positioning the merged entity's products in less favourable parts of their shops;

- threatening to enter the market themselves, sell own-label products or sponsor market entry by covering the costs of entry, e.g. through offering the new entrant a long-term contract;[13] or

- intensifying competition among suppliers through establishing a procurement auction or purchasing through a competitive tender.

6.46 Overall, the key questions are whether customers will have a sufficiently strong post-merger bargaining position and how much it will change as a result of the merger.

6.47 CCCS recognises that in a market, not all customers will possess significant countervailing buyer power. In such circumstances, CCCS will examine whether the countervailing buyer power of some customers will be sufficient to prevent a SLC in the market post-merger. It may not be sufficient if the countervailing buyer power only ensures that a particular segment of customers, with the ability and incentive to exercise their countervailing buyer power, is shielded from significantly higher prices or deteriorated conditions post-merger.

6.48 That a customer is commercially significant to the merged entity will not be sufficient in itself to conclude that its buyer power is strong. For example, even a commercially significant customer may have limited scope to exercise buyer power against a supplier of "must have" brands. A customer may also be constrained in its ability to exercise buyer power if there are no alternative suppliers to whom the customer could turn to. To maintain competitive constraints, customers should have an incentive to exercise their potential buyer power (because they may not always do so if other customers would also benefit).

6.49 It is also possible that in some markets, there are different customers at each level of the supply chain. For example, a manufacturer's customers may be distributors, and the distributor's customers may be the end-customers of the product or service. In such situations, additional consideration is required. For instance, if the merged firm's immediate customer is a reseller, its ability to exercise buyer power may be limited by the willingness of the reseller's customers to buy the products of alternative suppliers. Even if a reseller is able to buy from alternative suppliers this may not be credible if the products of the alternative supplier are not considered by the reseller's customers as a suitable replacement.

6.50 CCCS will consider the following types of information in assessing the countervailing buyer power of customers who are commercially significant to the seller:

- examples of such customers switching between the merger parties pre-merger, and/or switching to alternative suppliers pre-merger;

- the proportion of revenue attributed to large customers of the merger parties to the extent that such customers are commercially significant to the merger parties;

- evidence and examples of past negotiations (on price, quality of product or service) between such customers and the merging parties;

- whether the buyer has a large volume order such that it can or has sponsored entry for a potential supplier not currently in the market;

- evidence that such customers have considered vertical integration or sponsoring new entry and that such a strategy is commercially viable; and

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[13] As such threats to change the market structure often involve making investments and incurring sunk costs, it may be possible for incumbent suppliers to raise prices to some extent before such threats become credible. Thus, where the sunk costs of sponsoring entry are large, countervailing buyer power is unlikely to act as a strong competitive constraint. Customers may also have a limited incentive to sponsor entry because the benefit of their investment is shared with their rivals and customers.

- evidence that such customers have regularly and successfully resisted attempts by a supplier(s) to raise prices or otherwise harm competition pre-merger, coupled with evidence that the merger would not change this.

Assessment of Efficiencies that Increase Rivalry

6.51 Mergers can generate efficiencies and can increase rivalry to the extent that it is likely to prevent a SLC occurring in a market. For example, efficiencies can enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products for customers. For example, a merger between two smaller and weaker competitors to form a more effective competitor may generate efficiencies that increase rivalry by exerting greater competitive pressure on its larger competitors.

6.52 Where efficiency gains are claimed to have a positive effect on rivalry, their impact is assessed as an integral part of the SLC analysis. The key question is whether the claimed efficiency will enhance rivalry among the remaining players in the market. Such efficiencies could occur where a merger between two smaller firms stimulates the combined firm to invest more in R&D and increase rivalry in the market through innovation, or where efficiencies make coordination less likely or effective by enhancing the incentive of a maverick to lower price or by creating a new maverick firm.

6.53 Possible efficiencies may include cost savings (fixed or variable), more intensive use of existing capacity, economies of scale or scope, or demand-side efficiencies such as increased network size or product quality. Such efficiencies can also be considered in assessing those merger situations where there is likely to be a SLC. This is discussed in further detail in Part 8.

6.54 CCCS is of the view that there must be compelling evidence to show that efficiency gains will lead to increased rivalry and will prevent a SLC. Such evidence must show that the efficiencies would:

- be timely, likely and sufficient to prevent a SLC arising (having regard to the effect on rivalry that would otherwise result from the merger); and

- be merger specific, i.e. a direct consequence of the merger, judged relative to what would happen without it.

6.55 Such evidence might, for example, include the quantum and source of projected cost savings, which are contained in pre or post-announcement merger planning and strategy documents, to be complemented by objective factual and accounting information to verify the proposed cost saving claims. External consultancy reports pre or post-dating the merger may also be helpful in this context. A similar discussion on the assessment of net economic efficiencies can be found in Part 8.

7 ASSESSMENT OF NON-HORIZONTAL MERGERS

7.1 A non-horizontal merger is one where the relevant markets in which the parties operate are distinct. In other words, there is no overlap of directly competing products. Such a merger does not produce any change in the level of concentration in the relevant market. However, while non-horizontal mergers are less likely than horizontal mergers to create competition concerns, they may still do so in a number of cases. Like horizontal mergers, CCCS will assess whether the non-horizontal merger results or may be expected to result in a SLC in a market(s).

7.2 There are two broad classes of non-horizontal mergers, namely, vertical mergers and conglomerate mergers. The analytical framework applied in assessing these non-horizontal mergers and the potential theories of harm are explained in further detail below.

Vertical Mergers

7.3 Vertical mergers are mergers between an upstream supplier and a downstream customer which purchases the supplier's goods, either as an input into its own production or for resale. For example, a merger between an upstream manufacturer and a downstream retailer would be considered to be a vertical merger.

7.4 Some mergers may be both horizontal and vertical in nature, e.g. where the merging firms are not only in a vertical relationship but are also actual or potential horizontal competitors at either upstream or downstream level, or where there are overlaps in their activities in some but not all markets. In such cases, CCCS will examine both the horizontal and vertical aspects of the merger.

7.5 Acquisitions leading to vertical integration are generally efficiency-enhancing. Benefits of vertical integration could include:

- reduced production costs, e.g. reduced overhead and transaction costs, better production and distribution methods;
- increased innovation; and/or
- lower prices and/or increased supply of products from a reduced profit margin, i.e. prices will no longer include the previous mark-up on purchases by the downstream firm from the upstream firm.

Refer to paragraphs 6.51 to 6.55 for examples of efficiency gains that can have a positive effect on rivalry, and Part 8 for the list of efficiencies that CCCS may consider.

7.6 The analytical framework applied to assess vertical mergers is similar in some aspects to the framework applied to horizontal mergers, namely, CCCS would:

- develop a theory of harm;
- define the relevant markets, which could relate to different parts of the supply chain of the affected products and service, namely, separate markets for upstream and downstream activities;
- develop an appropriate counterfactual scenario;
- assess competition in each of the relevant markets and compare it with the counterfactual scenario. This includes an assessment of the competitive constraints on the merged entity like buyer power and barriers to entry.

7.7 However, the competition concerns arising in vertical mergers are likely to be different to the concerns raised in horizontal mergers. For instance, vertical mergers do not involve a direct loss of competition between firms in the same market and are unlikely to result in a SLC in a market, unless market power exists at one of the affected parts of the supply chain.

7.8 The potential theories of harm raised by a vertical merger may involve:

- market foreclosure (e.g. by restricting downstream rival's access to a necessary input; or restricting upstream rival's access to customers); and/or
- increasing the ability and incentive of parties to collude in a market.

7.9 These potential theories of harm are discussed in further detail below.

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Market Foreclosure

7.10 A vertically-integrated firm may be able to foreclose rivals from either an upstream market for selling inputs or a downstream market for distribution or sales. Foreclosure does not only refer to a vertically-integrated firm excluding a non-vertically integrated firm from a market (although this may be the case), but may include a range of behaviour such as customer foreclosure (or downstream foreclosure) described in paragraphs 7.11 and 7.12, and input foreclosure (or upstream foreclosure) described in paragraphs 7.13 and 7.14.

7.11 If the merged entity is an important downstream customer for a product that it also supplies upstream, it may be able to dampen competition from actual or potential rival suppliers of that product in certain circumstances. It can do so by, e.g. sourcing its future needs entirely from its own production facility, which may jeopardise the continued existence of alternative upstream suppliers of the product, and their ability or incentive to compete with the merged entity upstream.

7.12 If the merged entity controls an important channel of distribution to a downstream market, it might be able to reduce competition from its rivals by refusing to provide them with access to that means of distribution, or by granting access only at discriminatory prices that favour the merged entity's own business, thus placing rivals at a cost disadvantage.

7.13 If a merged entity supplies a large proportion of an important input to a downstream process where it also competes, it may be able to dampen competition from its rivals in the downstream market, e.g. by diverting its production of the input entirely to its own downstream process, thereby restricting access by downstream rivals of that input.

7.14 If the merged entity refuses to supply an input to its downstream rivals, or by only selling the input to its rivals at a price that makes them uncompetitive, this might also foreclose competition. This might be particularly relevant where firms in the downstream market need to stock a full range of products to be competitive; hence, the disruption in the supply of any product could undermine their competitiveness.

7.15 CCCS will be concerned where, in any of the above situations, competitors lack a reasonable alternative to the vertically-integrated firm. In such a situation, competitors may either be deprived of access to inputs or customers altogether or might be allowed to obtain the product or the facility only at unfavourable prices, thereby lessening rivalry in the market.

7.16 In assessing whether a vertical merger could have foreclosure effects, it is also important to consider whether the merged entity would have the ability and/or incentive to foreclose its competitors and the likely effect of that foreclosure on competition. In certain cases where foreclosure may not be profitable, the merged entity may have the ability to foreclose competition in some ways but lack the incentive to do so.

- *Ability to foreclose competition.* A firm is generally only able to foreclose competitors if it has market power at one or more level(s) of the supply chain. If a firm does not have market power, its competitors could switch to other suppliers or purchasers. This would mean that the firm is unlikely to have the ability to foreclose its competitors.

- *Incentives to foreclose competition.* A firm will only rationally foreclose competitors if it is profitable to do so. For example, if a firm forecloses access to an input, the firm must weigh up an increase in profits in a downstream market against a decrease in profits in the upstream market where the foreclosure occurs. This is because the firm's profits in the input market falls as the number of units sold fall but the firm's profits in the downstream market may increase if it can win a proportion of the sales its competitors lose as a result of the foreclosure.

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- *Effect on competition.* A key consideration is whether the competition lost from potentially foreclosed competitors is sufficient to have the effect of leading to a SLC. This may arise when foreclosure makes entry and expansion for competitors more difficult, or otherwise reduces a competitor's ability to provide a competitive constraint to the merged entity. Foreclosure does not need to force a competitor or competitors to exit the market to have such an effect.

Increased Potential for Collusion

7.17 In rare cases, vertical integration may facilitate collusion. For instance, a vertical merger may create or strengthen coordinated effects in the following way:

- A vertical merger may allow the merged entity to gain access to commercially sensitive information about the activities of non-integrated rivals. This may facilitate collusion.

- A vertical merger that results in foreclosure could reduce the number of players in an affected market, making it easier for the remaining players to coordinate. A vertical merger may increase the level of symmetry and/or transparency in the markets. For example, where vertical integration affords the merged entity better knowledge of selling prices in the upstream or downstream market, this may facilitate tacit collusion in either of the markets.

- A vertical merger may better align the incentives of firms in the market to maintain coordination (e.g. by enabling the vertically integrated firm to punish deviation more effectively if it becomes an important supplier to, or customer of, other firms in the market after the merger). A vertical merger may also increase barriers to entry, which can reduce the scope for entry to disrupt coordination, or it may reduce buyer power if it involves the acquisition of a customer who would otherwise disrupt coordination.

7.18 CCCS will assess whether a vertical merger may create or strengthen coordinated affects, by adopting the same general framework used in horizontal mergers, namely, whether the conditions for collusion are met following the merger, and the effect of the merger on the likelihood and effectiveness of coordination. However, as shown above, the details of the analysis of the impact of the merger may differ.

7.19 CCCS will consider the following information when assessing the vertical effects of a merger:

- vertical relationship(s) between the merger parties before and after the merger; the extent of vertical integration before the merger and how this is created or strengthened by the merger;

- the merger parties' market shares in the upstream and downstream markets;

- any existing supply arrangements between the merger parties; and

- the extent to which the competitors are vertically integrated.

Barriers to Entry

7.20 The vertical integration resulting from vertical mergers could also create barriers to entry that raise competition concerns. Generally, three conditions are necessary (but not sufficient) for this problem to exist:

- the degree of vertical integration between the two markets must be so extensive that entrants to one market (the "primary market") would also have to enter the other market (the "secondary market") simultaneously;

- the requirement of entry into the secondary market must make entry at the primary market significantly more difficult and less likely to occur; and

- the structure and other characteristics of the primary market must be otherwise so conducive to anti-competitive behaviour[14] that the increased difficulty of entry is likely to affect the market's performance.

7.21 CCCS will assess whether the vertical integration in a merger changes the barriers to entry to the extent that it reduces a significant competitive constraint, post-merger. More details on barriers to entry can be found in paragraphs 6.31 to 6.44.

Countervailing Buyer Power

7.22 As with horizontal mergers, a firm's ability to exercise market power may be constrained if there is countervailing buyer power. For example, the risk that customers may in the future be forced to source all their requirements for a particular product from the upstream business of the merged entity might be mitigated if the customers are commercially significant to the supplier such that they either resist price increases or sponsor the emergence of a new supplier.

7.23 CCCS will assess whether the vertical integration in a merger changes the buyer power of customers to the extent that it reduces a significant competitive constraint post-merger. More details on countervailing buyer power can be found in paragraphs 6.45 to 6.50.

Conglomerate Mergers

7.24 Conglomerate mergers involve firms that operate in different product markets. They may be product extension mergers (i.e. between firms that produce different but related products) or pure conglomerate mergers (i.e. between firms operating in entirely different markets). Conglomerate mergers are neither horizontal nor vertical i.e. there is no vertical relationship and no overlap in the products or services supplied by the merging parties. An example of a conglomerate merger would be between an athletic shoe company and a soft drink company. The firms are not competitors producing similar products (which would make it a horizontal merger) nor do they have an input-output relation (which would make it a vertical merger). In assessing conglomerate mergers, CCCS will consider both the anti-competitive effects arising from conglomerate mergers and the pro-competitive effects stemming from efficiencies (refer to paragraphs 6.51 to 6.55, and Part 8 for the list of efficiencies that CCCS may consider).

7.25 Conglomerate mergers typically do not result in a SLC. However, competition concerns could arise in mergers between parties in closely related markets. For example, mergers in closely related markets may involve sellers of complementary products[15], or sellers of (distinct or related) products that belong to a range of products that is generally purchased or likely to be purchased together by the same set of buyers for the same end use.

Potential Non-coordinated Effects

7.26 Competition concerns may arise when the combination of products in related markets confers upon the merged entity the ability and incentive to leverage a strong market position from one market to another by means of tying, bundling or other forms of exclusionary conduct.[16] Such conduct may lead to a reduction in actual or potential rivals' ability or incentive to compete. This may reduce the competitive pressure on the merged entity allowing it to increase prices.

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[14] E.g. if the structure of the primary market is conducive to monopolisation or collusion.

[15] Products or services are complementary when they are worth more when used or consumed together than separately. This would mean that a high price for one product reduces the demand for both.

[16] **Annex C** of the *CCCS Guidelines on the Section 47 Prohibition* contains additional elaboration on tying, bundling and other forms of exclusionary conduct, such as discount schemes and exclusive purchasing requirements.

7.27 In assessing whether a conglomerate merger results in foreclosure effects, CCCS will consider whether the merged entity would have the ability and incentive to foreclose its rivals and/or new entrants.

7.28 In relation to the ability of the merged entity to foreclose its competitors, CCCS may consider whether the merged entity has a significant degree of market power (while not necessarily having a dominant position) in one of the markets concerned. CCCS may take into consideration whether at least one of the merging firms' products is viewed by many customers as particularly important, and there are few alternatives for that product (e.g. due to product differentiation or capacity constraints on the part of competitors), in order to assess the extent of the foreclosure effect. CCCS may also take into account other factors such as the market structure and dynamics[17], whether there is a large common pool of customers that tend to buy the individual products concerned together such that demand for the individual products will be significantly affected through any foreclosure strategies by the merged entity and whether such foreclosure strategies are lasting.

7.29 In assessing the merged entity's ability to foreclose its competitors, CCCS may also consider whether there are effective and timely counter-strategies that the rival firms may deploy. For example, a foreclosure strategy of bundling could be defeated by single-product companies combining their offers so as to make them more attractive to customers, or by another firm in the market purchasing the bundled products and profitably reselling them unbundled. Rivals may also price more aggressively to maintain market share, mitigating the effects of any foreclosure strategies.

7.30 In relation to the incentive of the merged entity to foreclose its competitors, CCCS may consider the degree to which this foreclosure strategy is profitable. This may include the assessment of factors such as the relative value of the different products involved in the foreclosure strategy, the ownership structure of the merged entity which may affect the relative benefits to the different owners arising from such a strategy, the types of strategies adopted on the market in the past or the content of internal strategic documents.

Potential Coordinated Effects

7.31 Conglomerate mergers may facilitate coordination. This is especially so if the merged entity's rivals in one market are also rivals in at least one of its other markets, and if other factors facilitating collusion are also present in these markets.

7.32 CCCS will assess whether conglomerate mergers will facilitate collusion in the same manner in which it assesses coordinated effects in horizontal mergers.

Barriers to Entry

7.33 As for the possibility of entry constraining the conglomerate supplier, CCCS will primarily consider whether another firm could replicate the range of products offered by the merged entity. CCCS will also consider whether the creation of the range of products itself could result in economies of scope[18], and thus represents a barrier to entry and could limit the ability of competitors to either extend their own range of products or to enter new product markets.[19] In addition, where the range of products are commonly purchased together from the same supplier due to purchasing efficiencies[20] or their complementary nature, this could contribute to barriers to entry for a new entrant who may find it more difficult to attract buyers to compete effectively with the conglomerate supplier.

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[17] For example, foreclosure effects of tying and bundling are likely to be more pronounced in industries where there are economies of scale or network effects which can significantly affect the future conditions of supply in the market. Where a supplier of complementary products A and B has market power in product A, the decision to bundle or tie these two products may result in reduced sales by the non-integrated suppliers of product B. If product B features network effects, the bundling or tying strategy may significantly reduce the non-integrated suppliers' scope for expanding sales of product B in future.

[18] *CCCS Guidelines on the Section 47 Prohibition,* **Annex B,** paragraphs 10.21 to 10.22.

[19] Barriers to entry are discussed in greater detail in paragraphs 6.31 to 6.44 above.

[20] *CCCS Guidelines on the Section 47 Prohibition,* **Annex B,** paragraphs 10.26 to 10.27.

Countervailing Buyer Power

7.34 In assessing whether a conglomerate merger could have anti-competitive effects, CCCS will consider the ability of customers to exercise countervailing buyer power,[21] and in particular the incentives of customers to buy the range of products from a single supplier. In a situation where customers who are commercially significant to suppliers can and do source the range of products from multiple suppliers and are likely to continue to do so post-merger, it is unlikely that the merger would result or be expected to result in a SLC.

8 ADDRESSING A SUBSTANTIAL LESSENING OF COMPETITION

8.1 In the event that CCCS finds that a merger results or may be expected to result in a SLC in a market in Singapore, CCCS can consider the presence of any economic efficiencies in markets in Singapore that could outweigh the SLC arising from the merger. Any Net Economic Efficiencies resulting from the merger would be considered under the exclusion for mergers. Mergers that generate sufficient Net Economic Efficiencies may be excluded under the Fourth Schedule to the Act, which states that "[t]he section 54 prohibition does not apply to any merger if the economic efficiencies arising or that may arise from the merger outweigh the adverse effects due to the SLC in the relevant market in Singapore".

8.2 If Net Economic Efficiencies are not sufficient to offset the adverse effects of a SLC arising from the merger, CCCS may consider possible merger remedies that could remedy, mitigate or prevent the SLC or any adverse effects resulting from the SLC.

Assessment of Net Economic Efficiencies

8.3 In the assessment of Net Economic Efficiencies, merger parties must show that these efficiencies will be sufficient to outweigh the adverse effects resulting from the SLC caused by the merger. Such efficiencies could include lower costs, greater innovation and greater choice or higher quality. While these types of efficiencies can be considered in assessing whether there are efficiencies that can increase rivalry, efficiencies considered as part of the Net Economic Efficiencies are assessed when a merger is likely to lead to a SLC. For example, a merger may, despite leading to a SLC, give clear scope for large cost savings through a reduction in the costs of production (where these costs are not simply due to lower output alone). Mergers (leading to a SLC) that only create profits for the companies concerned are unlikely to benefit from the Net Economic Efficiencies exclusion which requires efficiencies arising from the merger to outweigh its potential anti-competitive effects.[22] In some cases, a merger may facilitate innovation through R&D that could only be achieved through a certain critical mass, especially where larger fixed (and) sunk costs are involved. However, in such cases these efficiencies will not increase rivalry in the relevant market.

8.4 The types of efficiencies that CCCS may consider can be categorised as follows:

- supply-side efficiencies;
- demand-side efficiencies; and
- dynamic efficiencies.

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[21] Countervailing buyer power is discussed in greater detail in paragraphs 6.45 to 6.50 above.

[22] Minister of State Mr. Lee Yi Shyan, Second Reading of Competition (Amendment) Bill, 21 May 2007.

Supply-side efficiencies

8.5 Supply-side efficiencies occur if the merged entity can supply its products or services at lower cost as a result of the merger, than compared to the merging parties operating separately prior to the merger. These could include:

- Cost reductions. A merged entity might be able to reduce costs by benefitting from economies of scale or economies of scope, or from more efficient production processes or working methods across a range of products. Cost savings that reduce marginal or variable costs tend to stimulate competition and are more likely to be passed on to customers in the form of lower prices. Cost savings simply arising from lower production or output are unlikely to be accepted as efficiencies.

- Removal of double mark-ups in vertical mergers. Vertical mergers may allow the merged entity to remove ("internalise") any pre-existing double mark-ups. These arise when, pre-merger, firms supplying the input and producing the final product set their prices independently and both charge a mark-up, resulting in prices for the final product being higher than would suit the joint interests of both firms. A vertical merger may enable, and provide incentives for, the merged firm to internalise this double mark-up resulting in a decrease in the price of the final product.

- Increases in investment. A vertical merger may lead to efficiencies from aligning the incentives within the merged firm to invest in, e.g. new products, new processes or marketing. For instance, a distributor of the manufactured products of a firm further up the supply chain may be reluctant to invest in promoting those products because its investment may also benefit competing distributors/retailers. A vertical merger can alleviate this "investment hold-up" problem.

- Increases in the variety of products and services, through product repositioning. Some mergers involving differentiated products may result in the merged firm and its rivals repositioning (or "rebranding") their products after the merger. The merging firms may seek to reduce the cannibalisation between the merging firms' products by increasing the differentiation between them. Their rivals may also reposition their products to distinguish from those of the merging firms. If so, post-merger product repositioning increases the variety of products available to the customers.

Demand-side efficiencies

8.6 Demand-side efficiencies occur if the merged entities' products become more attractive as a result of the merger. These could arise from:

- Network effects. Where a merger results in a greater number of users of a product or service thereby increasing the value of the network, i.e. direct or indirect network effects, it may benefit the individual user.

- Price effects of complementary products or services. A fall in the price of product A may increase the quantity demanded not only of product A but also of any complementary products or services. It may be profitable for a merged firm to offer product A and complementary products or services at a lower combined price than the set of prices previously charged by different suppliers.

- Purchasing efficiencies. This refers to efficiencies derived from purchasing multiple distinct products or services together from the same supplier. These efficiencies typically include benefits such as convenience, savings in transaction costs and time, which result in buyers deriving a greater value from purchasing the products or services from the same supplier instead of purchasing each product or service from different suppliers.

Dynamic efficiencies

8.7 Dynamic efficiencies involve innovation to change the products or services supplied by the merged entity relative to the pre-merger situation. Such efficiencies may arise, e.g. from technology transfer or an increase in the merged firm's R&D capacity.

8.7 Dynamic efficiencies generally have a non-price impact rather than reducing prices to consumers. Further, dynamic efficiencies may be less certain to occur and take more time to occur than other efficiencies which makes them more difficult to assess.

Evaluation of Efficiencies

8.9 In assessing claimed efficiencies, the merger parties must demonstrate that the efficiencies are:

- demonstrable;
- merger specific, that is, they are likely to arise from the merger;
- timely, in that the benefits will materialize within a reasonable period of time; and
- sufficient in extent.

These are explained in further detail below.

Demonstrable

8.10 Efficiencies are difficult to verify and quantify as most of the information resides with the merging parties. Efficiency claims will not be considered if they are vague, speculative, or otherwise cannot be verified. Therefore, merger parties should produce detailed and verifiable evidence, which could include:

- confidential information prepared by or for the parties concerning the rationale for the merger;
- confidential reports/papers for Board Members and/or Senior Management prepared by or for the merging parties; and/or
- past behaviour by, and future intentions of, the merging parties and/or relevant third parties.

8.11 Efficiency claims based on past experience of operating the businesses in question, are more likely to be considered than projections of efficiencies that are generated outside of the usual business planning process. As part of its assessment of efficiencies, CCCS will also test the efficiency claims with industry participants.

Merger Specific

8.12 Valid efficiency claims must be merger specific, i.e. efficiencies that would occur only as a result of the merger and could not be attained by feasible alternative scenarios that raise less serious competition concerns. The key issue is that the efficiencies are assessed relative to what would have happened without the merger.

8.13 The merged entity must demonstrate how the merger situation would allow the merged firm to achieve the efficiencies, the steps they anticipate taking to achieve the gains, the risks involved and the time and costs required to achieve them.

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8.14 The claimed efficiencies should arise in markets in Singapore, although they need not necessarily arise in the market(s) where the SLC concerns arise. It is conceivable that sufficient efficiencies might accrue in one market as a result of the merger, which would outweigh a finding of a SLC in another market(s). Any claim that efficiencies in one market outweigh an expected SLC in another will require clear and compelling evidence.

Timely

8.15 CCCS requires any claimed efficiencies to occur in a reasonable period of time. CCCS also recognises that efficiencies may arise over different periods of time, as some may occur upfront while others may not take place for a number of years. Where possible, CCCS requires any efficiencies, particularly, cost savings to be broken down according to whether they are one-off savings or recurring savings. CCCS will place less weight on the efficiencies that are likely to occur further into the future or that are more distantly related to the products and services being purchased and consumed. This is because the more distant the efficiency gain, the less direct the causal link is likely to be.

Extent of efficiencies

8.16 Where CCCS has clear evidence of economic efficiencies being demonstrable, merger specific and timely, it will assess the magnitude of those efficiencies. Possible efficiency claims should be quantified, particularly for cost savings. In such cases, parties must provide a detailed and robust explanation of how the quantification was calculated. In the absence of quantitative analysis, which may exist for dynamic efficiencies, qualitative evidence should be produced to show that efficiency will occur and is merger specific and the extent of the efficiency gain.

Comparing Efficiencies with Adverse Effects of a SLC

8.17 Once CCCS has assessed any economic efficiencies arising from the merger, CCCS will compare them with the adverse effects of a SLC. In particular, CCCS will compare the magnitude of the efficiencies against the magnitude of the anti-competitive effects from the merger that are likely to occur. If CCCS is satisfied that the efficiencies outweigh the potential anti-competitive effects, then CCCS is likely to consider clearing the merger. On the other hand, if the efficiencies are not sufficient to outweigh the competition concerns, CCCS may consider merger remedies, or in the absence of suitable remedies, prohibiting the merger under section 54 of the Act.

8.18 To assist CCCS in comparing the benefits of the merger with the adverse effects of the SLC, merger parties can provide their own quantified estimates of the potential loss of competition in the relevant markets, arising from the SLC in addition to quantified estimates of the claimed efficiencies that are likely to arise from the proposed merger, such as an estimate of the net changes to price and/or output, taking into account the SLC and efficiency factors. As mentioned above, where quantified estimates are provided, parties must provide a detailed and robust explanation of how the quantification was calculated.

9 INTERIM MEASURES

9.1 Prior to completing its assessment of an application or an investigation, CCCS may consider interim measures to prevent the merger parties from taking any action that might prejudice CCCS's ability to consider the merger situation further and/or to impose appropriate remedies. Interim measures may also be considered as a matter of urgency to prevent serious, irreparable damage to persons or to protect the public interest.[23]

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[23] Section 67(2) of the Act.

9.2 Interim measures may include directions that (i) stop the acquiring party from implementing the merger; (ii) prohibit the transfer of staff; (iii) set limits on the exchange of commercially sensitive information such as customer lists and prices; or, where (iv) for example the merger has already been implemented, require a merger to be dissolved or modified.

9.3 In the case of anticipated mergers, CCCS may give an interim measures direction prohibiting the merger parties from acquiring full or partial control or equity interests. In situations where the merger situation does not involve the acquisition of shares, CCCS may give a direction to require the merged entity not to proceed further with the transaction or not to take further steps to implement the merger.

9.4 The need for interim measures depends on the circumstances of each case. Interim measures may be necessary for an anticipated merger (e.g. to limit integration) or completed merger (e.g. to unwind the merger). In deciding on the type of interim measures, CCCS will take into consideration directions which are appropriate for their purpose in the context of the case.

9.5 Please refer to the relevant paragraphs of the *CCCS Guidelines on Directions and Remedies* for a more detailed discussion on interim measures.

10 REMEDIES

10.1 Once CCCS has decided that a merger has infringed, or that an anticipated merger, if carried into effect, will infringe the section 54 prohibition, it has to decide on the action to remedy, mitigate or prevent the SLC or any adverse effects resulting from the SLC. However, it should be highlighted that CCCS may consider any remedies that are offered by the merger parties at any time during the merger review process.[24] CCCS notes that merger parties may submit remedy proposals that could seek to mitigate the SLC or ensure that adequate efficiencies materialise post-merger.

10.2 This section describes various factors which CCCS may take into account in deciding on the appropriateness of taking remedial action and the action(s) which may be taken. In practice, these can rarely be considered in isolation from one another. The key to CCCS's choice of remedy will be its ability to remedy the SLC and any resulting adverse effects.

Directions and Commitments

10.3 Remedies may be implemented by directions issued by CCCS or by CCCS's acceptance of commitments which address any competition concerns arising from the merger.

Directions

10.4 Section 69 of the Act states that where CCCS makes a decision that a merger has infringed or that an anticipated merger, if carried into effect, will infringe the section 54 prohibition, it may give to such person as it thinks appropriate directions to effect the appropriate remedy. The direction may include provisions prohibiting an anticipated merger from being carried into effect[25] or requiring a merger to be dissolved or modified in such manner as CCCS may direct. The direction may also include provisions requiring any merger party to:

- enter such legally-enforceable agreements as may be specified by CCCS and designed to prevent or lessen the anti-competitive effects which have arisen;

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[24] Section 60A provides that CCCS may accept commitments at any time before making a decision on a merger.

[25] In the case of an anticipated merger, should there be no suitable commitments that can address the potential competition concerns, the most effective remedy may be to prohibit the anticipated merger from proceeding.

- dispose of such operations, assets or shares of such undertaking in such manner as may be specified by CCCS; and

- provide a performance bond, guarantee or other form of security on such terms and conditions as CCCS may determine.

In the case of a merger, CCCS may, if the infringement was committed intentionally or negligently, require any party involved in the merger to pay to CCCS such financial penalty as CCCS may determine.

10.5 Where any agreement or conduct is directly related and necessary to the implementation of an anti-competitive merger, CCCS's direction may also require any parties to the agreement or concerned with the conduct to modify or stop the agreement or conduct, notwithstanding that the agreement or conduct would otherwise fall under the exclusion for ancillary restrictions under paragraph 10 of the Third Schedule of the Act. The exclusion for ancillary restrictions is covered at paragraphs 11.4 to 11.12 below.

Commitments

10.6 CCCS may accept commitments that address any competition concerns, which may be raised by the merger or anticipated merger. Any commitment must be aimed at preventing or remedying the adverse effects to competition which have been identified. CCCS will only accept commitments that are sufficient to address clearly the identified adverse effects to competition and are proportionate to them.

10.7 An acquiring company can always take the initiative to propose suitable commitments if it thinks that they may be appropriate to meet any competition concerns that it foresees. Alternatively, CCCS may invite merger parties to consider whether they want to offer commitments where they believe that it is, or may be, the case that a merger may raise competition issues potentially warranting investigation or which may be expected to result in a SLC and which seem amenable to remedy by commitments.

10.8 Please refer to paragraphs 2.1 to 2.12 of the *CCCS Guidelines on Directions and Remedies* for a more detailed discussion on the types of remedies and how CCCS considers the appropriateness of such remedies.

11 EXCLUSIONS AND EXEMPTIONS

Exclusions in the Fourth Schedule

11.1 The merger provisions do not apply to the matters specified in the Fourth Schedule. These are:

- mergers

  - approved by any Minister or regulatory authority[26] pursuant to any requirement imposed by written law;

  - approved by the Monetary Authority of Singapore pursuant to any requirement imposed under any written law; or

  - under the jurisdiction of another regulatory authority under any written law or code of practice relating to competition; mergers involving any undertaking relating to any specified activity as defined in paragraph 6(2) of the Third Schedule; and

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[26] Other than CCCS.

- mergers with net economic efficiencies.

11.2 More details on the other Fourth Schedule exclusions can be found in the *CCCS Guidelines on Merger Procedures.*[27]

Exemption under Public Interest Considerations

11.3 A decision by CCCS that a merger has infringed or that an anticipated merger will, if carried into effect, infringe the section 54 prohibition may be made by CCCS either upon an application by merger parties for a decision, or upon the conclusion of investigations commenced by CCCS. Where CCCS proposes to make such a decision, the Applicants who notified the merger to CCCS for decision or, in the case of an investigation, the merger parties, may apply to the Minister for Trade and Industry ("the Minister") for the merger to be exempted from the merger provisions on the ground of any public interest consideration. More details can be found under the *CCCS Guidelines on Merger Procedures.*

Exclusion of Ancillary Restrictions and Mergers from the Section 34 Prohibition and Section 47 Prohibition

Exclusion of Ancillary Restrictions

11.4 Agreements, arrangements or provisions which are not integral to a merger may have to be concluded in conjunction with the merger. A seller of a business, e.g. sometimes accepts a non-compete obligation which prevents the seller from competing with that business after it has been sold. Agreements, arrangements or provisions which are "directly related and necessary to the implementation" of a merger are called "ancillary restrictions".

11.5 Ancillary restrictions are excluded from the section 34 prohibition and section 47 prohibition under the Third Schedule.

Requirements for Ancillary Restriction

11.6 The Third Schedule provides that a restriction must be directly related and necessary to the implementation of the merger if it is to benefit from the exclusion.

11.7 In order to be directly related, the restriction must be economically connected with the merger, intended to allow a smooth transition to the changed structure after the merger, but ancillary or subordinate to its main object. For example, the main object of a merger agreement may be for one undertaking to buy a particular manufacturing operation from another. The added obligation of supplying raw materials to enable the manufacturing operation to continue is directly related to the merger agreement, but subordinate to it.

11.8 Any contractual arrangements which go to the heart of the merger, such as the setting up of a holding company to facilitate joint control by two independent companies of a new joint venture company, are not characterised as subordinate. Such arrangements are part of the merger agreement itself and will form part of the assessment of the merger under the Act.

11.9 A restriction is not automatically deemed directly related to the merger simply because it is agreed at the same time as the merger or is expressed to be so related. If there is little or no connection with the merger, such a restriction will not be ancillary.

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[27] *CCCS Guidelines on Merger Procedures,* paragraphs 7.1 to 7.4.

11.10 It must also be established whether the restriction is necessary to the implementation of the merger. This is likely to be the case where, e.g. in the absence of the restriction, the merger would not go ahead or could only go ahead at substantially higher costs, over an appreciably longer period, or with considerably greater difficulty. In determining the necessity of the restriction, considerations such as whether its duration, subject matter and geographical field of application are proportionate to the overall requirements of the merger will also be taken into account. CCCS will consider all these factors in the context of each case.

11.11 If equally effective alternatives are available for attaining the same objective, the merger parties must demonstrate that they have chosen the alternative that is the least restrictive of competition.

Examples of Ancillary Restrictions

11.12 The following examples set out some general principles on how some common ancillary restrictions (e.g. non-compete clauses, licences of intellectual property and know-how, and purchase and supply agreements) will be assessed.

- Non-compete clauses:

  Such clauses, if properly limited, are generally accepted as essential if the purchaser is to receive the full benefit of any goodwill and/or know-how acquired with any tangible assets. CCCS will consider the duration of the clause, its geographical field of application, its subject matter and the persons subject to it. Any restriction must relate only to the goods and services of the acquired business and apply only to the area in which the relevant goods and services were established under the previous/current owner. In general, CCCS will consider accepting non-compete clauses for a longer period if it involves not only the transfer of goodwill but also know-how. As an indication, CCCS has in previous merger cases accepted non-compete clauses for periods ranging from two (2) to five (5) years.

- Licences of intellectual property and know-how:

  Where an undertaking acquires the whole or part of another undertaking, the transaction may include the transfer of rights to intellectual property or know-how. However, the seller may need to retain ownership of such rights to exploit them in the remaining parts of its business. In such cases, the purchaser will normally be guaranteed access to the rights under licensing arrangements. In this context, restrictions in exclusive or simple licences of patents, trade-marks, know-how and similar rights may be accepted as necessary to the implementation of the merger and, therefore, covered by the definition of ancillary restrictions in the Act. The licences may be limited in terms of their field-of-use to the activities of the business acquired, and may be granted for the entire duration of the patents, trade-marks of similar rights, or the normal economic life of any know-how recorded earlier. If the licences contain restrictions not within any of the above categories, they are likely to fall outside the definition of an ancillary restriction.

- Purchase and supply agreements:

  Purchase and supply agreements may be acceptable where an acquired business was formerly part of an integrated group of companies and relied on another company in the group for raw materials, or where it represented a guaranteed outlet for the company's products. In such circumstances, purchase and supply agreements between the new and former owners may be considered ancillary for a transitional period so that the businesses concerned can adapt to their new circumstances. Exclusivity will not, however, be acceptable, save in exceptional circumstances.

Agreements and Conduct Giving Rise to a Merger

11.13 Agreements and conduct giving rise to a merger will be dealt with under Part 3, Division 4 of the Act. Where a merger situation is anti-competitive, action will be taken under this division.

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12 GLOSSARY

Ancillary restriction	Agreement, arrangement or provision which is "directly related and necessary to the implementation" of the merger. Ancillary restrictions are excluded from the section 34 prohibition and section 47 prohibition under the Third Schedule to the Act.
Anticipated merger	Arrangement that is in progress or in contemplation that, if carried into effect, will result in the occurrence of a merger referred to in section 54(2) of the Act.
Applicant(s)	The merger party or parties who have filed an Application.
Application	Application for a decision in relation to a merger situation, by way of notification under sections 57 or 58 of the Act.
CR3	Concentration ratio (i.e. the aggregate market share) of the three largest firms in the market.
Merger	A merger as defined in section 54 of the Act.
Merger parties	The parties to an anticipated merger, or the parties involved in a merger, as the case may be, including the merged entity.
Merger situation	Refers to both mergers and anticipated mergers.
SLC	Substantial lessening of competition
Theory of Harm	Theory on potential harm arising from the loss of rivalry between the merging firms. Theory can include type of harm, extent of harm and who would be harmed, post-merger.

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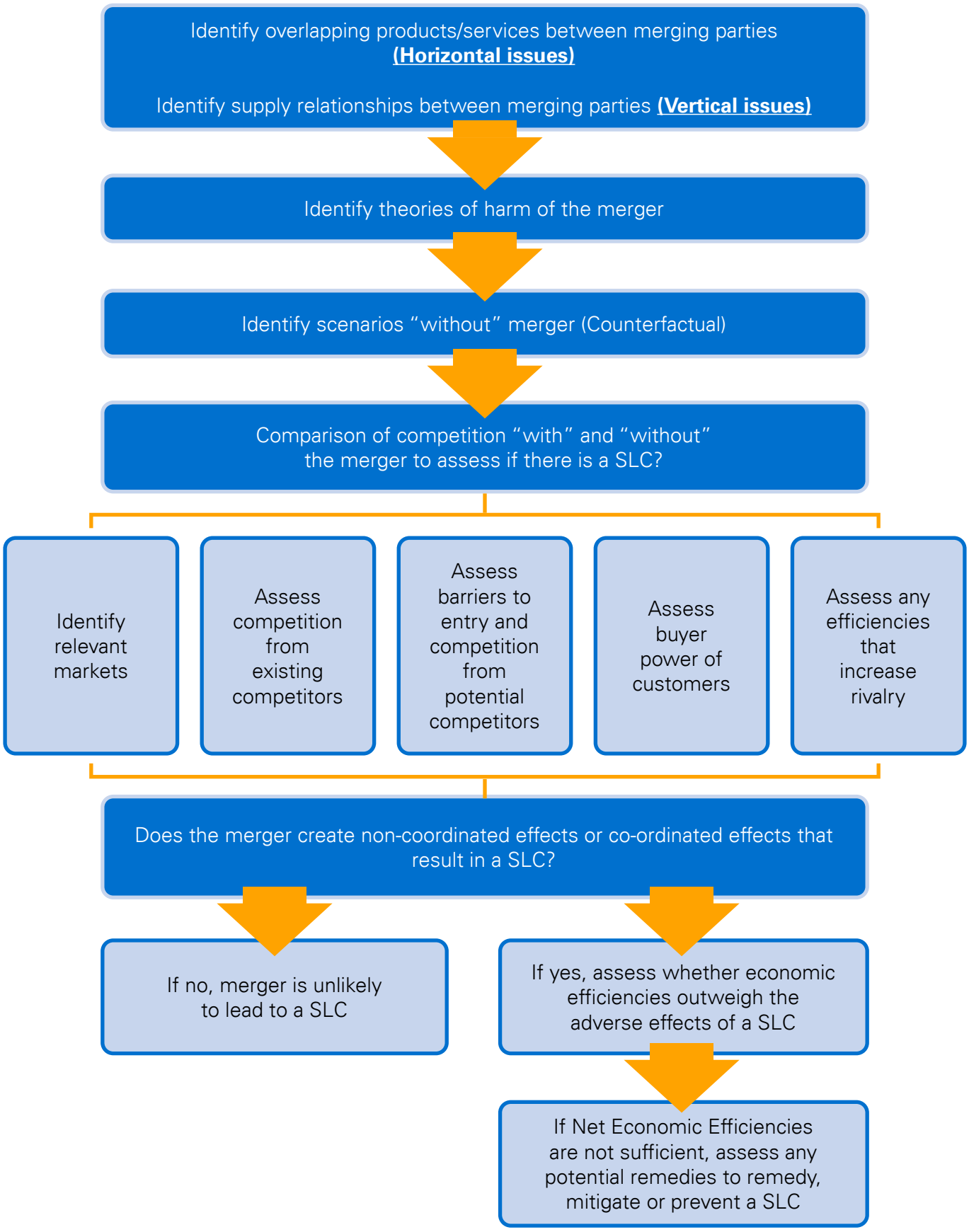
13 FLOWCHART: GENERAL FRAMEWORK FOR SUBSTANTIVE ASSESSMENT OF MERGERS



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14 EXAMPLES OF SITUATIONS THAT GIVE RISE TO JOINT CONTROL

14.1 This Part discusses various situations which CCCS may regard as giving rise to joint control, including equality in voting rights or in representation on decision-making bodies, veto rights and joint exercise of voting rights. Some of the other considerations relevant to the determination of whether joint control exists will also be covered. The illustrations provided in this Part are not exhaustive and situations not covered by or not referred to in this Part should not be assumed to be beyond the scope of the merger provisions.

14.2 The illustrations provided in this Part are also relevant to CCCS's determination of whether de facto control, referred to in paragraphs 3.11 and 3.12 above, exists.

Equality in Voting Rights or Appointment to Decision-Making Bodies

14.3 The clearest form of joint control exists where there are only two parent companies which share equally the voting rights in a joint venture. Equality may also be achieved when the parent companies have the right to appoint an equal number of members to the joint venture's decision-making bodies. It is not necessary for a formal agreement to exist between the parent companies. However, where there is a formal agreement, it must be consistent with the principle of equality between the parent companies, by laying down, e.g. that each parent is entitled to the same number of representatives on the management bodies and that none of the members have a casting vote.

Veto Rights

14.4 Joint control may exist in a joint venture even where there is no equality between the two parent companies in votes or in representation in decision-making bodies, or where there are more than two parent companies. This is the case where minority shareholders have additional rights which allow them to veto decisions that are essential to the strategic commercial behaviour of the joint venture. These veto rights may be set out in the agreement establishing the joint venture or conferred by agreement between its parent companies. The veto rights themselves may operate by means of a specific quorum required for decisions taken at the shareholders' meeting or by the board of directors, to the extent that the parent companies are represented on this board. It is also possible that strategic decisions are subject to approval by a body such as a supervisory board, where the minority shareholders are represented and form part of the quorum needed for such decisions.

14.5 These veto rights must be related to strategic decisions on the business activities of the joint venture. They must go beyond the veto rights which are normally accorded to minority shareholders to protect their financial interests as investors in the joint venture. The protection normally accorded to minority shareholders is related to decisions regarding the essence of the joint venture, such as changes in the joint venture agreement, changes in the capital or liquidation. Thus, a veto right which allows minority shareholders to prevent the sale or winding-up of the joint venture does not confer joint control on the minority shareholder concerned.

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14.6 In contrast, veto rights conferring joint control typically pertain to decisions and issues such as the budget, the business plan, major investments or the appointment of senior management. The acquisition of joint control, however, does not require that the acquirer has the power to exercise decisive influence on the day-to-day running of an undertaking. The crucial element is that the veto rights are sufficient to enable the parent companies to exercise such influence in relation to the strategic business behaviour of the joint venture. Moreover, it is not necessary to establish that an acquirer of joint control over the joint venture will actually make use of its decisive influence. The possibility of exercising such influence and, hence, the mere existence of the veto rights, is sufficient.

14.7 In order to acquire joint control, it is not necessary for a minority shareholder to have all the veto rights mentioned above. It may be sufficient that only some, or even one such right, exists. Whether or not this is the case depends upon the precise content of the veto right itself and also the importance of this right in the context of the specific business of the joint venture.

14.8 The following lists certain types of veto rights which may confer joint control.

- Appointment of management and determination of budget:

  Normally the most important veto rights are those concerning decisions on the appointment of the management and the budget. The power to co-determine the structure of the management confers upon the holder the power to exercise decisive influence on the commercial activities of an undertaking. The same is true with respect to decisions on the budget since the budget determines the precise framework of the activities of the joint venture and, in particular, the investments it may make.

- Veto rights over business plan:

  The business plan normally provides details of the aims of an undertaking, together with the measures to be taken in order to achieve those aims. A veto right over this type of business plan may be sufficient to confer joint control, even in the absence of any other veto right. In contrast, where the business plan contains merely general declarations concerning the business aims of the joint venture, the existence of a veto right will be only one element in the general assessment of joint control but will not, on its own, be sufficient to confer joint control.

- Veto rights over investments:

  In the case of a veto right on investments, the importance of this right depends, first, on the level of investments which are subject to the approval of the parent companies and, second, on the extent to which investments constitute an essential feature of the market in which the joint venture is active. In relation to the first criterion, where the level of investments necessitating approval of the parent companies is extremely high, this veto right may be closer to the normal protection of the interests of a minority shareholder than to a right conferring a power of co-determination over the commercial activities of the joint venture. With regard to the second criterion, the investment activity of an undertaking is normally an important element in assessing whether or not there is joint control. However, there may be some markets where investment does not play a significant role in the market behaviour of an undertaking.

- Market specific rights:

  Apart from the typical veto rights mentioned above, there exist a number of other veto rights related to specific decisions which are important in the context of the particular market of the joint venture. One example is the decision on the technology to be used by the joint venture, where technology is a key feature of the joint venture's activities. Another example relates to markets characterised by product differentiation and a significant degree of innovation. In such markets, a veto right over decisions relating to new product lines to be developed by the joint venture may also be an important element in establishing the existence of joint control.

14.9 In assessing the relative importance of veto rights, where there are a number of them, these rights should not be evaluated in isolation. On the contrary, the determination of whether or not joint control exists is based upon an assessment of these rights as a whole. However, a veto right which does not relate either to commercial activities and strategy or to the budget or business plan cannot be regarded as giving joint control to its owner.

Joint Exercise of Voting Rights

14.10 Even in the absence of specific veto rights, two or more undertakings acquiring minority shareholdings in another undertaking may obtain joint control. This may be the case where the minority shareholdings together provide the means for controlling the target undertaking. This means that the minority shareholders will together have a majority of the voting rights, and they will act together in exercising these voting rights. This can result from a legally binding agreement to this effect, or it may be established on a de facto basis.

14.11 The legal means to ensure the joint exercise of voting rights can be in the form of a holding company to which the minority shareholders transfer their rights, or an agreement by which they undertake to act in the same way (pooling agreement).

14.12 Under exceptional circumstances, collective action can occur on a de facto basis where strong common interests exist between the minority shareholders, to the effect that they would not act against each other in exercising their rights in relation to the joint venture. In the case of acquisitions of minority shareholdings, the prior existence of links between the minority shareholders or the acquisition of the shareholdings by means of concerted action will be factors indicating such a common interest.

14.13 In the case where a new joint venture is established, as opposed to the acquisition of minority shareholdings in a pre-existing undertaking, there is a higher probability that the parent companies are carrying out a deliberate common activity. This is true, in particular, where each parent company provides a contribution to the joint venture which is vital for its operation (e.g. specific technologies, local know-how or supply agreements). In these circumstances, the parent companies may be able to operate the joint venture with full cooperation only with each other's agreement on the most important strategic decisions, even if there is no express provision for any veto rights. The greater the number of parent companies involved in such a joint venture however, the more remote the likelihood of this situation occurring.

14.14 In the absence of strong common interests such as those outlined above, the possibility of changing coalitions between minority shareholders will normally exclude the assumption of joint control. Where there is no stable majority in the decision-making procedure and the majority can, on each occasion, be any of the various combinations possible amongst the minority shareholders, it cannot be assumed that the minority shareholders will jointly control the undertaking. In this context, it is not sufficient that there are agreements between two or more parties having an equal shareholding in the capital of an undertaking which establish identical rights and powers between the parties. For example, in the case of an undertaking where three shareholders each own one-third of the share capital, and each elect one-third of the members of the Board of Directors, the shareholders do not have joint control since decisions are required to be taken on the basis of a simple majority. The same considerations also apply in more complex structures, e.g. where the capital of an undertaking is equally divided between three shareholders and where the Board of Directors is composed of twelve members, each of the shareholders A, B and C electing two, another two being elected by A, B and C jointly, whilst the remaining four are chosen by the other eight members jointly. In this case, there is also no joint control, and hence no control at all within the meaning of the merger provisions.

Other Considerations in Joint Control

14.15 Joint control is not incompatible with one of the parent companies enjoying specific knowledge of, and experience in, the business of the joint venture. In such a case, the other parent company can play a modest or even non-existent role in the daily management of the joint venture where its presence is motivated by considerations of a financial, long-term strategy, brand image or general policy nature. Nevertheless, it must always retain the possibility of contesting the decisions taken by the other parent company, without which there would be sole control.

14.16 For joint control to exist, there should not be a casting vote for one parent company only. However, there can be joint control when this casting vote can be exercised only after a series of stages of arbitration and attempts at reconciliation or in a very limited field.

CCCS GUIDELINES ON MERGER PROCEDURES

Effective from: 1 February 2022

1 INTRODUCTION

1.1 These guidelines describe CCCS's procedures for the application of the *Competition Act 2004* ("the Act") to mergers.

1.2 The merger provisions of the Act apply to completed mergers that have infringed (or anticipated mergers that, if implemented, will infringe) the section 54 prohibition, unless they are excluded or exempt under the Act. Section 54 provides that mergers that have resulted, or may be expected to result in a substantial lessening of competition ("SLC") within any market in Singapore for goods or services are prohibited. The focus of CCCS's analysis is on evaluating the impact of the merger in Singapore and how the competitive incentives of the merger parties and their competitors may change as a result of the merger.

1.3 For ease of reference, the term "merger situation" is used in these guidelines to refer to both completed mergers and anticipated mergers.

1.4 In addition to these Guidelines, the following CCCS guidelines are also relevant to the framework for merger control:

- *CCCS Guidelines on the Substantive Assessment of Mergers:* These set out some of the factors and circumstances which CCCS may consider in determining whether or not a merger situation infringes the section 54 prohibition.

- *CCCS Guidelines on Market Definition:* These explain the methodology CCCS may use to define the relevant product market and geographic market.

- *CCCS Guidelines on the Powers of Investigation in Competition Cases 2016:* These explain CCCS's use of its statutory powers to investigate suspected anticompetitive behaviour under the Act. These powers also apply to merger situations pursuant to section 62 of the Act.

- *CCCS Guidelines on Directions and Remedies:* These explain CCCS's powers to give directions and remedies, accept and vary commitments and to impose financial penalties. These powers also apply to merger situations.

1.5 The following regulations and orders are also relevant to CCCS's assessment of mergers:

- *The Competition (Notification) Regulations 2007:* these regulations relate, inter alia, to applications to CCCS for a decision in respect of merger situations.

- *The Competition (Fees) Regulations 2007:* these regulations state, inter alia, the fees that are payable in respect of merger situations that are notified to CCCS for decision.

- *The Competition (Financial Penalties) Order 2007:* this order relates, inter alia, to the calculation of the level of any fine that CCCS can impose, including in the context of merger situations.

1.6 All of the above guidelines, regulations and orders are available on CCCS's website. Interested parties should read the relevant guidelines, regulations and orders to better understand the merger framework. CCCS's previous merger decisions, which are also available on CCCS's website, also provide useful information on how it has assessed mergers in the past.

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1.7 The guidelines are not a substitute for the Act, the regulations or orders. They may be varied from time to time in accordance with legislative provisions. In applying the guidelines, the facts and circumstances of each case will be considered. The examples in the guidelines are for illustration. They are not exhaustive and do not set a limit on the investigation and enforcement activities of CCCS. Persons who are in doubt about how they and their commercial activities may be affected by the Act may wish to seek legal advice.

1.8 A glossary of terms used in these guidelines is attached.

2 OVERVIEW OF PROCEDURAL FRAMEWORK

Definition of a Merger

2.1 Section 54(2) of the Act provides that a merger occurs if:

- two or more undertakings, previously independent of one another, merge;
- one or more persons or other undertakings acquire direct or indirect control of the whole or part of one or more other undertakings; or
- the result of an acquisition by one undertaking (the first undertaking) of the assets (including goodwill), or a substantial part of the assets, of another undertaking (the second undertaking) is to place the first undertaking in a position to replace or substantially replace the second undertaking in the business or, as appropriate, the part concerned of the business in which that undertaking was engaged immediately before the acquisition.

In addition, section 54(5) of the Act provides that the creation of a joint venture to perform, on a lasting basis, all the functions of an autonomous economic entity constitutes a merger.

2.2 Please refer to the relevant paragraphs of the *CCCS Guidelines on the Substantive Assessment of Mergers* for more details of merger situations that fall under the Act.

Voluntary regime

2.3 Singapore has a voluntary merger notification regime. This means that there is no obligation, or mandatory requirement, for merger parties to notify their merger situations to CCCS, either before or after implementation of the merger. It is the responsibility of merger parties to self-assess their merger and ensure that it does not infringe section 54 of the Act.

2.4 Merger parties have the option of notifying their merger situation to CCCS under sections 56 to 58 of the Act, to apply for a decision as to whether the merger situation infringes, or will infringe, the section 54 prohibition ("application" or "notification"). Parties should carry out their own assessment to determine whether or not notification may be appropriate.

2.5 Not notifying a merger situation that raises competition concerns under the Act carries risks since CCCS can investigate mergers on its own initiative ("own-initiative investigations"). When it does so, and finds that the merger situation leads to a SLC, CCCS has powers to give directions to remedy the SLC. For example, CCCS can require the merger to be dissolved or modified and can impose financial penalties. For further information on whether or not to notify a merger situation to CCCS, see Part 3 below. Parties may wish to seek legal advice if necessary.

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Applications

2.6 Merger parties may make an application to CCCS under section 57 of the Act in respect of an anticipated merger which has been made known to the public.[1] Alternatively, merger parties may wait until the anticipated merger has been carried into effect before making an application in respect of the merger under section 58. Merger parties notifying CCCS are strongly encouraged to notify as soon as possible, preferably prior to the completion of the merger. After conducting its assessment, CCCS will make a decision as to whether the section 54 prohibition has been or will be infringed.

2.7 CCCS also has a process whereby merger parties can obtain confidential advice from CCCS as to whether or not a merger raises concerns (see Part 3, paragraphs 3.18 to 3.29 below).

CCCS procedure for review

2.8 As a matter of administrative practice, CCCS adopts a two-phase approach in evaluating applications. In general, upon receipt of a complete application, CCCS will carry out an assessment (Phase 1 review) which is expected to be completed within 30 working days. A Phase 1 review entails a quick assessment and allows CCCS to give a favourable decision with regard to merger situations that clearly do not raise any competition concerns under the Act.

2.9 If CCCS is unable during the Phase 1 review to conclude that the merger situation does not raise competition concerns, it will provide the applicant(s) with a summary of its key concerns and, upon the filing of a complete Form M2 and response to the Phase 2 information request, CCCS will proceed to carry out a more detailed assessment (Phase 2 review). A Phase 2 review is more complex; CCCS will endeavour to complete it within 120 working days.[2]

2.10 Although CCCS will endeavour to meet the 30 and 120 working days administrative timelines, CCCS may suspend the timetable (known as 'stopping the clock') for a variety of reasons, for example if the merger parties do not respond to CCCS's requests for information within the stipulated time period or if commitments are being considered.

2.11 Merger parties who wish to make an application should refer to Part 4 of these guidelines for further details relating to the application procedure.

Powers of Investigation

2.12 Under sections 62(1)(c) and (d) of the Act, CCCS may conduct an investigation if there are reasonable grounds for suspecting that a merger situation infringes the section 54 prohibition. When conducting an investigation, CCCS's powers are as follows:

- to require the production of specified documents or information (pursuant to section 63 of the Act);
- to enter premises without a warrant (pursuant to section 64 of the Act); and
- to enter and search premises with a warrant (pursuant to section 65 of the Act).

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[1] Regulation 3 of the *Competition (Notification) Regulations 2007.*

[2] In respect of merger situations subject to the Singapore Code on Take-overs and Mergers (the Code), see Appendix 3 to the Code for the Guidance note on the Merger Procedures of the Competition and Consumer Commission of Singapore.

2.13 The Act also sets out a number of criminal offences which may be committed where an undertaking fails to comply when these powers are exercised[3], as well as limitations on the use of CCCS's powers of investigation.[4] For further information, please refer to the relevant paragraphs of the *CCCS Guidelines on the Powers of Investigation in Competition Cases 2016* pertaining to the exercise of CCCS's powers of investigation, and Part 5 below.

Interim Measures

2.14 Prior to completing its assessment of an application or an own-initiative investigation, CCCS may impose interim measures to prevent any action that may prejudice CCCS's ability to investigate the merger situation or its ability to impose appropriate remedies.[5] Interim measures may also be imposed as a matter of urgency for the purpose of preventing serious, irreparable damage to a particular person or category of persons or of protecting the public interest.[6] For further information, see paragraphs 4.67 to 4.76 below.

Commitments

2.15 Section 60A of the Act states that CCCS may, at any time before making a decision as to whether the section 54 prohibition has been or will be infringed, accept commitments that remedy, mitigate or prevent the SLC or any adverse effect arising from the merger situation. Where CCCS has accepted a commitment, CCCS will make a favourable decision.[7] For further information, see the *CCCS Guidelines on Directions and Remedies.*

Directions

2.16 Where CCCS has made an unfavourable decision, section 69 of the Act provides that CCCS may give directions as it considers appropriate to remedy, mitigate or eliminate any adverse effects arising from the merger situation. Such directions may include the imposition of financial penalties.[8] For further information, see Part 6 below.

3 SELF-ASSESSMENT: DECIDING WHETHER OR NOT TO NOTIFY

3.1 This part provides guidance on the circumstances in which it may be appropriate for merger parties to notify their merger situation to CCCS.

Voluntary regime

3.2 Singapore has a voluntary merger regime. This means that there is no obligation, or mandatory requirement, for merger parties to notify their merger situation to CCCS, either before or after implementation of the merger, but have the option of doing so. It is the responsibility of the merger parties to assess for themselves whether or not their merger would infringe the section 54 prohibition, and they can apply to CCCS for a decision as to whether the merger situation infringes, or will infringe, the section 54 prohibition.

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[3] Sections 75 to 78 of the Act.

[4] Sections 63 to 66 of the Act.

[5] Sections 58A and 67(2)(c) of the Act

[6] Section 67(2)(d) of the Act.

[7] Section 60B(1) of the Act.

[8] Section 69(2)(e) of the Act.

3.3 While CCCS becomes aware of mergers through notifications, it is also informed of mergers through its market intelligence function and complaints. It can investigate mergers on its own initiative (i.e. where the parties have decided not to notify), where it considers that there are reasonable grounds to suspect that the section 54 prohibition has been or will be infringed.[9] In those circumstances it can carry out an investigation using its statutory powers (see Part 5 below).

Circumstances when it would be appropriate to notify CCCS

3.4 Merger parties should assess if an application to CCCS is appropriate for their merger situation, bearing in mind that mergers that give rise to a SLC within any market in Singapore are prohibited under section 54 of the Act. The following paragraphs explain in more detail when notification may be appropriate. In general, merger situations should be notified to CCCS if the merger parties think the merger may result in a SLC within any market in Singapore.

3.5 CCCS is unlikely to investigate a merger situation that only involves small companies, namely where the turnover in Singapore[10] in the financial year preceding the transaction of each of the parties is below S$5 million and the combined worldwide turnover in the financial year preceding the transaction of all of the parties is below S$50 million.

3.6 CCCS considers that a SLC is unlikely to result, and CCCS is unlikely to investigate a merger situation unless:

- the merged entity will have a market share of 40% or more; or
- the merged entity will have a market share of between 20% to 40% and the post-merger combined market share of the three largest firms (CR3) is 70% or more.

3.7 The above thresholds are provided by way of notification guidelines. However, the thresholds are indicative only, and CCCS may investigate merger situations that fall below these indicative thresholds in appropriate circumstances. Conversely, merger situations that meet or exceed the thresholds stated in the notification guidelines are not necessarily prohibited under section 54.

3.8 Merger parties may wish to seek legal advice if necessary; they may also refer to the following guidelines in their assessment:

- Part 7 of these guidelines to determine if the merger situation is excluded under the Fourth Schedule of the Act.
- *CCCS Guidelines on Market Definition* to determine how to define a relevant market.
- *CCCS Guidelines on the Substantive Assessment of Mergers* to determine the nature and extent of any possible concerns that CCCS may have.
- CCCS's previous merger decisions in relation to both market definition and the competitive assessment that CCCS carries out.

Risks of not notifying

3.9 Merger parties should note that under section 62 of the Act, CCCS may conduct an investigation if there are reasonable grounds for suspecting that a merger has infringed, or that an anticipated merger if carried into effect will infringe, the section 54 prohibition.

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[9] Section 62 of the Act.

[10] Turnover in Singapore in this context refers to turnover booked in Singapore as well as turnover from customers in Singapore.

3.10 CCCS considers that there may be reasonable grounds to suspect that the section 54 prohibition has been or will be infringed, for example, where there are consistent complaints, or one or more substantiated complaints, from third parties; where there are preliminary indications that the merged entity may have a market share of 40% or more; or the merged entity may have a market share of between 20% to 40% and the post-merger combined market share of the three largest firms (CR3) may be 70% or more; where customers in Singapore appear, post-merger, to have limited choice, or – for vertical mergers - where there is a possibility of competitors being foreclosed. The examples given are not exhaustive.

3.11 When CCCS has reasonable grounds to suspect that the section 54 prohibition has been or will be infringed, it is empowered under section 63 of the Act, to require from any person (including the merger parties and third parties) specified information or documents that CCCS considers related to any matter relevant to the investigation into the merger situation.

3.12 If CCCS carries out an own-initiative investigation and ultimately identifies a SLC, this could have two consequences. First, CCCS may direct the merged entity to remedy the SLC, for example by divesting all or part of the business.[11] Second, CCCS has the power to impose financial penalties on merger parties that implement a merger that gives rise to a SLC.[12] For further information on directions that may be imposed by CCCS, please refer to Part 6 below.

CCCS's market intelligence function

3.13 CCCS considers that a market intelligence function is an integral part of its voluntary merger notification regime. As part of its statutory remit in the context of merger control, CCCS keeps markets under review to ascertain which mergers and acquisitions are taking place. Where it identifies transactions that it considers may potentially raise concerns under the merger provisions of the Act, it approaches the merger parties to gather further information about the transaction and its effect on competition. It may also approach third parties in this regard. Parties and third parties are encouraged to respond promptly and comprehensively to any information requests.

3.14 In order to elicit information about particular mergers, CCCS may publish a notice on its website indicating that it is considering whether or not a completed or anticipated merger that has not been notified to it may raise concerns under the merger provisions of the Act.

3.15 If the response of the parties or third parties to CCCS's enquiries, or any other information available to CCCS, indicates that there are reasonable grounds to suspect that the section 54 prohibition has been or will be infringed, CCCS may use its statutory powers to investigate mergers that have not been notified to it.

Third party complaints

3.16 If any interested parties wish to make CCCS aware of a merger that it considers might raise concerns under the merger provisions of the Act, they are encouraged to make use of the Complaint Form on CCCS's website in order to register the complaint. Alternatively, complainants may file a written complaint by emailing cccs_feedback@cccs.gov.sg. Complainants should try to provide all the information requested in the form. CCCS endeavours to keep complaints and the identity of complainants confidential.

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[11] Section 69(2)(f)(ii) of the Act provides that where CCCS has made a decision that the merger situation has infringed the section 54 prohibition, it can require the merger party(s) to dispose of such operations, assets or shares in such manner as may be specified by CCCS.

[12] Section 69(2)(e) of the Act.

3.17 It should be noted that there is no obligation on CCCS to follow-up or investigate complaints relating to non-notified mergers as this would undermine the benefits of the voluntary regime. CCCS will not investigate a merger simply because a complaint has been made to it; each complaint will be judged on its merits taking into account, among other things, the strength of any supporting evidence.

Obtaining confidential advice from CCCS

3.18 As noted above, merger parties are required to carry out their own assessment to decide whether or not to notify their merger situation to CCCS. However, to assist with planning and consideration of future mergers, in particular at the stage when the merger parties are concerned to preserve the confidentiality of the transaction, CCCS is prepared to give confidential advice on whether or not an anticipated merger is likely to raise competition concerns in Singapore and whether a notification is advisable, with the necessary qualification that such advice is not binding on CCCS and is provided without having taken into account third party views. Confidential advice is only available if CCCS is satisfied that certain conditions are met (see Part 3, paragraphs 3.19 to 3.23). This is so that CCCS can manage its resources appropriately.

Conditions for confidential advice

3.19 Following self-assessment, merger parties may approach CCCS for confidential advice if the following three conditions set out in section 55A of the Act are met.

3.20 First, the merger must not be completed but there must be a good faith intention to proceed with the transaction, as evidenced to the satisfaction of CCCS by the party or parties requesting the confidential advice.

3.21 Second, the anticipated merger must not be in the public domain. In exceptional circumstances, CCCS may consider giving confidential advice in relation to anticipated mergers that are no longer confidential, but the requesting party or parties must provide good reasons why they wish to receive confidential advice and not proceed with a notification.

3.22 Third, in CCCS's view the merger situation must raise a genuine issue relating to the competitive assessment in Singapore, so there must be some doubt as to whether or not the merger situation raises concerns such that notification may be appropriate. For example, there may be a genuine issue if there is a lack of relevant precedents and therefore CCCS's approach to the merger situation is genuinely in doubt. On the other hand, there would be no genuine issue if, for example, both merger parties have an insignificant market presence in Singapore.

3.23 The requesting party or parties are expected to keep CCCS informed of significant developments in relation to the merger situation in respect of which confidential advice was obtained, for example, completion date or abandonment of the merger.

Process for confidential advice

3.24 The process for obtaining confidential advice is as follows. As a first step, the party or parties wishing to request the advice should contact the CCCS hotline on 1800-325-8282, or email CCCS at the following email address: cccs_feedback@cccs.gov.sg. In the first instance, they should provide basic information about the merger, such as the merger parties' names, sector, overlapping goods or services, timing, evidence of good faith intention to proceed with the merger and reasons for seeking the confidential advice. A provisional timeline for the submission of full information by the requesting party (or parties) and the provision of the advice by CCCS can then be agreed. CCCS expects to be able to provide advice within 14 working days of receipt of all the required information.

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3.25 The requesting party is expected to provide information similar to that required in Form M1 in order for CCCS to begin its assessment. Since the process is confidential, no third party enquiries will be carried out and third party contact details do not need to be provided. In addition, CCCS does not expect to request further information by way of written questions to the requesting party. In light of this, it is very important that a full and frank account of the likely competitive effect of the merger in Singapore is provided in the submission to CCCS.[13]

3.26 Based on the information provided, CCCS will carry out an internal assessment of the merger. A meeting may be arranged with the requesting party (or parties), providing an opportunity for CCCS to ask questions and for the requesting party to state its views on the competitive effect of the merger orally. At the end of the process, CCCS will provide a letter to the requesting party stating whether it considers that the merger is likely to raise competition concerns in Singapore and whether notification is advisable.

Important aspects of confidential advice

3.27 Confidential advice does not amount to a decision under section 57 or section 58 of the Act. As such, confidential advice is not binding on CCCS, and in all cases where confidential advice is given, CCCS reserves the right to investigate the merger situation where the statutory test for doing so is met.

Safeguards in relation to information provided

3.28 In circumstances when a party requests confidential advice and submits confidential information in that context, and CCCS decides that the conditions for giving confidential advice are not met (see paragraphs 3.19 to 3.23), CCCS will return the confidential information submitted by the requesting party.

3.29 Information provided by the party requesting confidential advice, and the fact that confidential advice has been requested, will not be disclosed to other organisations or competition authorities in other jurisdictions unless the relevant waivers have been given.

4 APPLICATIONS

4.1 This part provides a more detailed account of the application process, explaining how merger parties should make an application to CCCS for a decision regarding a merger situation. It also describes CCCS's powers to gather supplementary information from the applicant and the process for obtaining information from third parties. The Phase 1 and Phase 2 processes and CCCS's publication policy are also explained.

4.2 For anticipated mergers, an application can only be made once the parties have a bona fide intention to proceed with the transaction and the merger has been made public (or if the parties have no objection to CCCS publicising their merger). This is to allow CCCS to seek third party views.[14] Parties to an anticipated merger should exercise due caution when exchanging commercially sensitive information (such as prices and customer details) in the context of the merger negotiations and the application and review process. The exchange of such information may infringe section 34 of the Act where it has the object or effect of preventing, restricting or distorting competition within Singapore.

4.3 In the case of completed mergers, an application may be made at any time, although parties are encouraged to notify as soon as possible after completion.

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[13] Note that pursuant to section 77 of the Act, it is an offence to provide false or misleading information to CCCS.

[14] Regulation 3 of the *Competition (Notification) Regulations 2007* provides that only such anticipated mergers as may be made known to the public may be notified to CCCS under section 57 of the Act.

4.4 Merger parties can implement an anticipated merger while it is being considered by CCCS, but they do so at their own risk. In the case of a completed merger, the merger parties may also proceed with further integration of the merger at their own risk.

Notification Guidelines

4.5 The circumstances in which notification is encouraged are outlined in Part 3, paragraphs 3.4 to 3.8.

Pre-Notification Discussions

4.6 Merger parties are strongly encouraged to contact CCCS at an early opportunity to discuss the content and timing of their notifications. These discussions are generally referred to as Pre-Notification Discussions ("PNDs").

4.7 As a first step, merger parties wishing to engage in PNDs should contact the CCCS hotline on 1800-325-8282, or email CCCS at the following email address: cccs_feedback@cccs.gov.sg.

4.8 While CCCS encourages PNDs for anticipated mergers that may not yet be in the public domain, PNDs are not intended to relate to purely speculative or hypothetical transactions. At the point when parties approach CCCS for PNDs, they should be in a position to show that there is a good faith intention to proceed with the transaction. Generally, CCCS considers that there is a good faith intention to proceed with the transaction when, for example, a draft sale and purchase agreement is in place.

4.9 PNDs can be informal and brief, or more formal and prolonged, depending on the preference of the merger parties, the complexity of the transaction and the concerns that the merger may raise. PNDs are most useful for the parties where they can provide CCCS with a draft form M1 prior to, or in the course of, the discussions.

4.10 PNDs are useful because they permit the merger parties to ascertain what information CCCS is likely to require in order to assess their transaction. PNDs also help CCCS to understand the transaction early on, and serve to clarify the information and evidence which will be required in Form M1, thereby facilitating an expeditious merger review process. Wherever possible, CCCS will indicate gaps in the information provided in the draft Form M1. Where Form M1 stipulates the provision of information that is not relevant to the particular transaction under consideration, the PND provides an opportunity for parties to point this out to CCCS. For mergers involving more complex products or raising some competition issues, effective PNDs can help minimise the risk that the merger cannot be cleared in Phase 1. The more information that is provided at PND stage, the more useful the process will be.

4.11 In the context of PNDs, CCCS does not give views on whether a merger situation would be likely to require a Phase 2 assessment, or if it would lead to a SLC. However, merger parties may approach CCCS for confidential advice on a merger in certain circumstances. This is a separate process, details of which are outlined in Part 3, paragraphs 3.18 to 3.29.

Submitting an Application

Form M1

4.12 An application under section 57 or section 58 of the Act must be made by submitting a completed Form M1 to CCCS[15]. The Form M1 may be varied from time to time, with an updated version being available on CCCS's website.

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[15] Regulation 6(1)(b) of the *Competition (Notification) Regulations 2007*.

4.13 When it receives an application, CCCS will first determine whether Form M1 is complete and if the application otherwise meets all the requirements. If so, the indicative timeframe of 30 working days for Phase 1 review commences on the working day after the day of receipt of the application.

4.14 CCCS may refuse to accept an application if it is:

- incomplete;
- not accompanied by the relevant supporting documents;
- not substantially in the prescribed form;[16]
- not accompanied by the appropriate fee;[17] or
- not in compliance with any requirement under the Act or any regulations made thereunder.

4.15 If the application is satisfactory in all respects, CCCS will notify the merger parties accordingly in writing.[18] In the event of non-conformity, CCCS will inform the applicant as soon as practicable. The 30 working day indicative timeframe for Phase 1 review will not commence until the applicant has filed an application with the non-conformity rectified.

4.16 Merger parties are required to provide a non-confidential version of Form M1, in addition to a confidential version and a written statement explaining why the information is confidential.[19] This is to facilitate CCCS's discussions and meetings with third parties. Where CCCS considers that the confidentiality claims made by the parties are excessive or unreasonable, it may stop the clock, suspending the 30 working day indicative timeframe, until the applicant files a non-confidential version of Form M1 that meets CCCS's requirements. For further information on confidentiality claims, see paragraphs 4.30 to 4.35.

Form M2 and information requirements for commencement of Phase 2

4.17 If CCCS is of the opinion that it is necessary to proceed to a Phase 2 review, it will notify the applicant accordingly. The indicative timeframe of 120 working days for Phase 2 review commences when CCCS:

- notifies the applicant that the merger situation has proceeded to a Phase 2 review; and
- receives a complete Form M2 and a response to the Phase 2 information request that CCCS deems satisfactory. CCCS may, by giving notice to the applicant, dispense with the obligation to submit any particular information or document forming part of Form M2 if it considers that such information or document is unnecessary for the examination of the merger situation.[20] The Form M2 may be varied from time to time, with an updated version being available on CCCS's website.

4.18 The indicative timeframe for Phase 2 will not commence before both events have occurred. In any case, the Phase 2 review period will commence no earlier than after the expiry of the indicative timeframe of 30 working days for Phase 1 review.

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[16] Regulation 7(10) of the *Competition (Notification) Regulations 2007*.

[17] Refer to CCCS's website and the *Competition (Fees) Regulations 2007* with regard to the appropriate amount of filing fees.

[18] Notification that an application is satisfactory does not preclude CCCS from deciding in the course of its review that the notified transaction is not a merger within the meaning of section 54.

[19] Regulation 8(1) of the *Competition (Notification) Regulations 2007*.

[20] Regulation 6(4) of the *Competition (Notification) Regulations 2007*.

4.19 If the applicant fails to submit a complete Form M2, or a satisfactory response to the Phase 2 information request within the deadline stipulated by CCCS (and any extensions which may have been granted), CCCS may commence its own investigation into the merger using its statutory powers (see Part 5).

Additional Information and Stopping the Clock

4.20 In both Phase 1 and Phase 2, CCCS may from time to time ask the applicant to provide additional information. CCCS will require the applicant to furnish the additional information by such deadline as CCCS considers appropriate.[21] If the applicant is unable to provide the requested information by the deadline, the applicant should submit a request for an extension of time to CCCS as soon as possible.

4.21 CCCS may request the information in writing on an informal basis, or it may use its statutory powers under section 61A of the Act.[22]

4.22 Even if CCCS extends the deadline, it may (depending on the nature of the additional information that is required) "stop the clock" for the period between the date of the original deadline and the date on which the applicant reverts with the requested information. If the applicant fails to revert with the additional information within the deadline (and any extensions which may have been granted), CCCS may determine the application by not giving a decision[23], but may then commence its own investigation into the merger using its statutory powers (see Part 5).

Publication of Application on the Register and Invitations to Comment

4.23 Upon acceptance of a satisfactory application that meets the requirements in Form M1, CCCS will publish the details of the merger situation furnished by the applicant in Part 5 of Form M1 on the public register on its website.[24] Third parties are invited to comment on the merger via an invitation to comment on CCCS's website or may be directly contacted by CCCS.

4.24 The entry will be updated if CCCS accepts commitments at either Phase 1 or Phase 2, if the merger proceeds to a Phase 2 review and once CCCS takes a decision under section 54 of the Act. Third parties are invited to comment when CCCS consults on commitments.

Giving Notice of the Application to Non-applicant Merger Parties

4.25 If the application is made by one or only some of the merger parties, the applicant(s) must give written notification to all the other merger parties that the application has been made. The written notification to these parties must be given within 2 working days from the date on which the application is submitted to CCCS and a copy of the written notification must be provided to CCCS (on the same day that the application is submitted if written notice was given prior to that, or otherwise within 2 working days of the submission of the application). If the applicant is unable, despite the exercise of due diligence, to contact the other merger parties, CCCS may require the applicant to notify the other merger parties in such mode and manner as may be specified, e.g. by publishing the notice.[25]

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[21] Regulation 7(7) of the *Competition (Notification) Regulations 2007*.

[22] In the context of own-initiative investigations, CCCS may use its power under section 63 of the Act to obtain information.

[23] Regulation 7(6) of the *Competition (Notification) Regulations 2007*.

[24] Regulation 30(1)(b) of the *Competition Regulations 2007*.

[25] Regulations 5(3), 5(4), 5(5), 5(6) and 5(7) of the *Competition (Notification) Regulations 2007*.

Requirements for Submitting Materials to CCCS

4.26 The applicant is required to submit Form M1 and its supporting documents (including any agreements containing restrictions which may be ancillary to the merger and which are the subject of the Application), with any confidential information in the Form or documents clearly identified. The same applies to Form M2 and any information requests made by CCCS during Phase 1 and Phase 2.

4.27 The applicant is also required to submit the non-confidential version of Form M1 and its supporting documents. This should be accompanied by a separate annex identifying the confidential information and furnishing reasons as to why the information should be treated as confidential. The same applies to Form M2 and any information requests made by CCCS during Phase 1 and Phase 2.

4.28 Forms M1 and M2 and their accompanying supporting documents (and the non-confidential versions thereof) are to be provided electronically. Non-confidential versions need not be filed if the applicant is of the view that the relevant Form or document can be shared with third parties. Forms M1 and M2 (and the non-confidential versions thereof) and their supporting documents are to be in a format as specified on CCCS's website. CCCS's website also sets out the manner by which the electronic application documents can be lodged with CCCS.

4.29 If an applicant engages legal assistance to file the application on the applicant's behalf, CCCS should be furnished with a letter of authorisation signed by the applicant. If a joint Application is submitted, a joint representative should be appointed.[26]

Confidentiality

4.30 Applicants and third parties are required to provide both confidential and non-confidential versions of any submissions made to CCCS. CCCS requires non-confidential versions for the purpose of facilitating discussions and meetings with third parties and to enable it to publish a non-confidential version of its decision without delay. The manner in which confidential information should be identified is set out below.

- In the confidential versions of submissions, confidential information must be marked by enclosing it in square brackets.

- In the non-confidential version of submissions, redactions must be marked by square brackets containing the word "CONFIDENTIAL".[27] As explained above, the applicant must submit a separate annex with the non-confidential version of any submissions identifying the confidential information and giving reasons why the information should be treated as confidential.

4.31 CCCS cautions against blanket or overly wide confidentiality claims. Confidentiality should only be claimed over information that can reasonably be considered to be commercially sensitive or relating to the personal affairs of an individual. Section 89(6)(b) of the Act and regulation 2 of the *Competition (Notification) Regulations 2007* provide that confidential information means (a) commercial information the disclosure of which would, or might, in the opinion of CCCS, significantly harm the legitimate business interests of the undertaking to which it relates; (b) information relating to the private affairs of an individual the disclosure of which would, or might, in the opinion of CCCS, significantly harm the individual's interests; or (c) information the disclosure of which would, in the opinion of CCCS, be contrary to the public interest. The following classes of information are not generally considered to be confidential by CCCS:

- Information that relates to the business of any of the merger parties but is not commercially sensitive in the sense that disclosure would cause harm to the business;

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[26] Regulation 4(3) of the *Competition (Notification) Regulations 2007*.

[27] For example, if a document accompanying Forms M1 or M2 contains the statement "the turnover of the applicant is 1 billion dollars" and the turnover figure is confidential, the confidential portion should be blanked out from the non-confidential version of the document and square brackets containing the word "CONFIDENTIAL" inserted in the blanked out portion. The non-confidential version of the document will therefore read: "the turnover of the applicant is [CONFIDENTIAL] dollars".

- Information that reflects the merger parties' views of how the competitive effects of the merger could be analysed. This type of information can be produced by any reasonably well informed market participants, trade analysts or legal/economic advisors; or

- Information that is general knowledge within the industry, or is likely to be readily ascertainable by any reasonably diligent market participant or trade analyst.

4.32 Where CCCS considers that the confidentiality claims made in respect of Form M1, Form M2 or any other submission are excessive or unreasonable, it may stop the clock until such time as the applicant files a non-confidential version that meets CCCS's requirements.

4.33 It is CCCS's policy to keep confidential those aspects of applicants' submissions in respect of which legitimate confidentiality claims have been made. In exceptional circumstances it may be necessary to disclose confidential information, for example in the context of third party inquiries or in order to explain the reasoning of CCCS in its final decisions or to establish a point of precedent.[28] In these circumstances, CCCS will consider the extent to which the disclosure is necessary for the purposes for which CCCS is proposing to make the disclosure[29] and liaise with the parties in advance to consider how any detriment to the merger parties could be minimised.

4.34 Before CCCS decides to publish a merger decision, it will give the applicant an opportunity to review the draft decision in order to determine whether or not it contains confidential information and to check the accuracy of factual statements relating to, or supplied by, the applicant. In the interest of transparency, it is common practice for CCCS to safeguard confidentiality by replacing market share figures with ranges in the public version of the decision. This approach may also be used for other numeric information. Moreover, wherever possible, confidentiality claims of third parties are respected by redacting, anonymising and/or aggregating their responses.

4.35 While CCCS will treat all parties' submissions on confidentiality seriously, pursuant to section 89 of the Act and regulation 20(5) of the *Competition (Notification) Regulations 2007,* CCCS will have the final discretion to decide whether or not information is confidential.

Applicants' Obligations as to Accuracy of Information

4.36 Each applicant and any representative (where one has been appointed) must sign the declaration in Form M1 (and Form M2, where relevant) stating that the information submitted is correct to the best of the knowledge and belief of the person signing the declaration, and that all estimates are best estimates based on the underlying facts. Applications which lack the requisite signatures will not be accepted. Applicants have a continuing obligation to inform CCCS of any material changes in the information contained in the Application which may occur after the Application has been made.

4.37 Section 77 of the Act provides that it is an offence to recklessly or intentionally provide false or misleading information. This applies to applicants as well as third parties who provide information to CCCS in the course of its work.

Application Procedure for Ancillary Restrictions

4.38 Ancillary restrictions (also referred to as ancillary restraints) are restrictive agreements, arrangements or provisions that are directly related and necessary to the implementation of a merger. Ancillary restrictions are excluded from the section 34 prohibition and the section 47 prohibition of the Act ("the section 47 prohibition") by virtue of paragraph 10, Third Schedule of the Act.

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[28] Section 89(5) of the Act.

[29] Section 89(6)(c) of the Act.

4.39 Merger parties should assess whether any restrictive agreements, arrangements or provisions which are concluded as part of the merger qualify as ancillary restrictions. For merger parties seeking greater legal certainty on ancillary restrictions that merger parties self-assessed to raise competition concerns, the Act allows for ancillary restrictions to be notified to CCCS in two ways:

- Merger parties may notify the restrictions as part of the application and provide the necessary information in Form M1. CCCS will consider these restrictions in the review of the merger situation and decide whether or not they are ancillary restrictions. Merger parties should bear in mind that as part of the merger review process, CCCS may seek third party views on these restrictions. Applicants should note that CCCS only has jurisdiction to determine whether a restriction is ancillary to a merger in respect of its effect in Singapore.

- In the event that the merger parties do not make an application in respect of the merger situation itself, they can file a separate notification for guidance (under sections 43 or 50 of the Act) or a decision (under sections 44 or 51 of the Act) as to whether the agreement, arrangement or provision concerned constitutes an ancillary restriction. Merger parties should follow the procedures laid out in *CCCS Guidelines on Filing Notifications for Guidance or Decision with respect to the Section 34 Prohibition and Section 47 Prohibition 2016* in submitting such notifications. In filing such notifications, merger parties should provide the following:

  - details of each restriction;

  - an explanation as to why each restriction may infringe the section 34 prohibition and/or the section 47 prohibition but for the exclusion of ancillary restrictions from these prohibitions; and

  - an explanation as to why each restriction is directly related and necessary to the implementation of the merger situation.

  CCCS will then make a decision as to whether the restrictive agreements, arrangements or provisions which have been notified qualify as ancillary restrictions.

4.40 Even if CCCS gives guidance or a decision to the effect that a restrictive agreement, arrangement or provision is likely to qualify as an ancillary restriction, this does not prevent CCCS from taking further action in respect of a restriction which is implemented if CCCS finds that the underlying merger has infringed, or the underlying anticipated merger if carried into effect will infringe, the section 54 prohibition, or if the underlying anticipated merger is not subsequently implemented.

CCCS's Information Gathering Powers

Information from the Applicants

4.41 CCCS, after considering all the information available to it, may decide that it requires additional, or more comprehensive, information. To this end, CCCS will issue requests for information when it is clear that the information is necessary. Applicants are encouraged to comply with information requests promptly, so that CCCS can complete the merger assessment within the relevant timeline. The deadlines for requests of information are likely to be short and, depending on the nature of the information, may usually range from 3 to 5 working days. CCCS may also hold meetings with applicants in both Phase 1 and Phase 2.

4.42 Applicants receiving a request for information from CCCS may wish to discuss with CCCS at an early stage their likely timetable for responding, the extent to which the requested information is available, and the form in which it is available. Any request for an extension of time to respond should be made promptly as CCCS is unlikely to grant any extension of time requested just prior to the stipulated response date.

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4.43 Failure to meet the deadlines for response may result in a delay in the assessment process. In the event of any delay, CCCS may decide to stop the clock, thereby extending the relevant timeline. The clock will be restarted once the requested information has been provided.

4.44 Finally, CCCS is empowered under section 61A of the Act, when it has reasonable grounds to suspect that the section 54 prohibition has been or will be infringed, to require from any person specified information or documents that would assist CCCS in its assessment of the application. CCCS may use this power in appropriate circumstances to request information from applicants.

Information from Third Parties

4.45 Information provided by third parties plays an important role in CCCS's assessment of mergers. CCCS obtains relevant information from third parties via public consultation and by contacting them directly. Wherever possible, CCCS will respect confidentiality claims.

4.46 As stated above, details of applications accepted by CCCS will be published on the public register. All interested third parties (including non-applicant merger parties) are invited to submit their views on the Application. All interested third parties should submit their comments within 10 working days after the Applications are published on the public register so that CCCS will have sufficient time to give due consideration to their submissions.

4.47 CCCS also approaches third parties, such as the applicant's main customers (end customers and intermediate customers), suppliers and/or competitors, for information. CCCS may also contact other government bodies for their views on the merger situation. Where any of the merger parties are regulated by another government authority, CCCS will, in general, seek inputs from these authorities. These bodies may carry out their own public consultation before providing their comments to CCCS. CCCS may hold meetings with third parties in Phase 1, as well as in Phase 2.

4.48 When providing submissions to, or otherwise corresponding with CCCS, third parties should indicate which information is confidential. CCCS may share the non-confidential versions of submissions with the applicant or other parties, either by publication on CCCS website or through other means, for example when it provides access to the file in Phase 2. In the event that CCCS considers it necessary to publish or otherwise disclose confidential information, this will be done in accordance with section 89 of the Act, for example CCCS may liaise with the provider of the information to obtain consent for the disclosure. Part 4, paragraph 4.31 sets out further details regarding the type of information that CCCS is likely to regard as confidential.

4.49 Finally, CCCS is empowered under sections 61A and 63 of the Act, when it has reasonable grounds to suspect that the section 54 prohibition has been or will be infringed, to require from any person specified information or documents that would assist CCCS in its assessment of the application. CCCS may use this power in appropriate circumstances to request information from third parties.

Consequences of Providing False or Misleading Information

4.50 There are penalties for both applicants and third parties who provide false or misleading information to CCCS. Section 77(1) of the Act makes it an offence to knowingly or recklessly provide false or misleading information to CCCS, an investigating officer or an inspector or any person authorised to assist CCCS, investigating officer or inspector in connection with their functions or duties. The penalty for breaching this provision is a fine of up to $10,000 or imprisonment of up to 12 months, or both.[30]

4.51 Applicants are also reminded that CCCS may review its favourable decisions if, among other things, CCCS has reasonable grounds to suspect that the information on which CCCS based its decision was incomplete, false or misleading.

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[30] Section 83 of the Act.

Preliminary Thresholds

4.52 Upon accepting a complete Form M1 that meets all the applicable filing requirements, CCCS will first determine:

- whether the transaction falls within the meaning of a 'merger' or 'anticipated merger' as defined in the Act[31]; and
- whether the transaction is excluded under paragraph 1 or 2 of the Fourth Schedule of the Act.[32]

4.53 Where CCCS considers that the transaction does not fall within the meaning of a merger or an anticipated merger as defined in the Act, or is excluded under paragraph 1 or 2 of the Fourth Schedule of the Act, CCCS will inform the applicant as soon as is practicable.

Phase 1 Review

4.54 A Phase 1 review entails a quick review and allows merger situations that do not raise competition concerns under the section 54 prohibition to proceed without undue delay. Please refer to the *CCCS Guidelines on the Substantive Assessment of Mergers* for details of the assessment CCCS conducts.

4.55 CCCS expects to complete a Phase 1 review within 30 working days, where day 1 is the working day after date of receipt of the complete notification. In exceptional circumstances, CCCS may extend the Phase 1 review period upon informing the applicant in writing in advance. In Phase 1, CCCS will determine whether to issue a favourable decision and allow the merger situation to proceed, or to carry on to a Phase 2 review.

4.56 In Phase 1, the case team will gather information about the competitive effect of the merger situation from the applicant and from third parties, such as customers, competitors and, in some cases, suppliers, as well as other regulatory bodies and government departments, where relevant. The case team may hold meetings with the parties or third parties.

4.57 In the event that the case team identifies competition concerns in Phase 1 that indicate that a favourable decision at Phase 1 cannot be issued, and hence a Phase 2 review may be appropriate, it will communicate those concerns to the applicant in writing, setting out the main competition concerns that have been identified ("Phase 1 Issues Letter"). The applicant will be given an opportunity to respond to the Phase 1 Issues Letter. The Phase 1 Issues Letter will contain a deadline for the applicant to offer commitments or to submit Form M2. Should the applicant decide to put forward commitments, it will have to submit the final commitment proposal by the deadline stipulated by the case team. The final commitment proposal will have to adequately address all of the competition concerns identified by CCCS. If the final commitment proposal is accepted in principle by CCCS for market testing, a 50-working day administrative time (that is separate from the 30-working day review period) will commence for CCCS to evaluate the proposal. Where necessary, CCCS may, by giving written notice to the applicant, extend this administrative timeline by up to 40 working days. If the final commitment proposal is not accepted in principle by CCCS, CCCS will require the applicant to submit Form M2 by a stipulated deadline. If the applicant does not submit the final commitment proposal or Form M2 by the stipulated deadline, CCCS will generally proceed to open an investigation. If the commitments are accepted, CCCS will issue a favourable decision.[33]

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[31] Section 54(2) of the Act.

[32] Please refer to the relevant paragraphs of *CCCS Guidelines on the Substantive Assessment of Mergers* for more details of merger situations that fall under the purview of the Act.

[33] Please refer to paragraphs 3.3 to 3.10 of the *CCCS Guidelines on Directions and Remedies* for other relevant details.

4.58 CCCS will give notice of the decision to the applicant and announce the decision on the public register. If CCCS intends to publish the text of the decision, the merger parties (and, where relevant, third parties) will be given an opportunity to indicate whether or not there is any confidential information in the decision. If CCCS agrees with the confidentiality claim, the confidential information will be redacted before the decision is published.

Phase 2 Review

4.59 If CCCS, on the basis of all information before it, is unable to form the conclusion during the Phase 1 review that the merger situation does not raise competition concerns under the section 54 prohibition, CCCS will proceed to a Phase 2 review.

4.60 While the principles of substantive assessment for Phase 2 review are the same as those for Phase 1, a Phase 2 review entails a more detailed and extensive examination of the effects of the merger situation. As such, CCCS will require detailed information regarding the businesses of the merger parties and the markets in question.

4.61 Phase 2 reviews are more complex and CCCS endeavours to complete them within 120 working days. At the end of this period CCCS will decide whether to issue a favourable or unfavourable decision. In exceptional circumstances, CCCS may extend the Phase 2 review period upon informing the applicant in writing in advance.

4.62 During Phase 2, CCCS may call for a state of play meeting with the applicant to set out its competition concerns. CCCS's competition concerns will also be formally set out in a Phase 2 issues letter, which may be sent separately from a state of play meeting. CCCS will stipulate a deadline for the applicant to respond in the Phase 2 issues letter. If the applicant submits a commitments proposal after the deadline stipulated in the Phase 2 issues letter, CCCS will only evaluate the proposal if there is sufficient time to do so before it issues its Statement of Decision (Provisional). CCCS will not extend the 120-working day review period to make its final decision on the merger for the purposes of evaluating commitments submitted after the stipulated deadline save in exceptional circumstances.

4.63 If, towards the end of Phase 2, CCCS reaches a preliminary view that the merger situation is likely to give rise to a substantial lessening of competition, it will issue a Statement of Decision (Provisional) to the applicant.[34] The Statement of Decision (Provisional) will state the facts on which CCCS relies, as well as the reasons why CCCS has reached the preliminary view that the merger is likely to give rise to a substantial lessening of competition. The Statement of Decision (Provisional) may also outline any commitments or directions that CCCS considers may be appropriate.

4.64 After the issuance of the Statement of Decision (Provisional), CCCS will give the applicant an opportunity to make written representations to CCCS and it may permit the merger parties to make oral representations to CCCS. The applicant will be permitted to inspect the documents in CCCS's file. Internal documents, and confidential information will not be available for inspection.[35] The applicant's written response to the Statement of Decision (Provisional) will also be an opportunity for the applicant to propose commitments. The applicant may choose to re-submit the commitments proposal (which was submitted after the deadline stipulated in the Phase 2 issues letter and which has not been evaluated by CCCS) or submit a fresh proposal together with any written representations to the Statement of Decision (Provisional). Should a commitments proposal be submitted after a Statement of Decision (Provisional) has been issued, CCCS will "stop the clock" upon receipt of the proposal to allow it to assess the proposed commitments. CCCS will "resume the clock" if it rejects the proposal at any point in time.

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[34] Regulation 10(2) of the *Competition (Notification) Regulations 2007.*

[35] Regulation 11 of the *Competition (Notification) Regulations 2007.*

4.65 Once CCCS has issued a notice setting out its Statement of Decision (Provisional), the merger parties can apply in writing to the Minister for Trade and Industry for the merger situation to be exempted on public interest considerations.[36] The parties should provide CCCS with a copy of their submissions to the Minister.

4.66 Having taken into account any oral and written representations made by the applicant in response to the Statement of Decision (Provisional), CCCS will take a final decision on the merger. It will then give notice of the decision to the merger parties and announce the decision on the public register. If CCCS intends to publish the text of the decision, the merger parties (and, where relevant, third parties) will be given an opportunity to indicate whether or not there is any confidential information in the decision. If CCCS agrees with the confidentiality claim, the confidential information will be redacted before the decision is published.

Interim Measures

4.67 Since the merger regime is voluntary, merger parties who have made an application may proceed with their anticipated merger or with further integration of their completed merger, as the case may be, at their own risk before CCCS issues a decision.

4.68 However, section 58A allows CCCS to impose interim measures, that is, directions it considers appropriate to prevent merger parties from taking any action that might prejudice CCCS's ability to consider the merger situation further and/or to impose appropriate remedies. Such directions may also be issued as a matter of urgency to prevent serious, irreparable damage to persons or to protect the public interest.

4.69 Interim measures may include directions that (i) stop the acquiring party from implementing the merger; (ii) prohibit the transfer of staff; (iii) set limits on the exchange of commercially sensitive information such as customer lists and prices; or, (iv) where for example the merger has already been implemented, require a merger to be dissolved or modified. In the case of anticipated mergers, CCCS may give a direction prohibiting the merger parties from acquiring control or equity interests. In situations where the merger situation does not involve the acquisition of shares, CCCS may give a direction to require the merged entity not to proceed further with the transaction or take further steps to implement the merger until the Application has been determined.

4.70 Section 58A(1) of the Act provides that interim measures may be imposed when CCCS has reasonable grounds for suspecting that the merger situation under consideration has resulted, or may be expected to result, in a SLC within the meaning of section 54 of the Act. Section 67(2) allows CCCS to impose interim measures in similar circumstances in relation to mergers that have not been notified to it but that are under investigation. As a matter of practice, however, CCCS is unlikely to use this power unless it believes that there is a real possibility that the merger situation will give rise to a SLC. The fact that CCCS has imposed interim measures does not rule out eventual clearance of the merger situation.

4.71 Once interim measures have been imposed, CCCS will consider any reasoned requests for waivers which are necessary to provide the parties with the flexibility required to run their business.

4.72 CCCS may publish interim measures that it imposes on its website.

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[36] Section 57(3) and section 58(3) of the Act; regulation 11(1)(d) of the *Competition (Notification) Regulations 2007*.

Procedure for Imposing Interim Measures

4.73 Under section 58A, CCCS must give prior written notice to the persons to whom it proposes to give the relevant direction (usually the merged entity in the case of a completed merger, or the acquirer in the case of an anticipated merger), indicating the nature of the proposed direction and the reasons for it. Such persons will be given an opportunity to make representations to CCCS. They can also appeal against CCCS's directions.[37]

4.74 *CCCS Guidelines on Directions and Remedies* provide further information on the procedure for directions imposing interim measures.

Enforcement of Directions Imposing Interim Measures

4.75 If a direction imposing interim measures has not been complied with, CCCS may apply to register the direction with a District Court in accordance with Order 97 of the Rules of Court. Any person who fails to comply with a registered direction without reasonable excuse may be found to be in contempt of court. The normal sanctions for contempt of court will apply, i.e. the court may impose a fine or imprisonment.[38]

4.76 Reference should be made to the relevant paragraphs of *CCCS Guidelines on Directions and Remedies* pertaining to the enforcement of directions on interim measures.

CCCS Decisions

Favourable Decisions

4.77 A favourable decision is a decision by CCCS that a merger has not infringed, or that an anticipated merger if carried into effect will not infringe, the section 54 prohibition. A favourable decision may be issued at the end of Phase 1 or Phase 2. Where CCCS makes a favourable decision, it will give notice of the decision to the merger parties. CCCS may also publish the text of the decision on the public register. Before publishing the decision, the merger parties (and, where relevant, third parties) will be given an opportunity to indicate whether or not there is any confidential information in the decision. If CCCS agrees with the confidentiality claims, the confidential information will be redacted before the decision is published.

4.78 Sections 59 and 60 of the Act provide that once CCCS has issued a favourable decision, it will not take further action unless it has reasonable grounds for suspecting that:

- information on which CCCS has based its decision (which may include information on the basis of which a commitment was accepted) was materially incomplete, false or misleading;
- a party who provided a commitment failed to adhere to one or more terms of the commitment; or
- where a favourable decision was given for an anticipated merger to proceed, the merger so effected, is materially different from the anticipated merger. Should any of these circumstances occur, the favourable decision may be revoked and CCCS may commence investigations into the merger.

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[37] Section 71(3) of the Act.

[38] Section 58A(5) and section 85 of the Act.

4.79 CCCS may, at the time of issuing a favourable decision for an anticipated merger, specify the validity period of the decision within which the anticipated merger must be carried into effect.[39] CCCS will not take further action if the anticipated merger is effected within the validity period, unless any of the circumstances stated in paragraph 4.78 occurs. In specifying the validity period, CCCS considers that one year will generally be sufficient for merger parties to act on the favourable decision and carry the anticipated merger into effect. However, CCCS will take account of the circumstances of each merger situation when specifying the duration of any validity period.

4.80 If the applicant is unable to carry the anticipated merger into effect within the validity period, the applicant may make a request to CCCS to extend the validity period. If the Application had been jointly made by more than one applicant, any request for extension must be jointly made by all of them.[40] The applicant(s) requesting for an extension must notify all other parties to the anticipated merger about the request for extension within 2 working days from the date on which the request is made.

4.81 A request for extension must be made to CCCS in writing, and must contain the following:

- an explanation as to why the anticipated merger cannot be effected within the validity period;
- a statement as to the duration of extension sought and an explanation as to why this duration is necessary;
- an explanation as to how the competitive environment has changed since the favourable decision was issued and how it may be expected to change further within the period of extension sought;
- an explanation as to how the competitive impact of carrying the anticipated merger into effect within the period of extension will differ from that if it had been carried into effect within the initial validity period.

All explanations should be clear and accompanied by relevant supporting documents.

4.82 Requests for extensions will be considered by CCCS on a case-by-case basis. Extensions may also be granted subject to conditions imposed by CCCS. Generally, CCCS is more likely to grant an extension if there is no material change in the competitive environment since the favourable decision was granted and the competitive impact from carrying the anticipated merger into effect within the period of extension sought will not be materially different than if the merger is carried into effect within the initial validity period. If the determination of whether the validity period should be extended requires significant analysis of the competitive impact of the merger situation, the request for extension is unlikely to be acceded to. In such instances, the merger parties may wish to consider making a fresh Application in respect of the anticipated merger instead.

Unfavourable Decisions

4.83 An unfavourable decision is a decision by CCCS that a merger has infringed, or that an anticipated merger if carried into effect will infringe, the section 54 prohibition. In other words, the merger has resulted, or may be expected to result, in a SLC within the meaning of the Act. An unfavourable decision is only issued at the end of Phase 2.

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[39] Section 57(7) of the Act.

[40] Section 57(8) of the Act.

4.84 If, towards the end of Phase 2, CCCS reaches a preliminary view that the merger situation is likely to give rise to a substantial lessening of competition, it will issue a notice to the merger parties. The notice will state the facts on which CCCS relies, as well as the reasons why CCCS has reached the preliminary view that the merger is likely to give rise to a substantial lessening of competition.[41] The notice will also outline any commitments or directions that CCCS considers may be appropriate.

4.85 CCCS will give the merger parties an opportunity to make written representations to CCCS and to inspect the documents in CCCS's file relating to the proposed unfavourable decision. Where appropriate, CCCS will allow the merger parties to make oral representations to CCCS. Internal documents, and confidential information will not be available for inspection.[42]

4.86 Once CCCS has issued a notice setting out its Statement of Decision (Provisional), the merger parties can apply in writing to the Minister for Trade and Industry for the merger situation to be exempted on public interest considerations. The parties should provide CCCS with a copy of their submissions to the Minister.[43]

4.87 Should the application to the Minister for Trade and Industry not be successful and having taken into account any oral and written representations made by the merger parties, CCCS will take a final decision on the merger. If CCCS makes an unfavourable decision, it will give notice of the decision to the merger parties and publish the decision on the public register. Before publishing the decision, the merger parties (and, where relevant, third parties) will be given an opportunity to indicate whether or not there is any confidential information in the decision. If CCCS agrees with the confidentiality claim, the confidential information will be redacted before the decision is published.

4.88 CCCS may also issue directions to remedy, mitigate or eliminate the adverse effects arising from the merger situation.[44] Reference should be made to the relevant paragraphs of *CCCS Guidelines on Directions and Remedies* pertaining to the enforcement of directions.

Competing Bids

4.89 Where there are competing bids for the same undertaking, CCCS will try to consider them simultaneously. However, this may not be possible when the bids have been made or notified to CCCS at different times, or where they raise different issues. If one of the bids has progressed to a Phase 2 review, it does not necessarily follow that the other bid(s) will follow suit. As in the case of a single bidder, each case must be considered on its own merits.

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[41] Regulations 10(2) and 11 of the *Competition (Notification) Regulations 2007.*

[42] Regulation 11 of the *Competition (Notification) Regulations 2007.*

[43] Section 57(3) and section 58(3) of the Act; Regulation 11(1)(d) of the *Competition (Notification) Regulations 2007.*

[44] Section 69(1)(c) and (d) of the Act.

5 OWN-INITIATIVE MERGER INVESTIGATIONS

5.1 CCCS may obtain information about merger situations through complaints from third parties or via its market intelligence function. CCCS may conduct an investigation of mergers which come to its attention whenever there are reasonable grounds for suspecting that a merger has infringed, or that an anticipated merger if carried into effect will infringe, the section 54 prohibition.[45]

5.2 The procedure for making complaints and the use of statutory powers to gather information are set out below.

Complaints about Merger Situations

Procedure for Complaints

5.3 In order to make a complaint about a merger situation to CCCS, complainants may make use of the Complaint Form on CCCS's website. Alternatively, complainants may file a written complaint by emailing cccs_feedback@cccs.gov.sg. The complaint should include the following details:

- a description of the relationship between the complainant and the merger parties or merged entity;
- a concise explanation of the reasons for, and details of, the complaint, including details of the merger situation to which the complaint relates, when and how the complainant became aware of the merger situation, and (where possible) the relative market positions of the parties named in the complaint; and
- available evidence directly related to the facts set out in the complaint, including appropriate copies of relevant correspondence, statistics or data which relate to the facts set out in the complaint (in particular, where they show developments in the market).

5.4 CCCS may also contact the complainant to seek further information or clarifications.

5.5 CCCS will consider each complaint on its merits and the strength of any supporting evidence to determine if an investigation is warranted. As mentioned in paragraph 3.17 above, CCCS is not obliged to follow-up or investigate complaints relating to non-notified mergers, as this would undermine the benefits of the voluntary regime.

Confidentiality Claimed by Complainants

5.6 If a complainant does not wish to be identified publicly as a complainant, this should be made clear to CCCS at the earliest opportunity. CCCS will consider the complainant's reasons for wanting his identity to be kept confidential. However, potential complainants should note that it is sometimes necessary to reveal information which may identify the source of a complaint for the effective handling of the complaint. Additional steps which may be required to protect the identity of the complainant may also hamper investigations.

5.7 When providing information or documents to CCCS, complainants should provide a non-confidential version of the complaint and of any other information or documents which the complainant may furnish. Please refer to Part 4, paragraphs 4.30 to 4.35 for further details regarding confidentiality claims.

5.8 CCCS recognises the importance of complainants voluntarily supplying information and also their interest in maintaining confidentiality. If CCCS considers it necessary in the interest of transparency to disclose any of the information over which confidentiality has been claimed, it will, to the extent that it is practicable to do so, consult the complainant who has provided the information.

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[45] Section 62(1)(c) and (d) of the Act.

Powers of Investigation

5.9 CCCS's powers of investigation include the power to:

- require the production of specified documents or information (pursuant to section 63 of the Act);
- enter premises without a warrant (pursuant to section 64 of the Act); and
- enter and search premises with a warrant (pursuant to section 65 of the Act).

5.10 In the context of own-initiative merger investigations, CCCS may, for example, use its powers under section 63 of the Act to require the production of specified documents or information either from the merger parties or from third parties. The section 63 notice will specify which documents or information are required and state a deadline for response.

5.11 The Act sets out a number of criminal offences which may be committed where an undertaking fails to comply or cooperate when these powers are exercised, as well as limitations on the use of CCCS's powers of investigation. Please refer to the relevant paragraphs of *CCCS Guidelines on the Powers of Investigation in Competition Cases 2016* pertaining to the exercise of CCCS's powers of investigation.

6 REMEDIES: COMMITMENTS AND DIRECTIONS

6.1 Remedies may be implemented either by CCCS's acceptance of commitments which address competition concerns arising from a merger situation, or by directions issued by CCCS.

Commitments

6.2 CCCS may accept commitments at any time during a Phase 1 review or during a Phase 2 review or during an investigation before a final decision on whether or not a merger situation infringes the section 54 prohibition has been taken. Commitments are generally proposed by the merger parties and must be aimed at remedying, mitigating or preventing the competition concerns which have been identified as arising from the merger situation. Commitments may be accepted by CCCS if CCCS deems them to be appropriate under section 60A. Please refer to the relevant paragraphs of *CCCS Guidelines on Directions and Remedies* for a more detailed discussion on commitments.

6.3 Commitments are binding on the parties when they are accepted by CCCS and can be enforced by CCCS via the courts.

Directions

6.4 CCCS may give directions when it has made a decision that a merger situation infringes the section 54 prohibition. Directions are therefore only relevant following the issuance of an unfavourable decision as a result of a Phase 2 review or as a result of an investigation of an anticipated merger or merger. Directions may consist of a prohibition of the merger, or an order that the parties take certain steps to address the competition concerns. Directions may also relate to the imposition of financial penalties.

6.5 Section 69 of the Act provides that CCCS may give such directions as it considers appropriate to remedy, mitigate or prevent the adverse effects to competition caused by the merger situation.

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6.6 Section 69(2) of the Act provides examples of directions which may be issued by CCCS. These include directions:

- prohibiting an anticipated merger from being carried into effect or requiring a merger to be dissolved or modified in such manner as CCCS may direct;
- requiring the merger parties to enter into such legally enforceable agreements as may be specified by CCCS to prevent or lessen the anti-competitive effects which have arisen;
- requiring the merger parties to dispose of such operations, assets or shares of such undertaking in such manner as may be specified by CCCS; and
- providing a performance bond, guarantee or other form of security on such terms and conditions as CCCS may determine.

6.7 Please refer to the relevant paragraphs of *CCCS Guidelines on the Substantive Assessment of Mergers* for more information on CCCS's consideration of appropriate remedies for mergers.

Procedures for Directions

6.8 The directions must be in writing and may be given to such person(s) as CCCS considers appropriate.

6.9 Please refer to the relevant paragraphs of *CCCS Guidelines on Directions and Remedies* pertaining to the procedures which govern the issue of directions.

Enforcement of Directions

6.10 If a direction has not been complied with, CCCS may apply to register the direction with a District Court in accordance with Order 97 of the Rules of Court. Any person who fails to comply with a registered direction without reasonable excuse may be found to be in contempt of court. The normal sanctions for contempt of court apply, i.e. the court may impose a fine or imprisonment. The court may also make orders to secure compliance with the direction, or to require any person to do anything to remedy, mitigate or eliminate any effects arising from non-compliance with the direction.

6.11 Please refer to the relevant paragraphs of the *CCCS Guidelines on Directions and Remedies* pertaining to the enforcement of directions.

Directions as to Financial Penalties

6.12 Under section 69 of the Act, CCCS may impose a financial penalty if a merger has infringed the section 54 prohibition and the infringement was committed intentionally or negligently. A financial penalty may be up to 10% of the turnover of each relevant merger party in Singapore for each year of infringement for a maximum period of 3 years.

6.13 Generally, CCCS prefers structural and (to a lesser degree) behavioural remedies over financial penalties in order to restore the competitive conditions in the market. However, in exceptional circumstances, financial penalties may be imposed, for example to reflect the seriousness of the infringement or to deter future infringements.

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6.14 In determining the financial penalty imposed under section 69 of the Act, CCCS will take the following factors into consideration:

- the seriousness of the SLC;
- the turnover of the relevant parties in Singapore for the relevant product and relevant geographic markets where competition is substantially lessened;
- the time the merger parties took to carry the infringing merger into effect and how long the merged entity has been in place; and
- other relevant factors, e.g. deterrent value, the presence or absence of any aggravating or mitigating factors.

6.15 CCCS may impose financial penalties only if it is satisfied that the section 54 prohibition has been infringed intentionally or negligently:

- Infringement is intentional if the merger parties were aware, or could not have been unaware, that the merger infringed the section 54 prohibition.
- Infringement is negligent if the merger parties ought to have known that the merger would, or was reasonably likely to, infringe the section 54 prohibition.

An example of where CCCS may possibly impose a financial penalty is where merger parties, after having received an unfavourable decision from CCCS in respect of an anticipated merger, proceed with an allegedly different merger which is simply a sham restructuring of the anticipated merger.

6.16 Should CCCS issue a direction requiring an undertaking to pay a financial penalty, it will inform the undertaking of CCCS's reasons for doing so. If an undertaking fails to pay the penalty within the date specified in CCCS's direction and the undertaking has either not appealed against the imposition or amount of the penalty or such an appeal has been made and the penalty upheld, CCCS may register the direction with a District Court in accordance with the Rules of Court. The effect of registration is that the imposition of the penalty has the same force and effect as if it had been an order originally obtained in the District Court and can be executed and enforced accordingly, for example, by writ of seizure and sale.

6.17 CCCS will publish the details of all directions imposed under the Act on the public register.

Rights of Private Action

6.18 Parties suffering loss or damage directly arising from a merger that has infringed the section 54 prohibition are entitled to commence a civil action seeking relief against the relevant undertakings. Such rights of private action shall only arise after CCCS has made a decision that a merger has infringed the section 54 prohibition and the appeal period has expired or, where an appeal has been brought, upon determination of the appeal.[46]

6.19 Reference should be made to the relevant paragraphs of *CCCS Guidelines on the Major Provisions* pertaining to the rights of private action.

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[46] Section 86 of the Act.

7 EXCLUSIONS AND EXEMPTIONS

Exclusions in the Fourth Schedule

7.1 The section 54 prohibition does not apply to the mergers specified in the Fourth Schedule to the Act, namely:

- Any merger:
  - approved by any Minister or regulatory authority pursuant to any requirement for such approval imposed by any written law;
  - approved by the Monetary Authority of Singapore pursuant to any requirement for such approval imposed under any written law; or
  - under the jurisdiction of another regulatory authority under any written law relating to competition, or code of practice relating to competition issued under any written law.
- Any merger involving any undertaking relating to any of the following specified activity as defined in paragraph 6(2) of the Third Schedule of the Act:
  - The supply of ordinary letter and postcard services by a person licensed and regulated under the *Postal Services Act 1999;*
  - The supply of piped potable water;
  - The supply of wastewater management services, including the collection, treatment and disposal of wastewater;
  - The supply of scheduled bus services by any person licensed and regulated under the *Bus Services Industry Act 2015;*
  - The supply of rail services by any person licensed and regulated under the *Rapid Transit Systems Act 1995;* and
  - Cargo terminal operations carried out by a person licensed and regulated under the *Maritime and Port Authority of Singapore Act 1996.*
- Any merger with net economic efficiencies where the economic efficiencies arising or that may arise from the merger outweigh the adverse effects due to the SLC in the relevant market in Singapore.

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Exemption under Public Interest Considerations

7.2 Under sections 57(3), 58(3) and 68(3) of the Act, where CCCS proposes to make an unfavourable decision, it must give written notice of the proposed unfavourable decision to the merger parties. The merger parties may, within 14 days of the date of the notice, apply to the Minister for the merger situation to be exempted on the ground of any public interest consideration. Section 2 of the Act specifically provides that "public interest considerations" for the purposes of the Act means "national or public security, defence and such other considerations as the Minister may, by order published in the Gazette, prescribe." Hence, for a matter of public interest to qualify as a "public interest consideration" that may be relied on by the Minister when granting an exemption from section 54 of the Act, such a matter will have to first be gazetted. As of the date of publication of these Guidelines, the Minister has not exercised his power to gazette any other matters as "public interest considerations" under section 2 of the Act. The Minister's consideration of an application for a merger situation to be exempted on the ground of any public interest consideration is hence limited to matters of national or public security and defence, unless other matters are gazetted as such. The decision of the Minister for the exemption will be final.

7.3 The Minister may revoke any exemption of a merger situation which has been granted if the Minister has reasonable grounds for suspecting that the information on which the Minister based his or her decision was incomplete, false or misleading in a material particular.

Other Exclusions

7.4 Under the Third Schedule, restrictions which are directly related to and necessary for the merger are excluded from the section 34 and 47 prohibitions (please see paragraph 4.38). However, agreements by and conduct of the merged entity are still subject to the Act.

8 APPEALS

8.1 There is a right of appeal to the Competition Appeal Board against any decision by CCCS in respect of a merger situation or any direction (including interim measures) imposed by CCCS.[47] An appeal against CCCS's decision in respect of a merger situation may be made by any merger party, while an appeal against a direction may be made by the person to whom CCCS gave the direction. An appeal must be brought within the time period specified in the *Competition (Appeals) Regulations*. Third parties can apply to the courts for review.

8.2 Reference should be made to the relevant paragraphs of *CCCS Guidelines on Directions and Remedies* pertaining to appeals against directions (including directions as to financial penalties) issued by CCCS.

8.3 There is no right of appeal against CCCS's refusal to accept any commitments offered, but parties may appeal against CCCS's refusal to vary, substitute or release existing commitments.

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[47] Section 71 of the Act.

9 GLOSSARY

Ancillary restriction	Agreement, arrangement or provision which is "directly related and necessary to the implementation" of the merger. Ancillary restrictions are excluded from the section 34 prohibition and section 47 prohibition under the Third Schedule of the Act.
Anticipated merger	Arrangement that is in progress or in contemplation that, if carried into effect, will result in the occurrence of a merger referred to in section 54(2) of the Act.
Applicant(s)	Merger party(ies) who have filed an Application with CCCS.
Application	Application for a decision in relation to a merger situation, by way of notification under section 57 or section 58 of the Act.
CR3	Concentration ratio (that is, the aggregate market share) of the three largest firms in the market.
Favourable decision	Decision that a merger has not infringed, or that an anticipated merger if carried into effect will not infringe, the section 54 prohibition.
Merger	A merger as defined in section 54(2) of the Act.
Merger parties	Parties to an anticipated merger, or parties involved in a merger.
Merger situation	Refers to both completed mergers and anticipated mergers.
Parties involved in a merger	Persons or undertakings specified in section 54(2) of the Act and includes the merged entity.
SLC	Substantial lessening of competition.
Unfavourable decision	Decision that a merger has infringed, or that an anticipated merger if carried into effect will infringe, the section 54 prohibition.

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CCCS GUIDELINES ON MARKET DEFINITION

Effective from: 1 February 2022

1 INTRODUCTION

1.1 These guidelines provide the analytical framework on how the Competition and Consumer Commission of Singapore ("CCCS") may define markets when investigating possible infringements of the section 34 and 47 prohibitions under the *Competition Act 2004* ("the Act"). These guidelines should be read together with the *CCCS Guidelines on the Substantive Assessment of Mergers* for the purposes of market definition relating to the section 54 prohibition.

1.2 Market definition and the measurement of market shares are important in the process of determining:

- whether agreements, decisions between associations of undertakings or concerted practices have as their object or effect an appreciable prevention, restriction or distortion of competition in a market under the section 34 prohibition, or

- whether an undertaking with substantial market power amounting to a dominant position in a market has abused its market power under the section 47 prohibition.

Once the relevant market has been defined, market shares can be measured. The other aspects of competition analysis, including the potential for new entry into the market, will then be considered.

1.3 In cases where it may be apparent that an activity is unlikely to have an appreciable adverse effect on competition, or that the undertaking under investigation does not possess substantial market power within any sensible market definition, it would not be necessary to formally establish a definition of the market.

1.4 These guidelines are not a substitute for the Act, the regulations and orders. They may be revised should the need arise. The examples in these guidelines are for illustration. They are not exhaustive, and do not set a limit on the investigation and enforcement activities of the CCCS. In applying these guidelines, the facts and circumstances of each case will be considered. Persons in doubt about how they and their commercial activities may be affected by the Act may wish to seek legal advice.

1.5 A glossary of terms used in these guidelines is attached.

Purpose of Market Definition

1.6 Competition analysis usually involves an identification of the potential competition concerns, which informs the market definition exercise. Market definition is a useful tool to provide the framework for this competition analysis through identifying the competitive constraints acting on the undertaking(s) involved (such as, a seller or group of sellers of a given product), which assists CCCS to assess the market power of the undertaking(s). For example, an investigation relating to the section 47 prohibition of an undertaking whose market share is low can normally be closed at an early stage unless other relevant factors provide strong evidence of dominance. This is because an undertaking with a low market share will usually not possess substantial market power.

1.7 Market definition is also useful in assessing the effects of potentially anticompetitive activity on competition. Market definition may facilitate the assessment that agreements do not have an appreciable adverse effect on competition. For example, in the context of an agreement involving undertakings whose combined share of the relevant market is low, the agreement is unlikely to raise competition concerns relating to the section 34 prohibition, unless it contains, for example, price fixing, bid-rigging, market sharing, or output limitations. Market definition may also facilitate the assessment of whether the conduct of a dominant undertaking has, or is likely to have, an adverse effect on the process of competition. For example, in an investigation relating to the section 47 prohibition, where an undertaking is dominant in one market, but engages in conduct to foreclose other undertaking(s) in another market, market definition is useful to identify the market in which the foreclosure occurs in order to assess the effects of such conduct. Similarly, where a merger involves undertakings whose combined share of the relevant market is low, the merger is unlikely to raise competition concerns relating to the section 54 prohibition.

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1.8 Market definition may also be relevant for calculating a financial penalty that may be imposed on an undertaking for having infringed the section 34, 47 or 54 prohibition. Factors such as the structure and condition of the market, and the market share(s) of the undertaking(s) involved may be considered in determining the seriousness of infringement, as well as the turnover for the relevant product and relevant geographic markets affected by the infringement. Please refer to the *CCCS Guidelines on the Appropriate Amount of Penalty in Competition Cases* for the calculation of financial penalties.

2 MARKET DEFINITION

The Hypothetical Monopolist Test

2.1 A market is commonly understood to consist of both buyers and sellers of a product in a certain geographical area. However, the term "market" has a specific meaning for competition law purposes. The essential task in market definition is to define all the products on the demand side that buyers regard as reasonable substitutes for the product under investigation ("focal product"), and then to identify all the sellers who supply the focal and substitute products, or who could potentially supply them – this is the relevant market. This exercise of market definition includes defining the geographical reach of the relevant market, which may extend beyond the area under investigation and in which the focal product is sold ("focal area").

2.2 The hypothetical monopolist test ("the test") is a conceptual approach used to define markets. The test (in essence, a "price-elevation" test) tries to identify all the products that buyers regard as reasonably substitutable for the focal product. Once those substitute products are identified, all those undertakings that could potentially supply the focal product and substitutes can be identified. These are the competitors that actually constrain the exercise of market power.

2.3 In essence, the test seeks to establish the relevant market by including in the market all the products and their sellers that constrain the exercise of market power and then, determine if a hypothetical monopolist that controls this defined market would be able to act without constraint.

2.4 The relevant market is therefore the smallest product group (and geographical area) such that a hypothetical monopolist controlling that product group (in that area) could profitably sustain "supra competitive" prices, i.e. prices that are at least a small but significant amount above competitive levels. That product group (and area) is usually the relevant market for competition law purposes.

2.5 If, for example, a hypothetical monopolist over a candidate product group could not profitably sustain supra competitive prices, then that product group would be too narrow to be a relevant market. If, on the other hand, a hypothetical monopolist over a subset of a candidate product group could profitably sustain supra competitive prices, then the relevant market would usually be narrower than the candidate product group.

2.6 The test starts with a narrow definition of the product and geographic market. This would normally be the focal product or the area in which the focal product is sold. Using this narrow definition, the following question is asked: whether a significant number of buyers will switch to other products (or areas), that are the next best substitutes, if the price of the focal product is raised by a small but significant, non-transitory amount above competitive levels. If the answer is yes, these other products (or areas) should be included in the definition of the market because these other products (or areas) potentially constrain the exercise of market power. The group of products (or areas) is widened to include those products (or areas) and their sellers and the same question is asked again.

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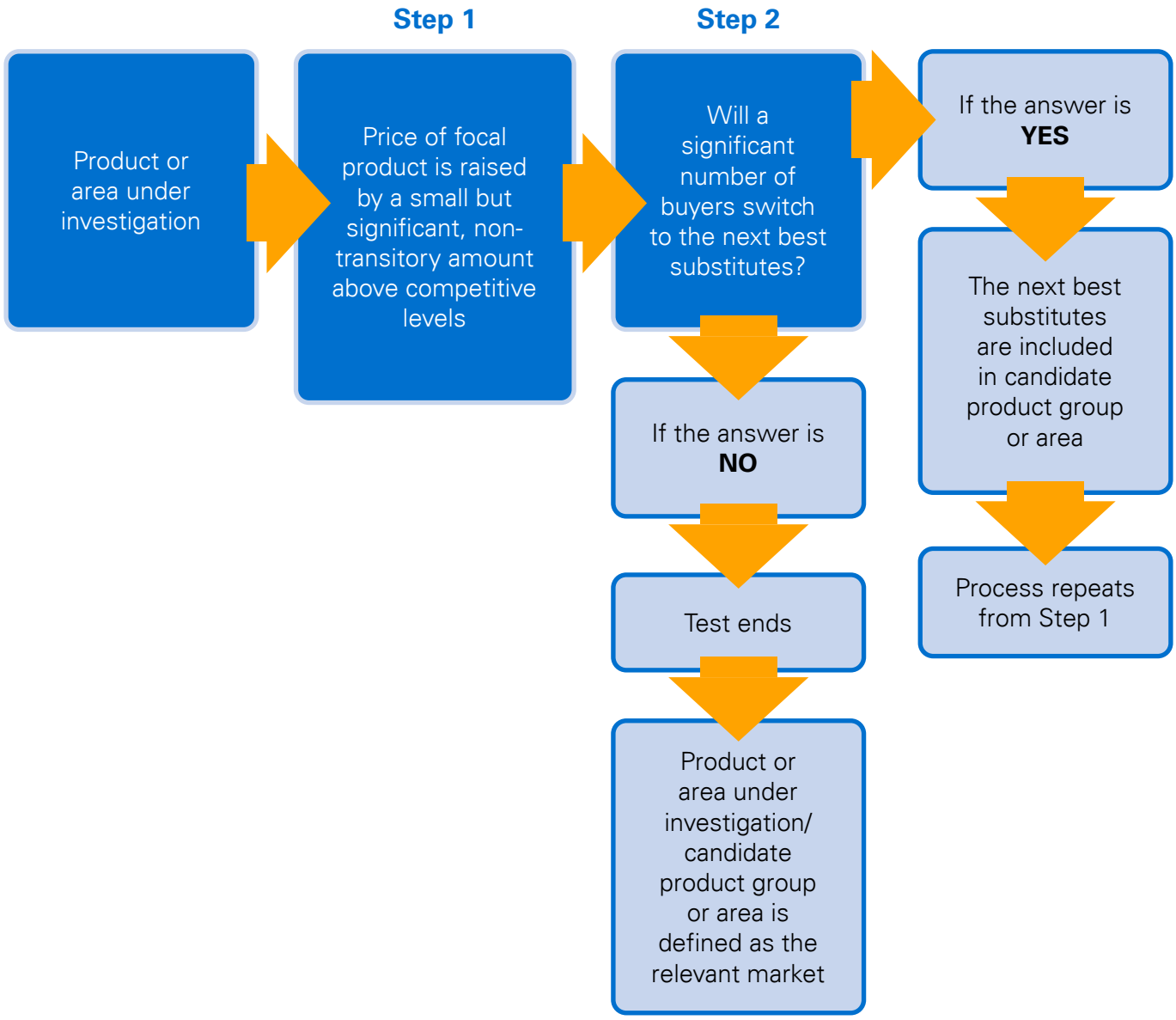
2.7 This question is repeated and the market is widened until the point is reached when a significant number of buyers do not respond to the small but significant increase in price by switching to other products (or areas). The relevant market containing the principal constraints on the exercise of market power is then used to assess the impact of an agreement or conduct, or to assess whether an undertaking is dominant in that market. The following diagram provides an illustration of this process.



2.8 An increase of about 10% above the competitive price will be used for the test. The actual percentage increase used may vary depending on the particular facts of each case.

2.9 It should be emphasised that defining a market in strict accordance with the test's assumptions is rarely possible. Even if the test could be conducted precisely, the relevant market is in practice no more than an appropriate frame of reference for competition analysis. The test provides a conceptual framework within which evidence on competitive constraints can be gathered and analysed.

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Practical Issues

2.10 In practice, defining a market requires an assessment of the various types of evidence and the exercise of judgement. It may not be necessary to define the market uniquely, where there is strong evidence that the relevant market is one of a few plausible market definitions, and the assessment on competitive impact is shown to be largely unaffected whichever market definition is adopted.

2.11 A market definition should normally contain two dimensions: the product market and the geographic market. It is often practical to define the relevant product market first and then to define the relevant geographic market.

3 THE PRODUCT MARKET

3.1 Defining the relevant product market involves determining which products would be regarded by buyers as substitutes for the focal product on the demand side and then determining, on the supply side, who currently supply such products and also who could potentially supply them at short notice by, for example, switching production from other products.

Demand-Side

3.2 Product market definition starts by considering the products which the parties to an agreement produce, or the products which are the subject matter of an abuse of dominance complaint. The effects of a price increase above competitive levels are considered in order to determine the relevant market for these products.

3.3 The hypothetical monopolist test will usually be carried out using a 10% increase in price above competitive levels. This figure may vary depending on the facts of each case. The price increase must be large enough that a response from buyers is reasonably likely, but not so large that the price rise would inevitably lead to a substantial shift in demand, and so lead to markets being defined so widely that market shares convey no meaningful information on market power.

3.4 If a significant number of buyers switch to substitute products following the increase in price above competitive levels, these substitute products would be included in the definition of the product market. Not all potential substitutes are considered. It is when a significant number of buyers are willing to substitute to a different product and exert pressure to prevent the "hypothetical monopolist" from exercising its market power, that these substitute products will be included in the market definition.

3.5 Products may be viewed as substitutes although they do not have similar physical or other characteristics. Their prices also need not be similar. For example, if two products serve the same function but one is of a higher price and quality than the other, they might be included in the same market. This is because even though one product is of a higher price and quality than the other, a price increase in the product of a higher quality could be such that buyers no longer feel that the quality difference between the two products outweigh their price differential. Hence a price increase in one product could lead to buyers switching to the other product.

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3.6 The important issue is whether a hypothetical monopolist could profitably sustain prices above competitive levels. The more quickly buyers can switch, the greater the constraint on the exercise of market power. Depending on the case, products for which buyers take longer than one year to switch in response to a price increase are generally not included in the same market. Other factors such as significant buyer switching costs[1] will be taken into account. The relevant time period used in the assessment of switching behaviour may be significantly shorter than one year, for example, in industries where transactions are made very frequently. A case by case analysis of switching is therefore appropriate.

3.7 Evidence on substitution by buyers can be obtained from a variety of sources, for example, trade associations, buyers, competitors, and market research reports. In particular, buyers can be interviewed directly to determine their reaction to a hypothetical price increase. However, answers to these hypothetical questions should be treated with caution. Survey evidence might also provide information on buyer preferences that would help to assess substitutability, for example, evidence on how buyers rank particular products, whether and to what extent brand loyalty exists, and which characteristics of products are important in their decision to purchase.

3.8 Evidence from undertakings active in the market and their commercial strategies may also be useful. For example, company documents may indicate which products the undertakings under investigation believe to be the closest substitutes to their own products. Company documents such as internal communications, public statements, and studies on buyer preferences or business plans may provide other useful evidence.

3.9 Other possible types of information that CCCS may consider as evidence on substitution include:

- **Switching costs:** Buyers could be deterred from substitution because of the high costs involved. High switching costs relative to the value of the product would make substitution unlikely.

- **Patterns in price changes:** Supplementary evidence can be gathered from patterns in price changes. If two products share a similar pattern of price changes unrelated to changes in cost or general price inflation, this may indicate (although it is not proof) that these two products could be close substitutes. Similarly, if the prices of two products diverge over time without significant levels of substitution, then this could indicate that these products may not be in the same market. However, price divergence may also reflect changes in quality, and in this case, the products could be considered to be in the same market.

- **Own or cross price elasticities:** The own price elasticity of demand provides estimates of the percentage change in demand for a product (for example, the focal product) arising from a change in its price. The cross price elasticity of demand measures the percentage change in demand for a product (for example, a rival product) in response to a change in price of another product (for example, the focal product). In general, if there is little change in the amount of a product bought by buyers as a result of a change in price (either in the price of the product itself or the rival product) then this could imply that there is limited substitutability.

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[1] From a buyer's point of view, switching costs can be defined as the real or perceived costs that are incurred when changing seller but which are not incurred by remaining with the current seller.

- **Product characteristics:** Evidence on product characteristics may provide useful information where buyer substitution patterns are likely to be influenced significantly by those characteristics. Where the objective characteristics of products are very similar and their intended uses the same, this would be good evidence that the products are close substitutes. However, the following qualifiers should be noted. First, even where products apparently have very similar characteristics and intended use, switching costs and brand loyalty may affect how substitutable they are in practice. Second, although products display similar physical characteristics, this does not necessarily mean that buyers would view them to be close substitutes. For example, buyers of peak season (school vacations) tour packages may not view off-peak tour packages as a close substitute. Third, products with very different physical characteristics may be close substitutes if they have a very similar use from a buyer's point of view.

- **Price-concentration relationship:** Evidence on price-concentration relationship may also be informative. Price-concentration studies examine how the price of a product in a distinct area varies according to the number (or share of supply) of other products sold in the same area. These studies are useful where data is available for several distinct areas with varying degrees of concentration. For example, if observations of prices in several geographical areas suggest that when two products are sold in the same area, prices are significantly lower than when they are not, this might suggest that the two products are close substitutes (provided that it is possible to distinguish this from the effect of other factors which might explain the price differences).

Price Discrimination

3.10 In some cases, an undertaking may be able to charge some buyers (i.e. captive buyers[2]) a higher price than others (i.e. non-captive buyers[3]), where the price difference is not related to higher costs of serving those buyers. This is called "price discrimination". Price discrimination is only possible when the undertaking is able to differentiate between captive and non-captive buyers, and there is no arbitrage between them. The hypothetical monopolist could be able to discriminate between buyers due to a variety of reasons, for example:

- It is not in all cases that buyers are able to switch from one product to another. The switching costs could be so high that buyers are locked in to purchasing a particular product. For example, a buyer might use a product as an input to its production process and switching to a rival product might mean increased costs and lower quality production, as well as adjustments to its production process.

- Buyer demand may differ at different times, for example, demand for taxi services after midnight is much less price sensitive than demand for the same service during other times of the day.

- Buyer demand for an input may differ depending on the purpose for which it is used.

3.11 Where a hypothetical monopolist is able to charge different prices for captive and non-captive buyers, separate relevant markets could be created. For example, tour agencies could price discriminate between travellers who travel during peak season (during the school vacations) and those who are able to travel during off- peak season (during the school term). These could be two separate markets.

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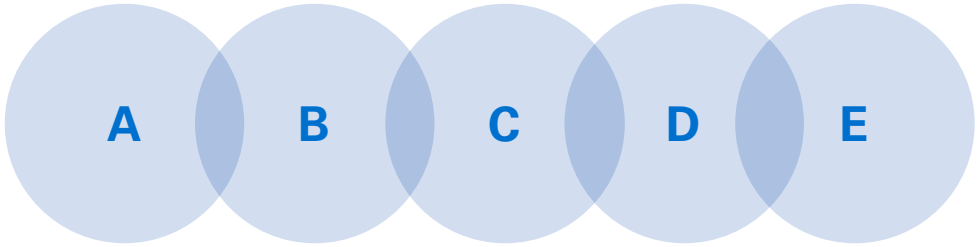
[2] Captive buyer is defined as a buyer who is unable to switch from one product to another.

[3] Non-captive buyer is defined as a buyer who has the ability to substitute one product for another. A hypothetical monopolist may be able to practise price discrimination if it can differentiate between captive and non-captive buyers by charging higher prices to captive buyers and lower (competitive) prices to non-captive buyers for the same product or service.

3.12 Where an undertaking is unable to price discriminate, this may lead to the relevant market being wider than the focal product or focal area. For example, sellers may face price constraints such that they must set a uniform price across products or across geographical areas. Although it might in theory be profitable for a hypothetical monopolist to raise price in the focal area, perhaps because substitutes are unavailable there, the existence of a price constraint may make such a price rise unprofitable, because it would require that prices be raised in other areas where substitutes are present. Price constraints may thus lead to the relevant market being widened beyond the focal area. In a given case, evidence on the extent to which prices are constrained and the effect of the constraint on substitution would need to be considered when assessing the appropriate relevant market.

Chains of Substitution

3.13 The existence of chains of substitution where the price of one product constrains the price of another product, which in turn constrains the price of a further product, might lead to the definition of a relevant market, which includes products or areas at the boundaries of the market which are not directly substitutable for the focal product. Hence a chain of substitution could exist, in which a series of five differentiated products (A to E) can be linked (see diagram below). The closer the two products are to each other in the chain, the more substitutable they are from the point of view of buyers. The important consideration is therefore whether, via these chains of substitution, the ability to raise the price of the focal product, for example product B, would be constrained by product E. An important point to note is that in such situations, there should be no breaks in the chain that would indicate the existence of separate markets.



3.14 To illustrate further, buyers may regard products A and C as very good substitutes for product B and they may view product D as a very poor substitute for product B, but a good substitute for product C. Buyers may also view product E as a good substitute for product D, but a very poor substitute for product C, and a much poorer substitute for product B. An example could be memory sticks with different storage capacities.

3.15 Even though all products in the chain are substitutes, this does not mean that the whole chain is the relevant market. For example, it may be that a hypothetical monopolist of three products next to each other in the chain could profitably sustain prices 10% above competitive levels. In short, the hypothetical monopolist test is a way of determining what range of products in the chain constitutes the relevant product market.

3.16 Actual evidence of such chains of substitution, for instance, where it can be shown that there exists price constraints, price interdependence, or similar price levels between the focal product and the indirect substitute at the extended portion of the chain would be useful considerations as further supporting information for an extension of the relevant market.

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Supply-Side

3.17 Undertakings might be prevented from charging higher prices if other undertakings currently not supplying the product in question could easily switch production or otherwise supply the product within a short time period. In other words, substitution can occur on the supply side as well. Supply-side substitution can be thought of as a special case of entry that occurs quickly (generally less than one year); effectively (generally on a scale large enough to affect prices); and without the need for substantial sunk investments[4]. Supply-side substitution addresses the questions of whether, to what extent, and how quickly, undertakings could start supplying a market in response to a hypothetical monopolist attempting to sustain supra competitive prices.

3.18 For example, depending on the different types of coating used, different grades of paper can be produced for different purposes. Buyers may not view the different types of paper as substitutable, but because they are produced using the same plant and raw materials, it may be relatively easy for sellers of one grade of paper to switch production to another grade. Hence a hypothetical monopolist in one grade of paper might not be able to profitably sustain prices above competitive levels because sellers currently producing other grades would switch production to that grade of paper.

3.19 Undertakings that can potentially supply the product in less than 12 months would normally be considered as part of the relevant market.

3.20 Indications of supply-side substitution could include:

- **Ease of substitution:** Potential sellers could be interviewed as to whether substitution is possible in terms of technical feasibility, substitution costs and the time taken to switch production. The key consideration is whether it would be worthwhile to switch production given a 10% price increase above the competitive price.

- **Evidence as to existing capacity:** Undertakings may be prevented from switching production because of a lack of spare capacity to supply the new products. Undertakings could also face difficulties in obtaining necessary inputs or finding distribution outlets.

- **Buyer preference:** Even though new undertakings may be able to supply the new products, buyers might not choose to buy the products. The views of buyers on how loyal they are to existing products and whether they would consider buying from new sellers could be relevant. More generally, buyers may also be able to provide information regarding potential sellers.

3.21 Whether a potential competitive constraint is labelled a supply-side constraint (and so part of market definition) or potential entry (and so not within the market) should not matter in an overall competitive assessment. If there is serious doubt about whether possible supply-side substitution should be taken into account, for example, when supply-side substitution does not take place quickly and easily, the market will be defined only on the basis of demand-side substitutability. The supply-side constraint in question will be considered when analysing potential entry into the market.

Asymmetric Substitution

3.22 Demand-side substitution may not necessarily be the same in both directions. In such a case, there may be asymmetric substitution where substitution only occurs in one direction and not the other. For example, a consumer may be able to substitute from a branded luxury product to a more mass-market product but not necessarily the other way. Similarly, supply-side substitution may also be asymmetric. For example, it may be easier for a producer to undertake retail sales and therefore be a ready entrant into the retail market, than it would be for a retailer to undertake production of the products it sells.

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[4] A sunk investment or sunk cost is a cost incurred on entering a market that is not recoverable on exiting that market. This could include investments in product placement, distribution and production technology.

4 THE GEOGRAPHIC MARKET

4.1 The geographic market refers to the area over which substitution takes place. If buyers will travel further afield to buy products when their local prices are increased, then the geographical spread of the market is wide and vice versa. If sellers from afar will now supply to local markets because the local price has risen, then the geographic market is also wider than the situation where only local sellers are willing to supply.

4.2 The geographic scope of the market can be defined using the same framework used to analyse the product market, while putting emphasis on three particular categories of issues:

- Demand-side issues (usually for defining retail markets);
- Supply-side issues (usually for defining wholesaling and manufacturing markets); and
- Imports.

Demand-Side

4.3 The process for defining the geographic market is similar to the process for defining the product market. It begins by looking at a relatively narrow geographic area, which usually refers to the focal area, by asking if a 10% increase in the price of a product in one area would lead to buyers switching to sellers in neighbouring areas. If a significant number of buyers are likely to switch to other sellers, this would restrain the ability of a hypothetical monopolist to charge higher prices in its area. These neighbouring areas would be included in the market definition.

4.4 Use of the chains of substitution could potentially lead to a larger geographic market. Not all of the neighbouring areas may be included in the geographic market (depending on the case). There could be areas where the chain of substitution is broken.

4.5 The evidence used to define geographic markets on the demand side would usually be similar to that used to define the product market. An additional consideration would be the value of the product. Generally, the higher the price of a product, the greater the willingness of buyers to travel further to buy cheaper supplies. The mobility of buyers (whether buyers have the ability to travel to buy cheaper supplies) is also relevant.

4.6 In the case of consumer products, geographic markets may often be quite narrow if a significant number of buyers are unlikely to switch to products sold in neighbouring areas, or countries. For wholesaling or manufacturing markets where transport costs are not too high, buyers may be in a better position to switch between sellers in different regions.

Supply-Side

4.7 Apart from the willingness of buyers to switch to sellers from neighbouring areas in response to a price increase, the potential for undertakings in neighbouring areas to supply to buyers should also be considered. As in the product market definition, these sellers should be considered if they can respond in the short run (for example, within one year). Significant costs in terms of advertising or marketing, or non-access to distribution channels may constrain a potential seller.

4.8 The costs of transportation should also be considered. If buyers and sellers face high transportation costs, then the geographic market will be smaller than when transport costs are low. The higher the costs of transportation, the smaller the geographic market is likely to be.

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Imports

4.9 Significant imports of a particular product may indicate that the market is wider than Singapore. Imports could come solely from the international operations of domestic sellers, in which case they may not act as an independent constraint on domestic undertakings. Also, in order to import on a larger scale, international sellers may require substantial investments in establishing distribution networks or branding their products in the destination country. These factors may mean that sellers of the relevant product located outside Singapore would not provide a sufficient constraint on domestic sellers to be included in the relevant geographic market.

4.10 On the other hand, a lack of imports does not necessarily imply that the market could not be a regional or a wider international market. The potential for imports may still be an important source of supply-side substitution should prices rise. This possibility could constrain the exercise of market power by existing sellers and may be taken into consideration at the stage(s) of geographic market definition, competition assessment, or both.

4.11 Where the geographic market is to be widened as a result of supply-side substitution through significant imports, the competitive constraints considered should only reflect those that impact competition in Singapore specifically. For example, if the geographic market is widened to worldwide to reflect significant imports from global suppliers as opposed to just suppliers in Singapore, the market shares to be considered should generally reflect the worldwide supply to Singapore instead of the market shares of global suppliers throughout the world, which may include sales that are not to customers in Singapore and thus overstate the competitive constraints.

5 OTHER ISSUES

Temporal Markets

5.1 Another dimension that may be relevant in some markets is time. Examples of how the timing in the production and purchasing of products can affect markets include:

- Peak and off-peak services (for example, tour packages during peak season (school vacations) and off-peak season (school term)): In these cases, it may not be possible for buyers to substitute between time periods. Some buyers may not view peak and off-peak services as substitutable.

- Seasonal variations (for example, food specialities which have a significantly higher demand during local festive celebrations): A time dimension is appropriate as the market for these products may only exist to a limited extent during certain time periods.

- Innovation/ Inter-generational products (for example, handphones and computers): Consumers may choose to defer expenditure on present products because they believe innovation will soon produce better substitutes or they may own an earlier version of the product, which they consider to be a close substitute for the current generation.

5.2 To some extent, the time dimension is simply an extension of the product dimension, for example, the product can be defined as the supply of tour packages at a certain time of the year.

Identifying the Competitive Price

5.3 The hypothetical monopolist test uses the competitive price as the base price.

5.4 When assessing whether an agreement is anti-competitive under the section 34 prohibition, the price in the absence of the agreement may be used as a benchmark level in determining the relevant market, even though in practice, it may not be the competitive price. The agreement can be considered to have an appreciable adverse effect on competition if it would allow the undertakings to raise prices above the price level that would exist in that market in the absence of the agreement.

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5.5 In a market definition exercise relating to the section 47 prohibition, to assess whether an undertaking is dominant,[5] it should be noted that the current price may be above competitive levels as the undertaking could have already used its dominant position to raise prices above competitive levels in order to maximise its profits. In this situation, the hypothetical monopolist could be constrained from further raising prices by the possibility of substitution by buyers. If prices already exceed the competitive level, then the closest substitutes cannot be included in the relevant market as they did not prevent the hypothetical monopolist from exercising its market power. If a wide range of substitutes is included in the relevant market, it might lead to a misleading finding that the market power of the undertaking is lower than it actually is and hence the undertaking is found to be not dominant, when that might not be the case.

5.6 This problem is known as the "cellophane fallacy" after a US case involving cellophane products. For example, a seller of product A with high market power could have raised the price of product A above competitive levels, as buyers regard other products as inferior substitutes. The current price of product A could be set so high that buyers would replace it with other products if the price was raised any further. In this case, although the inferior substitutes were able to constrain the seller from further raising the price of product A, these substitutes should not be included in the definition of the relevant market. This is because they did not constrain the seller of product A from exercising its high market power and raising the price of product A above competitive levels in the first place.

5.7 Evidence that prices are above competitive levels might include excess profits or past price movements. The possibility that market conditions are distorted by the presence of market power (or other factors) will be accounted for when all the evidence on market definition is considered. For example, where current prices are likely to differ substantially from their competitive levels, caution must be exercised when dealing with the evidence on switching patterns as such evidence may not be a reliable guide to what would occur in normal competitive conditions.

Previous Cases

5.8 Although there might be cases where a market would have been investigated and defined in an earlier investigation, the fact that competition conditions do change over time will be taken into account. This is especially so in markets characterised by innovation, including digital markets, which could make substitution between products easier or harder. Therefore, changing circumstances may require a new market definition because competitive constraints have changed.

5.9 Behaviour by an undertaking with substantial market power could affect market definition as well. For example, suppose an earlier investigation had defined a market to be relatively wide because of the scope for both demand-side and supply-side substitution. A dominant undertaking in that market might raise buyer switching costs or act in such a way as to remove some possibilities for supply- side substitution. If so, this could affect the appropriate definition of the relevant market in the future. Hence, while an earlier definition could provide useful information, it may not always be the right one to use in future cases.

Other Approaches to Market Definition

5.10 Many markets contain differentiated products, for example products that are differentiated by features such as brand, location or quality. Hence, there are no clear boundaries in defining the market, even within the same area at the same time. The market definition would vary depending on the facts of the case. This means that there may be no clear distinction between products that are "in" the market and those that lie outside it. Therefore, even if two products do not lie within the same market for the purposes of one case, this does not rule out the possibility that in another case, they will be in the same relevant market.

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[5] In assessing the effects of the conduct by a dominant entity, CCCS may use the price in the absence of the conduct, instead of the competitive price, as the benchmark price.

5.11 In some cases, sellers may bundle distinct products, A, B, C and D to be sold together. An example could be furniture sellers bundling distinct pieces of furniture to be sold as bedroom or dining room sets, or sellers bundling different stationery items to be sold together, such as pencils, erasers, rulers, staplers. Depending on the case, distinct products may be included in the relevant market due to "bundling".

5.12 CCCS may take into account both demand-side and supply-side factors in considering whether products that are not considered complementary or from adjacent markets should be included in a relevant market. These factors may include the buyers' views on the efficiencies derived from consuming these products as a package or the buyers' views on the substitutability of a seller offering only one component of the package of multiple products. CCCS may also consider how suppliers design and supply these products to buyers, such as whether the suppliers achieve significant economies of scale by jointly offering the products or whether they offer a single loyalty programme that cover the various products they offer. Such an analysis will be performed on a case by case basis.

5.13 In other cases, it may be necessary to consider substitution possibilities at the downstream level, for example, when considering substitutes for a wholesale product. Suppose a seller produces a wholesale product A which is a necessary input for the supply of a retail product B. Suppose also that a vertically integrated seller that does not supply a substitute wholesale product supplies a product C which is a substitute for product B at the retail level. The ability of buyers to substitute product C for product B at the retail level may constrain the ability to raise the price of wholesale product A.

Market Definition for Multi-sided Platforms

5.14 Market definition involving a multi-sided platform can have practical complexities that render the market definition exercise less informative in relation to the competitive constraints acting on the focal product. As traditional frameworks may not adequately take into account the characteristics of multi-sided platforms, CCCS may supplement the market definition exercise with the consideration of additional factors. In performing the market definition exercise, CCCS will identify the appropriate theories of harm based on the potential competition concerns. In light of these theories of harm, CCCS will consider the interactions between the different sides of the platform. CCCS will then assess, on a case-by-case basis, whether the relevant market should be treated as a single multi-sided market including all sides of the multi-sided platform ("multi-sided market")[6], or as multiple interrelated single-sided markets ("single-sided markets")[7] when it carries out the hypothetical monopolist test. For example, an agreement or a merger between a multi-sided platform and a single-sided competitor may not be defined as a multi-sided market. Regardless of how the relevant market is defined, the competition analysis should take into consideration the interdependencies or lack thereof between the different sides of the platform and the competitive constraints faced on each side of the platform.

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[6] In CCCS 500/001/18: *Sale of Uber's Southeast Asian Business to Grab in consideration of a 27.5% stake in Grab* at [178], CCCS defined a single relevant market for two-sided platforms matching drivers and riders for the provision of booked chauffeured point-to-point transport services in Singapore after considering the substitution options on the rider and driver sides of the market respectively.

[7] In CCS 400/001/06: In relation to a *Notification for Decision by Visa Worldwide Pte. Ltd. of its MIF system as formalised in the Visa Rules* at [9.29]-[9.30], CCCS defined separate but interrelated markets for the (i) provision of issuing services of card payments in Singapore, (ii) the provision of acquiring services for Visa Card payments in Singapore (the "acquiring market"), and (iii) the provision of card scheme administration services in Singapore, with a key focus on assessing the competition effects in the acquiring market based on the identified theory of harm (see [9.18]).

5.15 When applying the test in the case of a multi-sided market, CCCS may consider externalities which arise as a result of factors relating to users on other side(s) of the platform. One such externality is indirect network effects, where the value of the platform to users on one side of the platform depends on the number of users on the other side(s) of the platform. Besides the number of users, the quality of these users and intensity of usage can also affect the strength of indirect network effects. In addition, another relevant externality is usage externality which occurs due to costs and/or benefits accrued to users on one side of the platform as a consequence of usage on other side(s) of the platform. CCCS will likely consider such externalities when assessing market definition. In the same vein, when applying the test on single-sided markets, CCCS may consider the interaction between these inter-related markets. Regardless of whether the relevant market is a multi-sided market or single-sided markets, the relevant question to ask is whether a hypothetical monopolist could profitably sustain a "supra competitive" pricing strategy, taking into account any externalities.

5.16 In setting the prices that it charges its users on the different sides of the platform, a multi-sided platform will also determine the price structure on the platform (i.e. the ratio of price levels between different groups of users). For example, a multi-sided platform may implement an increase in total price level (i.e. the sum of the prices charged to all sides of the multi-sided platform) in various ways. It can seek to impose the full increase from one side of the platform while keeping prices on the other side(s) unchanged, increase prices on all sides of the platform by the same or different amounts, or increase price on one side of the platform while decreasing prices on the other side(s) to a lesser extent.

5.17 When performing the test on a multi-sided market, CCCS may consider how the price structure, or changes in the price structure, affects the ability of the hypothetical monopolist to sustain a "supra competitive" pricing strategy. For instance, in the presence of positive indirect network effects between two sides of the platform, imposing the full increase in the price on one side of the platform while keeping prices on the other side(s) of the platform unchanged may not only reduce the number of users on the side experiencing the price increase, but also the number of users on the other side(s) of the platform. This may in turn result in a feedback loop causing more users on the side of the platform experiencing the full price increase to switch away from the platform. This may lead to the outcome where the hypothetical monopolist is not able to profitably sustain the "supra competitive" pricing strategy if the price increase results in a significant number of users of the platform switching away to other substitutes. However, the number of users who switch to other substitutes may be mitigated if the hypothetical monopolist concurrently lowers the price charged to users on the other side(s) of the platform. This may result in a reduction in the number of users switching away on the side(s) of the platform experiencing a price decrease in the initial instance, and in turn a reduction in the number of users switching to other substitutes on the side of the platform experiencing the price increase. In this regard, changes to the pricing structure may affect the ability of the hypothetical monopolist to profitably sustain a "supra competitive" pricing strategy.

5.18 As for single-sided markets, CCCS may still assess the effects of the pricing strategy or structure of the platform on competition in these inter-related markets. Hence, regardless of whether the market is a multi-sided market or single-sided markets, the price structure of the platform is a relevant factor for consideration.

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5.19 It is a common phenomenon that a multi-sided platform may not charge a positive price to users on one or more sides of the platform while charging a positive price to users on other side(s) of the platform. In such cases, any effects on or arising from the side of the platform that is not charged a positive price should still be considered, regardless of whether a multi-sided market or single-sided markets are defined. For example, CCCS will consider changes to the price structure of the platform, changes to the usage on the side that is not charged the positive price and changes to the usage on the other side(s) that is/are charged positive price(s). When performing the test in the context of single-sided markets, it may also be relevant to consider how the platform is monetising its product, or how the number of users on the side which is not charged the positive price may respond to changes in non-monetary aspects of the product. Some examples of non-monetary aspects which CCCS may consider include the platform's data security, access, and sharing policies, the platform's speed and ease of use, and the level of innovation (e.g. through the number of new features on the platform). The range of non-monetary aspects is wide, and the specific aspects which CCCS may consider will depend on the facts of the case and the industry concerned.

6 MARKET DEFINITION FOR AFTER MARKETS

Complements and Secondary Markets

6.1 Apart from identifying groups of substitutes, markets can also be defined to include groups of complements. Complements are groups of products that are consumed or produced together. They are included in the same market when competition in the supply of one product constrains the price charged for the other. This is most common in secondary markets, also known as after markets.

6.2 Secondary products are products that are only purchased if the buyer has already purchased the primary product. This situation often arises in the case of durable products which need to be maintained. For example, car parts can only be used for a particular car brand. The question in determining the relevant market is, therefore, should cars and their parts be considered as separate markets, or a combined car and parts market. Sellers of durable products sometimes have a monopoly or high market share in the supply of secondary products or services and might be perceived as exploiting this dominant position in the secondary market. However, as any exploitation of a seller's market power in the secondary market could affect its position in the primary market, the secondary market alone may not be the relevant market. For example, an increase in the price of spare parts for a car might affect a buyer's decision whether to buy that particular brand of car. So the seller might be constrained in exercising its market power in the secondary market.

6.3 There are three possible market definitions for secondary products:

- A **system** market – including the primary and secondary products.
- **Multiple** markets – where there is one market for the primary product but separate markets for secondary products for each brand of primary product.
- **Dual** markets – one for the primary product and one for all brands of secondary product.

6.4 Determining the market for secondary products depends on the facts of the case. A system market may be appropriate when buyers take into account the whole-life cost of the product before buying. This means that the buyer will look at both the price of the primary product and the secondary product before deciding which product to buy. In certain circumstances, the buyer of the primary and secondary products may not be the same, and therefore this would have an impact on the ability and incentive of the primary buyer to take the whole-life cost of the product into consideration. This definition also applies when reputation effects mean that setting a supra competitive price for the secondary product would significantly harm a seller's profits on future sales of its primary product.

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6.5 A seller may not wish to increase prices of its secondary product for existing buyers if that would earn it a reputation for exploitation and significantly reduce its ability to attract new or repeat buyers to its primary product. Reputation is more likely to be important where sellers have the prospect of relatively large numbers of new or repeat buyers, and where undertakings cannot price discriminate between new or repeat buyers, and other buyers.

6.6 Where the conditions for a system market do not apply, a multiple markets or a dual markets definition may be appropriate. The former is likely where, having purchased a primary product, buyers are locked in to using only a restricted number of secondary products that are compatible with the primary product. For example, buyers might be restricted to purchasing certain types of inkjet cartridges that are compatible with their printers. A dual markets definition is appropriate where secondary products are compatible with all primary products (and are so perceived by buyers). For example, buyers are able to purchase any brand of paper to use with their printers.

6.7 The following are some of the factors that influence a buyer's decision to consider the whole-life cost of the product:

- **Price proportion:** Buyers are more likely to adopt a whole-life costing approach if the secondary product is a higher proportion of the primary product's price.

- **Size of purchase:** Large companies may be better able to do whole-life costing than smaller companies or final consumers.

- **Availability of information:** Whole-life costing will be more difficult if buyers lack specialised information on the costs of spare parts and servicing, and the reliability of products.

- **Uncertainty:** It would be difficult to adopt a whole-life costing approach if there is uncertainty about how often spare parts or servicing would be required. Products catering to different segments of customers, e.g. home appliances vs. industrial equipment may have different maintenance requirements.

6.8 Another factor to consider is how often the primary product is to be replaced, the price of the primary product, and whether there are any costs involved in changing sellers. If replacement is infrequent, expensive or switching costs are high, there may be a significant number of secondary product buyers who are captive. Depending on the relative size of the primary market, the seller may find it profitable to exploit these captive buyers, even though new buyers may take a whole-life approach in evaluating the cost of the product. This would thus imply that secondary products would be in a separate market.

6.9 Sellers of the primary product may reduce prices below cost in order to increase the profits from future sales of secondary products. However, this behaviour might be considered undesirable by sellers as it may lead to an over-supply of the primary product and an under-supply of the secondary product. It may be appropriate to treat the two products as separate markets, instead of defining the market to include both products, and consider whether the undertaking's behaviour in either market might be an abuse of dominance under the section 47 prohibition.

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7 GLOSSARY

Agreement	Includes decisions by associations of undertakings and concerted practices unless otherwise stated, or as the context so demands.
Buyer	Refers to the end-user consumer, and/or an undertaking that buys products as inputs for production or for resale, as the context demands.
Market Power	Refers to the ability to profitably sustain prices above competitive levels or to restrict output or quality below competitive levels. An undertaking with market power might also have the ability and incentive to harm the process of competition in other ways, for example by weakening existing competition, raising entry barriers or slowing innovation. Market power arises where an undertaking does not face sufficiently strong competitive pressure.
Product	Refers to goods and/or services.
Seller	Refers to the primary producer, an undertaking that sells products as inputs for further production, and/or an undertaking that sells goods and services as a final product, as the context demands.
Undertaking	Refers to any person, being an individual, a body corporate, an unincorporated body of persons or any other entity, capable of carrying on commercial or economic activities relating to goods or services, as the context demands. Includes individuals operating as sole proprietorships, companies, firms, businesses, partnerships, co-operatives, societies, business chambers, trade associations and non profit-making organisations.
Multi-sided platforms	Refers to an undertaking acting as a platform that facilitates interactions between two or more groups of users and creates value for sellers or buyers on one side of the platform by matching or connecting them with buyers or sellers on the other side of the platform.

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CCCS GUIDELINES ON THE POWERS OF INVESTIGATION IN COMPETITION CASES 2016

Effective from: 1 December 2016

1 INTRODUCTION

1.1 The *Competition Act 2004* ("the Act") gives the Competition and Consumer Commission of Singapore ("CCCS") various powers to investigate suspected anti-competitive behaviour, which may infringe the section 34[1] prohibition, section 47[2] prohibition or section 54[3] prohibition under the Act ("section 34, 47 or 54 prohibition" respectively). These guidelines describe these powers of investigation.

1.2 Under the Act, CCCS has power to:

- require the production of specified documents or specified information;[4]
- enter premises[5] without a warrant;[6] and
- enter and search premises with a warrant.[7]

1.3 Parts 3 to 6 of these guidelines describe when each of these powers can be used, the extent of each power and the procedures that must be followed. The limitations on the use of these powers are described in Part 7 of these guidelines. The offences committed by a person who fails to comply when these powers are exercised are described in Part 8.

1.4 These guidelines are not a substitute for the Act, the regulations and orders. They may be revised should the need arise. The examples in these guidelines are for illustration. They are not exhaustive, and do not set a limit on the investigation and enforcement activities of CCCS. In applying these guidelines, the facts and circumstances of each case will be considered. Persons in doubt about how they and their commercial activities may be affected by the Act may wish to seek legal advice.

1.5 A glossary of terms used in these guidelines is attached in **Annex A.**

2 CIRCUMSTANCES UNDER WHICH CCCS WILL USE ITS POWERS OF INVESTIGATION

2.1 Section 62 of the Act provides that CCCS may conduct an investigation if there are reasonable grounds for suspecting that the section 34, 47 or 54 prohibition has been infringed. The formal powers of investigation outlined in these guidelines can be used only where this requirement is met.

2.2 CCCS will assess the information available in each case to ascertain if there are reasonable grounds for suspicion that a prohibition has been infringed. Examples of information that may be a source of reasonable grounds for suspicion include information provided by disaffected members of a cartel, statements from employees or ex-employees, or a complaint.

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[1] 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. Further information can be found in the *CCCS Guidelines on the Section 34 Prohibition*.

[2] Conduct on the part of one or more undertakings which amounts to the abuse of a dominant position. Further information can be found in the *CCCS Guidelines on the Section 47 Prohibition*.

[3] Mergers that have resulted, or may be expected to result, in a substantial lessening of competition within any market in Singapore for goods or services. Further information can be found in the *CCCS Guidelines on the Substantive Assessment of Mergers*.

[4] Section 63 of the Act.

[5] Section 2 of the Act.

[6] Section 64 of the Act.

[7] Section 65 of the Act.

2.3 Where an agreement may infringe the section 34 prohibition but enjoys the benefit of an exemption, CCCS will conduct an investigation only if it is of the view that there are reasonable grounds for suspecting that the circumstances are such that it could exercise its power to cancel the exemption for that agreement under section 37(2) of the Act.

2.4 CCCS may conduct an investigation of mergers which come to its attention whenever there are reasonable grounds for suspecting that a merger has infringed, or that an anticipated merger if carried into effect will infringe the section 54 prohibition.[8] *CCCS Guidelines on Merger Procedures* provide more details in relation to own-initiative investigations by CCCS.

2.5 Parts 3 to 6 of these guidelines describe CCCS's formal powers of investigation. It should be noted that CCCS may also obtain information about undertakings,[9] agreements, practices and markets through informal enquiries, either before or during the course of an investigation. Such enquiries may be made at a meeting, in written correspondence or in a telephone conversation. They may be made in addition to, or instead of, using the formal powers of investigation set out in the Act. Undertakings are encouraged to cooperate.

2.6 The timeframe for an investigation will depend largely on the nature and complexity of each case. CCCS will endeavour to complete its investigation as soon as it is practically possible.

3 POWER TO REQUIRE THE PRODUCTION OF DOCUMENTS AND INFORMATION

3.1 Where CCCS has reasonable grounds for suspecting that the section 34, 47 or 54 prohibition has been infringed, it may, under section 63 of the Act, require a person to produce specified documents or to provide specified information, which relates to any matter relevant to the investigation. This power is exercised by service of a written notice, the contents of which are described in paragraph 3.8 below.

3.2 The section 63 power may be used before CCCS carries out an inspection of premises (described in Parts 5 and 6 of these guidelines) or, either during or after an inspection to clarify facts that have emerged.

3.3 A person may receive a notice requiring the production of documents or information on more than one occasion during the course of an investigation. For example, CCCS may require a person to produce further information after considering the documents produced in response to an earlier notice under section 63.

Scope of the Power

3.4 CCCS or an inspector appointed by CCCS can require any person to produce documents or information that it considers relate to any matter relevant to the investigation. CCCS is not limited to approaching the undertakings suspected of infringement and/or their officers (past or present). For example, the notice may be addressed to third parties such as complainants, suppliers, customers and competitors.

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[8] Sections 62(1)(c) and (d) of the Act.

[9] Section 2 of the Act.

3.5 The term "document" includes "information recorded in any form".[10] This definition includes records, such as invoices or sales figures, stored in any form, electronic or otherwise, for example, on a computer. "Specified" means documents or information that are specified or described in a written notice or that fall within a category which is so specified or described in a written notice under section 63[11] (described in paragraph 3.8 below). The documents required to be produced may include, for example, invoices, agreements and minutes of meetings.

3.6 When requiring a person to produce a document, CCCS can:

- take copies of or extracts from any document produced;
- require the person served with a notice to produce the document (or any past or present officer or employee of that person) to provide an explanation of the document produced or require the person to provide a translation of the document produced if it is in a language other than the English language; and
- if the document is not produced, require the person served with a notice to produce the document to state, to the best of that person's knowledge or belief, where the document can be found.

3.7 Under the power relating to the production of specified information, CCCS can require the information to be compiled and produced if it is not already in recorded form. For example, a person may be asked to provide market share information or to provide a description of a particular market using his knowledge and experience or the knowledge and experience of his staff.

The Procedure

3.8 The power to require the production of documents or information using section 63 of the Act is exercised by serving a written notice. The written notice must:

- state the subject matter and purpose of the investigation;
- specify or describe the documents or information, or categories of documents or information, required; and
- set out the nature of the offences that may be committed if a person fails to comply when the powers of investigation are exercised (described in Part 8 of these guidelines).

3.9 The written notice may also state the time and place at which a document or information must be produced and the manner and form in which it is to be produced. For example, a person may be required to produce the documents or information at a specified address on a designated date at a particular time. If information is provided, it may be recorded or reduced into writing by the investigating officer or inspector. The person providing the information will be given the opportunity to amend, add to or delete from the written record and will be asked to sign against the record. If a document is produced, CCCS may require that an explanation of the document be provided. A person required by CCCS to provide information or an explanation of a document may be accompanied by a legal adviser.

3.10 The written notice will be delivered personally or sent by pre-paid post to the last known address of the person.

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[10] Section 2 of the Act.

[11] Section 63(5) of the Act.

3.11 When setting the appropriate time limit for the production of documents or information, CCCS will consider the amount and complexity of the information required, the resources available to the individual or undertaking and the urgency of the case.

3.12 The written notice may be addressed to individuals or undertakings. Where a written notice is addressed to an undertaking, the appropriate person to respond is the person who is authorised by the undertaking to respond on the undertaking's behalf. Where a written notice is addressed to an individual, that individual must respond, and it is not acceptable for another person to respond on that individual's behalf. This does not prevent an individual from obtaining legal advice in relation to a notice.

3.13 CCCS will not ask for more documents or information than what it believes is necessary for the investigation as at the date of the written notice.

4 POWER TO ENTER PREMISES FOR INSPECTION

4.1 If CCCS has reasonable grounds for suspecting that the section 34, 47 or 54 prohibition has been infringed, it may conduct an investigation. It has the power to enter into any premises to carry out inspections, either with or without a warrant. These powers enable CCCS to enter premises and to gain access to documents relevant to an investigation.

4.2 "Premises"[12] generally refers to business premises and does not include domestic premises unless they are used in connection with the affairs of an undertaking or where documents relating to the affairs of an undertaking are kept there. "Premises" also includes any vehicle.

4.3 When entering any premises for inspection, the investigating officer, authorised person, inspector or person required by the inspector shall produce evidence of his identity together with evidence of due authority to enter or the inspector's appointment at the point of entrance.

5 POWER TO ENTER PREMISES WITHOUT WARRANT

5.1 The power to enter premises without a warrant[13] is described in this Part of the guidelines. The power to enter and search premises under warrant[14] is described in Part 6 of these guidelines.

When the Power can be Used

5.2 Depending on the circumstances, entry into premises without a warrant may be effected with or without giving an occupier of the premises at least two (2) working days written notice of the intended entry.

Entry of Premises with Prior Written Notice

5.3 An investigating officer, authorised person, inspector or person required by the inspector may enter any premises in connection with an investigation without a warrant if the occupier of the premises has been given at least two (2) working days' written notice of the intended entry. The occupier of the premises need not be suspected of an infringement. For example, the premises of a supplier or customer may be entered using this power.

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[12] Section 2 of the Act.

[13] Section 64 of the Act.

[14] Section 65 of the Act.

Entry of Premises without Prior Written Notice

5.4 An investigating officer, authorised person, inspector or person required by the inspector may enter any premises in connection with an investigation without warrant and without notice if:

- CCCS has reasonable grounds for suspecting that the premises are or have been occupied by an undertaking that is being investigated in relation to an infringement of the section 34, 47 or 54 prohibition; or

- the investigating officer or inspector has been unable to give written notice to the occupier despite taking all reasonably practicable steps to do so.

Scope of the Power

5.5 An investigating officer, authorised person, inspector or person required by the inspector entering any premises without a warrant may require:

- any person on the premises to produce any document that the investigating officer, authorised person, inspector or person required by the inspector considers relates to any matter relevant to the investigation. For example, an employee may be asked to produce minutes of any meetings with competitors, the diaries of specified directors, sales data or invoices. Copies of, or extracts from, any such documents produced can be taken by the investigating officer, authorised person, inspector or person required by the inspector;

- any person on the premises to provide an explanation of any document produced. For example, an employee may be requested to provide an explanation of the entries or codes on an invoice or spreadsheet;

- any person to state, to the best of that person's knowledge and belief, where any document that the investigating officer, authorised person, inspector or person required by the inspector considers relates to any matter relevant to the investigation can be found;

- any information, which is stored in any electronic form and is accessible from the premises, and which the investigating officer, authorised person, inspector or person required by the inspector considers relates to any matter relevant to the investigation, to be produced in a form in which it can be read and can be taken away; and

- take any other steps which appear necessary in order to preserve the documents or prevent interference with them. This includes requiring that the premises (or any part of the premises, including offices, files and cupboards) be sealed for such time as is reasonably necessary to enable the inspection to be completed. This time period will not be for longer than seventy-two (72) hours, except where an undertaking consents to a longer time or where access to documents is unduly delayed, such as by the unavailability of a person who can provide access.

5.6 An investigating officer, authorised person, inspector or a person required by the inspector, may take with him any equipment that he deems necessary when entering any premises under this power. For example, he may take portable computer equipment and tape recording equipment.

The Procedure

Entry of Premises with Prior Written Notice

5.7 Where an investigating officer or inspector gives written notice of at least two (2) working days of his intended entry into the premises without a warrant, the written notice shall state:

- the subject matter and purpose of the investigation; and

- the nature of the offences that may be committed should any person choose not to comply or co-operate when the powers of investigation are exercised (described in Part 8 of these guidelines).

5.8 On entering the premises, the investigating officer, authorised person, inspector or person required by the inspector will produce evidence of his identity together with evidence of his due authority to enter or the inspector's appointment. Apart from evidence of his right to enter, he will also hand over a separate document which sets out the powers of the investigation.

Entry of Premises without Prior Written Notice

5.9 If a prior written notice is not required to be given under the Act and the investigating officer, authorised person, inspector or person required by the inspector is entering the premises without a warrant, he may enter only upon production of (i) evidence of his identity together with evidence of his due authority to enter or the inspector's appointment; and (ii) a document indicating the subject matter and purpose of investigation and the nature of offences that may be committed should any person choose not to comply or co-operate when the powers of investigation are exercised (described in Part 8 of these guidelines). He will also hand over a separate document which sets out the powers of investigation.

5.10 The investigating officer, authorised person, inspector or person required by the inspector will normally arrive at the premises during office hours. Where possible, the person in charge at the premises should designate an appropriate person to be a point of contact for the investigating officer, authorised person, inspector or person required by the inspector during the inspection. The investigating officer, authorised person, inspector or person required by the inspector will provide a list of documents and extracts from documents of which copies have been taken at the end of the inspection as far as practicable and in any event, not later than three (3) working days from the end of the inspection.

Access to Legal Advice

5.11 Where the investigating officer, authorised person, inspector or person required by the inspector considers it reasonable in the circumstances to grant a request to allow the occupier of the premises a reasonable time for the occupier's legal adviser to arrive at the premises before the investigation continues, he may impose such conditions as he considers appropriate. The conditions could include sealing of cabinets, keeping business records in the same state and places as when entry into the premises was effected, suspending external email and allowing the investigating officer, authorised person, inspector or person required by the inspector to remain in occupation of selected offices.

5.12 The exercise of the right to consult a legal adviser must not unduly delay or impede the inspection. Any delay must be kept to a strict minimum. If an undertaking has an in-house legal adviser on the premises, the investigating officer, authorised person, inspector or person required by the inspector will not wait for an external legal adviser to arrive. If an undertaking has been given notice of the inspection, the investigating officer, authorised person, inspector or person required by the inspector will not wait for the legal adviser to arrive.

6 POWER TO ENTER AND SEARCH PREMISES UNDER WARRANT

6.1 An application can be made to a District Court for a warrant for an inspector or officer of CCCS named in the warrant ("named officer")[15] and other persons required by the inspector or authorised in writing by CCCS ("accompanying officers")[16] to enter and search any premises.

When the Power can be Used

6.2 The Act identifies three circumstances in which the court may issue a warrant to authorise a named officer and any other accompanying officers to enter and search the premises specified in the warrant. The court must be satisfied that there are reasonable grounds for suspecting that within the premises to be searched, there are documents:

- which have not been produced, although CCCS has required production, either by written notice (section 63 of the Act) or in the course of an inspection without a warrant (section 64 of the Act);
- which an investigating officer, authorised person, inspector or person required by the inspector could have required to be produced in the course of an inspection without a warrant (section 64 of the Act), but was unable to effect entry into the premises; or
- which would be concealed, removed or tampered with or destroyed, if CCCS were to require their production by written notice (section 63 of the Act). This last ground is the only means by which CCCS is able to carry out an inspection of any premises with a warrant without using one of the other investigatory powers first.

Scope of the Power

6.3 The warrant will authorise a named officer, and any other accompanying officers to enter the premises. Such accompanying officers could include persons such as computer technicians or industry experts who may carry out specific tasks under supervision of the named officer.

6.4 The named officer and any other accompanying officers entering premises under a warrant may take with them such equipment as they deem necessary. This will include equipment that can be used to enter the premises using reasonable force (for example, equipment that can be used to break locks) as well as equipment that can be used to facilitate the search (for example, computer equipment).

6.5 The warrant will authorise a named officer and any other accompanying officers to:

- enter the premises specified in the warrant using such force as is reasonably necessary. The named officer and any other accompanying officers entering the premises will be entitled to use force only if they are prevented from entering the premises and may use only such force as is reasonably necessary for the purpose of gaining entry. Force cannot be used against any person;
- search any person on the premises if there are reasonable grounds for believing that the person has in his possession any document, equipment or article which has a bearing on the investigation;

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[15] Section 65(14) of the Act.

[16] Section 65(2) of the Act.

- search the premises and take copies of or extracts from any document appearing to be of the kind in respect of which the warrant was granted (identified in paragraph 6.6 below). The named officer and any other accompanying officers can search offices, desks and filing cabinets etc. to find such documents. The named officer will, as far as it is practicable, provide a list of documents and extracts from documents of which copies have been taken at the end of the inspection. If it is not practicable to do so, the list will be provided within three (3) working days from the end of the inspection;

- take possession of any document, original or otherwise, appearing to be of the kind in respect of which the warrant was granted if such action appears to be necessary for preserving the document or preventing interference with it, or if it is not reasonably practicable to take copies of the document on the premises. Upon the reasonable request made by an occupier (or occupier's representative) for a copy of the document to be taken, such copy may, as far as it is practicable, be provided. The named officer will cause to be provided to the occupier or occupier's representative for checking a list of documents to be removed from the premises at the end of the inspection as far as practicable and in any event, not later than three (3) working days from the end of the search. Documents taken will be returned within three (3) months;

- take any other steps which appear necessary in order to preserve the documents or prevent interference with them. This includes requiring that the premises (or any part of the premises, including offices, files and cupboards) be sealed for such time as is reasonably necessary to enable the inspection to be completed. This time period will not be for longer than seventy-two (72) hours, except where an undertaking consents to a longer time or where access to documents is unduly delayed, such as by the unavailability of a person who can provide access;

- require any person to provide an explanation of any document appearing to be of the kind in respect of which the warrant was granted or to state to the best of his knowledge and belief where such document may be found;

- require any information, which is stored in any electronic form and is accessible from the premises, and which the named officer considers relates to any matter relevant to the investigation, to be produced in a form in which it can be taken away and read; and

- remove from the premises for examination any equipment or article which relates to any matter relevant to the investigation, for example, computers or any recording devices. If the circumstances are such that the named officer may, instead of removing from the premises such equipment or article, allow them to be retained on the premises, he may impose such conditions as he deems appropriate, for example, to allow for inspection of the said article or equipment at regular intervals.

6.6 The named officer or accompanying officers may take copies (as set out in paragraph 6.5 above) of the following types of documents depending on the ground under which a warrant was obtained:

- where a warrant was granted because an undertaking failed to produce the documents which were required to be produced under section 63 or 64 of the Act, copies of those documents;[17]

- where a warrant was granted because there was a reasonable suspicion that documents would have been concealed, removed, tampered or destroyed if prior written notice under section 63 was given, copies of those documents;[18]

- where a warrant was granted because attempts to effect entry into the premises without a warrant under section 64 of the Act proved futile, copies of those documents, which could have been required to be produced upon entry into the premises.[19]

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[17] Section 65(1)(a) of the Act.

[18] Section 65(1)(b) of the Act.

[19] Section 65(1)(c) of the Act.

6.7 In addition, where a warrant is granted to enter premises where there is a reasonable suspicion that if prior written notice under section 63 was given, documents would have been concealed, removed, tampered or destroyed, then, if the court is satisfied that it is reasonable to suspect that there are also other documents relating to the investigation on the premises, the warrant will authorise the actions mentioned in paragraph 6.5 above to be taken.

The Procedure

6.8 The powers set out in paragraphs 6.3 to 6.7 above may only be exercised on production of the warrant.

6.9 A warrant continues in force for one (1) month from the date of issue and must indicate:

- the subject matter and purpose of the investigation; and
- the nature of the offences that may be committed if any person fails to comply or co-operate when the powers of investigation are exercised (described in Part 8 of these guidelines).

6.10 The named officer and any other accompanying officers will normally arrive at the premises during office hours. On entering the premises, the named officer and accompanying officers will produce evidence of their identity. The named officer will also hand over a separate document which sets out the powers of the investigation. Where possible, the person in charge at the premises should designate an appropriate person to be a point of contact for the named officer during the inspection and search.

6.11 If there is no one at the premises, the named officer must take reasonable steps to inform the occupier of the intended entry. If the occupier is informed, the occupier or his legal or other representative must be given a reasonable opportunity to be present when the warrant is executed. If the named officer has been unable to inform the occupier of the intended entry, he is under a duty to leave a copy of the warrant in a prominent place on the premises. On leaving premises that are unoccupied, the named officer must leave them as effectively secured as he found them.

Access to Legal Advice

6.12 See paragraphs 5.11 and 5.12 above.

7 LIMITATIONS ON THE USE OF POWERS OF INVESTIGATION

Privileged Communications

7.1 The power to require the disclosure of information or documents under Part III of the Act does not extend to any communication:

- between a professional legal adviser and his client; or
- made in connection with, or in contemplation of, legal proceedings and for the purposes of those proceedings;

which would be protected from disclosure in proceedings in a court on grounds of privilege.

7.2 This will mean that communications with in-house lawyers, in addition to lawyers in private practice including foreign lawyers, can benefit from the privilege. The power to require the details of the relevant persons under section 66(4) of the Act will only be used, where necessary, to ascertain if the communications were indeed privileged.

Self-incrimination

7.3 A person or undertaking is not excused from disclosing information or documents to CCCS under a requirement made of him pursuant to the provisions of the Act on the ground that the disclosure of the information or documents might tend to incriminate him.[20]

7.4 Where a person claims before making a statement disclosing information that the statement might tend to incriminate him, that statement shall be admissible in evidence against him in civil proceedings including proceedings under the Act. The statement shall not be admissible in evidence against him in criminal proceedings other than proceedings under Part V of the Act relating to ancillary offences such as providing false or misleading information.

Disclosure of Information

7.5 Section 89 of the Act imposes limits on the disclosure of information relating to the business, commercial or official affairs of any person, any matter identified as confidential by a person furnishing information and the identity of persons furnishing information to CCCS, obtained in connection with the exercise of any function and discharge of duties of CCCS under the Act (including CCCS's powers of investigation under the Act).

7.6 It is an offence for any specified person[21] to communicate any such information unless it is necessary for the performance of any function or duty of CCCS or he is lawfully required to disclose the same by any court or the Competition Appeal Board or required or permitted to do so under the Act or any other written law.

7.7 The Act however permits CCCS to make disclosure under certain circumstances.[22] For example, CCCS is permitted to disclose information for the purpose of investigations or prosecutions under the Act, giving effect to any provision of the Act or complying with prescribed provisions of an agreement with a foreign country under certain conditions.[23] Disclosure is also allowed with the consent of the person to whom the information relates.

7.8 Before making a permitted disclosure for the purpose of giving effect to certain provisions of the Act,[24] CCCS must have regard to three considerations:

- the need to exclude, so far as is practicable, information the disclosure of which would in its opinion be contrary to the public interest;
- the need to exclude, so far as is practicable, commercial information the disclosure of which it thinks might significantly harm the legitimate business interests of the undertaking to which it relates, or information relating to the private affairs of an individual the disclosure of which it thinks might significantly harm the individual's interests; and
- the extent to which the disclosure of information is necessary for the purposes for which it is to be disclosed.[25]

In doing so, CCCS may redact the documents it proposes to disclose to remove information: for example, by blanking out parts of documents or by aggregating figures.

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[20] Section 66 of the Act.
[21] Section 89(8) of the Act.
[22] Section 89(5) of the Act.
[23] Section 89(7) of the Act.
[24] Section 89(5)(b)(ii) of the Act.
[25] Section 89(6) of the Act.

8 OFFENCES RELATING TO THE POWERS OF INVESTIGATION

8.1 The Act sets out a number of criminal offences which may be committed where an undertaking fails to comply or co-operate when the powers of investigation set out in the Act are exercised. It is an offence to:

- fail to comply with any condition imposed under section 65(5) of the Act by a named officer who, instead of removing from the premises for examination any equipment or article which has a bearing on the investigation, allows the equipment or article to be retained on those premises;[26]
- fail to comply with a requirement imposed under the powers of investigation in the Act to provide documents, information, explanation or state where a document is to be found[27] (subject to certain defences, see below);
- obstruct, by refusing to give access to, assaulting, hindering or delaying, any member, officer, employee or agent of CCCS authorised to act for or assist CCCS, or any inspector or person assisting an inspector in the discharge of his duties under the Act;[28]
- intentionally or recklessly destroy or otherwise dispose of or falsify or conceal a document of which production has been required or cause or permit its destruction, disposal, falsification or concealment;[29] or
- provide information that is false or misleading in a material particular knowingly or recklessly, either to CCCS or to another person such as an employee or legal adviser, knowing that it will be used for the purpose of providing information to CCCS.[30]

A person who fails to comply with a requirement to produce a document under sections 63, 64 or 65 of the Act has a defence if he can prove that the document was not in his possession or control and that it was not reasonably practicable to comply with the requirement. It is a defence for a person who fails to comply with a requirement to provide information or an explanation of a document or to state where a document is to be found if he can prove that he had a reasonable excuse for failing to comply with the requirement

8.2 Failing to comply with a requirement imposed under sections 63 or 64 of the Act is not an offence if CCCS has failed to act in accordance with the provision in question.[31]

8.3 Where an offence under the Act committed by a body corporate or unincorporated association is proved to have been committed with the consent or connivance of an officer or member of the governing body, as the case may be, or is attributable to his neglect, that officer or member of the governing body shall also be guilty of the offence. Where the affairs of the body corporate are managed by its members, a member is also guilty of an offence if the offence of the body corporate is proved to have been committed with the consent or connivance of the member or to be attributable to his neglect as if he were a director. Where an offence under the Act committed by a partnership is committed with the consent or connivance of a partner or person purporting to be a partner or is attributable to his neglect, the partner or purported partner, as well as the partnership, shall be guilty of the offence.

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[26] Section 65(6) read with section 65(5) of the Act.
[27] Section 75 of the Act.
[28] Section 78 of the Act.
[29] Section 76 of the Act.
[30] Section 77 of the Act.
[31] Section 75(4) of the Act.

8.4 To enable CCCS to take steps towards the prosecution of any of the offences in paragraph 8.1 above, any CCCS officer or employee may, on the declaration of his office and production of his CCCS identification card, require:

- any person whom he reasonably believes to have committed that offence to furnish evidence of the person's identity;
- any person to produce document or information in his possession and take copies or extracts thereof; and
- any person who appears to be acquainted with the circumstances of the case to attend before that officer or employee by written order.[32]

8.5 Any person who, in relation to the exercise of powers under paragraph 8.4 above:

- wilfully mis-states or refuses without lawful excuse to give information or produce any document required by a CCCS officer or employee; or
- fails to comply with the lawful demand of a CCCS officer or employee in the discharge of his duties; shall be guilty of an offence.[33]

8.6 Offences will be tried in the District Court which shall have power to impose the full penalty or punishment in respect of the offences. All offences are punishable, on conviction, with a fine, imprisonment or both.

8.7 The sanctions that may be imposed by the courts on a person found guilty of each offence described in paragraph 8.4 above are set out in the table in **Annex A.**

8.8 An offence under the Act may be compounded if it is prescribed as a compoundable offence under the *Competition (Composition of Offences) Regulations.*[34]

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[32] Section 80(1) of the Act.
[33] Section 80(2) of the Act.
[34] Section 84 of the Act.

9 TABLE OF OFFENCES & SANCTIONS PROVIDED

Offences	Sanction on Conviction
Section 65(6) – Failure to comply with any condition imposed under section 65(5) by a named officer who, instead of removing from the premises for examination any equipment or article which has a bearing on the investigation, allows the equipment or article to be retained on those premises.	Punishable with a fine not exceeding S$10,000 or to imprisonment for a term not exceeding twelve (12) months or to both.
Section 75 – Failing to comply with a requirement imposed under the powers of investigation in the Act to provide documents, explanation or information.	Punishable with a fine not exceeding S$10,000 or to imprisonment for a term not exceeding twelve (12) months or to both.
Section 76 – Intentionally or recklessly destroying or otherwise disposing of or falsifying or concealing a document that is required to be produced or causing or permitting its destruction, disposal, falsification or concealment.	Punishable with a fine not exceeding S$10,000 or to imprisonment for a term not exceeding twelve (12) months or to both.
Section 77 – Providing information that is false or misleading in a material particular knowingly or recklessly, either to CCCS or to another person such as an employee or legal adviser, knowing that it will be used for the purpose of providing information to CCCS.	Punishable with a fine not exceeding S$10,000 or to imprisonment for a term not exceeding twelve (12) months or to both.
Section 78 – Obstructing, by refusing to give access to, assaulting, hindering or delaying, any member, officer, employee or agent of CCCS authorised to act for or assist CCCS, or any inspector or person assisting an inspector in the discharge of his duties under the Act.	Punishable with a fine not exceeding S$10,000 or to imprisonment for a term not exceeding 12 months or to both.
Section 80 – Wilfully mis-stating or refusing without lawful excuse to give information or produce any document required by a CCCS officer or employee pursuant to section 80 (1) or failing to comply with the lawful demand of a CCCS officer or employee in the discharge of his duties under the Act.	Punishable with a fine not exceeding S$5,000 or to imprisonment for a term not exceeding 12 months or to both.

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10 GLOSSARY

Authorised person	Refers to any officer of CCCS who is authorised in writing to accompany the investigating officer under section 64(1) of the Act.
Inspector	Refers to an inspector appointed by CCCS to conduct an investigation under section 62 of the Act.
Investigating officer	Refers to any officer of CCCS who is authorised to exercise the power to enter premises for inspection without a warrant under section 64(1) of the Act.
Officer in paragraph 8.3	a. in relation to a body corporate, refers to any director, member of the committee of management, chief executive, manager, secretary or other similar officer of the body corporate and includes any person purporting to act in any such capacity; and b. in relation to an unincorporated association (other than a partnership), refers to the president, the secretary, or any member of the committee of the unincorporated association, or any person holding a position analogous to that of president, secretary or member of a committee and includes any person purporting to act in any such capacity.
Person	Includes any undertaking.
Specified person	Refers to a person who is or has been — a. a member, an officer, an employee or an agent of CCCS; b. a member of a committee of CCCS or any person authorised, appointed or employed to assist CCCS; c. an inspector or a person authorised, appointed or employed to assist an inspector; or d. a member of the Board or any person authorised, appointed or employed to assist Competition Appeal Board.
Undertaking	Refers to any person, being an individual, a body corporate, an unincorporated body of persons or any other entity, capable of carrying on commercial or economic activities relating to goods or services, as the context demands. Includes individuals operating as sole proprietorships, companies, firms, businesses, partnerships, co-operatives, societies, business chambers, trade associations and non-profit-making organisations.

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CCCS GUIDELINES ON DIRECTIONS AND REMEDIES

Effective from: 1 February 2022

1 INTRODUCTION

1.1 The Competition Act 2004 ("the Act") gives the Competition and Consumer Commission of Singapore ("CCCS") the power to enforce the section 34[1] prohibition, the section 47[2] prohibition and the section 54[3] prohibition under the Act.

1.2 CCCS's investigation and enforcement powers are set out in Part 3 Division 5 of the Act and its powers to accept commitments are set out in Part 3 Division 4A of the Act. These guidelines describe the power of CCCS to:

- accept or impose different types of remedies in concluding investigations or notifications (Parts 2 and 3);
- give directions to bring an infringement to an end (Part 4);
- give directions on interim measures during an investigation (Part 5); and
- impose financial penalties on undertakings for infringing the section 34, 47 and/or 54 prohibitions (Part 6).

1.3 In respect of the section 54 prohibition, the *CCCS Guidelines on Merger Procedures* provide guidance on CCCS's powers to give directions to bring an infringement to an end, to give directions on interim measures and to impose financial penalties on undertakings for infringing the section 54 prohibition.

1.4 The powers of investigation of CCCS under the Act are described in the *CCCS Guidelines on the Powers of Investigation in Competition Cases 2016*.

1.5 These guidelines are not a substitute for the Act, the regulations and orders. They may be revised should the need arise. The examples in these guidelines are for illustration. They are not exhaustive, and do not set a limit on the investigation and enforcement activities of CCCS. In applying these guidelines, the facts and circumstances of each case will be considered. Persons in doubt about how they and their commercial activities may be affected by the Act may wish to seek legal advice.

1.6 A glossary of terms used in these guidelines is attached.

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[1] 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. Further information can be found in the *CCCS Guidelines on the Section 34 Prohibition*.

[2] Conduct on the part of one or more undertakings which amounts to the abuse of a dominant position. Further information can be found in the *CCCS Guidelines on the Section 47 Prohibition*.

[3] Mergers that have resulted or may be expected to result in a substantial lessening of competition within any market in Singapore for goods or services are prohibited. Further information can be found in the CCCS *Guidelines on Merger Procedures and the CCCS Guidelines on the Substantive Assessment of Mergers*.

2 REMEDIES

2.1 Remedies may be implemented either by CCCS's acceptance of commitments which address competition concerns arising from an investigation or notification, or by directions issued by CCCS. This Part describes the types of remedies CCCS may consider and the basis by which CCCS assesses whether they are appropriate.

Structural vs. Behavioural Remedies

2.2 There are broadly two types of remedies which CCCS may consider: structural remedies and behavioural remedies.

Structural Remedies

2.3 Structural remedies are preferable to behavioural ones because they address the market structure issues that give rise to the competition problems, given that a structural remedy is likely to address the very source of the competition concerns, and they require little on-going monitoring by CCCS.

2.4 Typically, structural remedies require the sale of one of the businesses that has led to the competition concern. Ideally, this should be a self-standing business, which is capable of being fully separated from the applicant/undertaking involved. The sale should be completed within a specified period. A purchaser may be deemed to be a reasonable alternative purchaser if it is willing to pay a commercially reasonable price, even if the price is lower than the price that the applicant/undertaking is prepared to pay. An independent trustee may be appointed, at the applicant's/undertaking's expense, to monitor the operation of the business pending disposal and/or to handle the sale if the applicant/undertaking has not completed the divestiture within the specified period.

2.5 Before the sale of any business as part of a structural remedy, CCCS must approve the buyer. This is to ensure that the proposed buyer has the necessary expertise, resources and incentives to operate the divested business as an effective competitor in the marketplace. If that is not the case, it is unlikely that the proposed divestiture will be considered as an effective remedy for the competition concerns which have been identified.

2.6 In appropriate cases, CCCS will consider other structural or quasi-structural remedies. For example, divestment of the acquirer's existing business (or part of it), in combination with assets from the target company (i.e., assets from both merger parties) to form a viable business post divestment, might be appropriate in the context of a merger, although in such cases, CCCS will also need to consider the competition implications of the asset swap. Alternatively, an amendment to intellectual property licences might, in some circumstances, be an appropriate remedy.

Behavioural Remedies

2.7 Behavioural remedies can also constrain the scope for parties to behave anti-competitively[4] or constrain them from exploiting their market power[5]. CCCS will consider behavioural remedies in situations where structural remedies will be impractical, or inappropriate, in relation to the nature of the concerns identified.

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[4] Such as a commitment to remove exclusivity clauses imposed by a dominant supplier of beer to retail outlets.

[5] Such as the commitment to supply proprietary spare parts by a dominant lift manufacturer to third party lift maintenance companies.

2.8 Behavioural remedies may sometimes be necessary to support structural remedies. For example, in the context of a merger where CCCS imposes a partial divestment remedy, a commitment by the merged business to not approach the former customers of the divested business for a limited period of time may increase CCCS's confidence that the acquirer of the divested business will prove a viable and effective competitor. Behavioural remedies may also consist of supplying goods or services on fair, reasonable and non-discriminatory terms.

Consideration of the Appropriate Remedy

2.9 The remedial action to be taken by CCCS will depend on the facts and circumstances of each case. In addressing the question of which remedies would be appropriate and would provide as comprehensive a solution as is reasonable and practicable, CCCS will take into account how adequately the action would prevent, remedy or mitigate the competition concerns caused by the activity in question.

2.10 CCCS's starting point will be to choose the remedial action that will address the adverse effects on competition directly and restore competition in the affected markets. For example, given that the effect of the merger is to change the structure of the market, remedies that aim to restore all or part of the pre-merger market structure are likely to be a more direct way of addressing the adverse effects.

2.11 Where appropriate, CCCS considers that structural remedies are preferable to behavioural ones, as they tend to address the competition concerns more directly and require less monitoring.

The Cost of Remedies and Proportionality

2.12 In addition, when deciding on the appropriate remedy, CCCS will have regard to the principle of proportionality in assessing the effectiveness of different remedies and their associated costs in practice. However, CCCS will normally regard the costs which undertakings would have to incur as a result of putting in place a set of effective remedies as subordinate to the effectiveness of the remedy.

3 OFFERING AND VARYING COMMITMENTS

Offering Commitments

3.1 Commitments are generally proposed, where competition concerns have been identified, by an applicant that has made a notification to CCCS or an undertaking under investigation by CCCS. CCCS has the discretion to accept commitments at any time before making a decision pursuant to applications under sections 44, 51, 57, 58 or investigations under section 62(1).

3.2 In general, CCCS takes a dim view of repeated revisions of a commitments proposal by the offering parties. In the case of a merger notification, CCCS endeavours to work expeditiously to complete its merger review within 30 working days for Phase 1 and 120 working days for Phase 2. If the applicant's commitments proposal submitted within the stipulated deadlines is unable to address CCCS's competition concerns, CCCS may proceed to issue an unfavourable decision. CCCS will only be minded to extend the stipulated deadlines for commitments in very limited circumstances.

Phase 1 Merger Notifications

3.3 Applicant(s) are encouraged to take the initiative to propose commitments which they think can appropriately resolve competition concerns that they foresee arising from the merger.

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3.4 In the event that CCCS identifies competition concerns in Phase 1 that indicate that Phase 2 may be appropriate, it will communicate those concerns to the applicant in writing (hereinafter referred to as "Phase 1 Issues Letter"). The Phase 1 Issues Letter will set out the competition concerns as well as all the theories of harm that have been identified and stipulate a deadline. This will provide the final opportunity for the applicant, if it wishes, to put forward its commitments proposal to address these concerns in Phase 1. Where the applicant seeks an extension of time for the deadline, CCCS may agree in instances where the applicant is able to sufficiently justify the need for such an extension. If the commitments proposal submitted by the stipulated deadline does not adequately address all the articulated competition concerns and theories of harm, CCCS will proceed to Phase 2.

3.5 For merger situations that are subject to the Singapore Code for Takeovers and Mergers ("Takeover Code"), the Phase 1 Issues Letter does not constitute a decision to proceed to Phase 2 within the meaning of paragraph 3(a) to the Guidance Note to Appendix 3 to the Takeover Code. For such merger situations, CCCS will issue a separate letter stating its decision to proceed to Phase 2, for instance, where it has not been possible to resolve the issues outlined in the Phase 1 Issues Letter.

3.6 If the applicant's commitments proposal put forward by the stipulated deadline is accepted in-principle by CCCS in Phase 1, the applicant will be informed that a 50-working day administrative timeline (that is separate from the 30-working day review period) will begin. Where necessary, CCCS may, by giving written notice to the applicant, extend this administrative timeline by up to 40 working days. During this time, CCCS will, unless exceptional circumstances exist, issue an invitation to the public to comment on the commitments proposal on its website or approach relevant third parties on an individual basis for their views on the commitments. This process is otherwise known as "market testing". Having obtained relevant third party views, CCCS will decide whether to accept the commitments or proceed to Phase 2. Where a commitments proposal requires substantial changes in view of third party feedback and therefore a second market test, CCCS may reject the proposal altogether and proceed to Phase 2 where there is insufficient time to adequately assess the revisions to the initial commitments proposal. In any event, CCCS may terminate the review of the commitments at any time and proceed to Phase 2.

3.7 Where commitments have been accepted, CCCS will issue a favourable decision. CCCS will generally publish the details of all commitments as part of its decision on the merger on the public register.

Phase 2 Merger Notification

3.8 During the Phase 2 merger review process, CCCS may call for a "state of play meeting" with the applicant to provide an update of CCCS's review and its assessment of the competition concerns identified, including those identified in Phase 1. CCCS's competition concerns will also be formally set out in an issues letter ("Phase 2 Issues Letter"), which may be sent separately from a state of play meeting. A deadline for the applicant to respond will be set out in the Phase 2 Issues Letter. If the applicant submits a commitments proposal by the deadline stipulated in the Phase 2 Issues Letter and it is accepted in-principle by CCCS for market testing, CCCS will generally not extend the 120-working day review period for the purpose of evaluating the commitments proposal.

3.9 As part of CCCS's review, the commitments proposal will be subject to market testing (unless exceptional circumstances exist). CCCS will generally accept a commitments proposal where only minor refinements are necessary to address any concerns raised during the market testing. If feedback received during market testing strongly indicates that the commitments proposal will not be able to address the competition concerns identified by CCCS, CCCS will proceed to issue its Statement of Decision (Provisional).

3.10 If the applicant submits a commitments proposal after the deadline stipulated in the Phase 2 Issues Letter, CCCS will only evaluate the proposal if there is sufficient time to do so before it issues its Statement of Decision (Provisional). CCCS will not extend the 120-working day review period to make its final decision on the merger for the purposes of evaluating commitments submitted after the stipulated deadline save in exceptional circumstances. After the issuance of the Statement of Decision (Provisional), the applicant may re-submit the commitments proposal or submit a fresh proposal together with any written representations to the Statement of Decision (Provisional). Should a commitments proposal be submitted after a Statement of Decision (Provisional) has been issued, CCCS will "stop the clock" upon receipt of the proposal to allow it to assess the proposed commitments. CCCS will "resume the clock" if it rejects the proposal at any point in time.

Notifications for decision under sections 44 or 51

3.11 An applicant seeking a decision under sections 44 or 51 may also offer commitments to CCCS in order to address competition concerns.[6]

3.12 As part of the Form 1 review process, CCCS will generally set out to the applicant its competition concerns and may inform the applicant that it is able to submit a commitments proposal by a stipulated deadline. Should CCCS not receive a commitments proposal by the deadline which can be accepted in-principle, CCCS will request that the applicant submit Form 2 by a stipulated deadline. On the other hand, if the applicant's commitments proposal put forward by the stipulated deadline is accepted in-principle by CCCS, CCCS will proceed with market testing (unless exceptional circumstances exist). Having obtained relevant third party views, CCCS will decide whether to accept the commitments or proceed to a Form 2 review. CCCS may terminate the review of the commitments at any time and proceed to a Form 2 review.

3.13 During the Form 2 review process, CCCS may call for a state of play meeting with the applicant to set out its competition concerns. CCCS may similarly inform the applicant that it is able to submit a commitments proposal by a stipulated deadline. Should CCCS receive a commitments proposal by the deadline which can be accepted in-principle, CCCS will proceed to market test the commitments (unless exceptional circumstances exist). Having obtained relevant third party views, CCCS will decide whether to accept the commitments or proceed to make a proposed/provisional unfavourable decision. CCCS may terminate the review of the commitments at any time and proceed to make a proposed/provisional unfavourable decision.

3.14 Where a commitments proposal is submitted after the deadline stipulated in the Form 2 review process, CCCS may choose to consider such a proposal at the same time as it considers the applicant's written representations to any proposed/provisional unfavourable decision. The applicant may also choose to submit a fresh or revised commitments proposal together with their written representations.

3.15 If the commitments proposal is accepted in-principle, CCCS will proceed to market test the commitments (unless exceptional circumstances exist). Having obtained relevant third party views, CCCS will decide whether to accept the commitments or proceed to make an unfavourable decision. CCCS may terminate the review of the commitments at any time and proceed to make an unfavourable decision.

3.16 CCCS will generally accept a commitments proposal where only minor refinements are necessary to address any concerns raised during the market testing. If feedback received during market testing strongly indicates that the commitments proposal will not be able to address the competition concerns identified by CCCS, CCCS will proceed to request for Form 2 or issue a proposed/provisional unfavourable decision or unfavourable decision as the case may be. CCCS may also terminate the review of the commitments at any time. Where a commitments proposal undergoes substantial changes and requires a second market test, CCCS may also reject the proposal.

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[6] Sections 60A(2) and 60A(3) of the Act respectively.

Investigations

3.17 CCCS has the discretion to decide whether to accept commitments during investigations on a case by case basis. CCCS is generally not inclined to accept commitments in cases involving restrictions of competition by object (e.g., bid-rigging) with no accompanying net economic benefit.

3.18 Where an undertaking under investigation seeks to offer a commitments proposal, CCCS will generally stipulate a deadline for its submission. Where a commitments proposal is accepted in-principle, CCCS will, unless exceptional circumstances exist, seek relevant third party views on the proposal. CCCS will generally accept a commitments proposal where only minor refinements are necessary to address any concerns raised by relevant third parties. Should the undertaking fail to offer a commitments proposal by the stipulated deadline which is acceptable to CCCS, CCCS will proceed with the issuance of a proposed infringement decision.

Form of Commitments

3.19 Parties interested to offer a commitments proposal should use a completed Form CR. The form may be revised from time to time, with an updated version being available on CCCS's website.

Applications to Vary, Substitute or Release a Commitment

3.20 Where CCCS has accepted a commitment, the party who provided the commitment may apply to CCCS to vary, substitute or release that commitment.[7] CCCS highlights that the burden is on the party making such application to explain the basis for the application and demonstrate how the variation, substitution or release of the original commitments would address any competition concerns persisting at the time of the application, and would not give rise to new competition concerns. Section 60B(4) also gives CCCS the power to revoke the favourable decision if any of the commitments are breached.

3.21 CCCS may of its own initiative release a party from a commitment where it has reasonable grounds for believing that the commitment is no longer necessary or appropriate.[8]

3.22 Before varying, substituting or releasing a commitment, CCCS will, unless exceptional circumstances exist, issue an invitation to the public to comment on the commitments proposal on its website or approach relevant third parties on an individual basis for their views on the commitments.

3.23 Parties should submit the application using a completed Form CV. The form may be revised from time to time, with an updated version being available on CCCS's website.

4 DIRECTIONS TO BRING AN INFRINGEMENT TO AN END

4.1 The Act provides that where CCCS has made a decision that the section 34, 47 and/or 54 prohibitions has or have been infringed, CCCS may give such directions as it considers appropriate to bring an infringement to an end.[9]

4.2 The directions may be given to such person(s) as CCCS considers appropriate.[10] This includes individuals and undertakings. CCCS is not limited to giving directions to the infringing undertakings.[11] For example, directions may be addressed to a parent company which, though not the actual instigator of the infringement, has a subsidiary which is the immediate party to the infringement.

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[7] Regulation 3, *Competition Regulations 2007.*
[8] Section 60A(6) of the Act.
[9] Section 69 of the Act.
[10] Section 69(1) of the Act.
[11] Section 2 of the Act.

4.3 Directions may in particular require the person concerned to modify the agreement or conduct, or to terminate the agreement or cease the conduct in question.[12] Directions may require positive action, such as informing third parties that an infringement has been brought to an end and reporting back periodically to CCCS on certain matters. In some circumstances, the directions appropriate to bring an infringement to an end may be (or include) directions requiring an undertaking to make structural or behavioural changes to its business.

Procedure for Giving Directions

4.4 The directions must be in writing and may be given to such person(s) as CCCS considers appropriate.[13] They are likely to form part of the infringement decision in cases where the decision and the directions are addressed to the same person. If CCCS proposes to make an infringement decision, it must give the person likely to be affected by such decision, a written notice setting out the facts on which CCCS relies and its reasons for the proposed decision, and an opportunity to make written representations to CCCS.[14] The person receiving the written notice may request in his written representations a meeting with CCCS to make oral representations to elaborate on the written representations.

4.5 CCCS will give these persons or their authorised representatives a reasonable opportunity to inspect the documents in CCCS's file relating to the matters referred to in the notice. CCCS may withhold any documents to the extent that they contain confidential information or are internal documents.

4.6 Any direction given by CCCS will set out its reasons for giving the direction. The direction will be published on the register maintained by CCCS, which is open to public inspection on CCCS's website.

Enforcement of Directions

4.7 In most cases, directions will take immediate effect. In some cases, CCCS may allow the undertaking a period of time within which to comply with a direction.

4.8 If there is non-compliance with a direction, CCCS may apply to register the direction with a District Court in accordance with the Rules of Court. On registration, the direction has the same force and effect as if it had been an order originally obtained in the District Court and will be enforced accordingly.[15] Any person who fails to comply with a registered direction without reasonable excuse will be in contempt of court. The normal sanctions for contempt of court will apply, i.e. the court may impose a fine or imprisonment. The court may also make orders to secure compliance with the direction, or to require any person to do anything to remedy, mitigate or eliminate any effects arising from non-compliance with the direction. In addition, the District Court may also make an award for costs upon the registration of the direction.

Appeals against Directions

4.9 A direction imposed can be appealed to the Competition Appeal Board ("Board").[16] Such an appeal must be brought within the specified time period.

4.10 The Board can impose, revoke or vary a direction as long as it is a direction that CCCS could itself have given.[17] A decision by the Board as to any direction can be appealed to the High Court and then to the Court of Appeal on a point of law arising therefrom.[18] Such an appeal can only be made by a party to the proceedings in which the decision of the Board was made.[19]

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[12] Sections 69(2)(a) and (b) of the Act.
[13] Section 69(1) of the Act.
[14] Section 68(1) of the Act.
[15] Section 85 of the Act.
[16] Section 71 of the Act.
[17] Section 73(8) of the Act.
[18] Section 74(1)(a) of the Act.
[19] Section 74(2) of the Act.

4.11 An appeal to the Board against a direction imposed will not operate to suspend that direction. The infringement decision and the direction will remain in effect (unless suspended by an interim order made by the Board or, in the case of a further appeal, the relevant appeal court).

5 DIRECTIONS ON INTERIM MEASURES

5.1 The Act provides that CCCS may give directions on interim measures pending its final decision as to whether there has been an infringement of the section 34, 47 or 54 prohibitions.[20] Directions on interim measures will not affect the final decision.

5.2 CCCS may give directions on interim measures before it has completed its investigation of the suspected infringement if:

- it has begun an investigation under section 62 of the Act, the investigation is ongoing and it has not completed the investigation;[21] and
- it considers that it is necessary to act urgently either to prevent serious, irreparable damage to a particular person or category of persons, or to protect the public interest.[22]

5.3 What constitutes serious damage is a question of fact and will depend upon the circumstances of each case. Damage may be serious where a particular person or category of persons may suffer considerable competitive disadvantage likely to have a lasting effect on their position. Serious damage is likely to include significant financial loss to a person (to be assessed with reference to that person's size or financial resources as well as the proportion of the loss in relation to the person's total revenue), and significant damage to the goodwill or reputation of a person.

5.4 A threat of insolvency will generally be sufficient to constitute serious, irreparable damage although it need not always be so. Less extreme forms of serious damage may still be irreparable, in so far as they cannot be remedied by later intervention. Serious and irreparable damage are cumulative, though inter-related, requirements. Thus, serious damage which is not irreparable will not suffice. The serious, irreparable damage must be shown to result from the alleged anti-competitive behaviour.

5.5 CCCS may consider that it is necessary to act urgently to protect the public interest, for example, to prevent damage being caused to a particular industry or to consumers as a result of the suspected infringement. It may also take action to prevent damage to competition more generally. For mergers, CCCS may consider interim measures to prevent the merger parties from taking any action that might prejudice CCCS's ability to consider the merger further and/or to impose appropriate remedies.[23]

5.6 Directions on interim measures may be given by CCCS on its own initiative or after receiving a request, provided that the conditions in paragraph 5.2 above are satisfied. Any person requesting a direction on interim measures should provide as much evidence as possible, demonstrating that the alleged infringement is causing, or is likely to cause, serious, irreparable damage or that it is necessary that CCCS act to protect the public interest. Such a request should also indicate as precisely as possible the nature of the interim measure sought.

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[20] Section 67 of the Act.
[21] Section 67(1)(a) of the Act.
[22] Section 67(1)(b) of the Act.
[23] Section 67(2) of the Act.

5.7 CCCS may give such directions on interim measures as it considers appropriate. CCCS may in particular require the person(s) concerned to terminate the agreement or cease the conduct in question, or to modify the agreement or conduct. For mergers, interim measures may include directions that (i) stop the acquiring party from implementing the merger; (ii) prohibit the transfer of staff; (iii) set limits on the exchange of commercially sensitive information such as customer lists and prices; or (iv) require a merger to be dissolved or modified.[24]

5.8 When the investigation is complete and CCCS has decided that an infringement has taken place, it may replace the direction on interim measures with a direction described in Part 4 above. Otherwise, a direction on interim measures has effect until CCCS has discontinued or completed its investigation into the matter or until CCCS considers there is no longer any necessity to act as a matter of urgency to prevent any serious, irreparable damage to a particular person or category of persons or for the protection of the public interest.

Procedure on giving Directions on Interim Measures

5.9 Before giving a direction on interim measures, CCCS must give to the person to whom it proposes to give the direction, a written notice indicating the nature of the direction it proposes to give and the reasons for deciding to give it, and an opportunity to make written representations to CCCS.[25] The person receiving the written notice may request in his written representations a meeting with CCCS to make oral representations to elaborate on the written representations.

5.10 CCCS will give such a person or his authorised representative a reasonable opportunity to inspect the documents in CCCS's file relating to the proposed direction. However, CCCS may withhold any documents to the extent that they contain confidential information or are internal documents.

5.11 The directions on interim measures will be published on the register maintained by CCCS, which is open to public inspection on CCCS's website.

5.12 A direction on interim measures can be appealed to the Board. Such an appeal must be brought within the specified time period. The making of an appeal will not suspend the effect of the direction on interim measures but the Board may suspend its effect by an interim order.

Enforcement of Directions on Interim Measures

5.13 Directions on interim measures can be enforced following the procedure set out in paragraphs 4.7 to 4.8 above.

Appeals against Directions on Interim Measures

5.14 Directions on interim measures can be appealed following the procedure set out in paragraphs 4.9 to 4.11 above.

Assurances in lieu of Interim Measures Directions

5.15 CCCS may accept informal interim assurances offered by the person(s) concerned where it is satisfied that these will prevent any harm which might otherwise form the basis for imposition of a direction on interim measures.

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[24] For additional information on directions on interim measures in relation to anticipated mergers and mergers that do not involve the acquisition of shares, or interim measures in the merger context more generally, please refer to paragraph 4.68 of the *CCCS Guidelines on Merger Procedures*.

[25] Section 67(3) of the Act.

5.16 One of the prerequisites for an interim remedy is that it is necessary to act as a matter of urgency. The ability to accept informal interim assurances in appropriate circumstances helps facilitate quick action by CCCS.

5.17 CCCS may replace informal interim assurances by a direction on interim measures.

5.18 Informal interim assurances will include a provision that they will come to an end when an investigation is complete. If CCCS has decided that an infringement has taken place, it may replace any informal interim assurances with a direction described in Part 4 above.

6 DIRECTIONS ON PENALTIES

6.1 The Act provides that CCCS may impose a financial penalty[26] on any party to an agreement that infringes the section 34 prohibition or any person whose conduct infringes the section 47 prohibition or section 54 prohibition provided that infringement has been intentionally or negligently committed.[27] The amount of the penalty imposed may be up to 10% of the turnover of the business of the undertaking in Singapore for each year of infringement, up to a maximum of three (3) years.[28] It is for CCCS to determine whether a financial penalty should be imposed. CCCS can impose penalties for infringements that have already stopped as well as for ongoing infringements.

6.2 CCCS will use this power to impose penalties on infringing undertakings to reflect the seriousness of the infringement and to serve as an effective deterrent, both to the undertaking concerned and to other undertakings which might be considering activities contrary to the section 34, 47 or 54 prohibitions. The setting of the maximum penalty at 10% of the turnover of the business of the undertaking in Singapore for each year of infringement, up to a maximum of three (3) years, allows CCCS to adjust, where appropriate, the levels of penalties to ensure that deterrence is achieved.

Intentionally or Negligently

6.3 Before exercising the power to impose a financial penalty, CCCS must be satisfied, as a threshold condition, that the infringement has been committed intentionally or negligently.

6.4 For intention or negligence to be found, it is not necessary for there to have been action by, or even knowledge on the part of, the partners or principal managers of the undertaking concerned; action by a person who can act on behalf of the undertaking suffices.

6.5 CCCS may consider the existence of past decisions or directions made against an undertaking when considering whether or not an infringement of the section 34, 47 or 54 prohibition by similar anti-competitive activities of that undertaking was committed intentionally or negligently.

6.6 The fact that a particular type of agreement or conduct has not previously been found to have infringed the section 34, 47 or 54 prohibitions does not mean that the infringement cannot be committed intentionally or negligently.

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[26] Section 69(2)(e) of the Act.
[27] Section 69(3) of the Act.
[28] Section 69(4) of the Act.

Intention

6.7 The circumstances in which CCCS might find that an infringement has been committed intentionally include the following:

- the agreement or conduct has as its object the restriction of competition;
- the undertaking in question is aware that its actions will be, or are reasonably likely to be, restrictive of competition but still wants, or is prepared, to carry them out; or
- the undertaking could not have been unaware that its agreement or conduct would have the effect of restricting competition, even if it did not know that it would infringe the section 34, 47 or 54 prohibitions.

6.8 The intention (or negligence, referred to below) relates to the facts, not the law. Ignorance or a mistake of law (i.e. ignorance that the relevant agreement or conduct is an infringement) is thus no bar to a finding of intentional infringement.

6.9 In establishing whether or not there is intention, CCCS may consider internal documents generated by the undertakings in question. CCCS may regard deliberate concealment of an agreement or practice by the undertakings as strong evidence of an intentional infringement. It may be inferred that an infringement has been committed intentionally where consequences giving rise to an infringement are plainly foreseeable from the pursuit of a particular policy by an undertaking.

Negligence

6.10 CCCS is likely to find that an infringement of the section 34, 47 or 54 prohibitions has been committed negligently where an undertaking ought to have known that its agreement or conduct would result in a restriction or distortion of competition.

Involuntary Infringement

6.11 Where an undertaking participates in an infringement under pressure, it may still be held to have acted intentionally or negligently, although, depending on the circumstances, the penalty may be reduced.

Provisional Immunity from Penalties under the Section 34 Prohibition from the Date of Notification to CCCS

6.12 The Act provides for parties to notify their agreements or conduct to CCCS for guidance or a decision.[29] Where an agreement to which the section 34 prohibition applies has been notified, CCCS cannot impose a penalty in respect of any infringement of the section 34 prohibition, during the period beginning with the date of notification and ending on such date as may be specified in a notice given in writing to the applicant by CCCS on determination of the application.[30] The date specified in the notice may not precede the date on which the notice is given.[31] No such immunity exists for notifications in respect of conduct under the section 47 or 54 prohibitions.

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[29] Sections 42 and 49 of the Act.
[30] Sections 43(4) and 44(3) of the Act.
[31] Sections 43(5) and 44(4) of the Act.

6.13 Provisional immunity only arises after the application for guidance or a decision has been made. Further information on such applications can be found in the *CCCS Guidelines on Filing Notifications for Guidance or Decision with respect to the Section 34 Prohibition and Section 47 Prohibition 2016*.

Immunity after Guidance or Decision

6.14 Where CCCS has given a favourable guidance or decision in respect of any agreement or conduct notified to it under sections 43, 44, 50 and 51 respectively, no penalty may be imposed in respect of any infringement under the section 34 or 47 prohibition, as the case may be. However, CCCS may remove the immunity from such penalties if –

- it takes further action with respect to the agreement or conduct in one of the following circumstances –
    - it has reasonable grounds for believing that there has been a material change of circumstance since the guidance or decision, as the case may be, was given; or
    - it has reasonable grounds for suspecting that the information on which the guidance or decision was based was incomplete, false or misleading in a material particular; or
    - in the case of guidance on infringement of the section 34 prohibition only, one of the parties to the agreement applies for a decision with respect to the agreement; or
    - in the case of guidance only, a complaint about the agreement or conduct is made to CCCS;
- it considers it likely that the agreement or conduct will infringe the section 34 or 47 prohibition; and
- it gives written notice to the party or undertaking on whose application the guidance was given or the decision was made, that it is removing the immunity as from the date specified in the notice.

6.15 If CCCS has reasonable grounds for suspecting that the information provided to it by a party to the agreement or by an undertaking engaging in the conduct, on which it based the guidance or decision, as the case may be, was incomplete, false or misleading in a material particular, the date specified in the notice may be earlier than the date on which the notice is given. It is a criminal offence to provide information that is false or misleading in a material particular under section 77 of the Act (see the *CCCS Guidelines on the Powers of Investigation in Competition Cases 2016* for further treatment of offences).

Turnover

6.16 The definition of turnover for the purposes of determining the maximum financial penalty that may be imposed by CCCS under section 69(4) of the Act has been prescribed in the *Competition (Financial Penalties) Order 2007*.

Amount of a Penalty

6.17 CCCS's approach on the calculation of a financial penalty to be imposed has been set out in the *CCCS Guidelines on the Appropriate Amount of Penalty in Competition Cases*.

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6.18 In brief, a financial penalty imposed by CCCS for an infringement of the section 34, 47 or 54 prohibitions will be calculated taking into consideration, amongst other things, the nature, duration and seriousness of the infringement, the turnover of the business of the undertaking in Singapore for the relevant product and geographic markets affected by the infringement, market conditions, aggravating factors including the existence of any prior anti-competitive practices and behaviour of the infringing party, and mitigating factors including the existence of any compliance programme and the extent to which the infringing party has co-operated with CCCS. In line with the procedure for giving directions set out in paragraphs 4.4 to 4.6 above, the proposed amount of financial penalty will be set out in the proposed infringement decision so as to permit addressees of the proposed infringement decision to make representations, written and oral, to CCCS on matters of liability as well as penalty. After taking in representations, should CCCS decide to issue an infringement decision including a financial penalty, CCCS may request updated applicable turnover figures,[32] where necessary, to ensure that the statutory maximum for any financial penalty is not exceeded.

Lenient Treatment for Undertakings Coming Forward with Information

6.19 Undertakings participating in cartel activities might wish to terminate their involvement and inform CCCS of the existence of the cartel activity, but be deterred from doing so by the risk of incurring large financial penalties. To encourage such undertakings to come forward, CCCS will grant total immunity from financial penalties for an infringement of the section 34 prohibition to a participant in a cartel activity who is the first to come forward subject to certain conditions being met (including that the undertaking refrain from further participation in the cartel activity, except as directed by CCCS). An undertaking which is not the first to come forward, or does not satisfy all of these conditions, may benefit from a reduction in the amount of the penalty imposed.

6.20 Further information on immunity from, or reduction in the amount of financial penalties is set out in the *CCCS Guidelines on Lenient Treatment for Undertakings Coming Forward with Information on Cartel Activity 2016*.

Payment

6.21 Where CCCS directs an undertaking to pay a financial penalty, it must, at the same time, inform the undertaking in writing of its reasons. Where CCCS imposes a penalty, it must serve a written notice on the undertaking required to pay the penalty, specifying the date before which the penalty is required to be paid.[33] The date for payment must not be earlier than the end of the period within which an appeal against the direction may be brought.[34]

Liability for Payment

6.22 CCCS may direct:

- any party to an agreement which has infringed the section 34 prohibition;
- any person whose conduct has infringed the section 47 prohibition; and/or
- any person whose conduct has infringed the section 54 prohibition;

to pay a penalty. Where there has been a finding of joint dominance, so that more than one undertaking has infringed the section 47 prohibition, CCCS can direct each undertaking to pay a penalty.

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[32] Refer to section 69(4) of the Act and the *Competition (Financial Penalties) Order 2007*.
[33] Section 69(5) of the Act.
[34] Section 69(5) of the Act.

6.23 A parent company and its subsidiaries will usually be treated as a single undertaking if they operate as a single economic unit. This will depend on the facts of each case. CCCS may need to consider the respective responsibility of both parent and subsidiary for an infringement and therefore for consequent liability to pay a penalty. Where CCCS decides to impose a penalty on both parent and subsidiary, it may be imposed jointly and severally.

6.24 A penalty may be imposed on a company that takes over the undertaking that has committed an infringement. Changes in the legal identity of an undertaking will not prevent it or its component parts from being penalised. As far as possible, liability for penalties will follow responsibility for actions. Thus, a subsequent transfer of a business from one economically distinct undertaking to another will not automatically absolve the transferor from responsibility. Where the original undertaking has ceased to exist by the time a penalty comes to be imposed, the penalty may be imposed on the successor undertaking.

6.25 The involvement of a trade association in an infringement of the section 34 or 47 prohibition may result in financial penalties being imposed on the association itself, its members or both. Where the infringement relates to activities of its members, the penalty shall not exceed 10% of the sum of the turnover of business of each member of the trade association in Singapore active on the market affected by the infringement, for each year of infringement, up to a maximum of three (3) years.

Enforcement of Penalty Decision

6.26 If an undertaking fails to pay a penalty within the date specified in the direction and it has not brought an appeal against the imposition or amount of the penalty within the time allowed or such an appeal has been made and the penalty upheld, CCCS may register the direction to pay a penalty with a District Court in accordance with the Rules of Court and the effect of registration is that the imposition of the penalty has the same force and effect as if it had been an order originally obtained in the District Court[35] and can be executed and enforced accordingly, for example, by writ of seizure and sale. In addition, the District Court may make an award for costs and interest upon the registration of the imposition of the penalty.

Appeals against Penalty Decision

6.27 The decision to impose a financial penalty and the decision as to the amount of that penalty can be appealed to the Board.[36] Such an appeal must be brought within the specified time period.

6.28 The Board can revoke a penalty or vary its amount.[37] A decision by the Board as to the amount of a penalty can be appealed to the High Court and then to the Court of Appeal[38]. Such an appeal can only be made by a party to the proceedings in which the decision of the Board was made.[39]

6.29 An appeal to the Board against the imposition or amount of a penalty will suspend the penalty until the appeal is determined. The infringement decision itself will remain in effect (unless suspended by an interim order made by the Board or, in the case of a further appeal, the relevant appeal court).

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[35] Section 85 of the Act.
[36] Section 71 of the Act.
[37] Section 73(8)(b) of the Act.
[38] Section 74(1)(b) of the Act.
[39] Section 74(2) of the Act.

7 ENFORCEMENT IN THE COURTS

7.1 Parties suffering loss or damage directly arising from an infringement of the section 34, 47 or 54 prohibition are entitled to commence a civil action to seek relief against the infringing undertaking.[40]

7.2 Such rights of private action shall only arise after CCCS has made a decision of infringement in respect thereof, and in the event the decision is subject to an appeal, upon expiry of the appeal period or upon determination of the appeal if an appeal is brought.[41]

7.3 There is a two (2) year limitation period for the commencement of such private actions from the time that CCCS made the decision or from the determination of the appeal, whichever is the later.[42]

7.4 The court will be bound in such proceedings by the relevant infringement decisions.[43]

8 GLOSSARY

Person	Includes any undertaking.
Undertaking	Refers to any person, being an individual, a body corporate, an unincorporated body of persons or any other entity, capable of carrying on commercial or economic activities relating to goods or services, as the context demands. Includes individuals operating as sole proprietorships, companies, firms, businesses, partnerships, co-operatives, societies, business chambers, trade associations and non-profit-making organisations.

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[40] Section 86(1) of the Act.
[41] Sections 86(2) and (3) of the Act.
[42] Section 86(6) of the Act.
[43] Section 86(7) of the Act.

CCCS GUIDELINES ON LENIENT TREATMENT FOR UNDERTAKINGS COMING FORWARD WITH INFORMATION ON CARTEL ACTIVITY 2016

Effective from: 1 December 2016

1 INTRODUCTION

1.1 Under section 34 of the *Competition Act 2004* ("the Act"), 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 are prohibited.

1.2 Section 34 extends to prohibit cartel activities.[1] Cartel activities include, amongst other things, the following:

- Price-Fixing:
  E.g. where parties agree, directly or indirectly, on the prices;

- Establishment of Restrictions / Quotas on Output:
  E.g. agreements which restrict output or production;

- Bid-Rigging:
  E.g. arrangements where parties collude when submitting their tenders;

- Market Sharing Agreements.

Further information on the section 34 prohibition can be found in the *CCCS Guidelines on the Section 34 Prohibition*.

1.3 Cartels hurt consumers because they restrict or remove competition between market players and thereby remove the incentive for market players to be efficient or to innovate.

1.4 As cartel activities infringe the section 34 prohibition, undertakings participating or which have participated in them are liable under section 69 of the Act to a financial penalty. Such undertakings may wish to inform the Competition and Consumer Commission of Singapore ("CCCS") of the existence of the cartel activity but might be deterred from doing so because of the risk of incurring large financial penalties.

1.5 Due to the secret nature of cartels, undertakings participating or which have participated in them should be given an incentive to come forward and inform CCCS of the cartel's activities. The policy of granting lenient treatment to these undertakings which co-operate with CCCS outweighs the policy objectives of imposing financial penalties on such cartel participants.

1.6 As leniency programmes have been found to be effective in other competition law regimes, a similar programme forms part of Singapore's enforcement strategy.

1.7 These guidelines are not a substitute for the Act, the regulations and orders. They may be revised should the need arise. The examples in these guidelines are for illustration. They are not exhaustive, and do not set a limit on the investigation and enforcement activities of CCCS. In applying these guidelines, the facts and circumstances of each case will be considered. Persons in doubt about how they and their commercial activities may be affected by the Act may wish to seek legal advice.

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[1] Cartel activities refer to agreements between undertakings, decisions by associations of undertakings or concerted practices which have as their object, the prevention, restriction or distortion of competition within Singapore.

2 TOTAL IMMUNITY FOR THE FIRST TO COME FORWARD BEFORE AN INVESTIGATION HAS COMMENCED

2.1 Under section 69(4) of the Act, an undertaking which has intentionally or negligently infringed the Act's prohibitions faces a financial penalty of up to 10% of its business turnover for each year of infringement (up to a maximum of three (3) years).

2.2 CCCS will nevertheless grant an undertaking/leniency applicant the benefit of total immunity from financial penalties if all of the following conditions are satisfied:

- The undertaking is the first to provide CCCS with evidence of the cartel activity before an investigation[2] has commenced, *provided that CCCS* does not already have sufficient information to establish the existence of the alleged cartel activity;
- The undertaking:
  - provides CCCS with all the information, documents and evidence available to it regarding the cartel activity; immediately.[3] Such information, documents and evidence must provide CCCS with sufficient basis to commence an investigation;[4]
  - grants an appropriate waiver of confidentiality to CCCS in respect of any jurisdiction where the applicant has also applied for leniency or any other regulatory authority for which it has informed of the conduct;
  - unconditionally admits to the conduct for which leniency is sought and details the extent to which this had an impact in Singapore by preventing, restricting or distorting competition within Singapore;
  - maintains continuous and complete co-operation throughout the investigation and until the conclusion of any action by CCCS arising as a result of the investigation; and
  - refrains from further participation in the cartel activity from the time of disclosure of the cartel activity to CCCS (except as may be directed by CCCS).

2.3 If an undertaking does not qualify for total immunity under paragraph 2.2, it may still benefit from a reduction in the financial penalty of up to 100% under paragraphs 3.1 and 3.2.

2.4 An undertaking which has initiated or coerced another undertaking to participate in the cartel will not be eligible for total immunity or receive a reduction in the financial penalty of up to 100% under paragraphs 3.1 and 3.2. However, such an undertaking can still apply for leniency and benefit from a reduction in the financial penalty of up to 50% subject to the conditions set out in paragraphs 4.1 and 4.2. In determining whether an undertaking has initiated or coerced another undertaking to participate in the cartel, CCCS would consider the surrounding circumstances of each case carefully, including but not limited to whether the undertaking took positive and successful steps to either initiate a cartel (in the case of an initiator) or pressurised an unwilling participant to take part in the cartel (in the case of a coercer).

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[2] Section 62 of the Act provides that CCCS may conduct an investigation if there are reasonable grounds for suspecting that, *inter alia*, the section 34 prohibition has been infringed by any agreement. A formal investigation may include the exercise of any of CCCS's investigatory powers under sections 63 to 65 of the Act.

[3] Where an undertaking is not immediately able to provide all the information, documents and evidence available to it regarding the cartel activity, a reasonable time frame for the provision of this information can be agreed by CCCS.

[4] Section 62 of the Act provides that CCCS may conduct an investigation if there are reasonable grounds for suspecting that, *inter alia*, the section 34 prohibition has been infringed by any agreement.

3 REDUCTION OF UP TO 100% IN THE LEVEL OF FINANCIAL PENALTIES WHERE THE UNDERTAKING IS THE FIRST TO COME FORWARD BUT WHICH DOES SO ONLY AFTER AN INVESTIGATION HAS COMMENCED

3.1 An undertaking may benefit from a reduction in the financial penalty of up to 100% if:

- the undertaking seeking immunity is the first to provide CCCS with evidence of the cartel activity;
- this information is given to CCCS after CCCS has started an investigation but before CCCS has sufficient information to issue a written notice under section 68(1) that it proposes to make a decision that the section 34 prohibition has been infringed;
- the conditions under the second bullet in paragraph 2.2 are satisfied;
- the information adds significant value to CCCS's investigation (i.e. it genuinely advances the investigation);
- the undertaking was not the one to initiate the cartel; and
- the undertaking must not have coerced another undertaking to participate in the cartel.

3.2 Any reduction in the level of the financial penalty under these circumstances is discretionary. In exercising this discretion, CCCS will take into account:

- the stage at which the undertaking comes forward;
- the evidence already in CCCS's possession; and
- the quality of the information provided by the undertaking.

4 SUBSEQUENT LENIENCY APPLICANTS: REDUCTION OF UP TO 50% IN THE LEVEL OF FINANCIAL PENALTIES

4.1 Undertakings which provide evidence of cartel activity before CCCS issues a written notice under section 68(1) of its intention to make a decision that the section 34 prohibition has been infringed, but are not the first to come forward, may be granted a reduction of up to 50% in the amount of the financial penalty which would otherwise be imposed, if the conditions under the second bullet in paragraph 2.2 are satisfied and the information adds significant value to CCCS's investigation.

4.2 Any reduction in the level of the financial penalty under these circumstances is discretionary. In exercising this discretion, CCCS will take into account:

- the stage at which the undertaking comes forward;
- the evidence already in CCCS's possession; and
- the quality of the information provided by the undertaking.

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5 PROCEDURE FOR REQUESTING IMMUNITY OR A REDUCTION IN THE LEVEL OF PENALTIES

5.1 An undertaking that wishes to take advantage of the lenient treatment detailed in these guidelines must contact CCCS. Anyone contacting CCCS on the undertaking's behalf must have power to represent the undertaking.

5.2 Applications for leniency may be made either orally or in writing, through the online form available on CCCS's website, by electronic mail to cccs_leniency@cccs.gov.sg, or by telephone to the Assistant Chief Executive or the Directors of the Legal and Enforcement Divisions of CCCS. Telephone calls should be made to the CCCS hotline 1800-325-8282 (or for calls from overseas +(65) 6325-8206) and a request should be made that the call be routed to the Assistant Chief Executive or the Directors of the Legal and Enforcement Divisions of CCCS. Although CCCS is of the view that correspondence between CCCS and the applicant and/or its legal representatives should be in writing for administrative matters, CCCS is prepared to consider conducting the communications between the applicant and CCCS orally, whether by way of meeting or telephone conferences.

5.3 Initial contact with or "feelers" to CCCS may be made anonymously. However, for the leniency application to be properly recorded and proceeded with, the undertaking's name must be given to CCCS.

5.4 CCCS will provide a marker system for leniency applications under paragraphs 2 and 3 above where an undertaking is not able to immediately provide all the information, documents and evidence available to it regarding the cartel activity. A marker secures an undertaking's position in the queue for immunity under paragraph 2 or a reduction in the financial penalty of up to 100% under paragraph 3 for a period to be specified by CCCS on a case-by-case basis in order to allow the undertaking to gather the necessary information, documents and evidence.

5.5 To secure a marker, an applicant must specify the name of the undertaking(s) for which the marker is sought and provide a description of the cartel activity. The applicant is also expected to define the market(s) in which the cartel activity occurred and detail the impact of the conduct on the identified relevant markets in Singapore. Sufficient details of the cartel activity, including the estimated duration of the cartel activity and the parties to the cartel, must be given to allow CCCS to determine that no other undertaking has applied for leniency for such similar conduct.

5.6 A marker will be granted by way of a letter (unless an alternative mode of communication is agreed to by CCCS) setting out the date on which the marker was granted, the undertaking(s) to which the marker applies, the subject matter and scope of the conduct for which the marker was sought.

5.7 The grant of a marker is discretionary. However, its grant is expected to be the norm rather than the exception. An applicant will only be informed whether it has been the first to come forward.

5.8 To perfect a marker, the undertaking must, within the period specified by CCCS, provide information, documents and evidence which meet the requirements for a grant of conditional immunity or leniency (see paragraph 5.11 below). Where an extension of time is required by the undertaking for the perfection of the marker, this will be considered by CCCS on a case-by-case basis. Applications for an extension of time should be made at least five working days before the expiry of the deadline set. If the undertaking fails to perfect the marker, the next undertaking in the marker queue will be eligible to obtain immunity or a reduction in the financial penalty of up to 100%.

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5.9 The marker system will not apply to leniency applications under paragraph 4 and such applicants should immediately provide CCCS with all the evidence relating to the cartel activity. Where an undertaking is not immediately able to provide all the information, documents and evidence available to it regarding the cartel activity, a reasonable time frame for the provision of this information can be agreed by CCCS. An applicant will be required when applying for leniency to provide its name and a description of the cartel activity. The applicant is also expected to define the market(s) in which the infringing conduct occurred and detail the impact of the conduct on the identified relevant markets in Singapore. This will assist CCCS in determining a reasonable time-frame for furnishing all information, documents and evidence to CCCS.

5.10 Undertakings may provide information relating to a suspected infringement by way of an oral corporate statement. Information that is public or is general market information should be provided in a document. Oral corporate statements will be recorded and transcribed at CCCS's premises. CCCS may request for the applicant or the applicant's legal representatives to provide secretarial and/or administrative support, where appropriate. Where an oral corporate statement is made, the applicant and/or its legal representatives will be given the opportunity to verify the accuracy of the CCCS's transcript.

Grant of Conditional Immunity or Leniency

5.11 For the grant of conditional immunity or leniency, an applicant must provide CCCS with all the information, documents and evidence available to it regarding the cartel activity, and such information, documents and evidence must provide CCCS with a sufficient basis for commencing an investigation or add significant value to CCCS's investigation. In practice, this means that the information is sufficient to allow CCCS to exercise its formal powers of investigation or advance the investigation. Examples of the types of information and documents required by CCCS would include documentary records evidencing the existence of cartel activity, the identification of personnel formerly and currently employed by the undertaking who had engaged in the conduct for which leniency is sought and the provision of information by these personnel about the cartel activity in an interview with CCCS.

5.12 When CCCS considers that the conditions for conditional immunity or leniency have been met, CCCS will issue a letter to the applicant confirming the grant of conditional immunity or leniency. The letter will state the conditions and continuing obligations that the applicant has to meet to maintain its conditional immunity or leniency. Failure to abide with the conditions and obligations may lead to CCCS revoking the grant of conditional immunity or leniency.

Grant of Immunity or Leniency

5.13 When issuing a Proposed Infringement Decision, CCCS will inform an applicant in writing whether immunity or leniency will be granted. The letter will record the scope of the immunity or leniency to be granted. An Infringement Decision shall set out the grant of immunity or leniency and its scope.

6 ADDITIONAL REDUCTION IN FINANCIAL PENALTIES (LENIENCY PLUS)

6.1 An undertaking co-operating with an investigation by CCCS in relation to cartel activity in one market (the first market) may also be involved in a completely separate cartel activity in another market (the second market) which also infringes the section 34 prohibition.

6.2 To qualify for leniency plus, CCCS would have to be satisfied that:

- the evidence provided by the undertaking relates to a completely separate cartel activity. The fact that the activity is in a separate market is a good indicator, but not always decisive; and
- the undertaking would qualify for total immunity from financial penalties or a reduction of up to 100% in the amount of the financial penalty, under paragraphs 2 and 3 in relation to its activities in the second market.

6.3 If CCCS is satisfied with the above, the undertaking will receive a reduction in the financial penalties imposed on it in relation to the first market, which is additional to the reduction which it would have received for its co-operation in the first market alone. For the avoidance of doubt, the undertaking does not need to be in receipt of leniency in respect of the first market to receive this reduction. It is sufficient for the undertaking to be receiving a reduction, by way of mitigation, for co-operation, in the first market.

6.4 For example, as a result of an investigation by CCCS of manufacturers, including XYZ Ltd, in Market A, XYZ Ltd carries out an internal investigation and discovers that it has participated in cartel activity in Market B. XYZ Ltd has been co-operating with CCCS's investigation in Market A and is interested in seeking lenient treatment by disclosing its participation in cartel activity in Market B.

6.5 Assuming XYZ Ltd qualifies for total immunity in relation to Market B, it can also obtain a reduction in financial penalty in relation to Market A in addition to the reduction it would have received for co-operation in the investigation in Market A alone, i.e. an additional reduction in respect of Market A as a result of its co-operation in the investigation into Market B.

7 QUALITY OF INFORMATION PROVIDED BY UNDERTAKING

7.1 As a minimum to meet the conditions for lenient treatment by CCCS, the information, documents and evidence provided by the undertaking under these guidelines must be such as to provide CCCS with a sufficient basis for taking forward a credible investigation or to add significant value to CCCS's investigation. In practice, this means that the information is sufficient to allow CCCS to exercise its formal powers of investigation or genuinely advances CCCS's investigation.

8 CONFIDENTIALITY

8.1 An undertaking coming forward with evidence of cartel activity may in particular be concerned about the disclosure of its identity as an undertaking which has volunteered information. CCCS will therefore endeavour, to the extent that is consistent with its obligations to disclose or exchange information, to keep the identity of such undertakings confidential throughout the course of its investigation, until CCCS issues a written notice under section 68(1) of its intention to make a decision that the section 34 prohibition has been infringed.

8.2 An applicant may submit a request for confidentiality in relation to information provided to CCCS. Part 9 of the *CCCS Guidelines on the Major Provisions* provides details on CCCS's obligations under section 89 and the exceptions under which disclosure is authorised.

9 DISCLOSURE AND USE OF INFORMATION

9.1 Information submitted or obtained from the applicant and its employees or former employees may be used by CCCS for its investigation and against the applicant or third parties in proceedings under the Act.

9.2 Subject to confidentiality, information that is in documentary form provided by the applicant will be disclosed to addressees of a Provisional Infringement Decision, during the course of access to CCCS's file after a Provisional Infringement Decision has been issued. This will include any corporate statement that is given as a document to CCCS. Access to any such corporate statement is only granted to addressees of a Provisional Infringement Decision, provided an addressee undertakes not to make any copy by mechanical or electronic means.

9.3 In the event that:

- an immunity or leniency application is rejected;
- immunity or leniency is not granted;
- immunity or leniency is revoked by CCCS; or
- the applicant withdraws its application for immunity or leniency;

the applicant may withdraw the information submitted for the purposes of its application or still provide the information to CCCS and request that CCCS consider a mitigating reduction in financial penalties in view of its co-operation. If information is withdrawn by the applicant, this does not prevent CCCS from using its formal powers of investigation under the Act to obtain the information. For the avoidance of doubt, records of the applicant's oral submissions made by CCCS are internal documents of CCCS. However, CCCS will not use the information unless it is subsequently submitted by the applicant or obtained by CCCS through the exercise of its formal powers of investigation under the Act.

9.4 In the event that CCCS discontinues its investigation without the issuance of an Infringement Decision, all information obtained from the applicant will be retained by CCCS.

9.5 The information obtained from the applicant may be used by CCCS if the investigation or part thereof is re-opened. For avoidance of doubt, the conditional immunity or leniency previously granted to the applicant will be available to that applicant in the event CCCS re-opens its investigation or part thereof.

10 EFFECT OF LENIENT TREATMENT

10.1 Lenient treatment does not protect the undertaking from the other consequences of infringing the law, which include:

- the fact that the infringing provision is void and therefore cannot be enforced; and
- the possibility that third parties who consider themselves as having been harmed by the cartel may have a claim under a private right of action.

10.2 Lenient treatment also does not provide immunity from any penalty that may be imposed on the undertaking by other competition authorities outside of Singapore.

11 WITHDRAWAL OF LENIENCY MARKER/ REVOCATION OF CONDITIONAL IMMUNITY/ LENIENCY OR LENIENCY

11.1 If at any time after the grant of a leniency marker, CCCS has concerns that an applicant has acted or is acting in a way that puts its leniency status at risk, it will raise those concerns with the applicant and give the applicant an opportunity to respond, and if possible to address CCCS's concerns, prior to withdrawing the leniency marker.

11.2 In the event that the applicant has not complied with the terms on which conditional immunity/ leniency or leniency has been granted or that the applicant has made a false declaration or given false information to CCCS at any point in time, CCCS may revoke the grant of conditional immunity/ leniency or leniency. If CCCS is minded to revoke the grant of conditional immunity/leniency or leniency, the applicant will be notified in writing and given an opportunity to make representations.

CCCS GUIDELINES ON FILING NOTIFICATIONS FOR GUIDANCE OR DECISION WITH RESPECT TO THE SECTION 34 PROHIBITION AND SECTION 47 PROHIBITION 2016

Effective from: 1 December 2016

1 INTRODUCTION

1.1 Section 34 of the *Competition Act 2004* ("the Act") prohibits agreements, decisions by associations of undertakings and concerted practices which have the object or effect of appreciably preventing, restricting or distorting competition in Singapore. Section 47 of the Act prohibits conduct by one or more undertakings amounting to the abuse of a dominant position in any market in Singapore.

1.2 An undertaking may apply to the Competition and Consumer Commission of Singapore ("CCCS") for:

- guidance as to whether, in CCCS's view,
    - an agreement (note that section 34(4) of the Act extends the term "agreement", with the necessary modifications, to encompass a decision by an association of undertakings as well as a concerted practice) to which the undertaking is a party is likely to infringe the section 34 prohibition or whether the agreement is likely to fall under a block exemption (see section 43 of the Act) or is excluded; and/or
    - whether conduct by the undertaking is likely to infringe the section 47 prohibition (see section 50 of the Act); or
- a decision as to whether
    - the agreement has infringed the section 34 prohibition (see section 44 of the Act); and/or
    - the conduct has infringed the section 47 prohibition (see section 51 of the Act).

1.3 CCCS has issued these guidelines to assist undertakings seeking to notify an agreement or conduct to CCCS for guidance or for a decision.

1.4 These guidelines are not a substitute for the Act, the regulations and orders. They may be revised should the need arise. The examples in these guidelines are for illustration. They are not exhaustive, and do not set a limit on the investigation and enforcement activities of CCCS. In applying these guidelines, the facts and circumstances of each case will be considered. Persons in doubt about how they and their commercial activities may be affected by the Act may wish to seek legal advice.

1.5 Undertakings are not required to notify their agreements or conduct and apply for guidance or a decision. However, they may do so if they have serious concerns as to whether they are infringing the Act's prohibitions.

1.6 CCCS wishes to inform undertakings that they should not notify agreements or conduct that do not raise any real concerns of possible infringement of the Act. Where applications of such nature are received, CCCS may exercise its discretion to not give guidance or make a decision. Where this discretion is exercised, CCCS will notify the Applicant(s) that CCCS has determined the application by exercising its discretion not to give guidance or a decision.

1.7 Notification cannot be made in respect of prospective agreements (i.e. agreements where the parties have yet to enter into the agreement) or prospective conduct.

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2 HOW AN APPLICATION FOR GUIDANCE OR FOR A DECISION IS TO BE MADE

2.1 Applications for guidance or decision must be made by submitting Form 1 to CCCS. Form 1 requires information relating to, amongst other things:

- the purpose of the application;
- the Applicant(s) and the other parties to the agreement or conduct;
- the relevant product and geographic markets; and
- details of the agreement or conduct.

Form 1 is found in **Appendix A** to these guidelines.

2.2 Before completing Form 1, Applicant(s) should refer to these guidelines as well as to the various Regulations made under the Act ("the Regulations"). They may also wish to consider the self-assessment criteria in Form 1 and conduct a self-assessment to ascertain if their application is necessary. Applicant(s) may wish to seek legal advice if they consider it helpful. An application for guidance (under sections 43 or 50 of the Act) or for a decision (under sections 44 or 51 of the Act) is deemed as having been made only after the requirements in connection with the filing of Form 1 are met. Fees are payable, in accordance with Regulation 9 of the *Competition (Notification) Regulations 2007*. The quantum of fees payable to CCCS are specified in the Second Schedule of the *Competition (Fees) Regulations 2007*.

2.3 Where the information provided by the Applicant(s) in Form 1 is incomplete, CCCS will notify the Applicant(s) after receipt of the Form and specify a time frame for the Applicant(s) to provide CCCS with the outstanding information. If the Applicant(s) fails to do so within this time frame (or within any extensions granted), then the application will be deemed as not having been made. In addition, with regard to the section 34 prohibition, the provisional immunity referred to in sections 43(4) and 44(3) of the Act will not apply. For the avoidance of doubt, the provisional immunity begins only on the date on which the application is made (i.e. CCCS acknowledges receipt of the application and deems it complete). Where the outstanding information is submitted, the application shall be deemed to be made on the date on which CCCS receives all such information.

2.4 CCCS reserves the right to require the submission of Form 2, including relevant supporting documentation during the course of its assessment of a notification for guidance or decision. Where CCCS requires the Applicant(s) to submit Form 2, it will endeavour to notify the Applicant(s) of this requirement within two (2) months after receiving Form 1. CCCS will specify a time frame for the submission of Form 2 to CCCS.

2.5 Where the Applicant(s) fails to submit Form 2 within the specified time frame (or within any extensions granted), or the substantive information provided by the Applicant(s) in Form 2 is incomplete and the Applicant(s) fails to provide the outstanding information within the time frame specified by CCCS (or within any extensions granted), then in the case of an application with regard to the section 34 prohibition, the application will be deemed as not having been made, whereupon the provisional immunity referred to in sections 43(4) and 44(3) of the Act will not apply. In the case of an application with regard to the section 47 prohibition, CCCS may determine the application by not giving guidance or a decision.

2.6 Form 2 requires information relating to, amongst other things:

- the position of the relevant undertakings in the relevant product and geographic market(s); and
- market entry and potential competition in the relevant product and geographic market(s).

Form 2 is found in **Appendix B** to these guidelines.

2.7 Applicant(s) should note that where information required in Form 2 is submitted as part of Form 1, CCCS reserves the right to require the Applicant(s) to submit Form 2, notwithstanding that such information has already been submitted but is above that required in Form 1.

2.8 Applicant(s) submitting Form 1 may, if it so chooses, also submit Form 2 to CCCS at the same time. This will speed up the process in more complex cases.

2.9 CCCS may within two (2) months from the date of filing of Form 2 by the Applicant(s), give notice to the Applicant(s): (a) requiring the Applicant(s) to pay the appropriate further fee; and (b) specifying the time limit as CCCS considers appropriate for such further fee to be paid to CCCS.

2.10 In determining whether the further fee ought to be imposed, CCCS will, amongst other things, consider (i) the complexity of the case including but not limited to the time spent and resources allocated; and (ii) whether one or more of the Applicant(s)s are SMEs.

2.11 None of the factors are determinative and CCCS will assess the entire facts and circumstances of each case in exercising its discretion on the imposition of the further fee. Applicant(s) should refer to the Second Schedule of the *Competition (Fees) Regulations 2007* for the further fees payable for notifications for guidance or decision under the Act.

2.12 CCCS may refuse to accept an application if it is incomplete, if it is not accompanied by the relevant supporting documents, if it is not substantially in the prescribed form or if it does not comply with any requirement under the Act or the Regulations. The receipt of an application by CCCS does not in any way indicate that the application is correct or complete.

2.13 In some cases, it may be possible for CCCS to dispense with the obligation to submit any particular information specified in Forms 1 or 2 where CCCS considers that such information is unnecessary for examining the agreement or consideration of the conduct in question.

2.14 Conversely, CCCS may request additional information that is *not* required under Forms 1 or 2, for the purpose of considering the notification. In this event, CCCS may require the Applicant(s) to furnish the additional information within such time frame as CCCS considers appropriate. If the Applicant(s) fails to provide CCCS with the information within the time frame (or within any extensions granted), CCCS may determine the application by not giving guidance or a decision, as the case may be.

2.15 The Applicant(s) is required to take all reasonable steps to notify all other parties to the agreement or conduct (as the case may be) that an application has been made and state whether it is for guidance or decision. The written notification to these parties must be given within 7 working days from the date on which the application is lodged with CCCS. If the Applicant(s) is unable, despite the exercise of due diligence, to contact the other parties to the agreement or conduct, CCCS may require him to publish the notice in such newspapers as it may specify.

2.16 Any confidential information in the Form or documents must be clearly identified. A confidential as well as a non-confidential version of Form 1 (and Form 2, where provided) and its supporting documents, with confidential information removed and replaced by square brackets containing the word "CONFIDENTIAL"[1] should be submitted to CCCS. A separate annex should accompany the non-confidential version of each Form or supporting document, identifying the confidential information and furnishing reasons as to why the information should be treated as confidential. A non-confidential version (and the accompanying annex) need not be filed if the Applicant(s) is of the view that the relevant Form or document can be posted on CCCS's website in its entirety.

2.17 Three copies of the confidential version of Form 1 (and Form 2, where provided) and accompanying documents, and one copy of the non-confidential version of Form 1 (and Form 2, where applicable) and accompanying documents, as well as soft copies of both the confidential and non-confidential versions of Form 1 (and Form 2, where applicable) in Microsoft Word format are to be submitted to CCCS. Supporting documents accompanying Forms 1 and 2 must, where possible, also be in a format which allows for cutting and pasting of text.

2.18 The Applicant(s) may get his lawyers to file the application on his behalf, subject to the inclusion of a letter of authorisation signed by the Applicant(s). However, the declaration in Form 1 (and Form 2, where provided) must be signed by the Applicant(s) and by the Applicant's lawyers or joint representative (where one has been appointed).

3 OTHER MATTERS WHICH APPLICANTS SHOULD NOTE

Applicant's Obligations as to Accuracy of Information

3.1 The Applicant(s) must conclude Form 1 (and Form 2, where provided) with the declaration that the information submitted is correct to the best of the knowledge and belief of the person signing the declaration, and that all estimates are best estimates based on the underlying facts. The declaration must be signed by all the Applicants as well as by the lawyers for all the Applicants. Unsigned applications are invalid.

3.2 The Applicant(s) have a continuing obligation to inform CCCS of any material changes in the information contained in the application which may occur after the application has been made.

Removal of Immunity

3.3 Applicant(s) are also reminded that any immunity conferred by guidance of the nature specified in section 45(1) or 52(1) of the Act may be removed if:

- CCCS has reasonable grounds for believing that there has been a material change of circumstance since it gave its guidance;
- CCCS has reasonable grounds for suspecting that the information on which it based its guidance was incomplete, false or misleading in a material particular;

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[1] For example, if a document accompanying Forms 1 or 2 contains the statement "the turnover of the Applicant is 1 billion dollars" and the turnover figure is confidential, the confidential portion should be blanked out from the non-confidential version of the document and square brackets containing the word "CONFIDENTIAL" inserted over the blanked out portion. The non-confidential version of the document will therefore read: "the turnover of the Applicant is [CONFIDENTIAL] dollars".

- a complaint about the agreement or conduct has been made to CCCS (in the case of agreements, the complaint is to come from a person who is not a party to the agreement); or

- (in the case of agreements) one of the parties to the agreement applies to CCCS for a decision in respect of the agreement, under section 44 of the Act.

3.4 Similarly, any immunity conferred by a decision of the nature specified in sections 46(1) or 53(1) of the Act may be removed if:

- CCCS has reasonable grounds for believing that there has been a material change of circumstance since it gave its decision; or

- CCCS has reasonable grounds for suspecting that the information on which it based its decision was incomplete, false or misleading in a material particular.

Confidentiality & Secrecy

3.5 The non-confidential versions of Forms 1 and 2 and their supporting documents, or any information within them, may be shared with third parties, whether by publishing on the CCCS website for public viewing or through other means.

3.6 CCCS may seek further clarification as to the reasons supplied in the explanatory annex justifying the claim of confidentiality. If CCCS rejects the reasons given with regard to any item of information, it may require the Applicant(s) to re-submit the non-confidential version of the relevant Form or document with that item of information included ("the appropriately revised non-confidential version"), by such deadline as CCCS considers appropriate. If the Applicant(s) is unable to revert with the appropriately-revised non-confidential version within the deadline, the Applicant(s) should submit a request for extension of time to CCCS as soon as possible. If the Applicant(s) fails to revert with the appropriately-revised non-confidential version within the timeframe (or within any extensions granted), CCCS may determine the Application by not giving guidance or a decision.

3.7 Similarly, any subsequent correspondence and documents sent by the Applicant(s) to CCCS should be accompanied by a non-confidential version, except those where the Applicant(s) are of the view that they can be freely disclosed in their entirety. CCCS may share the non-confidential versions of such correspondence or documents, or any information within them, with third parties, either by publishing them on the CCCS website or through other means. Paragraph 3.6 also applies to such subsequent correspondence or documents.

3.8 Even if CCCS allows any item of information to be treated as confidential, it may, at any subsequent point in time, require the Applicant(s) to re-submit the non-confidential version of the relevant Form, document or correspondence with that item of information included. This may happen when it becomes necessary for CCCS to share the information with third parties in order to properly assess the notification. Under such circumstances, paragraph 3.6 will apply.

3.9 Section 89 of the Act imposes a general duty on CCCS to preserve secrecy, although there are a number of exceptions to this duty. For example, communication is allowed where, subject to certain considerations[2] disclosure is needed to enable CCCS to give effect to certain provisions of the Act.

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[2] Section 89(6) of the Act states that before disclosing any information in order to give effect to any provision of the Act, the Commission shall have regard to:

a. the need for excluding, so far as is practicable, information the disclosure of which would in its opinion be contrary to the public interest;

b. the need for excluding, so far as is practicable,

   i. commercial information the disclosure of which would, or might, in its opinion, significantly harm the legitimate business interests of the undertaking to which it relates; or

   ii. information relating to the private affairs of an individual the disclosure of which would, or might, in its opinion, significantly harm his interest; and

c. the extent to which the disclosure is necessary for the purposes for which the Commission is proposing to make the disclosure.

Timeframe for Completion by the CCCS

3.10 The time taken by CCCS to furnish guidance or decisions will depend very much on the nature and complexity of the application, as well as on the volume of applications which have been filed at that point in time. Applicant(s) may request for state-of-play meetings with CCCS at any time during the course of the assessment of the application for an indication as to when an outcome can be expected.

3.11 Where an application requires urgent attention, Applicant(s) may indicate this, together with reasons for requiring urgent consideration, in a cover letter submitted with Forms 1 or 2.

4 INSTRUCTIONS ON HOW TO COMPLETE FORM 1

4.1 The following paragraphs highlight what Applicant(s) should take note of when completing Form 1.

Purpose of the Application

4.2 Applicant(s) are required to specify whether the application is made in relation to the section 34 prohibition or the section 47 prohibition. Applicant(s) are also required to show why they consider that the notified agreement or conduct raises questions of compatibility with the Act's prohibitions.

4.3 Where there is genuine uncertainty about whether an agreement or conduct is likely to infringe the section 34 or section 47 prohibitions, Applicant(s) may wish to include arguments both for and against a finding that an infringement exists (in the case of notifications for decision) or is likely to exist (in the case of notifications for guidance).

4.4 It would be helpful if Applicant(s) could refer in their application to any principles laid down by any foreign jurisdictions which they consider may be of relevance to the determination of their application.

General Information and Contact Details of the Applicant(s) and all Parties to the Agreement or Conduct

4.5 For the purposes of Forms 1 and 2 and of these guidelines, the term "agreement" bears the same meaning as that ascribed to it by section 34(4) of the Act.

4.6 The submission of a joint application on behalf of two or more parties to the agreement or conduct is encouraged as it is useful to have the views of all the parties concerned at the same time. Where a joint application has been submitted, the Applicant(s) are required to appoint a joint representative to act on behalf of all the Applicants, unless good reason is furnished as to why joint representation is not practicable.

The Relevant Product and Geographic Market(s)

4.7 In supplying and explaining the Applicants' views on the definition of the relevant product and geographic market(s), Applicant(s) are reminded to refer to the relevant portions of the *CCCS Guidelines on Market Definition*. It would be helpful if Applicant(s) could refer to the alternative market definitions and explain why their preferred definition might be more appropriate than another.

4.8 Applicant(s) are also required to provide details of the level of concentration in the relevant markets.

Details of the Agreement or Conduct

4.9 The form requires Applicant(s) to state the types of provisions in the agreement, or aspects of the conduct, which may restrict the parties in their freedom to take independent commercial decisions or to act on those decisions. In this regard, Applicant(s) should refer to the relevant parts of the *CCCS Guidelines on the Section 34 Prohibition* for examples of anti-competitive agreements, as well as to the relevant parts of the *CCCS Guidelines on the Section 47 Prohibition* for examples of conduct that amounts to an abuse of a dominant position.

Financial Information of the Parties to the Agreement or Conduct

4.10 Applicant(s) are requested to submit information on their turnover. In this respect, please provide copies of annual reports and accounts. These must be copies of the most recent audited annual reports and accounts unless the undertakings concerned are exempted from the requirement to file audited accounts, in which case, management accounts should be provided where available.

Exemptions and Exclusions

4.11 There is no need to notify agreements which fall within the categories of agreements specified in a block exemption order. In supplying and explaining why there is uncertainty as to whether the agreement is covered by a block exemption, Applicant(s) are reminded to refer to the relevant portion of the *CCCS Guidelines on the Section 34 Prohibition*, in particular, the section on "Block Exemptions".

4.12 The provision for block exemptions does not apply to the section 47 prohibition.

4.13 By virtue of sections 35 and 48 of the Act, the section 34 and section 47 prohibitions respectively do not apply to matters specified in the Third Schedule to the Act ("the Third Schedule"). The section on "Exclusions" and **Annex C** of the *CCCS Guidelines on the Section 34 Prohibition*, and the section on "Exclusions" and **Annex D** of the *CCCS Guidelines on the Section 47 Prohibition*, further set out the analytical framework on how CCCS will assess if the criteria for exclusion under the Third Schedule are met.

Supporting Documents

4.14 Supporting documents submitted as part of Form 1 must either be originals or certified copies. Documents not in the English language must be accompanied by a translation certified by a court interpreter or a translation verified by the affidavit of a qualified translator.

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5 INSTRUCTIONS ON HOW TO COMPLETE FORM 2

5.1 The following paragraphs highlight what Applicant(s) should take note of when completing Form 2, should Form 2 be required by CCCS, or if Applicant(s) choose to submit Form 2 themselves.

The Relevant Product and Geographical Market(s)

5.2 Form 2 requires Applicant(s) to provide further details in relation to the relevant product and geographical market(s) such as the goods or services that might be considered as close substitutes from both the customer and supplier perspectives.

5.3 Applicant(s) also have to provide estimates of the total market size and market share. Market shares may be calculated on the basis of value or volume. However, if market share calculated by the alternative method would differ by 5 per cent or more, then both sets of figures should be provided.

5.4 It should be reiterated here that an agreement will only infringe the section 34 prohibition if it has as its object or effect an appreciable prevention, restriction or distortion of competition in Singapore and lacks net economic benefit.

5.5 The market share estimates given by the parties will also be taken into account in assessing whether an undertaking has a dominant position within the meaning of section 47 of the Act. Applicant(s) should refer to the relevant parts of the *CCCS Guidelines on the Section 47 Prohibition* for guidance on what constitutes dominance.

Barriers to entry

5.6 Form 2 also requests Applicant(s) to describe the barriers to entry which exist in the relevant product and geographic markets identified. Entry may be influenced by factors such as the requirements of Government, the availability of raw materials, the length of contracts between an undertaking and its suppliers and customers etc. Applicant(s) should refer to the relevant parts of the *CCCS Guidelines on the Section 47 Prohibition* for more details on entry barriers.

Competitors

5.7 Applicant(s) are required to identify the five largest competitors, to describe and give details on the nature of competition and the best estimates of the competitors' market shares in the goods or services. Applicant(s) are also required to provide details on bidding markets, if applicable.

Countervailing buyer power

5.8 In identifying the five main customers of the parties, the Applicant(s) are further required to provide details on the extent to which the Applicant(s) would be constrained by the conduct of the customers.

Exclusions

5.9 Applicant(s) are required to describe any vertical relationships between the parties and the nature and extent of such vertical integration (i.e. the degree to which undertakings operate at more than one level of the production process, combining, for example, production, distribution or retail).

5.10 Applicant(s) are also required to describe any net economic benefits arising from the agreement or conduct and explain whether these benefits are indispensable to attaining the said benefits.

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FORM 1

INFORMATION REQUIRED FOR APPLICATIONS FOR GUIDANCE UNDER SECTIONS 43 OR 50 OR FOR DECISION UNDER SECTIONS 44 OR 51 OF THE COMPETITION ACT 2004

PART 1
INTRODUCTION

This Form lists the information and supporting documents which must be provided when making an application for guidance under sections 43 or 50 or an application for a decision under sections 44 or 51 of the Act.

The Commission reserves the right to give notice in writing to the Applicant(s), requiring submission of Form 2, including supporting documentation and payment of further fees in accordance with Regulation 9 of the *Competition (Notification) Regulations 2007*, in respect of information submitted but which has been deemed by the Commission to be above that required in this Form 1, at any time during the course of its assessment of this application.

If the Applicant(s) considers that the Commission should treat any part of the information submitted under this Form as confidential, the Applicant(s) must provide both a confidential as well as a non-confidential version of this Form with that item of information deemed confidential removed and replaced by square brackets containing the word "CONFIDENTIAL". The non-confidential version should also contain an annex marked "confidential information" identifying each item of information which has been removed from the confidential version and providing a written explanation as to why the information should be treated as confidential. The same treatment should also be extended to supporting documents accompanying this Form containing any information that the Applicant(s) considers should be treated as confidential.

NOTES:

a. In completing this form, Applicant(s) are encouraged to refer to the principles outlined in the relevant paragraphs of the *CCCS Guidelines on the Section 34 Prohibition*, the *CCCS Guidelines on the Section 47 Prohibition*, the *CCCS Guidelines on Filing Notifications for Guidance or Decision with respect to the Section 34 and Section 47 Prohibition 2016 and the CCCS Guidelines on Market Definition*, where applicable.

b. Please ensure that all answers are concise and where relevant, supported by reasons, evidence (where possible from independent sources) and pertinent examples.

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FORM 1

PART 2
INFORMATION TO BE PROVIDED BY THE UNDERTAKING(S) MAKING THE APPLICATION

Purpose of The Application

1. Please specify whether the application is being made in relation to the section 34 prohibition and/or the section 47 prohibition.

2. Please specify whether the application is for guidance or a decision.

General Information and Contact Details

3. Please provide the names and the following contact details of the Applicant(s) and all parties to the agreement or conduct:

    a. Address of registered office; and

    b. Full name, designation, address (if different from that set out in (a)), direct telephone number, fax number and email address of the contact person.

4. Please provide the full name, designation, address, direct telephone and fax numbers and e-mail addresses (where available) of any representative(s) who has been authorised to act for the Applicant(s), indicating whom they represent and in what capacity (e.g. a solicitor). CCCS's correspondence in relation to the notification will be directed to the identified representative(s).

5. Please provide written proof of any solicitor's or representative's authority to act on the Applicant(s)' behalf.

6. Have steps been taken to notify all other parties involved in the agreement or conduct of this application?

    a. If so, please state the names of these parties, and whether these parties have received a copy of the application and whether confidential information was included in that copy of the application.

    b. If not, please state any reasons for not notifying these parties of the application.

The Relevant Product and Geographic Market(s)

7. State the specific products or services directly or indirectly affected by the agreement or conduct which is the subject of the application ("the affected products or services"). For branded goods, please indicate the brand name used in Singapore. Please list also the goods sold or services provided in Singapore by the Applicant(s) that overlap with those provided by the other parties to the agreement or conduct.

8. In respect of the affected products or services identified in question 7 above:

   a. What do you consider to be the relevant product market(s)?; and

   b. What do you consider to be the relevant geographic market(s)?

   Where available, please provide a copy of the most recent market studies (produced by the Applicant(s) in-house or commissioned by the Applicant(s) from external consultants) which assess and/or analyse the relevant product market(s) and/or the relevant geographic market(s). Please also supply references to any external published studies of the relevant product market(s) and/or the relevant geographic market(s) or, where available, please supply a copy of each such study with the application.

9. For each of the relevant product and geographical market(s) identified in question 8, please provide the market share estimates (by value and/or volume, where relevant) for each of the parties (and any undertaking affiliated or connected to the Applicant(s), either wholly or partly) to the agreement and/or conduct.

Ownership Structure

10. Do any of the Applicant(s) and all other parties to the agreement or conduct belong to a corporate group? A corporate group relationship exists where one undertaking:

    a. owns more than half the capital or business assets of another undertaking;

    b. has the power to exercise more than half the voting rights in another undertaking;

    c. has the power to appoint more than half the members of the supervisory board, board of directors or bodies legally representing the undertaking; or

    d. has the right to manage the affairs of another undertaking.

11. If so, please provide an overview of the group structure of the Applicant(s) and/or other parties to the agreement or conduct belonging to the same corporate group(s).

12. Please identify any other links, formal or informal, between the Applicant(s) and other parties to the agreement or conduct.

Details of the Agreement or Conduct

13. About the agreement or conduct:

    a. If the application is made in relation to a written agreement, please attach either an original of the most recent text of that agreement, or a copy certified by the Applicant(s) to be a true copy of the original. If the application is made in relation to an agreement which is not written, please provide a full description of the agreement;

    b. If the application is made in relation to conduct, please provide a full description of that conduct; and

    c. If the application relates to standard form terms and conditions, indicate the number of agreements expected to be entered into on those terms and conditions.

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14. Please state how the agreement or conduct which is the subject of the application might in the Applicant's view raise questions of compatibility with the section 34 prohibition and/or the section 47 prohibition, and provide reasons in support. In addition, where relevant, please identify the relevant provisions of the agreement or aspects of the conduct that have given rise to such concerns.

Financial Information of the Parties to the Agreement or Conduct

15. In the last financial year, what was each party's:

    a. total (group) worldwide turnover; and

    b. total (group) Singapore turnover.

16. Where relevant, please provide the Applicant(s)' turnover in respect of each of the affected products or services and the respective proportions of the Applicant(s)' total worldwide and Singapore turnover that this represents.

Exemptions and Exclusions

17. If the agreement which is the subject of the application is considered to qualify for any existing block exemption within the Singapore regime, specify the exemption and give reasons why the Applicant(s) is unsure whether the agreement is covered by the exemption.

18. If the agreement or conduct which is the subject of the application is considered to benefit from any exclusion from the *section 34 prohibition and/or section 47 prohibition*, specify the exclusion and give reasons why the Applicant(s) is unsure whether the agreement or conduct is covered by the exclusion.[3]

Fees

19. Please specify how the fee payable for this application has been paid and complete the details on the relevant payment slip at Part 5 of this Form.

Supporting Documents

20. Please ensure that the Applicant(s) has attached the following documents (where relevant) to the application:

    a. If paragraph 5 of this form applies, written proof of the solicitor's or representative's authority to act on the Applicant(s)' behalf;

    b. If paragraph 13a of this form applies with regard to a written agreement, either an original or certified copy, of the most recent version of the text of the agreement which is the subject of the application;

    c. All other relevant supporting documents to the responses in Form 1; and

    d. Where documents are not in the English language, a translation of that document certified by a court interpreter or a translation of that document verified by the affidavit of a qualified translator.

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[3] Refer to **Appendix A** of the *CCCS Guidelines on Filing Notifications for Guidance of Decision* with respect to the *Section 34 Prohibition and Section 47 Prohibition 2016*.

FORM 1

PART 2A
DECLARATION

Under section 77 read with section 83 of the Act, it is an offence, punishable by a fine or imprisonment or both to provide information which is false or misleading in a material particular if the undertaking or person providing it knows that it is false or misleading, or is reckless as to whether it is. If the undertaking or person is a body corporate, its officers may be guilty of an offence under section 81 of the Act.

Declaration

The undersigned declare and confirm that all information given in the Form 1 and all pages annexed hereto are correct to the best of their knowledge and belief, and that all estimates are identified as such and are their best estimates based on the underlying facts.

Signature(s)

_____

Name(s) as in NRIC or Passport (in block capitals):
Company Name and Designation(s):
Date:

FORM 1

PART 3
ACKNOWLEDGEMENT OF RECEIPT

This acknowledgement of receipt will be returned to the address inserted below if the Applicant(s) provides the information requested below.

To be completed by the Applicant(s)

To: (name and address of Applicant(s))

Re: The application dated (date of application) concerning (brief description of subject matter) involving the following undertakings: (names of undertakings) [and others]

To be completed by the Commission

Received on:

Registered under reference number:

Please quote this reference number in all correspondence with the Commission.

FORM 1

PART 4
INFORMATION FOR THE COMMISSION'S PUBLIC REGISTER (TO BE COMPLETED BY THE APPLICANT(S))

1. Please give the full names of the parties to the agreement(s) or conduct which is the subject of the application.

2. Please provide a short summary which does not contain any confidential information (no more than 250 words) of the nature and objectives of the agreement(s) or conduct which is the subject of the application. Please note that in the case of notifications for *decision,* this summary will be open to viewing by the public.

3. Please describe the relevant good(s) or service(s) involved as fully and accurately as possible.

FORM 1

PART 5
PAYMENT DETAILS FOR FEES PAYABLE

All payments are to be made by cheque payable to the "Competition and Consumer Commission of Singapore".

To: Finance Department
Competition and Consumer Commission of Singapore
45 Maxwell Road
#09-01
The URA Centre
Singapore 069118

I enclose herewith (bank and cheque no.) for the amount of ($x) being the fees payable.

Signature

_____

Name as in NRIC or Passport (in block capitals):
Company Name and Designation:
Company Address (in block capitals):
Date:

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FORM 1

PART 6
SELF-ASSESSMENT CRITERIA

Section 34 prohibition: An agreement will fall within the scope of the section 34 prohibition if it has as its object or effect the appreciable prevention, restriction or distortion of competition unless it is excluded or exempted.

Section 47 prohibition: Conduct that constitutes an abuse of a dominant position in a market, includes conduct that protects, enhances or perpetuates the dominant position of an undertaking in ways unrelated to competitive merit, and will fall within the scope of the section 47 prohibition unless it is excluded or exempted.

Section 34 Prohibition

1. Is it an agreement entered into on the part of the Government, any statutory body or any person acting on their behalf in relation to that agreement?

If so, the agreement is excluded from the section 34 prohibition.

2. Is the agreement one which falls within a matter specified in the Third Schedule of the Competition Act?

If so, the agreement or conduct is excluded from the section 34 prohibition. A summary of this appears at paragraph 4.1 of the *CCCS Guidelines on the Section 34 Prohibition*, the contents of which have been reformatted in **Annex A**.

3. Does the agreement involve at least two independent undertakings?

If the agreement involves a parent and a subsidiary, and the subsidiary does not have economic independence or freedom of action in deciding its policy and practices for the purpose of the agreement, there is no agreement as between at least two independent undertakings and therefore no agreement for the purposes of the section 34 prohibition.

4. Do the parties have market power[4]?

4.1 Do the parties have a significant share of any market to which the agreement relates?

If not, they are unlikely to have market power.

4.2 Are they small players in the context of the markets affected by the agreement?

If, for example, the parties are the third and fourth firms in the market and the first and second are much larger, or there is a dominant firm with a larger market share the parties may not have market power.

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[4] Market power refers to, *inter alia*, the ability to profitably sustain prices above competitive levels or to restrict output or quality below competitive levels. An undertaking with market power might also have the ability and incentive to harm the process of competition in other ways, for example by weakening existing competition, raising entry barriers or slowing innovation. Market power arises where an undertaking does not face sufficiently strong competitive pressure.

4.3 Are the main customers strong buyers?

In the negotiation of prices, are the parties price-setters or price takers? If there is strong buyer power then the parties may not have market power.

If the parties to the agreement do not have market power, it is unlikely that the agreement will result in an appreciable effect on competition. If the self-assessment indicates that the parties may have market power, they may wish to consider whether this is likely to mean that the agreement has an appreciable effect on competition. If the agreement has an appreciable effect on competition but there is a net economic benefit (see paragraph 2.29 of the *CCCS Guidelines on the Section 34 Prohibition*), the agreement is excluded from the section 34 prohibition.

4.4 Are they small and medium enterprises[5]?

Small and medium enterprises are unlikely to have market power. Nonetheless, other factors continue to be relevant in determining whether market power exists, including those mentioned in paragraphs 4.1 to 4.3 above.

Section 47 Prohibition

5. Is the conduct or activity carried on by the Government, any statutory body or any person acting on their behalf in relation to that conduct or activity?

If so, the conduct or activity is excluded from the section 47 prohibition.

6. Is the conduct or activity one which falls within a matter specified in the Third Schedule of the Competition Act?

If so, the conduct or activity is excluded from the section 47 prohibition. Please see **Annex A.**

7. Is there an abuse of a dominant position?

7.1 Is the undertaking dominant in a relevant market, either in Singapore or elsewhere?

Generally and as a starting point, a market share of less than 60% is likely to indicate that the undertaking is not dominant in the relevant market. In addition to market share, other factors, where relevant to the market, such as the history of the market shares, barriers to entry, the degree of innovation, product differentiation and the responsiveness of buyers or competitors to price increases may have to be considered in deciding if an undertaking has market power and is therefore dominant.

7.2 Is the behaviour of the undertaking an abuse of its dominant position?

If the dominant position is maintained through conduct arising from efficiencies, such as through successful innovation or economies of scale or scope, or through the legitimate exercise of an intellectual property right, such conduct will not be considered as an abuse of dominance. If the undertaking can objectively justify that it has behaved in a proportionate manner in defending its legitimate commercial interests, such conduct will also not be considered as an abuse of dominance.

The above questions are designed to help parties decide for themselves if there is likely to be an issue for CCCS to consider. For more information, please refer to the *CCCS Guidelines on the Section 34 Prohibition, the CCCS Guidelines on the Section 47 Prohibition,* and the *CCCS Guidelines on Market Definition* as appropriate.

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[5] Small and medium enterprises in Singapore are defined as businesses with annual sales turnover of not more than $100 million, or employing no more than 200 staff.

EXCLUSIONS FROM SECTION 34 AND 47 PROHIBITIONS

1. The section 34 and 47 prohibitions do not apply to the following matters specified in the Third Schedule to the Competition Act by virtue of section 35 and 48 of the Competition Act. These are:

   a. an undertaking entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly, insofar as the prohibition would obstruct the performance, in law or fact, of the particular tasks assigned to that undertaking;

   b. an agreement/conduct to the extent to which it is made in order to comply with a legal requirement, that is any requirement imposed by or under any written law;

   c. an agreement/conduct which is necessary to avoid conflict with an international obligation of Singapore, and which is also the subject of an order by the Minister;

   d. an agreement/conduct which is necessary for exceptional and compelling reasons of public policy and which is also the subject of an order by the Minister;

   e. an agreement/conduct which relates to any product to the extent to which any other written law, or code of practice issued under any written law, relating to competition gives another regulatory authority jurisdiction in the matter;

   f. an agreement/conduct which relates to any of the following specified activities:

      i. the supply of ordinary letter and postcard services by a person licensed and regulated under the *Postal Services Act 1999;*

      ii. the supply of piped potable water;

      iii. the supply of wastewater management services, including the collection, treatment and disposal of wastewater;

      iv. the supply of scheduled bus services by any person licensed and regulated under the *Bus Services Industry Act 2015;*

      v. the supply of rail services by any person licensed and regulated under the *Rapid Transit Systems Act 1995;* and

      vi. cargo terminal operations carried out by a person licensed and regulated under the *Maritime and Port Authority of Singapore Act 1996;*

   g. an agreement/conduct which relates to the clearing and exchanging of articles undertaken by the Automated Clearing House established under the *Banking (Clearing House) Regulations;* or any activities of the Singapore Clearing Houses Association regarding the Automated Clearing House;

   h. any agreement or conduct that is directly related and necessary to the implementation of a merger;

   i. any agreement (either on its own or when taken together with another agreement) to the extent that it results, or if carried out would result, in a merger; and

   j. any conduct (either on its own or when taken together with other conduct) to the extent that it results in a merger.

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EXCLUSIONS FROM THE SECTION 34 PROHIBITION ONLY

2. In addition, the section 34 prohibition does not apply to:

   a. vertical agreements entered into between 2 or more undertakings each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain products[6], other than such vertical agreement as the Minister may by order specify.

   b. An agreement which contributes to:

      i. improving production or distribution; or

      ii. promoting technical or economic progress, but which does not:

         a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; or

         b) afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question.

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[6] The definition of "vertical agreement" also includes provisions contained in agreements which relate to the assignment to the buyer or use by the buyer of intellectual property rights, provided that those provisions do not constitute the primary object of the agreement and are directly related to the use, sale or resale of products by the buyer or its customers.

FORM 2

FURTHER INFORMATION REQUIRED FOR APPLICATIONS FOR GUIDANCE UNDER SECTIONS 43 OR 50 OR FOR DECISION UNDER SECTIONS 44 OR 51 OF THE COMPETITION ACT 2004

PART 1
INTRODUCTION

This document lists the further information (and supporting documents) which may be required by the Commission after Form 1 has been filed.

If the Applicant(s) considers that the Commission should treat any part of the information submitted under this Form as confidential, the Applicant(s) must provide both a confidential version of this Form, as well as a non-confidential version of this Form with that item of information deemed confidential removed and replaced by square brackets containing the word "CONFIDENTIAL". The non-confidential version should also contain an annex marked "confidential information" identifying each item of information which has been removed from the confidential version and providing a written explanation as to why the information should be treated as confidential. The same treatment should also be extended to supporting documents accompanying this Form containing any information that the Applicant(s) considers should be treated as confidential.

NOTES:

a. In completing this form, applicants are encouraged to refer to the principles outlined in the relevant paragraphs of the *CCCS Guidelines on the Section 34 Prohibition*, the *CCCS Guidelines on the Section 47 Prohibition*, the *CCCS Guidelines on Filing Notification for Guidance or Decision with respect to the Section 34 Prohibition and Section 47 Prohibition 2016* and the *CCCS Guidelines on Market Definition*, where applicable.

b. Please ensure that all answers are concise and where relevant, supported by reasons, evidence (where possible from independent sources) and pertinent examples.

GO BACK TO CCCS GUIDELINES ON FILING NOTIFICATIONS FOR GUIDANCE OR DECISION WITH RESPECT TO THE SECTION 34 PROHIBITION AND SECTION 47 PROHIBITION 2016 CONTENTS

FORM 2

PART 2
FURTHER INFORMATION TO BE PROVIDED BY THE UNDERTAKING(S) MAKING THE APPLICATION

The Relevant Product and Geographic Market(s)

1. For each of the affected products or services identified in question 7 of Form 1 Part 2:

    a. give a brief description of the characteristics and intended use;

    b. state where it is produced;

    c. state to which customer group it is supplied;

    d. identify any goods or services that might reasonably be considered as close substitutes on the demand-side (that is, substitutes from the customer's perspective);

        i. explain the reason(s) why each good or service is considered to be a close substitute;

        ii. state the price differential (if any) between the substitutes and the affected products or services; and

        iii. indicate whether any of the substitutes are imported into Singapore and if so, from which country.

    e. identify any goods or services that might reasonably be considered as close substitutes on the supply-side (that is, substitutes from a supplier's perspective);

        i. explain the reason(s) for the supply-side substitutability, namely, how suppliers can switch to supplying the affected products or services quickly and easily with little cost.

    f. provide details of:

        i. how far customers are willing to travel to purchase the affected products or services (for example, locally, nationally, regionally);

        ii. how far suppliers are willing to supply the affected products or services (for example, locally, nationally, regionally).

    g. provide details of the time, cost and resources required to move to a different part of the supply chain, for example, a distributor moving to retail or manufacturer moving to retail activities; and

    h. describe any differences in supplying different types of customers.

2. For each of the relevant product and geographic market(s) identified in question 8 in Form 1 Part 2, please provide the following data for the last three years:

   a. Total market size (value and volume);

   b. Market share estimates (by value and/or volume, where relevant) for each of the parties (and any affiliated or connected undertaking) to the agreement and/or conduct; and

   c. Market share estimates (by value and/or volume of competitors, where relevant)

For (a-c), please explain any significant year-on-year variations.

3. If the geographic market identified in question 8(b) of Form 1 Part 2 is wider than Singapore, please provide the following data for the last three years in Singapore:

   a. An estimate of the total value and volume of goods or services; and

   b. Market share estimates (by value and/or volume where relevant) for each of the parties to the agreement or conduct and their competitors.

For (a-b), please explain any significant year-on-year variations.

4. Please identify the undertakings belonging to the same group (within the meaning of question 10 in Form 1 Part 2) as the parties to the agreement or conduct which are active in the relevant product market(s) identified in question 8 in Form 1 Part 2 and those active in products and/or services which are regarded as imperfect and partial substitutes for those products. Please provide the name, place of incorporation, exact product manufactured and the geographic scope of operation of each member of the group.

Barriers to Entry

5. For each of the relevant product and geographic market(s) identified in question 8 of Form 1 Part 2, give an estimate of the capital expenditure and time required to enter the relevant market(s) identified on a scale necessary to gain a five per cent market share, both as a new entrant, and as a company that already has the necessary technology and expertise, and estimate to what extent this cost is recoverable should the firm decide to exit the market.

6. Give an estimate of the scale of annual expenditure on advertising/promotion relative to sales required to achieve a market share of five percent.

7. With specific reference to Singapore, provide details of any other factors affecting entry, for example, planning restraints, technology, R&D requirements, regulatory barriers, import restrictions (tariffs, licensing, quarantine), IP rights, availability of raw materials, length of contracts, etc.

8. Give details of instances of market entry and exit in the past five years.

9. Identify any companies that would be in a position to enter the relevant market(s) identified in the response to question 8 of Form 1 Part 2 in a manner that would be sufficiently timely and likely and of such scope as to adequately constrain the parties to the agreement or conduct.

Competitors

10. With specific reference to Singapore, for each of the relevant markets identified in question 8 of Form 1 Part 2:

    a. Identify the five largest competitors of each party to the agreement or conduct which is the subject of the application, providing each competitor's name, address, telephone and fax numbers, and, where possible, a contact name;

    b. For the competitors identified in question 10a, give the best estimates of their market shares in the goods or services;

    c. Describe the nature of competition (for example, do firms compete on price quality, innovation, tender process);

    d. Describe the cost and the time it takes for a customer to switch between suppliers;

    e . Describe and name any local or overseas firms that are not currently providing goods or services in Singapore, but which could do so relatively quickly on a material scale;

    f. Describe the ability of actual or potential competitors to expand or utilise existing productive capacity; and any other material factors;

    g. Provide details of any shareholding, agreement, or joint ventures with existing competitors that may affect Singapore; and

    h. For the competitors identified in question 10g, please provide the best estimates of their market shares in the goods or services.

11. For bidding markets only, in respect of the relevant market(s), give details:

    a. Of any bids made by each party to the agreement in the last five years; and

    b. The outcomes of those bids (for example, whether the bids were won or lost) and the reasons why, if known).

Countervailing buyer power

12. With specific reference to Singapore, for each of the relevant markets identified in question 8 of Form 1 Part 2:

    a. Identify the five main customers of each party to the agreement or conduct which is the subject of the application, in the relevant product and geographic market(s), giving the customer's name, address, telephone and fax numbers, and, where possible, a contact name.

    b. To what extent, and why, would each party to the agreement or conduct (and if applicable, the parties to the agreement as a collective entity) be constrained by the conduct of buyers following the implementation of the agreement or conduct.

Vertical Agreements

(To be completed if there is (potentially) a vertical relationship amongst the parties to the agreement or conduct)

13. Describe any vertical relationship(s) between the parties before and after the agreement or conduct, including the following information:

    a. the extent of vertical integration before the agreement or conduct; and how this is created or strengthened by the agreement or conduct; and

    b. any existing supply arrangements amongst the parties to the agreement or conduct.

14. For the competitors identified in question 10, provide details on the extent to which they are vertically integrated.

Agreements with Net Economic Benefits

15. If the agreement or conduct has net economic benefits that would not be achieved except for the agreement:

    a. Describe how the agreement or conduct contributes to improving production or distribution, or promotes technical or economic progress. In addition, please explain:

        i. How the claimed efficiencies are achieved;

        ii. A direct causal link between the agreement and the claimed efficiencies; and

        iii. The value of the claimed efficiencies and how it outweighs the anti-competitive effects of the agreement.

    b. Explain whether the agreement or conduct, and the individual restrictions of the agreement or conduct are indispensable to attaining the efficiencies described above in paragraph 15a. In addition, please explain:

        i. If there are other means of achieving the claimed efficiencies;

        ii. If there are economically practical and less restrictive means of achieving the claimed efficiencies than the agreement/conduct notified; and

        iii. If more efficiencies are produced with the agreement/conduct notified in place than its absence.

SUPPORTING DOCUMENTS

Please ensure that the Applicant(s) has attached the following documents (where relevant to the application:

16. All relevant documents to support the claims made in this Form 2.

17. Source or sources of the information should also be given and one copy should be provided of any document, where available, from which information has been taken.

18. Where documents submitted are not in the English language, they should be accompanied by a translation certified by a court interpreter or a translation verified by the affidavit of a qualified translator.

GO BACK TO CCCS GUIDELINES ON FILING NOTIFICATIONS FOR GUIDANCE OR DECISION WITH RESPECT TO THE SECTION 34 PROHIBITION AND SECTION 47 PROHIBITION 2016 CONTENTS

FORM 2

PART 2A
DECLARATION

Under section 77 read with section 83 of the Act, it is an offence, punishable by a fine or imprisonment or both to provide information which is false or misleading in a material particular if the undertaking or person providing it knows that it is false or misleading, or is reckless as to whether it is. If the undertaking or person is a body corporate, its officers may be guilty of an offence under section 81 of the Act.

Declaration

The undersigned declare and confirm that all information given in the Form 2 and all pages annexed hereto are correct to the best of their knowledge and belief, and that all estimates are identified as such and are their best estimates based on the underlying facts.

Signature(s)

_____

Name(s) as in NRIC or Passport (in block capitals):
Company Name and Designation(s):
Date:

FORM 2

PART 3
ACKNOWLEDGEMENT OF RECEIPT

This acknowledgement of receipt will be returned to the address inserted below if the Applicant(s) provides the information requested below.

To be completed by the Applicant(s)

To: (name and address of Applicant(s))

Re: The application dated (date of application) concerning (brief description of subject matter) involving the following undertakings: (names of undertakings) [and others]

To be completed by the Commission

Received on:

Registered under reference number:

Please quote this reference number in all correspondence with the Commission.

CCCS GUIDELINES ON THE APPROPRIATE AMOUNT OF PENALTY IN COMPETITION CASES

Effective from: 1 February 2022

1 INTRODUCTION

1.1 The *Competition Act 2004* ("the Act") gives the Competition and Consumer Commission of Singapore ("CCCS") the power to issue directions[1] and impose financial penalties[2] on undertakings for infringing the section 34[3] prohibition, the section 47[4] prohibition and the section 54 prohibition[5] under the Act.

1.2 CCCS's powers to issue directions and impose financial penalties are described in the *CCCS Guidelines on Directions and Remedies*.

1.3 These guidelines provide general guidance and information about the basis on which CCCS will calculate financial penalties for infringements of the section 34, section 47 and section 54 prohibitions.

1.4 The *CCCS Guidelines on Merger Procedures* has set out some key considerations in the calibration of penalties for the infringement of the section 54 prohibition. These considerations may be applied in accordance with the six-step process set out in paragraphs 2.1 to 2.23 below.

Statutory background

1.5 The Act provides that CCCS may impose a financial penalty only if it is satisfied that an undertaking, which has committed an infringement of the section 34 prohibition, section 47 prohibition or section 54 prohibition has done so intentionally or negligently.[6]

1.6 The financial penalty may not exceed 10% of such applicable turnover of the business of the undertaking in Singapore for each year of infringement, as defined in the *Competition (Financial Penalties) Order 2007,* up to a maximum of three (3) years.[7]

Policy objectives

1.7 In imposing any financial penalty, CCCS has the following twin objectives:

- to impose penalties on infringing undertakings which reflect the seriousness of the infringement; and
- to ensure that the threat of penalties will deter both the infringing undertakings and other undertakings from engaging in anti-competitive practices.

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[1] Section 69(1) of the Act.

[2] Section 69(2)(e) of the Act.

[3] 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. Further information can be found in the *CCCS Guidelines on the Section 34 Prohibition*.

[4] Conduct on the part of one or more undertakings which amounts to the abuse of a dominant position. Further information can be found in the *CCCS Guidelines on the Section 47 Prohibition*.

[5] Mergers that have resulted or may be expected to result in a substantial lessening of competition within any market in Singapore for goods or services are prohibited. Further information can be found in the *CCCS Guidelines on Merger Procedures* and the *CCCS Guidelines on Substantive Assessment of Mergers*.

[6] Section 69(3) of the Act.

[7] Section 69(4) of the Act.

1.8 The imposition of a financial penalty is discretionary and is aimed at deterring not only the infringing undertaking but also other like-minded undertakings which might be considering activities contrary to the section 34, section 47 or section 54 prohibitions.

1.9 The assessment of an appropriate penalty to be imposed for all types of infringement will depend on the facts of each case.

1.10 These guidelines are not a substitute for the Act, the regulations and orders. They may be revised should the need arise. The examples in these guidelines are for illustration. They are not exhaustive, and do not set a limit on the investigation and enforcement activities of CCCS. In applying these guidelines, the facts and circumstances of each case will be considered. Persons in doubt about how they and their commercial activities may be affected by the Act may wish to seek legal advice.

1.11 A glossary of terms used in these guidelines is attached.

2 DETERMINING THE AMOUNT OF PENALTY

2.1 A financial penalty imposed by CCCS under section 69 of the Act will be calculated following a six-step approach:

- calculation of the base penalty having regard to the seriousness of the infringement (expressed as a percentage rate) and the turnover of the business of the undertaking in Singapore for the relevant product and relevant geographic markets affected by the infringement in the undertaking's last business year. In this context, an undertaking's last business year is the financial year preceding the year when the infringement ended ("relevant turnover");
- adjustment for the duration of the infringement;
- adjustment for other relevant factors, e.g. deterrent value;
- adjustment for aggravating or mitigating factors;
- adjustment if the statutory maximum penalty under section 69(4) of the Act is exceeded; and
- adjustment for immunity, leniency reductions and/or fast track procedure discounts.

Step 1 – Calculation of the base penalty

2.2 The base penalty will be determined having regard to:

- the seriousness of the infringement (expressed as a percentage rate); and
- the relevant turnover of the undertaking.

Assessment of seriousness of the infringement

2.3 CCCS will consider the seriousness of the infringement and set a percentage starting point for calculating the base penalty. The more serious and widespread the infringement, the higher the starting percentage point is likely to be. Serious infringements of the section 34 prohibition include, for example, price fixing, market sharing, bid-rigging (collusive tendering) and limiting or controlling production or investment arrangements. Conduct which infringes the section 47 prohibition and which by virtue of the undertaking's dominant position and the nature of the conduct has, or is likely to have, an adverse effect on the process of competition, for example, predatory pricing, is also considered to be a serious infringement. With respect to the section 54 prohibition, the seriousness of the substantial lessening of competition within the relevant market that has resulted, or which may be expected to result from the merger may be a factor used in assessing the percentage starting point.

2.4 In assessing the seriousness of the infringement, CCCS will consider a number of other factors, including the nature of the product, the structure and condition of the market, the market share(s) of the undertaking(s) involved in the infringement, entry conditions and the effect on competitors and third parties. The impact and effect of the infringement on the market, direct or indirect, will also be an important consideration. The assessment will be made on a case by case basis for all types of infringements, taking into account all of the circumstances of the case.

Determination of relevant turnover

2.5 An undertaking's relevant turnover is the turnover of the business of the undertaking in Singapore for the relevant product and geographic markets affected by the infringement in the undertaking's last business year. In this context, the undertaking's last business year is the financial year preceding the date when the infringement ended.

2.6 CCCS will require undertakings to provide their relevant turnover pursuant to a section 63 request for information and, if necessary, to provide further evidence to substantiate the section 63 responses. Generally, CCCS will base relevant turnover on figures from the undertaking's audited accounts. The relevant turnover shall be limited to the amounts derived by the undertaking from the sale of relevant products and provision of relevant services falling within the undertaking's ordinary activities in Singapore after deduction of sales rebates, goods and services tax and other taxes directly related to turnover. However, CCCS retains the discretion to use different figures, for example, where the audited accounts are not available or where the audited accounts do not reflect the true scale of an undertaking's activities in the relevant market.

2.7 Where an undertaking is unable or refuses to provide CCCS with its relevant turnover or is suspected of providing CCCS with incomplete or very low relevant turnover, CCCS may attribute a relevant turnover to that undertaking.

Base Penalty – Application of percentage rate to relevant turnover

2.8 The base penalty will be calculated by applying the percentage rate to the relevant turnover.

Step 2 – Adjustment for the duration of infringement

2.9 The base penalty will be multiplied by the duration of the infringement.

2.10 An infringement over a part of a year may be treated as a full year for the purpose of calculating the duration of the infringement. Therefore, penalties for infringements that last more than one (1) year may be multiplied by the number of years of the infringement and a part of a year may be treated as a full year for the purpose of calculating the duration of the infringement. However, CCCS may, in cases involving a duration of over one (1) year, round down part years to the nearest month.

GO BACK TO CCCS GUIDELINES ON THE APPROPRIATE AMOUNT OF PENALTY IN COMPETITION CASES CONTENTS

2.11 Where the total duration of an infringement is less than one year, CCCS will treat the duration as a full year for the purpose of calculating the number of years of the infringement. However, in exceptional circumstances, CCCS may round down the duration of the infringement to the nearest month subject to a minimum duration of one (1) month.

2.12 The effects of bid-rigging or collusive tendering are generally irreversible, cannot be easily rectified, and continue to be felt long after the duration where the bid-rigging or collusive tendering conduct occurred. For this reason, CCCS will generally not set a duration of infringement that is less than one (1) year.

Step 3 – Adjustment for aggravating and mitigating factors

2.13 The financial penalty, adjusted as appropriate at Step 2, may be increased where CCCS considers there are aggravating factors, or decreased where CCCS considers there are mitigating factors.

2.14 Aggravating factors include:

- role of the undertaking as a leader in, or an instigator of, the infringement;
- involvement of directors or senior management;
- retaliatory or other coercive measures taken against other undertakings aimed at ensuring the continuation of the infringement;
- continuance of the infringement after the start of investigation;
- repeated infringements by the same undertaking or other undertakings in the same group;
- unreasonable failure by an undertaking to respond to a request for financial information on business turnover and/or relevant turnover;
- in the case of bid-rigging or collusive tendering, CCCS may treat each infringement that an undertaking participates in, after the first infringement, as an aggravating factor and calibrate with a proportionate percentage increase in penalties;
- infringements which are committed intentionally rather than negligently; and
- retaliatory measures taken or commercial reprisal sought by the undertaking against a leniency applicant.

2.15 Mitigating factors include:

- role of the undertaking, for example:
    - that the undertaking was acting under severe duress or pressure; or
    - in the context of a section 34 infringement, where the undertaking (a) provides evidence that its involvement in the infringement was substantially limited, and (b) demonstrates that, during the period in which it was party to the infringement, it actually avoided applying it by adopting competitive conduct in the market;

- genuine uncertainty on the part of the undertaking as to whether the agreement or conduct constituted an infringement;

- adequate steps taken with a view to ensuring compliance with the section 34 prohibition or section 47 prohibition, for example, existence of any compliance programme;

- termination of the infringement as soon as CCCS intervenes; and

- co-operation which enables the enforcement process to be concluded more effectively and/or speedily.

2.16 For the avoidance of doubt, the fact that an undertaking did not play a leader or instigator role in the infringement or that it was not a pro-active participant in the infringement will not, in itself, be regarded as a mitigating factor. Furthermore, the fact that an undertaking participated in an infringement for a shorter duration than others will not be regarded as a mitigating factor since this will already be reflected in the duration of the infringement at Step 2.

2.17 In considering how much mitigating value is to be accorded to the existence of any compliance programme, CCCS will consider:

- whether there are appropriate compliance policies and procedures in place;

- whether the programme has been actively implemented;

- whether it has the support of, and is observed by, senior management;

- whether there is active and ongoing training for employees at all levels who may be involved in activities that are touched by competition law; and

- whether the programme is evaluated and reviewed at regular intervals.

Step 4 – Adjustment for other relevant factors

2.18 The amount of financial penalty to be imposed after Step 3 may be adjusted by CCCS applying an uplift, on a case by case basis, to achieve the policy objectives outlined in paragraph 1.7 above, in particular, to deter the undertakings concerned as well as other undertakings from engaging in anti-competitive practices.

2.19 In determining whether to impose an uplift, CCCS may take into account other considerations, including, but not limited to, an objective estimate of any economic or financial benefit derived or likely to be derived from the infringement by the infringing undertaking and any other special features of the case, including the size and financial position of the undertaking in question. Where relevant, any gains which might accrue to the undertaking in other product or geographic markets as well as in the relevant market under consideration may be taken into account.

Step 5 – Adjustment if the statutory maximum penalty is exceeded

2.20 The amount of the financial penalty to be imposed may not exceed the statutory maximum penalty under section 69(4) of the Act, i.e. 10% of the turnover of the business of the undertaking in Singapore for each year of infringement, up to a maximum of three (3) years ("total turnover"). The total turnover of the business of the undertaking in Singapore for the purposes of section 69(4) of the Act is defined in the *Competition (Financial Penalties) Order 2007* as the applicable turnover for the business year preceding the date on which the decision of the Commission is taken, or if figures are not available for that business year, the previous business year. The financial penalty will be adjusted if necessary to ensure that the statutory maximum is not exceeded.

2.21 The involvement of an association of undertakings (e.g. a trade association) in an infringement of the section 34 prohibition or section 47 prohibition may result in financial penalties being imposed on the association itself, its members or both. Where the infringement by an association of undertakings relates to the activities of its members, the penalty shall not exceed 10% of the sum of the turnover of business of each member of the association of undertakings in Singapore active on the market affected by the infringement, for each year of infringement, up to a maximum of three (3) years.

Step 6 – Adjustment for immunity, leniency reductions and/or fast track procedure discounts

2.22 An undertaking participating in cartel activity may benefit from total immunity from, or a significant reduction in the amount of financial penalty to be imposed if it satisfies the requirements for immunity or lenient treatment set out in the *CCCS Guidelines on Lenient Treatment for Undertakings Coming Forward with Information on Cartel Activity 2016*. CCCS will make the necessary adjustments to the financial penalty calculated after Step 5 to take into account immunity or any leniency reductions conferred on an undertaking.

2.23 CCCS will also adjust the penalty to take into account the discount applicable for an undertaking that agrees to CCCS's fast track procedure. The discount for the fast track procedure will be in addition to any applicable leniency reductions.

3 GLOSSARY

Business year	Refers to a period of more than six (6) months in respect of which an undertaking publishes accounts or, if no such accounts have been published for the period, prepares accounts.
Relevant turnover	Refers to the turnover of the business of the undertaking in Singapore for the relevant product and geographic markets affected by the infringement in the undertaking's last business year. In this context, the undertaking's last business year is the financial year preceding the date when the infringement ended.
Total turnover	Refers to the turnover of an undertaking for the business year preceding the date on which the decision of the CCCS is taken or, if figures are not available for that business year, the one immediately preceding it which is set out in the *Competition (Financial Penalties) Order 2007.*
Undertaking	Refers to any person, being an individual, a body corporate, an unincorporated body of persons or any other entity, capable of carrying on commercial or economic activities relating to goods or services, as the context demands. Includes individuals operating as sole proprietorships, companies, firms, businesses, partnerships, co-operatives, societies, business chambers, trade associations and non-profit-making organisations.

CCCS GUIDELINES ON THE TREATMENT OF INTELLECTUAL PROPERTY RIGHTS

Effective from: 1 February 2022

1 INTRODUCTION

1.1 These guidelines explain how the Competition and Consumer Commission of Singapore ("CCCS") expects the *Competition Act 2004* ("the Act") to operate in relation to agreements and conduct which concern intellectual property rights ("IPRs"). They set out how CCCS views the interface between IPRs and competition law, and indicate non-exhaustively some of the factors and circumstances that CCCS may consider when assessing agreements and conduct which concern IPRs.

Intellectual Property Rights

1.2 Intellectual property ("IP") commonly refers to the product of the human mind, and includes inventions, trade marks, designs or brands. Examples are a logo, an artistic work (such as a painting), the design of a product, or a technical solution to a problem. For the purposes of these guidelines, the term "intellectual property rights" refers to all IPRs including those granted under the *Patents Act 1994*[1], *Copyright Act 2021, Plant Varieties Protection Act 2004, Layout-Designs of Integrated Circuits Act 1999, Registered Designs Act 2000, Trade Marks Act 1998* and *Geographical Indications Act 2014,* as well as trade secrets. The IPRs include:

- **Patents:** A patent is a legal monopoly right, generally for a period of 20 years, given to the owner of an invention to enable him to prevent others from using, copying or making the invention without his consent in the country in which he has obtained patent protection. A patentable invention may be a product or a process that gives a new technical solution to a problem. It may be a new method of doing things, the composition of a new product, or a technical improvement on how certain objects work;

- **Copyrights:** Copyright protects literary (e.g. novels), dramatic (e.g. plays), musical and artistic works (e.g. paintings). Other works like films, sound recordings and broadcasts are also protected. For a work to be protected by copyright, it has to be original and expressed in a tangible form such as in a recording or in writing; ideas alone are not protected. Originality simply means that there is a degree of independent effort in the creation of the work. Generally, the author of a copyright work has the right to reproduce, publish, perform, communicate and adapt his work. These different exclusive rights form the bundle of rights called copyright. The term of copyright protection varies depending on the subject matter of protection;

- **Trade marks:** A trade mark is a sign used by a person in the course of trade to distinguish his goods or services from others. A registered trade mark grants the owner a statutory monopoly of the trade mark in the country in which he has obtained protection. The protection granted to a trade mark registration is for an initial period of 10 years and it can last indefinitely if the registration is renewed every 10 years;

- **Registered designs:** A design refers to the features of shape, configuration, colours, pattern or ornament applied to any article or non-physical product that give that article or non-physical product its appearance. Generally, the owner of a registered design has the right to prevent others from using the design without permission, in the country for which the right has been granted. The term of registered design protection is for an initial period of 5 years, thereafter, the registration may be renewed every 5 years up to a maximum of 15 years.

GO BACK TO CCCS GUIDELINES ON THE TREATMENT OF INTELLECTUAL PROPERTY RIGHTS CONTENTS

[1] Please note sections 50A, 51 and 52 of the *Patents Act* apply for certain types of contract and licences entered into on or after 23rd February 1995 but before 1 December 2008. Further, please note section 55 of the *Patents Act* which relates to compulsory licences.

The Competition Act

1.3 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 within Singapore unless they fall within an exclusion in the Third Schedule to the Act ("the Third Schedule") or meet all of the requirements specified in a block exemption order ("the section 34 prohibition").

- Any conduct on the part of one or more undertakings, which is an abuse of a dominant position in any market in Singapore unless they fall within an exclusion in the Third Schedule ("the section 47 prohibition").

- Mergers which substantially lessen competition in Singapore unless they fall within an exclusion in the Fourth Schedule to the Act ("the section 54 prohibition") or are exempted by the Minister.

1.4 Details of how CCCS expects to apply these prohibitions in general are contained in the *CCCS Guidelines on the Section 34 Prohibition*, the *CCCS Guidelines on the Section 47 Prohibition*, and the *CCCS Guidelines on the Substantive Assessment of Mergers.*

1.5 These guidelines are not a substitute for the Act, the regulations and orders. They may be revised should the need arise. The examples in these guidelines are for illustration. They are not exhaustive, and do not set a limit on the investigation and enforcement activities of CCCS. In applying these guidelines, the facts and circumstances of each case will be considered. Persons in doubt about how they and their commercial activities may be affected by the Act may wish to seek legal advice.

1.6 A glossary of terms used in these guidelines is attached.

The Interface between IPRs & Competition Law

1.7 Both IP and competition laws share the same basic objective of promoting economic efficiency and innovation. IP law does this through the provision of incentives for innovation and its dissemination and commercialisation, by establishing enforceable property rights for the creators of new and improved products and processes. Competition law does this by helping to promote competitive markets, thereby spurring undertakings to be more efficient and innovative.

1.8 IP has certain characteristics that may make it difficult for IP owners to restrict access to, and therefore, exercise their rights over it. For example, IP is costly to develop, but often easy and inexpensive to copy, thus making it difficult to prevent others from free-riding on the discovery in the absence of IP law. The use of IP is also typically non-rivalrous, meaning that one person's use does not reduce its use by another person. While these characteristics will be taken into account in competition analysis, they do not warrant the application of fundamentally different analytical principles to IPRs.

1.9 For competition law purposes, CCCS will regard IPRs as being essentially comparable to any other form of property. The right to exclude is the basis of private property rights. An IPR bestows on the IP owner certain rights to exclude others, and CCCS recognises that these rights are necessary in order to allow IP owners to recover the costs of their investments and profit from the use of their property. However, as with other forms of private property, certain types of agreements or conduct with respect to IP may have anti-competitive effects which come under the purview of competition law.

1.10 Although there are clear and important differences in the purpose, extent and duration of protection provided under the IP regimes mentioned in paragraph 1.2, the general analytical principles to be applied are the same. These guidelines address mainly issues relating to technology transfer and innovation. In evaluating the specific circumstances of each case, the differences between the various forms of IPRs will be taken into account.

1.11 The possession of an IPR does not necessarily create market power in itself. While an IPR may confer a 'legal' monopoly over a product, process or work, it does not necessarily confer an 'economic' monopoly. While the IPR may confer the right to exclude with respect to the specific product, process or work in question, there may be sufficient actual or potential close substitutes that constrain the exercise of market power by the IP owner.

2 RELEVANT MARKETS

2.1 These guidelines address some aspects of market definition which may be relevant where IP related arrangements are concerned. These guidelines should be read together with the *CCCS Guidelines on Market Definition*.

2.2 IP related arrangements can raise competition concerns if they are likely to adversely affect the price, quantity, quality or variety of products currently or potentially available. CCCS will normally analyse the competitive effects of such arrangements within the relevant markets for the products affected by such arrangements ("product markets"). In some cases, however, the analysis may require the further assessment of competitive effects on the markets for technology ("technology markets") and/or markets for research and development ("innovation markets"). When defining a market for the purpose of its competition analysis, CCCS may consider the geographic and temporal dimensions for each market. CCCS will also take into account the context and circumstances associated with the IP arrangement including the existence of any applicable standard(s).

Product Markets

2.2.1 IP can be integrated either into a product or production process. A number of different product markets may be relevant in evaluating the effects of an IP related arrangement. For example, a licensing restraint may have competitive effects in markets for final or intermediate products made using the IP, or it may have effects upstream, in markets for products that are used as inputs, along with the IP, for the production of other products.

Technology Markets

2.2.2 A technology market consists of the IP that is licensed ("licensed technology") and its close substitutes, that is, the technologies to which licensees could switch in response to an increase in the IP licence fee or royalty. For example, a standardisation agreement may have competitive effects on, or limit the availability of substitutes to, the product or service market(s) to which the standard(s) relate. When the standard setting process involves the selection of a particular technology and where the rights to IP are marketed separately from the products to which they relate, the standard may also have effects on the relevant technology market.

Innovation Markets

2.2.3 An innovation market consists of the research and development ("R&D") directed at particular new or improved goods or processes, and the close substitutes for that R&D that significantly constrain the exercise of market power with respect to the relevant R&D. CCCS may consider the effects of IP related arrangements on innovation markets; for example, where the licensing arrangements reduce the innovation efforts of the undertakings in question, or restrict or prevent the innovation efforts of others.

2.2.4 In analysing how IP related arrangements may affect competition in innovation, CCCS will usually examine the impact of the arrangement on competition within existing and potential product and technology markets. Competition in such markets may be affected by arrangements that delay the introduction of improved products or new products that over time will replace existing products. In such cases, innovation is a source of potential competition which must be taken into account when assessing the impact of the arrangement on product markets and technology markets. However, in a limited number of cases, it may be useful and necessary to also analyse the effects of an arrangement on competition in innovation separately, i.e. to assess its impact on an innovation market. This is particularly the case where the arrangement affects innovation aimed at creating new products and where it is possible at an early stage to identify R&D poles. In such cases it can be analysed whether after the arrangement, there will be a sufficient number of competing R&D poles left for effective competition in innovation to be maintained.[2]

Geographic Markets

2.2.5 The geographic dimension comprises the area in which substitution takes place. This entails looking at demand and supply side substitutability i.e. the willingness of buyers to switch to sellers in neighbouring markets, or the potential for undertakings in neighbouring markets to supply to buyers, in response to a price increase. The geographic market of the relevant technology market(s) can differ from the geographic market of the relevant product market(s).[3]

Temporal Markets

2.2.6 Another dimension that may be relevant, particularly for technology markets, is time. Technology markets may be characterised by fast-paced innovation, such that competition conditions are dynamic over time. The relevant market defined at one point in time may differ from the relevant market for the same or similar product(s) depending on the timeframe over which substitution possibilities should be assessed. Changes in competition conditions over time will be taken into account by CCCS in its market definition exercise.[4] This is especially so in markets characterised by innovation, which could make substitution between products easier or harder.

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[2] Competing R&D poles are R&D efforts directed towards a certain new product or technology, and the substitutes for that R&D, that is to say, R&D aimed at developing substitutable products or technology for those developed by the agreement and having similar timing.

[3] See also *CCCS Guidelines on Market Definition*, paragraphs 4.1 to 4.11.

[4] See also *CCCS Guidelines on Market Definition*, paragraphs 5.1 to 5.2, and paragraphs 5.8 to 5.9.

3 IPRs & THE SECTION 34 PROHIBITION

3.1 An agreement will fall within the scope of the section 34 prohibition if it has as its object or effect the appreciable prevention, restriction or distortion of competition within Singapore. An agreement will not be prohibited if it falls within an exclusion in the Third Schedule or meets all of the requirements specified in a block exemption order. This section sets out the general framework that CCCS will apply when assessing agreements involving the licensing of IPRs such as technology licensing agreements and franchise agreements (collectively referred to, for ease of reference, as "licensing agreements") within the context of the section 34 prohibition. These guidelines should be read together with the *CCCS Guidelines on the Section 34 Prohibition* and the *CCCS Guidelines on Market Definition*. As some agreements, such as those involving discounts, price discrimination and/or vertical restraints, may raise issues which fall within the scope of the section 47 prohibition, reference should also be made to the *CCCS Guidelines on the Section 47 Prohibition* where appropriate.

Pro-competitive Benefits of Licensing

3.2 In the vast majority of cases, licensing is pro-competitive. IP is typically one of a few components in a production process and derives value from its combination with complementary factors such as manufacturing and distribution facilities. Licensing can facilitate the integration of the IP with other complementary factors of production, thus leading to more efficient exploitation of the IP.

3.3 Licensing also promotes the dissemination of technologies; this in turn leads to a reduction of the production costs of the licensee or the introduction of new or improved products. Licensing may also promote innovation by helping IP owners reap the full commercial potential of their inventions.

3.4 Efficiencies may result from agreements where IP owners assemble a technology package for licensing to contributors of the pool and to third parties; such pooling arrangements may reduce transaction costs. In sectors where large numbers of IPRs exist and where products require a combination of IPRs, such licensing agreements may often be pro-competitive.

General Framework for Assessing Licensing Agreements

3.5 **Step 1:** CCCS will first distinguish if the agreement is made between competing or non-competing undertakings. In general, agreements between non-competitors pose significantly smaller risks to competition than agreements between competitors. In order to determine the competitive relationship between the undertakings, it is necessary to examine whether the undertakings would have been actual or potential competitors in the absence of the agreement. CCCS will review the competitive relationship between the undertakings at the time the agreement is made.

Step 2: CCCS will then consider if the agreement and the licensing restraints restrict actual or potential competition that would have existed in their absence. CCCS will consider the impact on both inter-technology competition (i.e. competition between undertakings using different technologies) and intra-technology competition (i.e. competition between undertakings using the same technology).

Step 3: CCCS will consider if an agreement that falls within the scope of the section 34 prohibition may, on balance, have a net economic benefit.[5] An agreement may have a net economic benefit, where it contributes to improving production or distribution or promoting technical or economic progress and it does not impose on the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question. Such an agreement will be excluded by virtue of section 35 of the Act, no prior decision by CCCS to that effect being required.

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[5] **Annex C** of the *CCCS Guidelines on the Section 34 Prohibition* sets out how CCCS will determine if an agreement meets the criteria for the exclusion of individual agreements under the Third Schedule.

Licensing Agreements between Competitors

3.6 Licensing agreements between competitors are agreements made between parties that, in the absence of the agreement, would have been actual or potential competitors on a relevant market.

3.7 Restraints in licensing agreements between competitors may harm competition if they facilitate, or amount to price fixing, market sharing or output limitation. Such restraints may also harm competition if they adversely affect the licensee's ability or incentive to carry out independent R&D. This may occur, for example, where undertakings transfer competing technologies to each other and impose a reciprocal obligation to provide each other exclusively with future improvements of their respective technologies.

3.8 Parties may be considered as actual competitors on the technology market if they are either already licensing substitutable technology rights, or one of them is already licensing its technology rights and the other enters the technology market by granting a licence for competing technology rights.

3.9 Parties may be potential competitors if they own substitutable technologies and the licensee is not licensing its own technology, provided that it would be likely to do so in the event of a small but permanent increase in prices of the licensed technology or IP rights. In assessing the likelihood of potential substitutability of a technology, the stage of standardisation may be a material factor for consideration. In particular, while a standard is being developed, alternative technologies can still compete for inclusion in a standard. Therefore, such alternative technologies are considered to be substitutable. However, once a technology has been chosen and the standard has been set, competing technologies and undertakings may face a barrier to entry and may potentially be excluded from the market. In other words, these competing technologies may no longer be deemed as viable substitutes once the standard is established.

Licensing Agreements between Non-Competitors

3.10 Licensing agreements between non-competitors are agreements made between parties that, in the absence of the agreement, would not have been actual or potential competitors on a relevant market. The relationship between the undertakings will be defined as the status that existed at the time the agreement was made. CCCS will not consider that the status of this relationship has changed as a result of the competition that may develop following the licensing agreement, unless the agreement is subsequently amended materially.

3.11 Licensing agreements made between undertakings on the same level, e.g. two manufacturers, are considered agreements made between non-competitors so long as they are not actual or potential competitors in a relevant market. Most licensing agreements between non-competitors are made between parties in a complementary relationship, and generally do not pose competition concerns.

3.12 However, such licensing agreements may still raise competition concerns under the section 34 prohibition where they give rise to an adverse impact on competition in a market involving one of the parties to the agreement. For example, an adverse impact on competition between a licensee and its competitors may arise if the licensing agreement forecloses access to, or increases the licensee's competitors' costs of obtaining, important inputs from the same licensor. Similarly, an adverse impact on competition between a licensor and its competitors may occur if, for example, the licensor makes the licensing of one technology conditional upon the licensee also procuring another licence from the licensor.

3.13 Agreements between non-competitors may contain certain licensing restraints that could adversely impact competition in the technology market. Foreclosure effects may stem from licensing restraints that prevent licensees from obtaining licences to competing technologies or create disincentives for them to do so, where the licensor enjoys a significant degree of market power. For instance, competing providers of technology may be foreclosed where incumbent licensors impose licensing restraints on licensees (e.g. product manufacturers) to such an extent that an insufficient number of product manufacturers is available to be licensed by competing providers of technology and where high barriers to entry limit the number of new product manufacturers. Sellers of substitutable technologies may be foreclosed where licensors which collectively have a significant degree of market power pool together various parts of a technology and license them together as a package when only part of the package is essential to produce a certain product. More information in this regard can be found in the section on "Technology Pools" at paragraphs 3.34 to 3.36 below. Such agreements may also give rise to competition concerns under the section 47 prohibition, where one (or more) of the undertakings involved hold(s) a dominant position.

3.14 Agreements between non-competitors may also have an adverse impact on competition between competing licensees if they facilitate coordination to increase prices or to reduce output in a relevant market. For example, if owners of competing technologies impose similar restraints on their licensees, the licensors may find it easier to coordinate their prices. Similarly, licensees that are competitors may find it easier to coordinate their pricing if they are subject to common restraints in licences with a common licensor or competing licensors. The risk of anti-competitive coordination is increased when the relevant markets are concentrated and difficult to enter. The use of similar restraints may, however, be common and pro-competitive in an industry, because they contribute to the efficient exploitation of the IP. The facts and circumstances of each case will need to be considered.

The Exclusion of Vertical Agreements under Paragraph 8 of the Third Schedule

3.15 The section 34 prohibition does not apply to vertical agreements, other than such vertical agreements as the Minister for Trade and Industry may by order specify. This exclusion is provided for under paragraph 8 of the Third Schedule. Vertical agreements are agreements entered into between 2 or more undertakings each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain products. This includes IPR provisions contained in such agreements, provided that they do not constitute the primary object of such agreements, and are directly related to the use, sale or resale of products.

3.16 The exclusion covers agreements which concern the purchase or redistribution of products, such as a franchise agreement where the franchisor sells to the franchisee products for resale. This includes IPR provisions contained in the franchise agreement, such as the trade mark and know-how which the franchisor licenses the franchisee in order to market the products.

3.17 Agreements with IPR provisions, which do not fall under the exclusion under paragraph 8 of the Third Schedule, such as agreements which have as their primary object the assignment or the licensing of IPRs for the manufacture of products, will be assessed in accordance with the framework set out in paragraph 3.5.

The Appreciable Adverse Effect on Competition Test

3.18 In assessing the effect or potential effect on competition, it is necessary to consider the degree of market power enjoyed by the parties to the agreement. The likelihood that the pro-competitive effects will outweigh any anti-competitive effects due to restrictions contained in the licensing agreement depends, to a large extent, on the degree of market power of the undertakings concerned. In general, there is less potential for harm to competition where there is a lower concentration of market power in the relevant markets, and where a lower proportion of licensees in those markets are subject to similar restraints.

3.19 A licensing agreement will generally have no appreciable adverse effect on competition:

- if the aggregate market share of the parties to the agreement does not exceed 20% on any of the relevant markets affected by the agreement, where the agreement is made between competitors (i.e. undertakings which are actual or potential competitors on any of the markets concerned);

- if the market share of each of the parties to the agreement does not exceed 25% on any of the relevant markets affected by the agreement, where the agreement is made between non-competitors.

Where it may be difficult to classify an agreement as an agreement between competitors or an agreement between non-competitors, the 20% threshold will be applicable.

3.20 As with other types of agreements, a licensing agreement between competitors which involves price fixing, market sharing, output limitations or the restriction of a licensee's ability to exploit its own technology rights, will always have an appreciable adverse effect on competition, notwithstanding that the market shares of the parties are below the threshold levels mentioned in paragraph 3.19.

3.21 The fact that the market shares of the parties to a licensing agreement exceed the threshold levels mentioned in paragraph 3.19 does not necessarily mean that the effect of that agreement on competition is appreciable.

3.22 Whether a licensing agreement falls within the threshold levels set out in paragraph 3.19 will be determined by reference to the product market only, unless the analysis of the product market alone would inadequately address the effects of the licensing agreement on competition among technologies or in R&D.

3.23 If an examination of the effects on technology markets is required, it is generally the case that in the absence of restrictions highlighted at paragraph 3.20 above, there is unlikely to be an appreciable adverse effect on competition where there are a sufficient number of independently controlled technologies in addition to the technologies controlled by the parties to the agreement, that may be substitutable at comparable cost, for the licensed technology in question.

3.24 If an examination of the effects on innovation markets is required, it is generally the case that in the absence of restrictions highlighted at paragraph 3.20 above, there is unlikely to be an appreciable adverse effect on competition where there are a sufficient number of independently controlled entities in addition to the parties to the agreement, that possess the required specialised assets or characteristics and the incentive to engage in R&D that is a close substitute of the R&D activities of the parties to the agreement.

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3.25 Where an examination of the effects on innovation markets is required, CCCS may have regard, in particular, to the specific licensing restraints set out in paragraphs 3.27 to 3.30; and whether there are standard essential patents ("SEPs") involved[6].

Considerations in the Application of the Section 34 Prohibition to Various Types of Licensing Restraints or Arrangements

3.26 This section sets out some of the considerations in the application of the section 34 prohibition to particular licensing restraints or licensing arrangements. The facts and circumstances of each case will need to be considered in assessing whether such agreements fall within the scope of the section 34 prohibition.

Autonomy of Licensees to Engage in Independent R&D

3.27 Licensing agreements which, directly or indirectly, restrict the ability or incentive of any of the parties, to carry out independent R&D, including independent R&D with third parties, may have anti-competitive effects. This is because such agreements can reduce potential competition on the technology and innovation markets, which would have existed in the absence of the agreement. However, in determining whether such agreements are likely to infringe the section 34 prohibition, other factors may be taken into account, including whether the restriction is indispensable to prevent the disclosure of licensed know-how to third parties.[7] In order to be covered by the exception, the restrictions imposed to protect the licensor's know-how against disclosure must be necessary and proportionate to ensure such protection. For instance, where the agreement designates particular employees of the licensee to be trained in and responsible for the use of the licensed know-how, it may be sufficient to oblige the licensee not to allow those employees to be involved in R&D with third parties. Other safeguards may be equally appropriate.

Grantbacks

3.28 A grantback is an arrangement under which a licensee assigns to the licensor, or agrees to extend to the licensor, the rights over the licensee's improvements to the licensed technology. Grantback provisions can increase a licensor's incentives to license and promote the dissemination of licensees' improvements to the licensed technology. There are often pro-competitive reasons for including grantback provisions, and these generally do not pose competition concerns, especially where they are non-exclusive in nature. They may, however, have an adverse impact on competition, where they substantially reduce the incentives of the licensee to engage in R&D and thereby reduce innovation.

3.29 An obligation to grant the licensor an exclusive licence to improvements of the licensed technology or to assign such improvements to the licensor is likely to reduce the licensee's incentive to innovate since it hinders the licensee in exploiting the improvements, including by way of licensing to third parties. An exclusive grantback is defined as a grantback which restricts the licensee (which is the innovator and licensor of the improvement in this case) from exploiting the improvement (for its own production and/or for licensing to third parties)[8]. This is the case both where the improvement concerns the same application as the licensed technology and where the licensee develops new applications of the licensed technology.

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[6] A further discussion on SEPs is set out at paragraphs 4.9 to 4.11 below.

[7] Know-how is a package of practical information which is a result from experience and testing. It is typically secret, substantial and identified. "Substantial" means that the know-how includes information which is significant and useful for the production of the products covered by the licensing agreement or the application of the process covered by the licensing agreement, i.e. the information must significantly contribute to or facilitate the production of the contract products. "Identified" means it is possible to verify that the licensed know-how fulfils the criteria of secrecy and substantiality, such as where the licensed know-how is described in manuals or written form, or possessed by licensor's employees.

[8] A grantback is exclusive even if the licensee is permitted to use the improvements that is to be licensed/assigned to the licensor under the grantback.

3.30 Non-exclusive grantbacks are not likely to be objectionable. However, it may have negative effects on innovation if there is cross-licensing between competitors where a grantback obligation on both parties is combined with an obligation on both parties to share improvements of its technology with the other party. The sharing of all improvements between competitors may prevent each competitor from gaining a competitive lead over the other.[9] However, the parties are unlikely to be prevented from gaining a competitive lead over each other where the purpose of the licence is to permit them to develop their respective technologies and where the licence does not lead them to use the same technological base in the design of their products. This is the case where the purpose of the licence is to create design freedom rather than to improve the technological base of the licensee.

Example:

Firm A holds a patent to technology used in a construction process, and licenses the technology to Firm B, on condition that Firm B "grants back" exclusive rights to all improvement patents on Firm A's technology back to Firm A.

Analysis:

CCCS will consider the effects of this exclusive grantback agreement to determine if it infringes the section 34 prohibition. Factors that will be considered include the availability of competitive alternatives, the duration of the arrangement, and whether any innovation was or could have been suppressed by the agreement. Other factors may include whether consideration was given for the grantback and the level of consideration given, whether the licensor was in a strong or weak market position, and whether there is a network of agreements that contain such grantback provisions.

CCCS will also consider whether the net economic benefit exclusion applies on the facts.

Territorial and Field-of-Use Restrictions

3.31 Generally, an agreement between undertakings which prevents, restricts or distorts competition within a particular territory (or field-of-use) would fall within the scope of the section 34 prohibition. For example, an agreement which prevents the lawful parallel importation of a product into a territory where an IP owner (or its licensee) is active, may give rise to competition concerns.

3.32 However, while licensing restraints such as territorial or field-of-use limitations, appear restrictive of competition, they may in fact serve pro-competitive ends by promoting licensing, and thus the dissemination and more efficient exploitation of the technology. For example, by protecting the IP owner from competition (in its own technology) in its core areas, they may increase the IP owner's incentive to license its IP to parties for exploitation in other areas. Licensing agreements containing such restraints do not normally fall within the scope of the section 34 prohibition because such restraints may not be viewed as restrictions of competition as such, but simply a sub-division of the licensor's original right granted by IP law. These licensing restraints are generally no more restrictive of competition than if the original IP owner had exercised the rights itself.

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[9] In cases where the parties have a significant degree of market power the agreement is likely to be caught by the section 34 prohibition, where the agreement prevents the parties from gaining a competitive lead over each other. For an additional discussion about cross-licensing in settlement agreements, please refer to paragraphs 3.41 to 3.42.

Licensing Agreements Involving Exclusivity

3.33 The grant of an exclusive licence, for example, where a licensor is obliged not to license another licensee in the same territory, may be necessary to give the licensee an incentive to invest in the licensed technology or to further develop the technology. Licensing restraints such as non-compete clauses[10], may also promote licensing by reducing the risk of misappropriation of the licensed technology, and may also help ensure that the licensees have an incentive to invest in and exploit the licensed technology. Non-compete clauses may however give rise to competition concerns in cases where they provide a basis for market sharing in licensing agreements between competitors; or there are (likely) foreclosure effects as a result of a significant degree of market power on the part of the licensor.

Technology Pools (Patent Pools)

3.34 Technology pools are arrangements whereby two or more parties assemble a package of technology which is licensed not only to contributors to the pool but also to third parties. These may have pro-competitive benefits, in clearing blocking patents, integrating complementary technologies and reducing transaction costs. Where a pool is composed only of technologies that are essential and complementary, it is generally pro-competitive regardless of the market position of the parties involved. However, technology pools may have anti-competitive effects in certain circumstances. For example, where pools are composed solely or predominantly of substitute technologies, this leads to little efficiency gains and may amount to price fixing. In addition to reducing competition between parties, there is also the risk of foreclosing alternative technologies that are outside the pool. Other potential competition concerns are that pool members may discriminate against non-member licensees (which could result in a distortion of competition), restrict the independent licensing of the patents, or use the pool to share confidential business information so as to reduce competition in a downstream market.

3.35 To evaluate whether a technology pool would likely cause a competition issue, CCCS would seek to determine whether each patent placed inside the pool is essential for developing the product or service that is the basis behind the formation of the pool, and whether the patents are substitutes or complements. If each patent inside the pool is required to implement an international standard required for developing the product or service, then the members of the pool cannot be viewed as horizontal competitors; an undertaking looking to buy technologies to develop the product or service conforming to the standard would need permission to use each patented technology in the pool. A pool comprising only non-competing patents (e.g. complementary patents) is not likely to have the potential to harm competition among suppliers of technology either inside or outside the pool.

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[10] Non-compete clauses oblige the licensee not to deal with competing technologies.

3.36 CCCS would also consider whether the technologies inside the pool were being used to distort competition in a downstream market. In doing so, CCCS would consider whether licences are issued on a non-discriminatory basis to all interested parties; and whether pool members remain free to license their patents independently to interested parties outside the pool.

Example:

Firm A and Firm B are competitors in the market for equipment and technology used for a certain type of surgery. Firm A and Firm B hold patents for their respective equipment and technology, which are substitutable for the other firm's equipment and technology. Instead of competing with each other, Firm A and Firm B place their competing patents in a patent pool and established a $300 licensing fee to be paid to the pool each time either firm's equipment or technology was used in order to share the proceeds.

Analysis:

The use of a patent pool between Firm A and Firm B to eliminate competition between them may constitute a price fixing agreement that infringes the section 34 prohibition.

Non-challenge Clauses

3.37 Non-challenge clauses refer to the direct or indirect obligation not to challenge the validity of the licensor's IPR. As licensees are typically in the best position to determine whether or not an IPR is valid, there is public interest in eliminating invalid IPRs. Further, clauses that stipulate a licensor's right to terminate a licensing agreement if the licensee were to challenge the validity of any IPR of licensor may, in effect, function similarly to a non-challenge clause in the sense that the licensee may incur significant losses if it were forced to switch to an alternative technology. In such a case, the licensee may be deterred from challenging the validity of the IPR of a licensor if it faces the risk of termination.

3.38 CCCS will consider such clauses on a case by case basis. Some factors that may be considered are whether the clause operates in an exclusive licensing agreement and the market positions of the licensor and licensee. CCCS may also weigh the competing public interests of strengthening the incentive of the licensor to license by not being forced to continue with a licensee that challenges the very subject matter of the licensing agreement, against the interest of eliminating any obstacle to economic activity which may arise where an IPR was granted in error. CCCS will also consider whether the non-challenge relates solely to technological know-how. In particular, as the recovery of licensed know-how is likely to be impossible or difficult once it is disclosed, there may be pro-competitive benefits for allowing such clauses, particularly where it leads to the licensor disseminating new technology to the licensee.

IP Settlement Agreements

3.39 IP settlement agreements refer to commercial agreements between undertakings to settle actual or potential IP-related disputes. Undertakings may prefer to discontinue the dispute or litigation because it proves too costly, time-consuming and/or uncertain as regards its outcome. There may also be welfare enhancing benefits from the adoption of IP settlement agreements, as the time and resources of the Court and/or any competent administrative bodies are saved.

3.40 However, depending on the terms and conditions of the IP settlement agreements, such agreements may infringe the section 34 prohibition. For example, "pay-for-delay" type settlement agreements, which are based on a value transfer[11] from one undertaking in return for a limitation on the entry and/or expansion into the market of another undertaking, may have as its object or effect the prevention, restriction or distortion of competition in Singapore. If the parties to a "pay-for-delay" type settlement agreement are actual or potential competitors, and there was a significant value transfer in exchange for a limitation on the entry and/or expansion, then such a settlement agreement may be considered by CCCS to be a market allocation, market sharing or market exclusion agreement. One of the factors which CCCS may take into consideration in its assessment of whether an IP settlement agreement falls within the category of a "pay-for-delay" type agreement is whether it was the value transfer which induced the limitation of the entry and/or expansion, or whether the value transfer is a true recognition by the parties as to the settlement of the IP-related dispute.

3.41 Further, IP settlement agreements in which parties cross-license each other and impose restrictions on the use of their IPRs, may also raise competition concerns. Where the parties to the "cross-licensing" type settlement agreement have a significant degree of market power, and where the settlement agreement imposes restrictions that clearly go beyond the resolution of the dispute, then such a settlement agreement may raise competition concerns. Where the parties have utilised such a "cross-licensing" type settlement agreement to share markets or fix reciprocal running royalties which have a significant impact on market prices, such a settlement agreement is likely to infringe the section 34 prohibition.

3.42 Where the parties to a settlement agreement are entitled, under the terms of the agreement, to use each other's technology and the agreement extends to future developments, CCCS may assess the impact of the agreement on the parties' incentive to innovate. In cases where the parties have a significant degree of market power, and where the agreement prevents the parties from gaining a competitive lead over each other, the agreement is likely to be caught by the section 34 prohibition. Agreements that eliminate or substantially reduce the possibilities of one party to gain a competitive lead over the other reduce the incentive to innovate and thus adversely affect an essential part of the competitive process. Such agreements are also unlikely to satisfy the Third Schedule of the Act as an agreement with a net economic benefit.

4 IPRs & THE SECTION 47 PROHIBITION

4.1 The section 47 prohibition prohibits any conduct on the part of one or more undertakings, which is an abuse of a dominant position in any market in Singapore. This section sets out some of the considerations that CCCS will have, with regard to assessing conduct involving IPRs, within the context of the section 47 prohibition. These guidelines should be read together with the *CCCS Guidelines on the Section 47 Prohibition* and the *CCCS Guidelines on Market Definition*.

Dominant Position

4.2 Ownership of an IPR will not necessarily create a dominant position. Whether or not an IP owner enjoys dominance in the relevant market will depend on the extent to which there are substitutes for the technology, product, process or work to which the IPR relates.

4.3 Although the existence of an IPR may impede entry into the market in the short term, any other undertaking may in the long term be able to enter the market with its own innovation. In markets where undertakings regularly improve the quality of their products, a persistently high market share may indicate no more than persistently successful innovation. CCCS will make its assessment of dominance, based on the particular facts of each case.

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[11] A value transfer in a settlement agreement may comprise monetary payment and/or a licensing agreement under which the licensee develops a relevant product under specific conditions agreed to by the licensor.

Abuse

4.4 The legitimate exercise of an IPR by a dominant undertaking *per se* will not usually be an abuse when limited to the specific product which is protected by the IPR. However, competition concerns may arise where the dominant undertaking attempts to exercise its market power, in the relevant market which includes the IPR-protected product or into a neighbouring or related market, through conduct that protects, enhances or perpetuates the market power of the undertaking in ways unrelated to competitive merit. In defining markets, care will have to be taken in choosing the initial focal product and in identifying if secondary products formed a separate but related market, or part of the same market as the primary product.[12]

4.5 Conduct may be abusive to the extent that it harms competition, for example, by removing an efficient competitor, limiting competition from existing competitors, or excluding new competitors from entering the market. The likely effect of each kind of behaviour will be assessed on the particular facts of each case. The paragraphs below set out some considerations that CCCS may have, with regard to assessing certain types of conduct involving IPRs, when carried out by dominant undertakings.

Refusal to Supply a Licence

4.6 The basis of property rights is the right to exclude. Ownership of an IPR does not normally impose on the IP owner an obligation to license the use of that IP to others, even where the IPR confers market power on the IP owner. Therefore, a refusal to supply a licence, even by a dominant undertaking, is not normally an abuse. However, in limited circumstances, a dominant undertaking's refusal to supply a licence may constitute an infringement under the section 47 prohibition. For example, this may occur if the refusal concerns an IPR which relates to an essential facility, with the effect of (likely) substantial harm to competition. CCCS may consider if the dominant undertaking is able to objectively justify its conduct, whether the dominant undertaking (or its affiliates) operates in an upstream or downstream market and whether the dominant undertaking has behaved in a proportionate way in defending its legitimate commercial interest.

4.7 A facility may be viewed as essential if there are no potential substitutes (through duplication or otherwise), and if the facility is indispensable to the exercise of the activity in question. IPRs by themselves are generally unlikely to create essential facilities.[13]

4.8 In determining whether a refusal to supply a licence constitutes an abuse under the section 47 prohibition, the impact on the technology and innovation markets will be considered. Care must be taken not to undermine the incentives for undertakings to make future investments and innovations.

Example:

Firm A was the first firm to market spreadsheet software for personal computers ("Software A"). Software A established personal computers as an essential tool for businesses, and Firm A outsold its closest competitors significantly. After a few years, Firm B introduced new software ("Software B") that contained a number of features not found in Software A. However, Firm B soon ran into financial difficulties and requested a licence to copy the words and layout of Software A's menu command hierarchy, which Firm A had a copyright in. This would have allowed Software B to read Software A files and ensured compatibility between both products. Firm A refused to grant a licence to Firm B and announced that it would enforce its IP rights against Firm B if it copied the Software A's hierarchy. As a consequence, several other prominent software makers announced the discontinuation of their spreadsheet development programs.

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[12] Please refer to Part 6 of the *CCCS Guidelines on Market Definition* for more details on market definition for after markets.

[13] *CCCS Guidelines on the Section 47 Prohibition.*

Analysis:

To establish whether Firm A's refusal to supply a licence constitutes an abuse under the section 47 prohibition, CCCS would first determine whether the refusal adversely affected competition in a relevant market.

In determining the relevant market (e.g. whether it is the market for Software A-compatible spreadsheets), CCCS would consider factors such as the extent and importance of network effects and switching costs. CCCS would then determine whether Firm A is dominant in this market taking into account factors such as Firm A's market share and barriers to entry (including the pace of innovation and the potential for a new technology to "leap-frog over" Software A).

Assuming that Firm A is dominant, CCCS would determine whether access to Software A's menu command hierarchy is essential for competitors to participate in the relevant market and the extent to which Firm A's refusal to license its IP would adversely alter other firms' incentives to invest in R&D in respect of goods that require the IP as an input. If Software A's menu command hierarchy is an essential input, a refusal by Firm A to license this product to other firms could potentially constitute an abuse of its dominant position (unless there are objective justifications for this refusal, such as poor creditworthiness of the developers of competing software).

SEPs and Licensing on Fair, Reasonable and Non-Discriminatory ("FRAND") Terms

4.9 The relationship between patents and standards is fundamental to innovation and economic growth. While standards ensure that interoperable and safe technologies are widely disseminated among undertakings and end-consumers, patents can serve as one way to incentivise technology-contributing undertakings to participate in future standard setting efforts, and enable innovative undertakings that seek to license to receive reasonable compensation for the value of their patents. At the nexus of patents and standards lies a special category of patents known as SEPs, which cover technologies treated as essential to a standard. In other words, suppliers who wish to manufacture products based on certain standards, will need to have the ability to obtain the necessary licences to use the technologies covered by one or more applicable SEPs.

4.10 Standard setting is often done through the auspices of independent Standard Setting Organisations ("SSOs"), which consist of active players in the market. By the very definition of a standard setting process, it implies a single technological solution per module. In other words, the standard setting process will eliminate all other alternative technologies and may confer a degree of market power to the SEP holder whose technology is included in the standard. Furthermore, the standard setting process at its core involves bringing market players, sometimes competitors, together and providing a conduit where such market players coordinate their actions. Such features, which are common in the standard setting process, may provide the very conditions with which competition law is concerned.[14]

4.11 CCCS understands that as part of the standard setting process, participating patent holders disclose patents they believe are, or are likely to become, essential to that standard. The patent holders may provide a voluntary commitment to SSOs, undertaking to license their SEPs on FRAND terms should their patented technologies be included in the standard. Where an owner of an SEP has a dominant position in a market, its refusal to license its SEP on FRAND terms to any applicant for a licence (irrespective of its position in the value chain) may give rise to competition concerns under section 47 of the Act. In addition, it should be noted that seeking an injunction based on an alleged infringement of a SEP may give rise to competition concerns under section 47 of the Act if the SEP holder has a dominant position in a market, has given a voluntary commitment to license its SEP on FRAND terms and where the party against whom the SEP holder seeks to injunct is willing to enter into a licence agreement on such FRAND terms.

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[14] See section 34 of the Act. See also the Third Schedule of the Act which, *inter alia*, excludes from section 34 any agreement which has a net economic benefit.

Tying

4.12 An undertaking may be found to be abusing its dominant position where it attempts to leverage on its substantial market power in one market, to harm competition in another market, through practices such as tying. For example, an undertaking who is dominant in the market might impose a condition that he will grant a licence to his IPR only if the potential licensee agrees to buy an additional product or set of products, which is not covered by the IPR. However, the conduct of the dominant undertaking may be an objectively justified and proportionate response, if it can show that such provisions are necessary for a satisfactory exploitation of the IPR, such as for ensuring that the licensee conforms to quality standards or for technical interoperability.

Example:

Firm A is dominant in the market for personal computer operating systems through its ownership of Operating System A ("OS A"). Firm A mandated that licences for OS A would only be sold to personal computer users together with a licence for its music player software, Player A, and not as a standalone licence.

Analysis:

Firm A's conduct in trying to leverage on its dominant market position in the market for operating systems to gain market share in the market for music player software by tying the sale of licences for OS A to the sale of Player A is likely to raise competition issues under section 47. Firm A's conduct would have the effect of foreclosing Firm A's competitors in the market for music player software, as customers who already have Player A installed in their personal computers would be less likely to purchase an alternative music player software. Further, the tying of Player A to OS A is likely to create a disincentive for computer manufacturers to include other media player software in their computers. CCCS may take into account the availability of alternative music player software to customers. However, if CCCS finds that fewer customers use other music players because Player A is pre-installed, and there is no objective justification for the tying of licences for OS A and Player A, Firm A's conduct is likely to infringe the section 47 prohibition.

Refusal of Access to Data

4.13 Facts and data *per se* are not protected under copyright law. However, a compilation of facts and data may be protected if it constitutes an intellectual creation by reason of the selection or arrangement of its contents.[15]

4.14 This distinction reflects copyright law's goal of balancing private rights with public needs and interests: while copyright may protect, for a limited period, the copyright holder's efforts in compiling facts and data, the facts and data *per se* must remain free for others to work on so that the public can benefit from further additions to the pool of results. Otherwise, the first compiler could gain a monopoly over the data in the compilation, particularly when the data can only be found in the compiler's work. In such cases, a single compiler would have the power to control the growth of the pool of works for the consumption and benefit of the public.

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[15] See paragraph 15 of *Global Yellow Pages Ltd* v *Promedia Directories Pte Ltd and another matter* [2017] 2 SLR 185; [2017] SGCA 28.

4.15 Notwithstanding the "thin" copyright protection afforded over data and facts, there is potential scope for competition intervention where a dominant undertaking disallows its competitors access to data which is a key competitive input in the relevant market. Whether the data is a key competitive input may include a consideration of factors such as the availability of substitute data, the ability of competitors to replicate the data under reasonable conditions, as well as the degree of necessity of the data for competitors to compete effectively. Further, in order to assess whether competition intervention is appropriate, CCCS will also take into consideration evidence of likely or actual harm to competition, and whether the refusal of access to data can be objectively justified (e.g. on the basis of poor track record of privacy of that competitor, or security concerns over a particular data set).

Example:

Firm A has about 70% market share in market X. Firm A will only purchase the services of an affiliated company, Firm B, which operates in market Y. In doing so, Firm A will only provide relevant customer data to Firm B, but not disclose such data to competitors of Firm B. The collection of a larger customer data set has resulted in direct improvements to the quality of Firm B's services.

A new entrant to market Y, Firm C, has complained to CCCS about its inability to persuade other firms from market X to use its service. Firm C has also complained about its ability to collect relevant customer data from Firm A.

Analysis:

In the event that CCCS is satisfied that Firm C is unable to obtain the relevant customer data from other alternative sources, and that such customer data is necessary for the provision of services in market Y, CCCS may find that Firm A's conduct may amount to an infringement of the section 47 prohibition. In particular, Firm A may be leveraging its dominant position in market X to confer an advantage to Firm B, and foreclosing Firm B's competitors in market Y. The refusal of Firm A to supply customer data to Firm C could lead to a self-perpetuating cycle by which Firm C is unable to develop a credible service to offer to other firms in market X. This then means that Firm C is unable to collect even more customer data to improve the quality of its services. CCCS may then proceed to assess whether there is an objective justification by Firm A for such conduct.

Post Expiration Licensing Conditions/Royalty Charges

4.16 While patent owners are entitled to impose licensing conditions and charge royalties to licensees who wish to use their patents during the patent protection period under IP law, the imposition of conditions and/or structuring of royalty payments over a period that commences during the patent protection period and continues even after the patent has expired may infringe the section 47 prohibition. CCCS will consider the licensing conditions and the structure of royalty payments on a case by case basis in order to assess whether the patent owner is trying to exclude competitors and extend its monopoly beyond the patent period. In its assessment, CCCS may take into account the rationale for the licensing conditions and the structure of royalty payments, as well as whether the patent holder's conduct unreasonably extends its market power, if any, beyond the patent's statutory term.

5 GLOSSARY

Agreement	Includes decisions by associations of undertakings and concerted practices unless otherwise stated, or as the context so demands.
Buyer	Refers to the end-user consumer, and/or an undertaking that buys products as inputs for production or for resale, as the context demands.
Intellectual Property Rights (IPRs)	Refers to all IPRs including those granted under the *Patents Act 1994*, *Copyright Act 2021*, *Plant Varieties Protection Act 2004*, *Layout-Designs of Integrated Circuits Act 1999*, *Registered Designs Act 2000*, *Trade Marks Act 1998* and *Geographical Indications Act 2014*, as well as trade secrets.
Product	Refers to goods and/or services.
Seller	Refers to the primary producer, an undertaking that sells products as inputs for further production, and/or an undertaking that sells goods and services as a final product, as the context demands.
Undertaking	Refers to any person, being an individual, a body corporate, an unincorporated body of persons or any other entity, capable of carrying on commercial or economic activities relating to goods or services, as the context demands. Includes individuals operating as sole proprietorships, companies, partnerships, co-operatives, business chambers, trade associations and non-profit-making organisations.

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