

CCS GUIDELINES ON THE SECTION 34 PROHIBITION

THE SECTION 34 PROHIBITION

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1 INTRODUCTION

- 1.1 Section 34 of the Competition Act (Chapter 50B) (“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 III 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 Commission of Singapore (“CCS”) may consider in determining whether agreements are anti-competitive. They indicate the manner in which the CCS will interpret and give effect to the provisions of the Act when assessing agreements between undertakings.
- 1.3 The CCS 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 the CCS. 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.'

2.4 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.

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.
- 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 to the Act ("the Third Schedule"), are excluded from the section 34 prohibition in the first instance. These 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. 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 products¹. 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 shall apply to such vertical agreement.

Decisions by Associations of Undertakings

- 2.13 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 co-ordinate 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

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 *CCS Guidelines on the Treatment of Intellectual Property Rights*.

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 co-ordinate 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.

- 2.14 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.
- 2.15 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

- 2.16 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.
- 2.17 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

2.18 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. The CCS 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.

The Appreciable Adverse Effect on Competition Test

2.19 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 markets² 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 a small or medium enterprise (“SME”)³. Agreements between SMEs are rarely capable of distorting competition appreciably within the section 34 prohibition.

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.

2.20 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 2.19, and even if the parties to such agreements are SMEs.

2.21 The fact that the market shares of the parties to an agreement exceed the threshold levels mentioned in paragraph 2.19 does not necessarily mean that the effect of that agreement on competition is appreciable. Other factors may be

² Please refer to the *CCS Guidelines on Market Definition*.

³ SMEs in Singapore are defined as follows: For manufacturing SMEs, if they have Fixed Assets Investment (FAI) of less than S\$15 million; and for services SMEs, if they have less than 200 workers.

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.

- 2.22 When applying the market share thresholds mentioned in paragraph 2.19, 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 *CCS Guidelines on Market Definition*.
- 2.23 Please refer to Annex B for details on market power and market shares.

Net Economic Benefit

- 2.24 An agreement that falls within the scope of section 34 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 the CCS to that effect being required.
- 2.25 In the event of an investigation by the CCS, 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 the CCS will determine whether an agreement meets the criteria for the exclusion for 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;
- 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.

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 co-ordination 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.
- 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.
- 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.

- 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 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.

Exchange of Price Information

- 3.21 The exchange of information on prices may lead to price co-ordination 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.

- 3.22 The more recent or current the information exchanged, the more likely that 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.

Exchange of Non-Price Information

- 3.23 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 exchange of such information is unlikely to reduce individual undertakings' commercial and competitive independence.
- 3.24 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.

Advertising

- 3.25 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.
- 3.26 Decisions, for example by associations, 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

- 3.27 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

- 3.28 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 places with all the parties to the scheme. The circumstances of each case will be considered.
- 3.29 Other types of agreements where the parties agree to co-operate may have an appreciable adverse effect on competition.

4 EXCLUSIONS

- 4.1 The section 34 prohibition does not apply to the matters specified in the Third Schedule to the Act by virtue of section 35. 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 (Chapter 237A);
 - 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 Public Transport Council Act (Chapter 259B);

- The supply of rail services by any person licensed and regulated under the Rapid Transit Systems Act (Chapter 263A); and
- Cargo terminal operations carried out by a person licensed and regulated under the Maritime and Port Authority of Singapore Act (Chapter 170A);
- An agreement which relates to the clearing and exchanging of articles undertaken by the Automated Clearing House established under the Banking (Clearing House) Regulations (Chapter 19, Rg 1); or any related activities of the Singapore Clearing Houses Association;
- 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 products⁴, other than such vertical agreement as the Minister may by order specify;
- 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 the CCS, to exempt, by order, categories of agreements from the section 34

⁴ 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.

prohibition. Such an exemption is known as a block exemption. Section 39 provides for the procedure which the CCS 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 the CCS 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 shall have 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.

5.4 Breach of a condition imposed by a block exemption order shall have the effect of cancelling the block exemption for an agreement from such date as the CCS may specify. Failure to comply with an obligation imposed by a block exemption order enables the CCS to cancel the block exemption for an agreement from such date as the CCS may specify. If the CCS considers that an agreement is not one to which section 41 applies, the CCS may cancel the block exemption for such agreement from such date as the CCS 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 the CCS of the agreement. If the CCS does not give notice of its opposition within the specified period, the agreement shall be treated as falling within a category specified in the block exemption order. If the CCS exercises the right to oppose, the notification shall be treated as a notification for decision.

6 NOTIFICATION FOR GUIDANCE/DECISION

- 6.1 There is no requirement for undertakings to notify agreements to the CCS. 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 the CCS 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 The CCS 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 the CCS 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. The CCS 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 The CCS 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 the CCS 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 the CCS following its determination of the notification. This date cannot be earlier than the date of the notice.
- 6.7 If the CCS 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 an immunity from financial penalties for infringements of the section 34 prohibition. The CCS 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, the CCS will issue a notice informing the applicant that the immunity is being removed as from the date specified in the notice. If the

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

7 CONSEQUENCES OF INFRINGEMENT

Voidness

- 7.1 Any provision of an agreement entered into before 1 January 2006, shall be 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 shall be 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 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 the CCS has determined that an undertaking has infringed the section 34 prohibition and after the appeal process has been exhausted.

ANNEX A

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	<u>Likely to have an appreciable effect on competition.</u>	<u>Unlikely to have an appreciable effect on competition.</u>
a) Pricing	<input checked="" type="checkbox"/> Any recommendation as to prices and charges, including discounts and allowances is likely to have an appreciable effect on competition.	
b) Information sharing	<input checked="" type="checkbox"/> 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. <input checked="" type="checkbox"/> 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.	<input checked="" type="checkbox"/> 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.
c) Exchange of price information	<input checked="" type="checkbox"/> The more recent or current the information exchanged, the more likely that exchange could have an appreciable effect on competition. <input checked="" type="checkbox"/> The exchange of information may lead to price co-ordination and therefore diminish competition which would otherwise be present between the undertakings.	<input checked="" type="checkbox"/> 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.

Examples	<u>Likely to have an appreciable effect on competition.</u>	<u>Unlikely to have an appreciable effect on competition.</u>
<p>d) Exchange of non-price information</p>	<p><input checked="" type="checkbox"/> There may be an appreciable effect on competition if it is possible to disaggregate the information and identify the participants.</p>	<p><input checked="" type="checkbox"/> 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.</p>
<p>e) Advertising</p>	<p><input checked="" type="checkbox"/> 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.</p>	<p><input checked="" type="checkbox"/> 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.</p>
<p>f) Joint purchasing-</p>	<p><input checked="" type="checkbox"/> 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.</p>	<p><input checked="" type="checkbox"/> Joint purchasing, joint selling or joint research are unlikely to have an appreciable effect on competition, and therefore not explicitly prohibited.</p>
<p>g) Codes of conduct</p> <p>A code of conduct seeks to introduce best practices and may include provisions e.g. for dealing with consumer complaints and a redress procedure.</p>		<p><input checked="" type="checkbox"/> 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.</p>
<p>h) Technical standards</p> <p>An association of undertakings may play a role in the negotiation and promulgation of technical standards in an industry.</p>	<p><input checked="" type="checkbox"/> If entry barriers were to be significantly raised as a result of adoption of the standard, the effects on competition could be appreciable.</p>	

Examples	<u>Likely to have an appreciable effect on competition.</u>	<u>Unlikely to have an appreciable effect on competition.</u>
<p>i) Standard terms and conditions</p> <p>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.</p>	<p><input checked="" type="checkbox"/> 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.</p>	<p><input checked="" type="checkbox"/> Standard conditions are less likely to have an appreciable effect on competition where members remain free to adopt different conditions if they so wish.</p>
<p>j) Terms of membership</p> <p>Rules of admission as a member of an association of undertakings should be transparent, proportionate, non-discriminatory and based on objective standards.</p>	<p><input checked="" type="checkbox"/> 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.</p> <p><input checked="" type="checkbox"/> 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.</p>	
<p>k) Certification</p> <p>An association of undertakings may certify or award quality labels to its members to demonstrate that they have met minimum industry standards.</p>	<p><input checked="" type="checkbox"/> 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.</p>	<p><input checked="" type="checkbox"/> 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.</p>

ANNEX B

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.
- **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 were not close to full capacity.

Measuring Market Shares

Evidence

9.5 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.

9.6 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.

9.7 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 market⁵ 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.

⁵ This includes situations where the undertaking in question is part of the same group as an importer into that market.

ANNEX C

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;
- 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 from economies of scale and specialisation in research and development with the prospect of an enhanced flow or speed of innovation.

“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, the CCS 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.

ANNEX D

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 THIRD SCHEDULE TO THE ACT)

11.1 The CCS 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 the CCS 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 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.

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"⁶. 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.

⁶ 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	<p>Refers to the ability to profitably sustain prices above competitive levels or to restrict output or quality below competitive levels.</p> <p>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.</p> <p>Market power arises where an undertaking does not face sufficiently strong competitive pressure.</p>
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.