

MEDIA RELEASE

29 July 2005

The Competition Commission Publishes Revised Competition Guidelines

Outreach Programme Continues with the Competition Law Conference 2005

1. To give greater clarity to businesses, the Competition Commission of Singapore (CCS) has today published the finalised Competition Act¹ guidelines pertaining to the *section 34 prohibition*, the *section 47 prohibition* and *market definition*. This follows a six-week consultation period² where a total of 23 submissions were received. Many of the contributions were generally in support of the draft guidelines.
2. In the revised guidelines, the CCS has provided further clarifications and where possible included examples and illustrations to make the guidelines more user-friendly. Terms such as “abuse” and “single economic unit” were further elaborated taking into account the comments the CCS received. To address the questions raised by trade associations and professional bodies, CCS has incorporated a list of activities that are likely as well as unlikely to have an appreciable adverse impact on competition.
3. The constructive suggestions on points of detail from industry were carefully considered and the CCS made appropriate changes to specific sections. The CCS thanks the respondents for their contributions and comments.
4. The revisions to the guidelines are outlined in *Appendix 1* and the finalised guidelines are found in *Appendices 2, 3, and 4*. The guidelines will be available from the CCS website at www.ccs.gov.sg.

Inaugural Competition Law Conference

5. As part of its ongoing outreach programme, the CCS is organising the inaugural Competition Law Conference 2005 on **2 August** with the theme “*Introducing Competition Law: Perspectives and Implementation*”. The Minister for Trade and Industry, Mr Lim Hng Kiang, will be the guest-of-honour at the conference where he will officially launch CCS. He will speak on the strategies and priorities of the CCS in his keynote address.
6. The conference will bring to Singapore, practitioners from other competition authorities and consultants to share their experience and exchange ideas. The Competition Law Conference 2005 is co-organised with the Singapore Academy of Law and in association with the Singapore Business Federation.

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Competition Commission of Singapore

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About the Competition Commission of Singapore

The CCS is a new statutory body established under the Competition Act 2004 on 1 January 2005 to administer and enforce the Act. Its mission is to promote healthy competitive markets that will benefit the Singapore economy based on sound economic principles applied objectively and consistently. For more information, visit www.ccs.gov.sg.

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Notes to Editor:

1. The Competition Act 2004 (Act) was passed in Parliament on 19 October 2004 and assented to by the President on 4 November 2004. The new law will improve Singapore's international competitiveness by enhancing the efficient functioning of markets in Singapore. Instead of attempting to catch all forms of anti-competitive activities, the principal focus will be on activities, that have an appreciable adverse effect on competition in Singapore or that do not have any net economic benefit. The Act is being implemented in phases:

Phase I - On 1 January 2005, the provisions establishing the Competition Commission of Singapore (CCS) were brought into force.

Phase II - On 1 January 2006, the provisions on anti-competitive agreements, decisions and practices; abuse of dominance; investigation, enforcement; appeal process; and miscellaneous areas will come into force.

Phase III - The remaining provisions relating to mergers and acquisitions will likely come into force at least 12 months after Phase II.

2. The CCS issued this set of three guidelines between 31 March and 13 May 2005 for public consultation (see media release dated 31 March 2005). Additional guidelines are in preparation and will be published for consultation during the next few weeks.

COMPETITION COMMISSION OF SINGAPORE GUIDELINES

INTRODUCTION

1. On 31 March 2005, the Competition Commission of Singapore ('CCS') launched the public consultation on the first set of draft guidelines to the Competition Act 2004 ('the Act') on (i) *the section 34 prohibition*, (ii) *the section 47 prohibition* and (iii) *market definition*. Besides posting of the consultation documents on the CCS website and the Government Online Consultation Portal, the CCS also wrote to over 122 business chambers and trade associations to invite comments. In conjunction with the Singapore Business Federation ('SBF'), 3 briefings on the draft guidelines were conducted for the business community.

2. We received a total of 23 submissions at the end of the public consultation exercise on 13 May 2005. We thank all the contributors for their comments. Most were supportive of the draft guidelines, and there were several suggestions on how the draft guidelines could be improved. The CCS, after carefully reviewing the submissions, has made appropriate changes to the draft guidelines. This paper outlines the changes made, as well as the reasons why some suggestions have not been adopted.

GUIDING PRINCIPLES AND FRAMEWORK OF THE DRAFT GUIDELINES

3. Guiding Principles: In reviewing the submissions and proposed changes to the draft guidelines, the CCS continues to be guided by the following principles¹:

a. The primary consideration is the promotion of healthy competitive markets in Singapore. Section 6 of the Act also provides that the CCS shall, in performing its functions, have regard to the differences in the nature of the various markets in Singapore, and the economic, industrial and commercial needs of Singapore. In drafting the guidelines, we have taken into account our specific needs and circumstances, in particular that we are a small, open economy.

b. The CCS should prioritise its enforcement and target those that are clearly more harmful and warrant regulatory intervention.

c. Rather than being prescriptive and detailed, the guidelines should outline the conceptual, analytical and procedural framework, within which the CCS will investigate and assess complaints and undertake enforcement. This is also in line with the approach of competition

¹ As first set out in the 31 March 2005 public consultation document, released with the first set of draft guidelines.

authorities elsewhere. The guidelines can only provide a general indication on how the CCS will administer and enforce the Act; the guidelines are not intended to be individual firm- or sector-specific rules. The application of the guidelines will depend on the facts of each case. The CCS will, however, apply its guidelines in a consistent and coherent manner.

4. The framework of the guidelines remains unchanged. However, specific sections of the guidelines have been revised, taking into account the comments received.

GUIDELINE ON THE SECTION 34 PROHIBITION

5. Concept of single economic unit: A number of contributors sought clarification as to whether “single economic entity” only covered “a parent and subsidiary” or would also cover “two companies under the control of a third company”. Further, there was also concern whether the parent company would also be liable if the subsidiary was found to have infringed the prohibitions in the Act. The guideline clarifies the factors that the CCS may consider in assessing whether a subsidiary is independent of or forms part of the same economic unit with its parent. The key issue is whether the undertakings enjoy “economic independence” or “freedom to determine its own course of action”.

6. Association of undertakings: A number of trade associations expressed concern as to whether the associations would be held accountable, and sanctioned accordingly, for the actions of their members. The CCS considers that if the trade association was a party to the activity that infringed the prohibitions of the Act, the association, as well as its members would be liable for any infringement. Annex A to the guideline illustrates the types of activities of trade associations and professional bodies that are likely, as well those that are unlikely, to have an appreciable adverse effect on competition.

7. Appreciable adverse effect on competition test: Most contributors agreed that the appreciable adverse effect test set out the correct standard. A number of contributors noted that there may be some agreements where it was not clear whether the agreement was between competitors (where the market share threshold for non-appreciability was set at 20%) or between non-competitors (where the market share threshold for non-appreciability was set at 25%). For such cases, the guideline clarifies that the lower 20% market share threshold will be applicable.

8. While noting that agreements between small and medium enterprises (SMEs) were unlikely to distort competition appreciably, a number of contributors viewed that the definition of SMEs was too wide and could consequently exclude a large number of entities in Singapore. The CCS would in the first instance

conform to the standard definition of SME (as set by SPRING Singapore²) to avoid confusion. However, if there is evidence to show that the larger SMEs are able to adversely impact competition in the relevant market to an appreciable extent, the CCS will review and tighten the definition if necessary.

9. Examples of activities that would infringe the section 34 prohibition: Several contributors asked for examples of the types of agreements and practices that could infringe the *section 34 prohibition*; and for the guideline to elaborate on the types of agreements and practices. To this end, the CCS has worked in examples and illustrations where possible.

10. Exemptions and Net Economic Benefit: Several contributors sought clarification on the term “net economic benefit”, and the basis for granting block exemptions. This term is used in cases where an agreement with an appreciable adverse effect on competition may on balance, have net economic benefit. By this, we mean that the agreement 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 portion of the goods or services in question. Annex C has been included in the guideline to set out the analytical framework on how the CCS will determine if such an agreement meets this criteria. The Third Schedule will be amended by order of the Minister published in the *Gazette* to provide that such agreements, which meet the criteria, will be excluded from the operation of the section 34 prohibition.

11. There were also requests for block exemptions to be granted for cooperative joint ventures (‘JVs’) and for agreements amongst shipping companies on price-fixing activities. Cooperative JVs cover a wide variety of agreements. Hence, it is not appropriate to have a block exemption for cooperative JVs in general. The CCS will study the merits of block exemptions for various categories of agreements in the context of Singapore. These block exemption orders will be released for consultation before adoption.

12. Notification for guidance/decision: Some contributors sought clarification as to whether guidance/decisions were binding; and the guidance and notification procedure. The CCS’ draft guideline on *Filing Notification For Guidance Or Decision* was released on 26 May 2005.

GUIDELINE ON THE SECTION 47 PROHIBITION

13. Dominant position in “Singapore or elsewhere”: Following upon the Act, the guideline has set out how the Act will apply to an undertaking that is

² 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. **NOTE:** The definition for service SMEs has been revised from “less than 100 workers” to “less than 200 workers” following SPRING’s definition.

dominant in a relevant market, either in Singapore or elsewhere. A number of contributors have asked why the *section 47 prohibition* should apply to an undertaking that is dominant in a market outside of Singapore. This is because as a small open economy, Singapore is vulnerable to anti-competitive conduct emanating from overseas. We need to be able to enforce against dominant undertakings, when their conduct distorts competition in a relevant market in Singapore, regardless of whether they are dominant in a market in Singapore or elsewhere.

14. 60% as an indicative threshold for determining dominance: As Singapore is a small open economy where market concentrations are at times inevitable, the CCS will use 60% as the indicative market share threshold in determining dominance. The CCS will also take into consideration other factors such as entry barriers and buyer power, in determining if a firm is indeed dominant.

15. Definition of “Abuse”: Several contributors asked for the term “abuse” to be defined and for examples of the types of conduct that might be considered abusive, and the circumstances under which conduct might be considered to be abusive. The CCS has included examples of conduct that may amount to an abuse in Annex C.

16. Collective dominance: Some contributors sought clarification on the term “collective dominance” and what would constitute abuse of collective dominance. To this end, further illustrations have been included in the guidelines where possible.

17. Objective justification and proportionality approach: Further clarification on the approach has been included in the guideline. This took into account comments from a number of contributors that sought clarification on the application of this approach, i.e. how a potentially abusive conduct need not necessarily be found to infringe the *section 47 prohibition*, if there was objective justification; and if the conduct was a proportionate response.

18. Guidance from European Commission (‘EC’)/United Kingdom (‘UK’) caselaw: A number of contributors suggested that the CCS should indicate clearly which areas of EC caselaw would or would not apply to the Singapore context. These cases are persuasive authority. As our situation will, in some respects be different from that in the UK and the EC, it is not practicable or appropriate for the CCS to so indicate.

GUIDELINE ON MARKET DEFINITION

19. Hypothetical Monopolist Test (‘HMT’): Some contributors sought clarification on how the HMT would be applied to intermediate goods and luxury goods. The application of the HMT would be the same at all levels of production and for all goods (including luxury goods). Further, contributors requested for guidelines on how “the competitive level of pricing”, “relevant focal product” and

“acceptable substitutes” would be determined. Where possible, further examples and clarifications have been included in the guideline.

NEXT STEPS

20. Section 61 of the Act provides for the CCS, with a view to enabling any person to order his affairs in compliance with the Act, to publish guidelines in the *Gazette* indicating the manner in which the CCS will interpret, and give effect to, the provisions of the Act. The CCS will publish the above set of guidelines in the *Gazette* before 1 January 2006, when the provisions on anti-competitive agreements, decisions and practices and abuse of dominance (*section 34 and 47 prohibitions*) will come into force.

21. The guidelines will be reviewed from time to time to ensure their continued relevance, taking into account market changes and the decisions of the Competition Appeal Board and the courts.