

# COMPETITION LAW UPDATE

14 October 2015

## PROPOSED CHANGES TO THE COMPETITION COMMISSION OF SINGAPORE'S GUIDELINES: WHAT YOU NEED TO KNOW

On 25 September 2015, the Competition Commission of Singapore (“CCS”), announced a consultation process on proposed amendments to its existing guidelines.

CCS has previously issued 13 sets of guidelines:

- (a) CCS Guidelines on the Major Provisions;
- (b) CCS Guidelines on the Section 34 Prohibition;
- (c) CCS Guidelines on the Section 47 Prohibition;
- (d) CCS Guidelines on the Substantive Assessment of Mergers;
- (e) CCS Guidelines on Merger Procedures 2012;
- (f) CCS Guidelines on Market Definition;
- (g) CCS Guidelines on the Powers of Investigation;
- (h) CCS Guidelines on Enforcement;
- (i) CCS Guidelines on Lenient Treatment for Undertakings Coming Forward with Information on Cartel Activity Cases 2009;
- (j) CCS Guidelines on Filing Notifications for Guidance or Decision with respect to the Section 34 Prohibition and Section 47 Prohibition;

- (k) CCS Guidelines on the Appropriate Amount of Penalty;
- (l) CCS Guidelines on the Treatment of Intellectual Property Rights; and
- (m) CCS Guidelines on Competition Impact Assessment for Government Agencies.

Whilst not statements of law, the guidelines generally outline how CCS will administer and enforce the provisions of the Competition Act (Cap.50B) (“Act”), and are an important reference point for businesses and practitioners.

In the current consultation process, changes are proposed to a large number of the guidelines. We have set out below a practical guide for businesses to understand some of the key changes, and where relevant, the potential impact that these proposed changes might have.

### A NEW GUIDELINE: FAST-TRACK PROCEDURE FOR SECTION 34 AND SECTION 47 CASES

A key feature of the consultation process is the introduction of a proposed fast-track procedure, which represents a fundamental new development, rather than a revision of the existing guidelines. The fast-track procedure essentially provides an avenue for parties to admit liability for infringements of the Act (and comply with various other conditions), and in return, the party will receive a reduction in the amount of financial penalty to be imposed (which is set at 10% of the penalty that would otherwise be imposed). CCS has also highlighted that parties will additionally benefit from a shorter, expedited investigative timeframe.

CCS has stated that the fast-track procedure will be initiated by CCS in appropriate cases (as determined on a case-by-case basis). Parties have the option to agree to the fast-track procedure, but are not under an obligation to agree to it.

CCS has indicated that to allow parties under investigation to determine whether they wish the fast-track procedure to take effect, discussions will take place with CCS regarding the scope and gravity of the conduct, including identifying the infringements upon which CCS contemplates making a decision, how the reduction in financial penalty for the fast-track procedure will be applied,

and the possible range and quantum of financial penalties.

The fast-track procedure outlines that the reduction in financial penalties that can be gained from the fast-track procedure are in addition to any potential reductions in financial penalties that a party might stand to gain through the use of CCS's leniency programme.

The procedure also states that CCS envisages that in general, the fast-track procedure will be applied only when all parties under investigations in the appropriate case agree to the fast-track procedure.

### **How the changes might impact you**

The procedure represents an interesting development and option for parties under investigation. The fact that parties will need to admit liability in order to qualify for the fast-track procedure is significant and this factor may be particularly relevant in the context of abuse of dominance cases, where it is usually much more unclear as to whether the conduct in question is a breach of the law, especially early on in the investigation. With that said, abuse of dominance investigations can be lengthy and complicated, which may increase the attractiveness of a fast-track option.

Another critical consequence of admitting liability is that it potentially exposes the party in question to follow-on actions for damages by parties that have suffered loss or damage directly as a result of the infringing conduct. Accordingly, whilst weighing the benefit of a potential reduction in possible financial penalties against the time and cost involved in a full investigation, parties will also need to factor in the potential exposure to private damages claims.

How the procedure will play out in practice remains to be seen, but it is clear that the system will run parallel to the leniency system, which may give rise to interesting questions for undertakings as to whether they apply for leniency or seek to fast-track the case, or both.

### **GUIDELINES ON LENIENT TREATMENT**

CCS's leniency programme essentially incentivizes cartel participants to come forward with information and evidence of an anti-competitive arrangement, in return for lenient treatment in the context of the investigation. In relation to CCS's enforcement decisions to date, many parties have benefitted from the programme in receiving total immunity from financial penalties, or a substantial reduction in such.

One of the biggest changes to CCS's guidelines on leniency is the introduction of two further criteria in order to qualify for leniency. In particular, the CCS has stated that the party seeking leniency must grant a waiver of confidentiality to CCS in respect of any jurisdiction where the applicant has also applied for leniency or any other regulatory authority which it has informed of the conduct. In addition, a further condition is that the party 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.

In addition to the new criteria, CCS has also tweaked the other criteria applying to leniency applications, though such changes are arguably of lesser consequence.

This guideline also goes into significant detail with regard to the actual procedures for requesting a marker and leniency. In particular, CCS outlines in much greater detail the procedure that should be followed in order to be granted a leniency marker, conditional leniency, and then ultimately immunity or leniency, which represent the three key milestones in the process.

CCS has also provided further detail on when information provided in the course of a leniency application may be disclosed to third parties. In particular, CCS has stated that information provided to CCS will be accessible to addressees of any provisional infringement decision, provided that the addressee undertakes not to make any copy by mechanical or electronic means.

### **How the changes might impact you**

CCS's new condition that applicants must admit liability is an interesting development. There are

many situations where it is unclear as to whether particular conduct constitutes an infringement of competition law, and many situations where it may be difficult to determine whether conduct has actually given rise to an adverse impact in Singapore. Moreover, an admission of liability opens the door for private actions for damages against the party, which might have the counter-productive effect of making parties more hesitant in wanting to apply for leniency.

The increased level of detail provided on the procedures relating to leniency applications has obviously been distilled from CCS's practice in dealing with such applications over the years, and provides further clarity on the concrete steps that parties will need to take to qualify for leniency.

## **GUIDELINES ON THE SECTION 34 PROHIBITION**

The most notable change to this guideline is in relation to the meaning of what constitutes a restriction of competition by "object".

First, CCS has specifically noted that the words "object" or "effect" are alternative and not cumulative requirements.

Secondly, CCS has set out that it will assess other factors in order to determine whether a particular arrangement constitutes a restriction of competition by object, including the content of the agreement and the objective aims pursued by it.

Thirdly, and notably, CCS has stated that should it find that particular types of arrangements restrict competition by object, then it will consider such conduct to restrict competition by an appreciable extent. Previously, assumptions that agreements will be regarded as restrictive of competition to an appreciable extent was reserved for the four hard-core offences (*ie* price fixing, market sharing, bid-rigging and output limitation).

CCS also provides more detail on how it will assess instances of information sharing (both of price information and non-price information). This further explanation mirrors CCS's approach in its enforcement decision involving ferry operators in 2012, where CCS determined that the exchange of forward looking price information was a restriction of competition by object. In particular, CCS has

highlighted that the unilateral disclosure of information by one undertaking to another might constitute a prohibited concerted practice, if the other party requests the information or at the very least accepts it. CCS goes on to highlight that the receiving party would need to respond with a clear statement that it does not wish to receive such information, otherwise it may be held liable in any enforcement proceedings.

Another proposed change involves a specific mention that 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 in respect of how their competitors might act. This change reflects the position taken by CCS in previous decisions such as its decision in respect of the Singapore Medical Association's Guidelines on Fees for Doctors in Private Practice, which it considered would contravene section 34 of the Act.

CCS has also included some further explanation as to what constitutes a vertical arrangement (which are excluded from consideration under section 34 of the Act), and outlined that the existence of a vertical agreement does not preclude the existence of a horizontal agreement. Again, this change provides further clarification to businesses seeking to better understand the application of the exclusion provided to vertical agreements, but does not represent a fundamental new approach.

## **How the changes might impact you**

Most of the proposed changes to this guideline are clarifications and appear to be made to reflect CCS's current decisional practice. The changes relating to vertical agreements and guidelines on fees can be seen as clarifications, rather than fundamental moves in policy or approach.

CCS's proposed revisions relating to when it will consider that an agreement might restrict competition by object has the potential to make it easier for CCS to take enforcement actions under the prohibition, and arguably narrows the defences that might be available to parties under investigation. How these changes take effect practically remains to be seen.

In terms of information sharing, the proposed changes highlight that should businesses receive information from competitors (even unsolicited information), a clear rejection of this information should be made. Passive receipt of the information in the absence of any formal agreement relating to how the information will be used is not sufficient to absolve the receiving party from responsibility.

### GUIDELINES ON THE SECTION 47 PROHIBITION

A key change to these guidelines is the inclusion of the legal test for abuse of dominance, as was determined by the Competition Appeal Board in 2012, in hearing the appeal of SISTIC.com Ltd in relation to CCS's infringement finding against it. Specifically, CCS states that CCS will take an effects-based assessment as to whether the conduct "has, or is likely to have, an adverse effect on the process of competition".

CCS has also added an indication that it may use a counterfactual analysis as a tool for assessing abuse of dominance (albeit that this is not a legal requirement). A counterfactual is essentially a hypothetical "with and without" comparison, often used by competition authorities worldwide for trying to determine the effects of the conduct in question.

#### How the changes might impact you

Whilst the inclusion of the legal test determined for abuse of dominance provides more detail than the original draft of the guidelines, it is still unclear as to when an "adverse effect on the process of competition" would be established. It remains unclear as to exactly how an adverse effect on the process of competition would be established, or what might be relevant to the consideration.

The test reflected in the guidelines arguably makes it rather easy for CCS to determine that conduct is abusive, as there is no objective yardstick for determining when conduct might be considered to have an adverse effect on the process of competition. This means that businesses that might be in a dominant position should be very cautious to assess their business conduct which might have an exclusionary effect on their competitors.

With the above said, it is noteworthy that the test reflected in the CCS guidelines is derived from the decision of the Competition Appeal Board, in hearing the appeal of SISTIC.com Pte Ltd in 2011, in respect of CCS's infringement decision against it. In that regard, the test reflected by CCS is not a novel creation by CCS.

### GUIDELINES ON APPROPRIATE AMOUNT OF PENALTY

CCS has proposed a number of clarifications to its guidelines on the appropriate amount of penalty, which sets out CCS's approach to determining financial penalties in the context of an infringement finding. In particular, CCS has made changes to reflect:

- (a) that where an undertaking is unable or refuses to provide CCS with its relevant turnover or is suspected of providing CCS with very low relevant turnover, CCS will attribute a proportionate relevant turnover to that undertaking based on a proxy formula;
- (b) that CCS will not usually make an adjustment for duration in bid-rigging or collusive tendering cases, *ie* the duration multiplier will be set at 1. However, CCS will treat as aggravating, every bid-rigging infringement that the undertaking participates after the first infringement;
- (c) that unreasonable failure by an undertaking to respond to a request for financial information or providing incomplete information may be treated as an aggravating factor taken into account in the calibration of penalties;
- (d) that CCS may impose an uplift to the financial penalty calculated, at Step 4, to ensure its policy objectives are achieved; and
- (e) that CCS may take into account leniency and immunity reductions as well as discounts which may be applicable under the new fast-track procedure.

#### How the changes might impact you

The changes to these guidelines generally reflect minor revisions to the existing process, and clarifications. The proposed revisions will not likely have an impact on businesses in relation to their

day to day operations, but will provide more clarity for businesses under investigation by CCS and trying to determine their likely financial penalties. In this regard, the clarifications ought to assist considerations of whether to apply for leniency or CCS's fast-track procedure, by potentially making it slightly more easy to judge likely financial penalties.

### GUIDELINES ON POWERS OF INVESTIGATION

CCS has only included minor changes to these guidelines to reflect that CCS may exercise its powers of investigation and its powers of enforcements in respect of the section 54 prohibition, which is to be read together with the CCS Guidelines on Merger Procedures 2012.

### GUIDELINES ON THE SUBSTANTIVE ASSESSMENT OF MERGERS

The revisions to the Draft CCS Guidelines on the Substantive Assessment of Mergers provide greater clarity on a large number of issues relevant to how CCS will review mergers which have been notified to it or mergers which it investigates unilaterally.

It has always been the case under Singapore's competition laws that the acquisition of minority shareholdings may give rise to a merger which falls for consideration under the merger review regime in the Act, if it confers upon the acquirer decisive influence over an undertaking. Whilst this is not a novel position taken by CCS, CCS has provided express clarification and additional illustration on how a minority shareholder may also be deemed to have sole control over an undertaking on a legal or de facto basis.

CCS has explained that the acquisition of, inter alia:

- (a) additional rights which allow minority shareholders to acquire veto decisions that are essential to the strategic commercial behaviour of the undertaking; or
- (b) control over decisions made at shareholders' meeting due to patterns of

attendance and voting (where the remaining shares are widely dispersed),

can amount to an acquisition of control which may lead to a reviewable merger under the Act.

CCS has clarified also that mergers between competing buyers may create or enhance the merged firm's ability to (unilaterally or in coordination with other firms) exercise market power when buying products or services. This creation or increase in "monopsony power" may lead to a substantial lessening of competition ("SLC") in the relevant (buying) market. CCS has also provided relevant considerations in assessing the competition effects of the merger in the relevant markets. These include, inter alia:

- (a) the number of other purchasers purchasing the products/services in the relevant market;
- (b) the market shares of the merger parties (as buyers) and that of other buyers;
- (c) the potential "entry" of a new buyer or increase in purchases if prices decreased; and
- (d) the possibility of suppliers exiting the market or reducing production of investment in response to any price decrease.

CCS has provided further elaboration on the types of information it may consider in assessing whether there is countervailing buyer power of customers. These include, inter alia:

- (a) examples of customers switching between alternative suppliers pre-merger;
- (b) the proportion of revenue large customers represent for the merger parties;
- (c) evidence and examples of (extensive) past negotiations on price, quality of products or services between the customer and the merger parties;
- (d) whether the buyer has a large volume order or its ability to sponsor entry for a potential supplier which is not currently in the market; and
- (e) evidence that customers have regularly and successfully resisted attempts by a supplier to raise prices.

CCS has also provided illustrations on the types of efficiencies it may consider in applying the "Net

Economic Efficiencies” test. The section 54 prohibition of mergers which has or is likely to result in an SLC in any market in Singapore does not apply to any merger if the economic efficiencies arising or that may arise from the merger outweigh the adverse effects of the merger in the relevant market in Singapore.

The illustrations provided by the CCS include, inter alia:

- (a) supply-side efficiencies (such as cost reductions and increased investment);
- (b) demand-side efficiencies (such as any beneficial price effects on complementary products or benefits of one-stop shopping); and
- (c) dynamic efficiencies (such as increased innovation).

### **How the changes might impact you**

The proposed revisions generally provide greater clarity to merger parties as to whether their transactions may potentially be considered to fall within the merger review regime under the Act.

CCS’s clarification that mergers of competing buyers can potentially adversely impact on competition in the relevant market (on the buying side) highlights to merger parties undertaking a self-assessment that (where relevant), consideration must be made also on whether the merger would create or enhance the merged entity’s ability to exercise monopsony power on the buying side.

CCS’s further elaboration and illustrations on countervailing buyer power as a means to discipline supplier pricing and explanation of the efficiencies that CCS may consider in assessing a merger situation will assist merger parties in structuring and formulating their representations to CCS in their notifications on why their transactions do not give rise to an SLC in any market in Singapore.

### **GUIDELINES ON FILING NOTIFICATIONS FOR GUIDANCE OR DECISION**

Agreements, conduct and mergers can be notified to CCS for clearance. The notification system

under the Act is voluntary and designed to provide parties with commercial and legal certainty that their transactions or conduct will not likely infringe the Act. These guidelines deal with the procedure for filing notifications for guidance or a decision in respect of the section 34 and section 47 prohibitions.

CCS has proposed changes regarding the information to be submitted within a “Form 1” application. In particular, CCS has indicated that there is now a requirement for information on the relevant product and geographic markets to be provided. CCS has also specified other areas on which information is required, such as in respect of identifying the applicant’s five largest competitors and detail relating to the applicability of any vertical relationships between the parties involved.

Under the current prevailing notification system, CCS may refuse to accept an application if it is incomplete. The proposed amendments clarify that where the information provided by the applicant in the Form 1 is incomplete, CCS will notify the applicant and specify a time frame for the applicant to provide the outstanding information. If the applicant fails to do so within the time frame (or any extensions granted) then the application will be deemed not having been made. Where the outstanding information is submitted, then the application will be deemed to be made on the day CCS receives all such information.

CCS has also clarified that documents which are not in the English language must be accompanied by a translation certified by a court interpreter or verified by the affidavit of a qualified translator. However, this clarification simply reflects CCS’s current practice.

### **How the changes might impact you**

In general, the proposed changes seek to refine the process of making notifications to CCS. The additional information requirements may involve some additional work in relation to the preparation of the notification; however, the additional information required at the initial stages might, to some extent, help to limit the degree to which CCS needs to request further information from the applicants during the consideration of the notification.

## CONCLUSION

With competition law in Singapore about to enter its 11th year of active enforcement, and CCS's bank of cases continuing to grow from year to year, it is timely for CCS to revisit some of the key principles and processes encapsulated in its guidelines. Whilst the majority of the proposed changes reflect minor revisions and improvements to existing processes, the proposed changes also touch on key substantive concepts such as what is meant by a restriction of competition by object under section 34 of the Act, and when an abuse of dominance under section 47 of the Act can be established. The introduction of a fast-track procedure for parties who admit liability under section 34 or 47 at an early stage in return for a fixed reduction in financial penalties represents one of the most novel changes, with such a system poised to sit alongside CCS's leniency programme as potential options for undertakings in the early stages of a CCS investigation.

The consultation process ends on 6 November 2015.

## REFERENCES

Please click on the following link to access the document.

**Public Consultation on Proposed Changes to CCS Guidelines**

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Should you require further information on the guidelines and the proposed changes, or on how to go about making a submission to CCS during the consultation process, please feel free to contact the Drew & Napier Competition Law Practice Group.



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## ABOUT DREW & NAPIER LLC'S COMPETITION & REGULATORY PRACTICE GROUP

Drew & Napier's Competition & Regulatory Practice Group, established in 1999, is consistently recognised as the leading practice in Singapore. The unique strength of the practice group lies in our capability to provide sound economics-based competition law advice that is in-line with the modern economics-based analytical approach practised by competition authorities. Our reviews include: Chambers Asia Pacific 2015, PLC Which Lawyer? 2011/2012 (Highly Recommended), Who's Who Legal: Competition 2014 and The Guide to the World's Leading Competition & Antitrust Lawyers/Economists 2010 (9th ed.), 2012 (10th ed.) and 2014 (11th ed.). In the 2014 survey conducted by the Asian-Mena Counsel, Drew & Napier was named the In-house Community Firm of the Year for Anti-trust and Competition Law in Singapore, the fifth year that Drew & Napier has received this honour. Drew & Napier is again recognised in 2015 as a competition law practice "regularly classed as one of Singapore's elite", by the Global Competition Review.

The Practice Group regularly assists companies in competition law matters across ASEAN member countries through our network of preferred competition lawyers. We leverage on our network of trusted partners in ASEAN to select appropriate local counsel, and work closely with them to find solutions that best meet our clients' business needs. Our expertise is further bolstered through assisting the ASEAN Secretariat with a study into the development of competition policy and law in the region and the formulation of best practices for its introduction and implementation in ASEAN. Drew & Napier's ASEAN Competition Law Portal (<http://www.drewnapier.com/Our-Expertise/Competition-Law-Regulatory-Practice/ASEAN-Competition-Law>) is a one-stop shop where in-house counsel can easily access practical country guides on competition law and a database of past cases. We are also a member of Antitrust Asia, a network of premier competition law firms that spans across 20 Asia-pacific jurisdictions.

We filed the first merger notification under the Competition Act and regularly assist on major merger notifications both in Singapore and as coordinating counsel in ASEAN. We also assist

clients regularly with filings to the CCS for guidance and decisions relating to agreements and conduct, and we have consistently achieved positive clearance for clients. Our expertise is recognised by the CCS and other sectoral competition regulators which regularly commission us to undertake market studies. The Practice Group has also assisted the telecommunications, media and postal sector regulators in the drafting of their respective sectoral competition codes.

We are also at the forefront of competition litigation, having been involved in all the major investigations by the CCS. We have successfully defended an MNC being investigated for an abuse of dominance in Singapore. We have also successfully represented clients in the first set of appeals before the Competition Appeal Board (CAB) and obtained reductions in the financial penalties of up to 90% for our clients. We represented SISTIC.com Pte Ltd in its appeal to the CAB in relation to the first and only abuse of dominance infringement finding made to date by the CCS, and secured a 20% reduction in the financial penalty imposed.

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