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Cartels 2022

Singapore: Law & Practice
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Law and Practice

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1. BASIC LEGAL FRAMEWORK

1.1 Statutory Bases for Challenging Cartel Behaviour/Effects

The Competition Act 2004 (the “Competition Act”) is the primary competition legislation in Singapore. Section 34 of the Competition Act prohibits cartel activities (“Section 34 Prohibition”); namely, in respect of “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”.

1.2 Public Enforcement Agencies and Scope of Liabilities, Penalties and Awards

The Competition and Consumer Commission of Singapore (the “Commission”) is the statutory body established on 1 January 2005 to administer and enforce the Competition Act under the purview of the Ministry of Trade and Industry. From 1 April 2018, the Commission also assumed responsibility for administering the Consumer Protection (Fair Trading) Act 2003.

While cartel matters are adjudicated by the Commission, its decisions can be appealed to the Competition Appeal Board (the “Board”). In turn, a decision of the Board can be appealed to the General Division of the High Court on a point of law arising from the decision or any decision in respect of the quantum of financial penalty imposed. Please see **4.8 Available Forms of Judicial Review or Appeal** for details.

Where an infringement of the Section 34 Prohibition is found, pursuant to Section 69 of the Competition Act, the Commission has a general discretion to give any directions it considers appropriate to bring the infringement to an end and, where necessary, require the taking of such

action as is specified in the direction to remedy, mitigate or eliminate any adverse effects of such infringement and to prevent the recurrence of such infringement. A direction may require parties to:

- modify or terminate the agreement that infringed the Section 34 Prohibition;
- enter into legally enforceable agreements designed to prevent or lessen the anti-competitive effects that have arisen;
- dispose of operations, assets or shares in undertakings in such manner as may be specified by the Commission;
- provide a performance bond, guarantee, or other forms of security on such terms and conditions as the Commission may determine; and/or
- where the infringement is committed intentionally or negligently, pay such financial penalty as the Commission may determine, which may not exceed 10% of a party’s business turnover in Singapore for each year of infringement, up to a maximum of three years.

While there is currently no criminal liability for cartel conduct per se, criminal liability may arise in cartel investigations where, eg, undertakings or individuals obstruct the Commission in performing its duties or refuse to provide the information requested pursuant to the Commission’s statutory powers.

Additionally, third parties who suffered loss or damages due to a competition law infringement will have a private right of action to seek relief through civil proceedings. Such rights will only arise after the Commission has decided that the Section 34 Prohibition has been infringed and the appeal period has expired or where an appeal has been brought upon the determination of the appeal. Private actions must be brought within two years from the date of the Commis-

sion's decision or from the determination of the appeal, whichever is later. Relief may be in the form of an injunction or declaration, damages, and such other relief as the court deems fit.

1.3 Private Challenges of Cartel Behaviour/Effects

Under the Competition Act, there is no private right of action for challenging cartel behaviour or effects. Potential infringements of the Competition Act are investigated and decided by the Commission. However, complaints may be made to the Commission, and a formal investigation launched if there are reasonable grounds for suspecting an infringement of the Section 34 Prohibition.

Third parties may bring a private right of action to seek relief from parties responsible for engaging in cartel behaviour after the Commission has made an infringement decision. Please see **1.2 Public Enforcement Agencies and Scope of Liabilities, Penalties and Awards**.

1.4 Definition of "Cartel Conduct"

As stated in **1.1 Statutory Bases for Challenging Cartel Behaviour/Effects**, Section 34 of the Competition Act prohibits "agreements between undertakings, decisions by associations of undertakings or concerted practices that have as their object or effect the prevention, restriction or distortion of competition within Singapore". As Section 34(2) of the Competition Act illustrates, agreements may have the object or effect of preventing, restricting or distorting competition within Singapore if they:

- directly or indirectly fix purchase or selling prices or any other trading conditions;
- limit or control production, markets, technical development or investment;
- share markets or sources of supply;
- apply dissimilar conditions to equivalent transactions with other trading parties,

thereby placing them at a competitive disadvantage; or

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

The illustrative list above is not intended to be exhaustive. As set out in the Commission's Guidelines on the Section 34 Prohibition, other examples of cartel activities are as follows:

- joint purchasing or selling;
- agreements to share information;
- exchanges of price information and/or non-price information;
- agreements restricting advertising; or
- standardisation agreements on technical or design standards.

In addition, the Section 34 Prohibition will apply only where agreements, decisions and concerted practices have, as their object or effect, the "appreciable" prevention, restriction or distortion of competition.

The Commission considers that arrangements between competing undertakings involving price fixing, bid rigging, market sharing, or output limitation will always be considered, by their very nature, restrictive of competition to an appreciable extent.

On 28 December 2021, the Commission also released the Business Collaboration Guidance Note (the "Guidance Note"), which supplements the Commission's Guidelines on the Section 34 Prohibition. It clarifies the Commission's position on the common types of business collaborations and provides guidance on how it will assess such collaborations in view of the Section 34 Prohibition. The seven common types of

business collaborations covered in the Guidance Note are:

- information sharing – exchange of both price and non-price information among businesses;
- joint production – collaboration to jointly produce a product, share production capacity or subcontract production;
- joint commercialisation – collaboration in the selling, tendering, distribution or promotion of a product;
- joint purchasing – collaboration to jointly purchase from one or more suppliers;
- joint research & development (“R&D”) – collaboration on R&D activities, such as joint investment;
- standards development – the setting of industry or technical standards; and
- standard terms and conditions in contracts – usage of terms shared amongst competitors establishing conditions of sale and purchase of goods and services between them and their customers.

In particular, the Guidance Note sets out factors and conditions, such as the nature and extent of the collaborations, and indicative market shares, under which competition concerns are less likely to arise from the collaborations.

In determining whether an agreement has the object of preventing, restricting or distorting competition, the Commission is not concerned with the subjective intention of the parties when entering into an agreement. Instead, it will determine if the Section 34 Prohibition has been breached based on the content and objective aims of the agreement considered in the economic context in which it is to be applied. The Commission will also consider the actual conduct and behaviour of the parties in the relevant market.

Notwithstanding, an agreement will not be prohibited if it falls within an exclusion in the Third Schedule to the Competition Act or meets all of the requirements specified in a block exemption order. The matters specified in the Third Schedule include:

- an undertaking entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly, in so far as the prohibition would obstruct the performance, in law or fact, of the particular tasks assigned to that undertaking;
- an agreement that is made to comply with a legal requirement;
- an agreement that is necessary to avoid conflict with an international obligation of Singapore and that is subject to an order by the Minister for Trade and Industry (the “Minister”);
- an agreement that is necessary for exceptional and compelling reasons of public policy and that is subject to an order by the Minister;
- any agreement that relates to any goods or services to the extent to which any other written law or code of practice issued under any written law relating to competition gives another regulatory authority jurisdiction in the matter;
- the supply of ordinary letter and postcard services by a person licensed and regulated under the Postal Services Act 1999;
- the supply of piped potable water;
- the supply of waste water management services, including the collection, treatment and disposal of waste water;
- the supply of bus services by a licensed bus operator under the Bus Services Industry Act 2015;
- the supply of rail services by any person licensed and regulated under the Rapid Transit Systems Act 1995;

- cargo terminal operations carried out by a person licensed and regulated under the Maritime and Port Authority of Singapore Act 1996;
- the clearing and exchanging of articles undertaken by the Automated Clearing House established under the Banking (Clearing House) Regulations; or
- any activity of the Singapore Clearing Houses Association in relation to its activities regarding the Automated Clearing House.

Section 34 Prohibition also does not apply to agreements or conduct that give rise to net economic benefit (as provided in the Third Schedule). For a net economic benefit to be shown, the agreement or conduct must:

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

Additionally, Section 34 Prohibition does not apply to vertical agreements unless the Minister otherwise specifies by order (as set out in the Third Schedule). As of 23 May 2022, no such order has been made.

Certain liner shipping agreements are exempted from the application of the Section 34 Prohibition pursuant to a block exemption order (BEO), which first took effect on 1 July 2006 for five years and extended twice until 31 December 2020. A third extension was granted on 26 August 2020, which extended the BEO for an additional year until 31 December 2021. Upon the recommendation of the Commission and

pursuant to the Competition (Block Exemption for Liner Shipping Agreements) (Amendment) Order 2021, the BEO has been extended for another three years, from 1 January 2022 to 31 December 2024, in respect of vessel sharing agreements for liner shipping services and price discussion agreements for feeder services. The liner shipping BEO remains the only BEO that has been granted in Singapore since the Competition Act came into force.

Notably, Section 33(4) of the Competition Act also provides that the substantive prohibitions will not apply to any activity carried on by, any agreement entered into or any conduct on the part of the government, any statutory body or any person acting on behalf of the government or that statutory body, as the case may be, regarding that activity, agreement or conduct.

1.5 Limitation Periods

There are no limitation period(s) applicable to a breach of the Section 34 Prohibition.

1.6 Extent of Jurisdiction

Section 33 of the Competition Act specifically states that the Commission may enforce infringements of the Section 34 Prohibition if the conduct that takes place outside Singapore has the object or effect of preventing, restricting or distorting competition in a market within Singapore. In particular, Section 33 of the Competition Act specifies that Section 34 of the Competition Act may apply notwithstanding that:

- an agreement referred to in Section 34 has been entered into outside Singapore;
- any party to such agreement is outside Singapore; or
- any other matter, practice or action arising out of such agreement is outside Singapore.

1.7 Principles of Comity

Pursuant to Section 88 of the Competition Act, the Commission is empowered to enter into arrangements with any foreign competition body with the approval of the Minister, whereby each party to such arrangements may:

- furnish to the other party information in its possession if the information is required by that other party for the purpose of performance by it of any of its functions; and
- provide such other assistance to the other party as will facilitate the performance by that other party of any of its functions.

In entering into any such arrangement, Section 88 of the Competition Act requires the Commission to adopt certain precautions relating to the subsequent disclosure of any information provided, including obtaining a written undertaking from the counterparty. As of 23 May 2022, the Commission has entered into a memorandum of understanding to facilitate co-operation on competition enforcement with Indonesia's Commission for the Supervision of Business Competition, a memorandum of co-operation with Japan's Fair Trade Commission on cross-border enforcement, and a memorandum of understanding with Canada's Competition Bureau to facilitate co-operation in the enforcement of national competition and consumer protection laws. More recently, the Commission signed memoranda of understanding with the Philippine Competition Commission and the State Administration for Market Regulation of the People's Republic of China.

It should also be noted that the Commission joined the International Competition Network's Framework on Competition Agency Procedures (the "Framework") as a founding member on 16 May 2019. The Framework promotes several basic and non-binding principles designed to facilitate procedural fairness and transparency

among participating competition agencies, in addition to fostering closer co-operation between participating agencies through dialogues to better understand each other's processes. Given the recent introduction of the Framework, the Framework has not been tested or utilised in any of the Commission's investigations or enforcement cases as yet.

1.8 COVID-19

On 20 July 2020, the Commission released the Guidance Note on Collaborations between Competitors in Response to the COVID-19 Pandemic (the "COVID-19 Guidance Note"). According to the COVID-19 Guidance Note, the Commission will presume that collaborations in place from 1 February 2020 and that end before 31 July 2021 will generate net economic benefits if they:

- sustain or improve the supply of essential goods or services;
- are limited in scope and time as set out in the COVID-19 Guidance Note; and
- do not involve price fixing, bid rigging, market sharing or output limitation.

The COVID-19 Guidance Note expired on 31 July 2021.

2. PROCEDURAL FRAMEWORK FOR CARTEL ENFORCEMENT – INITIAL STEPS

2.1 Initial Investigatory Steps

In practice, parties generally become aware of the Commission's investigations against them for a potential infringement of the Section 34 Prohibition in one of two ways.

On the one hand, the Commission may serve a formal notice pursuant to Section 63 of the

Competition Act, requiring the production of information or documents specified in the notice. The notice will set out the subject matter and purpose of the investigation and outline the nature of the offences that may be committed if a person fails to comply with the notice. It is not uncommon for multiple formal notices to be issued by the Commission to either the infringing parties or any other parties that might have information that is relevant to the investigation.

The written notice may also designate a time and place at which a document or information must be produced and the manner and form in which it is to be produced. If information is provided, it may be recorded or reduced into writing by the Commission's officers. The person providing the information will be given an opportunity to amend, add to or delete from the written record before signing it. If a document is produced, the Commission may require an explanation of the document to be provided as well. The Commission will generally not ask for more documents or information than what it believes is necessary for the investigation as at the date of the written notice.

On the other hand, the Commission may conduct unannounced searches (also known as dawn raids) of business premises. Please see **2.2 Dawn Raids** for further details.

2.2 Dawn Raids

The Commission may conduct dawn raids under a warrant pursuant to Section 65 of the Competition Act, where there are reasonable grounds for suspecting that the premises hold relevant documents that would be concealed, removed, tampered with or destroyed if the Commission had requested their production through a formal notice. It should be noted that the Commission may also enter premises without a warrant under Section 64 of the Competition Act, although it is required to

provide written notice at least two working days in advance of its intended entry, and it will not have the ability to actively search the premises. However, there is no need to provide notice if the premises are reasonably suspected to be, or to have been, occupied by the undertaking that is being investigated in relation to an agreement infringing the Section 34 Prohibition.

Where the Commission conducts a search of the premises under warrant, the Commission's officers will normally arrive at the premises during office hours. If no one is at the premises, the Commission's officers will take reasonable steps to inform the occupier of the intended entry. The occupier and legal representative will be given a reasonable opportunity to be present when the warrant is executed.

Where the Commissioner's officer grants a request allowing an occupier's legal representative a reasonable time to arrive at the premises, the Commission's officers may impose such conditions as deemed appropriate, which may include the sealing of cabinets, keeping business records in the same state and places as when entry into the premises was effected, suspending external email, and allowing the Commission's officers to occupy selected offices. The legal representative will only be given a reasonable time to arrive at the premises before a raid is executed. If the occupier has an in-house legal representative on the premises, the Commission's officers will not wait for an external legal representative to arrive.

In general, a warrant to conduct searches may only be granted if the court is satisfied that there are reasonable grounds for suspecting that within the premises to be searched there are:

- documents that should be produced under Section 63 (by written notice) or 64 (in the course of an inspection without a warrant)

- of the Competition Act but have not been produced;
- documents that an investigating officer, authorised person, inspector or person required by the inspector could have required to be produced under Section 64 but they were unable to access the premises; or
- documents that could be concealed, removed, tampered with or destroyed if the Commission were to require their production under Section 63.

If a warrant is granted by the courts, the warrant may permit the Commission's officers to do all or any of the following:

- enter the premises and use such force as is reasonably necessary for the purpose of gaining entry;
- search any person on the premises if there are reasonable grounds for believing the person has in his or her possession any document, equipment or article that has a bearing on the investigation;
- search the premises and take copies or extracts from any document appearing to be the kind in respect of which the warrant was granted;
- take possession of any document appearing to be the kind in respect of which the warrant was granted if necessary for preserving the document or preventing tampering, or if it is not reasonably practicable to make copies of it on the premises;
- take any other step necessary to preserve the documents or prevent interference with them, including the sealing of premises, offices or files;
- require any person to explain any document appearing to be the kind in respect of which the warrant was granted or state to the best of his or her knowledge where it could be found;
- require any person on the premises to produce any relevant document at such location, time, and in such form and manner as may be required by the Commission;
- require any information stored in electronic form and is accessible from the premises that the Commission's officers consider to be related to any matter relevant to the investigation, to be produced in a form in which it could be taken away and read; and
- remove from the premises any equipment or article related to any matter relevant to the investigation (eg, computers).

Whilst the Commission's powers under the warrant appear to be broad, a significant caveat is that the Commission's power to require the disclosure of information or documents under the Competition Act does not extend to any communication that would be protected in disclosure in court proceedings on the grounds of legal advice privilege or litigation privilege. Please see **2.7 Attorney-Client Privilege**.

It should also be noted that where the Commission's officers intend to enter premises without a warrant, the Commission's officers may nonetheless require:

- any person on the premises to produce any document that the Commission's officers consider related to any matter relevant to the investigation, eg, minutes of any meetings with competitors, the diaries of specified directors, sales data or invoices;
- any person on the premises to provide an explanation of any document produced;
- any person to state, to the best of that person's knowledge and belief, the location of any document that the Commission's officers consider to be related to any matter relevant to the investigation;
- any information stored in any electronic form and accessible from the premises that the

Commission's officers consider to be related to any matter relevant to the investigation, to be produced in a form in which it can be read and can be taken away; and

- the taking of any other steps that appear necessary to preserve the documents or prevent interference with them, eg, sealing such rooms or cabinets for such time as is reasonably necessary to enable the inspection to be completed. This period will not be longer than 72 hours, except where an undertaking consents to a longer time or where access to documents is unduly delayed, such as by the unavailability of a person who can provide access.

Further, the Commission is empowered to interview occupants on the premises being inspected without having to serve a written notice under Section 63 of the Competition Act. The Commission's officers may require individuals to answer any question relating to the investigation, and any information provided verbally must be reduced to writing, read to the individual, and after correction (if any), signed by the individual. If the individual does not understand English, the information recorded will be interpreted in a language that the individual understands.

2.3 Spoliation of Information

The Competition Act contains certain offences relating to non-compliance or non-co-operation with the Commission's investigations; in particular, where a person:

- refuses to provide information pursuant to a requirement on him or her to do so;
- destroys, falsifies or conceals documents;
- provides false or misleading information; or
- obstructs an officer of the Commission in the discharge of his or her duties.

A person who is convicted of an offence concerning the above may be sentenced to a

term of imprisonment not exceeding 12 months, a fine not exceeding SGD10,000, or both. To date, criminal sanctions relating to an offence described above have not been imposed in any case in Singapore.

2.4 Role of Counsel

Legal counsel (whether in-house or external) may play a role in the investigations process. For instance, where the Commission issues a written notice to require the production of documents or information under Section 63 of the Competition Act, legal advice may be sought in relation to the notice. A person required by the Commission to provide information or an explanation of a document may also be accompanied by legal counsel. However, it should be noted that the individual must be the person responding, and the Commission has stated that it is not acceptable for another person to respond on that individual's behalf. In addition, where the Commission conducts a search of the premises under warrant, the occupier's legal counsel may be given a reasonable amount of time to arrive at the premises under certain circumstances (please see **2.2 Dawn Raids**).

Generally, cartel involvement does not give rise to liability for individuals (such as employees or officers of the entity under investigation). In such a situation, representation would be at the corporate level. However, where individuals commit one of the ancillary offences relating to the obstruction of the Commission's investigations, individuals may consider obtaining legal representation in relation to any subsequent criminal proceedings brought against them.

In practice, legal counsel should inform all officers and employees of the undertaking under investigation of the legal requirements to co-operate with the Commission's officers, with particular emphasis on ensuring that there should be no attempts to delete, destroy or conceal

information or documents that may be relevant to the investigation. Legal counsel should also ensure that officers and employees do not disclose that the undertaking is under investigation and/or a dawn raid has taken place to other third parties; in particular, to such other undertakings who may potentially be the subject of the Commission's investigations.

2.5 Enforcement Agency's Procedure for Obtaining Evidence/Testimony

The Commission may issue a notice under Section 63 of the Competition Act to require the production of specified documents, provide specified information, or enter any premises to gain access to documents, either with or without a warrant.

Apart from issuing a notice under Section 63 of the Competition Act to require the provision of specified information, which may be given orally, the Commission's officers may also interview any person on the premises under inspection.

Please see **2.1 Initial Investigatory Steps** and **2.2 Dawn Raids** for further details.

2.6 Obligation to Produce Documents/ Evidence Located in Other Jurisdictions

In general, a company/individual must provide such documents or information in relation to the subject matter of the investigations, notwithstanding that the information is located in other jurisdictions, especially if it is stored in an electronic form and is accessible from the premises. Please refer to **2.3 Spoliation of Information** regarding the penalties that may be imposed for non-compliance with the Commission's investigations.

2.7 Attorney-Client Privilege

As mentioned in **2.2 Dawn Raids**, the Commission's power to require the disclosure of information or documents under the Competition

Act does not extend to any communication that would be protected in disclosure in court proceedings on the ground of legal advice privilege or litigation privilege. Section 66(3) of the Competition Act also provides that a professional legal adviser is not required to disclose or produce privileged communications made by or to him or her in that capacity.

In general, the advice provided by in-house counsel is also protected by legal professional privilege under the Evidence Act 1893. This was affirmed in the Commission's Guidelines on the Powers of Investigation in Competition Cases 2016, which stated that "communications with in-house lawyers, in addition to lawyers in private practice including foreign lawyers, can benefit from the privilege".

Section 66(2) of the Competition Act provides a saving provision in respect of statements that may tend to incriminate individuals. Where an individual claims, before making any statement disclosing information, that the statement may tend to incriminate him or her, that statement shall not be admissible in evidence against him or her in criminal proceedings other than in proceedings under Part 5 of the Competition Act relating to ancillary offences such as providing false or misleading information (please see **5.4 Admissibility of Evidence Obtained From Governmental Investigations/Proceedings**). Notwithstanding, these statements may be used by the Commission in its investigations and enforcement and remain admissible as evidence in civil proceedings, including proceedings under the Competition Act (please see **1.2 Public Enforcement Agencies and Scope of Liabilities, Penalties and Awards** and **5.1 Private Right of Action**).

2.8 Non-cooperation With Enforcement Agencies

As mentioned in **2.3 Spoliation of Information**, the Competition Act provides for offences in relation to the obstruction of the Commission's investigation efforts, which carry a sentence of imprisonment, a fine, or both. Further, certain forms of non-co-operation, such as an unreasonable failure by an undertaking to respond to a request for financial information on business turnover and/or relevant turnover, may be considered by the Commission as an aggravating factor in determining the appropriate financial penalty to be imposed, where relevant.

2.9 Protection of Confidential/ Proprietary Information

Parties cannot refuse to provide information or documents on the basis that they are confidential. However, parties are allowed to claim confidentiality over any information that they furnish to the Commission, and Section 89 of the Competition Act protects such confidential information (subject to certain statutory exceptions) by requiring the Commission's officers and other specified parties handling such information to preserve and aid in the preserving of secrecy, including all matters relating to the business, commercial or official affairs of any person.

2.10 Procedure for Defence Counsel to Raise Arguments Against Enforcement

Counsel may raise legal and factual arguments to persuade the Commission to forgo taking action in response to enquiries by the Commission or by proactive engagements with the Commission during an investigation.

During the Commission's investigations, and before the Commission decides whether the Section 34 Prohibition has been infringed, entities under investigation may come forward to voluntarily offer legally binding commitments

to address the competition concerns identified in the course of investigations. The Commission will cease its investigations if it accepts these commitments. Legally binding commitments can be enforced by the Commission through the courts under Section 85 of the Competition Act. While it is not stipulated in the Competition Act, defence counsel may play a role in this process in advising the relevant entity under investigation on the offering of legally binding commitments.

In the Commission's Guidelines on Direction and Remedies (previously named the Guidelines on Enforcement of Competition Cases 2016), the Commission clarified its position on commitments proposed by parties under investigation. The Commission has indicated that it will generally not accept commitments in cases involving restrictions of competition by object, such as bid rigging, with no accompanying net economic benefit.

2.11 Leniency and/or Immunity Regime

Under the Commission's leniency programme, an undertaking that applies for leniency may be granted the benefit of total immunity from financial penalties if it:

- is the first to provide the Commission with evidence of the cartel activity before an investigation has commenced, provided that the Commission does not already have sufficient information to establish the existence of the alleged cartel activity;
- provides the Commission with all the information, documents and evidence available to it regarding the cartel activity;
- grants an appropriate waiver of confidentiality to the Commission in respect of other jurisdictions and regulatory authorities notified of the conduct and/or from which leniency has been sought;
- unconditionally admits liability to the conduct for which leniency is sought;

- maintains continuous and complete co-operation throughout the investigation and until the conclusion of any action by the Commission arising as a result of the investigation;
- refrains from further participation in the cartel activity from the time of disclosure of the cartel activity to the Commission (except as may be directed by the Commission)
- is not responsible for initiating the cartel; and
- has not taken any steps to coerce another undertaking to take part in the cartel activity.

After the Commission has commenced an investigation, any reduction in the level of financial penalty will be at the Commission's discretion. The first party that provides information to the Commission about the cartel that is sufficient for it to issue an infringement decision can receive lenient treatment by way of a reduction of up to 100% in the level of the financial penalties. Subsequent applicants may benefit from reduced financial penalties of up to 50%.

In addition, the leniency programme in Singapore is also supplemented by a marker system and a Leniency Plus system.

The marker system is available to undertakings that cannot immediately provide all the information, documents and evidence regarding the cartel activity, provided that the Commission has not announced its intention to make a decision. An applicant who obtains a marker will secure a position in the queue for immunity or a reduction in the financial penalty of up to 100%, while the Commission grants the applicant a limited period to gather the necessary information, documents and evidence. If the applicant is unable to perfect the marker by providing the necessary information, documents and evidence within the time period specified, the Commission may grant extensions on a case-by-case basis. If the applicant fails to perfect the marker,

the next applicant in the marker queue will be eligible to obtain immunity or a reduction in the financial penalty of up to 100%. Once the marker has been perfected, the other applicants in the marker queue will be informed that they no longer qualify for full immunity or a 100% reduction in financial penalties.

Under the Commission's Leniency Plus system, a party involved in completely separate cartel activities in two different markets may benefit from additional reductions in the financial penalties imposed on it in the first market if that party were to provide information in respect of cartel activity in the second market. To be clear, the party does not need to be in receipt of leniency in respect of the first market to receive this reduction. The reduction in financial penalties will be in addition to any reduction it would receive for its co-operation in the investigation in the first market.

2.12 Amnesty Regime

Please see **2.11 Leniency and/or Immunity Regime**.

3. PROCEDURAL FRAMEWORK FOR CARTEL ENFORCEMENT – WHEN ENFORCEMENT ACTIVITY PROCEEDS

3.1 Obtaining Information Directly From Employees

In general, company employees may be required to provide information (including an explanation of any document provided) to the Commission pursuant to a notice issued by the Commission under Section 63 of the Competition Act. Employees may also be interviewed by the Commission's officers during an inspection of the company's premises. Please see **2.1 Initial**

Investigatory Steps and **2.2 Dawn Raids** on the Commission's powers of investigation.

3.2 Obtaining Documentary Information From the Target Company

The Commission may generally obtain documents and information from the company under investigation pursuant to the issuance of a written notice under Section 63 of the Competition Act and/or by entering the premises and conducting a search for such information under Sections 64 and 65 of the Competition Act. Please see **2.1 Initial Investigatory Steps** and **2.2 Dawn Raids** on the Commission's powers of investigation.

3.3 Obtaining Information From Entities Located Outside This Jurisdiction

Section 63 of the Competition Act empowers the Commission to request information from any person pursuant to a written notice. Whilst the Competition Act does not specify how the notice may be issued in respect of companies or individuals located outside the jurisdiction, the Commission's Guidelines on the Powers of Investigation in Competition Cases 2016 state that the written notice should be delivered personally or sent by pre-paid post to the last known address of the person. The same penalties for any non-compliance with the Commission's investigations will apply.

3.4 Inter-agency Co-operation/Co-ordination

Where cross-sectoral competition matters involve an industry separately regulated by industry-specific regulators (eg, telecommunications, media, post, gas and electricity), the Commission will work with the relevant regulator to determine which agency is best placed to handle the matter in accordance with statutory powers. The lead will be taken by the agency best placed to investigate the alleged anti-competitive conduct and impose any necessary remedies.

3.5 Co-operation With Foreign Enforcement Agencies

Please see **1.7 Principles of Comity** on the Commission's ability to enter into co-operative agreements with other foreign competition authorities.

Separately, the Commission has also publicly acknowledged that there has been at least one occasion where the Commission has co-ordinated with overseas competition authorities on conducting dawn raids. Further, an appropriate waiver of confidentiality in respect of other regulatory authorities informed of the conduct must be granted by an applicant seeking leniency from the Commission so that the Commission may communicate with such authorities for its investigations.

3.6 Procedure for Issuing Complaints/Indictments in Criminal Cases

As noted in **1.2 Public Enforcement Agencies and Scope of Liabilities, Penalties and Awards**, there is no criminal liability for infringements of competition law in Singapore, except for the ancillary offences relating to the failure to comply or co-operate when the Commission exercises its powers of investigation. Such offences will be tried in the District Court, which has the power to impose the full penalty or punishment.

3.7 Procedure for Issuing Complaints/Indictments in Civil Cases

The Commission is the primary agency responsible for initiating an investigation and deciding whether the Section 34 Prohibition has been infringed in the first instance. Please see **2.1 Initial Investigatory Steps** and **2.2 Dawn Raids** on the Commission's powers of investigation.

Where the Commission concludes, following the completion of investigations, that the parties have infringed the Section 34 Prohibition, the

Commission will issue a Proposed Infringement Decision (PID), which is a written notice setting out the basis of the Commission's decisions. The parties concerned will be given an opportunity to make representations to the Commission and present any other information for the Commission's consideration before the Commission finalises its decision. Parties will also be allowed to inspect the documents in the Commission's file relied on in its assessment. The Commission may withhold any documents to the extent that they contain confidential information or are internal documents. After the Commission has considered the parties' representations, it will finalise its infringement decision, which will set out the penalties and other remedies to be imposed, if any.

3.8 Enforcement Against Multiple Parties

It is understood that the Commission's infringement decision on an infringement of the Section 34 Prohibition will be issued in respect of all parties that have participated in the cartel.

3.9 Burden of Proof

The civil standard of proof – namely, proof on the balance of probabilities – will apply to the Commission's determination of whether there has been an infringement of the Section 34 Prohibition. The civil standard will also apply in appeals against the Commission's decision, which may be heard by the Board or the relevant appellate court.

3.10 Finders of Fact

The Commission is responsible for investigating an infringement of the Section 34 Prohibition and applying the relevant legal analysis to the facts of the matter in its assessment to arrive at its decision.

3.11 Use of Evidence Obtained From One Proceeding in Other Proceedings

The Commission may undertake several investigations simultaneously and, as such, requires information to be provided for multiple investigations as long as the information requested falls within the scope of the investigations.

Leniency applicants are required to provide a waiver to the Commission that enables it to share information with other authorities from which leniency is sought.

3.12 Rules of Evidence

Whilst the substantive provisions of the Evidence Act 1893 apply to all judicial proceedings in or before any court (except for proceedings before an arbitrator or to affidavits presented to any court or officer), the Evidence Act is silent on the application of rules of evidence to administrative proceedings such as the Commission's investigations and enforcement. Save for the specific provisions on privileged communications and information and the admissibility of statements relating to self-incrimination, the Competition Act is silent on the rules of evidence applicable to the Commission's enforcement of the Competition Act.

In practice, however, and as set out in the Commission's guidelines, the Commission has broad powers to require the production of documents and information necessary for the Commission's investigations. To this end, the Commission will generally consider all relevant information before arriving at its decision as to whether there is an infringement of the Section 34 Prohibition.

3.13 Role of Experts

The Commission comprises several divisions employing officers from various fields of expertise. In particular, the Legal and Business and Economics divisions of the Commission

comprise officers who can provide expert economic and legal analyses to competition and consumer cases to ensure that the detection, investigation, decision and enforcement processes are fair, thorough and robust.

In addition, where parties intend to make an application to the Commission for guidance or a decision on whether the agreement or conduct infringes the Section 34 Prohibition, they may require the assistance of experts in substantiating certain information required to be included in an application to the Commission; for example, a definition of the relevant product and geographic markets.

3.14 Recognition of Privileges

Please see **2.7 Attorney-Client Privilege**.

3.15 Possibility for Multiple Proceedings Involving the Same Facts

The Commission may undertake several investigations at the same time based on the same or related facts.

4. SANCTIONS AND REMEDIES IN GOVERNMENT CARTEL ENFORCEMENT

4.1 Imposition of Sanctions

The Competition Act gives the Commission the power to enforce the Section 34 Prohibition. Where the Commission has made a decision finding that the Section 34 Prohibition has been infringed, the Commission may give to such persons directions as it considers appropriate to bring the infringement to an end. Directions may require the person concerned to modify or terminate the agreement or conduct, report periodically to the Commission on certain matters, and even require undertakings to make structural changes to their business, where appropriate.

The Commission is not limited to giving directions to the infringing parties.

In general, directions will typically take effect immediately unless the Commission provides for a period within which to comply with a direction. An appeal to the Board or a relevant appeal court will not operate to suspend a direction unless an interim order is made by the Board or relevant appeal court.

In addition, the Competition Act provides that the Commission has the discretion to give a direction imposing a financial penalty on any party that has intentionally or negligently infringed the Section 34 Prohibition. The imposition of financial penalties reflects the seriousness of the infringement and serves as an effective deterrent.

The penalty imposed may be up to 10% of the turnover of the undertaking's business in Singapore for each year of infringement, up to a maximum of three years. The Commission has considered that intention or negligence relates to the facts, not the law. This means that ignorance or a mistake of law is no bar to a finding of intentional or negligent infringement.

4.2 Procedure for Plea Bargaining or Settlement

As noted in **2.10 Procedure for Defence Counsel to Raise Arguments Against Enforcement**, entities under investigation may come forward to voluntarily offer legally binding commitments to address the competition concerns identified by the Commission at any time during the Commission's investigations and before the Commission decides whether the Section 34 Prohibition has been infringed. The Commission will cease its investigations if it accepts these commitments. Legally binding commitments can be enforced by the Commission through the courts under Section 85 of the Competition Act.

Separately, the Commission has a “fast-track” procedure to expedite the investigative timeframe for cases involving the infringement of the Section 34 Prohibition detailed in the Commission’s Practice Statement on the Fast Track Procedure for Section 34 and Section 47 Cases. Under this procedure, parties that admit liability for their infringement will be eligible for a fixed percentage reduction in the financial penalty they are directed to pay pursuant to Section 69(2)(e) of the Competition Act. This procedure is not mutually exclusive from the leniency regime, and a leniency applicant can benefit from discounts arising from both leniency and the fast-track procedure.

Notwithstanding the parties’ willingness to participate in the fast-track procedure, the Commission retains broad discretion to determine whether the procedure would be suitable for the case under investigation. The Commission will initiate the fast-track procedure where it is reasonably satisfied, based on the information the Commission has, that the evidentiary standard of proof has been met such that it would be prepared to issue a proposed infringement decision or infringement decision (as appropriate, given the stage of proceedings). It is understood that parties to such a procedure may not disclose any information received from their participation in this procedure to other third parties, except with prior authorisation from the Commission.

On 14 December 2020, the Fast Track Procedure was applied for the first time in a big-rigging decision involving three water features maintenance businesses – CU Water Services, Crystalene Product (S) and Crystal Clear Contractor. In exchange for an admission of liability and co-operation with the Commission, the latter two companies benefitted from a 10% reduction on their respective financial penalties.

4.3 Collateral Effects of Establishing Liability/Responsibility

Any person who suffers loss or damage directly due to an infringement of the Section 34 Prohibition has a right of action for relief in civil proceedings in a court against any undertaking that is or has at the material time been a party to such infringement. It should be noted, however, that no private action may be brought under the Competition Act until the Commission has issued an infringement decision and the appeal period has expired, or where an appeal has been brought, upon the determination of the appeal.

4.4 Sanctions and Penalties Available in Criminal Proceedings

As noted in **1.2 Public Enforcement Agencies and Scope of Liabilities, Penalties and Awards**, there is no criminal liability for infringements of competition law in Singapore, except for the ancillary offences relating to the failure to comply or co-operate when the Commission exercises its powers of investigation.

4.5 Sanctions and Penalties Available in Civil Proceedings

Please see **4.1 Imposition of Sanctions** on the Commission’s ability to impose sanctions for infringements of competition law.

As noted in **1.2 Public Enforcement Agencies and Scope of Liabilities, Penalties and Awards** and **5.1 Private Right of Action**, private individuals only have a right to seek relief from the courts against parties found to have infringed competition law, where such relief may be in the form of an injunction or declaration, damages, and such other relief as the court deems fit.

4.6 Relevance of “Effective Compliance Programmes”

The Commission has stated in its Guidelines on the Appropriate Amount of Penalty in Competition Cases that the financial penalty may be reduced

where the Commission considers there are mitigating factors, including the existence of any compliance programme. In considering how much mitigating value is to be accorded to the existence of any compliance programme, the Commission will take into account whether:

- there are appropriate compliance policies and procedures in place;
- the programme has been actively implemented;
- it has the support of, and is observed by, senior management;
- there is active and ongoing training for employees at all levels who may be involved in activities touched by competition law; and
- the programme is evaluated and reviewed at regular intervals.

4.7 Mandatory Consumer Redress

There are no provisions requiring mandatory consumer redress for a breach of the Section 34 Prohibition in the Competition Act. As noted in **1.2 Public Enforcement Agencies and Scope of Liabilities, Penalties and Awards** and **5.1 Private Right of Action**, individuals have private rights of action to seek redress in court from parties found by the Commission to have infringed the Section 34 Prohibition.

4.8 Available Forms of Judicial Review or Appeal

As noted in **1.2 Public Enforcement Agencies and Scope of Liabilities, Penalties and Awards**, appeals regarding the Commission's decisions can be made to the Board, which is an independent body established under Section 72 of the Competition Act. The Board's powers and procedures are set out primarily in Section 73 of the Competition Act and the Competition (Appeals) Regulations.

In general, parties to an agreement or persons whose conduct in respect of which the Commis-

sion has made a decision finding an infringement of the Section 34 Prohibition may appeal against that decision, the imposition of or the amount of any financial penalty, or any directions issued. There is no right to appeal to the Board against the Commission's refusal to accept any commitments offered, but appeals may be made against the Commission's refusal to vary, substitute or release existing commitments.

Procedurally, appeals are made by lodging a notice of appeal, in accordance with the Competition (Appeals) Regulations, within two months from the date of the Commission's decision. Thereafter, the Commission has six weeks to file its defence. The Board may determine the procedure and timetable of the appeal, usually through holding a case management conference with the parties. The Board has broad powers to make such directions it thinks fit to secure the just, expeditious and economical conduct of the appeal proceedings.

Regarding the outcome, the Board can confirm, impose, revoke or vary a direction, or make any other direction or decision, as long as it is a decision or direction that the Commission itself could have given. On the merits of the appeal, the Board will apply the civil standard of proof – namely, proof on the balance of probabilities – which the Board has previously applied in the Express Bus Operators case.

Further appeals against the Board's decisions to the General Division of the High Court may be made on a point of law arising from a decision of the Board or in respect of any decision made by it as to the amount of the financial penalty. Appeals are brought by way of originating summons, and the procedure governing the appeal is set out in the Rules of Court 2021. Parties may also appeal decisions of the General Division of the High Court to the Court of Appeal. There is no further appeal right from the Court of Appeal.

As of 23 May 2022, 19 appeals have been filed to the Board; two were withdrawn, one is in progress, and the remainder completed. To date, no further appeals have been made against the Board's decisions.

5. PRIVATE CIVIL LITIGATION INVOLVING ALLEGED CARTELS

5.1 Private Right of Action

Third parties, including firms and individuals, may have a private right of action under Section 86 of the Competition Act. As stated in **1.2 Public Enforcement Agencies and Scope of Liabilities, Penalties and Awards**, such a right of private action is premised on an infringement finding by the Commission, and may only be brought within two years following the expiry of any applicable periods. There is no record of any such proceedings being brought in Singapore concerning competition-related matters.

5.2 Collective Action

On 1 April 2022, the new Rules of Court 2021 came into operation. Under Order 4, rule 6(1), where numerous persons have a common interest in any proceedings, such persons may sue or be sued as a group with one or more of them representing the group. Under Order 4, rule 6(4), where there is a class of persons and all or any member of the class cannot be ascertained or cannot be found, the Court may appoint one or more persons to represent the entire class or part of the class and all the known members, and the class must be included in a list attached to the order of Court. However, notwithstanding that representative and class actions may be brought, claimants still need to demonstrate that they have suffered loss or damage directly.

5.3 Indirect Purchasers and “Passing-On” Defences

Whilst questions of indirect purchasers and “passing-on” defences have yet to be considered in Singapore, it should be noted that only persons who suffer loss or damage directly as a result of an infringement of the Section 34 Prohibition may bring a private action under the Competition Act.

5.4 Admissibility of Evidence Obtained From Governmental Investigations/ Proceedings

Discovery requirements under the Rules of Court will likely apply to evidence from the Commission's investigations.

5.5 Frequency of Completion of Litigation

As of 23 May 2022, there have not been any claims brought by individuals in the exercise of their private rights of action in respect of a violation of the Section 34 Prohibition, nor have there been any publicly available details relating to any out-of-court settlements on the same.

5.6 Compensation of Legal Representatives

In general, “costs follow the event” for most civil actions in Singapore. This means that the costs of an action (which may include fees, charges, disbursements, expenses and remuneration) are usually awarded to successful litigants, although any award of costs is subject to the court's discretion.

5.7 Obligation of Unsuccessful Claimants to Pay Costs/Fees

Please see **5.6 Compensation of Legal Representatives**.

5.8 Available Forms of Judicial Review of Appeal of Decisions Involving Private Civil Litigation

In general, the normal avenues of appeal applicable to civil cases would apply. As noted in **5.5 Frequency of Completion of Litigation**, there is no record of any claims brought by individuals in the exercise of their private rights of action.

6. SUPPLEMENTARY INFORMATION

6.1 Other Pertinent Information

The Commission publishes all its decisions on cartel conduct and the Board's appeal decisions are also published.

6.2 Guides Published by Governmental Authorities

To date, the Commission has published 12 guidelines, one practice statement and two guidance notes on various topics concerning the [Competition Act](#). The following guidelines may be particularly pertinent to cartel conduct and enforcement:

- Guidelines on the Section 34 Prohibition;
- Guidelines on the Powers of Investigation in Competition Cases 2016;
- Guidelines on Directions and Remedies;
- Guidelines on Lenient Treatment for Undertakings Coming Forward with Information on Cartel Activity 2016;
- Guidelines on Filing Notifications for Guidance or Decision with respect to the Section 34 Prohibition and Section 47 Prohibition 2016; and
- Guidelines on the Appropriate Amount of Penalty in Competition Cases.

Drew & Napier LLC is a full-service law firm with one of the oldest and largest dedicated competition law practices in Singapore. The practice has grown in tandem with the development of national and sectoral competition laws in Singapore. The firm's competition law practice comprises an experienced and highly qualified team of over 12 lawyers who handle competition and regulatory matters both generally under the Competition Act 2004, as well as in the carved-out sectors such as

telecommunications, media, energy and post. Since 1999, the practice has worked on every noteworthy competition law-related matter in the telecommunications, media and postal sectors. The firm is regularly commissioned by the Singapore competition regulators to undertake market studies, and regularly assists regional companies, multinational corporations, associations, government bodies and industry regulators on a wide range of matters in Singapore and ASEAN member countries.

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