

Dominance

Contributing editors

Patrick Bock, Kenneth Reinker and David R Little



2017

GETTING THE
DEAL THROUGH

GETTING THE
DEAL THROUGH 

Dominance 2017

Contributing editors

Patrick Bock, Kenneth Reinker and David R Little
Cleary Gottlieb Steen & Hamilton LLP

Publisher
Gideon Robertson
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Senior business development managers
Alan Lee
alan.lee@gettingthedealthrough.com

Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com



Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

© Law Business Research Ltd 2017
No photocopying without a CLA licence.
First published 2003
Thirteenth edition
ISSN 1746-5508

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between January and March 2017. Be advised that this is a developing area.

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



CONTENTS

Global overview	6	Greece	85
Patrick Bock and Alexander Waksman Cleary Gottlieb Steen & Hamilton LLP		Cleomenis Yannikas Dryllerakis & Associates	
Argentina	8	Hong Kong	90
Miguel del Pino and Santiago del Rio Marval, O'Farrell & Mairal		Adam Ferguson and Jocelyn Chow Eversheds Sutherland	
Australia	13	India	96
Elizabeth Avery, Morelle Bull and Adelina Widjaja Gilbert + Tobin		Shweta Shroff Chopra, Harman Singh Sandhu and Rohan Arora Shardul Amarchand Mangaldas & Co	
Brazil	19	Indonesia	103
Lauro Celidonio Gomes dos Reis Neto, Andreia Saad and Felipe Pelussi Mattos Filho, Veiga Filho, Marrey Jr e Quiroga Advogados		Deny Sidharta, Verry Iskandar and Cameron R Grant Soemadipradja & Taher	
Bulgaria	24	Ireland	109
Anna Rizova and Dessislava Iordanova Wolf Theiss		Helen Kelly Matheson	
Canada	29	Israel	116
Arlan Gates, Yana Ermak and Eva Warden Baker McKenzie		Michal Rothschild and Daniel Henis Noyman Erদিনast, Ben Nathan, Toledano & Co (EBN)	
China	34	Italy	121
Susan Ning King & Wood Mallesons		Enrico Adriano Raffaelli and Maria Vittoria Caddeo Rucellai&Raffaelli	
Colombia	41	Japan	128
Alberto Zuleta-Londoño, Ximena Zuleta-Londoño and María Paula Macías Dentons Cardenas & Cardenas		Atsushi Yamada and Yoshiharu Usuki Anderson Mōri & Tomotsune	
Croatia	45	Korea	134
Marijana Liszt Posavec, Rašica & Liszt		Cecil Saehoon Chung, Sung Bom Park and In Seon Choi Yulchon LLC	
Czech Republic	50	Luxembourg	139
Tomáš Fiala Vejmelka & Wünsch		Léon Gloden and Carmen Schanck Elvinger Hoss Prussen	
Denmark	55	Malaysia	144
Frederik André Bork, Søren Zinck and Olaf Koktvedgaard Bruun & Hjejle		Sharon Tan Suyin and Nadarashnaraj Sargunraj Zaid Ibrahim & Co	
Ecuador	61	Mexico	150
Daniel Robalino-Orellana and José Urizar FERRERE		Rafael Valdés Abascal and Enrique de la Peña Fajardo Valdés Abascal Abogados, SC	
European Union	66	Morocco	155
Patrick R Bock, David R Little and Henry Mostyn Cleary Gottlieb Steen & Hamilton LLP		Corinne Khayat and Maija Brossard UGGC Avocats	
France	73	Netherlands	161
Corinne Khayat and Maija Brossard UGGC Avocats		Luuk Bressers Heron Legal	
Germany	79	Norway	167
Tilman Kuhn and Tobias Rump Cleary Gottlieb Steen & Hamilton LLP		Siri Teigum and Eivind J Vesterkjær Advokatfirmaet Thommessen AS	
		Portugal	171
		Mário Marques Mendes and Pedro Vilarinho Pires Gómez-Acebo & Pombo	

Russia	178	Switzerland	200
Anna Maximenko and Elena Klutchareva Debevoise & Plimpton LLP		Christophe Rapin, Mario Strebel, Renato Bucher and Jacques Johner Meyerlustenberger Lachenal	
Singapore	183	Turkey	207
Lim Chong Kin and Corinne Chew Drew & Napier LLC		Gönenç Gürkaynak and K Korhan Yıldırım ELİG, Attorneys-at-Law	
Slovenia	188	United Kingdom	212
Andrej Fatur and Helena Belina Djalil Fatur Law Firm		David R Little and Alexander Waksman Cleary Gottlieb Steen & Hamilton LLP	
Spain	194	United States	219
Rafael Baena and Javier Torrecilla Ashurst LLP		Kenneth S Reinker and Lisa Danzig Cleary Gottlieb Steen & Hamilton LLP	

Singapore

Lim Chong Kin and Corinne Chew

Drew & Napier LLC

General

1 Legislation

What is the legislation in your jurisdiction applying specifically to the behaviour of dominant firms?

The abuse of a dominant position is prohibited under general competition law by the operation of section 47 of the Singapore Competition Act (Cap 50B) (Competition Act), which states that ‘any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in any market in Singapore is prohibited’ (section 47 Prohibition).

However, it is noteworthy that (pursuant to paragraph 5 of the Third Schedule to the Competition Act), where goods and services are subject to any written law or code of practice relating to competition that gives another regulatory authority jurisdiction in the matter, the section 47 Prohibition will not apply to such. In this regard, other pieces of sector-specific legislation contain provisions relating to abuse of dominance and are enforced separately by the respective regulator.

The Competition Act is enforced by the Competition Commission of Singapore (CCS). The CCS has also issued guidelines on the application of the section 47 Prohibition.

As at February 2017, the CCS has only issued one infringement decision in respect of a violation of the section 47 Prohibition since the provision took effect on 1 January 2006, namely, abuse of a dominant position by *SISTIC com Pte Ltd* CCS 600/008/07 (4 June 2010) (*SISTIC* case).

2 Definition of dominance

How is dominance defined in the legislation and case law?

What elements are taken into account when assessing dominance?

No definition of dominance is contained within the Competition Act. However, the CCS Guidelines state that an undertaking will not be deemed dominant unless it has substantial market power. The CCS Guidelines go on to state that market power only arises where an undertaking does not face sufficiently strong competitive pressure and can be thought of as the ability to profitably sustain prices above competitive levels or to restrict output or quality below competitive levels.

The CCS will generally take into consideration the market share of the entity in question, constraints on market power by way of existing competition (having regard to barriers to expansion), constraints on market power by way of potential competition (having regard to barriers to entry), and the significance of any countervailing buyer power.

As there has only been one abuse of dominance infringement finding issued by the CCS to date, it is unclear as to how matters of ‘relative dominance’ or ‘heightened market power’ would be treated under Singapore competition law.

3 Purpose of the legislation

Is the purpose of the legislation and the underlying dominance standard strictly economic, or does it protect other interests?

The objective of the Competition Act (and by extension the section 47 Prohibition) is to promote the efficient functioning of the markets in

Singapore and to enhance the competitiveness of the economy through prohibiting anticompetitive activities that unduly prevent, restrict or distort competition. This was clearly expressed during the second reading of the Competition Bill, by the then Senior Minister of State for Trade and Industry (Vivian Balakrishnan). Moreover, the CCS has publicly stated that Singapore competition law adopts a ‘total welfare’ standard, rather than a ‘consumer welfare’ standard. In this regard, a dual agency design exists in Singapore whereby the CCS focuses on the enforcement of competition law, whereas consumer law issues are dealt with by a completely separate organisation.

4 Sector-specific dominance rules

Are there sector-specific dominance rules, distinct from the generally applicable dominance provisions?

As outlined in question 1, the Competition Act does not apply to any conduct in relation to any goods and services that are subject to any written law or code of practice relating to competition that gives another regulatory authority jurisdiction in the matter. In this regard, the following sectors have their own sector-specific abuse of dominance provisions:

- electricity, under the Electricity Act (Cap 89A) – enforced by the Energy Market Authority;
- gas, under the Gas Act (Cap 116A) – enforced by the Energy Market Authority;
- newspapers and broadcasting, under the Media Development Authority of Singapore Act (Cap 172) and the Code of Practice for Market Conduct in the Provision of Media Services 2010 – enforced by the Media Development Authority of Singapore;
- postal services, under the Postal Services Act (Cap 237A) and the Postal Competition Code 2008 – enforced by the Infocomm Development Authority of Singapore;
- telecommunications, under the Telecommunications Act (Cap 323) and the Code of Practice for Competition in the Provision of Telecommunication Services 2012 – enforced by the Infocomm Development Authority of Singapore; and
- airport services and facilities, under the Civil Aviation Authority of Singapore Act (Cap 41) and the Airport Competition Code 2009 – enforced by the Civil Aviation Authority of Singapore.

The section 47 Prohibition also does not apply to certain specified activities set out in paragraph 6 of the third Schedule to the Competition Act (including, inter alia, cargo terminal operations carried out by a person licensed and regulated under the Maritime and Port Authority of Singapore Act (Cap 170A)).

5 Exemptions from the dominance rules

To whom do the dominance rules apply? Are any entities exempt?

The section 47 Prohibition applies generally to all undertakings in Singapore and section 33 of the Competition Act specifies that the abuse of dominance prohibition will apply to undertakings that are outside of Singapore, where they are engaging in conduct that would infringe the section 47 Prohibition.

However, under section 33(4) of the Competition Act, the section 47 Prohibition will not apply to any activity carried on by, any agreement entered into by, 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, in relation to that activity, agreement or conduct.

The Third Schedule to the Competition Act also sets out various exclusions from the application of the section 47 Prohibition which include (inter alia) the activities of clearing houses, and conduct pertaining to the supply of piped potable water, the supply of wastewater management services, the supply of scheduled bus services by a licensed and regulated person, the supply of rail services by a licensed and regulated person, or cargo terminal operations carried on by licensed and regulated persons.

To reiterate, and as outlined in question 5, the section 47 Prohibition does not apply to any conduct in relation to any goods and services that are subject to any written law or code of practice relating to competition that gives another regulatory authority jurisdiction in the matter.

6 Transition from non-dominant to dominant

Does the legislation only provide for the behaviour of firms that are already dominant?

The section 47 Prohibition requires both that the undertaking in question holds a dominant position and that the undertaking engages in conduct that would amount to an abuse of that dominant position. Accordingly, if it were determined that the undertaking in question was not dominant, its conduct would not fall for consideration under the section 47 Prohibition.

7 Collective dominance

Is collective dominance covered by the legislation? How is it defined in the legislation and case law?

There is no specific reference in the Competition Act relating to collective dominance. However, the CCS Guidelines do refer to the concept, and specifically state that the section 47 Prohibition can extend to conduct on the part of two or more undertakings. The CCS Guidelines state that a dominant position may be held collectively when two or more undertakings are linked in such a way that they adopt a common policy in the relevant market, or in other words, there is some form of tacit coordination between the parties. To date, there have been no enforcement actions involving the concept of collective dominance and, accordingly, the boundaries of the concept are yet to be fully tested.

8 Dominant purchasers

Does the legislation apply to dominant purchasers? Are there any differences compared with the application of the law to dominant suppliers?

There is no distinction or specific reference in the Competition Act or the CCS Guidelines with regard to the application of the section 47 Prohibition to sellers and purchasers. Accordingly, the section 47 Prohibition can be applied to both purchasers and sellers in appropriate circumstances. There is no further guidance from the CCS as to how the application of the prohibition to purchasers and sellers may differ (if at all).

9 Market definition and share-based dominance thresholds

How are relevant product and geographic markets defined? Are there market-share thresholds at which a company will be presumed to be dominant or not dominant?

The CCS employs the hypothetical monopolist test (otherwise known as the SSNIP test) in its approach to defining the relevant market. This essentially involves the consideration of a hypothetical monopolist of the focal product in question and questioning whether that monopolist could profitably impose a small but significant, non-transitory increase in price. Through the use of this test, the market will be defined as the smallest product group (and geographical area) over which the

hypothetical monopolist controlling that product group in that area could profitably sustain such a price increase.

Notwithstanding the analytical framework above, given data limitations in reality, the CCS will commonly rely on qualitative assessments of demand-side and supply-side substitutability in the process of market definition. The conceptual approach in relation to market definition for abuse of dominance cases (ie, the hypothetical monopolist test) will essentially be the same as that employed in the context of merger cases. However, the test in an abuse of dominance context will be likely to contemplate price increases against 'competitive price levels' (rather than against 'prevailing price levels' in merger cases) in order to avoid the well-known 'Cellophane fallacy'.

The CCS Guidelines specifically state that 'there are no market share thresholds for defining dominance under the Section 47 Prohibition'. However, the CCS Guidelines go on to state that, generally, and as a starting point, the CCS will consider a market share in excess of 60 per cent as likely to indicate that an undertaking is dominant in the relevant market. In the *SISTIC* case, the CCS argued that 'SISTIC's persistently high market share over time, as opposed to high market share at a point in time, is indicative of its dominance'. The Competition Appeal Board (CAB) agreed with this proposition and stated that there were no exceptional circumstances shown by *SISTIC* to rebut such indication. Accordingly, while the CCS Guidelines indicate that market share is a starting point, the CAB's decision in the *SISTIC* case points to market share giving rise to a rebuttable presumption in certain circumstances.

Abuse of dominance

10 Definition of abuse of dominance

How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

The issue of abuse is assessed by the CCS on a case-by-case basis, and the analysis will be an effects-based analysis, rather than a form-based analysis. That being said, it seems clear from the CCS Guidelines, and from the *SISTIC* case, that the focus of the CCS will be on exclusionary behaviour, which may include 'excessively low prices, certain discount schemes, refusals to supply, or vertical restraints, which foreclose (or are likely to foreclose) market or weaken competition'. The CCS Guidelines state that such conduct may be abusive to the extent that it harms competition, for example, by removing an efficient competitor, limiting competition from existing competitors or excluding new competitors from entering the market.

In relation to the *SISTIC* case, in lodging an appeal to the CAB, one of *SISTIC*'s grounds of appeal was that its conduct was not abusive, and, accordingly, the definition of abuse (and the test for such) was considered by the CAB. In issuing its decision, the CAB determined that an abuse will be established where a competition authority demonstrates that a practice has, or is likely to have, an adverse effect on the process of competition, in particular:

- *it is sufficient for the competition authority to show a likely effect and it is not necessary to demonstrate an actual effect on the process of competition; and*
- *if an effect, or likely effect, on restricting competition by the dominant firm is established, the dominant undertaking can advance an objective justification. If it can adduce evidence to demonstrate that its behaviour produces countervailing benefits so that it has a net positive impact on welfare. However, the burden is on the undertaking to demonstrate an objective justification.*

11 Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

Despite the Competition Act being modelled on the UK Competition Act (and the European competition laws), purely exploitative conduct would arguably not constitute an abuse of dominance in Singapore. Critically, while UK and European laws contain a specific reference to the direct or indirect imposition of 'unfair purchase or selling prices or other unfair trading conditions', this was removed from the Competition Act before it was enacted in Singapore. Moreover, the CCS Guidelines contain no reference (or any examples) with regard to exploitative conduct constituting an abuse of dominance. However, the CCS is yet to

make a definitive statement in relation to whether exploitative conduct could constitute an abuse and the position is yet to be legally tested.

12 Link between dominance and abuse

What link must be shown between dominance and abuse? May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

No causal link between dominance and abuse must be shown as a matter of law, and the CCS will assess the issues of dominance and abuse separately.

That being said, there may be instances where the dominance of an undertaking might cast light on the issue of whether its conduct is abusive and vice-versa. In the *SISTIC* case, the conduct in question involved exclusive contracts between *SISTIC* and its venue operator and event promoter partners. In considering the question of barriers to entry (in the context of considering whether *SISTIC* held a dominant position), the CCS observed that *SISTIC*'s strategic conduct (ie, its exclusive agreements with key industry players) made large-scale entry even harder. In particular, the CCS stated in the *SISTIC* case that 'the barrier to entry in relation to network effect is artificially erected and sustained by *SISTIC*'s strategic conduct'. In this regard, and in appropriate circumstances, it is possible that the CCS will not make determinations of dominance and abuse completely in isolation from one another.

In addition to the above, it is also noted that the CCS Guidelines specifically state that it is not necessary for the dominant position, the abuse and the effects of the abuse to be in the same market.

13 Defences

What defences may be raised to allegations of abuse of dominance? When exclusionary intent is shown, are defences an option?

In assessing whether conduct is abusive, the CCS Guidelines state that the CCS may consider whether the dominant undertaking is able to objectively justify its conduct. However, to rely on this defence, it will be necessary for the dominant undertaking to show that it has behaved in a proportionate manner in defending its legitimate commercial interest and that it had not taken any measures that are more restrictive than necessary in doing so. While the CCS Guidelines indicate that objective justifications will be taken into consideration when assessing whether conduct is abusive, the test arising from the CAB's decision in the *SISTIC* case instead suggests that objective justifications can be a defence after the conduct has already been classified as abusive, and that the burden is on the dominant undertaking in question to establish those objective justifications. This is described in further detail in question 10.

Specific forms of abuse

14 Rebate schemes

The CCS Guidelines state that in certain circumstances discounts or rebates could give rise to abuse of dominance concerns. In particular, the CCS Guidelines state that the CCS will consider a range of factors in assessing such discounts, including whether the discount simply reflect competition to secure orders from valued buyers. The CCS Guidelines continue to state that a key question is whether the discount scheme will have an exclusionary effect on competition, which might arise where the discount arrangement amounts to a 'fidelity discount' or where it involves the tying of other products. The CCS Guidelines also state that it is necessary for the dominant undertaking to show that its conduct is proportionate to the benefits produced. To date, there have been no enforcement actions in Singapore involving rebate schemes.

15 Tying and bundling

The CCS Guidelines state that tying, which occurs where the manufacturer makes the purchase of one product (the tying product) conditional on the purchase of a second product (the tied product), may amount to an abuse of dominance in certain circumstances. There have been no relevant enforcement cases in Singapore to date.

16 Exclusive dealing

Exclusivity arrangements, non-compete provisions and single branding may amount to an abuse of a dominant position, and the CCS elaborates

on such in the CCS Guidelines. It is noteworthy that the *SISTIC* case, being the only abuse of dominance enforcement action taken by the CCS to date, primarily involved exclusivity provisions within supply contracts. In the *SISTIC* case, the CCS observed that the imposition of exclusive purchasing obligations is a common practice in commercial life, which may not be anticompetitive per se. The CCS continued to observe that in many circumstances, exclusive purchasing, especially those that come with discounts and other incentives, may bring about some pro-competitive outcomes such as lower prices and higher efficiency. Accordingly, it would seem that the primary consideration in assessing whether such restrictions are abusive is the extent to which competitors are foreclosed as a result.

17 Predatory pricing

The Competition Act, at section 47(2)(a), specifically states that 'predatory behaviour towards competitors' may constitute an abuse of dominance. The CCS Guidelines state that, in assessing predatory pricing cases, the CCS will have regard to the relevant price level against two measures of cost: average variable cost and average total cost. The Guidelines continue to state that, in the absence of an objective justification, predation may be presumed where price is below average variable cost. Where price is above average variable cost, but below average total cost, then the CCS will have regard to other evidence. Where price is above average total cost, the CCS Guidelines indicate that this will not indicate predation. It is also noteworthy that the CCS has indicated that the feasibility of recouping losses may also be taken into consideration when assessing a predation issue. To date, there have been no enforcement actions taken by the CCS involving predatory pricing.

18 Price or margin squeezes

Where a dominant, vertically integrated undertaking discriminates in the supply of an input to downstream entities (ie, providing preferential terms to its own downstream affiliate), such actions could be considered abusive according to the CCS Guidelines. Such actions can be called 'price squeezes' or 'margin squeezes'. The CCS Guidelines state that, in testing for a margin squeeze, the CCS will generally determine whether an efficient downstream competitor would earn (at least) normal profit when paying input prices set by the vertically integrated undertaking. To date, there have been no enforcement actions in Singapore involving price squeezes.

19 Refusals to deal and denied access to essential facilities

The CCS Guidelines state that undertakings generally have the freedom to decide whom they will deal with and not deal with, and accordingly that a refusal to supply will generally not be abusive. An exception arises where there is a refusal (or constructive refusal) to supply an essential facility. The CCS Guidelines state that a facility will be viewed as essential only where it can be demonstrated that access to it is indispensable in order to compete in a related market and where duplication is impossible or extremely difficult owing to physical, geographic, economic or legal constraints (or is highly undesirable for reasons of public policy). To date, there have been no enforcement actions taken by the CCS involving refusals to supply or essential facilities.

20 Predatory product design or a failure to disclose new technology

Predatory product design or failure to disclose new technology is not specified as potentially abusive conduct within the CCS Guidelines, nor has been considered specifically by the CCS in any case to date. Notwithstanding this, the CCS has indicated that it will consider the likely effects on competition based on the specific facts and circumstances of each case.

21 Price discrimination

The CCS Guidelines state that price discrimination is a usual business practice in a wide range of industries, including those in which competition is effective. However, it goes on to acknowledge that price or non-price discrimination (ie, discrimination in relation to service) may be abusive in certain circumstances. The CCS Guidelines highlight that price discrimination could be problematic where it gives rise to a predatory pricing issue, a loyalty-inducing rebate or discount issue or a margin squeeze issue. In this regard, it is arguable that price discrimination

Update and trends

In December 2016, the CCS issued revised guidelines relating to the application of the section 47 Prohibition. Some notable changes to the guidelines included a more expanded discussion of the concept of collective dominance, and the incorporation of the legal test for abuse of dominance, as determined in the *SISTIC* case. The guidelines also specify that the CCS will use a counterfactual assessment as a tool for assessing abuse of dominance where appropriate. It is also noteworthy that the CCS introduced a new 'fast-track' procedure, allowing for the quick resolution of cases, and that this procedure will apply to, inter alia, cases being considered under the section 47 Prohibition).

While the CCS has not issued any new enforcement decisions relating to the section 47 Prohibition, it has made several public statements noting the closure of several abuse of dominance investigations following the receipt of voluntary undertakings from the parties under investigation.

may simply be symptomatic of an abuse in a different form (ie, a margin squeeze), and that the CCS may not seek to frame discrimination as an abuse in and of itself. To date, there have been no cases in Singapore involving price or non-price discrimination taken by the CCS.

22 Exploitative prices or terms of supply

Exploitative prices or supply conditions would arguably not constitute the abuse of a dominant position in Singapore (see question 11).

23 Abuse of administrative or government process

The CCS Guidelines do not specifically identify 'abuse of government process' as a potential abuse of dominance, and there have been no relevant enforcement cases in Singapore to date. Notwithstanding this, the CCS has indicated that it will consider the likely effects on competition based on the specific facts and circumstances of each case.

24 Mergers and acquisitions as exclusionary practices

The CCS Guidelines do not specifically identify structural issues arising from mergers or acquisitions as potentially amounting to an abuse of dominance, and there have been no relevant enforcement cases in Singapore to date. Notwithstanding this, the CCS has indicated that it will consider the likely effects on competition, based on the specific facts and circumstances of each case.

25 Other abuses

Other than those types of abuses considered above in questions 14 to 24, there are no other types of abuse specifically identified in the CCS Guidelines. However, the CCS has indicated that it will consider the likely effects on competition, based on the specific facts and circumstances of each case. In this regard, it may be open to the CCS to consider other conduct abusive depending on the circumstances.

Enforcement proceedings

26 Enforcement authorities

Which authorities are responsible for enforcement of the dominance rules and what powers of investigation do they have?

The CCS enforces the Competition Act and, accordingly, the abuse of dominance provisions thereunder. Generally, the CCS has the power to require the provision of documents and information from any person, to enter premises with or without a warrant and to search premises with a warrant. In requiring the provision of documents and information, the CCS has the ability to specify how that information is to be provided and, accordingly, it routinely conducts interviews. The CCS also has a range of powers related to those powers already indicated (for instance, when entering a premises under a warrant, the CCS may, inter alia, use such force as is reasonably necessary for that purpose or search any person on the premises in certain circumstances). In relation to the authorities tasked to enforce sector-specific abuse of dominance provisions, see question 4.

27 Sanctions and remedies

What sanctions and remedies may the authorities impose? May individuals be fined or sanctioned?

Under section 69 of the Competition Act, the CCS can make such directions as it considers appropriate to bring an infringement to an end or to remedy, mitigate or eliminate any adverse effect of the infringement (which potentially could involve structural or behavioural directions). In this regard, the CCS has a general discretion in relation to the sanctions it imposes, although it may (inter alia):

- require parties to an agreement to modify or terminate the agreement;
- require an undertaking to pay to the CCS such financial penalty in respect of the infringement as the CCS may determine (where it determines that the infringement has been committed intentionally or negligently) but not exceeding 10 per cent of the turnover of the business of the undertaking in Singapore for each year of infringement for a period of up to a maximum of three years;
- require an undertaking to enter such legally enforceable agreements as may be specified by the CCS and designed to prevent or lessen the anticompetitive effects that have arisen;
- require an undertaking to dispose of such operations, assets or shares of such an undertaking in such a manner as may be specified by the CCS; and
- require an undertaking to provide a performance bond, guarantee or other form of security on such terms and conditions as the CCS may determine.

In the *SISTIC* case, *SISTIC* was directed to pay a financial penalty of S\$989,000 (which was reduced on appeal to S\$769,000). Moreover, *SISTIC* was required to remove exclusivity clauses from certain agreements.

28 Enforcement process

Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

Yes, the CCS has the ability to adjudge on abuse of dominance matters, and has a wide discretion to impose directions (including financial penalties) that it considers appropriate to bring an infringement to an end or to remedy, mitigate or eliminate any adverse effect of the infringement.

29 Enforcement record

What is the recent enforcement record in your jurisdiction?

The *SISTIC* case (as detailed in question 1), remains the only enforcement decision made by the CCS to date, relating to the abuse of a dominant position. The case is a landmark case in so far as it clarified the test for abuse of dominance in Singapore.

However, the CCS is known to actively investigate potential violations of the prohibition and may have a number of such investigations open at any one time. The CCS has made several public statements noting the closure of several abuse of dominance investigations following the receipt of voluntary undertakings from the parties under investigation.

30 Contractual consequences

Where a clause in a contract involving a dominant company is inconsistent with the legislation, is the clause (or the entire contract) invalidated?

While provisions of agreements that are determined to be anti-competitive under section 34 of the Competition Act are void in accordance with section 34(3), there is no equivalent provision in respect of violations of the abuse of dominance prohibition. However, should the CCS determine that a contractual provision gives rise to an abuse of dominance concern, it can impose any such direction that it considers appropriate to bring the infringement to an end or to remedy, mitigate or eliminate any adverse effect of the infringement.

31 Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or other authority to order a dominant firm to grant access, supply goods or services, conclude a contract or invalidate a provision or contract?

Stand-alone actions for competition law violations in Singapore (including the abuse of a dominant position) are not actionable in Singapore. Instead, the Competition Act only provides a right of follow-on actions for damages where the finding of an infringement by the CCS is a necessary precondition.

The right extends only to those parties who have suffered loss or damage directly as a result of an infringement of an operative provision of the Competition Act, and all such actions must be brought within two years after the expiry of the relevant appeal periods.

32 Damages

Do companies harmed by abusive practices have a claim for damages? Who adjudicates claims and how are damages calculated or assessed?

Parties may bring private actions for a breach of competition law under section 86 of the Act, which provides that any person who suffers loss or damage directly as a result of an infringement (including, inter alia, of the section 34 prohibition) shall have a right of action for relief in civil proceedings. The Act does not allow parties to claim for double or treble damages.

Such rights are predicated on an infringement finding by the CCS, and may only be brought within two years following the expiry of any applicable appeal periods. Third parties do not have standing to bring such claims in other circumstances, or to lodge an appeal with the CAB. On plain reading of section 86 of the Act, indirect purchasers do not have standing to bring a civil claim for damages, because only persons suffering loss or damage directly as a result of an infringement can bring such claims.

To date, there have been no cases in Singapore relating to the award of damages relating to abuse of dominance infringements.

33 Appeals

To what court may authority decisions finding an abuse be appealed?

Appeals of CCS decisions are made to the CAB, which is an independent body established under section 72 of the Act. The CAB comprises 30 members including lawyers, economists, accountants, academics and other business people. In the usual course, a panel of five members will be appointed to hear an appeal. The CAB's powers and procedures are set out primarily in section 73 of the Act and the Competition (Appeals) Regulations.

Appeals are made by lodging a notice of appeal, in accordance with the Competition (Appeals) Regulations, within two months from the date of the CCS's infringement decision. Thereafter, the CCS has six weeks to file its defence. The procedure and timetabling of the appeal may be determined at any time during the proceedings by the CAB, usually through holding a case management conference with the parties. The CAB has broad powers to make directions it thinks fit to determine the just, expeditious or economic conduct of the appeal proceedings. The CAB may review issues of facts and law.

Parties may appeal CAB decisions, in accordance with section 74 of the Act, to the High Court on a point of law arising from a decision of the CAB, 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 order 55 of the Rules of Court (Cap 322, R 5, 2006 Rev ed).

Parties may also appeal High Court decisions to the Court of Appeal under section 74 of the Act. Such appeals are governed by the same procedure as all other civil appeals in Singapore. There is no further appeal right from the Court of Appeal.

Unilateral conduct**34 Unilateral conduct by non-dominant firms**

Are there any rules applying to the unilateral conduct of non-dominant firms?

No. There are no specific restrictions under the Competition Act relating to unilateral conduct by non-dominant firms.



Lim Chong Kin
Corinne Chew

chongkin.lim@drewnapier.com
corinne.chew@drewnapier.com

10 Collyer Quay
10th Floor, Ocean Financial Centre
Singapore 049315

Tel: +65 6535 0733
Fax: +65 6535 4864
www.drewnapier.com

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Arbitration
Asset Recovery
Aviation Finance & Leasing
Banking Regulation
Cartel Regulation
Class Actions
Commercial Contracts
Construction
Copyright
Corporate Governance
Corporate Immigration
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gas Regulation
Government Investigations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mergers & Acquisitions
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Product Liability
Product Recall
Project Finance
Public-Private Partnerships
Public Procurement
Real Estate
Restructuring & Insolvency
Right of Publicity
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally



Online

www.gettingthedealthrough.com



Dominance
ISSN 1746-5508



THE QUEEN'S AWARDS
FOR ENTERPRISE:
2012



Official Partner of the Latin American
Corporate Counsel Association



Strategic Research Sponsor of the
ABA Section of International Law