

IN THE COMPETITION APPEAL BOARD OF THE REPUBLIC OF SINGAPORE

Appeal No. 1 of 2010

In the matter of: Notice of Infringement Decision issued by the Competition Commission of Singapore, Abuse of a Dominant Position by SISTIC.com Pte Ltd, CCS 600/008/07, 4 June 2010

Between

SISTIC.com Pte Ltd
(Reg No. 200006659E)

... Appellants

And

The Competition Commission of Singapore

... Respondent

DECISION

Dated this 28th day of May 2012

INDEX

I	INTRODUCTION	1
II	RELEVANT BACKGROUND FACTS.....	5
	The Ticketing Service Industry in Singapore	5
	The Relevant Parties	6
	SISTIC	6
	Tickets.com Singapore.....	7
	Gatecrash	8
	GTN	8
	Ticketing system suppliers.....	9
	OmniTicket.....	9
	Venue operators	10
	TECL	10
	SIS	11
	SISTIC’s contractual relationships with venue operators and event promoters.....	12
	The ASTA between SISTIC and TECL	12
	The ATS between SISTIC and SSC.....	15
	Exclusive ticketing sales agreements with event promoters.....	16
III	THE PROCEEDINGS	17
	Case Management Conference	18
	The Hearing	19
IV	THE INFRINGEMENT DECISION OF THE CCS.....	20
	The Section 47 prohibition	20
	The Section 33(4) exclusion	22
	Applicability of Competition Act.....	25

The Relevant Market	26
Section 47 Prohibition : The issues.....	29
The Infringement Decision – Whether SISTIC is dominant in the Relevant Market..	29
(i) Ability to profitably sustain prices above competitive levels.....	30
(ii) Ability to eliminate or weaken competitors.....	32
(iii)Market share	34
(iv)Barriers to entry	36
Barrier to entry: Indirect network effect	37
Indirect network effect – Website.....	38
Indirect network effect – Distribution Outlets.....	39
Indirect network effect – Customer database	40
Conclusion on Indirect Network Effect	40
Strategic conduct.....	40
(v) Countervailing buyer power	41
The Infringement Decision – Abuse of Dominant Position	44
Foreclosure effect of the ASTA and ATS	49
Foreclosure effect of Exclusive Agreements with event promoters	53
Foreclosure effect on competition for ticket buyers	55
Contractual duration and termination of the Exclusive Agreements.....	58
V. SISTIC’S CONTENTIONS ON DOMINANCE	59
Market Share.....	60
Barriers to entry and countervailing buying power	62
No indirect network effects in the Relevant Market.....	67
SISTIC’s customer database	69
Conclusion on indirect network effect.....	70

	Conclusion on barriers to entry and countervailing power.....	71
	SISTIC’s ability to profitably sustain price above competitive level.....	71
	SISTIC’s ability to eliminate and weaken competition.....	74
VI	THE CCS’S CONTENTIONS ON DOMINANCE	76
	Barriers to entry	79
	Exclusive Agreements as barriers to entry	80
	Countervailing buying power	81
VII	THE BOARD’S DECISION ON DOMINANCE	82
	Market Share of SISTIC	83
	SISTIC’s ability to profitably sustain price above competitive levels	87
	Countervailing buying power	91
	Barriers to entry – the Exclusive Agreements	97
	Ability to eliminate or weaken competitors.....	99
	Other factors	99
	The Board’s decision	100
VIII	SISTIC’S CONTENTIONS ON ABUSE OF DOMINANCE	100
	Effects-based assessment and the legal test.....	101
	The relevant counterfactual and its use in effects-based enforcement	105
	Increase in booking fee by SISTIC.....	110
IX	THE CCS’S CONTENTION ON ABUSE OF DOMINANCE	111
X	BOARD’S DECISION ON ABUSE OF DOMINANCE.....	116
	Legal Test on Abuse of Dominance	116
	Evidence on the issue of abuse of dominance	121
XI	FINANCIAL PENALTY.....	131
	Determination of Financial Penalty by the CCS.....	131

	Relevant turnover.....	131
	Base amount.....	132
	Duration of infringement	132
	Aggravating factors.....	133
	Mitigating factors.....	134
	The Appellants' Contentions on the Financial Penalty	136
	Aggravating factors.....	136
	Mitigating factors.....	138
	CCS's contentions on the Financial Penalty.....	140
	The Board's Decision on the Financial Penalty.....	143
XII	COSTS OF THE APPEAL.....	145
XIII	INTEREST.....	146
XIV	CONCLUSION.....	148

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I INTRODUCTION

1. On 4 June 2010, the Competition Commission of Singapore (“CCS”) issued and handed down its infringement decision (the “**Infringement Decision**”) against SISTIC.com Pte Ltd (“**SISTIC**”) for abuse of a dominant position in contravention of section 47 of the Competition Act (Cap. 50B, 2006 Rev Ed) (the “**Act**”) by way of the following agreements (collectively referred to as the “**Exclusive Agreements**”):

- (a) The Application Service and Ticketing Agreement (“ASTA”) between SISTIC and The Esplanade Co. Ltd (“TECL”), which contains explicit restrictions requiring all events held at the Esplanade venues to use SISTIC as the sole ticketing service provider;
- (b) The Agreement for Ticketing Services (“ATS”) between SISTIC and the Singapore Sports Council (“SSC”), which contains explicit restrictions requiring all events held at the Singapore Indoor Stadium (“SIS”) to use SISTIC as the sole ticketing service provider; and
- (c) 17 other agreements that also contain explicit restrictions requiring the event promoters concerned to use SISTIC as the sole ticketing service provider for all their events, these 17 agreements being made with the following:
 - (i) Alliance Francaise de Singapour;
 - (ii) Braddell Heights Symphony Orchestra;
 - (iii) Hype Records Pte Ltd;
 - (iv) Kideas Holdings Pte Ltd (formerly known as 1nitestand);
 - (v) MediaCorp TV12 Singapore Pte Ltd;
 - (vi) National Museum c/o National Heritage Board;
 - (vii) NUS Centre for the Arts;
 - (viii) Rock Records (S) Pte Ltd;
 - (ix) Scorpio East Productions Pte Ltd;
 - (x) The Necessary Stage;
 - (xi) The Singapore Lyric Opera;

- (xii) Toy Factory Productions Ltd;
 - (xiii) Unusual Entertainment Pte Ltd;
 - (xiv) Warner Music Singapore Pte Ltd;
 - (xv) Wild Rice Ltd;
 - (xvi) Yong Siew Toh Conservatory of Music; and
 - (xvii) Zebra Crossing Productions Pte Ltd.
2. Ticketing service providers such as SISTIC act as middle men between two groups of customers, that is, event promoters and ticket buyers, by providing them a platform to sell and buy tickets for events taking place in the venues. The CCS is of the view that when key venues such as the Esplanade and the SIS are required to use SISTIC, event promoters who wish to hold their events at these venues have no choice but to sell tickets through SISTIC, and ticket buyers who wish to attend those events have no choice but to buy the tickets through SISTIC.
3. The CCS finds that SISTIC is dominant in the ticket services market in Singapore. Over the assessment period from January 2006 to March 2009, SISTIC's market share had persistently been around 90%, of which about [...]% (by volume of tickets sold) was attributable to the Exclusive Agreements. The CCS further finds that high entry barriers are artificially erected through the network effect between event promoters and ticket buyers, which was in turn created by SISTIC's conduct. Since SISTIC raised its booking fees against ticket buyers by 50% to S\$3 per ticket for tickets with face value of more than \$20 in January 2008, the company has become significantly more profitable despite the economic downturn in 2008 and 2009.
4. The CCS is of the opinion that the Exclusive Agreements are harmful to competition. They restrict event promoters' choice of ticketing service providers, artificially

perpetuate SISTIC's dominant position and afford SISTIC the ability to charge ticket buyers higher booking fees.

5. Accordingly, the CCS determines that SISTIC has abused its dominant position in contravention of section 47 of the Act. It directs SISTIC to remove or modify as necessary any clause(s) under the Exclusive Agreements that has the effect of requiring the use of SISTIC as the sole ticketing service provider. Further, SISTIC is also directed to remove from its template used for signing agreements with event promoters a clause requiring these promoters to use SISTIC exclusively. In addition, the CCS imposes on SISTIC a penalty in the sum of S\$989,000 for infringing the section 47 prohibition of the Act. The CCS says that in so doing, it has taken into consideration the seriousness of the infringement concerned, as well as the relevant aggravating and mitigating factors.
6. Against the Infringement Decision, SISTIC lodged a Notice of Appeal on 3 August 2010 pursuant to paragraph 7(2) of the Competition (Appeals) Regulations (the "**Regulations**") and in accordance with paragraph 8 of the Regulations and sections 71(1) and 71(3) of the Act. SISTIC appeals against the CCS's determination of liability, and in the event that it fails in the appeal on liability, it appeals against the calculation of the financial penalty imposed by the CCS. In the appeal, SISTIC seeks the following reliefs:
 - (a) an order setting aside the Infringement Decision;
 - (b) or alternatively failing that, an order that the financial penalty be reduced.

II RELEVANT BACKGROUND FACTS

7. The relevant background facts have been very comprehensively set out in the Infringement Decision and are not in dispute, which the Board respectfully adopts for the purpose of this decision.

The Ticketing Service Industry in Singapore

8. The ticketing service industry in Singapore consists of the provision of ticketing services for a variety of events, such as performing arts events, sports events, leisure events, concerts and family entertainment events held at various venues in Singapore. Examples include the *Phantom of the Opera*, *David Tao World Tour 2008*, *Cinderella on Ice*, *Chingay Parade* and *Singapore Formula One Grand Prix*.
9. The ticketing services industry in Singapore is worth about S\$[...] million in 2008, and the providers for such services are mainly 4 players, namely, SISTIC, Gatecrash Ticketing Pte Ltd (“**Gatecrash**”), Tickets.com Singapore (previously known as TicketCharge) (“**Tickets.com**”) and Global Ticket Network Pte Ltd (“**GTN**”).
10. These ticketing service providers provide ticketing services to two distinct groups of customers, namely, the event promoters and ticket buyers. They act as ‘middlemen’ to help event promoters sell tickets to ticket buyers and ticket buyers to buy tickets for the events concerned.
11. Services provided by a ticketing service provider to event promoters include access to a ticketing system for ticket sales and collection for a particular event, held at a specific venue, through a variety of distribution and sales channels, such as telephone hotlines, internet booking, authorised sales outlets, post offices, box offices and other remote access electronic service delivery networks such as the AXS machines and

Self-Service Automated Machines (“SAM”). Some ticketing service providers also provide several other value-added services such as marketing and promotional services via email advertising, website advertising and other promotional collaterals such as brochures and events guides. Typically, event promoters pay ticketing service providers some fixed fees (e.g. a ticketing administrative fee) as well as some variable fees (usually dependent on the number and face value of tickets sold).

12. Separately, ticket buyers also pay ticketing service providers service fees for every ticket bought. These fees include a booking fee (usually tiered according to the face value of tickets purchased) and a handling fee. The latter varies depending on the mode of collection of the tickets (e.g. self-collection of tickets at authorised sales outlets is generally levied the lowest fees, while couriering of tickets to ticket buyers generally involves the highest fees).

The Relevant Parties

13. A brief history and workings of the 4 main players in the ticketing service industry in Singapore, namely: SISTIC, Gatecrash, Tickets.com and GTN, are set out below.

SISTIC

14. SISTIC was set up in 1991 as a department under the SSC to serve the ticketing needs of the SIS. On 28 July 2000, the SSC incorporated SISTIC.com Pte Ltd, which then took over the functions of the department, and began providing ticketing services to a wide range of arts, sports and entertainment events held in Singapore.
15. Before 2002, SISTIC was wholly owned by the SSC. From 2002, SISTIC became jointly owned by the SSC and TECL and is currently owned as to 65% by the SSC and as to 35% by TECL pursuant to an agreement entered into between TECL and the

SSC on 1 October 2002. The chairman of the SSC is currently the chairman of SISTIC and another Council Member of the SSC is also concurrently a director of SISTIC.

16. SISTIC has a large market share of the ticketing service market in Singapore. According to SISTIC's website, "SISTIC is the largest ticketing service and solution provider in Singapore. It sells tickets to events ranging from pop concerts, musicals, theatre, family entertainment to sports. It currently handles more than 90% of all events staged in Singapore". This claim by SISTIC is not disputed; nor is it disclaimed or denied by SISTIC. It sells tickets on behalf of more than 30 different performing arts venues, as well as sporting events and other leisure activities held at temporary venues.
17. By virtue of the ASTA and the ATA made with TECL and the SSC respectively, SISTIC has the exclusive rights to sell tickets for all events held at the two major venues in Singapore, namely, the Esplanade and the SIS. In addition, SISTIC has entered into 17 other Exclusive Agreements with the 17 event promoters in Singapore listed in paragraph 1 above (collectively referred to as the "17 Exclusive Agreements").

Tickets.com Singapore

18. Tickets.com is a global ticketing company with its headquarters in the United States of America. It provides ticketing solutions and services in around 20 countries, with annual sales of about US\$9.9 million. The Singapore franchise of Tickets.com is owned by Quebec Leisure International Pte Ltd ("Quebec Leisure"), which is a subsidiary of NTUC Club Investments. Tickets.com had a market share of about [0-10]% of the total number of tickets sold in Singapore for the period from January

2006 to March 2009. Tickets.com provides ticketing solutions for events held at NTUC-owned venues such as Downtown East at Pasir Ris.

Gatecrash

Gatecrash was set up in April 2005 by a group of arts practitioners and IT entrepreneurs, and it focuses on providing ticketing services to the arts industry in Singapore. In March 2008, Gatecrash was acquired by EXCEPTIONal Pte Ltd, comprising the former management of Gatecrash and the founders of Beyond Marketers, Inc. (USA). Gatecrash had a market share of about [0-10]% of the total number of tickets sold in Singapore for the period from January 2006 to March 2009.

GTN

19. GTN worked closely with a ticketing system supplier, OmniTicket Network (Singapore) Pte Ltd ("OnmiTicket") by utilising the latter's distribution platform and access control technology to provide ticketing services. In 2008, it provided ticketing services for the *Singapore Formula One Grand Prix 2008*. It also provided ticketing services for the *Chingay Parade 2008* and *Singapore Air Show 2008*.
20. GTN undertakes duties of a typical ticketing service provider such as organising call centre services, outlet distribution and other operational aspects of ticketing. GTN had a market share of about [0-10]% in terms of the total number of tickets sold in Singapore for the period from January 2006 to March 2009.

Ticketing system suppliers**OmniTicket**

21. OmniTicket is the Singapore arm of OmniTicket Network, Inc, which is a global ticketing solution provider based in Delaware, United States of America, and is privately owned and funded by several investment firms such as VPSA, GeoCapital Partners and Net Partners.
22. OmniTicket Network, Inc. is a system developer, integrator and consultant specialising in comprehensive turnkey solutions for ticketing, reservations, pre-sales, internet sales, access control, retail point-of-sale and inventory control operations. It claims to be the first and only company capable of offering complete and integrated ticketing solutions (hardware and software) to the following segments of the market: (i) leisure, such as amusement parks and zoos, (ii) performing arts, such as theatres, concert halls and operas, (iii) movie theatres, (iv) culture and education, such as museums and monuments, (v) sports, such as stadiums of any kind, and (vi) events, such as rock concerts, major expositions and larger events of any kind.
23. OmniTicket has developed customised ticketing systems for its clients and sold them the proprietary rights to run and manage these customised systems. Examples of dedicated systems created by OmniTicket would include those currently being used by the Singapore Flyer and the Singapore Science Centre.
24. In addition, OmniTicket has also provided the technology of ticketing system to its clients / agents such as GTN, and they in turn utilize it for their ticketing services for events.

Venue operators

TECL

25. TECL is a public company limited by guarantee. It is also a charitable organisation and has an Institution of a Public Character (“IPC”) status. Owned by the Ministry of Information, Communications and the Arts (“MICA”), TECL manages the Esplanade, a landmark premier performing arts venue located at 1 Esplanade Drive, Singapore 038981. The Esplanade consists of four main performance venues, which are available for hire:
- the Esplanade Theatre (seating capacity of 1942);
 - the Esplanade Concert Hall (seating capacity of 1811);
 - the Esplanade Recital Studio (seating capacity of 245); and
 - the Esplanade Theatre Studio (seating capacity of 220).
26. TECL operates on a cost recovery basis, and relies on non-operating income such as grants, sponsorships and direct government support in terms of subvention for land rental and direct grants for [...] % of its expenditure. TECL is the sole managing entity which handles all aspects of facilities and operations management of the Esplanade, including decisions and policies pertaining to ticketing systems.
27. Based on the number of tickets sold, about [20-30] % of all events held at the Esplanade venues from January 2006 to March 2009 were organised by TECL itself. Thus, TECL is simultaneously a venue operator and an event promoter, and is also SISTIC’s top customer.

28. TECL entered into the ASTA with SISTIC, which provides that all event promoters who hold their events at any of the Esplanade performing venues can only use SISTIC as their ticketing service provider.

SIS

29. The SIS, located at 2 Stadium Walk, Singapore, is an air-conditioned multi-purpose sports and entertainment facility and was constructed at the cost of S\$90 million. It officially opened on 31 December 1989. With a seating capacity of up to 13,000, SIS is the largest purpose-built indoor venue in Singapore, and one of the largest in Southeast Asia.
30. The SIS hosts a wide variety of events, ranging from world-class pop concerts and sporting events, to smaller family entertainment shows such as ice-skating shows and musicals. In 2008, the SIS hosted more than [70-80]% of the total number of concerts and live indoor sports events held in Singapore. Based on attendance numbers, the SIS had an estimated [80-90]% share of the total attendance of all concerts and live indoor sports entertainment events held in Singapore in 2008. The SIS is also designed to host smaller events of up to 2,500 spectators.
31. Based on the number of tickets sold, about [0-10]% of all events held at the SIS from January 2006 to March 2009 were organised by the SIS itself. Thus, the SIS is also simultaneously a venue operator and an event promoter, albeit to a much lesser extent than TECL. As an event promoter, the SIS is not amongst the top customers of SISTIC.
32. The SIS is a division of the SSC, a statutory board under the purview of the Ministry of Community Development, Youth and Sports ("MCYS") and is staffed by SSC

officers. SISTIC was the in-house ticketing arm of SIS before it was corporatised on 28 July 2000.

33. The SSC entered into the ATS with SISTIC, which provides that all event promoters who hold their events in the SIS can only use SISTIC as their ticketing service provider.

SISTIC's contractual relationships with venue operators and event promoters

The ASTA between SISTIC and TECL

34. During the period immediately preceding October 2002, SISTIC was looking into upgrading its ticketing system by acquiring a new modern ticketing software, as its existing software then was outdated.
35. During the same period, TECL was sourcing for a ticketing solution in preparation for the opening of the Esplanade operations. TECL first came across the Intelitix system in 2001, and Intelitix Inc. wanted to sell TECL the right to use the Intelitix software for US\$1.4m. However, this was not considered an ideal ticketing solution to TECL, as the Intelitix system would be hosted in the US, and did not have any sales or distribution channels locally.
36. Both TECL and SISTIC explored entering into a partnership due to the similar objectives of both parties to find a new ticketing solution. After negotiations with Intelitix Inc., a Master Services Agreement dated 26 August 2002 was entered into between Intelitix Inc. and SISTIC whereby TECL was expressly stated to be an authorised user of the Intelitix system. Intelitix Inc. agreed to provide the software to both parties for US\$2.0 million. As part of this agreement, SISTIC was also granted

the rights to distribute the Intelitix software in Singapore and selected Asia-Pacific countries.

37. On 1 October 2002, a shareholders' agreement was entered into between the SSC, TECL and SISTIC (the "2002 Shareholders' Agreement") whereby TECL acquired a minority stake in SISTIC. In accordance with the terms of the 2002 Shareholders' Agreement, TECL purchased SISTIC shares gradually over the period of 2002 to 2005 and became a holder of 35% of the shares in SISTIC as at 1 January 2006.
38. In accordance with the 2002 Shareholders' Agreement, TECL concurrently on the same date of 1 October 2002 entered into an Application Service and Ticketing Agreement (the "2002 ASTA") with SISTIC, whereby TECL was granted access to and the use of the ticketing software system.
39. In the 2002 ASTA, TECL appointed SISTIC as its exclusive ticketing agent for the sale and distribution of tickets, and further undertook not to grant the right to sell tickets, for any events held in the Esplanade venues or such other venues as agreed between both parties to any other person or corporation using any other computerised ticketing network system. The 2002 ASTA was in force until 31 December 2006 and would be automatically renewed upon the same terms and conditions for successive terms, although the agreement might be terminated by either party without cause after 31 December 2006 on giving 90 days' notice. The 2002 ASTA was subsequently renewed for a further [...] years with effect from 1 January 2007 by way of an Addendum dated 29 January 2007 (the "Addendum").
40. On 16 April 2008, a new Application Service and Ticketing Agreement was entered into between TECL and SISTIC (the "2008 ASTA"). The 2008 ASTA took effect retrospectively from 1 January 2008, thus replacing the Addendum and superseding

the 2002 ASTA. The 2008 ASTA is for a contractual duration of [...] years, although it may be terminated by either party without cause at any time upon giving [...] prior written notice.

41. The terms contained in the 2008 ASTA are largely similar to those of the 2002 ASTA. Under the 2008 ASTA, TECL retained the appointment of SISTIC as its exclusive ticketing agent for the sale and distribution of all events held in the Esplanade venues. As stated above, Clause 7.2 of the 2002 ASTA restricted TECL from granting the right to sell tickets for any event held in the Esplanade venues to other persons save in accordance with the stated exceptions. However, under the 2008 ASTA, this restriction was broadened to include the sale and distribution of any tickets for any event held in the Esplanade venues by persons using a computerised ticketing network service of a third party.
42. Both under the 2002 ASTA and the 2008 ASTA, SISTIC provides what it calls “data warehousing services” to TECL by granting the latter a non-exclusive, non-transferable license to use the software (comprising a centralised customer database and an interactive ticketing system) on the ticketing customer data obtained by SISTIC. The intellectual property rights of the software and application system resides with SISTIC, while the rights in the ticketing customer data are vested in and co-owned by SISTIC and TECL as tenants in common in equal shares, and each party is entitled to use, exploit and process, disclose and otherwise deal with the customer data without the approval or consent of the other. In the event of termination of contract by either party, TECL shall retain the right to use the ticketing customer data in its possession and where access to which does not require the use of or access to SISTIC’s software or application services.

43. It was stated in both the 2002 ASTA and the 2008 ASTA that SISTIC shall withhold a percentage of each hirer's ticketing proceeds for payment to TECL for rental and other charges agreed between the hirer and TECL, before settlement with the hirer.
44. In both the 2002 ASTA and the 2008 ASTA, SISTIC offered a [...] % discount on the basic fee of ticketing services for all events organised by TECL. However, there is no discount for events organised by other event promoters at the Esplanade venues, even though these are also covered under the exclusivity restrictions.

The ATS between SISTIC and SSC

45. On 22 February 2006, the ATS was entered into between the SSC and SISTIC. Under the ATS, the SSC was defined as a body corporate established under the Singapore Sports Council Act (Chapter 305) and that expression included the SIS, which is a division of the SSC.
46. In the ATS, the SSC agreed to appoint SISTIC as the sole and exclusive agent for the sale of tickets for each and every show staged by hirers of the SIS. Accordingly, the hirers of the SIS shall appoint SISTIC to, *inter alia*, print, issue and sell the tickets for their events and collect the proceeds of such tickets.
47. The ATS commenced from 22 February 2006 and was valid for [...] years. This period was defined as the "First Term" under the ATS. The ATS may be terminated by either party without reason upon the provision of 6 months' notice. Unless the ATS was terminated, the ATS would be automatically renewed on the same terms and conditions for a period of [...] years. This period was defined as the "Renewed Term" under the ATS. SISTIC has submitted that the current status of the ATS with the SSC is that it is continuing.

48. It was stated in the ATS that SISTIC shall, as a gratuitous service to the SSC, withhold a percentage or a fixed sum of each hirer's ticketing proceeds for payment to the SSC for rental and other charges agreed between the hirer and the SSC, before settlement with the hirer.
49. SISTIC also undertook to manage, operate and maintain the existing box office at the SIS at its own cost and expense as long as it remains a tenant at the SIS.
50. In the ATS, SISTIC offered the following discounts for events organised by the SIS:
- (a) an Inside Charge discount of \$[...];
 - (b) an Administrative Fee of \$[...] for all general admission/free seating events and 1 reserved seating event;
 - (c) discounts on advertising; and
 - (d) complimentary tickets for events organised by the SIS free of charge up to [...] % of the total configured seating capacity.
51. However, there is no discount for events organised by other event promoters at the SIS, even though these are also covered under the exclusivity restrictions.

Exclusive ticketing sales agreements with event promoters

52. Apart from TECL and the SIS (who are simultaneously venue operators and event promoters), there are 17 other event promoters (whose names are set out in [1(c)] above) that have entered into contractual agreements with SISTIC. These agreements provide that SISTIC shall be the exclusive ticketing agent for all ticketed events organised by the event promoters during the fixed terms specified in those agreements. In return, SISTIC usually offers these event promoters some form of discounts on the Ticketing Administration Fee and/or Inside Charge. These 17

agreements are all drafted based on SISTIC's standard template, *Ticket Sales Agreement with Promoter, Form of Agreement*, although the contractual duration and discount structures are individualised.

III THE PROCEEDINGS

53. In October 2007, the CCS received a complaint concerning restrictions on the choice of ticketing service providers imposed by TECL on event promoters hiring the Esplanade venues, and the "premium price" of ticketing services charged by SISTIC. After a preliminary enquiry, the CCS decided, in January 2008, that there were reasonable grounds for suspecting a possible infringement of section 47 of the Act.
54. The CCS commenced formal investigations under the Act, and between 10 March 2008 and 11 November 2008, sent a total of 27 notices requesting documents and information under section 63 of the Act to various parties. Based on the information obtained, SISTIC expanded the scope of its investigations, and between 23 February 2009 and 2 December 2009, sent a total of 78 notices to various parties, namely, TECL, 51 event promoters, 4 cinema operators, and 4 ticketing service providers (including SISTIC). Between March 2009 and April 2009, the CCS also conducted interviews with personnel from SISTIC as well as its competitors.
55. On 15 December 2009, the CCS, pursuant to Regulation 7 of the Competition Regulations 2007, issued a Proposed Infringement Decision ("PID") against SISTIC for its abuse of a dominant position in the relevant market in contravention of section 47 of the Act via the Exclusive Agreements. The CCS proposed in the PID to issue directions to SISTIC to remove the exclusivity clauses in the Exclusive Agreements and to impose a financial penalty in the sum of S\$989,000. In response, SISTIC submitted a written representation (the "Representation") on 9 February 2010. The

CCS then sent supplementary evidence to SISTIC on 16 April 2009, to which SISTIC replied with a further written representation (the “Supplementary Representation”) on 26 April 2010. On 29 April 2010, SISTIC made its oral representation to the CCS.

56. On 4 June 2010, the CCS issued the Infringement Decision against SISTIC for an infringement of section 47, in which the CCS held to and imposed the same direction and financial penalty as proposed in the PID. Following the receipt of the Infringement Decision, SISTIC lodged the Notice of Appeal (“NOA”) with the Competition Appeal Board (the “**Board**”) on 3 August 2010.

Case Management Conference

57. On 19 October 2010, a Case Management Conference was held by the Board with the parties, in which the following directions were given:
- (a) that the CCS file the Defence by 16 November 2010;
 - (b) that SISTIC file the report of its expert by 11 January 2011; and
 - (c) that the CCS file the report of its expert in reply by 8 March 2011.
58. Pursuant to the directions, the CCS filed its Defence with the Board on 15 November 2010. Following this, on 11 January 2011, SISTIC lodged with the Board supplementary evidence and the report of its expert, Mr Derek Ridyard of RBB Economics. In response, on 7 March 2011, the CCS lodged the report of its expert, Mr Justin Coombs of LECG Corporation (now known as Compass Lexicon), in reply.
59. Thereafter, SISTIC applied for leave to lodge with the Board a rebuttal by its expert to the report of Mr Justin Coombs. The CCS opposed the application. Consequently on 26 April 2011, a further Case Management Conference was held, at which the parties addressed the Board on the necessity for SISTIC to lodge its expert’s report in

response. After hearing the arguments from the parties, the Board made the following directions:

- (a) that SISTIC be given leave to file a rebuttal by its expert to the report of the CCS's expert by 10 May 2011;
- (b) that the CCS be given leave to file a rebuttal by its expert to the rebuttal of SISTIC's expert by 31 May 2011;
- (c) that the CCS and SISTIC (collectively, the "**Parties**") submit to the Board written submissions by 22 August 2011;
- (d) that the Parties submit to the Board a core bundle of documents by 5 September 2011; and
- (e) that the Parties submit skeletal arguments to the Board by 12 September 2011.

The Parties informed the Board that, at the hearing of the appeal, expert witnesses would be called by the Parties. The Parties suggested that the hearing for the appeal be fixed for 26 September to 30 September 2011 and 4 October to 5 October 2011, and the Board was to confirm the dates for the hearing, which the Board did subsequently.

60. Pursuant to the directions, SISTIC lodged with the Board on 10 May 2011 its rebuttal prepared by Mr Ridyard to Mr Coombs's report, and on 31 May 2011, the CCS lodged with the Board its rebuttal prepared by Mr Coombs to Mr Ridyard's rebuttal.

The Hearing

61. The hearing of this appeal commenced on 26 September and continued to 30 September 2011. After a short break on 3 October, the hearing continued for another 2

days on 4 and 5 October 2011. At the hearing, both Mr Ridyard and Mr Coombs gave evidence and were each cross-examined on the reports they prepared respectively. The hearing of the evidence was concluded on 5 October 2011, at which the following directions (at the request of the Parties) were given by the Board:

- (a) that the Parties serve and exchange written closing submissions by 2 November 2011; and
- (b) that the Parties serve and exchange written reply submissions by 9 December 2011.

Pursuant to the directions, written closing submissions and written reply submissions were duly served and exchanged on the respective dates as directed.

IV THE INFRINGEMENT DECISION OF THE CCS

62. At this stage, it would be helpful to set out and refer to in some detail the Infringement Decision, in so far as relevant to this decision.

The Section 47 prohibition

63. Section 47 of the Act prohibits any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in any market in Singapore. The said section provides as follows:

“47 – (1) Subject to section 48, 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.

(2) For the purposes of subsection (1), conduct may, in particular, constitute such an abuse if it consists in –

(a) predatory behavior towards competitors;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.

(3) In this section, "dominant position" means a dominant position within Singapore or elsewhere."

The section 47 prohibition came into force on 1 January 2006.

64. The Infringement Decision is based specifically on the conduct of SISTIC under paragraph (d) of section 47(2) above, that is to say, SISTIC made the conclusion of the Exclusive Agreements subject to acceptance by its contractual parties of the obligation to use SISTIC exclusively, and this obligation, by its nature or according to commercial usage, has no connection with the subject of the agreements.
65. Generally, the first step in any proceedings for infringement of section 47 of the Act is to consider whether the Act is applicable to the transaction in question. If the Act is indeed applicable, for the purposes of the section 47 prohibition against "the abuse of a dominant position in any market", the question to be determined is what the relevant market is. Having determined these two questions, the next step is to consider:
- (a) first, whether an undertaking is dominant in a relevant market, either in Singapore or elsewhere; and
- (b) second, if the undertaking in question is dominant, whether the undertaking is abusing that dominant position in the relevant market.

The Section 33(4) exclusion

66. In considering the applicability of section 47 to the transactions in question, the CCS considers whether the section 33(4) exclusion applies to the ASTA and the ATS. The said section 33(4) provides as follows:

“33 – (4) Nothing in this Part shall apply to any activity carried on by, any agreement entered into or any conduct on the part of–

(a) the Government;

(b) any statutory body; or

(c) 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.”

67. In considering this provision in relation to the ASTA, the CCS notes that while TECL is owned directly by MICA and SISTIC is co-owned directly by the SSC and indirectly by MICA through TECL, neither TECL nor SISTIC is part of the Government or a statutory body, and in addition the terms and conditions under the ASTA are commercial in nature. With respect to the ATS, the CCS notes that while SISTIC is a corporate entity, the SIS is a division of the SSC, which co-owns SISTIC, and which in turn is a body corporate set up under section 3 of the Singapore Sports Council Act (Cap. 305). This means the SIS is part of a statutory body within the meaning of section 33(4)(b). However, the CCS is of the view that it is considering the ATS from the perspective of unilateral conduct on the part of SISTIC in imposing the exclusive dealing obligations on the SSC under the ATS. The CCS holds that in such a case the relevant question is whether the obligations are imposed *by* a statutory body as opposed to whether the obligation is imposed *upon* a statutory body. In this case, the CCS finds that the exclusive purchase obligation under the ATS constitutes

an obligation imposed by SISTIC on the SSC. There is also no suggestion that SISTIC is acting on behalf of the Government or a statutory body in entering into the ATS. That being the case, the CCS concludes that the section 33(4) exclusion does not apply to SISTIC's conduct of imposing the exclusive dealing obligations under the ATS. SISTIC does not dispute the CCS's conclusion that the section 33(4) exclusion does not apply to the ASTA or the ATS.

68. Next, the CCS turns to consider whether –

(a) with respect to the ASTA, SISTIC and TECL; and

(b) with respect to the ATS, SISTIC and the SSC,

are in each case a single economic entity. In this regard, the CCS notes that SISTIC is a government-linked company, as it is 65% owned by the SSC, which is a statutory board, and 35% owned by TECL which in turn is owned by MICA, and that both the ASTA and the ATS are agreements made between related entities. However, neither the SSC nor TECL is involved in any strategic business plans of SISTIC which operates independently as a separate legal entity with its own management and board. Strategic and other decisions are approved by the SISTIC board and neither the SSC nor TECL is privy to, or has veto rights over, the decisions of SISTIC as they are made at the board meeting. Approval from the SSC and TECL is not required as the SISTIC board has full autonomy to decide. According to public information, SISTIC's board of directors comprises 7 directors, of whom 2 are nominated by the SSC, including SISTIC's chairman, and one director is nominated by TECL. The remaining 4 directors are independent.

69. Based on the information provided by the SSC and SISTIC, the SSC has two main operational relationships with SISTIC through the SIS: first, there is the landlord and

tenant relationship, and second, there is the relationship involving the SIS as the venue operator and SISTIC as the ticketing service provider. On the basis of the information provided, the CCS finds that the SSC or the SIS has been dealing with SISTIC at arm's length and on the basis of merit. In the Infringement Decision at [4.4.11] the CCS said:

“Considering the above, SSC appears to have been dealing with SISTIC at arm's length, and on the basis of merit. Therefore, SISTIC cannot be said to be simply carrying out instructions given directly or indirectly by SSC. Instead, SISTIC appears to be driven by commercial incentives to attract and retain SSC as its business partner.”

70. Thus, the CCS arrives at the conclusion that SISTIC and the SSC or the SIS do not form a single economic entity. SISTIC also does not dispute this conclusion of the CCS.

71. With respect to the relationship between TECL and SISTIC, the CCS finds as follows. TECL and SISTIC are separate legal entities and are involved in different businesses, and TECL has no role in instructing or giving approval to SISTIC for strategic business plans. TECL has never been and is not involved in the business operations of SISTIC, and likewise *“TECL has never been and is not involved in the formulation of SISTIC's practice of entering into exclusive agreements with venue operators and event promoters”*. In addition, the CCS finds the following:

- “● *TECL only has a minority shareholding in SISTIC (35%);*
- *TECL has only one director on SISTIC's Board,*
- *TECL does not enjoy any veto rights, i.e. does not have control of the Board of SISTIC; and*

- *TECL does not give directions to SISTIC on sale and marketing activities and investment matters.”*

72. At [4.5.5] of the Infringement Decision, the CCS says:

“Similar to SSC, TECL appears to have been dealing with SISTIC at arm’s length, and on the basis of merit. CCS notes SISTIC’s submission that it is under pressure from TECL to improve services “all the time”, and that if SISTIC does not perform, TECL “will go elsewhere”. CCS further notes that, when the 2002 ASTA expired in December 2006, the commercial relationship between SISTIC and TECL continued based on the Addendum for over a year, until the 2008 ASTA was reached in April 2008 with revised terms and conditions. This reveals a lengthy negotiation process between TECL and SISTIC, implying that SISTIC is not simply carrying out instructions given directly or indirectly by TECL.”

73. On the basis of the facts provided, the CCS comes to the conclusion that SISTIC and TECL do not form a single economic entity, and that instead they deal with each other at arm’s length just like any supplier-customer relationship. *“Hence the ASTA is not an agreement within the same undertaking, and is thus capable of falling within the ambit of the section 47 prohibition.”*

Applicability of Competition Act

74. The Competition Act applies to any person, being an individual, a body corporate, an incorporated body of persons or any other entity capable of commercial and economic activity, regardless of whether they are foreign or Singapore-owned. In addition, companies owned by the Singapore Government also come under the purview of the Act, provided they are engaged in commercial and economic activity. However, pursuant to section 33(4), the Act does not apply to activities, agreements and conduct

of the Government, or of statutory bodies or entities acting on their behalf. This is because the intent of competition law is to regulate conduct of market players, and not the Government and statutory boards that perform public and statutory functions.

In relation to SISTIC, the CCS comes to the following conclusion at [4.6.1]:

“Having considered that:

- *SISTIC is an undertaking engaging in the primary business of providing ticketing services to event promoters and ticket buyers for commercial rewards (i.e. monetary profits);*
- *SISTIC has entered into the Exclusive Agreements. The exclusive purchasing obligations under these agreements amounts to “conduct” on its part, within the meaning of section 47 of the Act;*
- *the section 33(4) exclusion does not apply to any of SISTIC’s agreements under investigation; and*
- *none of the contractual parties, including TECL and SSC/SIS in relation to the ASTA and ATS, form a SEE with SISTIC;*

CCS is satisfied that the exclusive purchasing obligations under the Exclusive Agreements entered into by SISTIC are capable of falling within the ambit of the section 47 prohibition.”

Again, this conclusion is not disputed by SISTIC.

The Relevant Market

75. Section 47(1) of the Act prohibits *“any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in any market in Singapore”*. Therefore, to assess the conduct of SISTIC for the purpose of section 47, it is necessary to ascertain what the relevant market is. In this case, the CCS for the

purpose of determining the relevant market, identifies the following ticketing services, namely:

- (a) open ticketing services where the service providers act as middle men providing to event promoters ticketing services of selling and distributing tickets for their events, and ticketing services to buyers who wish to buy the tickets for the events;
- (b) dedicated ticketing services for cinemas, attractions, transport, etc; and
- (c) self-ticketing services by the venue operators or event promoters themselves.

76. The open ticketing service providers provide ticketing services to different types of event promoters or venue operators and are not confined to any particular type of event promoters or venue operators. Accordingly their ticketing system is built flexibly to allow for customisation to meet the needs of various customers concurrently. The open ticketing service providers include SISTIC, Gatecrash, Tickets.com and GTN.

77. The dedicated ticketing service providers provide specific ticketing services on a perennial basis and by their very nature, their ticketing system is customised for a dedicated purpose for use for a particular event, activity or venue and they do not have the capability of serving other ticketing purposes without significant modification to their systems. The CCS finds that dedicated ticketing service providers do not compete in the same market as open ticketing services providers and are not regarded as potential suppliers of open ticketing services. The CCS is of the opinion that dedicated ticketing services should be excluded from the relevant product market for the purpose of this case.

78. The self-ticketing services by event promoters or venue operators, according to the CCS, are not prevalent in Singapore. The CCS finds that none of the Exclusive Agreements contain provisions for self-ticketing by the event promoters or venue operators. In particular, the ticketing services at the box offices of the SIS and the Esplanade are provided by SISTIC. The CCS finds that self-ticketing services by venue operators and event promoters are not a credible threat that can be translated into strong bargaining power against open ticketing service providers.
79. In conclusion, the CCS finds that the relevant market is the market for the provision of open ticketing services.
80. The CCS next proceeds to consider the geographical area for the market. In this regard, the CCS finds that event promoters generally do not use ticket service providers located outside of Singapore, and that this is true even for international road-shows, where the same event is held in different countries. The CCS attributes this to the reason as follows at [5.6.2]:

“...This is primarily because event promoters consider it essential for a ticketing service provider to possess an extensive network of physical outlets located throughout Singapore and to render them the necessary ground support. This suggests that a strong local presence of the ticketing service provider is considered crucial by the event promoters and venue operators.”

The CCS thus identifies the relevant geographical market as Singapore.

81. Accordingly, the CCS concludes that the relevant market is the market for the provision of open ticketing services in Singapore to both event promoters and ticket buyers (the “**Relevant Market**”), and that existing competitors in this market include SISTIC, Tickets.com, Gatecrash and GTN. SISTIC is not disputing this finding of the

Relevant Market; nor is SISTIC disputing in any way the CCS's assessment and reasoning in making this finding. The Board respectfully accepts this finding.

Section 47 Prohibition : The issues

82. It is common ground that there are two crucial issues for determination with respect to the application of the section 47 prohibition, namely:

- (a) whether SISTIC is dominant in the Relevant Market; and
- (b) if it is dominant, whether SISTIC is abusing its dominant position.

The Board now turns to consider these two issues seriatim.

The Infringement Decision – Whether SISTIC is dominant in the Relevant Market

83. The CCS refers to and relies on the *CCS Guidelines on the Section 47 Prohibition* which sets out the concept of dominance. It says at [6.1.1] as follows:

“The CCS Guidelines on the Section 47 Prohibition sets out the concept of dominance. An undertaking will not be deemed dominant unless it has substantial market power. Market power arises where an undertaking does not face sufficiently strong competitive pressure and can be thought of as having the ability to profitably sustain prices above competitive levels or to restrict output or quality below competitive levels. In other words, the ability to act independently without sufficient competitive constraint is the defining concept of dominance. The abilities to “increase prices”, “restrict output” and “reduce quality” are derived from this underlying concept.”

84. At [6.1.4], it says:

“This definition of dominance consists of three elements: (i) there must be a position of economic strength on a market which (ii) enables an undertaking to prevent

effective competition being maintained on that market by (iii) affording it the power to behave independently to an appreciable extent.”

85. In considering the question of dominance of SISTIC, the CCS says that it considers holistically the combination of all the relevant factors. The factors in this case include:
- (a) SISTIC’s ability to profitably sustain prices above competitive levels;
 - (b) SISTIC’s ability to eliminate or weaken competitor;
 - (c) market share of SISTIC and its competitors;
 - (d) barriers to entry to competitors to the Relevant Market; and
 - (e) countervailing buyer power.

(i) Ability to profitably sustain prices above competitive levels

86. At [6.2.2], the CCS says that the definition of market power refers to the ability to profitably sustain prices above competitive levels, and that it is not required that the undertaking has actually done so, or has done so consistently for every single year over a certain period. The CCS’s position is that: *“On the contrary, if evidence suggests that an undertaking has indeed priced profitably above competitive levels for a sustained period, then it cannot be that the undertaking has no ability to do so.”*
87. Reverting to the facts of this case, the CCS relies on the fact that on 15 January 2008, SISTIC raised its booking fee charged against the ticket buyers by 50% from \$2 to \$3 for those tickets with face values higher than \$20. It asserts that although the booking fee is only one component of SISTIC’s prices charged to one group of customers, namely, the ticket buyers, it is [...]. For the financial years 2007/2008 and 2008/2009, when the increases in the booking fee were reflected, the booking fee accounted for [...] % and [...] % respectively of the relevant turnover. The CCS notes

that the revenues from the event promoters during the same periods did not decline, and according to the CCS, this indicates that “*the incremental revenues from booking fees are not ‘competed away’ on the event side of the Relevant Market*”.

88. The CCS considered other financial data of SISTIC and came to the conclusion at [6.2.7] that SISTIC has been economically profitable throughout the period from the financial year 2006/2007 to the financial year 2008/2009, and that its booking fee increase in January 2008 further contributed to a significant increment in profitability.
89. The CCS finds that SISTIC’s booking fee is higher than that of its competitors in the Relevant Market as shown in the table below:

“Table: 6.2.8 Comparison of Booking Fees

Face value of tickets	Above \$20	At or Below \$20
SISTIC	\$3	\$1
Tickets.com	\$2	\$1
Gatecrash	\$2	\$1
GTN	Not currently active”	

90. At [6.2.13], the CCS makes the following comparison:

“For completeness, CCS has also compared SISTIC’s effective total ticketing price, based on ticketing services revenues earned from both event promoters and ticket buyers, divided by number of tickets sold, against its competitors’. [...]. SISTIC was the only player who exhibited a consistent uptrend in prices. On the premises, CCS concludes that SISTIC had sustained its effective total ticketing price above competitive levels.

“Table 6.2.13: Comparison of effective total ticketing price, January 2006 - March 2009

<i>Effective Total Price (\$\$)</i>	<i>2006</i>	<i>2007</i>	<i>2008</i>	<i>2009 (Jan-Mar)</i>
SISTIC	[...]	[...]	[...]	[...]
Tickets.com	[...]	[...]	[...]	[...]
Gatecrash	[...]	[...]	[...]	[...]
GTN	NA	NA	[...]	NA”

91. The CCS thus finds that SISTIC has become more profitable from its increase in booking fee in January 2008 till the end of the assessment period in March 2009. Further, this increase in booking fee had not resulted in a significant loss in ticketing sales over the period of 15 months. In fact, in the year 2009, SISTIC continued to increase its volume of business by providing services for projects such as the *Singapore Grand Prix* and entering into two new exclusive agreements with event promoters, namely, the National Museum and the NUS Centre for the Arts. On the basis of the evidence relied upon, the CCS concludes that SISTIC is able to profitably sustain its price above competitive levels in the Relevant Market, and has indeed done so.

(ii) Ability to eliminate or weaken competitors

92. The CCS next turns to consider the question of SISTIC's ability to eliminate or weaken its competitors. In this regard, the CCS refers to what it considers as the "exit" of TicketCharge (a ticketing service provider which was established in the 1990s), and relies on a statement made by Mr Kenneth Tan, the chief executive officer of SISTIC, at a board meeting of SISTIC that TicketCharge informed him that "[...]."

93. As a matter of fact, there was no actual "exit" of TicketCharge in the true sense. What happened was that in January 2006, Quebec Leisure bought over the assets of TicketCharge and became the franchisee of Tickets.com in Singapore. The CCS admits that the "exit" of TicketCharge had not resulted in a reduction of the number of competitors in the Relevant Market.

94. However, in February 2007, Quebec Leisure brought the musical show *My Fair Lady* to Singapore and intended to stage it at the Esplanade because it was an international production. Quebec Leisure naturally, as franchisee, wanted to use Tickets.com as the ticketing service provider for this event, and wrote to TECL requesting for permission to do so. TECL rejected the request, citing that they were not confident of the system of Tickets.com. TECL did not mention any legally binding agreement, but mentioned that they have some sort of service contract with SISTIC. In the end, Quebec Leisure staged the show at the Esplanade using SISTIC “*due to Esplanade’s requirement*”.
95. As Quebec Leisure is the majority shareholder of the Singapore franchisee of Tickets.com, Quebec Leisure would naturally have engaged the services of Tickets.com but for the restrictive requirement in the ASTA that event promoters who held events at the Esplanade were required to engage SISTIC for their ticketing requirements. The CCS relies on this incident as indicating SISTIC’s ability to weaken its competitors in the Relevant Market through the use of Exclusive Agreements like the ASTA.
96. On the basis of the above two factors, the CCS comes to the following conclusion at [6.3.7]:

“The above incidents indicate to a certain extent the difficulties for competitors to compete against SISTIC. This, in conjunction with the other considerations stated in this chapter, were taken into account by CCS in assessing whether SISTIC has the ability to act independently without sufficient competitive constraint in the Relevant Market.”

(iii) Market share

97. The CCS considers that the market share of an undertaking is an important factor in assessing dominance of the undertaking in the Relevant Market. However, the CCS accepts that market share alone does not determine whether an undertaking is dominant. Other factors such as entry barriers, buyer power, product differentiation and innovation, actual price increases and actual exit of competitors, may also be considered. The CCS also accepts that there are no market share thresholds for defining dominance under the section 47 prohibition but states that generally the CCS would, in accordance with the CCS Guidelines on the Section 47 Prohibition, consider an undertaking with a market share of above 60% as likely to indicate that the undertaking is dominant in the Relevant Market.
98. On the basis of information obtained, SISTIC compiles a table showing the estimates of the market shares of the four ticketing service providers for the Relevant Market for the relevant period (January 2006 to March 2009) as follows:

“Table 6.4.8 – Market share estimates by number of tickets sold (January 2006 - March 2009)”

	2006		2007		2008		Jan 2009 -Mar 2009		Aggregated (Jan 2006 – Mar 2009)	
	No. of Tickets	%	No. of Tickets	%	No. of Tickets	%	No. of Tickets	%	No. of Tickets	%
<i>SISTIC</i>	[...]	[85-95]	[...]	[85-95]	[...]	[85-95]	[...]	[90-100]	[...]	[85-95]
<i>Tickets.com</i>	[...]	[0-10]	[...]	[0-10]	[...]	[0-10]	[...]	[0-10]	[...]	[0-10]
<i>Gatecrash</i>	[...]	[0-10]	[...]	[0-10]	[...]	[0-10]	[...]	[0-10]	[...]	[0-10]
<i>GTN</i>	N.A.	N.A.	N.A.	N.A.	[...]	[0-10]	[...]	[0-10]	[...]	[0-10]
<i>Total</i>	[...]		[...]		[...]		[...]		[...]	”

99. At [6.4.8] the CCS states as follows:

“Based on volume of ticket sales, SISTIC’s market share persisted at about 90% over the period from January 2006 to March 2009. SISTIC’s market share dipped slightly in 2008, mainly due to GTN winning the contract to provide ticketing services for the 2008 Singapore Grand Prix. SISTIC has since recovered its market share in the period January 2009 to March 2009 to about [90-100]%. On an aggregated basis, SISTIC has a market share of about [85-95]% in the Relevant Market over the period from January 2006 to March 2009.”

100. The CCS next turns to the market shares by revenues earned from the sale and distribution of tickets, and compiles the following table:

“Table 6.4.11 – Market share estimates by revenues (January 2006 - March 2009)

	2006		2007		2008		2009 (Jan-Mar)		Aggregate (Jan 2006-Mar 2009)	
	<i>Ticketing Revenue (S\$)</i>	<i>%</i>	<i>Ticketing Revenue (S\$)</i>	<i>%</i>	<i>Ticketing Revenue (S\$)</i>	<i>%</i>	<i>Ticketing Revenue (S\$)</i>	<i>%</i>	<i>Ticketing Revenue (S\$)</i>	<i>%</i>
<i>SISTIC</i>	[...]	[85-95]	[...]	[90-100]	[...]	[65-75]	[...]	[90-100]	[...]	[80-90]
<i>Tickets.com</i>	[...]	[0-10]	[...]	[0-10]	[...]	[0-10]	[...]	[0-10]	[...]	[0-10]
<i>Gatecrash</i>	[...]	[0-10]	[...]	[0-10]	[...]	[0-10]	[...]	[0-10]	[...]	[0-10]
<i>GTN</i>	<i>N.A.</i>	<i>N.A.</i>	<i>N.A.</i>	<i>N.A.</i>	[...]	[20-30]	[...]	[0-10]	[...]	[10-20]
<i>Total</i>	[...]		[...]		[...]		[...]		[...]	”

101. On the basis of the shares of revenues as shown above, CCS asserts as follows:

“6.4.10 On the basis of revenues, SISTIC’s market share was over 90% during 2006 and 2007. In 2008, SISTIC’s market share dropped considerably to about [65-75]%, again due to the Singapore Grand Prix. This single event accounted for more than [20-30]% of revenues for the entire Relevant Market in 2008, although its share by number of tickets was only about [0-10]%. On an aggregated basis, SISTIC had a market share of about [80-90]% of the total ticketing revenues in the Relevant Market over the period from January 2006 to March 2009.”

6.4.11 *SISTIC has recovered its market share in the period January 2009 to March 2009 to about [90-100]%. In addition, CCS notes that SISTIC has been appointed as the ticketing service provider for the 2009 Singapore Grand Prix. This arrangement is likely to reinstate SISTIC's market shares for the later part of 2009, and its dip in market shares in 2008 can be viewed as transient."*

102. On the basis of the market shares estimates given above, the CCS comes to the following conclusion at [6.4.12] as follows:

“Conclusion

Based on the market share estimates, both by volume and by revenues, SISTIC has sustained its market share way above its competitors, and persistently above the indicative starting point of 60% stipulated in the CCS Guidelines for the Section 47 Prohibition. As such, CCS is satisfied that evidence of market shares of SISTIC and its competitors support the finding that SISTIC is dominant in the Relevant Market.”

Further, the CCS relies on SISTIC's website which states that in Singapore *“it is the largest ticketing service provider selling tickets for more than 90% of a wide variety of arts, entertainment and sports events”*. It also relies on a document called the *“Information Memorandum”*, dated March 2008 and prepared by KPMG Corporate Finance Pte Ltd for the purposes of the divestment of SISTIC, in which SISTIC estimates its market share to be *“[85-95]% for the financial year 2006/2007”*.

(iv) Barriers to entry

103. The CCS considers that entry barriers are important in the assessment of market power. The higher the entry barriers, the less likely it will be that *potential* competition will prevent the incumbent from profitably sustaining prices above

competitive levels. Examples of entry barriers include highly developed sales networks, the ability to offer a wide range of products and indirect network effects.

104. The CCS finds that there is no significant technical or regulatory barrier to entry into the Relevant Market. As a matter of fact, ticketing system suppliers such as OmniTicket are available in Singapore, and the cost of technology has come down over time, and there is no need for licensing of ticketing service providers in Singapore. The CCS also finds that economies of scale, while significant, are moderate and not insurmountable. It finds that SISTIC's cost structure is "*highly scalable in an economic sense*" and "*its business is labour-intensive without significant sunk cost and its personnel expenses are highly flexible*".

Barrier to entry: Indirect network effect

105. The CCS finds that indirect network effect is the most important barrier to entry into the Relevant Market and results in moderately high barriers to entry. Network effects were held to be a barrier of entry in *Microsoft Corp. v Commission of the European Communities* [2007] 5 CMLR 846. In that case, the European Court of First Instance ("CFI") upheld the finding of the European Commission ("EC") that the ubiquity of Microsoft in the personal computer operating systems market meant that nearly all commercial applications software were written first and foremost to be compatible with the Microsoft platform, thus proving that there are significant indirect network effects in the relevant market for operating systems.
106. Indirect network effect is said to exist in the Relevant Market due to its two-sided nature – if tickets of most events are sold through SISTIC, most tickets buyers would have to buy through SISTIC, and this will in turn attract more event promoters or

venue operators to use SISTIC's services. This network effect is further reinforced by the following:

- (a) SISTIC's website, which is the first 'port-of-call' for ticket buyers browsing events;
- (b) SISTIC's entrenched physical distribution network consisting of outlets in most major shopping malls in Singapore; and
- (c) SISTIC's existing customer database, which enables event promoters to perform targeted marketing to ticket buyers.

(a) Indirect network effect – Website

107. In a survey of the event promoters conducted by the CCS (the "Survey") the importance of the popularity of the ticketing agent's website was rated highly, with a mean rating of 3.3 and a median rating of 2 on a scale of 1 (most important) to 10 (least important). Not surprisingly, SISTIC's website was the most popular among ticketing service providers in Singapore, comprehensively outperforming its competitors by various benchmarks such as percentage of relevant "hits", number of websites linking in, page views per user and the average time spent on the website. Further, SISTIC is the only ticketing service provider that is able to generate a majority of its web traffic directly via a search of keywords such as "sistic", "gatecrash" and "tickets in Singapore", rather than via a search of venues or events. This implies that SISTIC's website is what the CCS describes as "*a first 'port of call' for browsing events*", ie, the first website that consumers will look at when browsing for events.

(b) Indirect network effect – Distribution Outlets

108. The existence of an established network of ticket sales and distribution channels has been held by the European Court of Justice (“ECJ”), in *Hoffmann-La Roche & Co AG v Commission of the European Communities* 1979 ECR 461 (“*Hoffmann-La Roche*”), to be a relevant factor in establishing the dominant position of an undertaking, as it confers a technical and competitive advantage on the dominant undertaking over its competitors. The CCS finds that physical outlets are important in the Relevant Market, as [...] % of SISTIC’s ticket sales were made at these outlets and a total of [...] % of tickets were collected physically. SISTIC enjoys an entrenched physical distribution network, as it has exclusive agreements with the landlords in most major shopping malls not to allow the sale of tickets at those malls except through SISTIC. The CCS considers that this arrangement limits the accessibility of ticket sales and distribution outlets to existing and potential competitors. It should be mentioned that the CCS also considers the availability of alternative physical networks (such as SingPost branches, AXS and SAM machines), but concluded that these were either inferior in quality, less-cost-effective, or not feasible.
109. In the Survey, the CCS finds accessibility to retail outlets as a key consideration in the event promoters’ choice of ticketing agent, with about [...] % of respondents citing this factor as one of their top five considerations. Consequently, an extensive physical distribution network increases demand from event promoters. This in turn increases demand from ticket buyers whose purchase decisions are event-driven.
110. The CCS finds that given that many strategically located and popular shopping malls have already been taken up by SISTIC, it is difficult for competitors to match SISTIC’s network of retail outlets without having substantial ticket volume. Hence, in this case, the CCS finds that SISTIC has established a two-way network effect.

111. Based on the facts and factors discussed above, the CCS concludes that the indirect network effect arising from an entrenched physical distribution network constitutes a barrier to entry in the Relevant Market.

(c) Indirect network effect – Customer database

112. The importance of a ticketing agent’s customer database is also rated highly in the Survey. The CCS asserts that SISTIC has been able to maintain a customer database through its incumbent operation in the Relevant Market to allow event promoters to perform targeted marketing to ticket buyers whose track records suggest that they are likely to be interested in particular types of events. According to the CCS, SISTIC submits that this capability is crucial and is unmatched by its competitors, albeit easily replicable. Both Tickets.com and Gatecrash also acknowledged that a large customer database is an important factor in the choice of ticketing agent, albeit not the only one.

Conclusion on Indirect Network Effect

113. The CCS concludes at [6.5.32] as follows:

“Based on the above, CCS is of the view that the indirect network effect between event promoters and ticket buyers exists in the Relevant Market, and it constitutes a barrier to entry.”

Strategic conduct

114. The CCS refers to the strategic conduct of SISTIC and states at [6.5.34] as follows:

“It should however be noted that the indirect network effect in the Relevant Market is not natural and not unbreakable. [...]. As CCS will demonstrate in Chapter 7, it is SISTIC’s Exclusive Agreements that have been preventing its partners and customers from doing so. This is consistent with UKCC’s finding that long-term preferred

relationships between incumbent ticketing agents and event promoters and venue operators made large-scale entry even harder.”

115. Following from the conclusion in the preceding paragraph, the CCS asserts that *“the barrier to entry in relation to network effect is artificially erected and sustained by SISTIC’s strategic conduct”*.

116. At [6.5.36] the CCS says:

“Having considered the above, CCS concludes that the level of barriers to entry is moderately high for the Relevant Market. There are no technical or regulatory barriers that would prevent competition. Although SISTIC’s distribution network and marketing capability are clearly superior at present, and some degree of economies of scale exists, these barriers are not insurmountable, especially over time. However, CCS found that the network effect created by SISTIC’s strategic conduct to maintain its exclusive access to events and venues is preventing the barriers to entry from being overcome by its actual or potential competitors.”

(v) Countervailing buyer power

117. The CCS finds that the market power of a seller can be constrained by the strength of buyers and the structure of the buyers’ side of the market. Among other things, the following factors are identified at [6.6.1] as having the capacity to enhance countervailing buyer power:

- *“the buyer is well-informed about alternative sources of supply and could readily, at little cost to itself, switch substantial purchases from one seller to another while continuing to meet its needs;*

- *the buyer could commence production of the item itself, or sponsor new entry by another seller relatively quickly, for example, through a long-term contract, without incurring substantial sunk costs; and*
- *the buyer is an important outlet for the seller, that is, the seller would be willing to cede better terms to the buyer in order to retain the opportunity to sell to that buyer.”*

118. However, the CCS finds that there is little countervailing buyer power constraining SISTIC’s market power, whether from event promoters, ticket buyers or venue operators. Ticket buyers, who are usually individual persons, have negligible bargaining power, due to the small volume of tickets purchased by each buyer. Further, the demand elasticity of ticket buyers is low, thus the effectiveness of their feedback to event promoters, venue operators and ticketing service providers is limited. Demand from event promoters is highly fragmented – no single promoter accounts for more than [5-15]% of SISTIC’s ticket sales (in terms of number of tickets) during the assessment period from January 2006 to March 2009. As such, no single promoter has significant bargaining power against SISTIC.
119. On the other hand, the two major venue operators, TECL and the SIS, have strong bargaining power – they respectively account for [30-40]% and [20-30]% of SISTIC’s ticket sales during the assessment period. However, they have little incentive to exercise their power against SISTIC. The true customers of SISTIC are not the venue operators, but the event promoters using the Esplanade and the SIS who have to purchase and pay for SISTIC’s ticketing services. As such, the loss implications of the ASTA and ATA are borne by the event promoters who have no choice but to use SISTIC.

120. Furthermore, while the venue operators also operate as event promoters, they secured discounts, under the Exclusive Agreements, for events organised by themselves, but not for events organised by other event promoters at their venues. For instance, TECL secured a [...] % discount on basic fee under the ASTA. Third-party event promoters are then left to negotiate with SISTIC individually and are, unsurprisingly, unable to secure any discount. These contractual arrangements reveal the limits of countervailing power from the venue operators in Singapore – they are only interested in securing discounts for the *minority* of events held at their venues by themselves, and are disinterested in negotiating for discounts for the *majority* of events held at their venues by other promoters. Where the venue operators do exercise countervailing power, it is confined to the imposition of strict quality standards, under the terms of the Exclusive Agreements, over SISTIC’s service standards for all events at the particular venue as the resultant reputational benefits accrue directly to the venue operators.
121. The CCS reaches the following conclusion on countervailing buyer power at [6.6.22]:
- “Given the above, CCS concludes that, in Singapore, the event promoters and ticket buyers have no countervailing buyer power against SISTIC. The major venue operators do have strong bargaining power (not ‘buyer’ power), but they have weak incentives to exercise their power with respect to price, and evidence suggests that they are indeed not exercising their power.”*
122. For the reasons given above, the CCS concludes that it is satisfied that SISTIC is dominant in the Relevant Market.

The Infringement Decision – Abuse of Dominant Position

123. The CCS considers whether SISTIC's business practice in relation to the following contractual relationships with event promoters and venue operators amounts to an abuse of dominance:

- (b) The ASTA, which contains explicit restrictions requiring all events held at the Esplanade venues to use SISTIC as the sole ticketing service provider;
- (c) The ATS, which contains explicit restrictions requiring all events held at the SIS to use SISTIC as the sole ticketing service provider; and
- (d) The 17 Exclusive Agreements, which contain explicit restrictions requiring the event promoters concerned to use SISTIC as the sole ticketing service provider for all their events.

With regard to these Exclusive Agreements, the CCS considers two important questions: first, whether these agreements are exclusionary in nature, and second, whether they have the effect of foreclosing competition.

124. The CCS concedes at [7.2.5] that "*exclusive purchasing obligations, especially those imposed by non-dominant firms, is [sic] a common practice in commercial life which may not be anti-competitive per se. In many circumstances, exclusive purchasing, may bring about some pro-competitive outcomes such as lower prices and higher efficiency.*" However, where exclusive purchasing obligations are imposed by a dominant undertaking, the conduct is capable of infringing section 47 of the Act. In support, it relies on the case of *BPB Industries Plc and British Gypsum Ltd v Commission of the European Communities*, Case T-65/89 [1993] ECR II-389, [1993] 5 CMLR 32. In that case, the CFI upheld the EC's decision that British Gypsum Ltd

(“BG”), a wholly owned subsidiary of BPB Industries plc and a dominant producer of plasterboard, had abused its dominant position through a scheme of payments to builders’ merchants who agreed to purchase plasterboard exclusively from it. In particular, the CCS cites the following passage from the judgment of the court:

“It is not unusual for commercial cooperation of that kind to involve, in return, an exclusive purchasing commitment given by the recipient of such payments or facilities to his supplier. Such exclusive purchasing commitments cannot, as a matter of principle, be prohibited. As the Court of First Instance stated in its judgment in Case T-61/89 Dansk Pelsdyravlerforening v EC [1992] ECR II-1931, appraisal of the effects of such commitments on the functioning of the market concerned depends on the characteristics of that market. As the Court of Justice held in Case C-234/89 Delimitis v Henninger Braeu [1991] ECR I-935, it is necessary, in principle, to examine the effects of such commitments on the market in their specific context.

But those considerations, which apply in a normal competitive market situation, cannot be unreservedly accepted in the case of a market where, precisely because of the dominant position of one of the economic operators, competition is already restricted. An undertaking in a dominant position has a special responsibility not to allow its conduct to impair genuine undistorted competition in the common market.”

125. It is the CCS’s position that it is SISTIC that initiated the exclusivity restrictions in the ASTA and ATS, relying on certain public statements made by TECL. As for the 17 Exclusive Agreements, the CCS notes that that they are all based on the same template, namely, *Ticket Sales Agreement with Promoter, Form of Agreement*. Further, the important clauses, including those relating to exclusivity commitment and contractual duration, are prescribed in the standard template, suggesting that these restrictions are unilaterally imposed by SISTIC rather than the event promoters. The CCS contends that there is no economic sense for the venue operators (namely, TECL

and the SIS) and event promoters to “volunteer” such restrictions, if SISTIC had not “demanded them”. The CCS finds at [7.4.7] of the Infringement Decision:

“...CCS is satisfied that the exclusivity restrictions are imposed by SISTIC upon event promoters and venue operators, and these restrictions make no economic sense except having the primary effect of foreclosing competition.”

126. In response to SISTIC’s contention that the nature of competition in the ticketing services market is one of competition *for* the market and not *in* the market, the CCS says that “*the mode of competition for the Relevant Market is not a result of natural evolution based on the intrinsic characteristics of the industry.*” It asserts that:

“...Instead of letting market forces optimise the extent to which competition be for or in the market, it is SISTIC who unilaterally and artificially dictates that any competition be for the market through the use of exclusivity restrictions”.

Competition for the market in this case is dictated by SISTIC, which is a dominant firm in the Relevant Market. At [7.5.2] the CCS states:

“Competition for exclusives’ is all or nothing. A new entrant either displaces the incumbent firm, or fails to enter the market. In a market with moderate barriers to entry, such as the Relevant Market with some economies of scale and indirect network effects, this mode of competition discourages customers from experimenting with new entrants by switching a minor portion of their needs. Consequently, new entrants are denied of the opportunity to pick up residual demand in the market, build capability and credibility progressively, and eventually attain critical mass to become an effective competitive constraint upon the incumbent.”

127. The CCS contends that SISTIC’s dictated mode of competition – for and not in the market – has critically and perennially prevented other ticketing service providers from becoming equally efficient to or more efficient than SISTIC through innovation

or otherwise in the longer term. In the CCS's contention, SISTIC's exclusionary conduct has prevented other ticketing service providers from becoming equally or more efficient. The CCS contends that the incentives for these competitors to invest in the Relevant Market and improve their quality of services are already dampened in the first instance. The CCS argues that these competitors have the ability to compete in the counterfactual, but "*SISTIC's exclusionary conduct has disincentivised competition*". This, it is submitted, is the foreclosure effect.

128. The CCS notes that there was effective competition for and/or in the markets in other jurisdictions, e.g. in the United Kingdom, where there was actual coexistence of competition for and in the market, and in Australia where there was effective competition at least for the market. However, the CCS says that in comparison competition with respect to the Relevant Market in Singapore is "*lacklustre, be it for or in the market,*" and that SISTIC has sustained persistently high market shares over the years, and other competitors have not been able to win exclusive or preferential contracts with any major venue operator or event promoter. Ticket sale by multiple ticketing service providers of the same event is rare in Singapore.
129. The CCS notes that in the *TicketMaster* case in Ireland (Enforcement Design Series E/06/001 Case COM/107/02) given on 26 September 2005, the Irish Competition Authority ("ICA") accepted that there was effective competition for the market. In that case, there was evidence to suggest that there were frequent renegotiations between event promoters and TicketMaster Ireland, and renegotiations and extensions of the contracts were at the behest of event promoters, not TicketMaster Ireland. It was the promoters, not TicketMaster, which drove the terms of the contract and with respect to the booking fee, TicketMaster Ireland did not have unfettered discretion to charge any amount for its services. Further, in a recent example, eleven companies

tendered for contracts with the Gaelic Athletic Association (“GAA”), a major Irish cultural and sporting organisation, and the contract duration was determined solely by the GAA.

130. Turning to the case at hand, the CCS finds as follows. The Exclusive Agreements were not tendered by the customers, but instead, were initiated by SISTIC. TECL’s public statement suggests that the subject of exclusivity was at the behest of SISTIC. The standard *Form of Agreement for Ticket Sales Agreement with Promoter* suggests that exclusivity restrictions were determined by SISTIC rather than by the customers. There is no evidence to suggest frequent renegotiations during the contractual terms or credible threats of switching providers, and there is no contractual cap on booking fees. At [7.5.20], the CCS concludes as follows:

“Based on the foregoing, CCS concludes that competition is lacklustre for or in the Relevant Market. SISTIC has unilaterally and artificially dictated the mode of competition via the Exclusive Agreements, thereby impeding market forces from determining an optimal outcome that maximises allocative, productive and dynamic efficiencies.”

131. The CCS relies on the Exclusive Agreements which, it states, contain “*explicit and total restrictions that prevent venue operators and event promoters from engaging ticketing services providers other than SISTIC.*” In support, the CCS relies on the following passage from the decision of the EC in *Prokent-Tomra*, Case Comp/E-1/38.113 (29 March 2006) (“Prokent-Tomra”):

“Exclusivity obligations, because they require the customers to purchase all or significant parts of their demand from a dominant supplier, have by their nature a foreclosing capability. It is the very purpose of these kinds of agreements or

arrangements to exclude competitors from respective parts of the market. Given Tomra's dominant position on the market and the fact that exclusivity obligations were applied to a not insubstantial part of the total market demand, it was capable of having and in fact had a market distorting foreclosure effect. Tomra was not allowed to engage in this kind of practice, and the exclusivity agreements and arrangements constituted an abuse of a dominant position."

132. On the effect of explicit and total restrictions, the CCS expresses the following view at [7.6.9]:

"...CCS is of the view that the explicit and total restrictions under the Exclusive Agreements are a strong form of restraint to effect exclusive purchasing. This does not mean, however, that explicit and total restrictions should be prohibited per se. CCS notes that the restrictions came with discounts to event promoters, and other incentives to venue operators [...]. Accordingly, the proportionality between the restrictions and the benefits to the customers of SISTIC will be examined."

133. The CCS takes into account the following factors. The Exclusive Agreements are not based on standardised and transparent criteria but are individually negotiated; the discounts and incentives, as well as durations, of these agreements are not uniform. Although the 17 Exclusive Agreements with the event promoters are all drafted based on a standard template with the exclusivity clause being standardised, the contractual duration and discount structures are individualised.

Foreclosure effect of the ASTA and ATS

134. With regard to the ASTA with TECL and the ATS with SSC/SIS, the CCS regards these agreements as *"highly strategic in nature"*. As the demand from event promoters in the Relevant Market is fragmented and even more so is that from the

ticket buyers, these two agreements with the venue operators provide important avenues for winning businesses in blocks. It is noted that events held at the Esplanade and the SIS account for [30-40]% and [20-30]% of SISTIC's total tickets sales respectively for the period from January 2006 to March 2009, while no single event promoter accounted for more than [0-10]%.

135. The CCS also considers the quality and sizes of the two venues: the Esplanade is the only world class venue for staging premium performing arts events in Singapore, while the SIS is the indoor venue with the largest seating capacity to stage popular live concerts / entertainment events in Singapore. Securing these two venues would restrict the choice of many event promoters who staged their events in these two venues.
136. The CCS asserts that when the ASTA was entered into in October 2002, TECL had no choice but to engage SISTIC who was then the incumbent ticketing service provider. When the Act came into force in January 2006, an equally efficient firm could not compete with SISTIC for ticketing business for TECL, as SISTIC had already engaged TECL on an exclusive basis, the ASTA being still in effect.
137. The 2002 ASTA expired in December 2006 and was superseded by the 2008 ASTA, which was entered into in April 2008, and during the interim period an Addendum was made and was in effect. The CCS says that it examined whether during this interim period SISTIC was an unavoidable trade partner to TECL and whether another equally efficient firm could have contested for the TECL's business thereby imposing an effective and competitive constraint upon SISTIC. In this regard, the CCS considers that the data warehousing service provided by SISTIC to TECL was an important obstacle for TECL to switch to another ticketing service provider. The CCS says that "[g]iven the diverse profiles of events held at the Esplanade venues by

genre, ticketing customer data is especially valuable for the purpose of targeted marketing of events". In support, the CCS relies on two statements of TECL. First, in its submission to the CCS, TECL said:

"[...]"

138. Next, the CCS relies on the following passage of TECL's board minutes of 28 July 2007:

"[...]"

139. This obstacle accounted for the insertion of a new clause in the 2008 ASTA which gives TECL the right to use the customer ticketing data in the event of termination of the ASTA. The CCS relies on all these to say that during the period from December 2006 to April 2008, TECL was unable to retain the right to use such data and switch to the ticketing application and services provided by an equally efficient firm to SISTIC. It further says that even if TECL had the right to carry the ticketing customer data over, porting away from SISTIC would inevitably incur some incremental switching costs. For this reason, a ticketing service provider has to be *more efficient than SISTIC "to provide an impetus for TECL to switch"*.
140. Thus, the CCS reaches the conclusion that during the period from December 2006 to April 2008, SISTIC was an *"unavoidable trade partner"* of TECL such that an equally efficient firm to SISTIC would not have been able to contest for TECL's business on an exclusive basis. The CCS also notes that the ASTA is the largest exclusive purchasing agreement for SISTIC, accounting for [30-40]% of the Relevant Market, and its contractual duration, i.e. [...] years for the 2002 ASTA and [...] years for the 2008 ASTA, is also the longest amongst the Exclusive Agreements.

141. The discounts and incentives provided to TECL and the SIS under the ASTA and the ATS respectively are strategically structured in the following ways. First, the discounts on ticketing services are only given to those events organised by TECL and the SIS but not to third-party events held at the Esplanade or the SIS in spite of the fact that the third-party event promoters are also bound by the ASTA and the ATS to use SISTIC's ticketing services. Second, SISTIC also gives to TECL and the SIS additional services such as a risk management arrangement, whereby proceeds from ticketing sales are withheld and not paid to event promoters until the events have been held. This arrangement applies only to TECL and the SIS. Lastly, SISTIC also offers data warehousing services to TECL.

142. The CCS contends that, while these discounts and incentives are beneficial to the venue operators, they do not benefit the event promoters, who ultimately pay for SISTIC's services and whose choices are restricted. The CCS asserts at [7.8.17]:

"...The structure of these incentives takes advantage of the venue operators' self-interest and indifference to the interests of event promoters, thereby achieving a broad foreclosure of competition with a narrow scope of profit sacrifice."

143. The CCS asserts the following conclusion at [7.8.20]:

"Overall, from January 2006 to March 2009, only [20-30]% of events held at the Esplanade venues (in terms of total number of tickets sold) were organised by TECL itself. The corresponding figure for the SIS was [0-10]%. Viewing these figures from another angle, SISTIC has managed to foreclose competition for [30-40%] and [20-30%] of the Relevant Market through the ASTA and the ATS respectively ([50-70%] combined), by providing discounts on ticketing services to [0-10]% and [0-10]% ([0-10]% combined) of the Relevant Market only. On this basis, CCS is satisfied that the harm on competition caused by the ASTA and ATS is disproportionate to the benefits

from discounts and other incentives to its customers. This is without even considering the broader foreclosure effects on competition for ticket buyers.”

Foreclosure effect of Exclusive Agreements with event promoters

144. The CCS contends that the 17 Exclusive Agreements with event promoters provide “an important bridging effect on SISTIC’s overall strategy in foreclosing competition” in two aspects. First, they broaden the scope of events foreclosed in the Relevant Market, thus further restricting the choice of ticket buyers, and second, they create a “chicken-and-egg” situation (see [7.9.10]) that restricts the choice of venue operators.
145. The CCS notes that for major hirers of the Esplanade, SISTIC does not have many exclusive purchasing agreements with event promoters who stage all or most of their events at the Esplanade. With regard to others, SISTIC has entered into a few exclusive purchasing agreements with event promoters who stage a relatively large portion of their events outside the Esplanade. The CCS contends that since TECL requires all hirers of its venue to use SISTIC pursuant to the ASTA, those event promoters who stage all or most of the events at the Esplanade have become captive customers for SISTIC. For these event promoters, who need to stage some events at the Esplanade, SISTIC is an unavoidable trade partner. The CCS goes further and asserts that an equally efficient firm to SISTIC would be unable to compete not only for those events held at the Esplanade but also for those held outside the Esplanade if these events are organised by the same event promoters who cannot avoid also holding some other events at the Esplanade. Thus, the scope of foreclosure is broadened.
146. As for the SIS, SISTIC has engaged in exclusive agreements with some event promoter who hold some events at the SIS and some outside the SIS. The CCS

submits that the foreclosure effect is similar to that with the Esplanade, except that SISTIC has relatively more exclusive purchasing agreements with the top hirers of the SIS who stage all or most of their events at the SIS. With SIS, SISTIC does not provide customers' data warehousing services. By reason of this the CCS contends that *“engaging the top hirers of the SIS exclusively has the ‘reverse’ effect of foreclosing competition on the partnership with SIS”*. The CCS quotes the examples of the Exclusive Agreements SISTIC entered with [...] and [...]. The CCS says at [7.9.10]:

“Since SISTIC entered into an exclusive purchasing agreement with [...] in April 2006, followed by [...] in October 2007, a ‘chicken-and-egg’ situation has been created – when [...] renew their agreements with SISTIC every year, they cannot switch ticket service provider, because of the restrictions imposed by the SIS; when SSC/SIS opted to automatically renew the ATS for [...] years after the first term expired in February 2009, it could not switch ticket service provider as well because at least [...] % of its hirers (in terms of total turnover of ticket sales) are locked-in by SISTIC. In other words, SISTIC has become an unavoidable trade partner with both the SSC/SIS and the event promoters concerned. An equally efficient firm would not be able to contest for these exclusive relationships with SISTIC...”

147. The CCS asserts at [7.9.14] that *“[f]rom the perspective of broadening the scope of foreclosure effect from events held at the Esplanade and the SIS and those held other venues, CCS estimates that, from January 2006 to March 2009, the 17 Exclusive Agreements accounted for [20-30] % of the Relevant Market by ticket volume, of which only [10-20] % was attributable to events held at the Esplanade and the SIS. The CCS goes further and says that “[i]n terms of the foreclosure effect attributable to the ‘chicken-and-egg’ situation between the SIS and those event promoters who always hold their events at the SIS, CCS estimates that [...] accounted for only [0-*

10]% of the Relevant Market, but a foreclosure of [20-30]% of the Relevant Market was achieved through the ATS with the SIS.

148. Thus, the CCS finds that the harm on competition caused by the 17 Exclusive Agreements with the event promoters is disproportionate to the benefits to customers concerned, “*because SISTIC has achieved a broader scope of foreclosure effect on competition with a narrower scope of discount and other incentives given to its contractual partners*”.

Foreclosure effect on competition for ticket buyers

149. The booking fee initially charged by SISTIC was \$1 for all events. On 1 April 2004, SISTIC increased the fee to \$2 for tickets with a face value of \$20 or higher. On 15 January 2008, SISTIC increased the booking fee to \$3. The CCS says that SISTIC’s booking fee is profitably sustained above competitive levels, and further while discounts and incentives are given to event promoters and venue operators, no discounts or other incentives are given to ticket buyers over the years. Amongst the various fees charged against the event promoters and ticket buyers, the booking fee is the single largest contributor to SISTIC’s revenues. In the FY 2006/2007, the booking fees accounted for [...]% of SISTIC’s Relevant Market turnover. In the FY 2008/2009, after the price increase in January 2008 has been fully reflected, the contribution of the booking fees became [...]%.
150. The CCS contends that an equally efficient firm cannot compete with SISTIC for the ticket buyers. SISTIC had by the Exclusive Agreements engaged the venue operators and the event promoters and by reason thereof the tickets for the majority of the events would be sold by SISTIC. This gives rise to an indirect network effect on the ticket buyers. The CCS says at [7.10.3 to 7.10.4]:

“7.10.3 This pricing strategy is clearly motivated by the consequential relationship of demand between event promoters and ticket buyers. In order to create the indirect network effect on ticket buyers, it is strategically important for SISTIC to engage the venue operators and event promoters first. Once this network effect is created, an equally efficient firm would not be able to compete for ticket buyers, because the majority of events are bound to sell tickets through SISTIC. SISTIC’s profitable increase in booking fee clearly demonstrates that it has little incentive to offer competitive prices to ticket buyers, because it has already become an unavoidable trade partner for the ticket buyers indirectly through the Exclusive Agreements.”

7.10.4 The indirect network effect works both ways. As most ticket buyers buy tickets through SISTIC due to the restrictions under the Exclusive Agreements, more potential ticket buyers will cluster around SISTIC’s advertising, promotion and distribution channels to look out for upcoming events. This in turn attracts more event promoters, including those who are not engaged exclusively by SISTIC, to use SISTIC’s ticketing service in order to reach out to more potential ticket buyers. Since an equally efficient firm could not compete for the venues and events covered under the Exclusive Agreements, it would not be able to match this indirect network effect to attract those non-exclusive event promoters.”

151. By reason of this network effect an equally efficient firm cannot compete with SISTIC for the ticket buyers. As a result, SISTIC has become indirectly “an unavoidable trade partner for the ticket buyers.” At [7.10.6] the CCS says:

“From the perspective of ‘one-way’ network effects between the two sides of the Relevant Market, SISTIC has been able to foreclose competition on both customer groups – event promoters and ticket buyers – by engaging in the Exclusive

Agreements with one group only – the event promoters. From the perspective of ‘two-way’ network effects, the foreclosure effect may even extend to other non-exclusive events, as ticket buyers cluster around SISTIC’s promotion and distribution channels. On the premise, CCS is satisfied that the harm on competition caused by the Exclusive Agreements is disproportionate to the benefits, if any, to the venue operators, event promoters concerned and ticket buyers.”

152. On the basis of various statements made and set out at [7.10.7] of the Infringement Decision, the CCS asserts at [7.10.8] that “*due weight must be given to the harm on consumers caused by SISTIC’s profitable increase in booking fees against ticket buyers.*” The CCS attributes this to the result of the foreclosure of competition from the event promoters’ side of the Relevant Market that conferred the ability on SISTIC to charge higher prices against the ticket buyers. At [7.10.8] it says:

“Based on the above, CCS cannot accept SISTIC’s general statement that its booking fees do not make a big difference to consumers. Instead, due weight must be given to the harm on consumers caused by SISTIC’s profitable increase in booking fees against ticket buyers. It is the result of foreclosure of competition from the event side of the Relevant Market that conferred the ability upon SISTIC to charge higher prices against the ticket buyers.”

153. The CCS turns to what in its view is SISTIC’s “*holistic and integrated strategy of concurrent foreclosure of competition, recoupment of sacrificed profits and artificial perpetuation of dominance*”. The CCS considers that SISTIC’s price structure (i.e. relative price level between event promoters and ticket buyers) is a “*holistic and interactive decision*”. This assertion of the CCS is based on the facts that while discounts are given to event promoters and venue operators, no discount whatever was given to ticket buyers, not even a bulk discount for the purchase of more than one ticket despite the “*operational efficiency*”, and that since 2004, SISTIC had increased

the booking fee twice – the first time in 2004 and the second time in 2008. It is the contention of the CCS that the pricing decisions between the two groups of customers – the event promoters and the ticket buyers – are closely related, and that it is more difficult to charge a higher price against event promoters than against the ticket buyers. At [7.11.7] the CCS asserts:

“An interactive and iterative relationship clearly exists: without sacrificing profits to foreclose competition from the event promoters’ side, SISTIC would not have market power to exploit on the ticket buyers’ side; without recouping sacrificed profits from the ticket buyers’ side, SISTIC would not be able to sustain its profit sacrifice on the event promoters’ side. Without concurrent foreclosure and recoupment, SISTIC would not be able to perpetuate its dominant position. Neither pure competition nor pure exploitation can adequately explain this connection in pricing strategy between the two sides.”

154. According to the CCS, SISTIC’s holistic strategy stems from the Exclusive Agreements, and once competitors’ access to the venue operators and event promoters is foreclosed by SISTIC, *“recoupment and perpetuation are inevitable”*.

Contractual duration and termination of the Exclusive Agreements

155. The CCS takes into consideration the duration of the Exclusive Agreements. The 2008 ASTA is a [...] year contract till [...] and the ATS was renewed for [...] years until [...]. Both the agreements are terminable on [...] notice. The 17 Exclusive Agreements with the event promoters were each for a shorter term – one year and renewable yearly. All these 17 agreements were in force as at 1 January 2006; and none of these had been terminated or were not renewed as of March 2009. Similarly, the ASTA and the ATS were never terminated, and were renewed in [...] and [...]

respectively. The CCS also notes that all these agreements contain “*explicitly exclusive*” conditions that “*require total commitment of purchase solely from SISTIC*”. The CCS says at [7.13.9]:

“In CCS’ consideration, it is the combination of discounts and other incentives with explicit and total commitments that creates the perennial effects for event promoters and venue operators to stay loyal to SISTIC. The key consideration is not how soon these contracts can expire or be terminated, but that (a) SISTIC is an unavoidable trade partner; (b) once a contract is terminated or not renewed, the discounts and incentives would be foregone; and (c) so long as a contract requires total commitment, event promoters and venue operators are restricted from allocating even a minor portion of their demand to other ticketing service providers.”

156. On the basis of all the matters discussed above, the CCS reaches the conclusion at [7.14.11] that the Exclusive Agreements are explicitly exclusionary in nature, and have actually led to substantial and perennial foreclosure effects on competition in the Relevant Market.

V. SISTIC’S CONTENTIONS ON DOMINANCE

157. SISTIC does not dispute or challenge the concept of dominance as stated in the *CCS Guidelines on the Section 47 Prohibition*, which is set out verbatim at paragraphs 83 and 84 above. However, SISTIC contends that it does not hold a dominant position in the Relevant Market, and that the CCS errs in finding that SISTIC holds such a position.
158. SISTIC says that the CCS in assessing dominance has regard to the following: (i) market share; (ii) barriers to entry; (iii) countervailing buyer power; (iv) the ability to profitably sustain price above competitive levels, and (v) the ability to eliminate or

weaken competitors. In SISTIC's submission, the critical consideration is the fact that its market position hinges on two large contracts with two major venue operators, namely: the SIS and TECL. Should SISTIC lose these contracts, it would instantly lose a substantial portion of its market share. Further, there is a credible threat of the venue operators switching to another ticketing service provider (or supplying their own ticketing services), and thus SISTIC's market position is vulnerable, which in turn is a serious competitive constraint. Ultimately, SISTIC is not in a position to "act independently of competitive constraint" or "profitably sustain prices above competitive levels or to restrict output or quality below competitive levels" because doing so would risk losing these critical contracts. For these reasons, SISTIC contends that it could not be correctly considered as holding a dominant position. It has neither the ability to profitably sustain price above the competitive levels, nor the ability to eliminate or weaken competitors and that the CCS's assessment is flawed. The CCS has not correctly assessed, or satisfactorily established either of these propositions.

Market Share

159. SISTIC does not dispute the data given at [6.4.8] and [6.4.10 – 6.4.11] of the Infringement Decision showing the very substantial market share that SISTIC has, and in particular the statement by the CCS that SISTIC's market share had persisted at about [...] % over the period from January 2006 to March 2009. SISTIC considers that reliance on market share as an indicator of dominance is only form-based assessment. There are other factors relevant to the assessment of dominance which might render the level of market share to be redundant. SISTIC relies on the case of *Re TicketMaster Ireland* (referred to earlier) where the Irish Competition Authority ("ICA") held that TicketMaster Ireland would likely not hold a dominant position,

despite holding a 100% market share in the relevant market for a period of more than 7 years.

160. While SISTIC concedes that market share is a relevant consideration in the assessment of dominance, its position is that this is only one indicator of an undertaking's position within a market and is not determinative of whether a dominant position is held. In this regard, SISTIC relies on what the CCS's expert, Mr Coombs, says at paragraph 2.13 of his first report:

"...a high market share would not necessarily establish dominance since an otherwise dominant position might be constrained by [the threat of potential competition from new entrants or other constraints, including the bargaining strength of buyers]..."

161. SISTIC contends that the critical considerations in determining whether SISTIC holds a dominant position are whether SISTIC is competitively constrained by:

- (a) the threat of potential entry; and/or
- (b) the bargaining strength of buyers.

SISTIC contends that either of these elements on its own could be sufficient to determine that SISTIC does not have a dominant position. Their presence and effect in combination may also lead to such a finding.

162. SISTIC maintains that its retention of a high market share is dependent on it having a small handful of contracts. The loss of a single contract, namely, either the ASTA or the ATS, would immediately and significantly change SISTIC's position. On the basis of the data provided by the CCS at [7.12.3], up to [...] % of the entire ticketing demand stems from the ASTA and the ATS.

163. It is SISTIC's submission that the ability and incentive of these two major venue operators to easily switch ticketing services, or to self-supply their own ticketing services countervail any market power that SISTIC might otherwise have had. Further, this combined with the "insignificant barriers to entry into the market" resulting in SISTIC's position being volatile and contestable, should have led to a finding by the CCS that SISTIC does not hold a dominant position (despite its market share).

Barriers to entry and countervailing buying power

164. SISTIC points out that the threat posed by potential competition is an important consideration and that the low barrier to entry would indicate that the exercise of market power is unlikely, even if the undertaking concerned has a large market share. In SISTIC's submission, the critical question is whether either of the large venue operators, namely, TECL and the SIS, could credibly switch to another ticketing service provider. SISTIC's market share and position are dependent primarily on two contracts and the credible threat of these two venue operators to switch ticketing service provider exerts a significant countervailing power on SISTIC's position and constrains its actions. SISTIC's submission is that in the assessment of barriers to entry and potential competition, the central focus should be on whether there are barriers to entry of such level that the two venue operators could not credibly threaten to switch ticketing service providers.

165. SISTIC again relies on the case of *Re TicketMaster Ireland*, in which the ICA determined in that case that the ability of two major event promoters, MCD Promotions Ltd ("MCD") and Aiken Promotions Ltd ("Aiken"), to switch to an alternate supplier or to self-supply their tickets acted as the countervailing power and prevented TicketMaster Ireland from engaging in abusive conduct. It was also found

in that case that this factor provided “*compelling evidence*” that TicketMaster Ireland was not dominant. SISTIC relies on following part of the decision of the ICA which it considers as the “the critical finding”:

“...have considerable countervailing buyer power vis-à-vis TicketMaster Ireland. Not only do they account for the majority of TicketMaster’s Ireland’s ticket sales, buy they can credibly threaten to switch to alternative promoters or self supply. It is the ability of the Promoters to award multi-year contracts for large volumes of tickets to an outsourced ticketing service provider that enables the latter to enter the market and overcome any entry barriers associated with the economies of density.”

166. Relying on that case, SISTIC contends that it is not dominant for substantially the same reasons, that is, the ability of the two largest venue operators, namely, TECL and the SIS, to enter into multi-year contracts for large volumes of tickets with another ticketing service provider in Singapore would enable those parties to overcome any barriers to entry into the Relevant Market, and it is this credible threat that competitively constrains the actions of SISTIC, regardless of its market share.
167. In SISTIC’s submission, the critical question is whether either of these two large venue operators could credibly threaten to switch from SISTIC to another ticketing service provider by either of them exercising its countervailing market power against SISTIC to competitively constrain its actions. It is submitted by SISTIC that this credible threat is real. There is no dispute between the parties that indirect network effects do not inhibit TECL or the SSC from switching to another ticketing service provider. In this regard, the CCS has conceded at [6.5.34] that indirect network effects could be overcome quickly if one of SISTIC’s major partners decides to switch ticketing service providers or to sponsor the entry of a new provider.

168. Therefore, in SISTIC's submission, the critical question here is whether there is a credible threat of either of the venue operators exercising countervailing market power against SISTIC to competitively constrain its actions. Reverting to the evidence on this issue, SISTIC refers to the report of Mr Coombs, the CCS's expert, and that of Mr Ridyard, SISTIC's expert. In his report, Mr Coombs accepts that the venue operators have the ability to switch to an alternative supplier, but they have no incentive to do so, as they are not buyers of SISTIC's services. This is consistent with what the CCS says in the Infringement Decision. At [2.94] of his report dated 7 March 2011, Mr Coombs says:

"The Decision concludes that the venues have the ability to help an entrant to overcome these entry barriers. However, the Decision also concludes that they do not have the incentive to do so, and evidently have not done so. They lack the incentive because they are not the promoters for the majority of the events held at their venues. In other words, they are not in fact a buyer of SISTIC's services for the majority of events."

169. In that respect, Mr Ridyard in his report takes a different view. At [19 – 21] of his report dated 10 May 2011, he says:

"The assumption on which Mr Coombs appears to rely here is that the major venues are indifferent as to the price charged by SISTIC for events that are staged at their venue unless they are also engaged as promoters for those events. However, that assumption ignores any consideration of the commercial incentives that would govern the venues' attitude towards ticketing costs. Suppose, for the sake of argument, that the competitive level of ticket agent remuneration is \$4 per ticket, but that SISTIC were to charge \$6 per ticket for this service. If the venue owner sells the venue to the promoter

on the condition that SISTIC must be used as the ticket agent, this \$2 surcharge will act like a tax on the promoter's use of the venue. Since the promoter must count on the extra \$2 being added to the effective price paid by the consumer for every ticket purchased, it will have the effect of reducing the face value of the tickets that the promoter can charge consumers for that event by a corresponding amount. It might, for example, cause the promoter to recalculate that instead of selling an event out at \$20 per ticket it will instead have to charge \$18 per ticket in order to sell the available seats.

It is straightforward to see how that reduced ticket price potential will feed through directly into the fee that the promoter is prepared to pay for the hire of the venue, since for the promoter that willingness to pay must be directly related to the ticket sales revenues it can achieve. Hence, if the venue owner cares about its ability to sell its capacity to promoters, it must also care about the "tax" that SISTIC's pricing decisions impose on the usage of its venue. For this reason, it is incorrect to assume that the venues have no incentive to use their bargaining power against SISTIC.

170. Mr Coombs, in his subsequent report dated 31 May 2011 at [4.2 – 4.6], considers that Mr Ridyard's argument is "logical as a matter of economic theory", but does not fit with the facts of the case.
171. SISTIC submits that the obvious way in which countervailing power would be exercised in this case is by one of the major venue operators terminating its contract with SISTIC and signing a new contract with an alternative ticketing service provider, or at least threatening to do so. In support it is submitted that both the CCS and Mr Coombs have conceded that TECL and the SSC clearly have the power to sponsor a new entry and thus this threat is credible. The threat of TECL and the SSC

terminating their contracts and appointing another ticketing service provider is very real and is a credible threat which is supported by evidence. It should be noted that the contracts made by SISTIC with TECL and the SSC are both terminable on [...] notice by either party without penalty, and as a matter of fact until [...], SISTIC's contract with TECL was terminable upon only [...] notice. SISTIC relies on the evidence given by Mr Kenneth Tan, the chief executive officer of SISTIC, to the effect that venue operators and event promoters gave SISTIC pressure to improve its service all the time; in fact, even ticket buyers gave SISTIC feedback to improve its service. He also said that it was always in his mind that if SISTIC does not perform TECL would "go elsewhere". According to him, TECL had said at certain times that SISTIC's level of service was not up to standards and SISTIC had to improve to meet the standards as required. So far as service is concerned SISTIC is treated by TECL as a vendor like any others and TECL would evaluate its service accordingly.

172. SISTIC also relies on the fact that OmniTicket successfully bid for and obtained exclusive ticketing rights for the *Singapore Grand Prix* in 2008, notwithstanding that it did not own or operate any physical sales outlet in Singapore. In addition SISTIC relies on the following:

- (a) that Gatecrash in 2008 approached TECL with regard to determining the requirements of TECL in a ticketing agent and enquired what it would need to do to become an authorised agent of TECL;
- (b) that Tickets.com through its chief executive officer, Mr Gerald S P Edwards, stated in a formal interview with the CCS that Tickets.com would be in a position to handle any type of event or venue.

173. On the basis of the evidence and matters raised in [69] of its Written Submissions, SISTIC submits that it is competitively constrained by the threat of losing its contracts with its major venue operators and as such, SISTIC does not hold a dominant position.

No indirect network effects in the Relevant Market

174. SISTIC contends that there are no indirect network effects in the Relevant Market. The CCS relies on SISTIC's website, physical distribution network and customer database as evidence of the presence of indirect network effects. In SISTIC's submission, none of these matters evidence the existence of an indirect network effect. In fact, SISTIC's competitors have replicated these features and this shows the absence of such indirect network effect.
175. Another reason advanced by SISTIC is that ticket buyers' demand is event-specific and whether ticket service providers have access to more events is not very material to ticket buyers. Their purchases are event-driven. SISTIC relies on a survey conducted in the United Kingdom for the UK Competition Commission ("UKCC") and published in August 2009, in the context of its decision on the *TicketMaster / Live Nation* merger. In that case, the survey showed 96% of all respondents indicated that they were looking to buy tickets for a particular event, i.e. 96% of the purchasers first determined the event they wished to attend and then searched for the avenue to purchase the tickets. In other words, the ticket buyers' demand or decision is event-driven. Since the ticket demand is primarily event-driven, the access of the ticketing agent to customers may not be a significant consideration.
176. SISTIC also criticises the CCS's reliance on SISTIC's website as evidence of indirect network effect. SISTIC does not dispute the statement made by the CCS that

SISTIC's website "*comprehensively outperforms its competitors*", and that the website is the "*first port of call*". But, in SISTIC's submission, all that established is that SISTIC's website enjoys a higher traffic and in no way indicates that buyers' purchase decisions are not event-driven. Thus, the CCS's finding that "*ticket service providers are more attractive to ticket buyers if they have access to more events*" is not sustainable on the evidence.

177. Lastly, SISTIC contends that its website is not a barrier to entry (whether by way of indirect network effect or otherwise). The establishment of a website is a simple process and would not incur a great deal of sunk costs. Both SISTIC's competitors, Tickets.com and Gatecrash, have well established and sophisticated websites in place and these websites are fully interactive and provide for online booking and various other services. Accordingly, SISTIC contends that the CCS's assertion (at [34] of its Defence) that the presence of indirect network effect renders the replication of SISTIC's website "*difficult*" is completely without any basis.
178. Next, SISTIC does not accept the CCS's contention that the evidence of SISTIC's physical distribution network also establishes an indirect network effect. In this regard, SISTIC says that its competitors have extensive physical distribution networks. At the time of the issue of the Infringement Decision, SISTIC had a physical distribution network of [...] outlets, and by comparison, Gatecrash's tickets could be purchased at any of the [...] Singapore Post Offices and [...] S.A.M. machines which are located around the whole of Singapore. Similarly, at the time the Infringement Decision was issued, Tickets.com already had an established network of [...] agencies nationwide, many of whom were located in shopping malls and convenient locations. It is asserted by SISTIC that the CCS has ignored these facts in its Infringement Decision, and that the CCS has not stated any valid reason why the

physical networks of SISTIC's competitors are insufficient or inferior to SISTIC's network. Thus, it has been established that SISTIC's competitors, Tickets.com and Gatecrash have been able to secure rather extensive networks through arrangements with shopping centres, information centres, Singapore Post branches and in respect of S.A.M. machines.

179. SISTIC also points out that its arrangements with shopping centre information counters are also contestable and are terminable on three months' notice without penalty. Whilst these arrangements are exclusive, they are to prevent competitors from having a free-ride on the investments made by SISTIC in training the staff at these counters. But there is nothing preventing Tickets.com or Gatecrash or any other potential entrant from competing for these outlets.
180. Thus, SISTIC submits that it cannot be established that SISTIC's exclusive arrangements are reinforcing an indirect network effect thereby making the replication of SISTIC's distribution network difficult as suggested by the CCS, on the ground that the evidence shows that SISTIC's competitors have extensive networks in place already.

SISTIC's customer database

181. SISTIC admits that it has a customer database, but it contends that this does not establish an indirect network effect between ticket buyers and event promoters. The CCS relies on the statements of Tickets.com and Gatecrash and the results of the Survey of event promoters on the importance of a large database. However, SISTIC points out that the size of the database is but one of the factors which event promoters take into consideration in choosing a ticketing agent, and that the CCS has overstated the importance of this factor. As stated above, [...] % of the ticket purchasers are

event-specific, and the large customer database is only important to a small group of consumers (about [...]%) who find out about events through this medium.

182. Lastly, SISTIC points out that TECL also has access to SISTIC's customer database. Therefore, any new provider of ticketing services to TECL could potentially have immediate access to the same database.
183. SISTIC criticises that the CCS has not assessed the critical question of the feasibility of other options that the competitors might be able to pursue to increase the sizes of their respective databases. Therefore, the CCS has no reasonable basis to assert that there is significant difference between the databases of SISTIC and its competitors.

Conclusion on indirect network effect

184. SISTIC concludes that the CCS has not established that indirect network effects exist between ticket buyers and event promoters, and that no such effects exist. In particular, the CCS has not established that two criteria necessary to establish the network effects exist, namely:

- (a) that ticketing service providers are more attractive to ticket buyers if they have access to more events; and
- (b) that the notion that access to more ticket buyers makes a ticketing service provider more attractive to event promoters.

Further, the popularity of SISTIC's website, its distribution network, and its customer database are no evidence of the existence of indirect network effects.

Conclusion on barriers to entry and countervailing power

185. On barriers to entry, SISTIC concludes that it is significantly constrained by the credible threat of its major venue operators exercising their countervailing power to switch to an alternative ticketing service provider or self-supplying their own ticketing needs. SISTIC relies on the concession of the CCS that any indirect network effects in the Relevant Market could be overcome quickly by TECL or the SIS switching to an alternative ticketing service provider. In SISTIC's submission, both these venue operators have the ability and the incentive to credibly threaten SISTIC with such switch so as to competitively constrain its actions.
186. SISTIC challenges the Infringement Decision on two further factors relied upon by the CCS, namely:
- (a) SISTIC's ability to profitably sustain price above the competitive level and
 - (b) SISTIC's ability to eliminate and/or weaken competitors.

SISTIC's ability to profitably sustain price above competitive level

187. On this factor, the CCS focuses primarily on the increase of booking fee from \$2 to \$3 per ticket on those tickets the face value of which is above \$20 in January 2008. The CCS relies on this to assert that SISTIC's price increase has been sustained profitably and that it is above the competitive level. The CCS notes that this increase had increased considerably SISTIC's profitability. According to SISTIC, the CCS in reaching this conclusion looks at SISTIC's profitability, the booking fees charged by SISTIC's competitors and the booking fees charged in certain other countries.
188. SISTIC's contention is that in so doing, the CCS has fallen into errors. As the market is a two-sided market, an assessment and a comparison of the booking fees alone is

meaningless. It is the price structure across the two sides of the market that matters, rather than absolute prices on either side. In this regard, SISTIC relies on the following passage at [31] of Mr Ridyard's first report dated 10 January 2011:

“The classic illustration is the newspaper which earns income both from the sale of space to advertisers and the sale of the newspaper to consumers. There are some complex interactions between these markets which can lead to a range of different equilibria. For example, by reducing the cover price of the newspaper the newspaper can increase readership thereby increasing the willingness of advertisers to buy advertising space. Different newspaper publishers see different trade-offs between these factors, and in some cases (i.e., with “free newspapers”) the optimal commercial choice is to charge nothing at all for the newspaper and to rely entirely on advertising income to cover the costs of the enterprise.”

189. SISTIC points out that the need to look at both sides simultaneously is also appreciated by the CCS in the Infringement Decision at [A5.3.2]:

“For a two-sided market, price level (more precisely, the absolute price level of either side) is not the only factor. Price structure (i.e., the relative price level between the two sides) is also an important determinant of the volume of output. It follows that the profit-maximising strategy of a seller in a two-sided market is an integrated, holistic decision of the level and structure of prices across both sides. One cannot rationalise such a strategy by analyzing the price level of either side in isolation”

190. On the basis of its own analysis, SISTIC says that the CCS focuses almost entirely on the booking fees in isolation of revenue obtained from event promoters, and that the only assessment which includes event promoter revenue is the CCS's calculation of the “effective ticket prices” which, the CCS claims, shows that SISTIC's effective

price is above the competitive level. SISTIC submits that the analysis of effective price does not establish that SISTIC's price is above the competitive level.

191. SISTIC contends at [135] of its Written Submissions that the differences in service quality and infrastructure between SISTIC and its competitors justify the increase in the booking fee and these are:

- (a) better reliability – SISTIC manages its own in-house ticketing system (“StiX”) through a dedicated IT team specialised in servicing the application, infrastructure, database and web-portal;
- (b) system capability – SISTIC’s system accommodates more concurrent ticket buyers;
- (c) system security and scalability – SISTIC has invested in the security and scalability of its system to a level unmatched by its competitors;
- (d) dedicated personnel assigned to handle each account and the respective customer needs;
- (e) overseas ticketing agents – SISTIC has overseas ticketing agents to promote ticket events held in Singapore;
- (f) ticket protector insurance – SISTIC offers ticket protector insurance for tickets purchased through SISTIC;
- (g) more distribution outlets – SISTIC currently has more dedicated physical distribution outlets than its competitors;
- (h) established and well trained agencies, call centres and box offices;
- (i) premium customer services – SISTIC has taken the initiative to provide service innovations to address the needs of event promoters, e.g. SISTIC has a

“seat expiry prompter” which sends reminders to event promoters to release seats which have been put on hold closer to the date of the event;

- (j) financial management procedures - SISTIC has put in place strict financial management and prompt event settlement procedures; and
- (k) gate collection held on trust – ticket buyers are assured that if a show handled by SISTIC at any venue is cancelled, ticket buyers will receive a refund.

192. Mr Ridyard in his report dated 10 January 2011 at [66] says that SISTIC has made significant investments which have resulted in noticeable quality improvements in SISTIC’s system performance, and in particular, in respect of the availability of SISTIC’s ticketing system, there is significant improvement from January 2008.

193. SISTIC complains that the CCS has made no assessment or allowance for such factors (as above stated) and has not compared how SISTIC’s system reliability and security compares with that of its competitors. With respect to the investments made by SISTIC, the CCS dismissed these investments on the ground that they relate to SISTIC’s overseas business expansion. In its Defence the CCS asserts that there have been “*no significant investments by SISTIC in the Relevant Market from April 2006 onwards*”. SISTIC submits that to the contrary more than \$1 million was invested in SISTIC’s web portal and ticketing engine which were investments directly relevant in the Singapore market in the financial year 2007/2008.

SISTIC’s ability to eliminate and weaken competition

194. SISTIC contends that on this issue the CCS relies on only two specific events, namely the alleged “exit” of TicketCharge from the Relevant Market and the fact that one event promoter reluctantly used SISTIC in respect of one particular event. One of

these events is factually incorrect and neither event establishes that a competitor has been weakened or that SISTIC has the ability to eliminate or weaken a competitor.

195. In relation to the alleged exit, what transpired was that TicketCharge in 2006 was acquired by Quebec Leisure International Pte Ltd and still exists as the franchise Tickets.com. Therefore, this was not an exit of a competitor. In fact it was acknowledged by the CCS at [6.3.4] of the Infringement Decision that there was no change in the number of competitors in the Relevant Market. The sole evidence relied upon by the CCS is the statement by Mr Kenneth Tan of SISTIC to the effect that [...]. SISTIC disputes that this is really evidence to support that TicketCharge was weakened.
196. The second event cited by the CCS was in relation to Quebec Leisure's inability to use Tickets.com as its ticketing service provider for the show "*My Fair Lady*" staged by Quebec Leisure at the Esplanade. In respect of this event SISTIC says that the evidence suggests that the inability to use Tickets.com was due to TECL "*not being confident of the system of Tickets.com*", and that is quite distinct from the supposed dominance of SISTIC. SISTIC concludes that the events cited by the CCS do not establish what the CCS contends, i.e. that SISTIC has the ability to weaken or eliminate competitors in the Relevant Market.
197. On the basis of what it contends, SISTIC concludes that it does not hold a dominant position in the Relevant Market. It is significantly constrained by its major venue operators which have the ability and the incentive to credibly threaten SISTIC with the loss of the Exclusive Agreements. Nor has the CCS established that SISTIC has the ability to price above the competitive level or the ability to weaken or eliminate its competitors.

VI THE CCS'S CONTENTIONS ON DOMINANCE

198. On the issue of dominance, the CCS refers to [3.3] of the *CCS Guidelines on the Section 47 Prohibition*, which provides that an undertaking will not be deemed dominant unless it has substantial market power and that market power arises where an undertaking does not face sufficiently strong competitive pressure and can be thought of as having the ability to profitably sustain prices above competitive levels or restrict output or quality below competitive levels. Next, the CCS refers to the cases of *United Brands Company and United Brands Continental BV v Commission of the European Communities*, Case 27/76 [1978] ECR 207; [1978] 1 CMLR 429 (“*United Brands*”) and *Hoffmann-La Roche* as laying down that the definition of dominance consists of three elements: (i) there must be a position of economic strength on a market which (ii) enables an undertaking to prevent effective competition being maintained on that market by (iii) affording it the power to behave independently to an appreciable extent. According to the CCS, the case law establishes that the legal threshold for dominance is satisfied so long as it is established from evidence that an undertaking is capable of profitably increasing prices above the competitive level for a significant period of time and does not face sufficiently effective competitive constraints in so doing. There is no requirement to establish actual price increases or any of the other parameters of competition such as impact on output, innovation, the variety or quality of goods or services that can be influenced by the dominant undertaking.
199. The CCS asserts that in any event, the evidence considered in the Infringement Decision includes actual incidents of price increases that demonstrate SISTIC’s ability to profitably sustain prices above competitive levels; SISTIC’s ability to eliminate or

weaken competition; SISTIC's persistently high market share and the corresponding low shares of its competitors; the barriers to entry to the Relevant Market, and the lack of countervailing buyer power. On the basis of a holistic consideration of a host of relevant factors and the interplay between them, the CCS found SISTIC to be overwhelmingly dominant in the Relevant Market: see [6.2], [6.4], [6.5] and [6.6] of the Infringement Decision.

200. The CCS, at [81] of its Written Submissions, asserts that SISTIC's "*persistently high market share over a sustained period of time*" is in itself extremely strong indication of its dominance. At [82] of its Written Submissions, the CCS says:

"SISTIC's persistently high market [sic] share over a sustained period of time, taken together with compelling factors such as SISTIC's exclusive agreements which enhanced the barriers to entry; the lack of countervailing buyer power exerted on SISTIC; and SISTIC having, to a significant extent, profitably sustained prices above competitive levels, CCS concluded that SISTIC held an overwhelmingly dominant position in the relevant market."

201. The CCS relies on the case of *AstraZeneca AB and AstraZeneca plc vs European Commission*, Case T-321/05 ("*AstraZeneca*") for the proposition that SISTIC's "*persistently high market share over a sustained period of time*" is in itself extremely strong evidence of its dominance. In that case, the General Court reiterated the existing case law to the effect that:

- (a) the possession over time of a very large market share is in itself, save in exceptional circumstances, evidence of existence of a dominant position; and
- (b) a market share of between 70% and 80% is itself a clear indication of the existence of dominant position.

202. In the Infringement Decision at [6.4.8 to 6.4.11], the CCS finds that SISTIC sustained a large market share over the period from January 2006 to March 2009. In terms of volume of tickets sold SISTIC's market share persisted at about 90% in the Relevant Market for this period. SISTIC's market share dipped slightly in 2008 owing mainly to GTN winning the contract to provide ticketing services for the *2008 Singapore Grand Prix*. However, in the following year, SISTIC recovered its market share to about [...]% in the period January 2009 to March 2009. In 2009, SISTIC was appointed the ticketing service provider for the event, *2009 Singapore Grand Prix*. The CCS asserts that on an aggregated basis, SISTIC had a market share of about [...]% in the Relevant Market over the period from January 2006 to March 2009.
203. In terms of revenue earned from the sale and distribution of tickets, SISTIC had also a large market share during the same period, January 2006 to March 2009. Its market share was over [...]% during 2006 and 2007. In 2008, its market share dropped considerably to about [...]%, and this was again due to GTN winning the contract for the provision of ticketing services for the *2008 Singapore Grand Prix*. This single event according to the CCS accounted for more than [20-30]% of the revenues for the entire Relevant Market in 2008. However, in the following year, SISTIC became the ticketing service provider for this event. According to the CCS, on an aggregated basis, SISTIC had a market share of about [...]% of the total ticketing revenues in the Relevant Market for the period January 2006 to March 2009.
204. Thus, the CCS's position is that based on its share market estimates, both by volume and by revenues, SISTIC has sustained its market share way above its competitors, and has sustained persistently its high market share over time, (as opposed to having high market share at a point of time) and this persistently high market share is

compelling evidence of SISTIC's dominant position. It was far above the indicative starting point of 60% stated in the *CCS Guidelines for the Section 47 Prohibition*.

205. The CCS submits at [92] of its Written Submissions that in the Infringement Decision at [6.4.1 to 6.5.36] there is other evidence that shows that SISTIC does not face any significant constraints that would prevent it from exercising market power. According to the CCS, the “*key question*” in assessing dominance is whether a firm has the ability to exploit the market power and not whether or not it has exercised that ability in practice.

Barriers to entry

206. The CCS contends that SISTIC's arguments on the issue of barriers to entry neglect the interplay of various factors, that is, the presence of indirect network effect renders the replication of SISTIC's website, customer database and the distribution outlets difficult. SISTIC has the Exclusive Agreements which reinforce the indirect network effect, and the actual evidence with respect to the website, customer database and distribution outlets of SISTIC and its competitors indeed demonstrate the working of indirect network effects in the Relevant Market. In particular, SISTIC –
- (a) has fundamentally misunderstood the notion of indirect network effects in the Relevant Market (see [35 to 38] of the Defence);
 - (b) has failed to acknowledge that the two way indirect network effect exists between event promoters and ticket buyers (see [39 to 42] of the Defence);
 - (c) has interpreted the economic concept of barriers to entry in an extreme manner in that they must be absolutely insurmountable (see [43 to 48] of the Defence);

- (d) has not challenged the CCS's finding that its website contributed to a barrier to entry;
- (e) fails to address the interplay between distribution outlets and indirect network effect that constituted a barrier to entry;
- (f) avoids the facts pertaining to its customer database being a barrier to entry; and
- (g) insists that the Exclusive Agreements do not create a barrier to entry.

Exclusive Agreements as barriers to entry

207. The CCS considers the strategic conduct on the part of SISTIC as an entry barrier. In this regard, it says that the Exclusive Agreements enhance barriers to entry. In support, it relies on the ECJ's decisions in *United Brands* and *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities*, Case 322/81 [1983] ECR 3461; [1985] 1 CMLR 282.
208. The CCS acknowledges that SISTIC attained its dominance without exclusive agreements. But subsequently, SISTIC had taken advantage of the indirect network effect in the Relevant Market to perpetuate its dominance through the use of the Exclusive Agreements. The CCS concedes that indirect network effect in the Relevant Market is "*not natural and not unbreakable*" and should SISTIC's major venue operators, the SIS and TECL, ever choose to switch to another ticketing service provider or 'sponsor' new entry, this competitor would be able to attain network effect quickly. However, according to the CCS, it is the Exclusive Agreements that have been preventing the venue operators and customers from doing so.

Countervailing buying power

209. The CCS maintains what it says in the Infringement Decision that ticket buyers and event promoters have no countervailing buyer power. The event promoters are fragmented in Singapore and even more so are the ticket buyers who are individuals. The venue operators namely, the SIS and TECL, have strong countervailing buying power but they have weak incentives to exercise that power, and the evidence suggests that they do not exercise their powers. That is because they normally are not exactly the “buyers” of SISTIC’s ticketing service. In certain cases they may also be the event promoters but the event promoters are the parties who actually buy SISTIC’s ticketing services. The CCS takes the position *“that the venue operators, despite having strong bargaining power, have weak incentives to exercise their power against SISTIC, because the profit and loss implications would be borne by event promoters.”* At [114] of its Written Submissions, the CCS says:

“In light of the above, it is clear on the facts and the various factors considered by CCS that the event promoters and ticket buyers have no countervailing buyer power against SISTIC. Thus, taken together with SISTIC’s persistently high market shares and the barriers to entry, it is even more convincing that SISTIC does indeed occupy a dominant position in the Relevant Market. As established in United Brands and Hoffman La-Roche, these factors accord SISTIC a position of economic strength on the Relevant Market and afford it the power to behave independently to an appreciable extent.”

210. In conclusion, the CCS contends at [139 and 140] as follows:

“139. Despite SISTIC’s attempt to dismantle the cumulative assessment of these factors by isolating them into stand-alone factors, CCS has holistically

considered the combination of all relevant factors in concluding that SISTIC is dominant in the Relevant Market.

140. *In making the finding that SISTIC is dominant (i.e. the extent to which there are competitive constraints on an undertaking's ability to act independently) in the Relevant market, CCS considered the following factors:*

- i. SISTIC's persistently high market share and the corresponding low shares of its competitors;*
- ii. the barriers to entry to the relevant market;*
- iii. lack of countervailing buyer power;*
- iv. SISTIC is able to profitably sustain its prices above competitive levels;*
- v. actual incidents of price increase that demonstrate SISTIC's ability to profitably sustain prices above competitive levels; and*
- vi. SISTIC's ability to eliminate or weaken competition."*

211. The CCS therefore concludes that, on the basis of all the factors which it has taken into consideration, SISTIC is dominant in the Relevant Market.

VII THE BOARD'S DECISION ON DOMINANCE

212. The concept of dominance is briefly set out in paragraph 3.3 of the *CCS Guidelines on Section 47 Prohibition* and is as follows:

"An undertaking will not be deemed dominant unless it has substantial market power. Market power arises where an undertaking does not face sufficient 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."

On the basis of this, the CCS at [73] of its Written Submissions says that “[i]n other words, the ability to act independently without sufficient competitive constraint is the defining concept of dominance”. The Board does not find any serious dispute on the concept of dominance. Certainly there is no challenge by SISTIC on the concept of dominance as stated in paragraph 3.3 of the *CCS Guidelines on Section 47 Prohibition*.

213. In considering the issue of dominance, the factors that should be considered are
- (i) market share;
 - (ii) ability of the undertaking to profitably sustain prices above the competitive levels;
 - (iii) ability to eliminate or weaken competitors;
 - (iv) countervailing buyer power; and
 - (v) barriers to entry.
- (i) **Market Share of SISTIC**

214. With reference to the market share of an undertaking, paragraphs 3.7 to 3.8 of the *CCS Guidelines on Section 47 Prohibition* provides:

“3.7 *Market shares, by themselves, may not necessarily be a reliable guide to market power. Other determinants of competition, such as entry barriers, the degree of innovation, product differentiation, the responsiveness of buyers to price increases, and the price responsiveness of competitors, may need to be considered as well. High market shares are not necessarily an indication that competition in the market is not effective. For example, a persistently high market share could be the result of*

persistently successful innovation in a market, where undertakings compete to improve the quality of their products.

3.8 *Generally, as a starting point, the CCS will consider a market share above 60% as likely to indicate that an undertaking is dominant in the relevant market. Other factors mentioned earlier, where relevant, may then be considered in determining if an undertaking is dominant. Similarly, dominance could potentially be established at a lower market share, if other relevant factors provided strong evidence of dominance.”*

215. A large market share of an undertaking is an important factor in assessing dominance. It provides a useful first indication on the extent to which the undertaking is faced with existing competition in the Relevant Market.
216. It is not disputed that, in terms of the number of tickets sold, SISTIC had a large market share of about [...] % over the period from January 2006 to March 2009, with the exception of 2008 when its market share dipped slightly to [...] %. That was due largely to GTN winning the contract to provide ticketing services for the 2008 *Singapore Formula One Grand Prix*. However, in 2009 SISTIC won the contract for providing ticketing services for the *Singapore Formula One Grand Prix* and it regained its large market share to about [...] % in the period January 2009 to March 2009. The CCS asserts that on an aggregate basis SISTIC had a market share of about [...] % over the period from January 2006 to March 2009.
217. On the basis of revenues, SISTIC’s market share was over [...] % in 2006 and 2007. However, in 2008, SISTIC’s market share dropped to about [...] % and this was due to GTN winning the contract for providing ticketing services for the *Singapore Formula One Grand Prix*. On an aggregate basis, SISTIC had a market share of about [...] %

of the total ticketing revenues in the Relevant Market over the period from January 2006 to March 2009.

218. The CCS asserts that based on its market estimates, both by volume and by revenues, SISTIC has sustained its market share way above those of its competitors during the period from January 2006 to March 2009. This is not disputed by SISTIC. In fact, SISTIC's website states that in Singapore it is "*the largest ticketing service provider selling tickets for more than 90% of a wide variety of arts, entertainment and sports events*". In addition, there is an Information Memorandum for divestment prepared by KPMG, which states that SISTIC estimates its market share to be about 89% for the financial year 2006/2007.
219. SISTIC does not challenge the large market share but submits that reliance on large market share as an indicator is a form-based approach, and that other factors in the assessment of dominance might render the level of market share held to be redundant. It relies heavily on the case of *TicketMaster Ireland* where the ICA held that TicketMaster would likely not hold a dominant position, despite holding 100% market share in the relevant market for a period of 7 years. However, as the CCS points out, the ICA did not in fact decide on the issue of dominance in that case. At [3.5], the ICA said:

"Under existing case law, TicketMaster Ireland, with a market share of 100% since 1998 in the relevant market, would be presumed dominant unless there were 'exceptional circumstances'. The evidence in Section 2 above, including the countervailing buyer power of the Promoters which is sufficient to offset any barriers to entry into the relevant market provides compelling evidence that TicketMaster Ireland is not dominant. However, since the Competition Authority is satisfied that two major promoters, MCD and Aiken, prevent TicketMaster Ireland from abusing

any dominant position it might have by charging excessive booking fees, the Competition Authority does not have to decide if TicketMaster Ireland is dominant in coming to the view that there is no breach of either Section 5 of the Act or Article 82 of the Treaty.”

220. The significance of a very large market share in the assessment of dominance has been affirmed in the case of *AstraZeneca* where the Court re-affirmed the following:

“242 As regards, first of all, the relevance attached to the possession of substantial market shares for the purposes of determining whether AZ held a dominant position, it should be borne in mind that, although the importance of market shares may vary from one market to another, the possession over time of a very large market share is in itself, save in exceptional circumstances, evidence of the existence of a dominant position (Hoffmann-La Roche v Commission, paragraph 239 above, paragraph 41; Case T-30/89 Hilti v Commission [1991] ECR II-1439, paragraph 91; and Joined Cases T-24/93 to T-26/93 and T-28/93 Compagnie Maritime Belge Transports and Others v Commission [1996] ECR II-1201, paragraph 76).

243 In this respect, it has been held that market shares of more than 50% constitute very large market shares (Case C-62/86 AKZO v Commission [1991] ECR I-3359, paragraph 60) and that a market share of between 70% and 80% is in itself a clear indication of the existence of a dominant position (Hilti v Commission, paragraph 242 above, paragraph 92, and Joined Cases T-191/98, T-212/98 to T-214/98 Atlantic Container Line and Others v Commission [2003] ECR II-3275, paragraph 907).”

221. The CCS contends 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 Board agrees with this proposition. In this case, in particular, there are no exceptional circumstances shown by SISTIC to rebut such indication.

SISTIC’s ability to profitably sustain price above competitive levels

222. As referred to above, paragraph 3.3 of the *CCS Guidelines on Section 47 Prohibition* provides that market power arises where an undertaking does not face sufficiently strong competitive pressure and can be thought of as having the ability to profitably sustain prices above the competitive levels or to restrict output or quality below competitive levels. The CCS says that the definition of market power refers to the “*ability*” to profitably sustain prices above competitive levels. It is not required that the undertaking has actually done so, or has done so consistently for every single year. It is submitted that if the evidence shows that the undertaking has indeed priced profitably above competitive levels for a sustained period, it cannot be said that the undertaking has no ability to do so.

223. On this factor, the CCS relies heavily on the increase of the booking fee from \$2 to \$3 for tickets with a face value above \$20. On 15 January 2008, SISTIC increased its booking fee charged against ticket buyers by 50% from \$2 to \$3 for those tickets with a face value above \$20. In the Infringement Decision at [6.2.3] the CCS says:

“On 15 January 2008, SISTIC raised its booking fee charged against ticket buyers by 50% from \$2 to \$3 for those tickets with face values higher than \$20. Although the booking fee is only one component of SISTIC’s prices charged to one group of its customers (i.e. the ticket buyers), it is the single most significant contributor to SISTIC’s revenues. In FY07/08 and FY08/09, when the booking fee increase was partially and fully reflected, the booking fee accounted for [...] % and [...] % of the Relevant Turnover respectively. Importantly, revenues from event promoters during the same period did not decline, indicating that the incremental revenues from booking fees are not ‘competed away’ on the event side of the Relevant Market.”

224. At the company level, the CCS finds that SISTIC's return on invested capital from the financial year 2006/2007 (before the increase) through the financial year 2007/2008 (booking fee increased during the last quarter) to the financial year 2008/2009 (full year of the impact of increase of booking fee) grew from [...] % to [...] % and further to [...] %. The CCS observes that in the financial year 2008/2009, all revenue lines either stagnated or declined amidst economic downturn, except revenues from booking fees which grew by [...] % year on year. The CCS further compares SISTIC's return on invested capital at the company and the segmented levels and on the basis of this comparison comes to the conclusion that SISTIC *"has been economically profitable throughout the period from FY06/07 to FY08/09, and its booking fee increase in January 2008 further contributed to a significant increment in profitability"*.
225. The CCS at [6.2.8] of the Infringement Decision shows that SISTIC's booking fee is higher than those of its competitors in the Relevant Market. That was the position in January 2006 when the Act came into force. Prior to January 2008, the position according to the CCS was as follows. In April 2004, SISTIC raised its booking fee from \$1 to \$2 for tickets with face value above \$20. In April 2005, Gatecrash entered into business with a booking fee of \$1. In March 2007, Gatecrash revised its booking fee from \$1 to \$2 for tickets with a face value above \$20. In July 2007, Tickets.com entered into business with a booking fee of \$2 for tickets with value above \$20. In January 2008, SISTIC raised its booking fee from \$2 to \$3 for tickets with face value above \$20. From the data provided in the Infringement Decision, clearly SISTIC's booking fee is higher than those of its competitors in the Relevant Market – certainly since January 2008 when it increased its booking fee from \$2 to \$3.

226. The CCS compares the booking fee of SISTIC (with the increase) and the handling fees with those charged by its competitors and finds that SISTIC's total ticketing prices are higher than those of its competitors. In addition the CCS also compares the SISTIC's effective total ticketing price, based on ticketing services revenues earned from both event promoters and ticket buyers, divided by the number of tickets sold, against its competitors. Having done that it comes to the conclusion that SISTIC had sustained its effective total ticketing price above the competitive levels.

227. SISTIC contends that the Relevant Market is a two-sided market and that an assessment and comparison solely of booking fee is meaningless, as it is the price structure across the two sides of the market that matters and not the absolute price of either side. The Board does not find that SISTIC is justified in its criticism, as the CCS in coming to its conclusion has considered the total ticketing price including the price charged by event promoters: see [6.2.13] of Infringement Decision, where the CCS says:

“For completeness, CCS has also compared SISTIC's effective total ticketing price, based on ticketing services revenues earned from both event promoters and ticket buyers, divided by number of tickets sold, against its competitors'. [...]. SISTIC was the only player who exhibited a consistent uptrend in prices. On the premises, CCS concludes that SISTIC had sustained its effective total ticketing price above competitive levels.”

228. The evidence clearly shows that SISTIC's booking fee is higher than those of its rivals – Tickets.com and Gatecrash have both maintained their booking fees at \$2 for tickets above \$20. For tickets below or at \$20, all three providers charge a uniform fee of \$1. SISTIC was the only provider who exhibited a consistent uptrend in its effective total ticketing price, which is obtained by dividing the total ticketing

services revenues earned from event promoters and ticket buyers by the total number of tickets sold, and SISTIC's effective total ticketing price was the highest among all ticket service providers in Singapore in 2009. SISTIC's effective total ticketing price increased from \$[...] in 2006 to \$[...] in 2007, \$[...] in 2008, and finally to \$[...] in 2009. On the other hand, Tickets.com's effective total ticketing price increased marginally from \$[...] in 2006 to \$[...] in 2007, then to \$[...] in 2008, before falling to \$[...] in 2009. In all 4 years, Tickets.com's effective total ticketing price is lower than SISTIC's. Gatecrash's effective total ticketing price decreased consistently from \$[...] in 2006 to \$[...] in 2007, then to \$[...] in 2008 and \$[...] in 2009. Therefore, while Gatecrash had initially charged higher fees than SISTIC, competitive pressures have since driven its fees below those of SISTIC.

229. Based on the figures given in the tables at [6.2.8] and [6.2.13] of the Infringement Decision, the CCS says that SISTIC has become more profitable from its increase in booking fee in January 2008 till the end of the assessment period in March 2009. Also the increase in booking fee has not resulted in any significant loss in ticketing sales over a period of 15 months. In 2009, SISTIC has continued to increase its volume of business by providing services for events such as the *Singapore Formula One Grand Prix* and entering into two new exclusive purchasing agreements with event promoters, namely: the National Museum and the NUS Centre for the Arts.
230. Having regard to all these, the Board finds that the CCS is justified in coming to the conclusion that SISTIC has the ability of sustaining prices above the competitive levels in the Relevant Market.

Countervailing buying power

231. In this case, it is clear to the Board that the parties who have the countervailing buying power are the two venue operators, TECL and the SSC/SIS. Under the two Exclusive Agreements made with them respectively, namely: the ASTA and the ATS, each of them is at liberty upon giving [...] notice to terminate the agreement (without any reason) and thereafter switch to another ticketing service provider. SISTIC submits that the threat of the two venue operators switching is sufficient to constrain SISTIC from exercising market power, and it is a credible threat. SISTIC further submits that it does not have to show the “*probability of it happening*”; it needs only to show the threat is realistic and not far-fetched. This, as the Board understands, is not in serious dispute. The question is whether the threat on the part of these venue operators switching to another ticketing service provider is credible and realistic as opposed to a mere theoretical possibility.

Credible Threat from SSC and TECL

232. The Board does not find any evidence to show that TECL or the SSC had sought any competing proposal from other ticketing service providers. The ASTA and the ATS were in each case renewed on expiry without any apparent attempt on the part of TECL or the SSC to consider or invite alternative proposals. All that SISTIC relies on are statements from itself that these two venue operators expect high service standards from SISTIC and the ability of the venue operators to go elsewhere for their ticketing services by terminating their contracts. There is no evidence to show any incident where the two venue operators have tried in any way to constrain SISTIC.
233. The case at hand is quite different from the case of *Re TicketMaster Ireland* (supra) where TicketMaster Ireland had entered into contracts with two event promoters,

MCD Promotions Ltd (“MCD”) and Aiken Promotions Ltd (“Aiken”). There, the ICA found that *“the promoters exerted downward pressure on booking fees”*. In each contract, among other things, there was a cap placed on TicketMaster Ireland in charging booking fee on ticket buyers. The ICA said at [2.62] as follows:

“The booking fees outlined in Table 2 above indicate that TicketMaster Ireland does not have unfettered discretion to charge any amount for its services. In other words, TicketMaster Ireland is unable to act as a supplier of ticketing services with substantial market power and charge the end consumer accordingly. Rather, for tickets sold over the telephone or Internet, TicketMaster Ireland is contractually bound to charge no more than the “cap” put in place in its contracts with the Promoters. This significantly restricts TicketMaster Ireland’s ability to set prices to end consumers”.

And at [2.64] the ICA said:

“In sum, TicketMaster Ireland’s ability to act independently with respect to the prices it charges end consumers is constrained by the strong bargaining position of the Promoters, which allows them to impose a limit on the level of the booking fee. The Promoters are quite properly concerned that if TicketMaster Ireland were unconstrained by such contractual terms, it would charge end consumers a higher booking fee”.

234. In contrast, in the case at hand, neither TECL nor SSC is entitled under their respective agreements to impose a cap on what SISTIC can charge the ticket buyers.
235. Again, in contrast to the position in the case of *Re TicketMaster Ireland*, the event promoters in the case at hand are small and fragmented, and do not have any countervailing power. This is even more so for the ticket buyers, who are individuals. In the *TicketMaster Ireland* case, the two large event promoters, MCD and Aiken,

were found by the ICA to exert considerable countervailing buying power to constrain TicketMaster's behaviour in such a way that benefited consumers. In the circumstances, the facts in the case of *TicketMaster Ireland* contrast sharply with those of the case at hand. SISTICS's submission that it is significantly competitively constrained for the same reasons as the two major promoters (MSD and Aiken) constrained TicketMaster Ireland, namely, that it faces the credible threat of losing its major venue operator contracts to a competing supplier should it raise prices above competitive level, or lower its quality below competitive levels, is unsupportable considering the realities of the case.

Relevance of SSC's and TECL's shareholdings in SISTIC

236. At the hearing, the Board raised for consideration by the parties the question whether the fact that SSC holds 65% and TECL holds the remaining 35% of the shares in SISTIC is relevant in determining the issue of dominance and in particular the extent to which a credible threat could or would operate in the context of these shareholdings. In response both parties addressed this point in their respective Closing Submissions.
237. SISTIC in its Closing Submissions points out that the CCS specifically considered the nature of the relationship between SISTIC and its shareholders in the context of considering whether SISTIC forms a single economic entity with the SSC or with TECL, as the case may be. On that issue, the CCS in the Infringement Decision made a finding that both shareholders deal with SISTIC at arms' length and on the basis of merit. Both SISTIC and the CCS before the Board accept this finding, and also accept that neither the SSC nor TECL forms a single economic entity with SISTIC. Should the Board now consider that the shareholdings of SSC and TECL in SISTIC have a

material impact on the issue of credible threat in the sense that these two venue operators (because of their shareholdings in SISTIC) may be dis-incentivised from considering switching to other ticketing service providers, then this would amount to the Board making a finding of fact that the relationship between the parties are less than arm's length, which is an issue neither party has submitted any evidence on in this appeal.

238. However, the CCS in the Closing Submission contends that the issue of the two venue operators dealing with SISTIC at arm's length as discussed in Chapter 4 of the Infringement Decision in consequence of which SISTIC is held not to be a single economic entity with its owners is a different issue from the commercial motivation that guides the venue operators in their decision to switch ticketing service providers. The CCS points out that TECL and the SSC, being the two venue operators affected by the two main Exclusive Agreements, own 100% of SISTIC. The CCS contends that given TECL's and SSC's commercial interests in SISTIC, they would have further disincentive to switch to another ticketing service provider.

239. The Board does not agree with SISTIC's submission that because the CCS has made a finding that SISTIC is not a single economic entity with either the SSC or TECL which is accepted by the parties, the Board should now not proceed to make a finding that by reason of SSC's and TECL's significant commercial interests in SISTIC, they are further dis-incentivised from switching ticketing service providers. It is true that in Chapter 4 of the Infringement Decision in dealing with the question whether SISTIC forms a single economic entity with SSC or TECL, the CCS for the reasons given there came to the conclusion that SISTIC operates independently of its two shareholders and its dealings with both SSC and TECL were conducted at arm's length and on the basis of merit. In the opinion of the Board, that is a separate issue

altogether. In the present issue the Board is concerned with the commercial interests that TECL and SSC have in SISTIC which are likely affect its decision to switch to other ticketing service providers. The Board accepts the following submission of the CCS at [51] of its Reply Submissions:

“... SISTIC functioning as a separate economic entity, dealing with TECL and SSC at arms-length and on the basis of merit does not mean that TECL’s and SSC’s shareholding in SISTIC cannot reduce the venue operators’ incentive to switch. It need not be an “all or nothing” approach where there must be a finding that SISTIC, TECL and SSC are a single economic entity before there can be a reduced incentive to switch. Indeed, even though TECL, SSC and SISTIC are separate entities and deal with each other at arm’s length in that there is no management control of SISTIC by either TECL or SSC, this does not mean that in evaluating the commercial merits of a contract with SISTIC, TECL and SSC do not take their financial stake with SISTIC into account.”

240. The CCS draws the Board’s attention to the board minutes of SISTIC, which suggests that the two major venue operators had no incentive to switch ticketing service providers, while they retain a commercial interest in SISTIC. In SISTIC’s board minutes of 24 January 2008, it was discussed at paragraph 4.2 that [...]. Similarly, SISTIC’s board minutes of 14 March 2001 state at paragraph 3.6 that “[...]”. Clearly both TECL and SIS have a significant commercial interest in how well SISTIC performed commercially.
241. From a practical perspective, it seems to the Board that there is hardly any evidence to support the claim that the credible threat of TECL and SSC to terminate the ASTA and ATS and switch to another ticketing service provider is realistic and not far-fetched.

Weak incentive of TECL and SSC to exercise countervailing power

242. The Board now turns to the next point. The CCS concedes that TECL and the SIS have strong bargaining power against SISTIC. However, the CCS does not consider TECL and the SIS as really “*buyers*” of SISTIC’s ticketing services. The reasons for this proposition as given at [6.6.3] of the Infringement Decision are as follows:

“... The venue operators may engage SISTIC to be the ticketing service provider for events held at their venues, but the event promoters are the parties who eventually buy SISTIC’s ticketing service. It follows that the venue operators, despite having strong bargaining power, have weak incentives to exercise their power against SISTIC, because the profit and loss implications would be borne by event promoters.”

243. The CCS further says that the venue operators, TECL and the SSC have weak incentives to exercise their power with respect to the price charged to other parties. In fact, TECL and the SIS have not exercised their bargaining power in terms of securing discounts to fees charged to third-party event promoters or to booking fees charged to ticket buyers. The venue operators may engage SISTIC to be the ticketing service provider for events held at their venues, but the event promoters are the parties who eventually buy SISTIC’s ticketing services. The CCS says at [6.6.4] of the Infringement Decision as follows:

“The weak incentives for venue operators to exercise their bargaining power against SISTIC are clearly reflected in their contractual terms. [...], [...]. The terms and conditions of the ATS are similar. In both cases, the third-party event promoters must individually negotiate with SISTIC, despite a restriction of choice imposed by the venue operators in the first place. These contractual relationships clearly demonstrate that, when a major venue operator is also the event promoter itself, it

has the power to bargain for significant discounts, and has indeed done so. However, when the venue operator is not the event promoter itself, [...].”

244. The Board agrees with the conclusion stated by the CCS at [6.6.22] of the Infringement Decision:

“Given the above, CCS concludes that, in Singapore, the event promoters and ticket buyers have no countervailing buyer power against SISTIC. The major venue operators do have strong bargaining power (not ‘buyer’ power), but they have weak incentives to exercise their power with respect to price, and evidence suggests that they are indeed not exercising their power.”

Barriers to entry – the Exclusive Agreements

245. It is disputed whether the Exclusive Agreements create a barrier to entry. In the Infringement Decision, the CCS says that it is the Exclusive Agreements that have prevented SISTIC’s major partners such as TECL and the SIS and its customers from switching to another ticketing service provider or sponsoring new entry. The CCS contends that this is consistent with the United Kingdom Competition Commission’s finding that long-term preferred relationships between incumbent ticketing agents and event promoters and venue operators made large-scale entry even harder.
246. SISTIC, on the other hand, contends that the Exclusive Agreements are contestable and in the case of the ASTA or the ATS each of them is terminable on [...] notice. There is no barrier to entry that would prevent a competitor from competing for such contract. The ASTA is not automatically renewed upon expiry. When the first ASTA expired in [...], the next ASTA was entered in [...] with revised terms and conditions and lengthy negotiations took place. As for the ATS, SISTIC was evaluated by the SIS like any other vendor and the parties were dealing with each other at arm’s length.

Therefore, competitors of SISTIC can compete for these contracts on merits and can win these contracts from SISTIC if they were to put forward a more attractive business proposition, and this is the essence of a competitive environment. Both TECL and the SSC are not prevented from switching to a competitor of SISTIC and have every equal opportunity to do so, and if such a switch takes place, SISTIC would lose a large proportion of its market share.

247. Looking at the matter from a practical point of view, the competition is not as straightforward as portrayed by SISTIC. Both the ASTA and the ATS are rather long-term agreements, though they are each terminable on [...] notice by either party to the agreement. Looking at the agreements from a practical point of view, the Board is convinced that, unless SISTIC really fails to discharge its obligations under the ASTA and/or the ATS, it is unlikely that either TECL or the SIS would terminate the respective agreement they made with SISTIC. The Board can see no reason for such termination. After all, it should not be forgotten that SISTIC is owned by the SSC – as to 65% and TECL – as to 35%. The Board, of course, accepts that the ASTA and the ATS were in each case, negotiated at arm's length. Nonetheless, this corporate structure of SISTIC is an important and relevant factor when it comes to determining a termination of the agreements. As a matter of fact, neither of the Exclusive Agreements has been contested over the years. Each of these agreements upon expiry had been renewed. By reason of these two Exclusive Agreements, SISTIC, became the anchor ticketing service provider for the events taking place at the Esplanade and the SIS. Further, it seems to the Board that, in all probability, mainly by reason of these Exclusive Agreements, SISTIC was able to negotiate and enter into the 17 Exclusive Agreements with 17 event promoters respectively. The

Board finds that the Exclusive Agreements are a barrier to entry into the Relevant Market.

Ability to eliminate or weaken competitors

248. The Board does not find that the CCS has established that SISTIC has the ability to eliminate or weaken competitors in the Relevant Market. The CCS refers to the “exit” of TicketCharge from Singapore. TicketCharge did not in a true sense “exit” from Singapore. In January 2006, Quebec Leisure bought over the assets of TicketCharge and became the franchisee of Tickets.com in Singapore. Accordingly this was not an exit of a competitor at all.
249. The other incident relied upon by the CCS is the staging of the show *My Fair Lady* in Singapore by Quebec Leisure. Quebec Leisure naturally would like to have Tickets.com providing its ticketing services for this event, and wrote to TECL for permission which however was refused. In the end, Quebec Leisure staged the show at the Esplanade using SISTIC “*due to Esplanade’s requirement*”. The refusal to allow Tickets.com to provide ticketing service presumably was due to the exclusivity restriction contained in the ASTA. However, this incident by itself does not establish that Tickets.com has been weakened or eliminated.

Other factors

250. The CCS relies on other factors, such as indirect network effect brought about by the following: (a) SISTIC’s website, (b) distribution outlets, and (c) customer database, all of which are discussed at some length at [6.5.9 – 6.5.35] of the Infringement Decision. We have also read the submissions of SISTIC on these factors. The Board

does not consider that all or any of these factors – whether considered together or separately – as truly material in assessing the dominance of SISTIC.

The Board's decision

251. Having regard to the factors which the Board has considered, namely: (i) SISTIC's large market share; (ii) SISTIC's ability to profitably sustain prices above competitive levels; (iii) lack of incentive on the part of venue operators and lack of countervailing buying power on the part of event promoters and ticket buyers; and (iv) the Exclusive Agreements, the Board is of the opinion that SISTIC holds a dominant position in the Relevant Market.

VIII SISTIC'S CONTENTIONS ON ABUSE OF DOMINANCE

252. The Board now turns to the second main issue for determination, namely, whether SISTIC's conduct amounts to an abuse of its dominant position. On this issue, it is helpful to set out below very briefly the respective contentions of SISTIC and the CCS.
253. According to SISTIC, it is common ground that the correct approach in assessing whether conduct is abusive is an assessment that is effects-based as opposed to form-based. The only disagreement between SISTIC and the CCS is on:
- (a) what an effects-based assessment is and the legal test and burden of proof thereunder; and
 - (b) whether SISTIC's conduct could be considered as abusive, irrespective of the legal test adopted.

254. SISTIC contends that an effects-based assessment in Singapore requires the CCS to assess the effects of the alleged abusive conduct on “*economic efficiency based on a total welfare standard*”. It contends at [167] of its Written Submissions:

“SISTIC submits that an effects-based assessment in Singapore requires the CCS to assess the effects of the alleged abusive conduct on economic efficiency based on total welfare standard. The assessed effect should then be compared to a counterfactual scenario, being the market outcome that would arise in absence of the allegedly abusive conduct. Only where an appreciable adverse effect on economic efficiency can be shown to have resulted, or shown to likely result, between those two scenarios as a consequence of the infringing conduct, should there be a finding that the conduct is actually abusive. Once the CCS has established that such an effect has resulted, or has likely resulted, from the conduct in question, there would be an opportunity for the undertaking in question to objectively justify its conduct, though it would bear the burden of such justification.”

255. SISTIC points out that the CCS’s position is that an effects-based approach requires the CCS to merely show that there is “*likely effect on the competitive process*” in order for the conduct to be classified as abusive. Hence, under the CCS’s test, actual effects on welfare or efficiency would be considered aggravating and not a requisite condition in demonstrating that the conduct is abusive. Once the CCS has found that there is a likely effect on the competitive process, its position is that the burden of proof shifts to the undertaking in question to objectively justify its conduct with reference to the total welfare. SISTIC’s contention is that the CCS erred in its assessment of SISTIC’s conduct in this respect.

256. SISTIC relies on the following statement made by Dr Vivian Balakrishnan, the Senior Minister of State for Trade and Industry, in Parliament during the second reading of the Competition Bill on 19 October 2004:

“... we need to balance regulatory and business compliance costs against the benefits from effective competition. Instead of attempting to catch all forms of anti-competitive activities, our principal focus will be on those that have an appreciable adverse effect on competition in Singapore or that do not have any net economic benefit. In assessing whether an action is anti-competitive, we will also give due consideration to whether it promotes innovation, productivity or longer-term economic efficiency. This approach will ensure that we do not inadvertently constrain innovative and enterprising endeavours...

...

Second, abuse of a dominant position. The Bill does not prohibit dominance or substantial market power per se – firms can continue to increase market power through offering cheaper or more innovative products. However, clause 47 prohibits firms from abusing market power in ways that are anti-competitive and which work against the long-term economic efficiency, eg, predatory behaviour towards competitors...

...

The Competition Commission has to find that a certain anti-competitive act or certain abuse of dominant position has actually led to a distortion, reduction or elimination of competition before it finds that this activity has transgressed the provisions of this Act. Let me try to explain that in greater detail. It is much easier to craft a legislation to say that specific acts are illegal. Instead, we have said the act is illegal only if it is performed and it has impact on our local economy, which actually puts a higher onus of proof on the person or party who wants to allege that a certain company has engaged in anti-competitive behaviour, and the Commission then has to

find it accordingly. So, it is not being done in a haphazard, slipshod or easy manner. It has been done very, very carefully.

...

The other point which... is worth reiterating, is that we cannot insist on competition at all costs. Let us not forget that at the end of the day, this is a business that needs to be run and a business that needs to be viable. To blindly insist that you must keep the appearance, the form of competition at all costs even when it does not make business sense would be wrong. It would be wrong for the Government to insist on that and for the Government to impose that on listed companies..."

257. SISTIC contends that the “*key objective of Singapore competition law is economic efficiency*”, and conduct is anti-competitive and abusive “*where an appreciable adverse effect on economic efficiency can be demonstrated or reasonably predicated*”, and in this regard the burden is on the CCS, and the latter has not discharged its burden.
258. SISTIC further contends that the assessment of the likely effect of conduct on welfare in the determination of whether the conduct is regarded as anti-competitive or abusive has been recognised by the EC in its *Guideline on Enforcement Priorities* (the “EC Guideline”) and the EC Guideline draws a distinction between “*mere foreclosure*” and “*anti-competitive foreclosure*”, the latter requiring an adverse effect on consumer welfare. SISTIC draws a distinction between conduct that may impede competitors and conduct which impedes competitors and results in negative effect on consumer welfare.
259. SISTIC contends that the CCS has not performed such assessment correctly, and that “*given that the correct benchmark for assessing economic efficiency in Singapore is total welfare, rather than consumer welfare, the CCS has a further hurdle to pass,*

which is another factor that is has not even addressed in its [Infringement Decision]”:

[181] of SISTIC’s Written Submissions. At [183] SISTIC submits:

“In the present circumstances, the conduct in question does give rise to substantial efficiencies, and does not result in SISTIC being “in a position to profitably increase prices”. Accordingly, this is not a case where harm to consumers can be inferred, much less is it a case where harm to economic efficiency on total welfare standard (being the relevant standard in Singapore) can be inferred.”

[emphasis in original]

260. It is submitted by SISTIC at [184] that in assessing the conduct in question, it is not sufficient for the CCS to assess whether the conduct merely has a “*foreclosure effect*” or “*an adverse effect on competitors*”. The “*relevant question in Singapore should be whether the foreclosure has indeed had an appreciable adverse effect on economic efficiency by reference to a total welfare standard*”. The CCS has not had regard to this “*crucial distinction*” and “*ultimately has not correctly assessed*”.

261. SISTIC contends at [193] the correct test as follows:

*“For the reasons outlined above, SISTIC submits that the correct legal test for abusive conduct in Singapore should be one that deems conduct as abusive only where it has resulted in an **appreciable adverse effect on economic efficiency (on a total welfare standard)**, or where such an effect can be reasonably predicated, with reference to the relevant counterfactual. Under this test, SISTIC submits that in order for the CCS to have discharged its burden in this case, it would have needed to:*

(a) *demonstrate that an adverse effect on economic efficiency (on a total welfare standard) has resulted, or can be reasonably predicated (without defaulting to form-based assumptions and inferences), as a result of the exclusive contracts in question; and*

- (b) *demonstrate that the adverse effect, or likely adverse effect, on economic efficiency is appreciable.”*

[emphasis in original]

The relevant counterfactual and its use in effects-based enforcement

262. SISTIC next turns to the relevant counterfactual and its use on effects-based enforcement and submits at [196] that:

“...irrespective of the legal test adopted for the consideration of whether conduct is abusive, an effects-based enforcement requires a counterfactual scenario to be considered and defined. SISTIC submits that the necessity of a counterfactual is self-evident given that the term “effect” is a relative concept requiring the comparison of two scenarios (i.e. a with and without comparison).”

263. SISTIC refers to Appendix 1 of the Infringement Decision, where the CCS sets out the beneficial effects of the outcome in the counterfactual scenario free from the Exclusive Agreements. There, the CCS lists out the benefits as follows:

- the choice of event promoters for their preferred ticketing service providers, free from the total purchase commitments, regardless of venues where the events are held and taking into account the ticket buyers’ interests;
- competition of ticketing service providers (including SISTIC) on a level playing field based on their own merits;
- more dynamically efficient market structure which will be determined by competitive forces, including the number of ticketing service providers, and with competitors continuing to invest, innovate and improve;

- benefit to ticket buyers with more competitive ticketing services in terms of price, quality and variety; and
- benefit to event promoters from increased event attendance resulting from more competitive ticketing services.

And SISTIC asserts that the above sets out the counterfactual against which the CCS assesses the harm of Exclusive Agreements on competition.

264. SISTIC says that the first two suggested outcomes are “*red herrings*” in an effects-based assessment of competitive harm. SISTIC submits that greater choice for event promoters may result in higher industry prices or a lower quality of service and such result would not be considered as a beneficial counterfactual outcome. It is said that in the ticketing service industry exclusive contracts are commonly considered by international authorities as legitimate and as giving rise to “*other efficiencies*”. In respect of the remaining outcomes, SISTIC submits that the CCS has not sufficiently demonstrated that the outcomes would result in the absence of the Exclusive Agreements, and would have an appreciable adverse effect on economic efficiency. Therefore, it is submitted that the CCS has “*fundamentally erred*” in not performing a “*focused and centralised assessment of the likely effects of the exclusive arrangements on economic efficiency based on a total welfare standard*”. In view of this fundamental error, it is SISTIC’s contention that the CCS has not discharged its burden and none of the counterfactual outcomes identified by the CCS have been sufficiently considered and demonstrated.

265. It is SISTIC’s submission that in the ticketing service industry the competition is *for* the market and not *in* the market and there will be no loss of dynamic efficiency with exclusive contracts in the competition for the market. This is because in the ticketing

service industry exclusive contracts are legitimate in competition for the market. In this regard, SISTIC relies on the following part of EC Guideline:

“If competitors can compete on equal terms for each individual customer’s entire demand, exclusive purchasing obligations are generally unlikely to hamper effective competition unless the switching of supplier by customers is rendered difficult due to the duration of the exclusive purchasing obligation”

266. In addition, SISTIC relies further on a lengthy statement from the UK Office of Fair Trading (“OFT”) in its report, *Ticket Agents in the UK*. For our purpose it is not necessary to set out the whole lengthy passage; and the following passage should be sufficient to show the underlying principles:

“1.12 The existence of these [exclusive] arrangements does not, in itself, imply that competition is not working effectively. The key issue is whether they lead to prices being higher than they would be otherwise. If there is effective competition between different ticket agents for these preferential rights from promoters, then the arrangements will not raise prices, because the agent offering the most suitable service at lowest cost will be the one that is most attractive to the promoter. Furthermore, if there are efficiencies associated with the promoter relying on primarily one ticket agent, instead of a range of agents, these arrangements could lead to lower prices.

1.13 We accordingly looked at the nature of competition for these preferential rights and also at whether the nature of the contracts was such that, in the future, they could be expected anti-competitively to reduce the number of agents competing for contracts. Our assessment is that there is no evidence of ineffective competition for these contracts at present, and no basis to expect this to become a problem in the future. We also noted that there are identifiable efficiency gains to be associated with

these arrangements insofar as they allow some of the fixed costs of distribution and retailing to be spread over a larger number of ticket sales.

...

4.20 The other potential advantage is that granting one or a limited number of agents the right to distribute tickets may also help realise other efficiencies such as reducing the overall underlying costs of distribution (for example, through avoiding duplication of retailing costs and spreading them over a wider volume of ticket sales)”

267. SISTIC submits that the critical consideration in this case is whether SISTIC’s competitors could compete for the Exclusive Agreements, the corollary of which is whether the two major venue operators could credibly switch to another ticketing service provider. In SISTIC’s submission, the answer is in the affirmative, having regard to the following:

- (a) there are no significant barriers to entry into the Relevant Market;
- (b) the CCS has conceded that any indirect network effect would be easily overcome upon a major venue operator switching to another service provider;
- (c) there is an incentive for the venue operators to threaten to switch in this case in the event that SISTIC attempts to exercise market power; and
- (d) the major venue operators have the ability to terminate the Exclusive Agreements and switch the suppliers within 6 months and this fact adds credibility to the threat.

268. SISTIC asserts that the CCS has ignored evidence in this case that competition for the market can occur and that there is constant pressure on SISTIC arising from the ability of the venue operators to “go elsewhere”. Among the facts relied on by SISTIC at [220] of its Written Submissions are:

- (a) that the Exclusive Agreements with the SIS and TECL are terminable with [...] notice;
- (b) that the 17 Exclusive Agreements with the event promoters are terminable immediately without notice; and
- (c) Mr Tan's evidence that TECL gave pressures to SISTIC to improve its service and that TECL threatened to go elsewhere should SISTIC not perform, and the concession of the CCS that TECL and SSC have been dealing with SISTIC at arm's length and on the basis of merit.

It is because of this credible threat that SISTIC has a constant incentive to invest, innovate and improve and there is evidence to show that SISTIC has continuously been improving its system and its services.

Dynamic efficiency and productive efficiency in assessment of abuse

269. SISTIC argues at [223] that the CCS has failed to make a comparison between dynamic efficiency effects and productive efficiency in the context of its abuse assessment, and has not established that there would be dynamic efficiency losses as a result of the conduct in question. Further the CCS has failed to assess the efficiency gains that has been identified by other competition authorities as arising from the exclusive contracts.
270. SISTIC submits that in the case of *Re TicketMaster Ireland*, the ICA took efficiency gains arising from exclusive contracts into account in the assessment of whether the conduct in question was actually anticompetitive. The efficiencies associated with the exclusive contracts as found were grouped into four areas, namely:
- reduced transaction costs;

- economies of density;
- risk-sharing efficiencies; and
- improved provision of services.

271. SISTIC contends at [227] that the CCS has not established that there will be dynamic efficiency losses as a result of the conduct of SISTIC in question, and that the CCS has completely failed to assess the efficiency gains that had already been identified as arising from the exclusive contracts by other competition authorities.

Increase in booking fee by SISTIC

272. In finding the abusive conduct on the part of SISTIC the CCS relies on, among other things, the increase in booking fee (from \$2 to \$3 where the face value of a ticket is more than \$20) imposed by SISTIC in January 2008. SISTIC contends that this focus on the increase of booking fee is erroneous for the following reasons:

- (a) the market is two-sided;
- (b) this increase in booking fee says nothing of the effects of economic efficiency or total welfare;
- (c) the increase is legitimate and there is no evidence to suggest that the booking fee is above the competitive level; and
- (d) the credible threat of the major venue operators switching to another ticketing service providers ensures that the price increase does not exceed the competitive level.

273. SISTIC submits that the CCS has not demonstrated that an appreciable adverse welfare effect has arisen from the increase of \$1 in the booking fee imposed by SISTIC in January 2008.
274. In conclusion, SISTIC submits that –
- (a) its conduct has not had, nor would it likely to have, an appreciable adverse effect on economic efficiency;
 - (b) the CCS has failed to discharge its burden to show that the conduct in question has had an appreciable adverse effect;
 - (c) there is nothing preventing competition for the market, and SISTIC is not in a position to exercise its market power, and is competitively constrained by the major venue operators through their ability and incentive to credibly threaten to switch suppliers or to self-supply services.

IX THE CCS'S CONTENTION ON ABUSE OF DOMINANCE

275. The CCS does not accept that there is any change in the law in the EU or the UK and contends at [59] of its Written Submissions that EU and UK case law continues to apply the principle that in order to determine if a conduct of a dominant undertaking is abusive, it is sufficient for the competition authority to establish that the conduct is intended to restrict or foreclose competition or is capable of doing so. Once an effect, or a likely effect, on the competitive process is established by the competent authority, the burden of proof then falls on the dominant undertaking to put forward an objective justification that their practice is not anti-competitive.
276. The CCS relies on the evidence of its expert, Mr Coomb, to the effect that competition authorities assess the impact or the likely impact of a practice on the

competitive process, and not the impact on prices, output and economic welfare. If a likely adverse impact on the competitive process is established, then this is assumed to have an adverse effect on welfare, unless the undertaking under investigation can establish the opposite: see [3.17] of the First Expert Report dated 22 February 2011. The CCS contends that this is in line with the case law of the UK and the EU and is the effects-based approach which it applies in arriving at its Infringement Decision. This is at variance with the approach advocated by SISTIC and its expert, Mr Ridyard, which is that an effects-based approach must establish that the counterfactual would deliver more efficient market outcomes than the actual conduct that is alleged to be an abuse. The CCS says at [64] of its Written Submissions as follows:

“This conclusion implies that behaviour which adversely affects the competitive process can be expected to reduce output, increase prices and reduce welfare. Competition law therefore prohibits such behaviour. Mr Coombs has also pointed out that it is important to note that this conclusion of economic theory is based on certain assumptions and in some circumstances, when those assumptions do not hold, behaviour which has an adverse effect on competition might actually improve welfare. For this reason, competition law involves certain “efficiency defences” such as the concept of an objective justification. However, behaviour which adversely affects the competitive process (or is likely to do so) is assumed to harm welfare in the absence of evidence to the contrary.”

277. The CCS rejects the “welfare test” advocated by SISTIC on the ground that that is not the test laid down by the EU and UK case law. The CCS submits at [70] that the EU/UK law should be adopted in Singapore and under the EU/UK law –

“...a competition authority will have to establish the existence of abuse by demonstrating that a practice has, or is likely to have, an adverse effect on the process of competition. In particular:

- (a) *It is sufficient for the competition authority to show a likely effect, and is not necessary to demonstrate an actual effect on the process of competition.*
- (b) *If an effect, or likely effect, on the competitive process is established, the undertaking can advance an objective justification. 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."*

278. Dealing with the effects-based approach, the CCS rejects SISTIC's interpretation of an effects-based approach which requires that the assessment of the effects of conduct be based on a comparison between (i) the actual outcomes arising from the conduct in question and (ii) the counterfactual situation that would arise, if the conduct is stopped. The CCS contends that the counterfactual assessment is not a legal requirement in the assessment of abuse of dominance investigations. It relies on *National Grid plc v Gas and Electricity Markets Authority & Ors* [2010] EWCA Civ 114 ("*National Grid*"), where it was highlighted that the counterfactual is not a legal requirement and merely a tool utilised in the assessment carried out by the EC. At [57] Richards LJ said:

"The use of counterfactuals as a tool of appraisal is plainly permissible and of potential value. What is appropriate by way of counterfactual, however, is a matter of judgment for the decision-maker. There is no rule of law that the counterfactual has to take a particular form. The Commission's guidance document refers to a range from "the simple absence of the conduct in question" to "another realistic alternative scenario, having regard to established business practices". It does not say that the alternative scenario must be based on alternative arrangements that the parties to the contracts in issue would or might realistically have made instead, and there is no principle requiring the adoption of such restrictive approach. The

purpose of the counterfactual is simply to cast light on the effect of the conduct in issue. It is for the decision-maker to determine whether a counterfactual is sufficiently realistic to be useful, and to decide how much weight to place on it. This is an area of appreciation, not of legal rules.”

279. The CCS also refers to the EC Guidance at [21], which states:

“This assessment [of exclusionary conduct] will usually be made by comparing the actual or likely future situation in the relevant market (with the dominant undertaking’s conduct in place) with an appropriate counterfactual, such as the simple absence of the conduct in question or with another realistic alternative scenario, having regard to established business practice.”

280. The CCS maintains that not only was SISTIC’s conduct “*intended to restrict or foreclose competition on the Relevant Market*”, or was capable of doing so, the evidence relied on had more than sufficiently proved the abuse. In particular, it relies on the following evidence:

- (a) SISTIC initiated the exclusivity restrictions;
- (b) the 17 Exclusive Agreements made with the event promoters were all based on a standard template, namely the *Ticket Sales Agreement with Promoter, Form of Agreement*;
- (c) important clauses, including the exclusivity commitment and contractual duration were prescribed in the standard template and these restrictions were unilaterally imposed by SISTIC;
- (d) these restrictions make no economic sense other than having an effect of foreclosing competition;

- (e) the Exclusive Agreements contain total and explicit restrictions and dictate an “all or nothing” mode of competition which denied competitors the opportunity to compete progressively;
- (f) the foreclosure effects and scope of foreclosure on the Relevant Market are broad to the extent of [...] % by both volume and revenue of the Relevant Market foreclosed through the ASTA for events held at the Esplanade; [...] % by volume and revenue of the Relevant Market foreclosed through the ATS for events held at the SIS; [...] % of the Relevant Market foreclosed by virtue of the 17 Exclusive Agreements; and an accumulated foreclosure (taking into account overlaps) as a result of the Exclusive Agreements amounts to [...] % by volume and revenue;
- (g) the exclusive agreement for the SIS is not contestable because of the “chicken-and-egg” effect, for instance, when [...] and [...] seek to renew their agreements with SISTIC every year they could not switch ticketing service provider because of the restrictions imposed by the SIS, and when the SSC/SIS opted to automatically renew the ATS, after the first term had expired in February 2009, it could not switch ticketing service provider as well because at least [...] % of its hirers are locked in by SISTIC;
- (h) the Exclusive Agreements with event promoters are not contestable as the event promoters’ choices have been restricted as a consequence of the venue exclusivities locked in by the ASTA and the ATS;
- (i) an equally efficient firm cannot overcome the competitive restraints generated by SISTIC’s strategic conduct to compete for ticket buyers; and

- (j) none of the 17 Exclusive Agreements signed on or before 1 January 2006 and renewed yearly had been terminated or were not renewed as of March 2009. Similarly the ASTA and the ATS with the key venues were never terminated but instead were renewed in [...] and [...] respectively.

281. The CCS reiterates its submission that once it has shown on a balance of probabilities that SISTIC's conduct was intended to restrict or foreclose competition on the Relevant Market or was capable of doing so, the burden of proving that the Exclusive Agreements are pro-competitive and hence are objectively justified falls on SISTIC. On this proposition the CCS relies on EU law and the EU Guidance. The CCS in its conclusion submits that neither SISTIC nor its expert, Mr Ridyard, has provided supporting submissions or evidence that the requisite justifications exist in this case.

X BOARD'S DECISION ON ABUSE OF DOMINANCE

Legal Test on Abuse of Dominance

282. It is first necessary to consider the legal test for determining whether a conduct is an abuse of dominance. It is common ground that the correct approach to an assessment of whether conduct is abusive is an assessment that is effects-based. The point in issue between the parties is what the effects-based assessment is and in particular, what the legal test for the abuse of dominance is.

283. The rival contentions of the Parties are briefly these. Relying on EU and UK case law, the CCS contends at [59] of its Written Submissions that in order to determine if conduct of a dominant undertaking is abusive, it is sufficient for the competition authority to establish that the conduct is intended to restrict or foreclose competition or is capable of doing so. Once an effect, or a likely effect, on the competitive

process is established by the competition authority, the burden of proof then falls on the dominant undertaking to put forward an objective justification that their practice is not anti-competitive. It is not necessary for the competition authority to establish the actual effects of the relevant conduct on welfare. It is sufficient to establish that the conduct is intended to restrict or foreclose competition in the relevant market or is capable of doing so. Thus, in this case, once the CCS has established that the Exclusive Agreements restrict or foreclose competition or are capable of doing so, it is for SISTIC to present specific facts and evidence on efficiencies as an objective justification for the Exclusive Agreements.

284. On the other hand, the contention of SISTIC at [167] of its Written Submissions is that an effects-based assessment in Singapore requires the CCS to assess the effects of the alleged abusive conduct on economic efficiency based on a total welfare standard. The assessed effect should be compared to counterfactual scenario, being the market outcome that would arise in the absence of the alleged abusive conduct. And only where an appreciable adverse effect on economic efficiency can be shown to have resulted, or shown likely to result, between those two scenarios as a consequence of the infringing conduct, then should there be a finding that the conduct is abusive. Only when the CCS has established such an effect, the burden shifts to the undertaking to justify it objectively. SISTIC contends that this is the “modern and proper approach” to be applied in assessing anticompetitive conduct in exclusive dealings in Singapore. It should be to primarily assess whether the conduct has a negative effect on welfare.
285. In support, SISTIC relies on EC’s *Guidance on the Commission’s enforcement priorities in applying Article 82 of the European Community Treaty to abusive exclusionary conduct by dominant undertakings*, issued in 2009, as showing a shift

towards an effects-based approach and further contends that “case law predating” the Guidance should not be followed. SISTIC further relies on an OECD discussion paper, the speech made at the Second Reading of the Competition Bill in Parliament and statements made by OFT and the ICA in support of its welfare test. However, SISTIC has not cited any EU / UK case law in support of the test it advocated.

286. The test advocated by the CCS is based on EU and UK case law. In particular, the CCS contends that the EU courts continue to apply the same legal test in their most recent decisions in *Tomra Systems ASA and Ors v European Commission*, Case T-155/06 (9 September 2010) (“*Tomra*”) and *Deutsche Telekom AG v European Commission* Case C-280/08 P (14 October 2010). In *Tomra*, the EU General Court examined a complaint against Tomra which manufactured and sold automatic recovery machines for empty beverages containers and in doing so, abused its dominant position by preventing competitors from entering the market by offering its customers exclusive agreements and loyalty programmes, whilst in the *Deutsche Telekom* (“DT”) case, DT was the subject of proceedings for abusing its dominant position in the market concerning direct access to its fixed telephone network by engineering a margin squeeze. The General Court in *Tomra* said at [289]:

“289. It must also be stated that, for the purposes of establishing an infringement of Article 82 EC, it is not necessary to show that the abuse under consideration had an actual impact on the relevant markets. It is sufficient in that respect to show that the abusive conduct of the undertaking in a dominant position tends to restrict competition or, in other words, that the conduct is capable of having that effect (Michelin II, paragraph 239, and British Airways v Commission, paragraph 293).”

The Court also said at [215]:

“...in order to determine whether exclusivity agreements... are compatible with Article 82 EC, it is necessary to ascertain whether, following an assessment of all the circumstance and, thus, also of the context in which those agreements operate, those practices are intended to restrict or foreclose competition on the relevant market or are capable of doing so.”

287. The Board respectfully agrees with the CCS that the decisions of the EU / UK Courts on competition law are highly persuasive on the legal test for abuse of dominance cases under section 47 of the Act. The said section 47 is modelled on section 18 of the UK Competition Act 1998 which in turn was modelled on Article 102 of the Treaty on the Functioning of European Union (formerly, Article 82 of the EC Treaty). Having regard to the decisions of the EU / UK courts cited by the CCS, the Board respectfully adopts the test laid down by these courts, which was summarised by the EU General Court (then known as the Court of First Instance) in the case of *British Airways Plc v Commission of European Communities*, Case T-219/99, in which British Airways not only rewarded the loyalty of some of its travel agents but also discriminated between travel agents. The Court of First Instance stated as follows:

“...for the purpose of establishing an infringement of Article 82 EC [now 102], it is not necessary to demonstrate that the abuse in question had a concrete effect on the markets concerned. It is sufficient in that respect to demonstrate that the abusive conduct of the undertaking in a dominant position tends to restrict competition, or, in other words, that the conduct is capable of having, or likely to have, such an effect.”

288. On appeal the decision of the Court of First Instance was affirmed by the ECJ, Case C-95/04 p, which, among other things, said at [144 – 145]:

“...there must be a finding not only that the behaviour of an undertaking in a dominant market position is discriminatory, but also that it tends to distort that

competitive relationship, in other words to hinder the competitive position of some of the business partners of that undertaking in relation to others...

In that respect, there is nothing to prevent discrimination between business partners who are in a relationship of competition from being regarded as being abusive as soon as the behaviour of the undertaking in a dominant position tends, having regard to the whole of the circumstances of the case, to lead to a distortion of competition between those business partners. In such a situation, it cannot be required in addition that proof be adduced of an actual quantifiable deterioration in competitive position of the business partners taken individually."

Further, the Court said at [149]:

"The Court of First Instance cannot therefore be accused of an error of law in not verifying, or in verifying only briefly, whether and to what extent those conditions had affected the competitive position of BA's commercial partners..."

289. The decision of *British Airways* was cited with approval by the UK Competition Appeal Tribunal ("CAT") in *National Grid plc v Gas and Electricity Markets Authority* [2009] CAT 14 in which National Grid by entering into long-term contracts for provision of domestic gas meters, was found to have abused its dominant position. On appeal by National Grid, the UK Court of Appeal in upholding the decision appealed in [2010] EWCA Civ 114, said at [85]:

*"It is common ground that in order to find an abuse it is not necessary to prove direct harm to consumers. The competition rules promote consumer welfare indirectly by their effect on market structure and the promotion of competition. As the Court of Justice said in *British Airways*, cited above, at para 106, Article 82 EC is aimed not only at practices which may cause prejudice to consumers directly, but also at those which are detrimental to them through their impact on the competition structure."*

290. The legal test of abuse of dominance as established under EU / UK law, is neatly summarised by the CCS at [212] of its Closing Submissions as follows:

“...an abuse will be established where a competition authority demonstrates that a practice has, or likely to have, an adverse effect on the process of competition. In particular:

- (a) It is sufficient for the competition authority to show a likely effect, and is not necessary to demonstrate an actual effect on the process of competition.*
- (b) If an effect, or likely effect, on restricting competition by the dominant undertaking 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 the net positive impact on welfare. However, the burden is on the undertaking to demonstrate an objective justification.”*

291. The Board respectfully adopts this as the correct and proper test in determining the abuse of a dominant position.

Evidence on the issue of abuse of dominance

292. The abusive conduct as found by the CCS is based on paragraph (d) of section 47(2) of the Act, which is that SISTIC made the conclusion of the Exclusive Agreements subject to acceptance by the other parties of supplementary obligations which by their nature or according to commercial usage, have no connection with the subject of contracts. The Board therefore turns to consider the Exclusive Agreements and their effects on competition.

293. First, there was the 2002 ASTA. The 2002 ASTA was made on 1 October 2002, whereby TECL appointed SISTIC as its exclusive agent for the sale and distribution

of tickets and further undertook not to grant the right to sell tickets, for any events held in the Esplanade venues or such other venues as agreed between both parties, to any other person using any other computerised ticketing network system. The agreement contained restrictions in Clauses [...], which are as follows [...].

294. The 2002 ASTA expired on [...] and was renewed by an Addendum for a further term of [...] years from [...] and was to expire on [...]. However, on [...], a new ASTA was entered into which is for a term of [...] years. It took effect retrospectively as from [...], thus replacing the Addendum and superseding the 2002 ASTA. The terms of the 2008 ASTA are largely similar to those of the 2002 ASTA (in all material respects). By that agreement TECL appointed SISTIC as the exclusive ticketing service agent for the sale and distribution of tickets of all events held at the Esplanade venues. It also restricts TECL from granting right to sell tickets for any event held in the Esplanade venues to other persons save in accordance with the stated exceptions.
295. The 2008 ASTA contains in Clauses [...] the following restrictions [...].
296. These 2 Exclusive Agreements made between TECL and SISTIC contain total and explicit restrictions on TECL on the sale and distribution of tickets for events at the Esplanade venues. Under the 2008 ASTA, the restriction was broadened to include the sale and distribution of any tickets for any event held in the Esplanade venues by persons using a computerised ticketing network service of a third party.
297. Next, there was the ATS, which was made on 22 February 2006 between SSC and SISTIC. Under the ATS, the SSC appointed SISTIC as the sole and exclusive agent for the sale of tickets for each and every show staged by hirers of the SIS. Effectively the hirers are required to appoint SISTIC, among other things, to print and sell the tickets for their events and collect the proceeds from the sale of such tickets. The

ATS (made in February 2006) was for a period of 3 years and may be terminated by either party without reason upon 6 months' notice. Unless terminated, the ATS is automatically renewed on the same terms and conditions for a period of 2 years. Currently, the ATS is still continuing.

298. The exclusivity restrictions in the ATS are found in Clauses [...] and are as follows [...].
299. With the execution of the 2002 ASTA and the ATS, SISTIC achieved virtually complete monopoly of providing ticketing service for all the events held in the Esplanade venues and at the SIS. By these agreements SISTIC effectively foreclosed any competition whether for or in the Relevant Market in so far as the Esplanade venues and the SIS are concerned during the contractual duration of these agreements. There is no way any competitor can compete for any share of the market with respect to these venues.
300. The Esplanade is a landmark premier performing arts centre in Singapore and has four main performing venues:
- (i) the Esplanade Theatre with a seating capacity of 1942;
 - (ii) the Esplanade Concert Hall with a seating capacity of 1811;
 - (iii) the Esplanade Recital Studio with a seating capacity of 245; and
 - (iv) the Esplanade Theatre Studio with a seating capacity of 220.

The Esplanade Theatre and the Esplanade Concert Hall are world class venues for staging international performing arts, and since its opening many world class events e.g. musical shows and concerts, have been staged in these two venues.

301. As for the SIS, it is an indoor air-conditioned multi-purpose sports and entertainment venue with the largest seating capacity of about 13,000. It is the largest purpose-built indoor venue in Singapore, and one of the largest in South East Asia. At [2.2.20] of the Infringement Decision, the CCS describes the SIS as follows:

“SIS hosts a wide variety of events, ranging from world-class pop concerts and sporting events, to smaller family entertainment shows such as ice-skating shows and musicals. In 2008, SIS hosted more than [70-80]% of the total number of concerts and live indoor sports events held in Singapore. Based on attendance numbers, SIS had an estimated [80-90]% share of the total attendance of all concerts and live indoor sports entertainment events held in Singapore in 2008. The SIS is also designed to host smaller events of up to 2,500 spectators.”

302. By the ASTA and the ATS, SISTIC has effectively succeeded in restricting the choice of event promoters from engaging ticketing service providers other than SISTIC in providing ticketing services in these two large and important venues. Any event promoters who intend to stage an event in any of the venues at the Esplanade or at the SIS will, by reason of the ASTA or the ATS (as the case may be), have to engage SISTIC as the ticketing service providers. This was demonstrated by what happened in February 2007, when Quebec Leisure brought the musical show, *My Fair Lady*, to Singapore and staged it at the Esplanade Theatre and was unable to obtain agreement from TECL to use Tickets.com as the ticketing service provider and consequently Quebec Leisure had to engage SISTIC to be the ticket service provider. The reasons stated by TECL and reproduced by the CCS at [6.3.5] of the Infringement Decision were rather vague and unconvincing. It seems to the Board that the real reason is as stated at [6.3.6] of the Infringement Decision, which is this. As Quebec Leisure is the majority shareholder of the Singapore franchisee of Tickets.com, Quebec Leisure

would have engaged the service of Tickets.com, but for the requirement in the ASTA that event promoters who hold events at the Esplanade were required to engage SISTIC to provide the ticketing services.

303. Effectively, SISTIC by these two Exclusive Agreements has secured for itself a large share of the Relevant Market for a long duration and effectively foreclosed any competitor from competing for a share of the ticketing services at the Esplanade venues and at the SIS.
304. This is not all. There are the 17 Exclusive Agreements that were made on diverse dates by SISTIC with the 17 event promoters. All these agreements were based on SISTIC's standard template, namely, "*Ticket Sales Agreement with Promoters, Form of Agreement*". The important clauses of the agreements, including the exclusivity commitment and the contractual duration were prescribed in the standard template. The exclusivity clause says that "*SISTIC shall be the exclusive ticketing agent for all ticketed events organised by the Promoter during the fixed term*". It seems to the Board the exclusivity restrictions are standard terms imposed by SISTIC on the event promoters.
305. The CCS provides the following table showing the list of the 19 event promoters (including TECL and SIS), the dates on which the agreements were entered into and the duration thereof:

Event promoters entering into exclusive ticketing sales agreements with SISTIC

	<i>Event promoter</i>	<i>Start of Contractual Relationship</i>	<i>End of Latest Contract</i>
1	<i>Alliance Francaise de Singapour</i>	<i>[...]</i>	<i>[...]</i>
2	<i>Braddell Heights Symphony Orchestra</i>	<i>[...]</i>	<i>[...]</i>
3	<i>Hype Records Pte Ltd</i>	<i>[...]</i>	<i>[...]</i>
4	<i>Kideas Holdings Pte Ltd (formerly known as Initestand)</i>	<i>[...]</i>	<i>[...]</i>
5	<i>MediaCorp TV12 Singapore Pte Ltd</i>	<i>[...]</i>	<i>[...]</i>
6	<i>National Museum c/o National Heritage</i>	<i>[...]</i>	<i>[...]</i>

	<i>Board</i>		
7	<i>NUS Centre For the Arts</i>	[...]	[...]
8	<i>Rock Records (S) Pte Ltd</i>	[...]	[...]
9	<i>Scorpio East Productions Pte Ltd</i>	[...]	[...]
10	<i>Singapore Indoor Stadium</i>	[...]	[...]
11	<i>The Esplanade Co Ltd</i>	[...]	[...]
12	<i>The Necessary Stage</i>	[...]	[...]
13	<i>The Singapore Lyric Opera</i>	[...]	[...]
14	<i>The Singapore Lyric Opera</i>	[...]	[...]
15	<i>Unusual Entertainment Pte Ltd</i>	[...]	[...]
16	<i>Warner Music Singapore Pte Ltd</i>	[...]	[...]
17	<i>Wild Rice Ltd</i>	[...]	[...]
18	<i>Yong Siew Toh Conservatory of Music</i>	[...]	[...]
19	<i>Zebra Crossing Productions Pte Ltd</i> <i>("Zebra Crossing")</i>	[...]	[...]

306. It is asserted by the CCS that SISTIC initiated the exclusivity restrictions in the Exclusive Agreements. In so far as the ASTA and the ATS are concerned they were negotiated and agreed upon by the parties to the agreements. However, it seems to the Board that the exclusivity restrictions as found in the agreements must have emanated from SISTIC, and were provided therein clearly for the benefit of SISTIC. In that sense, it can be said that the exclusivity restrictions were initiated by SISTIC. As for the 17 Exclusive Agreements they were all based on the standard template of SISTIC and on that basis the exclusivity restrictions must have been insisted on or imposed by SISTIC. As noted in the table above, the majority of these agreements were made after the 2002 ASTA was made, by which date SISTIC had already entrenched itself in the 2002 ASTA as the sole ticketing service provider for events in the Esplanade venues.

307. It should be noted that none of the Exclusive Agreements have been successfully contested over the years, and each one of them on expiry or soon thereafter had been renewed.

308. The Exclusive Agreements contain explicit and total restrictions that prevent venue operators and event promoters from engaging other ticketing service providers. In the case of *Porkent-Tomra*, the EC had this to say about exclusivity restrictions:

“(290) Exclusivity obligations, because they require the customers to purchase all or significant parts of their demand from a dominant supplier, have by their nature a foreclosing capability. It is the very purpose of these kinds of agreements or arrangements to exclude competitors from the respective parts of the market. Given Tomra’s dominant position on the market and the fact that exclusivity obligations were applied to a not insubstantial part of the total market demand, it was capable of having and in fact had a market distorting foreclosure effect. Tomra was not allowed to engage in this kind of practice, and the exclusivity agreements and arrangements constituted an abuse of a dominant position.

(291) In this case there are no circumstances that could exceptionally justify exclusivity or similar arrangements. Moreover, Tomra has failed to justify its practices by its cost savings.”

309. Through the Exclusive Agreements, SISTIC for the period from January 2006 to March 2009, gained the following shares of the Relevant Market:

- (i) through the ASTA, about [...]%, by both volume and revenue, for events held at the Esplanade;
- (ii) through ATS, [...]%, by volume and revenue, for events held at the SIS;
- (iii) through the 17 Exclusive Agreements, [...]% of the Relevant Market; and
- (iv) as a result of the Exclusive Agreements, an accumulated share amounting to [...]% by volume and by revenue.

310. At [7.9.10] of the Infringement Decision, the CCS gives an illustration of the parties being locked in by the exclusivity restrictions in the Exclusive Agreements. The full

text of [7.9.10] has been set out verbatim at [146] above, and it is not necessary to repeat it here. It seems to the Board that there is some merit in the illustration as given by the CCS.

311. SISTIC has sustained persistently high market shares over the years. Other competitors have not been able to win exclusive or preferential contracts with any major venue operator or event promoter.
312. The exclusivity restrictions contained in the Exclusive Agreements make no economic sense other than having the effect of foreclosing competition. The Exclusive Agreements with event promoters are not contestable as the event promoters' choices have been restricted as a consequence of the venue exclusivities being locked in by the ASTA and the ATS. An equally efficient firm cannot overcome the competitive restraints generated by SISTIC's strategic conduct to compete for ticket buyers.
313. The CCS provides evidence that SISTIC's competitors have already been disincentivised from making adequate investments in the relevant market. Gatecrash expressed that the main obstacles it faced in building competitive advantages to rival its competitors are "*the exclusive agreements which SISTIC has with [TECL] and [SIS]*". OmniTicket stated that "*[i]f SISTIC did not have any exclusive agreements, it would enable other competitors to slowly grow their business*". Tickets.com stated that "*[t]he whole market is aware that venues like [TECL] and [SIS] have exclusive agreements to use SISTIC. It has become a rule of thumb for the industry. For a ticketing agent, it is not encouraging but we just have to accept it.*" Similarly, The Necessary Stage, one of event promoters that has an exclusive agreement with SISTIC, stated: "*...with the exclusivity contracts [SISTIC] has with venues such as [TECL] and [SIS] – both of which are premiere performing venues in Singapore – it makes it difficult for any other ticketing service to rival them*".

314. The Board now turns to the issue of counterfactual. SISTIC asserts that there is “virtually universal agreement” among economists that a counterfactual analysis is required in order to carry out an effects-based analysis of an allegedly anti-competitive practice. SISTIC advocates that an effects-based approach requires a comparison between the actual outcome arising from the conduct in question, i.e. in this case, the outcome of the Exclusive Agreements, and the counterfactual situation that would arise if there were no Exclusive Agreements. And further with an effects-based approach, the onus is on the competition authority to demonstrate a reasonable likelihood that the counterfactual provides a superior outcome in competitive terms than the state of the work that exists with the alleged restrictions or abusive conduct.

315. The CCS rejects this approach and submits that a counterfactual assessment is not a legal requirement in the assessment of abuse of dominance. The CCS relies on the that part of the judgment of Richards LJ in *National Grid*, which was quoted at [274] above. The Board respectfully accept the decision of Richards LJ that a counterfactual assessment is not a legal requirement in assessing abuse of dominance. Nonetheless, the Board notes that the CCS at Appendix 1 of the Infringement Decision sets out the counterfactual being the outcome without the Exclusive Agreements as follows:

“Without the exclusivity restrictions under the Exclusive Agreements:

- *event promoters will be able to choose their preferred ticketing service provider(s), free from total purchase commitments, regardless of the venues where the events are held and taking into account the ticket buyers’ interests;*
- *ticketing service providers, including SISTIC, will compete on a level playing field based on their own merits such as customer service, technical capability, operational efficiency and product innovation;*

- *a dynamically efficient market structure will be determined by competitive forces, including the number of ticketing service providers, and who the winner(s) is/are. SISTIC and its competitors must continue to invest, innovate and improve, or risk being displaced/eliminated;*
- *ticket buyers will benefit from more competitive ticketing services in terms of price, quality and variety; and*

increased event attendance resulting from more competitive ticketing services will benefit the event promoters.”

[emphasis is original]

316. It seems to the Board that if a counterfactual is required the CCS has demonstrated a counterfactual which shows the outcome of a situation without the Exclusive Agreements. The Board accepts that this counterfactual as sufficient for the purpose of demonstrating a scenario without the Exclusive Agreements.
317. By reason of the matters mentioned above, the Board determines that the CCS has established that the Exclusive Agreements are explicitly exclusionary in nature and have led to substantial foreclosure effects on competition in the Relevant Market, all to the detriment of the consumers, as market entry, market access and growth opportunities for existing or potential competition are stifled.
318. The Board finds that the Exclusive Agreements have an appreciable adverse effect on competition in Singapore or do not have any net economic benefit, other than, from SISTIC’s point of view, foreclosing competition.
319. SISTIC’s strategy and conduct by way of the Exclusive Agreements are intended to effectively restrict or foreclose competition on the Relevant Market or was capable of so doing, and amounted to an abuse of dominance.

XI FINANCIAL PENALTY

320. Under section 69(2)(d) of the Act, the CCS may, where it has made a decision that a conduct has infringed the section 47 prohibition, impose on any party who committed the infringement a financial penalty not exceeding 10% of the turnover of the business of such party in Singapore for each year of infringement, up to a maximum of 3 years. Under section 69(3) the CCS may impose a financial penalty only if it is satisfied that the infringement has been committed intentionally or negligently.
321. SISTIC does not dispute that a financial penalty may be imposed if an infringement is found in the present case. It only disputes the quantum of the financial penalty imposed by the CCS. SISTIC's basic argument is that the CCS has erroneously assessed the aggravating and mitigating factors, and as a result the penalty imposed is excessive.

Determination of Financial Penalty by the CCS

322. The CCS determines that the financial penalty be in the sum of \$989,000, and its determination is based on its consideration of the factors listed below.

Relevant turnover

323. In determining the penalty, the CCS applied the relevant turnover in the last business year of SISTIC, and the "last business year" was the business year preceding the date on which the decision of the CCS was given, or if figures are not available for that business year, the one immediately preceding it.
324. For the purpose of calculating the penalty, the CCS has determined the relevant product, i.e. the provision of open ticketing services in Singapore to both event

promoters and ticket buyers, in the Relevant Market. On this basis, the CCS finds that the relevant turnover applicable to SISTIC is its turnover relating to its provision of open ticketing services in Singapore in the last business year. The relevant turnover applicable to SISTIC was S\$[...] for the financial year 2008/2009, based on SISTIC's audited financial statements.

Base amount

325. In determining the base amount, the CCS considers the factors such as the nature of infringement, SISTIC's market shares in the Relevant Market and the impact and effect of the infringement on the Relevant Market. Having considered these factors, the CCS determines that the base amount be [...]% of the relevant turnover which is S\$[...].

Duration of infringement

326. The CCS notes that many of the Exclusive Agreements had been in place since 1 January 2006 when the Act came into force, and none of them have been terminated since. In particular, the 2002 ASTA was entered into in October 2002 and renewed after its expiry by the Addendum and subsequently was replaced by the 2008 ASTA which was entered into in April 2006 for a term of [...] years with effect from 1 January 2008, and would expired only on 31 December 2012. As for the ATS, it was entered into on 22 February 2006 for 3 years and on expiry was automatically renewed for another [...] years.
327. SISTIC's conduct (as found by the CCS to be an infringement) was already in existence before the Act came into force on 1 January 2006 and had continued since then. The CCS therefore applied the base amount to the statutory maximum period of

3 years under section 69(2)(d) of the Act. Applying the multiple of 3 years to the base amount, the amount of penalty amounts to S\$[...].

Aggravating factors

328. The CCS considers first the aggravating factors. The aggravating factors stated in the *CCS Guidelines on the Appropriate Amount of Penalty* include the following:

- (a) the role of the undertaking as a leader in, or an instigator of, the infringement;
- (b) the involvement of directors or senior management;
- (c) retaliatory or other coercive measures taken against other undertakings aimed at ensuring the continuation of the infringement;
- (d) repeated infringements by the same undertaking or other undertakings in the same group;
- (e) infringements which are committed intentionally rather than negligently; and
- (f) retaliatory measures taken or commercial reprisal sought by the undertaking against a leniency applicant.

329. Bearing in mind the above aggravating factors, the CCS considers the involvement of the directors and senior management of SISTIC as an aggravating factor. After the Act had come into force, SISTIC continued the infringing conduct. Although SISTIC's senior management (including the Board of Directors) could not have been unaware that SISTIC's conduct is likely to be restrictive of competition, they made no attempt to terminate the conduct upon the Act coming into effect and after the commencement of the investigation by the CCS. Having regard to the aggravating factors the CCS increased the amount of the penalty by [...] % or S\$[...].

Mitigating factors

330. The CCS next turns to the mitigating factors. These factors as stated in the *CCS Guidelines on the Appropriate Amount of Penalty* include the following:
- (a) role of the undertaking, for example, that the undertaking was acting under severe duress or pressure;
 - (b) genuine uncertainty on the part of the undertaking as to whether the conduct constituted an infringement;
 - (c) adequate steps taken with a view to ensuring compliance with the section 47 prohibition, for example, existence of compliance programme;
 - (d) termination of the infringement as soon as CCS intervenes; and
 - (e) co-operation which enables the enforcement process to be concluded more effectively and/or speedily.
331. The CCS notes that this is the first case of infringement of section 47 of the Act in Singapore. It appears that SISTIC had sought legal advice from its legal counsel as to whether the Exclusive Agreements with TECL and the SSC would infringe section 47 of the Act. SISTIC had also expressed its intention of seeking guidance from the CCS as to whether its conduct has infringed or is likely to infringe the Act. All these indicate some genuine uncertainty on the part of SISTIC as to whether its conduct constitutes an infringement. However, the CCS notes that SISTIC ultimately did not approach the CCS for guidance or decision in relation to its conduct. Lastly, SISTIC gave the CCS the legally required level of cooperation that resulted in the enforcement being concluded no more or less effectively and/or speedily than expected. Having considered these mitigating factors the CCS decreases the amount of penalty by [...]% or S\$[...].

332. On the basis of its consideration of the matters as stated above, the CCS determines that the penalty be in the sum of S\$989,000 (rounded down to the nearest thousand) and accordingly imposes that amount of penalty on SISTIC for infringing the section 47 prohibition.
333. In summary the financial penalty of S\$989,000 imposed by the CCS is based on the calculation as follows:
- (a) The relevant turnover in the last business year was S\$[...];
 - (b) The base amount of penalty is [...] % of the relevant turnover, or S\$[...], after considering the seriousness of the infringement, SISTIC's market share, the structure of the market and the impact of the infringement on the Relevant Market;
 - (c) The infringement period is the statutory maximum of 3 years, and applying the multiple of 3 to the base amount brings the penalty to S\$[...];
 - (d) The penalty is increased by [...] %, or S\$[...], due to the presence of aggravating factors, such as the involvement of directors or senior management and the intentional nature of the infringement; and
 - (e) The penalty is reduced by [...] %, or S\$[...], due to the presence of mitigating factors, such as the fact that this was the first infringement of section 47 in Singapore and uncertainty on the issue of infringement of section 47 prohibition on the part of SISTIC.

On the basis of the above calculations, the amount of penalty payable is S\$[...] which the CCS rounded down to S\$989,000.

The Appellants' Contentions on the Financial Penalty

334. SISTIC contends that the CCS errs in two respects: first, in increasing the penalty by [...] % for aggravating factor, and, second, in not acknowledging SISTIC's cooperation and its genuine uncertainty as to whether its conduct constituted an infringement as mitigating factor in decreasing the penalty.

(1) Aggravating factors

335. SISTIC submits that the aggravating factor regarding the involvement of SISTIC's directors and senior management usually applies to cartel activities (prohibited under section 34 of the Act) which are particularly objectionable, and in which directors and members of senior management are usually involved. This is because involvement in cartel activities are always considered to have the object of preventing, restricting or distorting competition, and thus the involvement of senior officers is particularly objectionable.

336. Cartel arrangements *per se* are intrinsically objectionable but this is not the case with conduct relating to exclusive arrangements. Exclusive agreements are not *per se* anti-competitive. The CCS acknowledges this at [7.2.5] of its Infringement Decision where it states that in many circumstances, exclusive agreements may bring about some pro-competitive outcomes, such as lowering prices and producing higher efficiency. Therefore, involvement of senior officers should not be considered an aggravating factor.

337. Additionally, SISTIC argues that important contractual arrangements with large contractual partners inevitably involve the participation of members of senior management, and such arrangements may well give rise to efficient pro-competitive outcome. In the present case, in particular, the CCS has found that SISTIC had

genuine uncertainty as to whether its conduct constituted an infringement. SISTIC submits that there is no absolute rule in the *CCS Guidelines on the Appropriate Amount of Penalty* that this factor will always be considered aggravating, and that CCS has not provided any reason why this factor is regarded as aggravating in this particular case.

338. In SISTIC's submission, it would be inappropriate for the involvement of directors and members of senior management to be considered an aggravating factor, given that most exclusive agreements can only be entered into legitimately with the involvement of directors and members of senior management, and given also that the CCS acknowledged that there was genuine uncertainty on SISTIC's behalf with respect to whether the conduct constituted an infringement.
339. SISTIC further submits that it should not be considered to have committed the infringement intentionally, as the CCS has found that SISTIC had genuine uncertainty as to whether its conduct constituted an infringement. This uncertainty clearly establishes that the infringement was not committed intentionally.
340. SISTIC also contends that (i) CCS has conceded that it had at no time prior to the Proposed Infringement Decision being issued, informed SISTIC of the specific contractual provisions that were the subject of the investigation, or requested that SISTIC remove the provisions, and that (ii) while the removal of the offending clauses should be treated as a mitigating factor, non-removal pending the completion of investigation should not be treated as an aggravating factor.
341. In respect of the last point, SISTIC cites in support the UK CAT's decision in *Napp Pharmaceutical Holdings Limited and Subsidiaries and Director General of Fair Trading*, Case Number 1000/1/1/01 (IR) ("*Napp*"):

“...we feel that some caution is called for on this aspect. The mere fact that the Director has commenced an investigation does not mean that the undertaking has committed an infringement, nor does the issue of a Rule 14 Notice. The threat that penalties may be increased if an undertaking does not “give in” on receipt of a Rule 14 Notice could perhaps, in some circumstances, inhibit the undertaking from defending itself or, perhaps, cause it to modify commercially defensible conduct without a finding of infringement having been made.

In these circumstances, we think that the fact that the undertaking has committed an infringement after the start of an investigation can in many cases be sanctioned appropriately by simply taking into account the longer duration of the infringement resulting thereby. Further “aggravating circumstances” should be limited to cases where an undertaking has received a clear warning that it is engaging in a plain and obvious infringement of the Act, but has blatantly ignored that warning. Conversely, if an undertaking has, in fact, discontinued an infringement at the start of an investigation by the Director, that in our view is likely to be a mitigating factor”

(2) Mitigating factors

342. With respect to mitigating factors, SISTIC points out that CCS has not ascribed discounts to the level of co-operation given by SISTIC and to SISTIC’s genuine uncertainty as to whether its conduct constituted an infringement. With respect to co-operation, CCS requires the investigated party to do “more than required of them” before a discount is granted. With respect to SISTIC’s uncertainty, no discount was given because SISTIC ultimately did not approach CCS for guidance or decision in relation to its conduct.

343. With respect to co-operation, SISTIC argues that there is limited scope for it to be more forthcoming as the facts with respect to the Exclusive Agreements are evident and undisputed, with there being only a dispute over whether those facts constitute an infringement. SISTIC maintains that it has never denied, nor has there been anything less than forthcoming, that it has entered into the Exclusive Agreements, and that it has provided its utmost cooperation during the investigation. An example of SISTIC offering co-operation over and above what is legally required is Mr Kenneth Tan's offer, in oral representations to the CCS, to assist SISTIC in obtaining a deeper understanding of how the ticketing service market works. SISTIC also argues that the approach here contradicts CCS's earlier approach in *Decision 500/003/08 Price Fixing in Bus Services from Singapore to Malaysia and Southern Thailand*, issued on 3 November 2009, in which the CCS applied a 10% discount to every party for co-operating in replying to the CCS's requests for documents and during the subsequent interviews, notwithstanding that four of the 17 parties proceeded to challenge the CCS's finding of liability. Therefore, SISTIC seeks a [...] % reduction of the penalty on account of its co-operation.
344. With respect to SISTIC's uncertainty, SISTIC argues that there is no requirement that the investigated entity must approach the CCS for guidance or decision in relation to its conduct in order for its genuine uncertainty to be taken into account as a mitigating circumstance. SISTIC further points out that, had it taken those steps, the matter would likely have been resolved without these proceedings or, alternatively, SISTIC would have qualified for the additional mitigating factor of "*adequate steps taken with a view to ensuring compliance with the section 47 prohibition*", which is stipulated as a distinct mitigating factor from "genuine uncertainty" in CCS's *Guidelines on the Appropriate Amount of Penalty*. Therefore, SISTIC seeks a further reduction of

[...]%, or a reduction which the Board determines to be fair and reasonable, for its genuine uncertainty.

CCS's contentions on the Financial Penalty

345. The CCS emphasises that it is vested with discretion in determining the amount of financial penalty to be imposed, and that its discretion may be challenged only if it is shown to have been exercised unreasonably and/or irrationally. Section 69(2)(d) of the Act provides that CCS *may* impose directions as to “*such financial penalty in respect of the infringement as the Commission may determine*”. Similarly, the CCS’s *Guidelines on the Appropriate Amount of Penalty* states that the imposition of a financial penalty is discretionary, and that the appropriate penalty depends on the facts of each case.
346. This is similar to the approach taken in the EU and the UK. The EC’s *Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003* states that the EC “enjoys a wide margin of discretion”, within the limits set by the Regulation, in exercising its power to impose fines. Similarly, the CFI, in *Delacre and Others v Commission* Case C-350/88, [1990] ECR I-395, noted that the field of competition policy is “*characterised by a wide discretion on the part of the [EC], in particular as regards the determination of the amount of fines*”. The same discretion is provided for in the OFT’s *Guidance as to the Appropriate Amount of a Penalty*.
347. The CCS further argues that it has adequately considered the relevant aggravating and mitigating factors. With respect to the aggravating factors, the CCS argues that:

- (a) The involvement of directors and senior management, as an aggravating factor, is not connected to the type or seriousness of the infringement;
- (b) SISTIC's senior management could not have been unaware that SISTIC's conduct is likely to be restrictive of competition, even if they were generally uncertain about whether the conduct constitutes an infringement;
- (c) It was made obvious to SISTIC in the various section 63 notices given to SISTIC that CCS was investigating the exclusive nature of its agreements; and
- (d) SISTIC refused to remove the offending clauses when the Proposed Infringement Decision was issued, and only did so when the Infringement Decision was issued.

348. The CCS seeks to alleviate the impact of the decision in *Napp*, relied upon by SISTIC for the holding that "aggravating circumstances" should be limited to cases where an undertaking has received a clear warning that it is engaging in a plain and obvious infringement, by noting that in subsequent cases, the CAT had adopted a more nuanced approach depending on the facts of the case. In *Genzyme Limited v Office of Fair Trading* [2004] CAT 4, the undertaking sought to rely on the same decision in *Napp* to argue that the OFT had wrongly treated its conduct of margin squeezing, which commenced subsequent to investigations, as an aggravating factor. However, the CAT did not disagree with the OFT's decision in this respect as the undertaking was aware of the OFT's investigation when it commenced its abusive behaviour, although the CAT did observe that any aggravation would be counterbalanced to some extent by the fact that the OFT had discontinued interim measures proceedings and a subsequent Rule 14 notice (equivalent to the Proposed Infringement Decision in Singapore) was not served until about a year later. The CCS argues that SISTIC was

similarly continuously aware of the on-going investigation and the line of enquiry taken by SISTIC in its section 63 notices and in the interview of the CEO of SISTIC.

349. With respect to the mitigating factors, CCS argues that it has already noted and discussed in its Infringement Decision the factors raised by SISTIC, and that it has already given a substantial discount of 20% for all mitigating factors. On the issue of co-operation, the undertakings in previous CCS's decisions had been given a discount only because they had done more than what was required of them, including:

- (a) being forthcoming with information about their infringing conduct when responding to the CCS's section 63 notices and during investigative interviews;
- (b) admitting to their involvement in the collusive behaviour;
- (c) providing the CCS with incriminating emails during searches of their premises;
and
- (d) providing their utmost co-operation by volunteering documents and information for the investigation.

350. The CCS highlights that although the CEO of SISTIC did offer to provide more information to the CCS (as discussed earlier), this offer was made at an advanced stage of the investigations where substantial representations have already been made to the CCS, and the CCS had already weighed the evidence in its entirety. Further, the CCS had been waiting to receive an expert report to be prepared in support of SISTIC's representations, but this was not furnished due to extenuating circumstances. Therefore, the CCS submits that there is no good reason to disturb the quantum of the financial penalty imposed.

The Board's Decision on the Financial Penalty

351. On the financial penalty, there are only two issues for determination by the Board, namely: (i) the aggravating factors, and (ii) the mitigating factors. On the aggravating factors, the main issue between the two parties is the involvement of the directors or senior management of SISTIC in the Exclusive Agreements. The CCS relying on the *CCS Guidelines on the Appropriate Amount of Penalty* states at [10.3.23] as follows:

“In the present case, CCS considers the involvement of directors or senior management as an aggravating factor. Also, CCS is satisfied the infringement was committed intentionally, not just negligently. Subsequent to the Act coming into force, SISTIC had continued the infringing conduct, most noticeably by the renewal of the ASTA and the ATS. Although SISTIC's senior management (including the Board of Directors) could not have been unaware that SISTIC's conduct is likely to be restrictive of competition, they had made no attempt to terminate the conduct upon the Act coming into effect and after the commencement of investigation by CCS.”

352. The Board notes that involvement of directors or senior management is one of the aggravating factors provided in the *CCS Guidelines on Appropriate Amount of Penalty*. But the question is whether the CCS is justified in applying this as an aggravating factor in this case. It seems to the Board that usually, if not invariably, directors or members of senior management are involved in every case of an infringement of section 47 prohibition. But, in the opinion of the Board it does not follow that in every such case the involvement of the directors or senior management, which is stated as one of the factor in the guidelines should or would apply as an aggravating factor in increasing the financial penalty. On the basis of the facts in the present case, the Board is unable to find any ground for applying this factor. The

Board takes the view that this is not a correct application of an aggravating factor stated in the guidelines.

353. Secondly, the CCS held that it is satisfied that the infringement was committed “*intentionally, not just negligently*”. Whether it was committed intentionally or negligently is debatable and of course SISTIC cannot plead ignorance, as ignorance of the law is no excuse. However, the fact remains that SISTIC entertained some genuine uncertainty and this was acknowledged by the CCS. Lastly, the CCS said that SISTIC made no attempt to terminate the conduct upon the Act coming into effect and after the commencement of the investigation. As for termination of the conduct upon the Act coming into force, SISTIC said that there was some genuine uncertainty on its part and this was acknowledged by the CCS. As for terminating the conduct after the commencement of investigation, SISTIC rightly relied on the pronouncement made in *Napp* case (quoted in paragraph 327 above). The Board finds that pronouncement most apt in this case.
354. Having regard to the above the Board is of the opinion that there are no aggravating factors applying in this case, which would or should increase the financial penalty and accordingly the Board disallows the increase of [...] % or S\$[...] imposed by the CCS.
355. Turning to the mitigating factors, SISTIC contends that the CCS has not allowed any discount for the level of cooperation in the investigation given by SISTIC and also SISTIC’s genuine uncertainty. First, on the level of cooperation the facts as to the Exclusive Agreements are evident and the only question is whether the conduct amounted to an infringement. With regard to SISTIC’s uncertainty that should be taken into account. Thus SISTIC seeks a further discount of [...] %. The Board is inclined to agree with SISTIC and therefore would increase the discount to [...] % or S\$[...].

356. The net result is that the Board reduces the amount of financial penalty by [...]% or the sum of S\$[...]. Accordingly, the amount of penalty of S\$[...] (determined by the CCS) is reduced by the amount of S\$[...] resulting in an amount of S\$[...], which the Board rounds down to S\$769,000. The Board hereby determines that the penalty be in the sum of S\$769,000.

XII COSTS OF THE APPEAL

357. Regulation 30(1) of the Competition (Appeals) Regulations provides that the Board may, in relation to any appeal proceedings, award costs in its discretion.

358. In the *Transtar & Anor v CCS* (Appeal No 3 of 2009) the Board referred to the UK CA's decision in the case of *Independent Media Support Limited v Office of Communications* [2008] CAT 27, where the following guiding principles on costs are set out:

- “(a) There is no fixed rule as to the appropriate costs order; how the Board's discretion will be exercised in any case will depend on the particular circumstances of the case;*
- (b) It follows that there is no presumption under rule 55 (which is in pari materia to Regulation 30(1) of the Competition (Appeals) Regulations) that costs should be borne by the losing party;*
- (c) Subject to the first principle, a legitimate starting point is that a party who can fairly be identified as a winning party should ordinarily be entitled to recover his costs from the losing party;*
- (d) The starting point is, of course, subject to a consideration of whether the winning party has incurred costs in arguing issues on which he has lost, or has acted unreasonably in the proceedings;*

- (e) *Other relevant considerations include whether it was reasonable for the unsuccessful party to raise, pursue or contest a particular ground of appeal; the manner in which the parties pursued or defended the appeal and whether any award of costs may frustrate the objectives of the Competition Act.”*

359. Turning to the case at hand, this is the first case of an infringement of section 47 prohibition. The Board thinks that some allowance should be given for this. As for the merits of the appeal, SISTIC has failed in this appeal on the issues of dominance and abuse of dominance and has succeeded only in the reduction of the penalty by the sum of \$219,922. For this reason, SISTIC must bear the costs of the unsuccessful appeal on the substantive issues. However, SISTIC having succeeded on the issue of the reduction of the financial penalty imposed by the CCS and considering all the circumstances of this case, a fair order as to costs is that SISTIC should bear 70% of the costs. And the Board so orders.

XIII INTEREST

360. On the question of interest, Regulation 31 of the Competition (Appeals) Regulations provides:

“Interest

- 31 (1) *If the Board imposes, confirms or varies any financial penalty, the Board may, in addition, order that interest be paid on the amount of any such penalty from such date, not being a date earlier than the date upon which the notice of appeal was lodged in accordance with regulations 7 and 8, and at such rate as the Board considers appropriate.*

- (2) *Unless the Board otherwise directs, the rate of interest shall not exceed the rate prescribed in the Rules of Court (Cap. 322, R 5) in respect of judgment debts.*
- (3) *Any interest ordered to be paid under paragraph (1) shall form part of the penalty payable and be enforced according to section 85 of the Act.”*

361. Order 42 rule 12 of Rules of Court provides:

“Interest on judgment debts (O. 4t2, r.12)

12. Except when it has been otherwise agreed between the parties, every judgment debt shall carry interest at the rate of 6% per annum or at such other rate as the Chief Justice may from time to time direct or at such other rate not exceeding the rate aforesaid as the Court directs, such interest to be calculated from the date of judgment until the judgment is satisfied:

Provided that this rule shall not apply when an order has been made under section 43(1) or (2) of the Subordinate Courts Act (Chapter 321).”

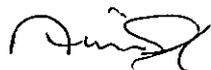
362. The Honourable Chief Justice has directed that the default interest rate shall be 5.33% per annum with effect from 1 April 2007 until further notice: Practice Direction No. 1 of 2007 – Interest on Judgments, Costs and Under Order 30 Rule 6(2).

363. In the case of the *Coach Operators*, the Board ordered the appellants there to pay interest on the penalty at the rate of 5.33% per annum from the date of the decision to the date of payment. Similarly, the Board is of the view that interest should be ordered and accordingly orders that SISTIC pays interest on the penalty at the rate of 5.33% from the date of this decision to the date of payment.

XIV CONCLUSION

364. For the reasons given above, the Board hereby dismisses the appeal of SISTIC on liability but allows the appeal on the financial penalty imposed by reducing the penalty by the sum of S\$219,922. The reduced amount of penalty is therefore \$769,726 which the Board rounds down to S\$769,000. The Board hereby orders that SISTIC pay the sum of S\$769,000 as financial penalty and pay interest thereon at the rate of 5.33% per annum from the date of this decision to the date of payment. The Board further orders that SISTIC bear and pay 70% of the costs of the Appeal.

Dated this 28th day of May 2012



Amarjeet Singh
Member



Thean Lip Ping
Chairman



Shanker Iyer
Member



Phillip Overmyer
Member



Tan Ying Hsien
Member

