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CCS GUIDELINES ON THE APPROPRIATE AMOUNT OF PENALTY

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THE APPROPRIATE AMOUNT OF PENALTY

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1 INTRODUCTION

1.1 The Competition Act (Chapter 50B) (“the Act”) gives the Competition Commission of Singapore (“CCS”) the power to issue directions¹ and impose financial penalties² on undertakings for infringing the section 34³ prohibition, ~~or the section 47⁴ prohibition~~ and the section 54 prohibition⁵ under the Act (~~“section 34 or 47 prohibition” respectively~~).

1.2 ~~The CCS’s~~ powers to issue directions and impose financial penalties are described in the *CCS Guidelines on Enforcement*.

1.3 These guidelines provide general ~~advice~~ guidance and information about the basis on which ~~the~~ CCS will calculate financial penalties for infringements of the section 34, ~~or section 47~~ and section 54 prohibitions.

~~1.3.1.4~~ The *CCS Guidelines on Merger Procedures 2012* has set out some key considerations in the calibration of penalties for the infringement of the section 54 prohibition. These considerations may be applied in accordance with the six-step process set out in paragraphs 2.1 to 2.22 below.

Statutory ~~B~~background

~~1.4.1.5~~ The Act provides that ~~the~~ CCS may impose a financial penalty only if it is satisfied that an undertaking, which has committed an infringement of the section 34 prohibition, ~~or section 47 prohibition~~ or section 54 prohibition has done so intentionally or negligently.^{6,7}

~~1.5.1.6~~ The financial penalty may not exceed ~~ten (10) per cent~~ 10% of such turnover of the business of the undertaking in Singapore for each year of infringement, up to a maximum of three (3) years.^{7,6}

Policy ~~O~~bjectives

~~1.6.1.7~~ In imposing any financial penalty, ~~the~~ CCS has the following twin objectives:

- to impose penalties on infringing undertakings which reflect the seriousness of the infringement, and
- to ensure that the threat of penalties will deter both the infringing undertakings and

¹ Section 69(1) of the Act.

² Section 69(2)(d) of the Act.

³ Agreements between undertakings, decisions by associations of undertakings or concerted practices which have as their object or effect the prevention, restriction or distortion of competition. Further information can be found in the *CCS Guidelines on the Section 34 Prohibition*.

⁴ Conduct on the part of one or more undertakings which amounts to the abuse of a dominant position. Further information can be found in the *CCS Guidelines on the Section 47 Prohibition*.

⁵ Mergers that have resulted or may be expected to result in a substantial lessening of competition within any market in Singapore for goods or services are prohibited. Further information can be found in the *CCS Guidelines on Merger Procedures and the CCS Guidelines on Substantive Assessment of Mergers*.

⁶ Section 69(3) of the Act.

⁷ Section 69(4) of the Act.

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other undertakings from engaging in anti-competitive practices.

~~1.71.8~~ The imposition of a financial penalty is discretionary. ~~The CCS will, where appropriate, impose financial penalties which are severe, particularly, in respect of cartel activities, for example, in price fixing, market sharing, bid rigging (collusive tendering) or, limiting or controlling production or investment arrangements, and serious abuses of a dominance as they are among the most serious infringements of competition law. This and~~ is aimed at deterring not only the infringing undertaking but also other like-minded undertakings which might be considering activities contrary to the section 34, ~~prohibition or~~ section 47 or section 54 prohibitions.⁸

~~1.81.9~~ The assessment of an appropriate penalty to be imposed for all types of infringement will depend on the facts of each case.

~~1.91.10~~ These guidelines are not a substitute for the Act, the regulations and orders. They may be revised should the need arise. The examples in these guidelines are for illustration. They are not exhaustive, and do not set a limit on the investigation and enforcement activities of ~~the~~ CCS. In applying these guidelines, the facts and circumstances of each case will be considered. Persons in doubt about how they and their commercial activities may be affected by the Act may wish to seek legal advice.

~~1.101.11~~ A glossary of terms used in these guidelines is attached.

2 DETERMINING THE AMOUNT OF PENALTY

2.1 A financial penalty imposed by ~~the~~ CCS under section 69 of the Act will be calculated ~~taking into consideration the~~ following a six-step approach:

- Calculation of the base penalty having regard to the seriousness of the infringement (expressed as a percentage rate) ~~and;~~ the turnover of the business of the undertaking in Singapore for the relevant product and relevant geographic markets affected by the infringement in the undertaking's last business year ("relevant turnover");
- Adjustment for the duration of the infringement;
- Adjustment for other relevant factors, e.g. deterrent value; ~~and~~
- Adjustment for any further aggravating or mitigating factors;
- Adjustment if the statutory maximum penalty under section 69(4) of the Act is exceeded; and
- Adjustment for immunity, leniency reductions and/or fast-track procedure discounts.

Step 1 – Calculation of the base penalty

2.2 The base penalty will be determined having regard to:

- The seriousness of the infringement (expressed as a percentage rate); and

⁸ In respect of an infringement of the section 54 prohibition, CCS may impose financial penalties where the merger parties were aware, or could not have been unaware that the merger infringed the section 54 prohibition, or where the merger parties ought to have known that the merger would, or was reasonably likely to infringe the section 54 prohibition. An example is where the merger parties, after having received an unfavourable decision from CCS in respect of an anticipated merger, proceed with an allegedly different merger which is simply a sham restructuring of the anticipated merger: Paragraph 6.27 of the CCS Guidelines on Merger Procedures 2012.

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- The relevant turnover of the undertaking.

Assessment of ~~S~~seriousness of ~~the~~ infringement

~~2.32.3~~ CCS will consider the seriousness of the infringement and set a percentage starting point for calculating the base penalty. ~~The amount of the financial penalty to be imposed will depend in particular upon the nature of the infringement and how more~~ serious and widespread the infringement, ~~the higher the starting percentage point is likely to be is.~~ Serious infringements ~~of the section 34 prohibition~~ include, for example, price-fixing, market sharing, bid-rigging (collusive tendering) and limiting or controlling production or investment arrangements. ~~Conduct which infringes the section 47 prohibition and which by virtue of the undertaking's dominant position and the nature of the conduct has, or is likely to have, an adverse effect on the process of competition, for example, predatory pricing, is also considered to be a serious infringement. With respect to the section 54 prohibition, the seriousness of the substantial lessening of competition within the relevant market that has resulted, or which may be expected to result from the merger may be a factor used in assessing the percentage starting point.~~

~~2.32.4~~ In assessing the seriousness of the infringement, ~~the~~ CCS will consider a number of ~~other~~ factors, including the nature of the product, the structure and condition of the market, the market share(s) of the undertaking(s) involved in the infringement, entry conditions and the effect on competitors and third parties. The impact and effect of the infringement on the market, direct or indirect, will also be an important consideration. ~~The assessment will be made on a case-by-case basis for all types of infringements, taking into account all of the circumstances of the case.~~

Determination of relevant turnover

~~2.42.5~~ An undertaking's relevant turnover is ~~In assessing the impact and effect of the infringement on the market, direct or indirect, the CCS will take into consideration, among other things,~~ the turnover of the business of the undertaking in Singapore for the relevant product and geographic markets affected by the infringement in the undertaking's last business year. ~~CCS will require undertakings to provide their relevant turnover pursuant to a section 63 request for information and, if necessary, to provide further evidence to substantiate the section 63 responses. Generally, CCS will base relevant turnover on figures from the undertaking's audited accounts. However, CCS retains the discretion to use different figures, for example, where the audited accounts are not available or where the audited accounts do not reflect the true scale of an undertaking's activities in the relevant market.~~

~~2.52.6~~ The business year, for this purpose, will be the one preceding the date on which the decision of ~~the~~ CCS is taken or, if figures are not available for that business year, the one immediately preceding it.

~~2.6~~ ~~Where an infringement involves several undertakings, the turnover of the business of each of the undertakings concerned in Singapore for the relevant product and geographic markets affected by the infringement in the undertaking's last business year will be considered in order to take account of the real impact of the infringing activity of each undertaking on competition.~~

~~2.7~~ ~~Where an undertaking is unable or refuses to provide CCS with its relevant turnover or is suspected of providing CCS with incomplete or very low relevant turnover, CCS may attribute a relevant turnover to that undertaking.~~

Base Penalty – Application of percentage rate to relevant turnover

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2.8 The base penalty will be calculated by applying the percentage rate to the relevant turnover.

Step 2 – Adjustment for the Duration of Infringement

~~2.7.9~~ The amount of financial penalty to be imposed will also depend on the duration of the infringement. The base penalty will be multiplied by the duration of the infringement.

~~2.8.10~~ An infringement over a part of a year may be treated as a full year for the purpose of calculating the duration of the infringement. Therefore, penalties for infringements that last more than one year may be multiplied by the number of years of the infringement and a part of a year may be treated as a full year for the purpose of calculating the duration of the infringement. However, CCS may, in cases involving duration over one year, round down part years to the nearest month.

~~2.9~~ The amount of financial penalty to be imposed may be adjusted, as appropriate, on a case by case basis, to achieve the policy objectives outlined in paragraph 1.6 above, in particular, to deter undertakings from engaging in anti-competitive practices. Other considerations may include, but not limited to, an objective estimate of any economic or financial benefit derived or likely to be derived from the infringement by the infringing undertaking and any other special features of the case, including the size and financial position of the undertaking in question. Where relevant, any gains which might accrue to the undertaking in other product or geographic markets as well as in the relevant market under consideration may be taken into account.

2.11 Where the total duration of an infringement is less than one year, CCS will treat the duration as a full year for the purpose of calculating the number of years of the infringement. However, in exceptional circumstances, CCS may round down the duration of the infringement to the nearest month subject to a minimum duration of one month

2.12 The effects of bid-rigging or collusive tendering are generally irreversible, cannot be easily rectified, and continue to be felt long after the duration where the bid-rigging or collusive tendering conduct occurred. For this reason, CCS will generally not set a duration of infringement that is less than one year.

Step 3 – Adjustment for Aggravating and Mitigating Factors

~~2.10.13~~ The financial penalty, adjusted as appropriate at Step 2, may be increased where CCS considers there are aggravating factors, or decreased where CCS considers there are mitigating factors. In assessing the amount of financial penalty to be imposed, the CCS will consider any aggravating or mitigating factors.

~~2.11.14~~ 2.14 Aggravating factors include:

- role of the undertaking as a leader in, or an instigator of, the infringement;
- involvement of directors or senior management;
- retaliatory or other coercive measures taken against other undertakings aimed at ensuring the continuation of the infringement;
- continuance of the infringement after the start of investigation;
- repeated infringements by the same undertaking or other undertakings in the same group;

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- unreasonable failure by an undertaking to respond to a request for financial information on business turnover and/or relevant turnover;
- in the case of bid-rigging or collusive tendering, CCS may treat each infringement that an undertaking participates in, after the first infringement, as an aggravating factor and calibrate with a proportionate percentage increase in penalties;
- infringements which are committed intentionally rather than negligently; and
- retaliatory measures taken or commercial reprisal sought by the undertaking against a leniency applicant.

2.122.15 Mitigating factors include:

- role of the undertaking, for example, that the undertaking was acting under severe duress or pressure;
- genuine uncertainty on the part of the undertaking as to whether the agreement or conduct constituted an infringement;
- adequate steps taken with a view to ensuring compliance with the section 34 prohibition or section 47 prohibition, for example, existence of any compliance programme;
- termination of the infringement as soon as ~~the~~ CCS intervenes; and
- co-operation which enables the enforcement process to be concluded more effectively and/or speedily.

2.132.16 In considering how much mitigating value to be accorded to the existence of any compliance programme, ~~the~~ CCS will consider:

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

Step 4 – Adjustment for ~~O~~ther ~~R~~relevant ~~F~~factors

2.17 ~~2.9~~ The amount of financial penalty to be imposed after Step 3 may be adjusted by CCS applying an uplift, as appropriate, on a case by case basis, to achieve the policy objectives outlined in paragraph ~~4.6-1.7~~ above, in particular, to deter ~~the~~ undertakings concerned as well as other undertakings from engaging in anti-competitive practices.

2.18 In determining whether to impose an uplift CCS may take into account ~~o~~Other considerations, ~~including may include~~, but not limited to, an objective estimate of any economic or financial benefit derived or likely to be derived from the infringement by the infringing undertaking and any other special features of the case, including the size and financial position of the undertaking in question. Where relevant, any gains

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which might accrue to the undertaking in other product or geographic markets as well as in the relevant market under consideration may be taken into account.

Step 5 – Adjustment if ~~T~~the statutory ~~M~~maximum ~~P~~penalty is exceeded

~~2.14~~2.19 The amount of the financial penalty to be imposed may not exceed the statutory maximum penalty under section 69(4) of the Act, i.e. 10% ~~per cent~~ of the turnover of the business of the undertaking in Singapore for each year of infringement, up to a maximum of ~~3~~ three years. The financial penalty will be adjusted if necessary to ensure that the statutory maximum is not exceeded.

~~2.15~~2.20 The involvement of an association of undertakings (e.g. a trade association) in an infringement of the section 34 prohibition or section 47 prohibition may result in financial penalties being imposed on the association itself, its members or both. Where the infringement by an association of undertakings relates to the activities of its members, the penalty shall not exceed 10% ~~per cent~~ of the sum of the turnover of business of each member of the association of undertakings in Singapore active on the market affected by the infringement, for each year of infringement, up to a maximum of ~~3~~ three years.

Step 6 – Adjustment for Immunity, ~~leniency~~ ~~or~~ ~~R~~reductions and/or fast-track procedure discounts ~~from~~ Penalty

2.21 An undertaking participating in cartel activity may benefit from total immunity from, or a significant reduction in the amount of financial penalty to be imposed if it satisfies the requirements for immunity or lenient treatment set out in the CCS Guidelines on Lenient Treatment for Undertakings Coming Forward with Information in Cartel Activity Cases. CCS will make the necessary adjustments to the financial penalty calculated after Step 5 to take into account immunity or any leniency reductions conferred on an undertaking.

2.22 CCS will also adjust the penalty to take into account the discount applicable for an undertaking that agrees to CCS's fast-track procedure. The discount for the fast-track procedure will be in addition to any applicable leniency reductions.

3 GLOSSARY

Business year	Refers to a period of more than six months in respect of which an undertaking publishes accounts or, if no such accounts have been published for the period, prepares accounts.
Turnover	Refers to the turnover of an undertaking for the business year preceding the date on which the decision of the CCS is taken or, if figures are not available for that business year, the one immediately preceding it.
Undertaking	Refers to any person, being an individual, a body corporate, an unincorporated body of persons or any other entity, capable of carrying on commercial or economic activities relating to goods or services, as the context demands. Includes individuals operating as sole proprietorships, companies, firms, businesses, partnerships, co-operatives, societies, business chambers, trade associations and non profit-making organizations <u>organisations</u> .

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CCS GUIDELINES ON THE POWERS OF INVESTIGATION

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THE POWERS OF INVESTIGATION

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INTRODUCTION

- 1.1 The Competition Act (Chapter 50B) (“the Act”) gives the Competition Commission of Singapore (“CCS”) various powers to investigate suspected anti-competitive behaviour, which may infringe the section 34¹ prohibition, ~~or~~ section 47² prohibition or section 54³ prohibition under the Act (“section 34, ~~or~~ 47 or 54 prohibition” respectively). These guidelines describe these powers of investigation.
- 1.2 Under the Act, ~~the~~ CCS has power to:
- require the production of specified documents or specified information;⁴
 - enter premises⁵ without a warrant;⁶ and
 - enter and search premises with a warrant.⁷
- 1.3 Parts 3 to 6 of these guidelines describe when each of these powers can be used, the extent of each power and the procedures that must be followed. The limitations on the use of these powers are described in Part 7 of these guidelines. The offences committed by a person who fails to comply when these powers are exercised are described in Part 8.
- 1.4 These guidelines are not a substitute for the Act, the regulations and orders. They may be revised should the need arise. The examples in these guidelines are for illustration. They are not exhaustive, and do not set a limit on the investigation and enforcement activities of ~~the~~ CCS. In applying these guidelines, the facts and circumstances of each case will be considered. Persons in doubt about how they and their commercial activities may be affected by the Act may wish to seek legal advice.
- 1.5 A glossary of terms used in these guidelines is attached.

¹ Agreements between undertakings, decisions by associations of undertakings or concerted practices which have as their object or effect the prevention, restriction or distortion of competition. Further information can be found in *the CCS Guidelines on the Section 34 Prohibition*.

² Conduct on the part of one or more undertakings which amounts to the abuse of a dominant position. Further information can be found in the *CCS Guidelines on the Section 47 Prohibition*.

³ [Mergers that have resulted, or may be expected to result, in a substantial lessening of competition within any market in Singapore for goods or services. Further information can be found in the CCS Guidelines on the Substantive Assessment of Mergers.](#)

⁴ Section 63 of the Act.

⁵ See section 2 of the Act.

⁶ Section 64 of the Act.

⁷ Section 65 of the Act.

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2 CIRCUMSTANCES UNDER WHICH ~~THE~~ CCS WILL USE ITS POWERS OF INVESTIGATION

2.1 Section 62 of the Act provides that ~~the~~ CCS may conduct an investigation if there are reasonable grounds for suspecting that the section 34~~, or~~ 47 or 54 prohibition has been infringed. The formal powers of investigation outlined in these guidelines can be used only where this requirement is met.

2.2 ~~The~~ CCS will assess the information available in each case to ascertain if there are reasonable grounds for suspicion that a prohibition has been infringed. Examples of information that may be a source of reasonable grounds for suspicion include information provided by disaffected members of a cartel, statements from employees or ex-employees, or a complaint.

2.3 Where an agreement may infringe the section 34 prohibition but enjoys the benefit of an exemption, ~~the~~ CCS will conduct an investigation only if it is of the view that there are reasonable grounds for suspecting that the circumstances are such that it could exercise its power to cancel the exemption for that agreement under section 37(2) of the Act.

2.3.2.4 CCS may conduct an investigation of mergers which come to its attention whenever there are reasonable grounds for suspecting that a merger has infringed, or that an anticipated merger if carried into effect will infringe the section 54 prohibition.⁸ The *Guidelines on Merger Procedures 2012* provide more details in relation to own-initiative investigations by CCS.

2.4.2.5 Parts 3 to 6 of these guidelines describe ~~the~~ CCS's formal powers of investigation. It should be noted that ~~the~~ CCS may also obtain information about undertakings⁹, agreements, practices and markets through informal enquiries, either before or during the course of an investigation. Such enquiries may be made at a meeting, in written correspondence or in a telephone conversation. ~~They~~ may be made in addition to, or instead of, using the formal powers of investigation set out in the Act. Undertakings are encouraged to cooperate.

2.5.2.6 The timeframe for an investigation will depend largely on the nature and complexity of each case. ~~The~~ CCS will endeavour to complete its investigation as soon as it is practically possible.

3 POWER TO REQUIRE THE PRODUCTION OF DOCUMENTS AND INFORMATION

3.1 Where ~~the~~ CCS has reasonable grounds for suspecting that the section 34~~, or~~ 47 or 54 prohibition has been infringed, it may, under section 63 of the Act, require a person to produce specified documents or to provide specified information, which

⁸ [Section 62\(c\) and \(d\) of the Act.](#)

⁹ See section 2 of the Act.

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relates to any matter relevant to the investigation. This power is exercised by service of a written notice, the contents of which are described in paragraph 3.8 below.

- 3.2 The section 63 power may be used before ~~the~~ CCS carries out an inspection of premises (described in Parts 5 and 6 of these guidelines) or, either during or after an inspection to clarify facts that have emerged.
- 3.3 A person may receive a notice requiring the production of documents or information on more than one occasion during the course of an investigation. For example, ~~the~~ CCS may require a person to produce further information after considering the document material produced in response to an earlier notice under section 63.

Scope of the Power

- 3.4 ~~The~~ CCS or an inspector appointed by ~~the~~ CCS can require any person to produce documents or information that it considers relate to any matter relevant to the investigation. ~~The~~ CCS is not limited to approaching the undertakings suspected of infringement and/or their officers (past or present). For example, the notice may be addressed to third parties such as complainants, suppliers, customers and competitors.
- 3.5 The term “document” includes “information recorded in any form”.¹⁰ This definition includes records, such as invoices or sales figures, stored in any form, electronic or otherwise, for example, on a computer. “Specified” means documents or information that are specified or described in a written notice or that fall within a category which is so specified or described in a written notice under section 63¹¹ (described in paragraph 3.8 below). The documents required to be produced may include, for example, invoices, agreements and minutes of meetings.
- 3.6 When requiring a person to produce a document, ~~the~~ CCS can:
- take copies of or extracts from any document produced;
 - require the person served with a notice to produce the document (or any past or present officer or employee of that person) to provide an explanation of the document produced or require the person to provide a translation of the document produced if it is in a language other than the English language; and
 - if the document is not produced, require the person served with a notice to produce the document to state, to the best of that person’s knowledge or belief, where the document can be found.

¹⁰ Section 2 of the Act.

¹¹ Section 63(5) of the Act.

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- 3.7 Under the power relating to the production of specified information, ~~the~~ CCS can require the information to be compiled and produced if it is not already in recorded form. For example, a person may be asked to provide market share information or to provide a description of a particular market using his knowledge and experience or the knowledge and experience of his staff.

The Procedure

- 3.8 The power to require the production of documents or information using section 63 of the Act is exercised by serving a written notice. The written notice must:
- state the subject matter and purpose of the investigation;
 - specify or describe the documents or information, or categories of documents or information, required; and
 - set out the nature of the offences that may be committed if a person fails to comply when the powers of investigation are exercised (described in Part 8 of these guidelines).
- 3.9 The written notice may also state the time and place at which a document or information must be produced and the manner and form in which it is to be produced. For example, a person may be required to produce the documents or information at a specified address on a designated date at a particular time. If information is provided, it may be recorded or reduced into writing by the investigating officer or inspector. The person providing the information will be given the opportunity to amend, add to or delete from the written record and will be asked to sign against the record. If a document is produced, ~~the~~ CCS may require that an explanation of the document be provided. A person required by ~~the~~ CCS to provide information or an explanation of a document may be accompanied by a legal adviser.
- 3.10 The written notice will be delivered personally or sent by pre-paid post to the last known address of the person.
- 3.11 When setting the appropriate time limit for the production of documents or information, ~~the~~ CCS will consider the amount and complexity of the information required, the resources available to the individual or undertaking and the urgency of the case.
- 3.12 The written notice may be addressed to individuals or undertakings. Where a written notice is addressed to an undertaking, the appropriate person to respond is the person who is authorised by the undertaking to respond on the undertaking's behalf. Where a written notice is addressed to an individual, that individual must respond, and it is not acceptable for another person to respond on that individual's behalf. This does not prevent an individual from obtaining legal advice in relation to a notice.

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- 3.13 ~~The~~ CCS will not ask for more documents or information than what it believes is necessary for the investigation as at the date of the written notice.

4 POWER TO ENTER PREMISES FOR INSPECTION

- 4.1 If ~~the~~ CCS has reasonable grounds for suspecting that the section 34~~, or~~ 47 or 54 prohibition has been infringed, it may conduct an investigation. It has the power to enter into any premises to carry out inspections, either with or without a warrant. These powers enable ~~the~~ CCS to enter premises and to gain access to documents relevant to an investigation.
- 4.2 “Premises”¹² generally refers to business premises and does not include domestic premises unless they are used in connection with the affairs of an undertaking or where documents relating to the affairs of an undertaking are kept there. “Premises” also includes any vehicle.
- 4.3 When entering any premises for inspection, the investigating officer, authorised person, inspector or person required by the inspector shall produce evidence of his identity together with evidence of due authority to enter or the inspector’s appointment at the point of entrance.

5 POWER TO ENTER PREMISES WITHOUT WARRANT

- 5.1 The power to enter premises without a warrant¹³ is described in this Part of the guidelines. The power to enter and search premises under warrant¹⁴ is described in Part 6 of these guidelines.

When the Power can be Used

- 5.2 Depending on the circumstances, entry into premises without a warrant may be effected with or without giving an occupier of the premises at least 2 working days written notice of the intended entry.

Entry of Premises with Prior Written Notice

- 5.3 An investigating officer, authorised person, inspector or person required by the inspector may enter any premises in connection with an investigation without a warrant if the occupier of the premises has been given at least two working days’ written notice of the intended entry. The occupier of the premises need not be suspected of an infringement. For example, the premises of a supplier or customer may be entered using this power.

¹² See section 2 of the Act.

¹³ Section 64 of the Act.

¹⁴ Section 65 of the Act.

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Entry of Premises without Prior Written Notice

5.4 An investigating officer, authorised person, inspector or person required by the inspector may enter any premises in connection with an investigation without warrant and without notice if:

- ~~the~~ CCS has reasonable grounds for suspecting that the premises are or have been occupied by an undertaking that is being investigated in relation to an infringement of the section 34, ~~or~~ 47 or 54 prohibition; or
- the investigating officer or inspector has been unable to give written notice to the occupier despite taking all reasonably practicable steps to do so.

Scope of the Power

5.5 An investigating officer, authorised person, inspector or person required by the inspector entering any premises without a warrant may require:

- any person on the premises to produce any document that the investigating officer, authorised person, inspector or person required by the inspector considers relates to any matter relevant to the investigation. For example, an employee may be asked to produce minutes of any meetings with competitors, the diaries of specified directors, sales data or invoices. Copies of, or extracts from, any such documents produced can be taken by the investigating officer, authorised person, inspector or person required by the inspector;
- any person on the premises to provide an explanation of any document produced. For example, an employee may be requested to provide an explanation of the entries or codes on an invoice or spreadsheet;
- any person to state, to the best of that person's knowledge and belief, where any document that the investigating officer, authorised person, inspector or person required by the inspector considers relates to any matter relevant to the investigation can be found;
- any information, which is stored in any electronic form and is accessible from the premises, and which the investigating officer, authorised person, inspector or person required by the inspector considers relates to any matter relevant to the investigation, to be produced in a form in which it can be read and can be taken away; and
- take any other steps which appear necessary in order to preserve the documents or prevent interference with them. This includes requiring that the premises (or any part of the premises, including offices, files and cupboards) be sealed for such time as is reasonably necessary to enable the inspection to be completed. This time period will not be for longer than

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seventy-two (72) hours, except where an undertaking consents to a longer time or where access to documents is unduly delayed, such as by the unavailability of a person who can provide access.

- 5.6 An investigating officer, authorised person, inspector or a person required by the inspector, may take with him any equipment that he deems necessary when entering any premises under this power. For example, he may take portable computer equipment and tape recording equipment.

The Procedure

Entry of Premises with Prior Written Notice

- 5.7 Where an investigating officer or inspector gives written notice of at least 2 working days of his intended entry into the premises without a warrant, the written notice shall state:
- the subject matter and purpose of the investigation, and
 - the nature of the offences that may be committed should any person choose not to comply or co-operate when the powers of investigation are exercised (described in Part 8 of these guidelines).
- 5.8 On entering the premises, the investigating officer, authorised person, inspector or person required by the inspector will produce evidence of his identity together with evidence of his due authority to enter or the inspector's appointment. Apart from evidence of his right to enter, he will also hand over a separate document which sets out the powers of the investigation.

Entry of Premises without Prior Written Notice

- 5.9 If a prior written notice is not required to be given under the Act and the investigating officer, authorised person, inspector or person required by the inspector is entering the premises without a warrant, he may enter only upon production of (i) evidence of his identity together with evidence of his due authority to enter or the inspector's appointment; and (ii) a document indicating the subject matter and purpose of investigation and the nature of offences that may be committed should any person choose not to comply or co-operate when the powers of investigation are exercised (described in Part 8 of these guidelines). He will also hand over a separate document which sets out the powers of investigation.
- 5.10 The investigating officer, authorised person, inspector or person required by the inspector will normally arrive at the premises during office hours. Where possible, the person in charge at the premises should designate an appropriate person to be a point of contact for the investigating officer, authorised person,

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inspector or person required by the inspector during the inspection. The investigating officer, authorised person, inspector or person required by the inspector will provide a list of documents and extracts from documents of which copies have been taken at the end of the inspection as far as practicable and in any event, not later than three (3) working days from the end of the inspection.

Access to Legal Advice

- 5.11 Where the investigating officer, authorised person, inspector or person required by the inspector considers it reasonable in the circumstances to grant a request to allow the occupier of the premises a reasonable time for the occupier's legal adviser to arrive at the premises before the investigation continues, he may impose such conditions as he considers appropriate. The conditions could include sealing of cabinets, keeping business records in the same state and places as when entry into the premises was effected, suspending external email and allowing the investigating officer, authorised person, inspector or person required by the inspector to remain in occupation of selected offices.
- 5.12 The exercise of the right to consult a legal adviser must not unduly delay or impede the inspection. Any delay must be kept to a strict minimum. If an undertaking has an in-house legal adviser on the premises, the investigating officer, authorised person, inspector or person required by the inspector will not wait for an external legal adviser to arrive. If an undertaking has been given notice of the inspection, the investigating officer, authorised person, inspector or person required by the inspector will not wait for the legal adviser to arrive.

6 POWER TO ENTER AND SEARCH PREMISES UNDER WARRANT

- 6.1 An application can be made to a District Court for a warrant for an inspector or officer of ~~the~~ CCS named in the warrant ("named officer"¹⁵) and other persons required by the inspector or authorised in writing by ~~the~~ CCS¹⁶ ("accompanying officers"¹⁷) to enter and search any premises.

When the Power can be Used

- 6.2 The Act identifies three circumstances in which the court may issue a warrant to authorise a named officer and any other accompanying officers to enter and search the premises specified in the warrant. The court must be satisfied that there are reasonable grounds for suspecting that within the premises to be searched, there are documents:
- which have not been produced, although ~~the~~ CCS has required production, either by written notice (section 63 of the Act) or in the course of an

¹⁵ See section 65(14) of the Act.

¹⁶ ~~See section 65(2) of the Act.~~

¹⁷ ~~See section 65(2) of the Act.~~

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inspection without a warrant (section 64 of the Act);

- which an investigating officer, authorised person, inspector or person required by the inspector could have required to be produced in the course of an inspection without a warrant (section 64 of the Act), but was unable to effect entry into the premises; or
- which would be concealed, removed or tampered with or destroyed, if ~~the~~ CCS were to require their production by written notice (section 63 of the Act). This last ground is the only means by which ~~the~~ CCS is able to carry out an inspection of any premises with a warrant without using one of the other investigatory powers first.

Scope of the Power

- 6.3 The warrant will authorise a named officer, and any other accompanying officers to enter the premises. Such accompanying officers could include persons such as computer technicians or industry experts who may carry out specific tasks under supervision of the named officer.
- 6.4 The named officer and any other accompanying officers entering premises under a warrant may take with them such equipment as they deem necessary. This will include equipment that can be used to enter the premises using reasonable force (for example, equipment that can be used to break locks) as well as equipment that can be used to facilitate the search (for example, computer equipment).
- 6.5 The warrant will authorise a named officer and any other accompanying officers to:
- enter the premises specified in the warrant using such force as is reasonably necessary. The named officer and any other accompanying officers entering the premises will be entitled to use force only if they are prevented from entering the premises and may use only such force as is reasonably necessary for the purpose of gaining entry. Force cannot be used against any person;
 - search any person on the premises if there are reasonable grounds for believing that the person has in his possession any document, equipment or article which has a bearing on the investigation;
 - search the premises and take copies of or extracts from any document appearing to be of the kind in respect of which the warrant was granted (identified in paragraph 6.6 below). The named officer and any other accompanying officers can search offices, desks and filing cabinets etc. to find such documents. The named officer will, as far as it is practicable, provide a list of documents and extracts from documents of which copies have been taken at the end of the inspection. If it is not practicable to do

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so, the list will be provided within three (3) working days from the end of the inspection;

- take possession of any document, original or otherwise, appearing to be of the kind in respect of which the warrant was granted if such action appears to be necessary for preserving the document or preventing interference with it, or if it is not reasonably practicable to take copies of the document on the premises. Upon the reasonable request made by an occupier (or occupier's representative) for a copy of the document to be taken, such copy may, as far as it is practicable, be provided. The named officer will cause to be provided to the occupier or occupier's representative for checking a list of documents to be removed from the premises at the end of the inspection as far as practicable and in any event, not later than three (3) working days from the end of the search. Documents taken will be returned within three (3) months;
- take any other steps which appear necessary in order to preserve the documents or prevent interference with them. This includes requiring that the premises (or any part of the premises, including offices, files and cupboards) be sealed for such time as is reasonably necessary to enable the inspection to be completed. This time period will not be for longer than seventy-two (72) hours, except where an undertaking consents to a longer time or where access to documents is unduly delayed, such as by the unavailability of a person who can provide access;
- require any person to provide an explanation of any document appearing to be of the kind in respect of which the warrant was granted or to state to the best of his knowledge and belief where such document may be found;
- require any information, which is stored in any electronic form and is accessible from the premises, and which the named officer considers relates to any matter relevant to the investigation, to be produced in a form in which it can be taken away and read; and
- remove from the premises for examination any equipment or article which relates to any matter relevant to the investigation, for example, computers or any recording devices. If the circumstances are such that the named officer may, instead of removing from the premises such equipment or article, allow them to be retained on the premises, he may impose such conditions as he deems appropriate, for example, to allow for inspection of the said article or equipment at regular intervals.

6.6 The named officer or accompanying officers may take copies (as set out in paragraph 6.5 above) of the following types of documents depending on the ground under which a warrant was obtained:

- where a warrant was granted because an undertaking failed to produce the

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documents which were required to be produced under section 63 or 64 of the Act, copies of those documents:¹⁸;

- where a warrant was granted because there was a reasonable suspicion that documents would have been concealed, removed, tampered or destroyed if prior written notice under section 63 was given, copies of those documents:¹⁹;
- where a warrant was granted because attempts to effect entry into the premises without a warrant under section 64 of the Act proved futile, copies of those documents, which could have been required to be produced upon entry into the premises.²⁰

6.7 In addition, where a warrant is granted to enter premises where there is a reasonable suspicion that if prior written notice under section 63 was given, documents would have been concealed, removed, tampered or destroyed, then, if the court is satisfied that it is reasonable to suspect that there are also other documents relating to the investigation on the premises, the warrant will authorise the actions mentioned in paragraph 6.5 above to be taken.

The Procedure

6.8 The powers set out in paragraphs 6.3 to 6.7 above may only be exercised on production of the warrant.

6.9 A warrant continues in force for one (1) month from the date of issue and must indicate:

- the subject matter and purpose of the investigation, and
- the nature of the offences that may be committed if any person fails to comply or co-operate when the powers of investigation are exercised (described in Part 8 of these guidelines).

6.10 The named officer and any other accompanying officers will normally arrive at the premises during office hours. On entering the premises, the named officer and accompanying officers will produce evidence of their identity. The named officer will also hand over a separate document which sets out the powers of the investigation. Where possible, the person in charge at the premises should designate an appropriate person to be a point of contact for the named officer during the inspection and search.

6.11 If there is no one at the premises, the named officer must take reasonable steps to inform the occupier of the intended entry. If the occupier is informed, the

¹⁸ Section 65(1)(a) of the Act.

¹⁹ Section 65(1)(b) of the Act.

²⁰ Section 65(1)(c) of the Act.

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occupier or his legal or other representative must be given a reasonable opportunity to be present when the warrant is executed. If the named officer has been unable to inform the occupier of the intended entry, he is under a duty to leave a copy of the warrant in a prominent place on the premises. On leaving premises that are unoccupied, the named officer must leave them as effectively secured as he found them.

Access to Legal Advice

6.12 See paragraphs 5.11 and 5.12 above.

7 LIMITATIONS ON THE USE OF POWERS OF INVESTIGATION

Privileged Communications

7.1 The power to require the disclosure of information or documents under Part III of the Act does not extend to any communication:

- between a professional legal adviser and his client, or
- made in connection with, or in contemplation of, legal proceedings and for the purposes of those proceedings,

which would be protected from disclosure in proceedings in a court on grounds of privilege.

7.2 This will mean that communications with in-house lawyers, in addition to lawyers in private practice including foreign lawyers, can benefit from the privilege. The power to require the details of the relevant persons under section 66(4) of the Act will only be used, where necessary, to ascertain if the communications were indeed privileged.

Self-incrimination

7.3 A person or undertaking is not excused from disclosing information or documents to ~~the~~ CCS under a requirement made of him pursuant to the provisions of the Act on the ground that the disclosure of the information or documents might tend to incriminate him.²¹

7.4 Where a person claims before making a statement disclosing information that the statement might tend to incriminate him, that statement shall be admissible in evidence against him in civil proceedings including proceedings under the Act. The statement shall not be admissible in evidence against him in criminal proceedings other than proceedings under Part V of the Act relating to ancillary

²¹ Section 66 of the Act.

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offences such as providing false or misleading information.

Disclosure of Information

- 7.5 Section 89 of the Act imposes limits on the disclosure of information relating to the business, commercial or official affairs of any person, any matter identified as confidential by a person furnishing information and the identity of persons furnishing information to ~~the~~ CCS, obtained in connection with the exercise of any function and discharge of duties of ~~the~~ CCS under the Act (including ~~the~~ CCS's powers of investigation under the Act).
- 7.6 It is an offence for any specified person²² to communicate any such information unless it is necessary for the performance of any function or duty of ~~the~~ CCS or he is lawfully required to disclose the same by any court or the Competition Appeal Board or required or permitted to do so under the Act or any other written law.
- 7.7 The Act however permits ~~the~~ CCS to make disclosure under certain circumstances.²³ For example, ~~the~~ CCS is permitted to disclose information for the purpose of investigations or prosecutions under the Act, giving effect to any provision of the Act or complying with prescribed provisions of an agreement with a foreign country under certain conditions.²⁴ Disclosure is also allowed with the consent of the person to whom the information relates.
- 7.8 Before making a permitted disclosure for the purpose of giving effect to certain provisions of the Act,²⁵ ~~the~~ CCS must have regard to three considerations:
- the need to exclude, so far as is practicable, information the disclosure of which would in its opinion be contrary to the public interest;
 - the need to exclude, so far as is practicable, commercial information the disclosure of which it thinks might significantly harm the legitimate business interests of the undertaking to which it relates, or information relating to the private affairs of an individual the disclosure of which it thinks might significantly harm the individual's interests; and
 - the extent to which the disclosure of information is necessary for the purposes for which it is to be disclosed.²⁶

In doing so, ~~the~~ CCS may ~~edit-redact~~ the documents it proposes to disclose to remove information: for example, by blanking out parts of documents or by aggregating figures.

²² See section 89(8) of the Act.

²³ See section 89(5) of the Act.

²⁴ See section 89(7) of the Act.

²⁵ See section 89(5)(b)(ii) of the Act.

²⁶ See section 89(6) of the Act.

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8 OFFENCES RELATING TO THE POWERS OF INVESTIGATION

8.1 The Act sets out a number of criminal offences which may be committed where an undertaking fails to comply or co-operate when the powers of investigation set out in the Act are exercised. It is an offence to:

- fail to comply with any condition imposed under section 65(5) of the Act by a named officer who, instead of removing from the premises for examination any equipment or article which has a bearing on the investigation, allows the equipment or article to be retained on those premises;²⁷
- fail to comply with a requirement imposed under the powers of investigation in the Act to provide documents, information, explanation or state where a document is to be found²⁸ (subject to certain defences, see below);
- obstruct, by refusing to give access to, assaulting, hindering or delaying, any member, officer, employee or agent of the CCS authorised to act for or assist the CCS, or any inspector or person assisting an inspector in the discharge of his duties under the Act;²⁹
- intentionally or recklessly destroy or otherwise dispose of or falsify or conceal a document of which production has been required or cause or permit its destruction, disposal, falsification or concealment;³⁰ or
- provide information that is false or misleading in a material particular knowingly or recklessly, either to the CCS or to another person such as an employee or legal adviser, knowing that it will be used for the purpose of providing information to the CCS.³¹

A person who fails to comply with a requirement to produce a document under sections 63, 64 or 65 of the Act has a defence if he can prove that the document was not in his possession or control and that it was not reasonably practicable to comply with the requirement. It is a defence for a person who fails to comply with a requirement to provide information or an explanation of a document or to state where a document is to be found if he can prove that he had a reasonable excuse for failing to comply with the requirement.

8.2 Failing to comply with a requirement imposed under sections 63 or 64 of the Act is not an offence if the CCS has failed to act in accordance with the provision in question.³²

²⁷ Section 65(6) read with section 65(5) of the Act.

²⁸ Section 75 of the Act.

²⁹ Section 78 of the Act.

³⁰ Section 76 of the Act.

³¹ Section 77 of the Act.

³² Section 75(4) of the Act.

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- 8.3 Where an offence under the Act committed by a body corporate or unincorporated association is proved to have been committed with the consent or connivance of an officer or member of the governing body, as the case may be, or is attributable to his neglect, that officer or member of the governing body shall also be guilty of the offence. Where the affairs of the body corporate are managed by its members, a member is also guilty of an offence if the offence of the body corporate is proved to have been committed with the consent or connivance of the member or to be attributable to his neglect as if he were a director. Where an offence under the Act committed by a partnership is committed with the consent or connivance of a partner or person purporting to be a partner or is attributable to his neglect, the partner or purported partner, as well as the partnership, shall be guilty of the offence.
- 8.4 To enable ~~the~~ CCS to take steps towards the prosecution of any of the offences in paragraph 8.1 above, any CCS officer or employee may, on the declaration of his office and production of his CCS identification card, require:
- any person whom he reasonably believes to have committed that offence to furnish evidence of the person's identity;
 - any person to produce document or information in his possession and take copies or extracts thereof; and
 - any person who appears to be acquainted with the circumstances of the case to attend before that officer or employee by written order.³³
- 8.5 Any person who, in relation to the exercise of powers under paragraph 8.4 above,
- wilfully mis-states or refuses without lawful excuse to give information or produce any document required by a CCS officer or employee; or
 - fails to comply with the lawful demand of a CCS officer or employee in the discharge of his duties,
- shall be guilty of an offence.³⁴
- 8.6 Offences will be tried in the District Court which shall have power to impose the full penalty or punishment in respect of the offences. All offences are punishable, on conviction, with a fine, imprisonment or both.
- 8.7 The sanctions that may be imposed by the courts on a person found guilty of each offence described in paragraph 8.4 above are set out in the table in Annex A.
- 8.8 An offence under the Act may be compounded if it is prescribed as a compoundable offence under the Competition (Composition of Offences)

³³ Section 80(1) of the Act.

³⁴ Section 80(2) of the Act.

| Regulations.³⁵

³⁵ Section 84 of the Act.

9 TABLE OF OFFENCES & SANCTIONS PROVIDED

Offences	Sanction on Conviction
<p>Section 65(6) – Failure to comply with any condition imposed under section 65(5) by a named officer who, instead of removing from the premises for examination any equipment or article which has a bearing on the investigation, allows the equipment or article to be retained on those premises.</p>	<p>Punishable with a fine not exceeding S\$10,000 or to imprisonment for a term not exceeding 12 months or to both.</p>
<p>Section 75 - Failing to comply with a requirement imposed under the powers of investigation in the Act to provide documents, explanation or information.</p>	<p>Punishable with a fine not exceeding S\$10,000 or to imprisonment for a term not exceeding 12 months or to both.</p>
<p>Section 76 - Intentionally or recklessly destroying or otherwise disposing of or falsifying or concealing a document that is required to be produced or causing or permitting its destruction, disposal, falsification or concealment.</p>	<p>Punishable with a fine not exceeding S\$10,000 or to imprisonment for a term not exceeding 12 months or to both.</p>
<p>Section 77 - Providing information that is false or misleading in a material particular knowingly or recklessly, either to the CCS or to another person such as an employee or legal adviser, knowing that it will be used for the purpose of providing information to the CCS.</p>	<p>Punishable with a fine not exceeding S\$10,000 or to imprisonment for a term not exceeding 12 months or to both.</p>

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Offences	Sanction on Conviction
<p>Section 78 – Obstructing, by refusing to give access to, assaulting, hindering or delaying, any member, officer, employee or agent of the CCS authorised to act for or assist the CCS, or any inspector or person assisting an inspector in the discharge of his duties under the Act.</p>	<p>Punishable with a fine not exceeding S\$10,000 or to imprisonment for a term not exceeding 12 months or to both.</p>
<p>Section 80 - Wilfully mis-stating or refusing without lawful excuse to give information or produce any document required by a CCS officer or employee pursuant to section 80 (1) or failing to comply with the lawful demand of a CCS officer or employee in the discharge of his duties under the Act.</p>	<p>Punishable with a fine not exceeding S\$5,000 or to imprisonment for a term not exceeding 12 months or to both.</p>

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10 GLOSSARY

Authorised person	Refers to any officer of the CCS who is authorised in writing to accompany the investigating officer under section 64(1) of the Act.
Inspector	Refers to an inspector appointed by the CCS to conduct an investigation under section 62 of the Act.
Investigating officer	Refers to any officer of the CCS who is authorised to exercise the power to enter premises for inspection without a warrant under section 64(1) of the Act.
Officer in paragraph 8.3	<ul style="list-style-type: none"> a. in relation to a body corporate, refers to any director, member of the committee of management, chief executive, manager, secretary or other similar officer of the body corporate and includes any person purporting to act in any such capacity; and b. in relation to an unincorporated association (other than a partnership), refers to the president, the secretary, or any member of the committee of the unincorporated association, or any person holding a position analogous to that of president, secretary or member of a committee and includes any person purporting to act in any such capacity.
Person	Includes any undertaking.
Specified person	<p>Refers to a person who is or has been —</p> <ul style="list-style-type: none"> a. a member, an officer, an employee or an agent of the CCS; b. a member of a committee of the CCS or any person authorised, appointed or employed to assist the CCS; c. an inspector or a person authorised, appointed or employed to assist an inspector; or d. a member of the Board or any person authorised, appointed or employed to assist the Competition Appeal Board.

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Undertaking	Refers to any person, being an individual, a body corporate, an unincorporated body of persons or any other entity, capable of carrying on commercial or economic activities relating to goods or services, as the context demands. Includes individuals operating as sole proprietorships, companies, firms, businesses, partnerships, co-operatives, societies, business chambers, trade associations and non profit-making organizationsorganisations .
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CCS GUIDELINES ON ENFORCEMENT

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ENFORCEMENT

PART

- 1 Introduction
- 2 Directions To Bring An Infringement To An End
- 3 Directions On Interim Measures
- 4 Penalties
- 5 Enforcement In The Courts
- 6 Glossary

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1 INTRODUCTION

1.1 The Competition Act (Chapter 50B) (“the Act”) gives the Competition Commission of Singapore (“CCS”) the power to enforce the section 34¹ prohibition, ~~the or~~ section 47² prohibition and the section 54³ prohibition under the Act (~~“section 34 or 47 prohibition”~~ respectively).

1.2 ~~The~~ CCS’s investigation and enforcement powers are set out in Part III Division 5 of the Act. These guidelines describe the power of ~~the~~ CCS to:

- give directions to bring an infringement to an end (Part 2);
- give directions on interim measures during an investigation (Part 3); and
- impose financial penalties on undertakings for infringing the sections 34 and/or 47 prohibition (Part 4).

1.3 In respect of the section 54 prohibition, the *Guidelines on Merger Procedures 2012* provide guidance on CCS’s powers to give directions to bring an infringement to an end, to give directions on interim measures and to impose financial penalties on undertakings for infringing the section 54 prohibition.

1.4 The powers of investigation of ~~the~~ CCS under the Act are described in ~~the~~ CCS *Guidelines on the Powers of Investigation*.

~~1.3~~1.5 These guidelines are not a substitute for the Act, the regulations and orders. They may be revised should the need arise. The examples in these guidelines are for illustration. They are not exhaustive, and do not set a limit on the investigation and enforcement activities of ~~the~~ CCS. In applying these guidelines, the facts and circumstances of each case will be considered. Persons in doubt about how they and their commercial activities may be affected by the Act may wish to seek legal advice.

~~1.4~~1.6 A glossary of terms used in these guidelines is attached.

2 DIRECTIONS TO BRING AN INFRINGEMENT TO AN END

2.1 The Act provides that where ~~the~~ CCS has made a decision that the sections 34

¹ Agreements between undertakings, decisions by associations of undertakings or concerted practices which have as their object or effect the prevention, restriction or distortion of competition. Further information can be found in the *CCS Guidelines on the Section 34 Prohibition*.

² Conduct on the part of one or more undertakings which amounts to the abuse of a dominant position. Further information can be found in the *CCS Guidelines on the Section 47 Prohibition*.

³ Mergers that have resulted or may be expected to result in a substantial lessening of competition within any market in Singapore for goods or services are prohibited. Further information can be found in the *CCS Guidelines on Merger Procedures 2012* and the *CCS Guidelines on the Substantive Assessment of Mergers*.

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- ~~and/or~~⁴⁷ ~~and 54~~ prohibitions has or have been infringed, ~~the~~CCS may give such directions as it considers appropriate to bring an infringement to an end.⁴
- 2.2 The directions may be given to such person(s) as ~~the~~CCS considers appropriate.⁵ This includes individuals and undertakings.⁶ ~~The~~CCS is not limited to giving directions to the infringing parties. For example, directions may be addressed to a parent company which, though not the actual instigator of the infringement, has a subsidiary which is the immediate party to the infringement.
- 2.3 Directions may in particular require the person concerned to modify the agreement or conduct, or to terminate the agreement or cease the conduct in question.⁷ Directions may require positive action, such as informing third parties that an infringement has been brought to an end and reporting back periodically to ~~the~~CCS on certain matters. In some circumstances, the directions appropriate to bring an infringement to an end may be (or include) directions requiring an undertaking to make structural changes to its business.

Procedure for Giving Directions

- 2.4 The directions must be in writing and may be given to such person(s) as ~~the~~CCS considers appropriate.⁸ They are likely to form part of the infringement decision in cases where the decision and the directions are addressed to the same person. If ~~the~~CCS proposes to make an infringement decision, it must give the person likely to be affected by such decision, a written notice setting out the facts on which ~~the~~CCS relies and its reasons for the proposed decision, ~~and~~ ~~Such person will be given~~ an opportunity to make written representations to ~~the~~CCS. The person receiving the written notice may request in his written representations a meeting with ~~the~~CCS to make oral representations to elaborate on the written representations ~~already made in this regard~~.
- 2.5 ~~The~~CCS will give these persons or their authorised representatives a reasonable opportunity to inspect the documents in ~~the~~CCS's file relating to the matters referred to in the notice. ~~The~~CCS may withhold any documents to the extent that they contain confidential information or are internal documents.
- 2.6 Any direction given by ~~the~~CCS will set out its reasons for giving the direction. The direction will be published on the register maintained by ~~the~~CCS, which is open to public inspection on ~~the~~CCS's website.

⁴ Section 69 of the Act.

⁵ Section 69(1) of the Act.

⁶ See section 2 of the Act.

⁷ Sections 69(2)(a) and (b) of the Act.

⁸ Section 69(1) of the Act.

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Enforcement of Directions

- 2.7 In most cases, directions will take immediate effect. In some cases, ~~the~~ CCS may allow the undertaking a period of time within which to comply with a direction.
- 2.8 If there is non-compliance with a direction, ~~the~~ CCS may apply to register the direction with a District Court in accordance with the Rules of Court (Chapter 322, Rule 5). On registration, the direction shall have the same force and effect as if it had been an order originally obtained in the District Court and will be enforced accordingly.⁹ Any person who fails to comply with a registered direction without reasonable excuse will be in contempt of court. The normal sanctions for contempt of court will apply, i.e., the court may impose a fine or imprisonment. The Court may also make orders to secure compliance with the direction, or to require any person to do anything to remedy, mitigate or eliminate any effects arising from non-compliance with the direction. In addition, the District Court may also make an award for costs upon the registration of the direction.

Appeals against Directions

- 2.9 A direction imposed can be appealed to the Competition Appeal Board ('Board').¹⁰ Such an appeal must be brought within the specified time period.
- 2.10 The Board can impose, revoke or vary a direction as long as it is a direction that ~~the~~ CCS could itself have given.¹¹ A decision by the Board as to any direction can be appealed to the High Court and then to the Court of Appeal on a point of law arising therefrom.¹² Such an appeal can only be made by a party to the proceedings in which the decision of the Board was made.¹³
- 2.11 An appeal to the Board against a direction imposed will not operate to suspend that direction. The infringement decision and the direction will remain in effect (unless suspended by an interim order made by the Board or, in the case of a further appeal, the relevant appeal court).

3 DIRECTIONS ON INTERIM MEASURES

- 3.1 The Act provides that ~~the~~ CCS may give directions on interim measures pending its final decision as to whether there has been an infringement of the section 34, ~~or~~ 47 or 54 prohibitions.¹⁴ Directions on interim measures will not affect the final decision.
- 3.2 ~~The~~ CCS may give directions on interim measures before it has completed its

⁹ See Section 85 of the Act.

¹⁰ See Section 71 of the Act.

¹¹ See Section 73(8) of the Act.

¹² Section 74(1)(a) of the Act.

¹³ Section 74(2) of the Act.

¹⁴ Section 67 of the Act.

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investigation of the suspected infringement if:

- it has begun an investigation under section 62 of the Act, the investigation is ongoing and it has not completed the investigation;¹⁵ and
- it considers that it is necessary to act urgently either to prevent serious, irreparable damage to a particular person or category of persons, or to protect the public interest.¹⁶

3.3 What constitutes serious damage is a question of fact and will depend upon the circumstances of each case. Damage may be serious where a particular person or category of persons may suffer considerable competitive disadvantage likely to have a lasting effect on their position. Serious damage is likely to include significant financial loss to a person (to be assessed with reference to that person's size or financial resources as well as the proportion of the loss in relation to the person's total revenue), and significant damage to the goodwill or reputation of a person.

3.4 A threat of insolvency will generally be sufficient to constitute serious, irreparable damage although it need not always be so. Less extreme forms of serious damage may still be irreparable, in so far as they cannot be remedied by later intervention. Serious and irreparable damage are cumulative, though inter-related, requirements. Thus, serious damage which is not irreparable will not suffice. The serious, irreparable damage must be shown to result from the alleged anti-competitive behaviour.

3.5 ~~The~~ CCS may consider that it is necessary to act urgently to protect the public interest, for example, to prevent damage being caused to a particular industry or to consumers as a result of the suspected infringement. It may also take action to prevent damage to competition more generally.

3.6 Directions on interim measures may be given by ~~the~~ CCS on its own initiative or after receiving a request, provided that the ~~conditions tests~~ in paragraph 3.2 above are satisfied. Any person requesting a direction on interim measures should provide as much evidence as possible, demonstrating that the alleged infringement is causing, or is likely to cause, serious, irreparable damage or that it is necessary that ~~the~~ CCS act to protect the public interest. Such a request should also indicate as precisely as possible the nature of the interim measure sought.

3.7 ~~The~~ CCS may give such directions on interim measures as it considers appropriate. ~~The~~ CCS may in particular require the person(s) concerned to terminate the agreement or cease the conduct in question, or to modify the agreement or conduct.

3.8 When the investigation is complete and ~~the~~ CCS has decided that an infringement

¹⁵ Section 67(1)(a) of the Act.

¹⁶ Section 67(1)(b) of the Act.

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has taken place, it may replace the direction on interim measures with a direction described in Part 2 above. Otherwise, a direction on interim measures has effect until ~~the~~ CCS has discontinued or completed its investigation into the matter or until ~~the~~ CCS considers there is no longer any necessity to act as a matter of urgency to prevent any serious, irreparable damage to a particular person or category of persons or for the protection of public interest.

Procedure on giving Directions on Interim Measures

- 3.9 Before giving a direction on interim measures, ~~the~~ CCS must give ~~written notice~~ to the person to whom it proposes to give the direction, a written notice indicating the nature of the direction it proposes to give and the reasons for deciding to give it.¹⁷ ~~Such person will be given and~~ an opportunity to make written representations to ~~the~~ CCS. The person receiving the written notice may request in his written representations a meeting with ~~the~~ CCS to make oral representations to elaborate on the written representations ~~already made in this regard~~.
- 3.10 ~~The person who receives written notice from the CCS about the proposed direction on interim measures may inspect the CCS' file on the case. The CCS~~ will give such a person or his authorised representative a reasonable opportunity to inspect the documents in ~~the~~ CCS's file relating to the proposed direction. However, ~~the~~ CCS may withhold any documents to the extent that they contain confidential information or are internal documents.
- 3.11 The directions on interim measures will be published on the register maintained by ~~the~~ CCS, which is open to public inspection on ~~the~~ CCS's website.
- 3.12 A direction on interim measures can be appealed to the Board. Such an appeal must be brought within the specified time period. The making of an appeal will not suspend the effect of the direction on interim measures but the Board may suspend its effect by an interim order.

Enforcement of Directions on Interim Measures

- 3.13 Directions on interim measures can be enforced following the procedure set out in paragraphs 2.7 to 2.8 above.

Appeals against Directions on Interim Measures

- 3.14 Directions on interim measures can be appealed following the procedure set out in paragraphs 2.9 to 2.11 above.

¹⁷ Section 67(2) of the Act.

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Assurances in lieu of Interim Measures Directions

- 3.15 ~~The~~ CCS may accept informal interim assurances offered by the person(s) concerned where it is satisfied that these will prevent any harm which might otherwise form the basis for imposition of a direction on interim measures.
- 3.16 One of the prerequisites for an interim remedy is that it is necessary to act as a matter of urgency. The ability to accept informal interim assurances in appropriate circumstances helps facilitate quick action by ~~the~~ CCS.
- 3.17 ~~The~~ CCS may replace informal interim assurances by a direction on interim measures.
- 3.18 Informal interim assurances will include a provision that they will come to an end when an investigation is complete. If ~~the~~ CCS has decided that an infringement has taken place, it may replace any informal interim assurances with a direction described in Part 2 above.

4 PENALTIES

- 4.1 The Act provides that ~~the~~ CCS may impose a financial penalty¹⁸ on any party to an agreement that infringes the section 34 prohibition or any person whose conduct infringes the section 47 prohibition or 54 prohibition provided that infringement has been intentionally or negligently committed.¹⁹ ~~on or after 1 January 2006~~. The amount of the penalty imposed may be up to 10 per cent of the turnover of the business of the undertaking in Singapore for each year of infringement, up to a maximum of 3 years.²⁰ It is for ~~the~~ CCS to determine whether a financial penalty should be imposed. ~~The~~ CCS can impose penalties for infringements that have already stopped as well as for ongoing infringements.
- 4.2 ~~The~~ CCS will use this power to impose penalties on infringing undertakings to reflect the seriousness of the infringement and to serve as an effective deterrent, both to the undertaking concerned and to other undertakings which might be considering activities contrary to the section 34, ~~or 47~~ or 54 prohibitions. The setting of the maximum penalty at 10% of the turnover of the business of the undertaking in Singapore for each year of infringement, up to a maximum of 3 years, allows ~~the~~ CCS to adjust, where appropriate, the levels of penalties to ensure that deterrence is achieved.

Intentionally or Negligently

- 4.3 Before exercising the power to impose a financial penalty, ~~the~~ CCS must be satisfied, as a threshold condition, that the infringement has been committed

¹⁸ Section 69(2)(d) of the Act.

¹⁹ Section 69(3) of the Act.

²⁰ Section 69(4) of the Act.

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intentionally or negligently.

- 4.4 For intention or negligence to be found, it is not necessary for there to have been action by, or even knowledge on the part of, the partners or principal managers of the undertaking concerned; action by a person who can act on behalf of the undertaking suffices.
- 4.5 ~~The~~ CCS may consider the existence of past decisions or directions made against an undertaking when considering whether or not an infringement of the section 34, ~~or~~ 47 or 54 prohibitions by similar anti-competitive activities of that undertaking was committed intentionally or negligently.
- 4.6 The fact that a particular type of agreement or conduct has not previously been found to be in breach of the section 34, ~~or~~ 47 or 54 prohibitions does not mean that the infringement cannot be committed intentionally or negligently.

Intention

- 4.7 The circumstances in which ~~the~~ CCS might find that an infringement has been committed intentionally include the following:
- the agreement or conduct has as its object the restriction of competition;
 - the undertaking in question is aware that its actions will be, or are reasonably likely to be, restrictive of competition but still wants, or is prepared, to carry them out; or
 - the undertaking could not have been unaware that its agreement or conduct would have the effect of restricting competition, even if it did not know that it would infringe the section 34, ~~or~~ 47 or 54 prohibitions.
- 4.8 The intention (or negligence, referred to below) relates to the facts, not the law. Ignorance or a mistake of law (i.e. ignorance that the relevant agreement or conduct is an infringement) is thus no bar to a finding of intentional infringement.
- 4.9 In establishing whether or not there is intention, ~~the~~ CCS may consider internal documents generated by the undertakings in question. ~~The~~ CCS may regard deliberate concealment of an agreement or practice by the parties as strong evidence of an intentional infringement. It may be inferred that an infringement has been committed intentionally where consequences giving rise to an infringement are plainly foreseeable from the pursuit of a particular policy by an undertaking.

Negligence

- 4.10 ~~The~~ CCS is likely to find that an infringement of the section 34, ~~or~~ 47 or 54 prohibitions has been committed negligently where an undertaking ought to have

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known that its agreement or conduct would result in a restriction or distortion of competition.

Involuntary Infringement

- 4.11 Where an undertaking participates in an infringement under pressure, it may still be held to have acted intentionally or negligently, although, depending on the circumstances, the penalty may be reduced.

Provisional Immunity from Penalties under the Section 34 Prohibition from the Date of Notification to ~~the~~ CCS

- 4.12 The Act provides for parties to notify their agreements or conduct to ~~the~~ CCS for guidance or a decision.²¹ Where an agreement to which the section 34 prohibition applies has been notified, ~~the~~ CCS cannot impose a penalty in respect of any infringement of the section 34 prohibition, during the period beginning with the date of notification and ending on such date as may be specified in a notice given in writing to the applicant by ~~the~~ CCS on determination of the application.²² The date specified in the notice may not precede the date on which the notice is given.²³ No such immunity exists for notifications in respect of conduct under the section 47 [or 54](#) prohibitions.

- 4.13 Provisional immunity only arises after the application for guidance or a decision has been made. Further information on such applications can be found in the *CCS Guidelines on Filing Notifications for Guidance or Decision with respect to the Section 34 Prohibition and Section 47 Prohibition*.

Immunity after Guidance or Decision

- 4.14 Where ~~the~~ CCS has given a favourable guidance or decision in respect of any agreement or conduct notified to it under sections 43, 44, 50 and 51 respectively, no penalty may be imposed in respect of any infringement under the section 34 or 47 prohibition, as the case may be. However, ~~the~~ CCS may remove the immunity from such penalties if –

- it takes further action with respect to the agreement or conduct in one of the following circumstances –
 - **i.** it has reasonable grounds for believing that there has been a material change of circumstance since the guidance or decision, as the case may be, was given; or

²¹ See sections 42 and 49 of the Act.

²² Sections 43(4) and 44(3) of the Act.

²³ Sections 43(5) and 44(4) of the Act.

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- ii. it has reasonable grounds for suspecting that the information on which the guidance or decision was based was incomplete, false or misleading in a material particular; or
 - iii. in the case of guidance on infringement of the section 34 prohibition only, one of the parties to the agreement applies for a decision with respect to the agreement; or
 - iv. in the case of guidance only, a complaint about the agreement or conduct is made to ~~the~~ CCS;
- it considers it likely that the agreement or conduct will infringe the section 34 or 47 prohibition; and
 - it gives written notice to the party or undertaking on whose application the guidance was given or the decision was made, that it is removing the immunity as from the date specified in the notice.
- 4.15 If ~~the~~ CCS has reasonable grounds for suspecting that the information provided to it by a party to the agreement or by an undertaking engaging in the conduct, on which it based the guidance or decision, as the case may be, was incomplete, false or misleading in a material particular, the date specified in the notice may be earlier than the date on which the notice is given. It is a criminal offence to provide information that is false or misleading in a material particular under section 77 of the Act (see the *CCS Guidelines on the Powers of Investigation* for further treatment of offences).

Turnover

- 4.16 The definition of turnover for the purposes of determining the maximum financial penalty that may be imposed by ~~the~~ CCS under section 69(4) of the Act ~~will~~ has been prescribed [in the Competition \(Financial Penalties\) Order 2007](#).

Amount of a Penalty

- 4.17 ~~The~~ CCS's approach on the calculation of a financial penalty to be imposed has been ~~will~~ be set out in the *CCS Guidelines on the Appropriate Amount of Penalty*.
- 4.18 In brief, a financial penalty imposed by ~~the~~ CCS for an infringement of the section 34, ~~or~~ 47 or 54 prohibitions will be calculated taking into consideration, amongst other things, the nature, duration and seriousness of the infringement, the turnover of the business of the undertaking in Singapore for the relevant product and geographic markets affected by the infringement, market conditions, aggravating factors including the existence of any prior anti-competitive practices and behaviour of the infringing party, and mitigating factors including the existence of any compliance programme and the extent to which the infringing party has co-operated with ~~the~~ CCS.

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Lenient Treatment for Undertakings Coming Forward with Information

- 4.19 Undertakings participating in cartel activities might wish to terminate their involvement and inform ~~the~~CCS of the existence of the cartel activity, but be deterred from doing so by the risk of incurring large financial penalties. To encourage such undertakings to come forward, ~~the~~CCS will grant total immunity from financial penalties for an infringement of the section 34 prohibition to a participant in a cartel activity who is the first to come forward subject to certain conditions being met (including that the undertaking refrain from further participation in the cartel activity, except as directed by ~~the~~CCS). An undertaking which is not the first to come forward, or does not satisfy all of these conditions, may benefit from a reduction in the amount of the penalty imposed.
- 4.20 Further information on immunity from, or reduction in the amount of financial penalties is set out in the *CCS Guidelines on Lenient Treatment for Undertakings Coming Forward with Information in Cartel Activity Cases*.

Payment

- 4.21 Where ~~the~~CCS ~~directs~~ ~~requires~~ an undertaking to pay a financial penalty, it must, at the same time, inform the undertaking in writing of its reasons. Where ~~the~~CCS imposes a penalty, it must serve a written notice on the undertaking required to pay the penalty, specifying the date before which the penalty is required to be paid.²⁴ The date for payment must not be earlier than the end of the period within which an appeal against the ~~direction~~ ~~notice~~ may be brought.²⁵

Liability for Payment

- 4.22 ~~The~~CCS may ~~direct~~~~require~~:
- any party to an agreement which has infringed the section 34 prohibition; and/or
 - any person whose conduct has infringed the section 47 prohibition;
- to pay a penalty. Where there has been a finding of joint dominance, so that more than one undertaking has infringed the section 47 prohibition, ~~the~~CCS can ~~direct~~ ~~require~~ each undertaking to pay a penalty.
- 4.23 A parent company and its subsidiaries will usually be treated as a single undertaking if they operate as a single economic unit. This will depend on the facts of each case. ~~The~~CCS may need to consider the respective responsibility of both parent and subsidiary for an infringement and therefore for consequent liability to pay a penalty. Where ~~the~~CCS decides to impose a penalty on both

²⁴ Section 69(5) of the Act.

²⁵ Section 69(5) of the Act.

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parent and subsidiary, it may be imposed jointly and severally.

- 4.24 A penalty may be imposed on a company that takes over the undertaking that has committed an infringement. Changes in the legal identity of an undertaking will not prevent it or its component parts from being penalised. As far as possible, liability for penalties will follow responsibility for actions. Thus, a subsequent transfer of a business from one economically distinct undertaking to another will not automatically absolve the transferor from responsibility. Where the original undertaking has ceased to exist by the time a penalty comes to be imposed, the penalty may be imposed on the successor undertaking.

The involvement of a trade association in an infringement of the section 34 or 47 prohibition may result in financial penalties being imposed on the association itself, its members or both. Where the infringement relates to activities of its members, the penalty shall not exceed 10 per cent of the sum of the turnover of business of each member of the trade association in Singapore active on the market affected by the infringement, for each year of infringement, up to a maximum of 3 years.

Enforcement of Penalty Decision

- 4.25 If an undertaking fails to pay a penalty within the date specified in the direction and it has not brought an appeal against the imposition or amount of the penalty within the time allowed or such an appeal has been made and the penalty upheld, ~~the~~ CCS may register the direction to pay a penalty with a District Court in accordance with the Rules of Court and the effect of registration is that the imposition of the penalty shall have the same force and effect as if it had been an order originally obtained in the District Court²⁶ and can be executed and enforced accordingly, for example, by writ of seizure and sale. In addition, the District Court may make an award for costs and interest upon the registration of the imposition of the penalty.

Appeals against Penalty Decision

- 4.26 The decision to impose a financial penalty and the decision as to the amount of that penalty can be appealed to the Board.²⁷ Such an appeal must be brought within the specified time period.
- 4.27 The Board can revoke a penalty or vary its amount.²⁸ A decision by the Board as to the amount of a penalty can be appealed to the High Court and then to the Court of Appeal²⁹. Such an appeal can only be made by a party to the proceedings

²⁶ See Section 85 of the Act.

²⁷ See Section 71 of the Act.

²⁸ See Section 73(8)(b) of the Act.

²⁹ Section 74(1)(b) of the Act.

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in which the decision of the Board was made.³⁰

- 4.28 An appeal to the Board against the imposition or amount of a penalty will suspend the penalty until the appeal is determined. The infringement decision itself will remain in effect (unless suspended by an interim order made by the Board or, in the case of a further appeal, the relevant appeal court).

³⁰ Section 74(2) of the Act.

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5 ENFORCEMENT IN THE COURTS

- 5.1 Parties suffering loss or damage directly arising from an infringement of the section 34 or 47 prohibition are entitled to commence a civil action to seek relief against the infringing undertaking ~~seeking relief~~.³¹
- 5.2 Such rights of private action shall only arise after ~~the~~ CCS has made a decision of infringement in respect thereof, and in the event the decision is subject to an appeal, upon expiry of the appeal period or upon determination of the appeal if an appeal is brought.³²
- 5.3 There is a 2 years' limitation period for the commencement ~~taking~~ of such private actions from the time that ~~the~~ CCS made the decision or from the determination of the appeal, whichever is the later.³³
- 5.4 The court will be bound in such proceedings by the relevant infringement decisions.³⁴

³¹ Sections 86(1) of the Act.

³² Sections 86(2) and (3) of the Act.

³³ Section 86(6) of the Act.

³⁴ Section 86(7) of the Act.

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6 GLOSSARY

Person	Includes any undertaking
Undertaking	Refers to any person, being an individual, a body corporate, an unincorporated body of persons or any other entity, capable of carrying on commercial or economic activities relating to goods or services, as the context demands. Includes individuals operating as sole proprietorships, companies, firms, businesses, partnerships, co-operatives, societies, business chambers, trade associations and non profit-making organizations