AMENDMENTS TO THE COMPETITION COMMISSION OF SINGAPORE GUIDELINES

1 November 2016

Introduction

Between 25 September 2015 and 27 November 2015, the Competition Commission of Singapore ("CCS") conducted a public consultation for proposed changes to CCS Guidelines. A total of 13 submissions were received from law firms, the business community, academia, professional consultancies, bar associations, government departments as well as members of the public.

Arising from feedback received from the earlier consultation on the proposed amendments to the CCS Guidelines on the Appropriate Amount of Penalty, CCS conducted another public consultation, in particular, on the proposed changes to the relevant financial year which CCS will use to calculate financial penalties (the "Second Public Consultation"). For this round of public consultation conducted between 8 June 2016 and 8 July 2016, CCS received a submission from a law firm.

We are grateful to all contributors for their feedback. Most were supportive of the proposed amendments to the CCS Guidelines, with many offering suggestions on how the guidelines could be improved. CCS has reviewed the feedback carefully and made the appropriate changes to the guidelines. This document outlines the major changes made, as well as the reasons why some suggestions have or have not been adopted.

Guidelines on the Substantive Assessment of Mergers

Control: One respondent commented that it was unclear why venture capital and/or private equity transactions were a specific example of *de facto* control and suggested that CCS clarifies the relationship. CCS has therefore amended paragraph 3.14 of the Guidelines to highlight that transactions by venture capitalists and private equity investors may raise possible competition concerns, particularly if they result in coordination of conduct among firms in their portfolios in the same market in which they have stakes and are able to influence their commercial behaviour.

Respondents [1] have also requested for clarity on when an acquisition of assets or the circumstances under which the transfer of pooling of assets, intellectual property ("IP") acquisitions, exclusive patent licences or the assignment of commercially significant IP rights or brands might constitute a merger. CCS notes that section 54(2) of the Competition Act (the "Act") expressly provides that the acquisition of assets can only amount to a merger if the acquirer is placed in a position to replace or substantially replace the acquiree in the business in which the acquiree was engaged immediately before the acquisition. As such, whilst CCS will continue to monitor developments in other jurisdictions, there is no need to amend the Guidelines at this stage.

[1] "Respondents" refer to two or more entities who provided feedback to CCS in response to the public consultations for proposed changes to the Guidelines.

One respondent noted that at present, there is a lacuna in the Guidelines on the CCS's treatment of a joint venture which does not fall within the definition of a merger under section 54(2) of the Act. CCS has added a footnote at paragraph 3.22 of the Guidelines to highlight that it is possible that a joint venture which may not constitute a merger under section 54(2) may be subject to section 34 of the Act.

Minority shareholdings: One respondent suggested that CCS could remove or in the alternative, clarify to what extent CCS will rely on historical records of attendance to determine whether acquisition of minority shareholdings would result in a reviewable merger as reliance on historical records may be misleading. CCS is of the view that actual historical attendance and voting patterns at past shareholders' meetings, prior to the acquisition, will be just one of the factors to be considered in assessing the influence of the minority shareholding. However, such evidence would provide a good proxy of future conduct post-acquisition.

Efficiencies: Respondents commented that while CCS has stated that CCS was "generally sceptical" that gains in efficiencies might offset a substantial lessening of competition, the scepticism should be on the evidence itself and not the fact that the evidence of efficiencies comes from the merging parties. CCS has revised paragraph 5.69 of the Guidelines to reflect this.

One respondent suggested that post-announcement planning and strategy documents, including those prepared with the assistance of external consultants and experts could be probative evidence for an efficiencies analysis. CCS agrees with the feedback and has amended paragraph 5.70 of the Guidelines to reflect this.

One respondent noted that paragraph 7.18 of the Guidelines requests parties to supply "quantified estimates of the potential loss of competition in the relevant markets", but there is no indication there of what CCS would like parties to measure. CCS has amended the paragraph to clarify that such estimates include an estimate of the net changes to price and/or output, taking into account the substantial lessening of competition and efficiency factors.

One respondent suggested that CCS considers clarifying the range of quantitative tools that may assist in assessing the effects of mergers or whether efficiency gains are sufficient to offset any lessening in competition. CCS, however, does not intend to limit the type of quantitative analysis that may be considered. Merging parties are free to propose and utilise any quantitative analyses as deemed necessary for the purpose of furthering effects or efficiency arguments.

One respondent commented that the current draft text does not explain whether for Net Economic Efficiencies ("NEE") to be accepted, they must benefit consumers directly, or whether cost savings to producers (which may or may not be passed on) are sufficient. CCS has further clarified in paragraph 7.3 of the Guidelines that merger parties have to demonstrate that the NEEs would be sufficient to outweigh the adverse effects resulting from the substantial lessening of competition caused by the merger, and that mergers that only create profits for the companies concerned are unlikely to benefit from the NEE exclusion.

Counterfactual: One respondent suggested that CCS should explicitly commit to identifying the most likely scenario as the counterfactual, while acknowledging that alternative, less certain scenarios can be used in the merger analysis. CCS agrees with the feedback and has amended paragraph 4.22 of the Guidelines to clarify that where there could be multiple counterfactuals, CCS will generally adopt the most likely scenario as the counterfactual.

Theories of harm: Respondents suggested that CCS should seek to understand the parties' commercial rationale for the merger transaction and take this into account when developing its theories of harm. CCS has clarified at paragraphs 4.12 and 4.13 of the Guidelines that whilst CCS will also seek to understand the commercial rationale for the merger, the development of the theory of harm will be based on objective assessment of the circumstances surrounding the transaction rather than the subjective intentions of the merging parties.

Remedies: Respondents suggested that it would be useful for CCS to acknowledge that, when devising a proposed remedy package, it will take into account the potential impact on the parties' activities in other jurisdictions and the need for consistency in developing a cross-border remedies package in respect of other international merger control obligations. CCS has noted the feedback and may take this into consideration when working with merger parties to devise remedy packages.

Ancillary restraints: One respondent suggested that with regard to the doctrine on ancillary restraints, CCS could provide a benchmark or general "starting point" for the acceptable duration for non-compete clauses. CCS notes that an acceptable duration for non-compete clauses varies from market to market and depends on the facts of each merger. However, there is value in providing a range of the duration of non-compete clauses as guidance. As such, CCS has amended paragraph 9.12 of the Guidelines to provide the indicative duration for non-compete clauses based on previous merger cases.

Barriers to entry: One respondent noted that the removal of the two-year time frame for "timely entry" reduces certainty for businesses to self-assess. CCS notes that an appropriate timeframe for timely entry varies from market to market and depends on the facts of each merger. However, taking the feedback into consideration, CCS has revised paragraph 5.56 of the Guidelines to provide an indicative range of the timeframe for entry which CCS has accepted in its previous merger decisions.

Fast Track Procedure ("FTP") Practice Statement

Distinction between FTP, commitments and leniency: As there appears to have been some misconception as to the FTP, commitments and leniency, CCS has provided further guidance on the distinction between the FTP, commitments and leniency at paragraph 1.2 of the Practice Statement. The key difference between commitments and the FTP is that commitments are provided to address concerns expressed by CCS with no admission of liability by an undertaking, and there is also no finding of an infringement by CCS. In relation to CCS's leniency policy and the FTP, it is highlighted that they are not mutually exclusive. It is possible for a leniency applicant to benefit from discounts arising from both the leniency policy and the FTP.

Application of FTP to section 34 and section 47 cases and its associated criteria: Respondents suggested that CCS clarifies the evidential threshold for when a case may be appropriate for the FTP. One respondent expressed concern that CCS may rely on FTP as means to avoid discharging its burden of proof. CCS has amended paragraph 1.6 of the Practice Statement to emphasise that the FTP will be considered only when CCS is reasonably satisfied that the evidentiary standard of proof has been met such that CCS would be prepared to issue a Proposed Infringement Decision ("PID") or Infringement Decision ("ID").

Information necessary for parties to decide whether to utilise the FTP: One respondent suggested that parties should have full access to the information on CCS's file and be informed of CCS's proposed calculation of the likely or maximum penalty that may be imposed. As one of the key objectives of the FTP is procedural efficiencies and administrative savings, a party will need to agree that it will not access the entire contents of CCS's file in order to benefit from the FTP. CCS has, however, clarified in paragraph 3.3 of the Practice Statement that access will be granted to key documents for the purpose of assisting an undertaking decide whether or not to utilise the FTP. In relation to proposed financial penalties, paragraph 3.2 of the Practice Statement sets out that CCS will discuss with each party involved in the FTP, the possible range and/or quantum of financial penalties.

Initiation of FTP by investigated parties: Respondents suggested that CCS allow investigated parties to initiate FTP. CCS has clarified in paragraph 1.5 of the Practice Statement that parties under investigation may choose to proactively indicate to CCS their willingness to engage in FTP discussions. CCS however retains a broad margin of discretion in determining whether a case is suitable for FTP and to initiate the FTP.

Documents for FTP: One respondent commented that more clarity could be provided on the timelines for each stage of the FTP. CCS notes that the timeframe for the FTP discussion will vary between cases, depending on the complexity of the case as well as other factors. CCS has, however, clarified in paragraph 3.1 of the Practice Statement that an indicative timetable will be provided to a party at the commencement of the FTP discussions.

One respondent requested that CCS provides a template Fast Track Procedure Agreement in the Practice Statement. CCS highlights that the terms of the Fast Track Procedure Agreement have been set out in paragraphs 4.1 and 4.2 of the Practice Statement.

Quantum of reduction of financial penalties under FTP: CCS has noted the feedback from some respondents that a 10% reduction from penalties may not provide sufficient incentive for parties to participate in the FTP, and that the discount should be set at 20% or more. CCS is of the view that a fixed percentage figure reduction would provide undertakings with certainty as to the discount they will receive. CCS notes that the FTP provides other incentives apart from reduction in penalty, for instance, undertakings have the opportunity to engage CCS on the scope and gravity of the case made against it, and through the streamlined procedure, the undertakings will enjoy resource and other savings (e.g. business and legal costs). CCS highlights that in leniency cases, the FTP reduction will be added cumulatively to any leniency reduction. CCS is also mindful of the need to retain existing incentives for undertakings to come in for leniency. Hence, CCS has retained the quantum of reduction of financial penalties under the FTP at 10%. CCS may review the quantum of this reduction at a later time and consider changes as appropriate.

Issuance of a PID/ID that departs from agreed position in FTP: Respondents commented that the possibility of a PID/ID which departs from the agreed position in FTP creates a disincentive for parties. CCS has further clarified the position in paragraph 5.4 of the Practice Statement. Generally, CCS may issue a PID or ID that departs from the agreed position where new exculpatory evidence comes to light after the Fast Track Procedure Agreement has been signed. In such a situation, the FTP no longer applies, and any admission by a party will be deemed withdrawn. The parties concerned will be informed that the FTP no longer applies and will also

be granted a reasonable time to allow them to make representations in response to the PID issued by CCS.

Safeguards in relation to the discontinuation of FTP: Respondents highlighted the need for safeguards for parties engaged in the FTP in respect of their unequivocal admission of liability and the provision of any documents or statements made in the course of the FTP. While paragraph 3.5 of the Practice Statement already provides that FTP discussions are conducted on the basis that such discussions are not prejudicial to the parties concerned, CCS has amended paragraphs 3.7 of the Practice Statement to clarify that, at the Fast Track Submission stage, a party is only providing CCS with an indication it is in principle willing to admit liability; any admission by a party of its liability to the infringement takes place when Fast Track Procedure Agreement is signed by that party. CCS has also amended paragraphs 5.4 and 5.5 of the Practice Statement to clarify that documents submitted by a party in the course of the FTP will not be used by CCS should the FTP no longer apply. However, CCS reserves the right to request for documents using its formal powers at a later stage as part of its investigation except in relation to those documents that were created for the purposes of the FTP.

Guidelines on Lenient Treatment for Undertakings Coming Forward with Information on Cartel Activity

Initiators, coercers and leaders: One respondent requested for greater clarity on the definition of "initiators" and "coercers" in the Guidelines. CCS has included further details on how CCS will assess whether an undertaking was an "initiator" or "coercer" at paragraphs 2.4 and 3.1 of the Guidelines. In particular, it has been clarified that CCS would consider the surrounding circumstances of each case carefully, including but not limited to whether the undertaking took positive and successful steps to either initiate a cartel or pressurise an unwilling participant to take part in the cartel.

Admission of cartel activity: Respondents have queried whether the requirement for leniency applicants to admit cartel activity entails an admission of liability. CCS highlights that paragraph 2.2 of the Guidelines make it sufficiently clear that leniency applicants are only required to admit the cartel conduct that occurred; no admission of liability is required.

Marker system: Respondents suggested that there should be no requirement for an applicant to define the markets affected or detail how competition within Singapore would be impacted in order to secure a marker. There was a request that CCS discloses to a subsequent applicant its place in the marker queue and also feedback that the requirement for an applicant to provide information, documents and evidence to the CCS "immediately" at the marker stage may cause applicants to delay applying for markers.

CCS considers that the requirement to define the market affected is necessary to ensure that the reported cartel activity has or could have the requisite nexus to Singapore, i.e. that the cartel could prevent, restrict or distort competition in a market within Singapore.

CCS notes the request for information regarding an applicant's place in the queue. Applicants will be informed if first place is not available. However, an applicant's subsequent place in the leniency queue will not be disclosed in order to better protect the identities of the applicants (especially in cases involving cartels with only a few members).

Pursuant to the feedback, CCS has clarified, at paragraph 2.2 of the Guidelines, that where an undertaking is not immediately able to provide all the information, documents and evidence available to it regarding the cartel activity, CCS can agree to a reasonable time frame for the undertaking to provide the information. This is CCS's current practice.

Waivers: Respondents commented that leniency should not be contingent on the provision of waivers of confidentiality for CCS to speak with other jurisdictions in which the applicant has also applied for leniency. Respondents also suggested for a clear statement that there would be no sharing of information received from the applicant with other competition authorities unless a waiver is granted and that CCS will not require any waiver of attorney-client privilege as a condition for the granting of leniency.

CCS notes that waivers may be necessary to enable CCS to proceed with a leniency matter expeditiously. CCS has clarified, at paragraph 2.2 of the Guidelines, that CCS only seeks appropriate waivers as necessary in each case. In general, CCS does not share information with other competition authorities without receiving a waiver enabling it to do so. Further, CCS does not require any waiver of legal professional privilege as a condition for the granting of leniency.

Provision of oral corporate statements and documents: A respondent suggested that the proposed requirement for an applicant to submit public and general market information in a document (as opposed to orally) may increase exposure to discovery of other related information. Another respondent raised concerns regarding discovery and access to oral submissions by addressees to any PID which CCS may issue. CCS notes that documentation of public and general market information, by definition, should not prejudice parties. In relation to oral submissions, CCS has further clarified, at paragraph 9.3 of the Guidelines, that CCS considers the records of oral submissions to be CCS's internal documents. As such, CCS will generally not use the information in the records of the oral submissions unless it has been subsequently submitted by the applicant or obtained by CCS through the exercise of its formal powers of investigation under the Act.

Withdrawal of leniency: A respondent requested that CCS provides details regarding the process by which a leniency application may be rejected, a statement that oral submissions can also be withdrawn by leniency applicants, and grant cooperation discounts to withdrawn or rejected leniency applicants.

CCS notes that potential cooperation discounts in such a situation are stated at paragraph 9.3 of the Guidelines. CCS has clarified, at paragraphs 11.1 and 11.2 of the Guidelines, that an applicant will be given appropriate notice and opportunity to address CCS on the proposed rejection of its leniency application. CCS has also clarified that the applicant may either withdraw the information submitted for the purposes of its application or provide the information to CCS for the purpose of obtaining a mitigating reduction in financial penalties in view of its cooperation.

Others: Respondents have highlighted the importance of transparency, predictability and ease of access to CCS's leniency policy to potential applicants and their need to know whether leniency will be available before making an approach to the CCS. CCS has clarified that total immunity under paragraph 2 of the Guidelines is available to the first-in applicant until CCS obtains sufficient information to satisfy the threshold set out in section 62 of the Act (i.e. if there are reasonable grounds for suspecting that, *inter alia*, the section 34 prohibition has been infringed). For further clarity, CCS has also amended paragraph 5.13 to clarify that when

issuing a Proposed Infringement Decision, CCS will inform an applicant in writing whether immunity or leniency will be granted as at this administrative stage of proceedings the decision is a proposed one.

Guidelines on the Section 34 Prohibition

Interpretation of the meaning of Vertical Agreements: Respondents suggested that CCS clarifies whether the amendment was targeted at hub-and-spoke agreements only, or at both hub-and-spoke and dual-distribution agreements[2]. CCS considers that whether an agreement is vertical in substance and in form has to be considered on a case-by-case basis. In view of the feedback, paragraph 2.19 of the Guidelines has been amended to clarify that while dual-distribution agreements may generally be considered as vertical agreements, a horizontal concerted practice is likely to be found in agreements of a hub-and-spoke nature.

Effects-based Infringements: Respondents suggested that the Guidelines could provide that assessing whether an agreement has the effect of preventing, restricting or distorting competition requires an extensive analysis of the effect on the market, including identifying the product and geographic boundaries of the market and establishing a counterfactual. CCS is of the view that no further clarifications or amendments are required because (i) guidance, to the extent possible, has been provided at paragraph 2.26; and (ii) given the position in case law and recent developments, there is less emphasis on the authority (in non-object cases) to undertake extensive analysis to prove actual adverse effect, and more of a move towards showing likely adverse effects. Amending the Guidelines to the extent suggested by the Respondents will not be in line with established legal positions and will hinder CCS's enforcement of the section 34 prohibition.

Assessment of object cases and test on appreciability: Respondents commented that (i) there was no specific guidance as to when CCS will determine that an arrangement is a restriction of competition by object; (ii) the distinction between object and appreciability is not clear; and (iii) CCS must ensure that it can show that the agreement will, in itself, restrict competition to an appreciable extent before it can classify such an agreement as being restrictive of competition by object. CCS does not agree with the comments made. CCS is of the view that the Guidelines (as revised) on the topic of object, effect and appreciability, as a whole, accords with current case law in the European Union and the United Kingdom.

Legitimate information exchange: Respondents suggested that CCS provides further guidance on exceptions to, or safeguards for, what may be read as *per se* prohibitions on exchanges of certain categories of information as there may be legitimate commercial circumstances under which parties may need to exchange future information. CCS is of the view that each alleged case of information exchange should be considered on its facts and it would be difficult to lay down precise rules in this regard.

Unilateral disclosure of strategic information: Respondents suggested that CCS elaborates on the nature of practical evidence it would consider sufficient to rebut the presumption that the information passively received had been used to influence the recipient's market behaviour. CCS considers that it would be impossible to identify the individual circumstances or evidence

[2] An agreement where only one party is active on the upstream manufacturing segment but both are active on the downstream, wholesale segment. In dual distribution agreements, strategic and sensitive information is typically exchanged by an undertaking to another undertaking which is both a competitor and a customer.

that would be sufficient to rebut the aforementioned presumption as every piece of evidence would have to be considered in light of all the other evidence and the facts of each case. To be prescriptive in this regard would unduly restrict CCS's enforcement efforts.

Exchange of historical information: Respondents suggested that CCS provides clarifications on the interpretation of historical information that is unlikely to have appreciable effect on competition. Pursuant to this feedback, CCS has clarified at Annex A, rows (b) and (d) of the Guidelines that there is no predetermined threshold for when data becomes historic such that it does not pose risks to competition but that it is dependent on the specific characteristics of the market such as the frequency of price re-negotiations in the industry. CCS has further provided an example that data can be considered historic if it is several times older than the average length of contracts in the industry.

Exchange of information not always appreciable: Respondents commented that CCS should not assume that an exchange of information between competitors will always be a restriction on competition to an appreciable extent. CCS considers that the current amendments at paragraph 3.20 of the Guidelines sufficiently address the concerns raised. However, certain types of information exchange will be considered an object infringement. This is clearly stated at paragraphs 3.22 and 3.25 of the Guidelines, and examples of such types of information have been provided.

Guidelines on the Section 47 Prohibition

Collective dominance: One respondent commented that American antitrust law does not recognise the concept of collective dominance. Another respondent submitted that, in the absence of clear legal links, CCS should be slow to find the existence of a collective entity, and asked for clarification on how a collective entity can be found in the absence of legal links.

The concept of collective dominance is well founded in the competition jurisprudence of the European Union, upon which the Act is modelled. CCS has revised paragraph 3.20 to clarify how a collective entity can be established in the absence of legal links.

Indicative threshold for dominance: Respondents were generally supportive of maintaining the 60% indicative threshold for dominance for companies operating in Singapore. It was noted that this indicative threshold is suitable for Singapore, which has a small, open economy and that the finding of dominance requires consideration of other economic evidence.

Respondents suggested that the Section 47 Guidelines should further clarify that there may be scenarios where undertakings with market shares above 60% are found not to be dominant. CCS is of the view that the language in paragraph 3.8 of the Guidelines is flexible enough to allow for such an interpretation.

Legal test for determining abuse of dominance: Respondents requested for more clarity on what amounted to an adverse effect on the process of competition. CCS has further clarified, in paragraph 4.4 of the Guidelines, that the process of competition may be adversely impacted, for instance, by conduct which would likely to foreclose, or has foreclosed competitors in the market. In addition, factors relevant to this assessment have also been included in the Guidelines.

Respondents commented that whether abuse of dominance has occurred should be determined by reference to the economic outcomes of the conduct with reference to a counterfactual. CCS highlights that the Competition Appeal Board in the *SISTIC* appeal has stated that the role of counterfactual assessment is not a legal requirement in the assessment of abuse of dominance investigations.[3] Nonetheless, as a matter of practice, CCS will generally endeavour to posit a counterfactual, and the Guidelines have been amended to clarify that a counterfactual is not a legal requirement for assessment on abuse of dominance but may be used as a tool for assessment, where appropriate.

Guidelines on Filing Notifications for guidance or Decision with respect to the Section 34 Prohibition and Section 47 Prohibition

Indicative deadlines for assessment: Respondents suggested that CCS could set out non-binding indicative timeframes for which the Form 1 and Form 2 assessments could be completed. CCS highlights that the time taken to furnish guidance or decisions depends on the nature and complexity of the application. However, CCS appreciates that notifying parties wish to have some certainty on expected timelines. As such, paragraph 3.10 of the Guidelines has been amended to clarify that applicants may request for state-of-play meetings with CCS to be kept up to date on the progress of their applications.

Timing of when provisional immunity begins: Respondents suggested that CCS clarifies when the provisional immunity in section 43(3) and 44(4) of the Act begins. CCS has clarified, at paragraph 2.3 of the Guidelines, that provisional immunity begins only on the date on which the application is made, i.e., the date on which Form 1 is submitted to and accepted by CCS, or where the information in Form 1 is incomplete, the date when the outstanding information is submitted to CCS. This is consistent with the position set out in Regulation 7(3) of the Competition (Notification) Regulations 2007.

Structure of Forms and further fees: Respondents suggested that CCS should allow notifying parties to state their reasons as to why exclusion(s) should apply in their Form 1 notification. The revised Form 1 (in the section entitled "Exemptions and Exclusion") seeks simple information on the relevant exclusion, and the reasons why the applicants are unsure as to whether the exemptions and exclusions apply to the agreement in question. CCS considers that whether or not the exclusions are applicable, which involves a more detailed analysis, is properly the domain of Form 2.

A respondent requested for clarity on when CCS will require applicants to submit Form 2, triggering the payment of further fees. CCS highlights that whether Form 2 is required depends on the entire facts and circumstances of the case. As set out in paragraph 2.10 of the Guidelines, the complexity of the case and whether one or more of the applicants are Small or Medium-sized Enterprises ("SMEs") are factors taken into consideration in determining whether a further fee would be imposed. The policy intention is to ensure that CCS calls for a further fee in complex notifications so as to be commensurate with the level of assessment required. However, CCS will generally not call for a further fee where the applicant is a SME.

Market share estimates of competitors: Respondents commented that information requested pursuant to question 3b of Form 2 has also been requested under questions 10b and 10h of the Form 2. CCS points out that while question 3b is intended to capture a broader spectrum of

[3] *Re Abuse of a Dominant Position by SISTIC.com Pte Ltd* [2012] SGCAB 1 at [316].

information, the information requested under questions 10b and 10h are specific to the preceding questions in 10a and 10g, respectively. In any case, if the answers to questions 10b and 10h are the same as that to question 3b, the applicants can simply make reference to the relevant paragraphs without repeating the answers.

Application of provisional immunity: Respondents commented that once applicants fail to submit Form 2 within the time specified by CCS (or within any extensions granted by CCS), the provisional immunity would not apply *ab initio*. To encourage applicants to seek a decision on their agreements, it was suggested that a preferred approach would be to terminate provisional immunity only from the date on which the applicant is notified by CCS that a Form 2 filing is required. CCS highlights that the circumstances where the provisional immunity would not apply *ab initio* is provided for by Regulation 7(5) of the Competition (Notification) Regulations 2007.

Guidelines on the Appropriate Amount of Penalty; Guidelines on the Powers of Investigation; and Guidelines on Enforcement

Guidelines on the Appropriate Amount of Penalty ("Penalty Guidelines")

Starting point percentage: Respondents suggested that CCS reveals the starting point percentage range which is used at step 1 of CCS's penalty methodology. As the percentage starting point is applied to relevant turnover for penalty calculation, CCS does not disclose this percentage starting point (other than to addressees of a PID or ID on a confidential basis) to ensure that the confidential relevant turnover of an addressee cannot be reverse engineered.

Base turnover: Consistent with the practice in other jurisdictions, such as the European Commission and the Competition and Markets Authority in the United Kingdom, respondents suggested that CCS should use the last financial year prior to the infringement for base turnover when calculating financial penalty.

In this regard, the feedback to the Second Public Consultation was positive and CCS has amended its Penalty Guidelines so that the calculation of financial penalties is based on an undertaking's relevant turnover which will be the turnover for the financial year preceding the date when an undertaking's participation in an infringement ends. The calculation of statutory maximum penalty will remain unchanged.

Attribution of relevant turnover: Respondents requested for clarity whether relevant turnover for penalty calculation includes goods and services taxes ("GST"), and other taxes directly related to turnover. CCS notes that the *Competition (Financial Penalties) Order 2007* provides for the exclusion of such taxes. CCS has, therefore, clarified at paragraph 2.6 of the Penalty Guidelines that relevant turnover should exclude sales rebates, GST and other taxes related to turnover.

Respondents commented that paragraph 2.5 of the Penalty Guidelines, which gives CCS the ability to use different turnover figures (as opposed to audited figures provided) to calibrate the financial penalties, provides CCS with unlimited discretion and the discretion should be limited to situations where the figures made available are incomplete or unreliable. Paragraph 2.6 of the Penalty Guidelines stipulates that CCS will generally use the relevant turnover from the undertaking's audited accounts. However, there may be situations where CCS needs to exercise

discretion to use different figures. Examples have been provided to illustrate when CCS may exercise such discretion, i.e. where audited accounts are unavailable or where audited accounts do not reflect the true scale of an undertaking's activities in the relevant market.

Further, in the Second Public Consultation, the respondent suggested that where the infringement ended more than 5 years ago and the undertaking's financial records have been destroyed after the 5-year statutory retention period, the alternative turnover figures which the undertaking is able to provide to CCS should be used, i.e. the turnover for the financial year which is closest to and subsequent to the year that the infringement ended. In this regard, it should be noted that the submission of original financial documents may not be necessary for the determination of relevant turnover and that CCS may also rely on records of audited accounts rather than actual, primary documents if they have been destroyed after the 5-year statutory retention period.

A respondent requested for clarity on CCS's assessment and methods of attribution of turnover in the event CCS suspects that an undertaking has provided CCS with an incomplete or very low turnover. As the method of attribution may vary according to the facts of each case and the figures available, CCS does not propose to include examples in the Penalty Guidelines. Moreover, examples of when CCS has attributed turnover may be found in CCS's published decisions (e.g. *Notice of Infringement Decision: Bid Rigging by Motor Vehicle Traders at Public Auctions of Motor Vehicles*; CCS 500/003/10 issued on 28 March 2013).

Another respondent requested for clarity on the determination of relevant turnover for a Single Economic Entity ("SEE"). CCS is of the view that the determination of relevant turnover in such cases will depend very much on the facts of each case, and entail a detailed consideration of the operations and preparation of accounts of the undertaking(s) concerned. Examples of how CCS has determined the relevant turnover for SEEs may be found in CCS's published decisions (e.g. *Notice of Infringement Decision: Supply of Ball and Roller Bearings*; CCS 700/002/11 issued on 27 May 2014; *Notice of Infringement Decision: Provision of Air Freight Forwarding Services for Shipments from Japan to Singapore*; CCS 700/003/11 issued on 11 December 2014).

Definition of turnover: Respondents commented that the definition of turnover for the purpose of determining statutory maximum financial penalty as prescribed by *Competition (Financial Penalties) Order 2007* is not referenced in the Penalty Guidelines. To address this, CCS has included references to the *Competition (Financial Penalties) Order 2007* in the Penalty Guidelines at paragraphs 1.6 and 2.19.

Multiple Infringements: Pursuant to the Second Public Consultation, the respondent requested for more clarity on how relevant turnover will be derived when there are multiple infringements occurring over different time periods. CCS is of the view that the six-step methodology for penalty calculations and its decisional practice sufficiently address this point. Further, the Penalty Guidelines provides that for bid-rigging cases involving more than one infringement, the duration multiplier (step 2) will be set at 1 and CCS will treat each additional infringement as an aggravating factor and calibrate with a proportionate increase in penalties (step 3).

Guidelines on the Powers of Investigation ("Investigation Guidelines")

Collection of electronic material: Respondents commented that it might be helpful for the Investigation Guidelines to detail the procedures on the conduct of dawn raids and the collection and review of electronic material. CCS considers that the Investigation Guidelines already contain sufficient information on the powers conferred by the Act, the procedure for unannounced inspections and the investigative process to provide sufficient certainty to undertakings under investigation regardless of the form of the information collected.

***Guidelines on the Powers of Enforcement* ("Enforcement Guidelines")**

Scope of enforcement in the courts: One respondent requested for clarity on whether the rights of private action apply to breaches of section 54 as well as section 34 and 47. CCS has amended paragraph 5.1 of its Enforcement Guidelines in this regard.

Guidelines on the Major Provisions

General feedback: Respondents commented that the Guidelines were concise and provided a user-friendly summary of the major provisions of the Act. As general feedback for all Guidelines, respondents suggested that CCS provides anecdotal examples and use visual depictions within the Guidelines. CCS is of the view that flowcharts and diagrams are currently used in the various Guidelines where appropriate, e.g. the flowchart on the general framework for substantive assessment of mergers in Annex B of the CCS Guidelines on the Substantive Assessment of Mergers. CCS also has a wealth of collaterals and brochures explaining the various prohibitions as well as interactive e-learning tools available on the CCS website at https://www.ccs.gov.sg/education-and-compliance/education-resources. These materials are also distributed when CCS conducts outreach and training on competition law.

Next steps

Pursuant to section 61 of the Competition Act, CCS will proceed to publish the above guidelines in the Gazette on 1 November 2016. The guidelines will be reviewed from time to time to ensure their continued relevance, taking into account best practices from leading competition jurisdictions, experiences gleaned from CCS's cases and inquiries, as well as the decisions of the Competition Appeal Board and the courts.

CCS will give a one-month notice period for the introduction of the revised guidelines. The revised guidelines will take effect on 1 December 2016 where the changes relate to *procedural* matters, i.e. Guidelines on the Section 47 Prohibition, Fast Track Practice Statement, Guidelines on Lenient Treatment for Undertakings Coming Forward with Information on Cartel Activity, Guidelines on Filing Notifications for Guidance or Decision with respect to the Section 34 Prohibition and Section 47 Prohibition, Guidelines on the Powers of Investigation, Guidelines on Enforcement and Guidelines on the Major Prohibitions.

Where the changes are *substantive* in nature and impacts on the manner in which CCS assesses a matter or calibrates penalties for infringing parties, it may not be appropriate to apply the new guidelines to all cases on 1 December 2016. The affected Guidelines are:

(i) **Guidelines on the Substantive Assessment of Mergers** – The revised guidelines will apply to all notifications filed after the publication of the revised guidelines. In relation to merger investigations, the revised guidelines will apply to cases where,

on 1 December 2016, CCS has yet to issue a PID;

(ii) **Guidelines on the Section 34 Prohibition** - The revised guidelines will apply to all cases where, on 1 December 2016, CCS has yet to issue a PID; and

(iii) **Guidelines on the Appropriate Amount of Penalty** – The revised guidelines will apply to all cases where, on 1 December 2016, CCS has yet to issue a PID.