

CCS DRAFT GUIDELINE ON THE SECTION 34 PROHIBITION

THE SECTION 34 PROHIBITION

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1 INTRODUCTION

- 1.1 Section 34 of the Competition Act 2004 ('Act') prohibits agreements between undertakings, decisions by associations of undertakings or concerted practices which have as their object or effect the prevention, restriction or distortion of competition within Singapore unless they are exempt in accordance with the provisions of Part III of the Act ('the section 34 prohibition').
- 1.2 This guideline sets out some of the factors and circumstances which the Competition Commission of Singapore ('CCS') will consider in determining whether agreements are anti-competitive. It indicates the manner in which the CCS will interpret and give effect to the provisions of the Act when assessing agreements between undertakings.
- 1.3 The CCS will focus principally on anti-competitive activities that have an appreciable adverse effect on markets in Singapore except where there is a net economic benefit¹. The CCS will set its strategies and priorities, and consider each case on its merits to see if it warrants an investigation.
- 1.4 This guideline is not a substitute for the Act, the regulations and orders. The examples in this guideline are for illustration. They are not exhaustive, and do not set a limit on the investigation and enforcement activities of the CCS. In applying this guideline, the facts and circumstances of each case will be considered. Persons in doubt about how they and their undertakings may be affected by the Act should seek legal advice.
- 1.5 A glossary of terms used in this guideline is attached.

¹ For example, an agreement has a net economic benefit if it leads to an improvement in production or distribution that more than outweighs the adverse impact that it has on competition.

2 SECTION 34: THE PROVISIONS

Scope of the Provisions

- 2.1 The section 34 prohibition applies to agreements between undertakings which have as their object or effect the prevention, restriction or distortion of competition within Singapore.
- 2.2 An agreement made outside Singapore, an agreement where any party to the agreement is outside Singapore or any other matter, practice or action arising out of such agreement outside Singapore are prohibited provided the agreement has as its object or effect the prevention, restriction or distortion of competition *within* Singapore.
- 2.3 Section 34(2) of the Act provides an illustrative list of such agreements:
 - ‘(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
 - (b) limit or control production, markets, technical development or investment;
 - (c) share markets or sources of supply;
 - (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
 - (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.’

Terms Used in the Section 34 Prohibition

Undertakings

- 2.4 Undertaking means 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. It includes individuals operating as sole proprietorships, companies, firms, businesses, partnerships, co-operatives, societies, business chambers, trade associations and non profit-making organisations, whatever its legal and ownership status (foreign or local, government or non-government), and the way in which it is financed.

- 2.5 The key consideration in assessing whether an entity is an undertaking for the application of the section 34 prohibition is whether it is engaged in commercial or economic activity. An entity may engage in commercial or economic activity in some of its functions but not others.
- 2.6 The section 34 prohibition does not apply to agreements where there is only one undertaking, that is between entities which form a single economic unit. In particular, an agreement between a parent and its subsidiary company, or between two companies which are under the control of a third, will not be agreements between undertakings if the subsidiary has no real freedom to determine its course of action in the market and, although having a separate legal personality, enjoys no economic independence. Whether or not the entities form a single economic unit will depend on the facts of each case.
- 2.7 As the intent of the Act is to regulate the conduct of market players, it will not apply to the Government, statutory bodies or any person acting on their behalf.

Agreement

- 2.8 Agreement has a wide meaning and includes both legally enforceable and non-enforceable agreements, whether written or oral; it includes so-called gentlemen's agreements. An agreement may be reached via a physical meeting of the parties or through an exchange of letters or telephone calls or any other means. All that is required is that parties arrive at a consensus on the actions each party will, or will not, take.
- 2.9 The fact that a party may have played only a limited part in the setting up of the agreement, or may not be fully committed to its implementation, or participated only under pressure from other parties does not mean that it is not party to the agreement (although these factors may be taken into account in deciding on the level of any financial penalty).

Decisions by Associations of Undertakings

- 2.10 The section 34 prohibition also covers decisions by associations of undertakings. Trade associations are the most common form of association of undertakings but the provisions are not limited to any particular type of association. A decision by a trade association may include the constitution or rules of an association of undertakings or its recommendations. In the day to day conduct of the business of an association, resolutions of the management committee or of the full membership in general meeting, binding decisions of the management or executive committee of the association, or rulings of its chief executive, may all be "decisions" of the association. The key consideration is whether the object or effect of the decision, whatever form it takes, is to influence

the conduct or co-ordinate the activity of the members in some commercial matter. A trade association's coordination of its members' conduct in accordance with its constitution may also be a decision even if its recommendations are not binding on its members, and may not have been fully complied with. It will be a question of fact in each case whether an association of undertakings is itself a party to an agreement.

Concerted Practices

- 2.11 The section 34 prohibition applies to concerted practices as well as to agreements. The key difference is that a concerted practice may exist where there is informal co-operation, without any formal agreement or decision. A concerted practice would be found to exist if parties, even if they did not enter into an agreement, knowingly substituted co-operation between them for the risks of competition.
- 2.12 The following may be considered in establishing if a concerted practice exists:
- whether the parties knowingly entered into practical co-operation;
 - whether behaviour in the market is influenced as a result of direct or indirect contact between undertakings;
 - whether parallel behaviour results from contact between undertakings leading to conditions of competition which do not correspond to normal conditions of the market;
 - the structure of the relevant market and the nature of the product involved;
 - the number of undertakings in the market, and where there are only a few undertakings, whether they have similar cost structures and outputs.

The Prevention, Restriction or Distortion of Competition

- 2.13 The section 34 prohibition applies where the object or effect of the agreement is to prevent, restrict or distort competition within Singapore. Enforcement will focus principally on agreements which have as their object or effect the appreciable prevention, restriction or distortion of competition unless there is a net economic benefit.

The Appreciable Adverse Effect on Competition Test

- 2.14 An agreement will infringe the section 34 prohibition if it has as its object or effect an **appreciable** prevention, restriction or distortion of competition in Singapore.

- 2.15 An agreement will generally have no appreciable adverse effect on competition:
- if the aggregate market share of the parties to the agreement does not exceed 20% on any of the relevant markets² affected by the agreement where the agreement is made between competing undertakings (i.e. undertakings which are actual or potential competitors on any of the markets concerned)
 - if the market share of each of the parties to the agreement does not exceed 25% on any of the relevant markets affected by the agreement, where the agreement is made between non-competing undertakings (i.e. undertakings which are neither actual nor potential competitors on any of the markets concerned)
 - in the case of an agreement between undertakings where each undertaking is a small and medium enterprise (SME)³. Agreements between SMEs are rarely capable of distorting competition appreciably within the section 34 prohibition
- 2.16 In cases where market shares of the parties to an agreement are below the threshold levels mentioned in paragraph 2.15, the section 34 prohibition will apply where the agreement involves price-fixing, bid-rigging, market-sharing or output limitations. This also applies to SMEs.
- 2.17 The fact that the market shares of the parties to an agreement exceed the threshold levels mentioned in paragraph 2.15 does not mean that the effect of that agreement on competition is appreciable. Other factors may be considered in determining whether the agreement has an appreciable effect, for example, market power of the parties to the agreement, the content of the agreement and the structure of the market or markets affected by the agreement, such as entry conditions or the characteristics of buyers and the structure of the buyers' side of the market.
- 2.18 When applying the market share thresholds mentioned in paragraph 2.15, the relevant market share will be the combined market share not only of the parties to the agreement but also of other undertakings belonging to the same group of undertakings as the parties to the agreement. These will include, in the case of each party to the agreement, (i) undertakings over which it exercises control, and (ii) undertakings which exercise control over it as well as any other undertakings which are controlled by those undertakings. Further details on defining the relevant market are given in the CCS guideline on *Market Definition*.

² Refer to the CCS guideline on *Market Definition*.

³ SMEs in Singapore are defined as follows: For manufacturing SMEs, if they have Fixed Assets Investment (FAI) of less than S\$15 million; and for services SMEs, if they have less than 100 workers.

2.19 Please refer to Annex A for details on measuring market shares.

3 EXAMPLES OF ANTI-COMPETITIVE AGREEMENTS

3.1 This part contains a discussion of the various types of agreement which might adversely affect competition appreciably and fall within the section 34 prohibition. Such agreements would not be prohibited (and would still be valid) where there are net economic benefits because they satisfy the conditions in section 41 of the Act (see Part 5).

3.2 The examples that follow are not exhaustive: they include types of agreements, which would generally fall within the section 34 prohibition. However, the facts and circumstances of each case will need to be considered. Equally, there will be other agreements which are prohibited because of their particular conditions or restrictions but which are not listed in section 34 or below:

- Directly or indirectly fixing prices;
- Bid-rigging (collusive tendering);
- Sharing markets;
- Limiting or controlling production or investment;
- Fixing trading conditions;
- Joint purchasing or selling;
- Sharing information;
- Exchanging price information;
- Exchanging non-price information;
- Restricting advertising;
- Setting technical or design standards.

The first four types of agreements are, by their very nature, regarded as restrictive of competition to an appreciable extent and will hence almost invariably infringe the section 34 prohibition.

Directly or Indirectly Fixing Prices

3.3 There are many ways in which prices can be fixed. It may involve fixing either the price itself or the components of a price such as a discount, establishing the amount or percentage by which prices are to be increased, or establishing a range outside which prices are not to move.

- 3.4 Price fixing may also take the form of an agreement to restrict price competition. This may include, for example, an agreement to adhere to published price lists or not to quote a price without consulting potential competitors, or not to charge less than any other price in the market. An agreement may restrict price competition even if it does not entirely eliminate it. Competition may, for example, remain in the ability to grant discounts or special deals on a published list price or ruling price.
- 3.5 Recommendations of a trade association in relation to price, or collective price-fixing or price co-ordination of any product may be considered to be price fixing, regardless of the form it takes. This could include a decision that requires members to post their prices at the association's premises or on the association's website etc., as well as any recommendation on prices and charges, including discounts and allowances.
- 3.6 An agreement may also fix prices by indirectly affecting the prices to be charged. It may cover the discounts or allowances to be granted, transport charges, payments for additional services, credit terms or the terms of guarantees, for example. The agreement may relate to specific charges or allowances or to the ranges within which they fall or to the formulae by which prices or ancillary terms are to be calculated.
- 3.7 Agreements that have the object to fix or effect of fixing prices of any product will, by their very nature, be regarded as restricting competition appreciably and will hence almost invariably infringe the section 34 prohibition.

Bid-rigging

- 3.8 Tendering procedures are designed to provide competition in areas where it might otherwise be absent. An essential feature of the system is that tenderers prepare and submit bids independently. Any tenders submitted as a result of collusion or co-operation between tenderers will, by their very nature, be regarded as restricting competition appreciably and will hence almost invariably infringe the section 34 prohibition.

Agreements to Share Markets

- 3.9 Undertakings may agree to share markets, whether by territory, type or size of customer, or in some other ways. Such agreements will, by their very nature, be regarded as restricting competition appreciably and will hence almost invariably infringe the section 34 prohibition.
- 3.10 There may be agreements to share markets to the extent that it is necessary to achieve efficiencies or to produce a new product. Each party may agree, for example, to specialise in the manufacture of certain products in a range, or of certain components of a product, in order to be able to produce in longer runs and therefore more efficiently. Such

agreements may have net economic benefits and hence be exempted based on the criteria in section 41 (see Part 5).

Agreements to Limit Output or Control Production or Investment

- 3.11 An agreement which limits output or controls production, in the form of fixing production levels or quotas or dealing with structural overcapacity will, by their very nature, be regarded as restricting competition appreciably and will hence almost invariably infringe the section 34 prohibition. In some cases, it may be linked to other agreements which may affect competition.
- 3.12 Competitive pressures may be reduced if undertakings in an industry agree to limit or at least to coordinate future investment plans.

Agreements to Fix Trading Conditions

- 3.13 Undertakings may agree to regulate the terms and conditions on which products are to be supplied. If an association imposes on its members an obligation to use common terms and conditions of sale or purchase, this may restrict competition.
- 3.14 Associations may also be involved in the formulation of standard terms and conditions to be applied by members. Depending on the facts of the case, this may be no more than a useful simplification of what might otherwise be complex and, to the buyer, potentially confusing conditions. Standard conditions are less likely to have an appreciable effect on competition where members remain free to adopt different conditions if they wish.

Joint Purchasing/Selling

- 3.15 An agreement between buyers to fix (directly or indirectly) the price that they are prepared to pay, or to purchase only through agreed arrangements, limits competition between them. An example of the type of agreement which might be made between buyers is an agreement on sellers with whom they will deal.
- 3.16 The same issues potentially arise in agreements between sellers, in particular, where sellers agree to boycott certain buyers.

Information Sharing

- 3.17 As a general principle, the more informed buyers are, the more effective competition is likely to be and so making information publicly available to buyers does not usually harm competition.

- 3.18 In the normal course of business, undertakings exchange information on a variety of matters legitimately and with no risk to the competitive process. Indeed, competition may be enhanced by the sharing of information, for example, on new technologies or market opportunities, particularly where consumers are also informed.
- 3.19 There are circumstances, where there can be no objection to the exchange of information between competitors or the exchange of information under the aegis of a trade association or otherwise.
- 3.20 The exchange of information may however have an appreciable adverse effect on competition, where it serves to reduce or remove uncertainties inherent in the process of competition. The fact that the information could have been obtained from other sources is not necessarily relevant. Whether or not exchange of information has an appreciable effect on competition will depend on the circumstances of each individual case: the market characteristics, the type of information and the way in which it is exchanged. As a general principle, it is more likely that there would be an appreciable adverse effect on competition the smaller the number of undertakings operating in the market, the more frequent the exchange, the more sensitive and confidential the nature of the information which is exchanged, and where information exchanged is limited to certain participating undertakings to the exclusion of their competitors and buyers.

Exchange of Price Information

- 3.21 The exchange of information on prices may lead to price co-ordination and therefore diminish competition, which would otherwise be present between the undertakings. This will be the case whether the information exchanged relates directly to the prices charged or to the elements of a pricing policy, for example including discounts, costs, terms of trade and rates and dates of change. Price announcements made in advance may be anti-competitive where it facilitates collusion. Price announcements made directly to buyers, on the other hand, may be pro-competitive.
- 3.22 The more recent or current the information exchanged, the more likely that exchange will have an appreciable adverse effect on competition. The circulation of purely historical information or the collation of price trends is not likely to have an appreciable adverse effect on competition. One example is where the exchange forms part of a structured scheme of inter-business comparison intended to spread best industrial practices such as in a bench-marking exercise, where the information is collected, aggregated and disseminated by an independent body.

Exchange of Non-Price Information

- 3.23 The exchange of information on matters other than price may have an appreciable adverse effect on competition depending on the type of information exchanged and the structure of the market to which it relates. The exchange of aggregated statistical data, market research, and general industry studies for example are unlikely to have an appreciable adverse effect on competition, since exchange of such information is unlikely to reduce individual undertakings' commercial and competitive independence.
- 3.24 In general, the exchange of information on output and sales should not affect competition provided that it is aggregated or, if it enables participants to identify individual undertakings' competitive behaviour, provided that it is sufficiently historic. In such circumstances, it is unlikely that an agreement to exchange such information would influence the participants' competitive market behaviour. There may however be an appreciable adverse effect on competition if the information exchanged is current or recent or concerns future plans, and if it can be ascribed to particular undertakings, whether because it is broken down in this way or because it can be disaggregated.

Advertising

- 3.25 Restrictions on advertising, whether relating to the amount, nature or form of advertising, have the potential to restrict competition. Whether the effect is appreciable depends on the purpose and nature of the restriction, and on the market in which it is to apply.
- 3.26 Decisions aimed at curbing misleading advertising, or at ensuring that advertising is legal, truthful and decent, are unlikely to have an appreciable adverse effect on competition.

Standardisation Agreements

- 3.27 An agreement on technical or design standards may lead to an improvement in production by reducing costs or raising quality, or it may promote technical or economic progress by reducing waste and consumers' search costs. The agreement may, however, have an appreciable adverse effect on competition in particular if it includes restrictions on what the parties may produce or is, in effect, a means of limiting competition from other sources, for example by raising entry barriers. Standardisation agreements which prevent the parties from developing alternative standards or products that do not comply with the agreed standard may also infringe the section 34 prohibition.

Other Anti-Competitive Agreements

- 3.28 Competition in a market can be restricted in less direct ways than by the fixing of prices or the sharing of markets or the other examples set out above – for example, an ‘aggregated rebate’ scheme under which a customer obtains better terms the more business he places with all the parties to the scheme. The circumstances of each case will be considered.
- 3.29 Other types of agreements where the parties agree to co-operate may fall within the section 34 prohibition if they have an appreciable adverse effect on competition.

4 EXCLUSIONS

4.1 The Third Schedule of the Act specifically excludes from the section 34 prohibition certain categories of agreement:

- An agreement made by an undertaking entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly, insofar as the prohibition would obstruct the performance of those tasks assigned to that undertaking;
- An agreement to the extent to which it is made in order to comply with a legal requirement;
- An agreement, which is necessary to avoid conflict with an international obligation of Singapore; and which is also the subject of an order by the Minister;
- An agreement which is necessary for exceptional and compelling reasons of public policy and which is also the subject of an order by the Minister;
- An agreement which relates to any activity within the jurisdiction of another regulatory authority;
- An agreement which relates to any of the following specified activities:
 - The supply of ordinary letter and postcard services by a person licensed and regulated under the Postal Services Act (Cap. 237A);
 - The supply of piped potable water;
 - The supply of wastewater management services, including the collection, treatment and disposal of wastewater;
 - The supply of scheduled bus services by any person licensed and regulated under the Public Transport Council Act (Cap. 259B);
 - The supply of rail services by any person licensed and regulated under the Rapid Transit Systems Act (Cap. 263A); and
 - Cargo terminal operations carried out by a person licensed and regulated under the Maritime and Port Authority of Singapore Act (Cap. 170A);
- An agreement which relates to the clearing and exchanging of articles undertaken by the Automated Clearing House established under the

Banking Act (Clearing House) Regulations (Cap. 19, Rg 1); or any related activities of the Singapore Clearing Houses Association;

- Vertical agreements entered into between 2 or more undertakings each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain products, other than such vertical agreement as the Minister may by order specify.

4.2 The Minister may at any time, by order, amend the Third Schedule.

5 EXEMPTIONS

- 5.1 An agreement which infringes the section 34 prohibition may be exempted if it satisfies the criteria in section 41 of the Act and the conditions and obligations set out in a block exemption order made under section 37.

Exemption Criteria

- 5.2 Section 41 of the Act sets out the criteria for block exemption orders. An exemption applies to any agreement which contributes to:

- ‘(a) improving production or distribution; or
- (b) promoting technical or economic progress,

but which does not –

- (i) impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; or
- (ii) afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question.’

- 5.3 It is for the parties claiming the benefit of exemption to establish that they have satisfied the relevant conditions.

The agreement contributes to improving production or distribution or promoting technical or economic progress

- 5.4 Examples of improvements in production or distribution include lower costs from longer production or delivery runs, or from changes in the methods of production or distribution; improvements in product quality; increases in the range of products produced or services provided. In each case the nature of the improvement claimed must be clearly identified and justified.
- 5.5 Examples of the promotion of technical or economic progress include efficiency gains from economies of scale and specialisation in research and development with the prospect of an enhanced flow or speed of innovation, and technical progress.

Restrictions which are not indispensable to the attainment of the objectives set out

- 5.6 To qualify for exemption, agreements may not include restrictions beyond those necessary for the attainment of the benefits which the parties show

are likely to result from the agreement. The agreement should contain the least restrictive means of achieving its aims.

Possibility of eliminating competition in respect of a substantial part of the products in question

- 5.7 This condition will be considered when assessing the overall effect of the agreement on competition.

Block Exemptions

- 5.8 The Minister may make block exemption orders which exempt particular categories of agreements, which satisfy the exemption criteria. An agreement which falls within such categories will be exempted from the section 34 prohibition. A block exemption may impose conditions or obligations subject to which the block exemption shall have effect.
- 5.9 Breach of a condition imposed by a block exemption order shall have the effect of cancelling the block exemption for an agreement from such date as the CCS may specify. Failure to comply with an obligation imposed by a block exemption order enables the CCS to cancel the block exemption for an agreement from such date as the CCS may specify. If the CCS considers that an agreement is not one to which exemption applies, the CCS may cancel the block exemption for such agreement from such date as the CCS may specify.
- 5.10 A block exemption order may provide that a party to an agreement which does not qualify for the block exemption but satisfies criteria specified in the order to notify the CCS of the agreement. If the CCS does not give notice of its opposition within the specified period, the agreement shall be treated as falling within a category specified in the order. If the CCS exercises the right to oppose, the notification shall be treated as a notification for decision.

6 NOTIFICATION FOR GUIDANCE/DECISION

- 6.1 There is no requirement for undertakings to notify agreements to the CCS. It is for the parties to an agreement to ensure that their agreements are lawful and decide whether it is appropriate to make a notification for guidance or decision.
- 6.2 Guidance may indicate whether or not an agreement would be likely to infringe the section 34 prohibition. If the CCS considers that the agreement is likely to infringe the section 34 prohibition, its guidance may indicate whether the agreement is likely to be exempt from the prohibition under a block exemption.
- 6.3 The CCS will generally take no further action once guidance has been given that section 34 prohibition is unlikely to be infringed, unless there are reasonable grounds for believing that there has been a material change of circumstance since the guidance was given; or the CCS has a reasonable suspicion that information on which it had based its guidance was materially incomplete, misleading or false; or a complaint is received from a third party, or where one of the parties to the agreement applies for a decision with respect to the agreement.
- 6.4 A decision may indicate whether the agreement has infringed the section 34 prohibition. If the section has not been infringed, the CCS will state whether that is because the agreement is excluded under the Third Schedule or is exempt from the section 34 prohibition.
- 6.5 The CCS will generally take no further action once a decision has been given that the section 34 prohibition has not been infringed unless there are reasonable grounds for believing that there has been a material change of circumstance or there is a reasonable suspicion that information on which it had based its decision was materially incomplete, misleading or false. Unlike guidance, a decision cannot be reopened because a complaint is made by a third party.
- 6.6 Notification of an agreement to the CCS by an undertaking provides immunity from financial penalty from the date on which the notification was given to such date as may be specified by the CCS following a determination. This date shall not be earlier than the date on which the CCS gives notice. The CCS may remove this immunity if it takes further action under one of the circumstances described in paragraph 6.3 (in a case for guidance) or paragraph 6.5 (in a case for decision), and considers that the agreement will likely infringe the section 34 prohibition. The CCS will notify the undertaking of the removal of the immunity. If the CCS removes the immunity because of materially incomplete, false or misleading information supplied by the parties to the agreement, it may

impose a penalty from a date that is earlier than the date of the CCS notice.

7 CONSEQUENCES OF INFRINGEMENT

Voidness

- 7.1 Any provision of an agreement entered into before 1 January 2006, shall be void and unenforceable to the extent that it infringes the section 34 prohibition on 1 January 2006. Any provision of an agreement entered into on or after 1 January 2006 shall be void and unenforceable to the extent that it infringes the section 34 prohibition.

Financial Penalties

- 7.2 A financial penalty not exceeding 10% of the turnover of the business of an undertaking in Singapore for each year of infringement may be imposed for a maximum period of 3 years, where there is an intentional or negligent infringement of the section 34 prohibition.

Rights of Private Action

- 7.3 A party who has suffered any loss or damage directly as a result of an infringement of the section 34 prohibition has a right of action in civil proceedings against the relevant undertaking.
- 7.4 This right of private action can only be exercised after the CCS has determined that an undertaking has infringed the section 34 prohibition and after the appeal process has been exhausted.

Annex A**8 MARKET SHARES**

- 8.1 This part considers the extent to which market shares indicate whether an undertaking possesses market power, how market shares may be measured, the sort of evidence likely to be relevant, and some potential problems. These issues are important when considering the intensity of existing competition.

Market Shares and Market Power

- 8.2 In general, market power is more likely to exist if an undertaking (or group of undertakings) has a persistently high market share. Likewise, market power is less likely to exist if an undertaking has a persistently low market share. Relative market shares can also be important. For example, a high market share might be more indicative of market power when all other competitors have very low market shares.
- 8.3 The history of the market shares of all undertakings within the relevant market is often more informative than considering market shares at a single point in time, partly because such a snapshot might not reveal the dynamic nature of a market. For example, volatile market shares might indicate that undertakings constantly innovate to get ahead of each other, which is consistent with effective competition. Evidence that undertakings with low market shares have grown rapidly to attain relatively large market shares might suggest that barriers to expansion are low, particularly when such growth is observed for recent entrants.
- 8.4 Nevertheless, market shares alone might not be a reliable guide to market power, both as a result of potential shortcomings with the data and for the following reasons:
- **Low entry barriers:** An undertaking with a persistently high market share may not necessarily have market power where there is a strong threat of potential competition. If entry into the market is easy, the incumbent undertaking might be constrained to act competitively so as to avoid attracting entry over time by potential competitors.
 - **Bidding markets:** Sometimes buyers choose their suppliers through procurement auctions or tenders. In these circumstances, even if there are only a few suppliers, competition might be intense. This is more likely to be the case where tenders are large and infrequent (so that suppliers are more likely to bid), where suppliers are not subject to

capacity constraints (so that all suppliers are likely to place competitive bids), and where suppliers are not differentiated (so that for any particular bid, all suppliers are equally placed to win the contract). In these types of markets, an undertaking might have a high market share at a single point in time. However, if competition at the bidding stage is effective, this currently high market share would not necessarily reflect market power.

- **Successful innovation:** In a market where undertakings compete to improve the quality of their products, a persistently high market share might indicate persistently successful innovation and so would not necessarily mean that competition is not effective.
- **Product differentiation:** Sometimes the relevant market will contain products that are differentiated. In this case, undertakings with relatively low market shares might have a degree of market power because other products in the market are not very close substitutes.
- **Responsiveness of customers:** Where undertakings have similar market shares, this does not necessarily mean that they have similar degrees of market power. This may be because their customers differ in their ability or willingness to switch to alternative suppliers.
- **Price responsiveness of competitors:** Sometimes an undertaking's competitors will not be in a position to increase output in response to higher prices in the market. For example, suppose an undertaking operates in a market where all undertakings have limited capacity (e.g. are at, or close to, full capacity and so are unable to increase output substantially). In this case, the undertaking would be in a stronger position to increase prices above competitive levels than an otherwise identical undertaking with a similar market share operating in a market where its competitors were not close to full capacity.

8.5 Therefore, while consideration of market shares over time is important when assessing market power, an analysis of entry conditions and other factors is equally important. All relevant factors will be considered.

Measuring Market Shares

Evidence

- 8.6 Data on market shares may be collected from a number of sources including:
- information provided by undertakings themselves. Undertakings are usually asked for data on their own market shares, and to estimate the shares of their competitors;
 - trade associations, customers or suppliers who may be able to provide estimates of market shares; and
 - market research reports.
- 8.7 The appropriate method of calculating market shares depends on the case in hand. Usually sales data by value and by volume are both informative. Often value data will be more informative, for example, where goods are differentiated.
- 8.8 The following issues may arise when measuring market shares:
- **Production, sales and capacity:** Market share is usually determined by an undertaking's sales to customers in the relevant market. Market share is normally measured using sales to direct customers in the relevant market rather than an undertaking's total production (which can vary when stocks increase or decrease). Sometimes market shares will be measured by an undertaking's capacity to supply the relevant market: for example, where capacity is an important feature in an undertaking's ability to compete or in some instances where the market is defined taking into account supply-side considerations.
 - **Sales values:** When considering market shares on a value basis, market share is valued at the price charged to an undertaking's direct customers. For example, when a manufacturer's direct customers are retailers, it is more informative to consider the value of its sales to retailers as opposed to the prices at which the retailers sell that manufacturer's product to final consumers.
 - **Choice of exchange rates:** Where the relevant geographic market is international, this may complicate the calculation of market shares by value, as exchange rates vary over time. It may then be appropriate to consider a range of exchange rates over time, including an assessment of the sensitivity of the analysis to the use of different exchange rates.

- **Imports:** If the relevant geographic market is international, market shares will be calculated with respect to the whole geographic market. If the relevant geographic market is not international, it is possible that imports will account for a share of that market. If so, and if information is available, the sales of each importing undertaking are usually considered and market shares calculated accordingly, rather than aggregating shares as if they were those of a single competitor. Where the relevant geographic market is domestic, the share of an undertaking that both supplies within and imports into that market⁴ would usually include both its domestic sales and its imports.
- **Internal production:** In some cases, a supplier may be using some of its capacity or production to meet its own internal needs. In the event of a rise in price on the open market, the supplier may decide to divert some or all of its 'captive' capacity or production to the open market if it is profitable to do so, taking into account effects on its downstream business that is now deprived of the captive supply. The extent to which 'captive' capacity or production is likely to be released onto the open market (or might otherwise affect competition on the open market) will be taken into account in assessing competitive constraints.

⁴ This includes situations where the undertaking in question is part of the same group as an importer into that market.

9 GLOSSARY

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| Agreement | Includes decisions by associations of undertakings and concerted practices unless otherwise stated, or as the context so demands. |
| Buyer | Refers to the end-user consumer, and/or an undertaking that buys products as inputs for production or for resale, as the context demands. |
| Market Power | <p>Refers to the ability to profitably sustain prices above competitive levels or to restrict output or quality below competitive levels.</p> <p>An undertaking with market power might also have the ability and incentive to harm the process of competition in other ways, for example by weakening existing competition, raising entry barriers or slowing innovation.</p> <p>Market power arises where an undertaking does not face sufficiently strong competitive pressure.</p> |
| Product | Refers to goods and/or services. |
| Seller | Refers to the primary producer, an undertaking that sells products as inputs for further production, and/or an undertaking that sells goods and services as a final product, as the context demands. |
| 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 organisations. |