

CCS DRAFT GUIDELINE ON ENFORCEMENT

ENFORCEMENT

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1. INTRODUCTION

- 1.1. The Competition Act 2004 (No. 46 of 2004) ('Act') gives the Competition Commission of Singapore ('CCS') the power to enforce the section 34¹ and 47² prohibitions under the Act ('Section 34 or 47 prohibition' respectively).
- 1.2. The CCS' investigation and enforcement powers are set out in Part III Division 5 of the Act. This guideline describes 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. The powers of investigation of the CCS under the Act are described in the CCS Guideline on the *Powers of investigation*.
- 1.4. This guideline is not a substitute for the Act and the regulations. 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. A person in doubt about how he and his undertaking may be affected by the Act should seek legal advice.
- 1.5. A glossary of terms used in this guideline 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 Guideline 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 Guideline on the *section 47 prohibition*.

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 and/or 47 prohibitions has or have been infringed, the CCS may give such directions as it considers appropriate to bring an infringement to an end³.
- 2.2. The directions may be given to such person(s) as the CCS considers appropriate⁴. This includes individuals and undertakings⁵. 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 question⁶. 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 appropriate⁷. 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, the objections raised by the CCS, the action it proposes to take and the reasons for it. 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' file relating to the matters referred to in the notice. The CCS may withhold any

³ Section 69 of the Act.

⁴ Section 69(1) of the Act.

⁵ See section 2 of the Act.

⁶ Sections 69(2)(a) and (b) of the Act respectively.

⁷ Section 69(1) of the Act.

documents to the extent that they contain confidential information or are internal documents.

- 2.6. Any direction given by the CCS will set out the facts on which the direction is based and the reasons for it. The direction will be published on the register maintained by the CCS, which is open to public inspection on the CCS' website.

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 (Cap. 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 accordingly⁸. 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. 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') by any party to the agreement in question or by the person who engaged in the conduct in question⁹. 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 given¹⁰. 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 therefrom¹¹. Such an appeal can only be made by a party to the proceedings in which the decision of the Board was made¹².
- 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).

⁸ See Section 85 of the Act.

⁹ See Section 71 of the Act.

¹⁰ See Section 73(8) of the Act.

¹¹ Section 74(1)(a) of the Act.

¹² Section 74(2) of the Act.

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 sections 34 and/or 47 prohibitions¹³. 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 investigation of the suspected infringement if:
 - it has begun an investigation under section 62 of the Act, the investigation is ongoing and has not completed it¹⁴; 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 interest¹⁵.
- 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 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,

¹³ Section 67 of the Act.

¹⁴ Section 67(1)(a) of the Act.

¹⁵ Section 67(1)(b) of the Act.

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 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, indicating the nature of the direction it proposes to give and the reasons for deciding to give it¹⁶. The CCS must allow the person receiving the notice an opportunity to make representations on it.
- 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' 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' 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.

¹⁶ Section 67(2) of the Act.

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.

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 penalty¹⁷ on any party to an agreement that infringes the Section 34 prohibition or any person whose conduct infringes the Section 47 prohibition provided that infringement has been intentionally or negligently committed¹⁸ on or after 1 January 2006. The amount of the penalty imposed may be up to 10 per cent of the undertaking's turnover in Singapore for each year of infringement up to a maximum of 3 years¹⁹. 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 sections 34 and/or 47 prohibitions. The setting of the maximum penalty at 10% of an undertaking's turnover 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 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 sections 34 and/or 47 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 sections 34 and/or 47 prohibitions does not mean that the infringement cannot be committed intentionally or negligently.

¹⁷ Section 69(2)(d)(iii) of the Act.

¹⁸ Section 69(3) of the Act.

¹⁹ Section 69(4) of the Act.

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 sections 34 and/or 47 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 sections 34 and/or 47 prohibitions has been committed negligently where an undertaking ought to have 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 decision²⁰. Where an agreement to which the section 34 prohibition applies has been notified, the CCS cannot impose a

²⁰ See sections 42 and 49 of the Act.

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 application²¹. The date specified in the notice may not precede the date on which the notice is given²². No such immunity exists for notifications in respect of conduct under the section 47 prohibition.

- 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 Guideline on *Filing notifications for guidance or decision*.

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 sections 34 and/or 47infringements, 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
 - (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; and
- it considers it likely that the agreement or conduct will infringe the sections 34 and/or 47 prohibitions; 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.

²¹ Sections 43(4) and 44(3) of the Act.

²² Sections 43(5) and 44(4) of the Act.

- 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 Guideline 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 of 10 per cent of the undertaking's turnover in Singapore for each year of infringement up to a maximum period of 3 years will be prescribed.

Amount of a Penalty

- 4.17. The CCS' approach on the calculation of a financial penalty to be imposed will be set out in the CCS Guideline on the *Appropriate amount of a penalty*.
- 4.18. In brief, a financial penalty imposed by the CCS for an infringement of the sections 34 and/or 47 prohibitions will be calculated taking into consideration, amongst other things, the nature, duration and seriousness of the infringement and the "relevant" turnover of the undertaking, 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.

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 Guideline on *Lenient treatment for undertakings coming forward with information in cartel activity cases*.

Payment

- 4.21. Where the CCS 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 paid²³. The date for payment must not be earlier than the end of the period within which an appeal against the notice may be brought²⁴.

Liability for payment

- 4.22. The CCS may 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 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 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.

²³ Section 69(5) of the Act.

²⁴ Section 69(5) of the Act.

The involvement of a trade association in an infringement of the section 34 and/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 Singapore turnover of each active member for each year of infringement up to a maximum period 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 Court²⁵ 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 by any party to the agreement in question or by the person who engaged in the conduct in question²⁶. Such an appeal must be brought within the specified time period.
- 4.27. The Board can revoke a penalty or vary its amount²⁷. 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 Appeal²⁸. Such an appeal can only be made by a party to the proceedings in which the decision of the Board was made²⁹.
- 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).

²⁵ See Section 85 of the Act.

²⁶ See Section 71 of the Act.

²⁷ See Section 73(8)(b) of the Act.

²⁸ Section 74(1)(b) of the Act.

²⁹ Section 74(2) of the Act.

5. ENFORCEMENT IN THE COURTS

- 5.1. Parties suffering loss or damage directly arising from an infringement of the section 34 and/or 47 prohibitions are entitled to commence a civil action against the infringing undertaking seeking relief³⁰.
- 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 brought³¹.
- 5.3. There is a 2 year limit for the taking of such private actions from the time that the CCS made the decision or from the determination of the appeal, whichever is the later³².
- 5.4. The court will be bound in such proceedings by the relevant infringement decisions³³.

³⁰ Sections 86(1) of the Act.

³¹ Sections 86(2) and (3) of the Act.

³² Section 86(6) of the Act.

³³ Section 86(7) of the Act.

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