

CCS DRAFT GUIDELINE ON TRANSITIONAL ARRANGEMENTS

There will be no public consultation on the Transitional Period Regulations.
The Competition Commission of Singapore will take into consideration public feedback on the Guideline on Transitional Arrangements when finalising the provisions of the Transitional Period Regulations.

TRANSITIONAL ARRANGEMENTS

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1. INTRODUCTION

Background

- 1.1 Section 34 of the Competition Act 2004 (the “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 excluded or exempt in accordance with Part III of the Act (the “section 34 prohibition”). Further information on the section 34 prohibition can be found in the Competition Commission of Singapore (the “CCS”) Guideline on the Section 34 Prohibition.
- 1.2 The section 34 prohibition will come into effect on 1 January 2006.
- 1.3 The Act was enacted as law on 4 November 2004. It was announced in Parliament on 19 October 2004, that during the 12 month period from 1 January to 31 December 2005, before the section 34 prohibition is brought into force:
 - i) the CCS will consult with stakeholders and issue guidelines on how the CCS will interpret and give effect to the provisions of the Act; and
 - ii) businesses should review their agreements and where necessary, renegotiate or amend their agreements or otherwise comply with the requirements of the section 34 prohibition.
- 1.4 The guidelines on the section 34 prohibition and market definition (together with the guideline on the section 47 prohibition) have been issued by the CCS on 29 July 2005.
- 1.5 Under section 94(b)(i) of the Act, the Minister may make regulations for any transitional period (whether granted upon an application or otherwise) and any extension or early termination thereof. The Transitional Period Regulations (the “TP Regulations”) will come into effect in the last quarter of 2005.

TP Regulation

- 1.6 This guideline outlines the transitional provisions that will be provided for in the TP Regulations, agreements for which parties may make an application for a transitional period, the prerequisites for such an application and the procedure.

- 1.7 The TP Regulations will apply to agreements which are made *on or before 31 July 2005*. It will not apply to agreements made after 31 July 2005.
- 1.8 The TP Regulations will apply only to agreements which infringe the section 34 prohibition. There are no transitional arrangements in respect of the section 47 prohibition relating to conduct amounting to abuse of a dominant position.

Guideline is Not a Substitute for the TP Regulation

- 1.9 This guideline is not a substitute for the Act, the regulations and orders. It may be revised should the need arise. 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 commercial activities may be affected by the Act may wish to seek legal advice.

2. REGULATIONS

No Financial Penalty from 1 January 2006 to 30 June 2006

- 2.1 Parties to agreements which were made on or before 31 July 2005, will automatically be given a period from 1 January 2006 to 30 June 2006 to review their agreements and where necessary, renegotiate or amend their agreements or otherwise comply with the requirements of the section 34 prohibition. Should the CCS subsequently determine that the agreement infringes the section 34 prohibition, the CCS will not impose a financial penalty on the undertaking for this 6-month period.

Application for Transitional Period

- 2.2 Parties to agreements that were made on or before 31 July 2005 and who are unable to comply with the Act by 30 June 2006, may apply for a transitional period for more time to comply with the Act. If the application is approved, the period during which the CCS will not impose a financial penalty will be extended.

All Parties to Agreement Must Apply

- 2.3 All the parties to whom an agreement still applies must agree to jointly apply for a transitional period. An application cannot be made if any one party to an agreement does not want to apply for a transitional period. If a party's obligation under the agreement has been completed, it is not necessary to secure his acquiescence for the application.

Time Period for Submission of Application

- 2.4 The application for a transitional period may be submitted from a date to be gazetted by Minister to 30 June 2006; both dates inclusive.

Application Fee

- 2.5 The application fee payable will be set out in the TP Regulations.

Processing Time

- 2.6 The time taken by the CCS to give its decision on the application will depend very much on the nature and complexity of the application, as well as the volume of applications which have been filed at that point in time. The CCS may seek clarification, or request additional information if this is necessary to determine an application.

Length of Transitional Period Granted

- 2.7 The CCS may grant a transitional period of up to one year from the date of the CCS' decision on the application. The CCS may consider granting a longer transitional period in exceptional circumstances. Please refer to Part 4 of this Guideline for more information on the CCS' criteria for granting a transitional period.

Terms and Conditions

- 2.8 The CCS may impose terms and conditions, when it grants a transitional period. Such terms and conditions will depend on the facts of the case including the nature of the agreement. If parties fail to comply with such terms and conditions, the CCS may terminate the transitional period.

If Application is Rejected

- 2.9 If an application for a transitional period is rejected (i.e. the CCS does not grant any transitional period), the CCS may give the parties a period of time from the date of its decision, for the parties to take steps to cease the agreement or to otherwise comply with the Act.

Termination of Transitional Period

- 2.10 The CCS will generally not take any further action during the transitional period granted unless –
- i) it has reasonable grounds to believe that there has been a material change of circumstances since it granted the transitional period;
 - ii) it has reasonable grounds to suspect that the information on which it granted the transitional period was incomplete, false or misleading in a material particular;
 - iii) it has reasonable grounds to suspect that the grantee of a transitional period has contravened or ceased to satisfy any term or condition imposed in relation to the transitional period; or
 - iv) a complaint about the agreement has been made to it by a person who is not a party to the agreement, which warrants follow up action from the CCS.
- 2.11 Where the CCS proposes to make a decision to terminate a transitional period, it will give at least 14 days' written notice to the grantees of the transitional period. Any grantee may submit written representations to the CCS before the expiry of the notice. The CCS will consider the representations, if any, and make its decision. Depending on the circumstances of the case, the CCS may give the parties a period of time to cease the agreement or otherwise comply with the Act. In the case of a

termination on the ground in paragraph 2.10(ii), the date specified in the notice in paragraph 2.11 may be earlier than the date on which the notice is given.

3. APPLICATION FOR TRANSITIONAL PERIOD

- 3.1 Parties to agreements that were made on or before 31 July 2005 and who are unable to comply with the Act by 30 June 2006, may apply for a transitional period for more time to comply with the Act, during which the CCS will not impose a financial penalty.
- 3.2 A joint application must be made by all parties to whom the agreement still applies. A joint representative must be appointed to act for and on behalf of all parties.
- 3.3 The written application must be submitted to the CCS in such form as the CCS may require.¹ If the agreement is written, attach the original agreement. This will be returned by the CCS after verification. If the agreement is oral, please provide a full description of the agreement, which must be agreed by all parties before submission.
- 3.4 The parties will be required to provide information on the following matters to the CCS:
- i) give a brief description of the agreement which is the subject of the application (including the nature, content, purpose, date(s), duration, descriptions of the undertakings involved and their roles);
 - ii) give a description of the goods or services involved as fully and accurately as possible;
 - iii) state the basis for their belief that the agreement was made on or before 31 July 2005 and is on-going, supported by documentary evidence where relevant, such as correspondence between parties;
 - iv) state the provisions or effects of the agreement which would in the parties' view, be non-compliant with the section 34 prohibition, and give reasons for that view;
 - v) explain why the parties are unable to comply with the section 34 prohibition by 30 June 2006 (e.g. explain why the additional time up to 30 June 2006 is insufficient for the parties to negotiate or amend the agreement or otherwise comply with the section 34 prohibition, the reasonable steps taken to negotiate or amend the agreement or otherwise comply with the section 34 prohibition, reason(s) if any, why delay in negotiating or amending the agreement or otherwise complying with the section 34 prohibition is due to factors beyond their control); and
 - vi) state the basis for the parties' belief that the agreement can be renegotiated, amended or otherwise brought into compliance with

¹ Please refer to draft Transitional Period Application Form which has been provided as part of the Public Consultation documents on the Transitional Arrangements.

the section 34 prohibition within the length of the transitional period applied for.

The CCS may require the parties to furnish such other information or documents as it thinks fit.

3.5 The following documents must be submitted:

- i) written proof of the joint representative's authority to act on behalf of all the parties (e.g. letter of authority signed by company officials of each undertaking);
- ii) the original agreement if the agreement is in writing. This original will be returned after verification;
- iii) a copy of the annual report and accounts for the last financial year (if applicable) of each party to the agreement; and
- iv) a soft copy of the application form (in Microsoft word format) together with 3 hard copies of the application form. Each hard copy of the application form should have a copy of all supporting documents, including the annual report or financial accounts (if relevant) for the last financial year for each party to the agreement and a copy of the agreement, if written.

3.6 The CCS may reject an application, where parties do not comply with the application requirements.

3.7 It is for the parties, who apply for a transitional period, to substantiate their case for a grant of a transitional period.

3.8 If the CCS does not grant the application for a transitional period, it will not impose a financial penalty for:

- i) the period from 1 January 2006 to 30 June 2006;
- ii) the time taken by the CCS to decide the application; and
- iii) the period of time granted by the CCS to the parties to cease the agreement or otherwise comply with the section 34 prohibition, if any.

3.9 If the CCS grants a transitional period, it will not impose a financial penalty for:

- i) the period from 1 January 2006 to 30 June 2006;
- ii) the time taken by the CCS to decide the application;
- iii) the transitional period; and
- iv) if the transitional period is terminated by the CCS, the period of time granted by the CCS for the parties to cease the agreement or otherwise comply with the section 34 prohibition.

- 3.10 Where the CCS has reasonable grounds for suspecting that information supplied by a party to an agreement and on which it based its decision on an application for a transitional period, was incomplete, false or misleading in a material particular, then the CCS may in addition to the measures stated in paragraphs 2.10 and 2.11, impose a financial penalty for the relevant time period during which the CCS took to decide the application under paragraphs 3.8(ii) and 3.9(ii) and the time period granted to the parties by the CCS to cease the agreement or otherwise comply with the section 34 prohibition under paragraph 3.8(iii).
- 3.11 The CCS will decide the application for a transitional period on the basis that the parties themselves take the view that the agreement infringes the section 34 prohibition. Applicants may wish to use the Self-Assessment Criteria in the Transitional Period Application Form to decide if they should apply for a transitional period. The CCS will not assess if the agreement is indeed anti-competitive. A transitional period will be granted if the CCS is of the view that the application merits the grant of a transitional period.

4. CRITERIA FOR GRANTING A TRANSITIONAL PERIOD

- 4.1 When deciding whether to grant a transitional period, the CCS will consider, based on the information provided, amongst other things, the nature of the agreement, how the parties propose to comply with the section 34 prohibition and the time within which this can be done.
- 4.2 Agreements involving serious infringements of the section 34 prohibition, for example price fixing, market sharing, collusive tendering or output limitation, will not be granted a transitional period, unless there are exceptional circumstances.

5. APPEALS

- 5.1 There will be a right of appeal to the Competition Appeal Board against a decision by the CCS on an application for a transitional period and the termination of a transitional period. Only a party to the application may appeal.
- 5.2 An appeal must be brought within the specified time period in the Competition Appeal Board Regulations.

TRANSITIONAL PERIOD APPLICATION FORM

INFORMATION REQUIRED FOR APPLICATION FOR TRANSITIONAL PERIOD UNDER REGULATION [x] OF THE TRANSITIONAL PERIOD REGULATIONS OF THE COMPETITION ACT (NO. 46 OF 2004)

**FORM
PART 1**

INTRODUCTION

This Form lists the information and supporting documents which must be provided when making an application for a transitional period under regulation [x] of the Transitional Period Regulations of the Competition Act. It also includes a self-assessment criteria in Part 6 to help you decide if you should apply for a transitional period. Further information on the section 34 prohibition can be found in the CCS Guideline on the Section 34 Prohibition.

A joint application must be made by **all** the parties to whom the agreement still applies. A joint representative **must** be appointed to act for and on behalf of all parties (the “representative”). The agreement **must** have been made on or before 31 July 2005.

The representative, when furnishing any information to the Competition Commission of Singapore (the “CCS”), may identify any part of the information submitted under this Form to be confidential, and must set out that part of the information in a separate annex to this Form marked “confidential information” and provide a written explanation as to why the information is confidential (including, where appropriate, details of any specific parties to which the information must not be disclosed).

The Declaration in Part 3 must be signed by the representative and all the parties to the agreement applying for a transitional period.

**FORM
PART 2**

**INFORMATION TO BE PROVIDED BY THE REPRESENTATIVE
MAKING THE APPLICATION**

1. Information about the parties to the Agreement

1.1. Please give the full name, registered office address, telephone and fax numbers and e-mail address (where available) of the representative who has been authorised to act for the parties.

1.2 Please give the full name, address (by registered office, where appropriate, and principal place of business, if different), telephone and fax numbers and e-mail address (where available) of all the parties to the agreement and a brief description of the nature of their businesses, together with the name of a contact at each undertaking concerned, their address, telephone and fax numbers and details of their position in the undertaking.

2. Information to be submitted in the Application

2.1. Please provide a brief description of the agreement which is the subject of the application (including the nature, content, purpose, date(s), duration, descriptions of the undertakings involved and their roles). If the agreement is written, attach the original agreement. This will be returned by the CCS after verification. If the agreement is oral, please provide a full description of the agreement, which must be agreed by all parties before submission.

2.2 Please describe the goods or services involved as fully and accurately as possible.

2.3 Please specify the basis for the parties' belief that the agreement was made on or before 31 July 2005 and is on-going, supported by documentary evidence where relevant, such as correspondence between parties.

2.4 Please state which provisions or effects of the agreement would in the parties' view, be non-compliant with the section 34 prohibition, and give reasons for that view.

2.5 Please explain why the parties are unable to comply with the section 34 prohibition by 30 June 2006 (e.g. explain why the additional time up to 30 June 2006 is insufficient for the parties to negotiate or amend the agreement or otherwise comply with the section 34 prohibition, the reasonable steps taken to negotiate or amend the agreement or otherwise

comply with the section 34 prohibition, reason(s) if any, why delay in negotiating or amending the agreement or otherwise complying with the section 34 prohibition is due to factors beyond their control).

- 2.6 Please explain the basis for the parties' belief that the agreement can be renegotiated, amended or otherwise brought into compliance with the section 34 prohibition within the length of the transitional period applied for.

3. Submission of Application Form and Supporting Documents

- 3.1 Please ensure that the following are submitted:

3.1.1 written proof of the representative's authority to act on behalf of all the parties (e.g. letter of authority signed by company officials of each undertaking);

3.1.2 the original agreement if the agreement is in writing. This original will be returned after verification;

3.1.3 a copy of the annual report and accounts for the last financial year (if applicable) of each party to the agreement; and

3.1.4 a soft copy of the application form (in Microsoft word format) together with 3 hard copies of the application form. Each hard copy of the application form should have a copy of all supporting documents, including the annual report or financial accounts (if relevant) for the last financial year for each party to the agreement and a copy of the agreement, if written.

4. Payment

- 4.1 Please specify how the fee payable for this application has been paid and complete the details on the relevant payment slip at Part 5 of this Form.

**FORM
PART 3**

DECLARATION

Under section 77 read with section 83 of the Competition Act, it is an offence, punishable by a fine or imprisonment or both to provide information which is false or misleading in a material particular if the undertaking or person providing it knows that it is false or misleading, or is reckless as to whether it is. If the undertaking or person is a body corporate, its officers may be guilty of an offence under section 81 of the Competition Act.

Declaration

The undersigned declare and confirm that all information given in the Form and all pages annexed hereto are correct to the best of their knowledge and belief.

Signature:

Name of representative/party to agreement (in block capitals):

Designation:

Date:

**FORM
PART 4**

ACKNOWLEDGEMENT OF RECEIPT

This acknowledgement of receipt will be returned to the address inserted below if the representative provides the information requested below.

To be completed by the representative

To: (name and address of representative)

Re: The application dated (date of application) concerning (brief description of subject matter) involving the following undertakings: (names of undertakings)

To be completed by the CCS

Received on:

Registered under reference number:

Please quote this reference number in all correspondence with the CCS.

**FORM
PART 5**

PAYMENT DETAILS FOR FEES PAYABLE

All payments are to be made by cheque payable to the “Competition Commission of Singapore”.

To: Finance Department
Competition Commission of Singapore
5 Maxwell Road
#13-01, Tower Block
MND Complex
Singapore 069110

I enclose herewith (bank and cheque no.) for the amount of (\$x) being the fees payable.

Signature

Name (in block capitals):

Address (in block capitals):

Date:

**FORM
PART 6**

SELF-ASSESSMENT CRITERIA

An agreement will fall within the scope of the section 34 prohibition if it has as its object or effect the appreciable prevention, restriction or distortion of competition unless it is excluded or exempted. If you are of the view that your agreement is excluded or exempt, there is no need to apply for a transitional period.

1. **Is it an agreement entered into on the part of the Government, any statutory body or any person acting on their behalf in relation to that agreement?** If so, the agreement is excluded from the section 34 prohibition.
2. **Is your agreement one which falls within a matter specified in the Third Schedule of the Competition Act?** If so, the agreement is excluded from the section 34 prohibition. A summary of this appears at paragraph 4.1 of the CCS Guideline on the Section 34 Prohibition, a copy of which is attached as Annex A.
3. **Does the agreement involve at least two independent undertakings?** If the agreement involves a parent and a subsidiary, and the subsidiary does not have economic independence or freedom of action in deciding its policy and practices for the purpose of the agreement, there is no agreement as between at least two independent undertakings and therefore no agreement for the purposes of the section 34 prohibition.
4. **Do the parties have market power?**
 - 4.1 **Do the parties have a significant share of any market to which the agreement relates?** If not, they are unlikely to have market power.
 - 4.2 **Are they small and medium enterprises?** If so, they are unlikely to have market power.
 - 4.3 **Are they small players in the context of the markets affected by the agreement?** If, for example, the parties are the third and fourth firms in the market and the first and second are much larger, or there is a dominant firm with a larger market share, the parties may not have market power.

- 4.4 **Are the main customers strong buyers?** In the negotiation of prices, are the parties' price-setters or price takers? If there is strong buyer power then the parties may not have market power.
- 4.5 If the parties to the agreement do not have market power, it is unlikely that the agreement will result in an appreciable effect on competition. It will not normally be necessary to apply for a transitional period if there is no market power. If the self-assessment indicates that the parties may have market power, they may wish to consider whether this is likely to mean that the agreement has an appreciable effect on competition. If the agreement has an appreciable effect on competition but has net economic benefit (see paragraph 2.24 of the CCS Guideline on the Section 34 Prohibition), the agreement is excluded from the section 34 prohibition.

The above questions are designed to help parties decide for themselves if there is likely to be an issue for the CCS to consider. For more information, please refer to the CCS Guideline on the Section 34 Prohibition.

CCS Guideline on the Section 34 Prohibition

4 EXCLUSIONS

4.1 The section 34 prohibition does not apply to the matters specified in the Third Schedule to the Act by virtue of section 35. These are:

- 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, in law or fact, of the particular tasks assigned to that undertaking. Annex D sets out how this exclusion will be applied;
- An agreement to the extent to which it is made in order to comply with a legal requirement, that is any requirement imposed by or under any written law;
- 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 product to the extent to which any other written law, or code of practice issued under any written law, relating to competition gives another regulatory authority jurisdiction in the matter;
- 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 Third Schedule will be amended shortly by order of the Minister published in the *Gazette* to include an exclusion for individual agreements in the following terms⁽³⁾:

- The section 34 prohibition shall not apply 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.

4.3 Such agreements will be regarded as having net economic benefit.

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

Footnote (3): The precise drafting is currently under discussion, but will mirror that used in section 41.