

CHAPTER 27 COMPETITION LAW

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SECTION 1 INTRODUCTION & DEFINITIONS

27.1.1 The Competition Act 2004 ('the Act') was passed by Parliament on 19 October 2004. It is largely modeled on the UK Competition Act 1998. The objective of the Act is to promote the efficient functioning of Singapore's markets and hence enhance the competitiveness of the economy.

Overview of the Competition Act 2004

27.1.2 The Act has various parts. Part II of the Act establishes the Competition Commission of Singapore ('CCS'), which is the statutory body that administers and enforces the competition law. The most important provisions are found in Part III of the Act which sets out the three main prohibited activities: (1) anti-competitive agreements, decisions and practices; (2) abuse of a dominant position; and (3) mergers which substantially lessen competition. As the intent is to regulate the conduct of market players, Part III does not apply to any activity carried on by, any agreement entered into or any conduct on the part of the Government or statutory bodies or any person acting on their behalf. The Act also confers powers of investigation and adjudication on the CCS. Part IV of the Act contains provisions relating to the Competition Appeal Board ('CAB'), which will hear appeals against the decisions of the CCS.

Phased Implementation

27.1.3 The Competition Act was implemented in phases. In the first phase which commenced on 1 January 2005, only those provisions establishing the CCS came into force. The provisions on anti-competitive agreements and abuse of dominance, as well as those relating to the CCS' enforcement powers, commenced on 1 January 2006. Finally, the provisions relating to mergers came into force on 1 July 2007.

The CCS Guidelines

27.1.4 Under section 61 of the Act, the CCS may publish guidelines indicating the manner in which the CCS will interpret and give effect to the provisions of the Act. The CCS has issued the following guidelines –

- a) The Section 34 Prohibition,
- b) The Section 47 Prohibition,
- c) Market Definition;
- d) The Powers of Investigation,
- e) Enforcement,
- f) Filing Notifications for Guidance or Decision,
- g) Lenient Treatment for Undertakings Coming Forward with Information on Cartel Activity Cases,
- h) Appropriate Amount of Penalty
- i) Transitional Arrangements
- j) Intellectual Property Rights,
- k) The Major Provisions,
- l) The Substantive Assessment of Mergers; and
- m) Merger Procedures.

Definition of Undertaking

27.1.5 For the purposes of the Act, an undertaking is defined as 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.

Individuals

27.1.6 The term 'undertaking' includes professionals such as self-employed lawyers and doctors. The individual employees of an undertaking are generally not undertakings themselves because the financial risk is borne not by them but by their employer. For the same reason, agreements between principal and agent may not fall within the Section 34 Prohibition if the agent does not bear any financial risk in the relationship.

Bodies Corporate

27.1.7 The term 'body corporate' includes companies registered under the Companies Act. It also includes limited liability partnerships, which have been statutorily defined as bodies corporate. Under section 33(4) of the Act, the Act's prohibitions do not apply to agreements, activities or conduct on the part of the Government or any statutory body, or any person acting on their behalf.

Unincorporated Bodies of Persons

27.1.8 This category of undertakings covers partnerships. Presumably, it would also cover bodies such as unincorporated trade associations registered under the Societies Act (Cap. 311), mutual benefit organisations registered under the Mutual Benefit Organisations Act (Cap. 191) and trade unions registered under the Trade Unions Act (Cap. 333).

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SECTION 2 THE SECTION 34 PROHIBITION

27.2.1 Agreements between undertakings, decisions by associations of undertakings or concerted practices which have as their object or effect the appreciable prevention, restriction or distortion of competition within Singapore will fall within the scope of the Section 34 Prohibition unless they are excluded under the Third Schedule or fall within a category specified in a block exemption order. Any provision in the Act expressed to apply in relation to an 'agreement' is taken as applying equally, with the necessary modifications, in relation to a decision by an association of undertakings or a concerted practice.

27.2.2 The Section 34 Prohibition may apply even where the agreement is entered into, or where any party to the agreement is, outside Singapore, so long as the agreement has as its object or effect the appreciable prevention, restriction or distortion of competition within Singapore.

27.2.3 Section 34(2) of the Act provides an illustrative but not exhaustive list of agreements which may be prohibited. These include agreements which (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.

Agreements between Undertakings

27.2.4 The term 'agreement' in section 34 does not require a formal contract. An informal understanding between parties may constitute an agreement, even though its terms have not been formally set down in a signed document. Likewise, a gentleman's agreement that has not been signed by the parties and which amounts to a 'faithful expression of the joint intention of the parties' can qualify as an agreement for the purposes of section 34.

27.2.5 Case law in other jurisdictions have found an agreement to exist when parties attend a meeting and exchange information on their price forecasts as well as express their common desire to conduct themselves in a particular manner in relation to prices. An undertaking which participates, even if not actively, in meetings between undertakings with an anti-competitive object and does not publicly distance itself from what was discussed gives the impression to the other participants that it subscribes to the outcome of the meetings and will act in conformity with it. As such, in the absence of proof to the contrary, mere attendance at a cartel meeting is sufficient to establish participation in the cartel activity. It is no answer for an undertaking to say that it did not abide by the outcome of the cartel meeting. It is also no defence for an undertaking to claim that other cartel members with greater market power had pressured it to participate in the meetings in question, since it is always open to the undertaking to report the matter to the authorities.

27.2.6 The Section 34 Prohibition does not apply to agreements between entities which form a single economic unit. A wholly owned subsidiary generally forms a single economic unit with its parent and hence agreements between a parent and a wholly owned subsidiary will generally fall outside the scope of the Section 34 Prohibition against anti-competitive agreements. Two wholly owned subsidiaries of the same parent will generally also be considered as forming a single economic unit. Any agreement between these subsidiaries thus generally falls outside the scope of the Section 34 Prohibition. A parent and its subsidiary, or two subsidiaries of the same parent, will also form a single economic unit if the subsidiary concerned has no real freedom to determine its course of action in the market and, although having a separate legal personality, enjoys no economic independence. Some of the factors that may be considered in assessing whether a subsidiary is independent of or forms part of the same economic unit with its parent include: (a) the parent's shareholding in the subsidiary; (b) whether or not the parent has control of the board of directors of the subsidiary; and (c) whether the subsidiary complies with the directions of the parent on sales and marketing activities and investment matters. Whether two or more entities form a single economic unit will depend on the facts and context of each case ([CCS Decision on Notification by Qantas Airways and Orangestar Investment Holdings of their Co-Operation Agreement: CCS 400/003/06](#)).

Decisions by Associations of Undertakings

27.2.7 A body need not be formally constituted as an association in order to be deemed as an association of undertakings for the purposes of competition law. Trade and other associations generally carry out legitimate functions intended to promote the competitiveness of their industry sectors. However, undertakings participating in such associations may in some instances collude and co-ordinate their actions which could infringe the section 34 prohibition. The association itself may also make certain decisions or perform actions which could infringe the section 34 prohibition. A decision by an association of undertakings may include the constitution or rules of the association, its recommendations, resolutions of the management committee or of the full membership in general meetings, binding decisions of the management or executive committee or rulings of its chief executive. 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. An 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.

27.2.8 In other jurisdictions, professional bodies have been held to be associations of undertakings.

Concerted Practices

27.2.9 This concept brings within the prohibition a form of coordination between undertakings which, without having reached the stage where it qualifies as an agreement per se, knowingly substitutes practical cooperation between them for the risks of competition. While economic operators are not deprived of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, any direct or indirect contact between such operators, the object or effect of which is either to (1) influence the conduct on the market of an actual or potential competitor or (2) disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market, can amount to a concerted practice. Hence, a concerted practice may be found to exist when parties come up with a practice that facilitates parallel price conduct, e.g. when a system is set up for the exchange of price information in advance, thus enabling prices to move upwards in a uniform fashion.

Prevention, Restriction or Distortion of Competition

27.2.10 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 such agreement is excluded or exempted. The factors considered in determining whether an agreement has an appreciable effect include the market shares of the parties to the agreement, the content of the agreement and the structure of the market affected by the agreement such as entry conditions or the characteristics of buyers, and the structure of the buyers' side of the market.

27.2.11 In this regard, the CCS Guideline on the Section 34 Prohibition state that an agreement will generally have no appreciable adverse effect on competition if (1)

it is made between undertakings which are actual or potential competitors and their aggregate market share does not exceed 20% on any of the relevant markets affected by the agreement; (2) it is made between undertakings which are neither actual nor potential competitors and their aggregate market share does not exceed 25% on any of the relevant markets affected by the agreement; or (3) it is made between undertakings, each of which is a small or medium enterprise ('SME'). Manufacturing SMEs are defined as having less than S\$15 million worth of fixed assets investment, and services SMEs are defined as having less than 200 workers. In applying the market share thresholds stated above, the relevant market share will be the combined market share of the parties to the agreement as well as other undertakings belonging to the same group including undertakings over which the parties exercise control, undertakings which exercise control over the parties, and undertakings controlled by such undertakings.

27.2.12 The fact that the market shares of the parties to an agreement exceed the threshold levels mentioned in [Section 27.2.11](#) does not mean that the effect of that agreement on competition is appreciable. The other factors mentioned in [Section 27.2.10](#) will also be considered. However, an agreement involving price-fixing, bid-rigging, market-sharing or output limitations will always be regarded as having an appreciable adverse effect on competition, notwithstanding the fact that the market shares of the parties may be below the threshold levels mentioned in [Section 27.2.11](#) or even if the parties to such agreements are all SMEs.

Exclusions under the Third Schedule

27.2.13 The following matters are specified in the Third Schedule as being excluded from the Section 34 and 47 Prohibitions: (a) activities relating to services of general economic interest or having the character of a revenue-producing monopoly; (b) activities needed to comply with legal requirements or to avoid conflict with international obligations; (c) activities which arise from exceptional and compelling reasons of public policy such as national security, defence and other strategic interests; (d) activities which already have sector-specific competition frameworks; and (e) specified activities, some of which are carried out by persons licensed and regulated under various Acts. The specified activities are (i) the supply of ordinary letter and postcard services; (ii) the supply of piped potable water; (iii) the supply of wastewater management services; (iv) the supply of scheduled bus services; (v) the supply of rail services; (vi) cargo terminal operations; (vii) the clearing and exchanging of articles undertaken by the Automated Clearing House established under the Banking (Clearing House) Regulations; and (viii) any activity of the Singapore Clearing Houses Association in relation to its activities regarding the Automated Clearing House.

27.2.14 Vertical agreements, as defined in the Third Schedule, are also excluded from the Section 34 Prohibition. These are agreements entered into between two or more undertakings, where each undertaking operates, **for the purposes of the agreement**, at a different level of the production or distribution chain, and where the agreement relates to the conditions under which the parties may purchase, sell or resell certain goods or services. This includes provisions contained in such agreements which relate to the assignment to the buyer or use by the buyer of intellectual property rights, provided that those provisions do not constitute the

primary object of the agreement and are directly related to the use, sale or resale of goods or services by the buyer or its customers. However, the Minister may, by order, specify the type of vertical agreements to which the Section 34 Prohibition shall apply. The rationale for this approach of excluding vertical agreements from the Section 34 Prohibition, subject to the clawback provision, lies in the general consensus amongst economists that the majority of vertical agreements have net pro-competitive effect.

27.2.15 An agreement falling within the scope of section 34 is also excluded under the Third Schedule if it has a net economic benefit. There is a net economic benefit if the agreement contributes to improving production or distribution or promoting technical or economic progress, and it neither imposes on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives nor affords the undertakings the possibility of eliminating competition in respect of a substantial part of the goods or services in question. (For an application of these criteria, see [CCS Decision on Notification by Qantas Airways and British Airways of their Restated Joint Services Agreement: CCS 400/002/06](#) and [CCS Decision on Notification by Qantas Airways and Orangestar Investment Holdings of their Co-Operation Agreement: CCS 400/003/06](#)). These criteria mirror those for block exemption orders set out in section 41 of the Act. The Section 34 Prohibition will not apply to such agreements by virtue of section 35 of the Act and no prior decision by the CCS to that effect is required. Should an investigation be carried out by the CCS, it will be for the undertaking claiming the benefit of the exclusion to prove that the agreement does have a net economic benefit.

27.2.16 Agreements are excluded from the Section 34 Prohibition and conduct from the Section 47 Prohibition to the extent that they result in a merger. Similarly, agreements and conduct that are directly related and necessary to the implementation of mergers (such agreements and conduct are called "ancillary restrictions") are also excluded from the Section 34 Prohibition and Section 47 Prohibition.

Block Exemption Orders

27.2.17 The CCS may recommend that the Minister makes a block exemption order in respect of a particular category of agreements. These agreements must, in the opinion of the CCS, be likely to be agreements which contribute to improving production or distribution or promoting technical or economic progress but which neither impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives nor afford the undertakings the possibility of eliminating competition in respect of a substantial part of the goods or services in question.

27.2.18 Before making such a recommendation, the CCS must publish details of its proposed recommendation to bring it to the attention of those likely to be affected and consider any representations made. Agreements which fall within the categories of agreements specified in a block exemption order need not be notified to the CCS. The only exception is when an agreement does not qualify for the block exemption created by the order but satisfies criteria specified in the order. In such a case, a party to the agreement may notify the CCS of the agreement. Unless the

CCS is opposed to it being treated as falling within a category specified in the order and gives notice in writing of its opposition, the agreement shall be so treated.

27.2.19 On 14 July 2006, the Minister issued the Competition (Block Exemption for Linear Shipping Agreements) Order 2006 exempting liner shipping agreements from the Section 34 Prohibition if the following conditions are met: (a) the aggregate market share of the parties to the agreement is not more than 50%; (b) the agreement allows the parties to offer, on the basis of individual confidential contracting, their own service arrangements and allows the parties to withdraw from the agreement on giving notice without penalty; and (c) the agreement does not require the parties to adhere to a tariff or to disclose confidential information concerning service arrangements. If the aggregate market share of the parties to a liner shipping agreement exceeds 50%, the parties would have to fulfil additional obligations relating to the filing and publication of information for the agreement to be exempted. An exemption may be cancelled in a particular case where a liner shipping agreement produces effects that do not satisfy the criteria as set out in [paragraph 27.2.17](#). The Order took effect retrospectively from 1 January 2006 and will last for 5 years. The CCS may, where circumstances so warrant, review the Order before the expiry of 5 years.

Consequences for Infringement

27.2.20 Any provision of an agreement or a decision which is prohibited by Section 34(1) shall be void on or after 1 January 2006 to the extent that it infringes the subsection. Where there is an intentional or negligent infringement of the Section 34 Prohibition, a financial penalty not exceeding 10% of the turnover of the business of the undertaking in Singapore for each year of infringement, up to a maximum of three years, may be imposed. A party who has suffered loss or damage directly as a result of an infringement of the Section 34 Prohibition has a right of action in civil proceedings, but that right can only be exercised after the CCS has made a decision of infringement and the appeal process has been exhausted.

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SECTION 3 THE SECTION 47 PROHIBITION

27.3.1 Section 47 prohibits conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in any market in Singapore, unless such conduct falls within an exclusion in the Third Schedule. While the Section 47 Prohibition does not prohibit undertakings from having a dominant position or striving to achieve it by offering cheaper or more innovative products, conduct that protects, enhances or perpetuates the dominant position in ways unrelated to competitive merit is prohibited.

27.3.2 The Section 47 Prohibition may apply even where the dominant position, or where the undertaking abusing the dominant position, is outside Singapore, so long as the abuse of that dominant position is in Singapore. The Section 47 Prohibition will also apply where the conduct is engaged in by entities which form a single economic unit, where the single economic unit is dominant in a relevant

market. More details on the concept of the 'single economic unit' can be found in [Section 27.2.6](#) above.

Two-Step Test

27.3.3 There is a two-step test to assess whether the Section 47 Prohibition applies: (1) whether an undertaking is dominant in the relevant market; and (2) whether it is abusing its dominant position.

Assessing Dominance

27.3.4 In assessing whether an undertaking is dominant, the extent to which there are constraints on an undertaking's ability to profitably sustain prices above competitive levels will be considered. Such constraints include: (a) the extent of existing competition; (b) potential competitors; and (c) other factors such as the existence of powerful buyers and any constraints imposed by economic regulation. In considering such constraints, relevant factors include the historical market shares of all the undertakings within the relevant market, entry barriers, the degree of innovation, product differentiation, the responsiveness of buyers to price increases, and the price responsiveness of competitors.

27.3.5 In this regard, the CCS Guidelines on the Section 47 Prohibition state that the CCS will consider a market share of above 60% as likely to indicate that an undertaking is dominant in the relevant market. Where relevant, other factors mentioned in [Section 27.3.4](#) above may then be considered in determining if an undertaking is dominant. Similarly, dominance could potentially be established at a lower market share if other relevant factors provide strong evidence of dominance.

Collective Dominance

27.3.6 The Section 47 Prohibition extends to conduct on the part of two or more economically independent undertakings, where there is an abuse of a collective dominant position. A dominant position may be held collectively when two or more undertakings are linked in such a way that they adopt a common policy in the relevant market.

Abuse

27.3.7 Section 47(2) of the Act provides an illustrative but not exhaustive list of abuses of a dominant position: (a) predatory behaviour towards competitors; (b) limiting production, markets, or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; and (d) making 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 the contracts.

27.3.8 The CCS has said in the CCS Guidelines on the Section 47 Prohibition that, in assessing whether any conduct is an abuse of a dominant position, it may consider

if the dominant undertaking is able to objectively justify its conduct and if it has behaved in a proportionate manner in defending its legitimate commercial interest.

27.3.9 It is not necessary for the dominant position, the abuse, and the effects of the abuse, to be in the same market.

Exclusion

27.3.10 The Section 47 Prohibition does not apply to those matters specified in the Third Schedule and which have been discussed in [Section 27.2.13](#) and [27.2.16](#). It must be noted that the Section 47 Prohibition applies to vertical agreements.

Block Exemptions

27.3.11 The provision for block exemptions does not apply to the Section 47 Prohibition.

Consequences for Infringement

27.3.12 Where there is an intentional or negligent infringement of the Section 47 Prohibition, 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 three years. In addition, a party who has suffered any loss or damage directly as a result of an infringement of the Section 47 Prohibition has a right of action in civil proceedings but the right can only be exercised after the CCS has made a decision of infringement and the appeal process has been exhausted.

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SECTION 4 THE SECTION 54 PROHIBITION

27.4.1 Section 54 prohibits mergers that have resulted or may be expected to result in a substantial lessening of competition within any market in Singapore for goods or services, unless the merger falls within an exclusion in the Fourth Schedule, or is exempted by the Minister on the ground of any public interest consideration.

27.4.2 The Section 54 Prohibition may apply even where the merger takes place outside of Singapore, or where any merger party is outside Singapore, so long as the substantial lessening of competition is within any market in Singapore.

When a Merger Occurs

27.4.3 A merger occurs when (a) 2 or more previously independent undertakings merge; (b) direct or indirect control is acquired over the whole or part of an undertaking; or (c) an undertaking acquires the assets of another undertaking (or a substantial part thereof) with the result that the first undertaking is placed in a position to either replace or substantially replace the second undertaking in the business in which the latter was engaged before the acquisition.

27.4.4 Control over an undertaking exists if decisive influence is capable of being exercised over that undertaking's activities, whether by virtue of ownership of or the right to use that undertaking's assets or by virtue of rights or contracts which enable decisive influence to be exercised over the composition, voting or decisions of that undertaking's organs.

27.4.5 A merger also occurs when a joint venture is created to perform, on a lasting basis, all the functions of an autonomous economic entity.

27.4.6 Certain categories of transactions are specifically deemed not to constitute a merger within the meaning of the Section 54 Prohibition. These are: (a) acquisitions of control by a person acting in his capacity as a receiver, liquidator or underwriter; (b) mergers between undertakings directly or indirectly controlled by the same undertaking; (c) acquisitions of control resulting from a testamentary disposition, intestacy or the right of survivorship in a joint tenancy; and (d) acquisitions of control by parties whose normal activities include carrying out of transactions and dealing in securities for their own account or for the account of others. The last category only applies where the securities in the acquired undertaking are held on a temporary basis and any exercise of the voting rights in respect of the securities is for the purpose of arranging the disposal of the acquired undertaking or its assets or securities, and not for determining the strategic commercial behaviour of the acquired undertaking.

The Test for Whether A Merger Substantially Lessens Competition

27.4.7 In assessing whether a merger substantially lessens competition, the CCS will look at the impact which the merger has on the competitive pressures within the market. This is in turn reflected by changes in market structure and concentration brought about by the merger. The CCS is generally of the view that competition concerns are unlikely to arise unless the merger results in (a) a merged entity with a market share of 40% or more; or (b) a merged entity with a market share of between 20% to 40% and a post-merger CR3 ratio of 70% or more. The CR3 is the concentration ratio measured by adding the market shares of the 3 biggest firms in the market.

27.4.8 These thresholds are merely indicators of potential competition concerns and are not determinative. Market shares and concentration ratios exceeding these thresholds do not give rise to a presumption that the merger substantially lessens competition, as there may be other countervailing factors that need to be considered. Conversely, market shares and concentration ratios below these thresholds may still raise competition concerns, if there are other indications that competition has been substantially lessened.

27.4.9 In the case of horizontal mergers, i.e. mergers between undertakings that are active, or potentially active, in the same economic market and at the same level of business, the CCS will assess if the merger enhances the risk of non-coordinated or coordinated effects. Non-coordinated effects arise if the merged entity finds it profitable to raise prices (or reduce output or quality) post-merger, due to a reduction in competition. If customers regard the product of one merger party as a

close substitute for the product of the other merger party, any price increase in one product is likely to result in customers switching to the other product. The sales which are lost as a result of a price increase in the first product are then more likely to be recaptured by increased sales in the other product, thereby enhancing the merged entity's incentive to raise prices. In this regard, the term "non-coordinated effects" is used because it refers to price increases by the merged entity, without the need for coordination from other competitors in the market. On the other hand, coordinated effects arise if the reduction in the number of market players post-merger increases the possibility that the firms may coordinate their behaviour to raise prices, or reduce quality or output. Certain market conditions may enhance coordinated effects, e.g. transparency that enables firms to observe their competitors' conduct, or the potential for credible retaliatory measures in the event that a firm deviates from any coordinated course of action.

27.4.10 Apart from horizontal mergers, there are also vertical or conglomerate mergers. Vertical mergers are mergers between undertakings operating at complementary levels of the production or distribution chain (e.g. a merger between a retailer and its wholesaler). Conglomerate mergers are mergers between undertakings in different markets where no vertical relationship exists between the merging parties. While non-horizontal mergers generally do not lead to a substantial lessening of competition, they may raise competition concerns under certain circumstances if the merged entity has market power in at least one of the markets concerned.

27.4.11 The competition concerns which may arise from a vertical merger can be illustrated by a merger between a wholesaler and retailer. The wholesaler may, post-merger, sell only to the retailer with which it has merged and refuse to sell to the retailer's competitors (or sell to them only at uncompetitive prices). If the wholesaler has market power, such a course of action could mean that the other retailers are effectively foreclosed from a substantial part of the wholesale market. Correspondingly, a retailer with market power can foreclose a substantial part of the retail market by buying only from the wholesaler with which it has merged. Similarly, the competition concerns which may arise from a conglomerate merger can be illustrated by a merger which creates a merged entity with a portfolio of brands under its control. Where the brands relate to products that share sufficient characteristics to be considered a discrete group, customers may have an incentive to purchase the portfolio of brands from a single supplier to reduce their transaction costs. If the merged entity plans to sell the portfolio of brands as a bundle and it has market power in at least one of the brands, competition concerns may arise if the merged entity's competitors are unable to supply the same full range of brands and are consequently foreclosed from the market, as a result of their inability to come up with a competing bundle.

27.4.12 Any competition concerns that a merger (whether horizontal or non-horizontal) might otherwise raise may be offset by certain countervailing factors that constrain any exercise of post-merger market power. One such factor would be the prospect of entry by new rivals or the expansion of existing rivals. However, for the threat of entry to be a sufficient competitive constraint, the entry must be: (i) sufficiently likely to occur in the event that the merged entity attempts to exercise its market power; (ii) sufficient in scope to constrain any such attempt to exercise

market power; and (iii) sufficiently timely and sustainable to provide effective and lasting post-merger competition.

27.4.13 Another countervailing factor would be the existence of buying power, e.g. where the customer is able to discipline supplier pricing by credibly threatening to switch to the supplier's competitors or by other measures (e.g. delaying purchases or positioning the supplier's products in less attractive locations within the retail outlet).

27.4.14 A merger may also be regarded as not substantially lessening competition if the failing firm defence applies. For the defence to apply, the failing merger party must be in such a dire situation that the party and its assets would exit the market in the near future if the merger does not proceed. Furthermore, the failing merger party must be unable to meet its financial obligations in the near future, with no serious prospect or re-organising. Finally, there must be no less anti-competitive alternative to the merger. The defence would thus not apply if there are other realistic buyers willing to purchase the failing merger party or its assets at a commercially reasonable price (this includes situations where the price is lower than what the acquiring party is prepared to pay), whose acquisition would produce a more competitive outcome. The failing firm defence also applies, with the necessary modifications, to failing divisions.

27.4.15 Another possible countervailing factor would be if the merger creates efficiencies that increase post-merger rivalry, e.g. where a merger between 2 smaller competitors generates efficiencies that enable the merged entity to charge a lower price and compete more effectively with a larger player, such that the conclusion is that there is no substantial lessening of competition. Any claimed efficiencies must be demonstrable, i.e. parties claiming these efficiencies must prove that the efficiencies are (i) clear and supported by detailed and verifiable evidence; and (ii) likely to arise with the merger and within a reasonable period of time. The claimed efficiencies must also be merger-specific, i.e. arising as a direct consequence of the merger.

27.4.16 Even if the merger is found to substantially lessen competition, it may still fall within the net economic efficiencies exclusion in paragraph 3 of the Fourth Schedule to the Act. This exclusion applies if the merger generates efficiencies which outweigh the adverse effects due to any substantial lessening of competition which may result from the merger. Examples of efficiencies which may satisfy the exclusion include those which bring about lower costs, greater innovation, greater choice or higher quality. For the exclusion to apply, these efficiencies must arise in markets within Singapore and must be sufficient to outweigh the detriments to competition in Singapore caused by the merger. Furthermore, the efficiencies must also satisfy the requirements of being demonstrable and merger specific, as explained in the preceding paragraph.

Exclusion

27.4.17 The Section 54 Prohibition does not apply to any merger subject to approval by any Minister or regulatory authority. For this exclusion to apply, the requirement for approval must be imposed by written law, although in the case of the Monetary Authority of Singapore, the exclusion will also apply if the requirement

for approval is imposed by non-legislative instruments (such as licenses and directives) issued under written law.

27.4.18 The Section 54 Prohibition also does not apply to any merger under the jurisdiction of any regulatory authority (other than the CCS), under any written law relating to competition, or code of practice relating to competition issued under any written law.

27.4.19 The Section 54 Prohibition also does not apply to any merger involving any undertaking relating to certain activities which have been specified as being excluded from the Section 34 Prohibition and the Section 47 Prohibition, namely: (i) the supply of ordinary letter and postcard services; (ii) the supply of piped potable water; (iii) the supply of wastewater management services; (iv) the supply of scheduled bus services; (v) the supply of rail services; and (vi) cargo terminal operations.

Commitments

27.4.20 The CCS may accept commitments at any time before making a decision as to whether an anticipated merger will, if carried into effect, infringe, or as to whether a merger has infringed, the Section 54 Prohibition. Commitments offered to the CCS must remedy, mitigate or prevent the adverse effects of the anticipated merger or merger. Upon accepting the commitment, the CCS has to issue a decision that the Section 54 Prohibition (in the case of an anticipated merger) will not be, or (in the case of merger has not been, infringed. Such a decision may nevertheless be revoked if the CCS has reasonable grounds for suspecting that any information on the basis of which it accepted the commitment was incomplete, false or misleading in a material particular or that any party who provided the commitment failed to adhere to one or more of the commitment terms.

27.4.21 The CCS may review the effectiveness of commitments which it has accepted and may at any time accept a variation, substitute or release of the commitment.

Consequences for Infringement

27.4.22 When the CCS has made a decision that an anticipated merger will if carried into effect infringe, or that a merger has infringed, the Section 54 Prohibition, it may impose the appropriate directions. In the case of anticipated mergers, the direction may, for example, require that the merger parties not carry the anticipated merger into effect. In the case of mergers, the directions may either be structural (e.g. divestment) or behavioural in nature, with a view to remedying, mitigating or eliminating the adverse effects arising from the merger.

27.4.23 Where there has been an intentional or negligent infringement of the Section 54 Prohibition by a merger, a financial penalty not exceeding 10% of the turnover of the business of the undertaking in Singapore for each year of infringement, up to a maximum of three years, may be imposed. A party who has suffered loss or damage directly as a result of an infringement of the Section 54 Prohibition has a right of action in civil proceedings, but that right can only be

exercised after the CCS has made a decision of infringement and the appeal process has been exhausted.

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SECTION 5 MARKET DEFINITION

27.5.1 Market definition and the measurement of market shares are important in the process of determining whether agreements have as their object or effect an appreciable prevention, restriction or distortion of competition in a market under the Section 34 Prohibition whether an undertaking with substantial market power amounting to a dominant position in a market has abused its market power under the Section 47 Prohibition, or whether a merger has resulted, or may be expected to result, in a substantial lessening of competition in any market in Singapore. Market definition is the first step in a full competition analysis and the key step in providing the framework for analysis through identifying the competitive constraints acting on a seller of a given product.

Defining the Relevant Market

27.5.2 The essential task in market definition is to define all the products on the demand side that buyers regard as reasonable substitutes for the product under investigation ('focal product') and then to identify all the sellers who supply the focal and substitute products or who could potentially supply them. This exercise of defining the relevant market includes defining its geographical reach which may extend beyond the area under investigation and in which the focal product is sold ('focal area').

The Hypothetical Monopolist Test

27.5.3 The CCS Guideline on Market Definition set out the hypothetical monopolist test as a conceptual approach used to define markets in cases falling under the Sections 34 and 47 Prohibitions. In essence, the test seeks to establish the relevant market as the smallest product group and geographical area such that a hypothetical monopolist controlling that product group in that area could profitably sustain prices that are at least a small but significant amount above competitive levels. That product group and area is usually the relevant market for competition law purposes.

27.5.4 The test starts with a narrow definition of the product and geographic market, usually the focal product or focal area. The following question is then asked: will a significant number of buyers switch to other products or areas that are the next best substitutes if the price of the focal product is raised by a small but significant and non-transitory amount above competitive levels? An increase of 10% above the competitive price will generally be used for the test but the actual percentage used may vary depending on the particular facts of each case. If the answer to the question is in the affirmative, these other products or areas and their sellers are included in the definition of the market because they potentially constrain the exercise of market power. The same question is asked again with this widened group of products or areas. The question is repeated and the market widened until

the point is reached when a significant number of buyers do not respond to the small but significant increase in price by switching to other products or areas. A hypothetical monopolist controlling these products in these areas would be able to profitably raise the price of the product under investigation by a significant amount above competitive levels. The relevant market containing the principal constraints on the exercise of market power is then used to assess the impact of that agreement or conduct under investigation, or to assess whether an undertaking is dominant in that market.

27.5.5 In cases under the Section 54 Prohibition, the test for market definition is the same as that for cases under the Sections 34 and 47 Prohibition cases, with the exception that the test focuses on postulating what happens if the price of the focal product is raised by a small but significant and non-transitory amount above current (as opposed to competitive) levels. The reason for this difference is that one of the primary concerns in merger control is whether the merger will result in an increase in prices above prevailing levels.

Practical Issues

27.5.6 In practice, it is rarely possible to define a market in strict accordance with the test's assumptions. Even if the test could be conducted precisely, the relevant market is no more than an appropriate frame of reference for competition analysis. Where there is strong evidence that the relevant market is one of a few plausible market definitions and the assessment on competitive impact is shown to be largely unaffected whichever market definition is adopted, it may not be necessary to define the market uniquely.

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SECTION 6 NOTIFICATIONS FOR GUIDANCE OR DECISIONS

Notifying Agreements and Conduct

27.6.1 Undertakings having serious concerns as to whether they are infringing the Section 34 Prohibition or the Section 47 Prohibition may apply to the CCS for guidance or a decision. Notification of an agreement to the CCS confers upon the agreement a provisional immunity from financial penalty, which lasts from the date on which the notification was given to such date as may be specified by the CCS following a determination of the notification. No provisional immunity is conferred for notification of conduct.

27.6.2 Guidance may indicate whether an agreement is likely to infringe the Section 34 Prohibition and whether it is likely to be exempt under a block exemption. Where the CCS has given guidance that an agreement is unlikely to infringe the Section 34 Prohibition or is likely to be exempt under a block exemption, or that conduct is unlikely to infringe the Section 47 Prohibition, immunity is conferred in that no further action may be taken with respect to the notified agreement in relation to the Section 34 Prohibition, or with respect to the notified conduct in relation to the Section 47 Prohibition, as the case may be. This immunity

cannot be removed unless: (a) the CCS has reasonable grounds for believing that there has been a material change of circumstances since it gave its guidance; (b) the CCS has reasonable grounds for suspecting that the information on which it based its guidance was incomplete, false or misleading in a material particular; (c) a complaint about the agreement or conduct has been made to the CCS (in the case of agreements, the complaint is to come from a person who is not a party to the agreement); or (d) (in the case of agreements) one of the parties to the agreement applies to the CCS for a decision with respect to the agreement. The CCS will have to give notice in writing to the notifying party before removing the immunity.

27.6.3 Similarly, where the CCS has made a decision upon a notification that an agreement has not infringed the Section 34 Prohibition or that conduct has not infringed the Section 47 Prohibition, immunity is conferred in that no further action may be taken with respect to the notified agreement in relation to the Section 34 Prohibition, or with respect to the notified conduct in relation to the Section 47 Prohibition, as the case may be. This immunity cannot be removed unless: (a) the CCS has reasonable grounds for believing that there has been a material change of circumstances since it gave its decision; or (b) the CCS has reasonable grounds for suspecting that the information on which it based its decision was incomplete, false or misleading in a material particular. The CCS will have to give notice in writing to the notifying party before removing the immunity.

Notifying Anticipated Mergers and Mergers

27.6.4 Undertakings having serious concerns as to whether their anticipated merger will, if carried into effect, infringe, or that their merger has infringed, the Section 54 Prohibition, may apply to the CCS for a decision. The CCS adopts a two-phased approach when evaluating notified anticipated mergers and mergers. Upon receiving the notification, the CCS will carry out Phase 1 review, which is expected to be completed within 30 working days from when the applicable Phase 1 filing requirements have been met. Anticipated mergers and mergers that clearly do not raise any competition concerns under the Section 54 Prohibition will be cleared under Phase 1. If the CCS is unable, based on the information submitted during Phase 1 review, to conclude that the anticipated merger or merger does not raise any competition concerns, it will proceed to Phase 2 review. Phase 2 review entails a more detailed assessment, and is expected to be completed within 120 working days from when the applicable Phase 2 filing requirements have been met. The timeframes of 30 working days and 120 working days are administrative in nature, and may be stopped if parties fail to comply with the CCS' requests for further information or if commitments are being negotiated.

27.6.5 Where the CCS has made a decision upon a notification that an anticipated merger will if carried into effect not infringe, or that a merger has not infringed, the Section 54 Prohibition, immunity is conferred in that no further action may be taken with respect to the notified anticipated merger or merger, in relation to the Section 54 Prohibition. This immunity cannot be removed unless: (a) the CCS has reasonable grounds for suspecting that the information on which it based its decision (including any information on the basis of which it accepted a commitment) was incomplete, false or misleading in a material particular; or (b) the CCS has reasonable grounds for suspecting that a party who provided a commitment failed to adhere to one or

more of the commitment terms. The CCS will have to give notice in writing to the notifying party before removing the immunity. A decision that an anticipated merger will, if carried into effect, not infringe the Section 54 Prohibition may be subject to a validity period, in which case the immunity will apply only if the anticipated merger is carried into effect within the validity period.

27.6.6 Where the CCS proposes upon a notification to make a decision that the notified anticipated merger will if carried into effect infringe, or that the notified merger has infringed, the Section 54 Prohibition, it will give notice to the party who applied for the decision or, where that party no longer exists, the merged entity. That party may, within 14 days of the notice, apply to the Minister for the anticipated merger or merger to be exempted from the Section 54 Prohibition on the ground of any public interest consideration.

27.6.7 The CCS may issue interim directions prior to completing its consideration of an anticipated merger or merger which has been notified to the CCS for a decision if the CCS has reasonable grounds for suspecting that the Section 54 Prohibition will be infringed by the anticipated merger if carried into effect, or has been infringed by the merger, and it considers that it is necessary to act (a) as a matter of urgency, for the purpose of preventing serious, irreparable damage or of protecting the public interest; or (b) for the purpose of preventing any action that may prejudice the CCS' consideration of the anticipated merger or merger, or prejudice the giving of any direction under Section 69 of the Act.

Requiring Information from Third Parties

27.6.8 When the CCS has reasonable grounds for suspecting that (a) the Section 34 Prohibition has been infringed by a notified agreement; (b) the Section 47 Prohibition has been infringed by notified conduct; or (c) the Section 54 Prohibition will be infringed by a notified anticipated merger if carried into effect or has been infringed by a notified merger, it may by written notice require any person to produce information or documents which the CCS considers relevant to its consideration of the notified agreement, conduct, anticipated merger or merger.

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SECTION 7 POWERS OF INVESTIGATION

27.7.1 The CCS has certain powers of investigation if there are reasonable grounds for suspecting that the Section 34 Prohibition has been infringed by any agreement, the Section 47 Prohibition has been infringed by any conduct, the Section 54 Prohibition will be infringed by any anticipated merger if carried into effect or has been infringed by any merger. These powers are: (a) the power to require the production of specified documents or information under s 63; (b) the power to enter premises without a warrant under s 64; (c) the power to enter and search premises with a warrant under s 65.

Power to Require Production of Specified Documents or Information

27.7.2 The power to require the production of specified documents or information under s 63 is exercised by way of a written notice. The notice must indicate the subject matter and purpose of the investigation and the offences involved in non-compliance. The notice may also state when and where the document or information is to be provided as well as how and in what form. The CCS has the further power to take copies or extracts from a document produced in response to the notice and to ask for an explanation of it, or if the document is not produced, to ask where it is believed to be. The requisite written notice may be addressed to complainants, suppliers, customers and competitors and not just to undertakings suspected of infringement or their officers. The power to require the production of specified documents or information may be exercised before, during or after an inspection of premises.

Power to Enter Premises without a Warrant

27.7.3 'Premises' are defined in section 2(1) of the Act as not including domestic premises unless they are used in connection with an undertaking's affairs or an undertaking's documents are kept there, but includes any vehicle. There are three circumstances under which the CCS may enter premises without a warrant. The first is where the occupier of the premises has been given at least two working days' written notice of the intended entry. The second is where the CCS has reasonable grounds for suspecting that the premises are or have been occupied by an undertaking that is being investigated in relation to the Section 34 Prohibition, the Section 47 Prohibition or the Section 54 Prohibition. The third is where the CCS has been unable to give written notice to the occupier despite taking all reasonably practicable steps to do so.

27.7.4 On the premises, the CCS may (a) require the production of relevant documents and an explanation of the same; (b) require a statement of where relevant documents may be found; (c) require copies of or extracts from any document produced; (d) require any relevant information stored in any electronic form and accessible from the premises to be produced in a form which can be taken away and in which it is visible and legible; or (e) take any other steps necessary for preserving the documents or preventing interference with them.

Power to Enter Premises with a Warrant

27.7.5 The Court may issue a warrant to enter and search any premises if it is satisfied that there are reasonable grounds for suspecting that, within the premises to be searched, there are documents: (a) which have not been produced, although the CCS has required production, either by written notice or in the course of an inspection without a warrant; (b) which the CCS could have required to be produced in the course of an inspection without a warrant but was unable to effect entry into the premises; or (c) which would be concealed, removed or tampered with or destroyed, if the CCS were to require their production by written notice.

27.7.6 Besides the powers available in an inspection without a warrant, the warrant may authorise the CCS to (a) enter the premises using such force as is reasonably necessary; (b) search the premises and any person on the premises for relevant documents; (c) take possession of documents if it is not reasonably

practicable to take copies of the documents on the premises; (d) take possession of relevant documents or any other step necessary for preserving the documents or preventing interference with them; and (e) remove from the premises for examination any relevant equipment or article.

Offences of Obstruction under the Act

27.7.7 These powers of investigation are backed up by the threat of criminal sanctions where an undertaking fails to comply or co-operate. The relevant offences are set out in sections 65 and 75 to 78 of the Act. They include: (a) failing to comply with a requirement imposed under sections 63 to 65; (b) intentionally or recklessly destroying, disposing of, falsifying or concealing documents, or causing or permitting the same to happen; (c) knowingly or recklessly supplying information which is false or misleading in a material particular either directly to the CCS, or to anyone else, knowing it is for the purpose of providing information to the CCS; (d) obstructing the CCS in the discharge of its duties under the Act; and (e) failing to comply with any condition imposed by an officer executing the search warrant for allowing any equipment or article to be retained on the premises instead of being removed. A person guilty of such offences shall be liable on conviction to a fine not exceeding \$10,000 or to imprisonment for a term not exceeding 12 months or to both. Furthermore, under section 81, officers of a body corporate are liable to punishment if they have consented to or connived at an offence or the offence is due to neglect on their part. 'Officer' means a director, manager, secretary or other similar officer, or anyone purporting to act as such. Similar provisions are applicable to companies managed by their members and to partners and partnerships.

27.7.8 The Act allows various defences to these penal provisions. If a person is charged with not producing a document, it is a defence to show that he did not have it in his possession or control and it was not reasonably practicable for him to get it. A similar statutory defence applies to failure to provide information. In relation to all requirements imposed under section 63 or 64, there is a general defence if the investigator failed to act in accordance with the section.

Limitations on Investigative Powers

27.7.9 The investigative powers are limited in certain aspects. Communications between a professional legal adviser and his client and communications made in connection with, or in contemplation of, legal proceedings or for the purpose of such proceedings are regarded as privileged documents. This will mean that communications with in-house lawyers, in addition to lawyers in private practice including foreign lawyers, can benefit from the privilege. The power to require the details of the relevant persons under section 66(4) of the Act will only be used, where necessary, to ascertain if the communications are indeed privileged.

27.7.10 A person or undertaking is not excused from disclosing information or documents to the CCS under a requirement made of him pursuant to the provisions of the Act on the ground that the disclosure of the information or documents might tend to incriminate him. Where a person claims before making a statement disclosing information that the statement might tend to incriminate him, that statement shall be admissible in evidence against him in civil proceedings including proceedings

under the Act. The statement shall not be admissible in evidence against him in criminal proceedings other than proceedings under Part V of the Act relating to ancillary offences such as providing false or misleading information. Please see [Section 27.7.7](#).

27.7.11 Unless one of the statutory gateways for disclosure under section 89 of the Act is established, the CCS is also obliged to preserve the secrecy of information relating to the business, commercial or official affairs of any person, any matter identified as confidential by a person furnishing information and the identity of persons furnishing information to the CCS, if such information obtained in connection with the exercise of any function and discharge of duties of the CCS under the Act.

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SECTION 8 ENFORCEMENT

27.8.1 As the CCS is both investigator and adjudicator, the Act provides for several procedural safeguards. Before the CCS proposes to make a decision that the Section 34 Prohibition or the Section 47 Prohibition has been infringed, or that the Section 54 Prohibition will be infringed by an anticipated merger if carried into effect or has been infringed by a merger, the CCS shall give written notice to the persons, involved and give such persons an opportunity to make representations to the CCS. Such persons will also be given a reasonable opportunity to inspect the CCS' file save for internal documents and confidential information.

27.8.2 Upon receipt of the notice referred to in [27.8.1](#), the notifying party (in the case of a notified anticipated merger or merger) or the merger parties (where the anticipated merger or merger was not notified) may, within 14 days of the notice, apply to the Minister for the anticipated merger or merger to be exempted from the Section 54 Prohibition on the ground of any public interest consideration.

27.8.3 Appeals against a decision of the CCS lie to the Competition Appeal Board and are by way of a rehearing.

Interim Directions

27.8.4 If the CCS has reasonable grounds for suspecting that the Section 34 Prohibition or that the Section 47 Prohibition has been infringed, the CCS may, prior to completing its investigations, give interim directions if it considers that it is necessary to act as a matter of urgency for the purpose of preventing serious, irreparable damage or of protecting the public interest.

27.8.5 The CCS may also issue interim directions when investigating anticipated mergers or mergers under Section 62 of the Act. Interim directions may be issued if the CCS has reasonable grounds for suspecting that the Section 54 Prohibition will be infringed by the anticipated merger if carried into effect, or has been infringed by the merger, and the CCS considers that it is necessary to act either (a) as a matter of urgency for the purpose of preventing serious, irreparable damage or of protecting the public interest; or (b) for the purpose of preventing any action that may

prejudice the investigation of the anticipated merger or merger, or prejudice the giving of any direction under section 69 of the Act.

27.8.6 The CCS has to give written notice to the person whom it proposes to give the direction indicating the nature of the proposed interim direction and its reasons for wishing to give it and afford that person an opportunity to make representations.

Directions

27.8.7 Where the CCS has made a decision that the Section 34 Prohibition, the Section 47 Prohibition or the Section 54 Prohibition has been infringed, or that the Section 54 Prohibition will be infringed by an anticipated merger if carried into effect, the CCS may give such directions as it considers appropriate to bring the infringement to an end or (in the case of an anticipated merger) to prevent the impending infringement. For example, the direction may require the parties to modify or cease the agreement, conduct or anticipated merger. In the case of mergers which have been carried into effect, the CCS may also order structural remedies (such as divestment) or behavioural remedies to address any adverse effects arising from the merger. Where the infringement has been committed intentionally or negligently, the CCS may impose a financial penalty of up to 10% of the turnover of the business of the undertaking in Singapore for each year of infringement up to a maximum of three years.

Financial Penalties

27.8.8 In imposing any financial penalty, the CCS has the twin objectives of reflecting the seriousness of the infringement and deterring undertakings from engaging in anti-competitive practices. Severe financial penalties may be imposed in respect of the most serious infringements of competition law such as cartel activities and serious abuses of a dominant position. The assessment of an appropriate penalty will depend on the facts of each case but the following will be taken into consideration: (a) the seriousness of the infringement; (b) the turnover of the business of the undertaking in Singapore for the relevant product and geographic markets affected by the undertaking's infringement; (c) the duration of the infringement; (d) other relevant factors such as the economic or financial benefit derived from the infringement, the size and financial position of the undertaking and any gains accruing to the undertaking in other product or geographic markets; and (e) any further aggravating or mitigating factors.

Enforcement of Directions

27.8.9 Enforcement of any direction by the CCS is by way of registration of the direction in a District Court, which shall then have power to enforce the direction regardless of the monetary amount involved.

Leniency Programme

27.8.10 The CCS administers a leniency programme for undertakings which provide the CCS with evidence of cartel activities. To qualify for leniency, the undertaking must (a) provide the CCS with all the information, documents and

evidence available to it regarding the cartel activity; (b) maintain continuous and complete co-operation throughout the investigation and until the conclusion of any action by the CCS arising as a result of the investigation; (c) refrain from further participation in the cartel activity from the time of disclosure of the cartel activity to the CCS except as directed by the CCS; (d) not have been the one to initiate the cartel; and (e) not have taken any steps to coerce another undertaking to take part in the cartel activity. Depending on the time at which the undertaking comes forward to the CCS, the evidence already in the CCS' possession and the quality of information provided by the undertaking, the undertaking may be granted a reduction in the amount of, or even total immunity from, financial penalty.

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SECTION 9 APPEALS

27.9.1 Appeals against the decisions of the CCS are taken to the Competition Appeal Board ('CAB') which consists of members appointed by the Minister on the basis of their ability and experience in industry, commerce or administration or their professional qualifications or their suitability otherwise for appointment.

Appealable Decisions

27.9.2 Section 71 sets out a list of decisions for which appeals lie to the CAB. They include a decision of the CCS as to whether the Section 34 Prohibition, the Section 47 Prohibition or the Section 54 Prohibition have been infringed, a decision as to whether the Section 54 Prohibition will be infringed by an anticipated merger if carried into effect, a direction of the CCS and any decision of the CCS which is prescribed by the Minister as an appealable decision. Decisions which have been prescribed as appealable, are decisions relating to the cancellation of a block exemption and decisions relating to a refusal by the CCS to vary, substitute or release a commitment. Any party to an agreement in respect of which the CCS has made a decision, any person in respect of whose conduct the CCS has made a decision, any party to an anticipated merger or party involved in a merger in respect of which the CCS has made a decision, or any other party or person who has been given a direction by the CCS, may appeal against the decision. Except in the case of an appeal against the imposition or the amount of a financial penalty, the making of an appeal shall not suspend the effect of the decision to which the appeal relates.

Powers on Appeal

27.9.3 The powers of the CAB on appeal are extensive. It may confirm or set aside the decision which is the subject of the appeal or any part of it. It may (a) remit the matter to the CCS; (b) impose or revoke, or vary the amount of, a financial penalty; (c) give such direction, or take such other step, as the CCS could itself have given or taken; or (d) make any other decision which the CCS could itself have made. Even if the CAB confirms the decision which is the subject of the appeal, it may nevertheless set aside any finding of fact on which the decision was based.

Enforcement and Further Appeals

27.9.4 A decision of the CAB on an appeal has the same effect, and may be enforced in the same manner, as a decision of the CCS. Further appeals against decisions of the CAB lie to the High Court, but only in respect of points of law or the amount of financial penalty. Such further appeals may only be made at the instance of a person who was a party to the proceedings in which the decision of the CAB was made. The High Court may confirm, modify or reverse the decision of the CAB and make such further order as it may think fit. The decision of the High Court is considered to be a decision made in the exercise of its original civil jurisdiction for which further rights of appeal lie to the Court of Appeal.

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SECTION 10 INTELLECTUAL PROPERTY RIGHTS

27.10.1 The term 'intellectual property rights' is frequently used to refer to patents, trademarks, copyrights, plant varieties protection, layout designs and registered designs and trade secrets.

27.10.2 For the purpose of competition law, an intellectual property right is treated as any other form of private property. The right to exclude is the basis of private property rights. An intellectual property right bestows on its owner certain rights to exclude others, which are necessary in order to allow him to recover the cost of his investment and profit from the use of the property. However, as with other forms of private property, certain types of agreements or conduct involving intellectual property rights may have anti-competitive effects which come under the purview of competition law. Licensing arrangements can raise competition concerns if they are likely to adversely affect the price, quantity, quality, or variety, of products currently or potentially available. The competitive effects of licensing arrangements will generally be analysed within the relevant markets for the products affected by such arrangements ('product markets'). In some cases, however, the analysis may require the further assessment of competitive effects on the markets for technology ('technology markets') or markets for research and development ('innovation markets') as the analysis of the product markets alone would inadequately address the effects of the licensing agreement on competition among technologies or in research and development.

27.10.3 In relation to intellectual property rights and the Section 34 Prohibition, the CCS Guidelines on the Treatment of Intellectual Property Right state that a licensing agreement will generally have no appreciable adverse effect on competition if 1) the aggregate market share 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 competitors, and 2) if the market share of each of the parties does not exceed 35% on any of the relevant markets affected by the agreement, where the agreement is made between non-competitors. As with other types of agreements, a licensing agreement between competitors which involves price-fixing, market-sharing or output limitations will always have an appreciable adverse effect on competition, notwithstanding that the market shares of the parties are below the market share thresholds as stated in this section.

27.10.4 The essential characteristic of intellectual property rights is that they confer exclusivity upon their owners, but the possession of an intellectual property right does not necessarily create market power in the economic sense. While the intellectual property right may confer the right to exclude with respect to the specific product, process or work to which the intellectual property right relates, this does not necessarily mean that there will not be actual or potential substitutes that constrain the exercise of market power by the intellectual property right owner.

27.10.5 In relation to intellectual property rights and the Section 47 Prohibition, the exercise of an intellectual property right by a dominant undertaking will not usually be an abuse when limited to the market for the specific product which incorporates it. However, competition concerns may arise when the dominant undertaking attempts to extend its market power into a neighbouring or related market beyond the scope granted by intellectual property law.

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SECTION 11 MARKET INQUIRIES

27.11.1 The CCS may also conduct inquiries into certain sectors of the market. In doing so, if the CCS has reasonable grounds for suspecting that any feature of a market in Singapore prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in Singapore, the CCS may by written notice require any person to produce information or documents which the CCS considers relevant for its purposes.

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