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# **CCS GUIDELINES ON THE MAJOR PROVISIONS**

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**Competition and Consumer Commission of Singapore**

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## CCS GUIDELINES ON THE MAJOR PROVISIONS

### 1 INTRODUCTION

#### *What these guidelines are about*

- 1.1 These summary guidelines provide an overview of the main provisions of the Competition Act 2004 (“the Act”) and explain how the Competition Commission of Singapore (“CCS”) will apply and enforce the prohibitions against anti-competitive activities under the Act with the aim of promoting healthy competitive markets in Singapore. The Act applies to “undertakings”. This covers any natural or legal person who is capable of engaging in economic activity, regardless of its legal status and the way in which it is financed. It includes individuals operating as sole proprietorships, companies, firms, businesses, partnerships, co-operatives, societies, business chambers, trade associations and non-profit-making organisations.<sup>1</sup> CCS has published more detailed guidelines on most of the topics covered in these guidelines and CCS would encourage interested parties to refer to the detailed guidelines.
- 1.2 Part 2 of these guidelines sets out the purpose, structure and scope of the Act. Part 3 explains the functions and duties of CCS. Details of the section 34 prohibition on agreements that appreciably prevent, restrict or distort competition (“the section 34 prohibition”) and section 47 prohibition on abuse of a dominant position (“the section 47 prohibition”) are to be found in parts 4 and 5 respectively. The section 34 and section 47 prohibitions came into force on 1 January 2006. The section 54 prohibition on mergers and acquisitions (“the section 54 prohibition”) comes into force on 1 July 2007. Details of the section 54 prohibition on mergers that result, or will result in a substantial lessening of competition are found in Part 6 of these guidelines.
- 1.3 The procedure for notification for guidance or decision and anti-competitive complaints are highlighted in Parts 7 and 8 respectively. A description of the provisions relating to confidentiality and disclosure of information appears in Part 9. The powers under the Act for investigation of undertakings believed to be involved in anti-competitive activities, and of enforcement, are described in Part 10 of these guidelines. The consequences of an infringement and the power to impose financial penalties on undertakings are discussed in Part 11. Part 12 explains the leniency programme provided for undertakings coming forward with information on cartel activity cases. Part 13 explains the fast track procedure, while Part 14 explains the appeal system and rights of private action.

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<sup>1</sup> A parent and its subsidiaries will usually be treated as a single undertaking if they operate as a single economic unit, depending on the facts of the case. As the intent of the Act is to regulate the conduct of market players, it will not apply to any agreement entered into or any conduct on the part of the Government, statutory bodies or any entity acting on their behalf.

## *Further Information*

- 1.4 Other guidelines provide more details on specific areas and we have included references to these where appropriate. The current list of CCS guidelines appears at Part 14 of these guidelines. The guidelines will be revised and re-issued from time to time and new ones may be published. An up-to-date list of our publications is always available on our website at [www.ccs.gov.sg](http://www.ccs.gov.sg).
- 1.5 These guidelines do not purport to be a full or binding statement of law. They are intended to be an introductory text and guide to other sources of relevant information. In the event that any of the provisions in these guidelines are inconsistent or incompatible with the provisions of specific guidelines issued by CCS, the provisions of that latter relevant guidelines will take precedence. Anyone in doubt about how they may be affected by the Act may wish to seek legal advice.

## **2 PURPOSE, STRUCTURE AND SCOPE OF THE ACT**

### *Purpose*

- 2.1 Competition is a key tenet that underpins Singapore's economic policies. Open and vigorous competition not only spurs firms to be more efficient and innovative, but also more responsive to consumer needs. Consumers in turn enjoy more choices, lower prices, and better products and services. The economy as a whole benefits from greater productivity gains and more efficient resource allocation.

### *Structure*

- 2.2 The Act is divided into six parts:

- Part 1 introduces the Act and defines the terms used in the Act.
- Part 2 establishes CCS as a corporate body and sets out its general functions.
- Part 3 makes provisions for a new competition regime and prohibits anti-competitive agreements, such as cartel agreements, the abuse of a dominant position and mergers and acquisitions that substantially lessen competition. It sets out the criteria for block exemption orders and outlines the procedures for notification for guidance and decision. CCS's investigatory powers and powers to make decisions and issue directions are also dealt with in this part.
- Part 4 establishes the Competition Appeal Board ("CAB") and makes provisions for appeal proceedings before the CAB and the Courts.
- Part 5 makes non-compliance with the exercise of CCS's investigatory powers criminal offences and provides for the composition of offences.
- Part 6 deals with a number of miscellaneous provisions, including provisions for the rights of private action once it has been determined that a party has engaged in anti-

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competitive activities and the appeal process has been exhausted.

### *Scope*

2.3 Unless they are excluded or exempted, there are three types of prohibited activities under the Act:

- anti-competitive agreements which appreciably prevent, restrict or distort competition in Singapore (“the section 34 prohibition”);
- abuse of a dominant position (“the section 47 prohibition”); and
- mergers and acquisitions that substantially lessen competition in Singapore (“the section 54 prohibition”).

### *Exclusions from the Section 34<sup>2</sup> and Section 47 Prohibitions*

2.4 The Act provides for certain exclusions from the section 34 and section 47 prohibitions in the Third Schedule to the Act (“Third Schedule”). 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;
- an agreement/conduct 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/conduct which is necessary to avoid conflict with an international obligation of Singapore, and which is also the subject of an order by the Minister for Trade and Industry (“Minister”);
- an agreement/conduct 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/conduct which relates to any goods or services 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/conduct 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 1999;
  - the supply of piped potable water;
  - the supply of wastewater management services, including the collection, treatment and disposal of wastewater;

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<sup>2</sup> The section 34 prohibition also does not apply to vertical agreements and agreements which have net economic benefit. Please refer to Part 4 of these guidelines for more details.

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- the supply of bus services by any person licensed and regulated under the Bus Services Industry Act 2015;
- the supply of rail services by any person licensed and regulated under the Rapid Transit Systems Act 1995; and
- cargo terminal operations carried out by a person licensed and regulated under the Maritime and Port Authority of Singapore Act 1996;
- an agreement/conduct which relates to the clearing and exchanging of articles undertaken by the Automated Clearing House established under the Banking (Clearing House) Regulations; or any activities of the Singapore Clearing Houses Association regarding the Automated Clearing House;
- any agreement or conduct that is directly related and necessary to the implementation of a merger;
- any agreement (either on its own or when taken together with another agreement) to the extent that it results, or if carried out would result, in a merger; and
- any conduct (either on its own or when taken together with other conduct) to the extent that it results in a merger.

### *Exclusions from the Section 54<sup>3</sup> Prohibitions*

2.5 The Act also provides for certain exclusions from the section 54 prohibition in the Fourth Schedule to the Act (“Fourth Schedule”). These are:

- A merger:
  - approved by any Minister or regulatory authority<sup>4</sup> pursuant to any requirement for such approval imposed by any written law;
  - approved by the Monetary Authority of Singapore pursuant to any requirement for such approval under any written law; or
  - under the jurisdiction of another regulatory authority<sup>4</sup> under any written law relating to competition, or code of practice relating to competition issued under any written law;
- Any merger involving any undertaking relating 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 1999;
  - The supply of piped potable water;

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<sup>3</sup> The section 54 prohibition also does not apply to agreements with net economic efficiencies. Please refer to Part 6 of these guidelines for more details.

<sup>4</sup> Other than CCS.

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- The supply of wastewater management services, including the collection, treatment and disposal of wastewater;
- The supply of bus services by a licensed bus operator under the Bus Services Industry Act 2015;
- The supply of rail services by any person licensed and regulated under the Rapid Transit Systems Act 1995; and
- Cargo terminal operations carried out by a person licensed and regulated under the Maritime and Port Authority of Singapore Act 1996.

2.6 The Minister has the power to amend the exclusions by order at any time.

### **3 THE COMPETITION COMMISSION OF SINGAPORE AND ITS GENERAL FUNCTIONS**

#### *The CCS*

3.1 The Act established CCS on a statutory basis as a body corporate on 1 January 2005.

3.2 The CCS consists of a Chairman and no fewer than four other members, appointed by the Minister. The Act provides for a Chief Executive to be appointed, who may also be appointed as a member of the CCS. CCS appoints staff as required to carry out its functions.

#### *The CCS Annual Report*

3.3 Following the end of each financial year, CCS will give the Minister a report on its activities and performance throughout the year. The annual report will contain information on the proceedings and policy of CCS as the Minister may direct.

#### *Functions and Duties of CCS*

3.4 The functions and duties of CCS under section 6 of the Act include the following:

- maintain and enhance efficient market conduct and promote overall productivity, innovation and competitiveness of markets in Singapore;
- eliminate or control practices having adverse effect on competition in Singapore;
- promote and sustain competition in markets in Singapore;
- promote a strong competitive culture and environment throughout the economy in Singapore;
- act internationally as the national body representative of Singapore in respect of competition matters;
- advise the Government or other public authority on national needs and policies in respect of competition matters generally; and

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- perform any other functions or discharge any other duties as conferred on CCS by or under any other written law.

These provide the context within which CCS will investigate possible infringement of the prohibitions under the Act, give guidance and make decisions.

3.5 In performing the functions and discharging its duties, CCS will consider the following:

- the differences in the nature of various markets in Singapore;
- the economic, industrial and commercial circumstances of Singapore; and
- how to best maintain the efficient functioning of the markets in Singapore.

### *Administrative Priorities*

3.6 CCS will set its strategic priorities and consider each case on its merits, to see if it warrants an investigation.

### *Co-operation between CCS and Other Regulatory Authorities on Competition Matters*

3.7 On cross-sectoral competition cases, CCS will work out with the relevant sectoral regulator on which regulator is best placed to handle the case in accordance with the legal powers given to each regulator. CCS will work closely with other regulators where necessary to prevent double jeopardy and minimise regulatory burden in dealing with the case.

## 4 SECTION 34 PROHIBITION – ANTI-COMPETITIVE AGREEMENTS

### *The Prohibition*

4.1 The section 34 prohibition covers agreements between undertakings which have the object or effect of appreciably preventing, restricting or distorting competition within Singapore. An agreement covers agreements between undertakings, decisions by associations of undertakings and concerted practices (which may include co-operation without any agreement or decision). These may be oral or written agreements and need not necessarily be legally binding (for example, unwritten ‘gentlemen’s agreements’). An agreement made outside Singapore or where any party to the agreement is outside Singapore, is also prohibited if it has the same object or effect within Singapore.

4.2 The Act provides a list of examples of prohibited agreements, namely those 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

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supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”

- 4.3 This list is not exhaustive and is for illustration only. It does not set a limit on the investigation and enforcement activities of CCS. An agreement that appreciably prevents, restricts or distorts competition is likely to fall within the section 34 prohibition although it is not covered in the list. An agreement will not be prohibited if it falls within an exclusion in the Third Schedule or meets all of the requirements specified in a block exemption order.
- 4.4 A review of the types of agreements which would generally fall within the section 34 prohibition and guidance on CCS’s approach towards these types of agreements, and other potentially anti-competitive agreements can be found in the CCS Guidelines on the Section 34 Prohibition.

### *The Appreciable Effect on Competition Test*

- 4.5 The *CCS Guidelines on the Section 34 Prohibition* set out, using indicative market share thresholds, CCS’s view as to what is generally not an appreciable restriction of competition under section 34. As Singapore is a small and open economy, an agreement will generally have no appreciable adverse effect on competition:
- if the aggregate market share of the parties to the agreement does not exceed 20% on any of the relevant markets affected by the agreement where the arrangement made is between competing undertakings (i.e. undertakings which are actual or potential competitors on any of the markets concerned);
  - if the market share of each of the parties to the agreement does not exceed 25% on any of the relevant markets affected by the agreement, where the agreement is made between non-competing undertakings (i.e. undertakings which are neither actual nor potential competitors on any of the markets concerned);
  - in the case of an agreement between undertakings where each undertaking is a small or medium enterprise (“SME”).<sup>5</sup>

The 20% threshold will be applicable where it is difficult to classify an agreement as an agreement between competitors or an agreement between non-competitors. Further details on market definition are available in the *CCS Guidelines on Market Definition*.

- 4.6 However, the fact that the market shares of the parties exceed the threshold levels set out in paragraph 4.5 does not necessarily mean that the effect of the agreement on competition is appreciable. This will depend on other factors such as the content of the agreement and the structure of the market.
- 4.7 The approach in paragraph 4.5 does not apply to agreements containing the various hard core restrictions involving:
- direct or indirect price fixing

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<sup>5</sup> SMEs in Singapore are defined as follows: Undertakings having annual sales turnover of not more than S\$100 million or employment size of not more than 200 workers.

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- bid-rigging (collusive tendering)
- sharing the market, and
- limiting or controlling production or investment.

Agreements containing any of the above restrictions will always be regarded as having an appreciable adverse effect on competition even where the market shares of the parties fall below the threshold levels indicated in paragraph 4.5.

### *Exclusion<sup>6</sup> from the Section 34 Prohibition*

4.8 The section 34 prohibition does not apply to vertical agreements, other than such vertical agreement as the Minister may by order specify. The exclusion applies to agreements that contain intellectual property rights (IPRs) provisions, provided that they do not constitute the primary object of such agreements, and are directly related to the use, sale or resale of products.<sup>7</sup> However, IPR agreements such as licensing agreements are not excluded from the section 34 prohibition.

4.9 The section 34 prohibition does not apply to agreements with net economic benefit. Accordingly, the section 34 prohibition does not apply to any agreement which contributes to:

- improving production or distribution; or
- promoting technical or economic progress,

and

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

An agreement, which does not fall within any of the earlier categories as stipulated in paragraph 2.4 or the purview of a sectoral regulator and which have an appreciable adverse impact on competition may, nonetheless, be excluded if it satisfies the criteria enumerated, that is the agreement has net economic benefit. Such an agreement will be excluded by virtue of section 35 of the Act, no prior decision to the effect by CCS being required. Please refer to **Annex C** of the *CCS Guidelines on the Section 34 Prohibition* for details on the analytical framework.

In the event of an investigation by CCS, it will be for the undertaking claiming the benefit of any exclusion to prove that it satisfies the requirements.

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<sup>6</sup> Please refer to paragraph 2.4 for more details on the other exclusions from the section 34 prohibition.

<sup>7</sup> On the assessment of provisions relating to IPRs in agreements which do not fall under the exclusion under paragraph 8 of the Third Schedule, please refer to the *CCS Guidelines on the Treatment of Intellectual Property Rights*.

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### *Block Exemptions*

- 4.10 Under the Act, the Minister may, acting on CCS's recommendation, make an order to exempt particular categories of agreements which CCS considers are likely to satisfy the conditions set out in section 41 of the Act ("block exemption"). These conditions in section 41 are the same as that set out in paragraph 4.9, i.e. that such category of agreements have net economic benefit.
- 4.11 Block exemptions are designed to clarify the application of section 41 for specific categories of agreements. No notification of individual agreements which meet the criteria for block exemption is required. However, in the event of an investigation by CCS, parties to an agreement seeking to rely on a block exemption will be required to demonstrate that the agreement falls within the scope of the block exemption.
- 4.12 An agreement which falls within a category specified by a block exemption will not infringe the section 34 prohibition. Any such block exemption may impose conditions or obligations subject to which that block exemption will have effect.
- 4.13 A block exemption may provide for a party to an agreement which does not qualify for the block exemption but satisfies the criteria specified in the order, to notify CCS of the agreement. If CCS does not give notice of its opposition within the specified period, the agreement is treated as falling within a category specified in the block exemption. If CCS exercises the right to oppose, the notification is treated as a notification for decision.

### *Transitional Period for Section 34 Prohibition*

- 4.14 Should CCS determine that an agreement, which was made on or before 31 July 2005, infringes the section 34 prohibition, CCS will not impose a financial penalty on the undertaking for a 6-month transitional period from 1 January 2006 to 30 June 2006.<sup>8</sup>

## **5 SECTION 47 PROHIBITION – ABUSE OF A DOMINANT POSITION**

### *The Prohibition*

- 5.1 The section 47 prohibition covers conduct by one or more undertakings which amounts to the abuse of a dominant position in any market in Singapore.
- 5.2 The prohibitions under section 47 relate to the abuse of a dominant position: there is no prohibition on being in a dominant position.
- 5.3 The Act gives examples of conduct that may constitute the abuse of a dominant position. The examples are:
- “a. predatory behaviour towards competitors;
  - b. limiting production, markets, or technical development to the prejudice of consumers;

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<sup>8</sup> This transitional period is provided for under the Competition (Transitional Provisions for Section 34 Prohibition) Regulations.

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- c. applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- 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.”

5.4 This list is not exhaustive and is for illustration only. It is not necessary for the dominant position, the abuse and the effect of the abuse to be in the same market. More detailed examples of conduct which may be considered to be an abuse of a dominant position are given in the *CCS Guidelines on the Section 47 Prohibition*.

5.5 There are two tests to assess whether the section 47 prohibition applies:

- is an undertaking dominant in a relevant market, either in Singapore or elsewhere, and
- if it is, whether it is abusing that dominant position in a market in Singapore.

### ***Dominance and Market Definition***

5.6 An undertaking will not be deemed dominant unless it has substantial market power. Market power arises when an undertaking does not face sufficiently strong competitive pressure. It can be thought of as the ability to profitably sustain prices above competitive levels or to restrict output or quality below competitive levels. Market power can also be the ability and incentive to harm the process of competition in other ways, for instance, by weakening existing competition, raising entry barriers or slowing innovation.

5.7 To assess whether an undertaking is dominant, it is useful to identify the relevant market. The definition of the relevant market usually starts with two dimensions:

- the relevant goods or services (“the product market”), and
- the geographic scope of the market (“the geographic market”).

5.8 The *CCS Guidelines on the Section 47 Prohibition* set out, using indicative market share thresholds, CCS’s view as to what constitutes dominance. Generally, as a starting point, CCS considers a market share above 60% as likely to indicate that an undertaking is dominant in the relevant market. However, this starting point does not preclude dominance being established at a lower market share. An undertaking’s market share does not, on its own, determine whether that undertaking is dominant. Other determinants of competition such as entry barriers, the degree of innovation, product differentiation, the responsiveness of buyers and competitors to price increases, the strength of network effects, and the control or ownership of key inputs also need to be considered.

5.9 Two undertakings can be considered collectively dominant if they adopt a common policy in the relevant market. This is sometimes called tacit coordination.

5.10 While SMEs are, in general, unlikely to be capable of conduct that would have an appreciable adverse effect on competition (due to its lack of market power), CCS reserves the right to investigate any anti-competitive conduct (including infringement of

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the section 47 prohibition) on the part of SMEs.

- 5.11 Further details are available in the *CCS Guidelines on the Section 47 Prohibition* and *CCS Guidelines on Market Definition*.

### *Abuse*

- 5.12 Where it is established that an undertaking is dominant in the relevant market, the *second* part of the test is to assess whether the undertaking's behaviour might be regarded as an abuse of its dominant position. Section 47(2) of the Act lists broad categories of business behaviour within which particular examples of abusive conduct are most likely found.
- 5.13 In assessing cases of alleged abuse, CCS may consider if the dominant undertaking is able to objectively justify its conduct. Further, the dominant undertaking will have to show that it has not taken more restrictive measures than are necessary to defend its legitimate commercial interest. CCS may also consider if the dominant undertaking is able to demonstrate any benefits arising from its conduct and that the conduct is proportionate to the benefits claimed.
- 5.14 A review of the types of conduct which would generally fall within the section 47 prohibition and guidance on CCS's approach towards these types of conduct can be found in the *CCS Guidelines on the Section 47 Prohibition*.

## 6 SECTION 54 PROHIBITION – MERGERS AND ACQUISITIONS

### *The Prohibition*

- 6.1 The section 54 prohibition covers mergers, which have resulted, or may be expected to result, in a substantial lessening of competition ("SLC") within any market in Singapore. The prohibition applies to both mergers and anticipated mergers. An anticipated merger refers to any arrangement that is in progress or in contemplation that, if carried into effect, will result in the occurrence of a merger.
- 6.2 A merger occurs when:
- two or more undertakings, previously independent of each other, merge;
  - one or more persons or other undertakings acquire direct or indirect control of the whole or part of one or more other undertakings; or
  - the result of an acquisition by one undertaking of the assets, or a substantial part of the assets, of another undertaking is to place the first undertaking in a position to replace or substantially replace the second undertaking in the business or the part concerned of the business in which that undertaking was engaged immediately before the acquisition.
- 6.3 The creation of a joint venture to perform, on a lasting basis, all the functions of an autonomous economic entity also constitutes a merger.
- 6.4 The determination of whether a merger exists under the Act is based on qualitative rather than quantitative criteria, focusing on the concept of control. These criteria include

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considerations of both law and fact. A merger may therefore occur on a legal or a de facto basis. There are four situations where the acquisition of a controlling interest does not constitute a merger under the Act:

- the person acquiring control is acting in its capacity as a receiver or liquidator, or an underwriter;
- all of the undertakings involved in the merger are, directly or indirectly, under the control of the same undertaking;
- control is acquired solely as a result of a testamentary disposition, intestacy or right of survivorship under a joint tenancy; or
- securities are acquired on a temporary basis by an undertaking whose normal activities include the carrying out of transactions and dealing in securities for its own account or for the account of others, where any exercise by the acquiring undertaking of voting rights in respect of the securities is:
  - with a view to the disposal of the acquired undertaking or its assets or securities within twelve (12) months (or such longer period as CCS may determine) of the acquisition; and
  - not for the purpose of determining the strategic commercial behaviour of the acquired undertaking.

### *Substantial Lessening of Competition*

- 6.5 Not all mergers give rise to competition issues. CCS believes that many mergers are either pro-competitive (because they positively enhance levels of rivalry) or are competitively neutral. Some mergers may lessen competition but not substantially, because sufficient post-merger competitive constraints will exist to ensure that competition (or the process of rivalry) continues to discipline the commercial behaviour of the merged entity. The section 54 prohibition is only applied to mergers which substantially lessen competition and do not have net economic efficiencies.
- 6.6 The focus of CCS's analysis is on evaluating how the competitive incentives and abilities of the merger parties and their competitors might change as a result of the merger. In applying the SLC test, CCS will evaluate the competitive situation, with and without the merger. Typically, where the substantive assessment is conducted prior to the completion of the merger situation or shortly thereafter, the relevant counterfactual is forward looking.

### *Market Definition and Concentration*

- 6.7 In merger assessment, market definition is focused on the areas of overlap in the merger parties' activities. The main competitive concern is whether the merger will result in an increase in prices above the prevailing level. As a result, in defining the market for merger purposes, the relevant price level is the current price rather than the competitive price.
- 6.8 As a guide, CCS is generally of the view that competition concerns are unlikely to arise in a merger situation unless:

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- the merged entity will have a market share of 40% or more; or
- the merged entity will have a market share of between 20% to 40% and the post-merger combined market share of the three largest firms is 70% or more.

### *Exclusions*

- 6.9 The section 54 prohibition does not apply to mergers with net economic efficiencies. Such efficiencies should arise in markets in Singapore, and must also be shown to be sufficient to outweigh the competition detriments caused by the merger. Any claimed efficiencies must also be demonstrable and merger-specific.
- 6.10 The Minister may also exempt the merger from the section 54 prohibition on the ground of any public interest consideration. Merger parties may apply to the Minister for exemption where CCS proposes to make a decision that a merger infringes, or an anticipated merger if carried into effect will infringe, the section 54 prohibition.

### *Exclusion for Ancillary Restrictions from the Section 34 and Section 47 Prohibitions*

- 6.11 Any agreement or conduct that is directly related and necessary to the implementation or the attainment of the merger (also known as an “ancillary restriction”) is excluded from the section 34 prohibition and section 47 prohibition under the Third Schedule. Similarly, any agreement or conduct is also excluded from the section 34 prohibition and section 47 prohibition to the extent that it results in a merger.
- 6.12 A more comprehensive explanation of the substantive assessment of mergers as well as the procedures relating to merger assessment is available in the *CCS Guidelines on the Substantive Assessment of Mergers* and the *CCS Guidelines on Merger Procedures*.

## **7 NOTIFICATION FOR GUIDANCE OR DECISION**

### *Notification*

- 7.1 There is no statutory requirement to notify agreements, conduct, mergers or anticipated mergers to CCS. It is for parties to ensure that their agreements, conduct, mergers or anticipated mergers are lawful. However, parties may notify their agreements or conduct to CCS for guidance or a decision if they have concerns as to whether they are infringing the section 34 prohibition or section 47 prohibition. Notification provides parties to an agreement with immunity from financial penalties for infringements of the section 34 prohibition occurring between the point of notification to such date as may be specified by CCS following its determination. This immunity does not apply to conduct notified under the section 47 prohibition. Parties may also notify their mergers or anticipated mergers for a decision if they have concerns as to whether their merger infringes, or their anticipated merger if carried into effect will infringe, the section 54 prohibition.
- 7.2 Notification cannot be made in respect of prospective agreements (i.e. agreements where the parties have yet to enter into the agreement) or prospective conduct. Anticipated mergers may be notified if they can be made known to the public. A fee will be charged. Undertakings also should not notify agreements, conduct, mergers or anticipated mergers that do not raise any real concerns of possible infringement of the Act. CCS has the discretion not to give guidance or make a decision.

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7.3 Details of how an undertaking may notify CCS of its agreement or conduct and seek guidance or a decision from CCS on whether there has been an infringement of the section 34 prohibition and/or section 47 prohibition can be found in the *CCS Guidelines on Filing Notifications for Guidance or Decision with respect to the Section 34 Prohibition and Section 47 Prohibition*. Details of how merger parties may notify their merger or anticipated merger and seek a decision on whether the merger has infringed or whether the anticipated merger if carried into effect will infringe the section 54 prohibition can be found in the *CCS Guidelines on Merger Procedures*. Further details can also be found in the *Competition (Notification) Regulations*.

### ***Application for Guidance or Decision with respect to the Section 34 or Section 47 Prohibitions***

7.4 On an application for guidance or decision with respect to the section 34 prohibition or section 47 prohibition, CCS may indicate as to –

- whether the relevant prohibition is likely to be (has been) infringed;
- in the case of the section 34 prohibition, if it is not likely to be (has not been) infringed, whether it is because of the effect of an exclusion or because the agreement is exempt from the prohibition; or
- in the case of the section 47 prohibition, if it is not likely to be (has not been) infringed, whether that is because of the effect of an exclusion.

7.5 CCS will not reopen a case once favourable guidance/decision has been given unless:

- it has reasonable grounds for believing that there has been a material change of circumstance since the guidance was given;
- it has reasonable grounds for suspecting that materially incomplete, misleading or false information had been given;
- in the case of the section 34 prohibition, one of the parties to the agreement applies for a decision; or
- a complaint is received from a third party.<sup>9</sup>

### ***Application for Decision with respect to the Section 54 Prohibition***

7.6 On an application for decision with respect to the section 54 prohibition, CCS may indicate as to –

- whether the merger has infringed or whether the anticipated merger if carried into effect will infringe, the section 54 prohibition; and
- if the section 54 prohibition has not been or will not be infringed, whether that is because of the effect of an exclusion, an exemption or the acceptance of a commitment.

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<sup>9</sup> Unlike favourable guidance, a favourable decision cannot be reopened solely on the basis of a complaint made by a third party.

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- 7.7 CCS will not reopen a case once a favourable decision has been given unless:
- it has reasonable grounds for suspecting that materially incomplete, misleading or false information had been given;
  - it has reasonable grounds for suspecting that a party who has given a commitment has failed to adhere to one or more of the terms of the commitment; or
  - (where the favourable decision is given in respect of an anticipated merger) the merger resulting from a purported carrying into effect of the anticipated merger is materially different from the anticipated merger.
- 7.8 Where a merger or anticipated merger has been notified for decision, CCS may impose interim measures prior to completing its assessment of the application, to prevent any action that may prejudice CCS's ability to assess the merger situation or its ability to impose the appropriate remedies. Interim measures may also be imposed as a matter of urgency to prevent serious, irreparable damage to persons or to protect the public interest.

### *Public Register*

- 7.9 CCS will maintain a public register containing details of each notification for a decision and a record of the outcome of the notification. The register will contain a summary of the nature and objectives of the agreement, conduct, merger or anticipated merger. The register will be accessible via the Internet. The register will not capture applications for guidance.

### *Confidentiality*

- 7.10 Further details are given in the *CCS Guidelines on Filing Notifications for Guidance or Decision with respect to the Section 34 Prohibition and Section 47 Prohibition*, the *CCS Guidelines on Merger Procedures* and the *Competition (Notification) Regulations*. Applicants should refer to the above guidelines and regulations before completing the Forms. They may also wish to consider the self-assessment criteria in the Forms to ascertain if their application is necessary.

## **8 COMPLAINTS ON ANTI-COMPETITIVE ACTIVITY**

### *Procedure*

- 8.1 CCS accepts complaints alleging an infringement of the section 34 prohibition, section 47 prohibition and/or section 54 prohibition. Complainants are highly encouraged to use the CCS complaint form available on the CCS website to make their complaints.
- 8.2 While CCS will consider anonymous complaints, there may be practical difficulties in doing so when full information is not available and clarification cannot be sought from the complainant. Complainants should endeavour to provide all the information requested in the complaint form.
- 8.3 CCS may pursue the complaint (and may need to seek further information from the complainant) or it may consider that there are no grounds for action in respect of the complaint because it does not give CCS reasonable grounds for suspecting a possible infringement of the section 34 prohibition, section 47 prohibition and/or section 54 prohibition. CCS will

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consider each case on its merits to see if it warrants an investigation. If CCS decides that the prohibitions have been infringed, or that the section 54 prohibition will be infringed if the anticipated merger is carried into effect, appropriate enforcement action will be taken.

### *Confidentiality*

8.4 If CCS decides to pursue a complaint, it will usually seek further information from the undertaking which is the subject of the complaint. If a complainant does not want to be identified to the undertaking, it should make this clear at the earliest opportunity. However, for effective handling of complaints, it must be noted that it is sometimes necessary to reveal information which may identify the source of the complaint to the target. When providing information or documents to CCS, complainants should:

- clearly identify any confidential information;
- provide this information in a separate annex clearly marked “confidential information”, and
- explain why this information should be treated as confidential.

8.5 CCS recognises the importance of complainants voluntarily supplying information and also recognises their interest in confidentiality. If CCS proposes to disclose any of the information in the confidential annexes, it will, to the extent that is practicable to do so, consult the person who provided the information. Confidentiality and disclosure of information are also discussed in Part 9 below.

## **9 CONFIDENTIALITY AND DISCLOSURE OF INFORMATION**

9.1 CCS recognises the importance of maintaining the confidentiality of commercially sensitive information and details of an individual’s private affairs.

9.2 Section 89 of the Act provides that all matters

- relating to the business, commercial or official affairs of any person;
- which have been identified as confidential; or
- relating to the identity of persons furnishing information to CCS;

coming to the knowledge of CCS in the course of performance of its functions and duties must not be disclosed, unless disclosure is necessary for the performance of the function or duty or is lawfully required by the CAB or the Courts, or unless disclosure is lawfully required or permitted under the Act or any written law.

9.3 However, section 89 of the Act sets out the following exceptions under which disclosure is authorised:

- where consent has been obtained from the person to whom the information relates;
- for the purposes of a prosecution under the Act;

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- for the purpose of investigating a suspected offence or enforcing a provision under the Act;
- for the purpose of complying with an agreement between Singapore and a foreign state (the conditions in section 89(7) of the Act must be satisfied in order for this exception to be applicable); and
- for the purpose of giving effect to any provision of the Act.

9.4 If disclosure is sought to be made under the last category stipulated in the preceding paragraph, i.e. to give effect to a provision of the Act, CCS must have regard to the extent to which disclosure is necessary for the purpose of the proposed disclosure. CCS is also to have regard to the need for excluding, so far as is practicable:

- information the disclosure of which would, in CCS's opinion, be contrary to the public interest;
- commercial information the disclosure of which would, in CCS's opinion, significantly harm the legitimate business interests of the undertaking to which it relates; or
- information relating to the private affairs of an individual, the disclosure of which would, in CCS's opinion, significantly harm that individual's interest.

As a matter of prudence, CCS may, where relevant, have regard to these factors even when proposing to make disclosures under the other exceptions.

## 10 INVESTIGATION AND ENFORCEMENT

10.1 The Act gives CCS powers to investigate infringements of the prohibitions under the Act as well as the power to enforce the Act.

10.2 It should be noted that CCS may also obtain information about undertakings, agreements, practices and markets through informal enquiries, either before or during the course of an investigation. They may be made in addition to, or instead of, using the formal powers of investigation set out in the Act. Undertakings are encouraged to co-operate.

### *Powers of Investigation*

10.3 The following paragraphs set out the powers that can be exercised by authorized officers where CCS has reasonable grounds for suspecting that the prohibitions under the Act have been infringed. Further details are given in the *CCS Guidelines on the Powers of Investigation*.

### *Production of Documents and Information*

10.4 When there are reasonable grounds for suspecting that the section 34, 47 or 54 prohibitions under the Act have been infringed or that the section 54 prohibition will be infringed if an anticipated merger is carried into effect, CCS can, by written notice, require any person to produce documents or information that it considers relate to any matter relevant to the investigation. CCS can take copies of, or extract from, or seek an explanation of, any

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document produced, or if a document is not produced, to ask where it is believed to be.

### *Entry of Premises Without A Warrant*

- 10.5 An authorised officer of CCS can enter any premises without a warrant after giving advance notice in writing. Prior written notice need not be given under the Act if the premises are suspected to be or have been occupied by an undertaking under investigation. The CCS officer will produce proof of identity and documents indicating the subject matter and purpose of the investigation upon entry.

### *Entry of Premises With A Warrant*

- 10.6 An application can be made to a District Court for a warrant for a named officer of CCS and other authorised officers to enter premises without notice using such force as necessary, and search the premises.

### *Offences*

- 10.7 The Act sets out a number of criminal offences which may be committed where a person fails to co-operate when the above powers of investigation are exercised.

### *Privileged Communications*

- 10.8 The power to require the disclosure of information or documents under Part 3 of the Act, does not extend to communications which would be protected from disclosure on grounds of legal professional or litigation privilege.

### *Self-Incrimination*

- 10.9 A person or undertaking is not excused from disclosing information or documents to CCS under a requirement made of him or her pursuant to the Act on the ground that the disclosure might tend to incriminate him or her.
- 10.10 Where a person claims before making a statement disclosing information that the statement might tend to incriminate him or her, that statement is admissible in evidence against him or her in civil proceedings including proceedings under the Act. The statement is not admissible in evidence against him or her in criminal proceedings other than proceedings under Part 5 of the Act relating to ancillary offences such as providing false or misleading information.

### *Enforcement Powers*

#### Infringement Decision and Directions

- 10.11 Please refer to paragraphs 11.8 and 11.9 for details.

#### Interim Measures Directions

- 10.12 CCS has the power to impose interim measures directions before it has completed its investigation. Interim measures directions may be imposed when CCS has reasonable grounds to suspect that the section 34, 47 or 54 prohibitions have been infringed or that the section 54 prohibition will be infringed if an anticipated merger is carried into effect and it

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considers that it is necessary for it to act urgently either to prevent serious, irreparable damage to a particular person or category of persons, or to protect the public interest. When CCS has reasonable grounds to suspect that the section 54 prohibition has been infringed by a merger or will be infringed if an anticipated merger is carried into effect, interim measures directions may also be imposed for the purpose of preventing any action that may prejudice CCS's investigations or its ability to impose remedies.

- 10.13 When the investigation is completed and CCS has decided that an infringement has taken place, it may replace the interim measures direction with a final direction. Otherwise, an interim measures direction has effect until CCS has discontinued or completed its investigation into the matter or until CCS considers there is no longer any necessity to act as a matter of urgency to prevent any serious, irreparable damage to a particular person or category of persons or for the protection of public interest.

### 11 ADDRESSING COMPETITION CONCERNS

- 11.1 The Act empowers CCS to address competition concerns identified in the course of investigations or notifications either through remedies offered voluntarily or via directions. CCS may also seek to deter future anti-competitive conduct by imposing financial penalties for infringements of the Act.

#### *Remedies*

- 11.2 Remedies may be implemented either by CCS's acceptance of commitments which address competition concerns arising from an investigation or notification, or by directions issued by CCS. There are broadly two types of remedies which CCS may consider: structural remedies and behavioural remedies. Structural remedies are preferable to behavioural ones because they address the market structure issues that give rise to the competition problems, given that a structural remedy is likely to address the very source of the competition concerns, and they require little on-going monitoring by CCS. Behavioural remedies can also constrain the scope for parties to behave anti-competitively<sup>10</sup> or constrain them from exploiting their market power<sup>11</sup>. CCS will consider behavioural remedies in situations where structural remedies will be impractical, or inappropriate, in relation to the nature of the concerns identified.
- 11.3 The remedial action to be taken by CCS will depend on the facts and circumstances of each case. In addressing the question of which remedies would be appropriate and would provide as comprehensive a solution as is reasonable and practicable, CCS will take into account how adequately the action would prevent, remedy or mitigate the competition concerns caused by the activity in question.
- 11.4 For further information, see Part 2 of the CCS Guidelines on Directions and Remedies.

#### *Commitments*

- 11.5 Commitments are generally proposed, where competition concerns have been identified, by an applicant that has made a notification to CCS or an undertaking under investigation by

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<sup>10</sup> For example, a commitment to remove exclusivity clauses imposed by a dominant supplier of beer to retail outlets.

<sup>11</sup> For example, a commitment to supply proprietary spare parts by a dominant lift manufacturer to third party lift maintenance companies.

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CCS. CCS has the discretion to accept commitments at any time before making a decision pursuant to applications under sections 44, 51, 57, 58 or investigations under section 62(1).

- 11.6 CCS has the discretion to decide whether to accept commitments during investigations on a case by case basis. CCS is generally not inclined to accept commitments in cases involving restrictions of competition by object (e.g., bid-rigging) with no accompanying net economic benefit.
- 11.7 For further information, see Part 3 of the CCS Guidelines on Directions and Remedies.

### *Infringement Decision and Directions*

- 11.8 Where CCS proposes to make a decision that the section 34 and/or 47 prohibitions under the Act has been infringed (“an infringement decision”), or that the section 54 prohibition has been infringed by a merger or will be infringed if an anticipated merger is carried into effect (“an unfavourable decision”) it will send the party(s) a written statement. CCS will allow the party receiving the notice an opportunity to make written representations and a reasonable opportunity to inspect the documents in CCS’s file relating to the proposed decision. The party receiving the written notice may request in his written representations a meeting with CCS to make oral representations to elaborate on the written representations already made in this regard.
- 11.9 When an infringement/unfavourable decision is made, CCS will notify the relevant parties and will publish the decision on a public register on CCS’s website. CCS may give a direction to the parties concerned, or to such persons as it considers appropriate, to bring the infringement or, in the case of an anticipated merger, the impending infringement, to an end. CCS may register the direction as a court order to enforce the direction if a person fails to comply with it without reasonable excuse. Breach of such an order would be punishable as a contempt of court.

### *Penalties*

- 11.10 The Act provides that CCS may impose a financial penalty for an infringement of any prohibition under the Act provided that infringement has been committed intentionally or negligently. The amount of penalty imposed may be 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 (3) years.
- 11.11 When setting the amount of any penalty, CCS will take into account the factors set out as follows:
- the seriousness of the infringement;
  - the turnover of the business of the undertaking in Singapore for the relevant product and geographic markets affected by the infringement in the undertaking’s last business year or, in the case of an infringing merger, the turnover of the relevant parties in Singapore for the relevant product and relevant geographic markets where competition is substantially lessened;
  - the duration of the infringement or, for an infringing merger, the duration of time

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over which the merger parties took steps to carry the infringing merger into effect and over which the merged entity has been in place;

- aggravating or mitigating factors;
- other relevant factors e.g. deterrent value; and
- immunity, leniency reductions and/or fast track procedure discounts.

Further details are given in the *CCS Guidelines on the Appropriate Amount of Penalty*, the *CCS Guidelines on Lenient Treatment for Undertakings Coming Forward with Information on Cartel Activity*, the *CCS Guidelines on the Fast Track Procedure* and the *CCS Guidelines on Merger Procedures*.

- 11.12 Any provision of an agreement which falls within the section 34 prohibition (and does not satisfy the conditions set out in section 41) is void to the extent that it infringes the section and cannot be enforced.
- 11.13 Third parties adversely affected by an infringement of any of the prohibitions under the Act may take action in the courts to seek relief. Further details on enforcement and infringement are also given in the *CCS Guidelines on Directions and Remedies*.

## 12 LENIENCY

### *Cartels*

- 12.1 The section 34 prohibition extends to prohibit cartel activities. Cartel activities *include*, amongst other things, the following:
- price fixing: e.g. where parties agree, directly or indirectly, on the prices;
  - establishment of restrictions/quotas on output: e.g. agreements which restrict output or production;
  - bid-rigging: e.g. arrangements where parties collude when submitting their tenders; and
  - market sharing agreements.

Further information on the section 34 prohibition can be found in the *CCS Guidelines on the Section 34 Prohibition*.

- 12.2 As cartel activities infringe the section 34 prohibition, undertakings participating or *which* have participated in them are liable under section 69 of the Act to a financial penalty. Such undertakings may wish to inform CCS of the existence of the cartel activity but might be deterred from doing so because of the risk of incurring large financial penalties.
- 12.3 Due to the secret nature of cartels, undertakings participating or which have participated in them should be given an incentive to come forward and inform CCS of the cartel's activities. The policy of granting lenient treatment to these undertakings which cooperate with CCS outweighs the policy objectives of imposing financial penalties on such cartel participants.

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- 12.4 More details on how CCS will administer its leniency programme as part of its enforcement strategy can be found in the *CCS Guidelines on Lenient Treatment for Undertakings Coming Forward with Information on Cartel Activity*.

### *Immunity*

- 12.5 Under section 69(4) of the Act, an undertaking which has intentionally or negligently infringed the Act's prohibitions faces a financial penalty of up to 10% of its business turnover of the business of these undertakings in Singapore for each year of infringement up to a maximum of three (3) years.
- 12.6 An undertaking which is the first to provide CCS with evidence of cartel activity before the commencement of an investigation will be granted total immunity from financial penalties if it fulfils certain conditions. Such conditions include rendering full and complete co-operation to CCS until the conclusion of any action arising as a result of the investigation and not being an initiator of the cartel.
- 12.7 If an investigation has already commenced, the undertaking may still benefit from a reduction in the financial penalty of up to 100% if the relevant conditions are met.
- 12.8 Subsequent leniency applicants which are not first in line may be granted a reduction of up to 50% in the amount of the financial penalty.

## **13 FAST TRACK PROCEDURE**

- 13.1 Once an investigation has commenced, CCS offers a fast track procedure which will enable undertakings under investigation to enter into an agreement with CCS under which they will acknowledge their participation in an anti-competitive activity and their liability for it in exchange for a reduced financial penalty and a shorter and expedited investigative timeframe.
- 13.2 More details on how CCS will administer its fast track procedure as part of its enforcement strategy can be found in the *CCS Guidelines on the Fast Track Procedure*.

## **14 APPEALS AND RIGHTS OF PRIVATE ACTION**

### *Appealable Decisions*

- 14.1 An appeal against the decision of CCS (including a direction/imposition of a financial penalty) can be made to the CAB. Such an appeal must be brought within the specified time period.
- 14.2 Except in the case of an appeal against the imposition, or the amount, of a financial penalty, the appeal does not suspend the effect of the decision to which the appeal relates.

### *Appeals*

- 14.3 The CAB has wide powers in determining appeals and may:
- confirm or set aside all or part of the decision;
  - remit the matter to CCS;

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- impose or revoke, or vary (either increase or decrease) the amount of a penalty;
- give such directions, or take other steps as CCS itself could have given or taken; or
- make any other decision which CCS itself could have made.

### *Further Appeal from the CAB's Decisions*

14.4 A further appeal from a decision can be made to the High Court and Court of Appeal either on a point of law arising from a decision of the CAB or from any decision of the CAB as to the amount of a financial penalty.

### *Rights of Private Action*

14.5 Parties suffering loss or damage directly arising from an infringement of any of the prohibitions under the Act are entitled to commence a civil action against the infringing undertaking seeking relief.

14.6 Such rights of private action will only arise after CCS has made a decision of infringement in respect thereof, and in the event the decision is subject to an appeal, upon expiry of the appeal period or upon determination of the appeal if an appeal is brought. The court will be bound in such proceedings by the relevant infringement decisions.

14.7 There is a two (2) year limit for the taking of such private actions from the time that CCS made the decision or from the determination of the appeal, whichever is the later.

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### 15 LIST OF GUIDELINES PUBLISHED BY CCS

1	CCS Guidelines on the Major Provisions (these guidelines)
2	CCS Guidelines on the Section 34 Prohibition
3	CCS Guidelines on the Section 47 Prohibition
4	CCS Guidelines on the Substantive Assessment of Mergers
5	CCS Guidelines on Merger Procedures
6	CCS Guidelines on Market Definition
7	CCS Guidelines on the Powers of Investigation
8	CCS Guidelines on Directions and Remedies
9	CCS Guidelines on Lenient Treatment for Undertakings Coming Forward with Information on Cartel Activity
10	CCS Guidelines on the Fast Track Procedure
11	CCS Guidelines on Filing Notifications for Guidance or Decision with respect to the Section 34 Prohibition and Section 47 Prohibition
12	CCS Guidelines on the Appropriate Amount of Penalty
13	CCS Guidelines on the Treatment of Intellectual Property Rights

All CCS guidelines are available for download at [www.ccs.gov.sg](http://www.ccs.gov.sg).