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# CCS GUIDELINES ON DIRECTIONS AND REMEDIES

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# Competition and Consumer Commission of Singapore

## 1 Introduction

- 1.1 The Competition Act 2004 (“**the Act**”) gives the Competition and Consumer Commission of Singapore (“**CCS**”) the power to enforce the section 34<sup>1</sup> prohibition, the section 47<sup>2</sup> prohibition and the section 54<sup>3</sup> prohibition under the Act.
- 1.2 CCS’s investigation and enforcement powers are set out in Part 3 Division 5 of the Act and its powers to accept commitments are set out in Part 3 Division 4A of the Act. These guidelines describe the power of CCS to:
- accept or impose different types of remedies in concluding investigations or notifications (Parts 2 and 3);
  - give directions to bring an infringement to an end (Part 4);
  - give directions on interim measures during an investigation (Part 5); and
  - impose financial penalties on undertakings for infringing the section 34, 47 and/or 54 prohibitions (Part 6).
- 1.3 In respect of the section 54 prohibition, the *CCS Guidelines on Merger Procedures* provide guidance on CCS’s powers to give directions to bring an infringement to an end, to give directions on interim measures and to impose financial penalties on undertakings for infringing the section 54 prohibition.
- 1.4 The powers of investigation of CCS under the Act are described in the *CCS Guidelines on the Powers of Investigation*.
- 1.5 These guidelines are not a substitute for the Act, the regulations and orders. They may be revised should the need arise. The examples in these guidelines are for illustration. They are not exhaustive, and do not set a limit on the investigation and enforcement activities of CCS. In applying these guidelines, the facts and circumstances of each case will be considered. Persons in doubt about how they and their commercial activities may be affected by the Act may wish to seek legal advice.
- 1.6 A glossary of terms used in these guidelines is attached.

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<sup>1</sup> Agreements between undertakings, decisions by associations of undertakings or concerted practices which have as their object or effect the prevention, restriction or distortion of competition. Further information can be found in the *CCS Guidelines on the Section 34 Prohibition*.

<sup>2</sup> Conduct on the part of one or more undertakings which amounts to the abuse of a dominant position. Further information can be found in the *CCS Guidelines on the Section 47 Prohibition*.

<sup>3</sup> 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 are prohibited. Further information can be found in the *CCS Guidelines on Merger Procedures* and the *CCS Guidelines on the Substantive Assessment of Mergers*.

### 2 Remedies

- 2.1 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. This Part describes the types of remedies CCS may consider and the basis by which CCS assesses whether they are appropriate.

#### *Structural vs. behavioural remedies*

- 2.2 There are broadly two types of remedies which CCS may consider: structural remedies and behavioural remedies.

#### *Structural remedies*

- 2.3 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.
- 2.4 Typically, structural remedies require the sale of one of the businesses that has led to the competition concern. Ideally, this should be a self-standing business, which is capable of being fully separated from the Applicant(s)/undertaking involved. The sale should be completed within a specified period. A purchaser may be deemed to be a reasonable alternative purchaser if it is willing to pay a commercially reasonable price, even if the price is lower than the price that the Applicant(s)/undertaking is prepared to pay. An independent trustee may be appointed, at the Applicant(s)/undertaking's expense, to monitor the operation of the business pending disposal and/or to handle the sale if the Applicant(s)/undertaking has not completed the divestiture within the specified period.
- 2.5 Before the sale of any business as part of a structural remedy, CCS must approve the buyer. This is to ensure that the proposed buyer has the necessary expertise, resources and incentives to operate the divested business as an effective competitor in the marketplace. If that is not the case, it is unlikely that the proposed divestiture will be considered as an effective remedy for the competition concerns which have been identified.
- 2.6 In appropriate cases, CCS will consider other structural or quasi-structural remedies. For example, divestment of the acquirer's existing business (or part of it), in combination with assets from the target company (i.e. assets from both merger parties) to form a viable business post divestment, might be appropriate in the context of a merger, although in such cases, CCS will also need to consider the competition implications of the asset swap. Alternatively, an amendment to intellectual property licences might, in some circumstances, be an appropriate remedy.

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### *Behavioural remedies*

- 2.7 Behavioural remedies can also constrain the scope for parties to behave anti-competitively<sup>4</sup> or constrain them from exploiting their market power<sup>5</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.
- 2.8 Behavioural remedies may sometimes be necessary to support structural remedies. For example, in the context of a merger where CCS imposes a partial divestment remedy, a commitment by the merged business to not approach the former customers of the divested business for a limited period of time may increase CCS's confidence that the acquirer of the divested business will prove a viable and effective competitor. Behavioural remedies may also consist of supplying goods or services on fair, reasonable and non-discriminatory terms.

### *Consideration of the appropriate remedy*

- 2.9 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.
- 2.10 CCS's starting point will be to choose the remedial action that will address the adverse effects on competition directly and restore competition in the affected markets. For example, given that the effect of the merger is to change the structure of the market, remedies that aim to restore all or part of the pre-merger market structure are likely to be a more direct way of addressing the adverse effects.
- 2.11 Where appropriate, CCS considers that structural remedies are preferable to behavioural ones, as they tend to address the competition concerns more directly and require less monitoring.

### *The cost of remedies and proportionality*

- 2.12 In addition, when deciding on the appropriate remedy, CCS will have regard to the principle of proportionality in assessing the effectiveness of different remedies and their associated costs in practice. However, CCS will normally regard the costs which undertakings would have to incur as a result of putting in place a set of effective remedies as subordinate to the effectiveness of the remedy.

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<sup>4</sup> Such as a commitment to remove exclusivity clauses imposed by a dominant supplier of beer to retail outlets.

<sup>5</sup> Such as the commitment to supply proprietary spare parts by a dominant lift manufacturer to third party lift maintenance companies.

### 3 Offering and varying commitments

#### *Offering commitments*

- 3.1 Commitments are generally proposed, where competition concerns have been identified, by an Applicant(s) that has made a notification to CCS or an undertaking under investigation by 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).
- 3.2 In general, CCS takes a dim view of repeated revisions of a commitments proposal by the offering parties. In the case of a merger notification, CCS endeavours to work expeditiously to complete its merger review within 25 to 30 working days for Phase 1 (which may be extended from 30 working days up to a total of 50 working days)<sup>6</sup> and 100 working days for Phase 2. If the Applicant(s)' commitments proposal submitted within the stipulated deadlines is unable to address CCS's competition concerns, CCS may proceed to issue an unfavourable decision. CCS will only be minded to extend the stipulated deadlines for commitments in very limited circumstances.

#### *Phase 1 merger notifications*

- 3.3 Applicant(s) are encouraged to take the initiative to propose commitments which they think can appropriately resolve competition concerns that they foresee arising from the merger situation.
- 3.4 If CCS has reasonable grounds to suspect that the section 54 prohibition may be infringed, and hence a Phase 2 may be appropriate, it will communicate those concerns to the Applicant(s) in writing (hereinafter referred to as "Phase 1 Issues Letter"). The Phase 1 Issues Letter will set out the key competition concerns as well as all the theories of harm that have been identified and that CCS is unlikely to clear the merger if these concerns remain unaddressed. The Phase 1 Issues Letter will stipulate a deadline for the Applicant(s), if it wishes, to put forward its commitments proposal to address these concerns in Phase 1. Where the Applicant(s) seeks an extension of time for the deadline, CCS may agree in instances where the Applicant(s) is able to sufficiently justify the need for such an extension. If the commitments proposal submitted by the stipulated deadline does not appropriately address CCS's competition concerns, CCS will proceed to Phase 2.

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<sup>6</sup> Please refer to the CCS Guidelines on Merger Procedures for more information.

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- 3.5 For merger situations that are subject to the Singapore Code for Takeovers and Mergers (“**Takeover Code**”), the Phase 1 Issues Letter does not constitute a decision to proceed to Phase 2 within the meaning of paragraph 3(a) to the Guidance Note to Appendix 3 to the Takeover Code. For such merger situations, CCS will issue a separate letter stating its decision to proceed to Phase 2, for instance, where it has not been possible to resolve the issues outlined in the Phase 1 Issues Letter.
- 3.6 If the Applicant(s)’ commitments proposal put forward by the stipulated deadline is accepted in-principle by CCS in Phase 1, the Applicant(s) will be informed that a 50-working day administrative timeline (that is separate from the review period) will begin. Where necessary, CCS may, by giving written notice to the Applicant(s), extend this administrative timeline by up to 20 working days. During this time, CCS will, unless exceptional circumstances exist, issue an invitation to the public to comment on the commitments proposal on its website or approach relevant third parties on an individual basis for their views on the commitments. This process is otherwise known as “market testing”. Having obtained relevant third party views, CCS will decide whether to accept the commitments or proceed to Phase 2. Where a commitments proposal requires substantial changes in view of third party feedback and therefore a second market test, CCS may reject the proposal altogether and proceed to Phase 2 where there is insufficient time to adequately assess the revisions to the initial commitments proposal. In any event, CCS may terminate the review of the commitments at any time and proceed to Phase 2.
- 3.7 Where commitments have been accepted, CCS will issue a favourable decision. CCS will generally publish the details of all commitments as part of its decision on the merger on the public register.

### *Phase 2 merger notification*

- 3.8 During the Phase 2 merger review process, CCS will engage the Applicant(s) at appropriate junctures to set out its competition concerns. Applicant(s) are encouraged to submit a commitments proposal that appropriately addresses CCS’s competition concerns (whether such concerns are articulated through the Phase 1 Issues Letter or during Phase 2 engagements). CCS will not extend the 100-working day review period to evaluate commitments proposal submitted during Phase 2, save in exceptional circumstances.<sup>7</sup>

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<sup>7</sup> CCS will consider whether an extension of the review period is warranted on a case-by-case basis, including the state of the Phase 2 review process, the sufficiency of details required for CCS to assess the commitments proposal appropriately, and whether the commitment proposals are appropriate for market testing.

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- 3.9 As part of CCS's review, the commitments proposal will be subject to market testing (unless exceptional circumstances exist). CCS will generally accept a commitments proposal where only minor refinements are necessary to address any concerns raised during the market testing. If feedback received during market testing strongly indicates that the commitments proposal will not be able to address the competition concerns identified by CCS, CCS will proceed to issue its Statement of Decision (Provisional).
- 3.10 After the issuance of the Statement of Decision (Provisional), the Applicant(s) may submit a commitments proposal together with any written representations to the Statement of Decision (Provisional).

### *Notifications for decision under sections 44 or 51*

- 3.11 An Applicant(s) seeking a decision under sections 44 or 51 may also offer commitments to CCS in order to address competition concerns.<sup>8</sup>
- 3.12 As part of the Form 1 review process, CCS will generally set out to the Applicant(s) its competition concerns and may inform the Applicant(s) that it is able to submit a commitments proposal by a stipulated deadline. Should CCS not receive a commitments proposal by the deadline which can be accepted in-principle, CCS will request that the Applicant(s) submit Form 2 by a stipulated deadline. On the other hand, if the Applicant(s)' commitments proposal put forward by the stipulated deadline is accepted in-principle by CCS, CCS will proceed with market testing (unless exceptional circumstances exist). Having obtained relevant third party views, CCS will decide whether to accept the commitments or proceed to a Form 2 review. CCS may terminate the review of the commitments at any time and proceed to a Form 2 review.
- 3.13 During the Form 2 review process, CCS may call for a state of play meeting with the Applicant(s) to set out its competition concerns. CCS may similarly inform the Applicant(s) that it is able to submit a commitments proposal by a stipulated deadline. Should CCS receive a commitments proposal by the deadline which can be accepted in-principle, CCS will proceed to market test the commitments (unless exceptional circumstances exist). Having obtained relevant third party views, CCS will decide whether to accept the commitments or proceed to make a proposed/provisional unfavourable decision. CCS may terminate the review of the commitments at any time and proceed to make a proposed/provisional unfavourable decision.
- 3.14 Where a commitments proposal is submitted after the deadline stipulated in the Form 2 review process, CCS may choose to consider such a proposal at the same time as it considers the Applicant(s)' written representations to any proposed/provisional unfavourable decision. The Applicant(s) may also choose to submit a fresh or revised commitments proposal together with their written representations.

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<sup>8</sup> Sections 60A(2) and 60A(3) of the Act respectively.

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- 3.15 If the commitments proposal is accepted in-principle, CCS will proceed to market test the commitments (unless exceptional circumstances exist). Having obtained relevant third party views, CCS will decide whether to accept the commitments or proceed to make an unfavourable decision. CCS may terminate the review of the commitments at any time and proceed to make an unfavourable decision.
- 3.16 CCS will generally accept a commitments proposal where only minor refinements are necessary to address any concerns raised during the market testing. If feedback received during market testing strongly indicates that the commitments proposal will not be able to address the competition concerns identified by CCS, CCS will proceed to request for Form 2 or issue a proposed/provisional unfavourable decision or unfavourable decision as the case may be. CCS may also terminate the review of the commitments at any time. Where a commitments proposal undergoes substantial changes and requires a second market test, CCS may also reject the proposal.

### *Investigations*

- 3.17 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.
- 3.18 Where an undertaking under investigation seeks to offer a commitments proposal, CCS will generally stipulate a deadline for its submission. Where a commitments proposal is accepted in-principle, CCS will, unless exceptional circumstances exist, seek relevant third party views on the proposal. CCS will generally accept a commitments proposal where only minor refinements are necessary to address any concerns raised by relevant third parties. Should the undertaking fail to offer a commitments proposal by the stipulated deadline which is acceptable to CCS, CCS will proceed with the issuance of a proposed infringement decision.

### *Form of commitments*

- 3.19 Parties interested to offer a commitments proposal should use a completed Form CR. The form may be revised from time to time, with an updated version being available on CCS's website.

### *Applications to vary, substitute or release a commitment*

- 3.20 Where CCS has accepted a commitment, the party who provided the commitment may apply to CCS to vary, substitute or release that commitment.<sup>9</sup> CCS highlights that the burden is on the party making such application to explain the basis for the application and demonstrate how the variation, substitution or release of the original commitments would address any competition concerns persisting at the time of the application, and would not give rise to new competition concerns. Section 60B(4) also gives CCS the power to revoke the favourable decision if any of the commitments are breached.
- 3.21 CCS may of its own initiative release a party from a commitment where it has reasonable grounds for believing that the commitment is no longer necessary or appropriate.<sup>10</sup>
- 3.22 Before varying, substituting or releasing a commitment, CCS will, unless exceptional circumstances exist, issue an invitation to the public to comment on the commitments proposal on its website or approach relevant third parties on an individual basis for their views on the commitments.
- 3.23 Parties should submit the application using a completed Form CV. The form may be revised from time to time, with an updated version being available on CCS's website.

## **4 Directions to bring an infringement to an end**

- 4.1 The Act provides that where CCS has made a decision that the section 34, 47 and/or 54 prohibitions has or have been infringed, CCS may give such directions as it considers appropriate to bring an infringement to an end.<sup>11</sup>
- 4.2 The directions may be given to such person(s) as CCS considers appropriate.<sup>12</sup> This includes individuals and undertakings.<sup>13</sup> CCS is not limited to giving directions to the infringing undertakings. For example, directions may be addressed to a parent company which, though not the actual instigator of the infringement, has a subsidiary which is the immediate party to the infringement.

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<sup>9</sup> Regulation 3, Competition Regulations 2007.

<sup>10</sup> Section 60A(6) of the Act.

<sup>11</sup> Section 69 of the Act.

<sup>12</sup> Section 69(1) of the Act.

<sup>13</sup> Section 2 of the Act.

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- 4.3 Directions may in particular require the person concerned to modify the agreement or conduct, or to terminate the agreement or cease the conduct in question.<sup>14</sup> Directions may require positive action, such as informing third parties that an infringement has been brought to an end and reporting back periodically to CCS on certain matters. In some circumstances, the directions appropriate to bring an infringement to an end may be (or include) directions requiring an undertaking to make structural or behavioural changes to its business.

### *Procedure for giving directions*

- 4.4 The directions must be in writing and may be given to such person(s) as CCS considers appropriate.<sup>15</sup> They are likely to form part of the infringement decision in cases where the decision and the directions are addressed to the same person. If CCS proposes to make an infringement decision, it must give the person(s) likely to be affected by such decision, a written notice setting out the facts on which CCS relies and its reasons for the proposed decision, and an opportunity to make written representations to CCS.<sup>16</sup> The person(s) receiving the written notice may request in his written representations a meeting with CCS to make oral representations to elaborate on the written representations.
- 4.5 CCS will give these persons or their authorised representatives a reasonable opportunity to inspect the documents in CCS's file relating to the matters referred to in the notice. CCS may withhold any documents to the extent that they contain confidential information or are internal documents.
- 4.6 Any direction given by CCS will set out its reasons for giving the direction. The direction will be published on the register maintained by CCS, which is open to public inspection on CCS's website.

### *Enforcement of directions*

- 4.7 In most cases, directions will take immediate effect. In some cases, CCS may allow the undertaking a period of time within which to comply with a direction.

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<sup>14</sup> Sections 69(2)(a) and (b) of the Act.

<sup>15</sup> Section 69(1) of the Act.

<sup>16</sup> Section 68(1) of the Act.

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4.8 If there is non-compliance with a direction, CCS may apply to register the direction with a District Court in accordance with the Rules of Court. On registration, the direction has the same force and effect as if it had been an order originally obtained in the District Court and will be enforced accordingly.<sup>17</sup> Any person who fails to comply with a registered direction without reasonable excuse will be in contempt of court. The normal sanctions for contempt of court will apply, i.e. the court may impose a fine or imprisonment. The court may also make orders to secure compliance with the direction, or to require any person to do anything to remedy, mitigate or eliminate any effects arising from non-compliance with the direction. In addition, the District Court may also make an award for costs upon the registration of the direction.

### *Appeals against directions*

4.9 A direction imposed can be appealed to the Competition Appeal Board (“**Board**”).<sup>18</sup> Such an appeal must be brought within the specified time period.

4.10 The Board can impose, revoke or vary a direction as long as it is a direction that CCS could itself have given.<sup>19</sup> A decision by the Board as to any direction can be appealed to the High Court and then to the Court of Appeal on a point of law arising therefrom.<sup>20</sup> Such an appeal can only be made by a party to the proceedings in which the decision of the Board was made.<sup>21</sup>

4.11 An appeal to the Board against a direction imposed will not operate to suspend that direction. The infringement decision and the direction will remain in effect (unless suspended by an interim order made by the Board or, in the case of a further appeal, the relevant appeal court).

## **5 Directions on interim measures**

5.1 The Act provides that CCS may give directions on interim measures pending its final decision as to whether there has been an infringement of the section 34, 47 or 54 prohibitions.<sup>22</sup> Directions on interim measures will not affect the final decision.

5.2 CCS may give directions on interim measures before it has completed its investigation of the suspected infringement if:

- it has begun an investigation under section 62 of the Act, the investigation is ongoing and it has not completed the investigation;<sup>23</sup> and

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<sup>17</sup> Section 85 of the Act.

<sup>18</sup> Section 71 of the Act.

<sup>19</sup> Section 73(8) of the Act.

<sup>20</sup> Section 74(1)(a) of the Act.

<sup>21</sup> Section 74(2) of the Act.

<sup>22</sup> Section 67 of the Act.

<sup>23</sup> Section 67(1)(a) of the Act.

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- it considers that it is necessary to act urgently either to prevent serious, irreparable damage to a particular person or category of persons, or to protect the public interest.<sup>24</sup>
- 5.3 What constitutes serious damage is a question of fact and will depend upon the circumstances of each case. Damage may be serious where a particular person or category of persons may suffer considerable competitive disadvantage likely to have a lasting effect on their position. Serious damage is likely to include significant financial loss to a person (to be assessed with reference to that person's size or financial resources as well as the proportion of the loss in relation to the person's total revenue), and significant damage to the goodwill or reputation of a person.
- 5.4 A threat of insolvency will generally be sufficient to constitute serious, irreparable damage although it need not always be so. Less extreme forms of serious damage may still be irreparable, in so far as they cannot be remedied by later intervention. Serious and irreparable damage are cumulative, though inter-related, requirements. Thus, serious damage which is not irreparable will not suffice. The serious, irreparable damage must be shown to result from the alleged anti-competitive behaviour.
- 5.5 CCS may consider that it is necessary to act urgently to protect the public interest, for example, to prevent damage being caused to a particular industry or to consumers as a result of the suspected infringement. It may also take action to prevent damage to competition more generally. For mergers, CCS may consider interim measures to prevent the merger parties from taking any action that might prejudice CCS's ability to consider the merger situation further and/or to impose appropriate remedies.<sup>25</sup>
- 5.6 Directions on interim measures may be given by CCS on its own initiative or after receiving a request, provided that the conditions in paragraph 5.2 above are satisfied. Any person requesting a direction on interim measures should provide as much evidence as possible, demonstrating that the alleged infringement is causing, or is likely to cause, serious, irreparable damage or that it is necessary that CCS act to protect the public interest. Such a request should also indicate as precisely as possible the nature of the interim measure sought.
- 5.7 CCS may give such directions on interim measures as it considers appropriate. CCS may in particular require the person(s) concerned to terminate the agreement or cease the conduct in question, or to modify the agreement or conduct. For mergers, interim measures may include directions that (i) stop the acquiring party from implementing the merger; (ii) prohibit the transfer of staff; (iii) set limits on the exchange of commercially sensitive information such as customer lists and prices; or (iv) require a merger to be dissolved or modified.<sup>26</sup>

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<sup>24</sup> Section 67(1)(b) of the Act.

<sup>25</sup> Section 67(2) of the Act.

<sup>26</sup> For additional information on directions on interim measures in relation to anticipated mergers and mergers that do not involve the acquisition of shares, or interim measures in the merger context more generally, please refer to paragraph 4.71 of the *CCS Guidelines on Merger Procedures*.

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- 5.8 When the investigation is complete and CCS has decided that an infringement has taken place, it may replace the direction on interim measures with a direction described in Part 4 above. Otherwise, a direction on interim measures 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 the public interest.

### ***Procedure on giving directions on interim measures***

- 5.9 Before giving a direction on interim measures, CCS must give to the person to whom it proposes to give the direction, a written notice indicating the nature of the direction it proposes to give and the reasons for deciding to give it, and an opportunity to make written representations to CCS.<sup>27</sup> The person receiving the written notice may request in his written representations a meeting with CCS to make oral representations to elaborate on the written representations.
- 5.10 CCS will give such a person or his authorised representative a reasonable opportunity to inspect the documents in CCS's file relating to the proposed direction. However, CCS may withhold any documents to the extent that they contain confidential information or are internal documents.
- 5.11 The directions on interim measures will be published on the register maintained by CCS, which is open to public inspection on CCS's website.
- 5.12 A direction on interim measures can be appealed to the Board. Such an appeal must be brought within the specified time period. The making of an appeal will not suspend the effect of the direction on interim measures but the Board may suspend its effect by an interim order.

### ***Enforcement of directions on interim measures***

- 5.13 Directions on interim measures can be enforced following the procedure set out in paragraphs 4.7 to 4.8 above.

### ***Appeals against directions on interim measures***

- 5.14 Directions on interim measures can be appealed following the procedure set out in paragraphs 4.9 to 4.11 above.

### ***Assurances in lieu of interim measures directions***

- 5.15 CCS may accept informal interim assurances offered by the person(s) concerned where it is satisfied that these will prevent any harm which might otherwise form the basis for imposition of a direction on interim measures.

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<sup>27</sup> Section 67(3) of the Act.

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- 5.16 One of the prerequisites for an interim remedy is that it is necessary to act as a matter of urgency. The ability to accept informal interim assurances in appropriate circumstances helps facilitate quick action by CCS.
- 5.17 CCS may replace informal interim assurances by a direction on interim measures.
- 5.18 Informal interim assurances will include a provision that they will come to an end when an investigation is complete. If CCS has decided that an infringement has taken place, it may replace any informal interim assurances with a direction described in Part 4 above.

### 6 Directions on penalties

- 6.1 The Act provides that CCS may impose a financial penalty<sup>28</sup> on any party to an agreement that infringes the section 34 prohibition or any person whose conduct infringes the section 47 prohibition or section 54 prohibition provided that infringement has been intentionally or negligently committed.<sup>29</sup> The amount of the 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.<sup>30</sup> It is for CCS to determine whether a financial penalty should be imposed. CCS can impose penalties for infringements that have already stopped as well as for ongoing infringements.
- 6.2 CCS will use this power to impose penalties on infringing undertakings to reflect the seriousness of the infringement and to serve as an effective deterrent, both to the undertaking concerned and to other undertakings which might be considering activities contrary to the section 34, 47 or 54 prohibitions. The setting of the maximum penalty at 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, allows CCS to adjust, where appropriate, the levels of penalties to ensure that deterrence is achieved.

#### *Intentionally or negligently*

- 6.3 Before exercising the power to impose a financial penalty, CCS must be satisfied, as a threshold condition, that the infringement has been committed intentionally or negligently.
- 6.4 For intention or negligence to be found, it is not necessary for there to have been action by, or even knowledge on the part of, the partners or principal managers of the undertaking concerned; action by a person who can act on behalf of the undertaking suffices.

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<sup>28</sup> Section 69(2)(e) of the Act.

<sup>29</sup> Section 69(3) of the Act.

<sup>30</sup> Section 69(4) of the Act.

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6.5 CCS may consider the existence of past decisions or directions made against an undertaking when considering whether or not an infringement of the section 34, 47 or 54 prohibition by similar anti-competitive activities of that undertaking was committed intentionally or negligently.

6.6 The fact that a particular type of agreement or conduct has not previously been found to have infringed the section 34, 47 or 54 prohibitions does not mean that the infringement cannot be committed intentionally or negligently.

### *Intention*

6.7 The circumstances in which CCS might find that an infringement has been committed intentionally include the following:

- the agreement or conduct has as its object the restriction of competition;
- the undertaking in question is aware that its actions will be, or are reasonably likely to be, restrictive of competition but still wants, or is prepared, to carry them out; or
- the undertaking could not have been unaware that its agreement or conduct would have the effect of restricting competition, even if it did not know that it would infringe the section 34, 47 or 54 prohibitions.

6.8 The intention (or negligence, referred to below) relates to the facts, not the law. Ignorance or a mistake of law (i.e. ignorance that the relevant agreement or conduct is an infringement) is thus no bar to a finding of intentional infringement.

6.9 In establishing whether or not there is intention, CCS may consider internal documents generated by the undertakings in question. CCS may regard deliberate concealment of an agreement or practice by the undertakings as strong evidence of an intentional infringement. It may be inferred that an infringement has been committed intentionally where consequences giving rise to an infringement are plainly foreseeable from the pursuit of a particular policy by an undertaking.

### *Negligence*

6.10 CCS is likely to find that an infringement of the section 34, 47 or 54 prohibitions has been committed negligently where an undertaking ought to have known that its agreement or conduct would result in a restriction or distortion of competition.

### *Involuntary infringement*

6.11 Where an undertaking participates in an infringement under pressure, it may still be held to have acted intentionally or negligently, although, depending on the circumstances, the penalty may be reduced.

***Provisional immunity from penalties under the section 34 prohibition from the date of notification to CCS***

- 6.12 The Act provides for parties to notify their agreements or conduct to CCS for guidance or a decision.<sup>31</sup> Where an agreement to which the section 34 prohibition applies has been notified, CCS cannot impose a penalty in respect of any infringement of the section 34 prohibition, during the period beginning with the date of notification and ending on such date as may be specified in a notice given in writing to the Applicant(s) by CCS on determination of the application.<sup>32</sup> The date specified in the notice may not precede the date on which the notice is given.<sup>33</sup> No such immunity exists for notifications in respect of conduct under the section 47 or 54 prohibitions.
- 6.13 Provisional immunity only arises after the application for guidance or a decision has been made. Further information on such applications can be found in the *CCS Guidelines on Filing Notifications for Guidance or Decision with respect to the Section 34 Prohibition and Section 47 Prohibition*.

***Immunity after guidance or decision***

- 6.14 Where CCS has given a favourable guidance or decision in respect of any agreement or conduct notified to it under sections 43, 44, 50 and 51 respectively, no penalty may be imposed in respect of any infringement under the section 34 or 47 prohibition, as the case may be. However, CCS may remove the immunity from such penalties if:
- it takes further action with respect to the agreement or conduct in one of the following circumstances –
    - it has reasonable grounds for believing that there has been a material change of circumstance since the guidance or decision, as the case may be, was given; or
    - it has reasonable grounds for suspecting that the information on which the guidance or decision was based was incomplete, false or misleading in a material particular; or
    - in the case of guidance on infringement of the section 34 prohibition only, one of the parties to the agreement applies for a decision with respect to the agreement; or
    - in the case of guidance only, a complaint about the agreement or conduct is made to CCS;

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<sup>31</sup> Sections 42 and 49 of the Act.

<sup>32</sup> Sections 43(4) and 44(3) of the Act.

<sup>33</sup> Sections 43(5) and 44(4) of the Act.

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- it considers it likely that the agreement or conduct will infringe the section 34 or 47 prohibition; and
- it gives written notice to the party or undertaking on whose application the guidance was given or the decision was made, that it is removing the immunity as from the date specified in the notice.

6.15 If CCS has reasonable grounds for suspecting that the information provided to it by a party to the agreement or by an undertaking engaging in the conduct, on which it based the guidance or decision, as the case may be, was incomplete, false or misleading in a material particular, the date specified in the notice may be earlier than the date on which the notice is given. It is a criminal offence to provide information that is false or misleading in a material particular under section 77 of the Act (see the *CCS Guidelines on the Powers of Investigation* for further treatment of offences).

### ***Turnover***

6.16 The definition of turnover for the purposes of determining the maximum financial penalty that may be imposed by CCS under section 69(4) of the Act has been prescribed in the *Competition (Financial Penalties) Order 2007*.

### ***Amount of a penalty***

6.17 CCS's approach on the calculation of a financial penalty to be imposed has been set out in the *CCS Guidelines on the Appropriate Amount of Penalty in Competition Cases*.

6.18 In brief, a financial penalty imposed by CCS for an infringement of the section 34, 47 or 54 prohibitions will be calculated taking into consideration, amongst other things, the nature, duration and 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, market conditions, aggravating factors including the existence of any prior anti-competitive practices and behaviour of the infringing party, and mitigating factors including the existence of any compliance programme and the extent to which the infringing party has co-operated with CCS. In line with the procedure for giving directions set out in paragraphs 4.4 to 4.6 above, the proposed amount of financial penalty will be set out in the proposed infringement decision so as to permit addressees of the proposed infringement decision to make representations, written and oral, to CCS on matters of liability as well as penalty. After taking in representations, should CCS decide to issue an infringement decision including a financial penalty, CCS may request updated applicable turnover figures,<sup>34</sup> where necessary, to ensure that the statutory maximum for any financial penalty is not exceeded.

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<sup>34</sup> Refer to section 69(4) of the Act and the *Competition (Financial Penalties) Order 2007*.

### *Lenient treatment for undertakings coming forward with information*

- 6.19 Undertakings participating in cartel activities might wish to terminate their involvement and inform CCS of the existence of the cartel activity, but be deterred from doing so by the risk of incurring large financial penalties. To encourage such undertakings to come forward, CCS will grant total immunity from financial penalties for an infringement of the section 34 prohibition to a participant in a cartel activity who is the first to come forward subject to certain conditions being met (including that the undertaking refrain from further participation in the cartel activity, except as directed by CCS). An undertaking which is not the first to come forward, or does not satisfy all of these conditions, may benefit from a reduction in the amount of the penalty imposed.
- 6.20 Further information on immunity from, or reduction in the amount of financial penalties is set out in the *CCS Guidelines on Lenient Treatment for Undertakings Coming Forward with Information on Cartel Activity*.

### *Payment*

- 6.21 Where CCS directs an undertaking to pay a financial penalty, it must, at the same time, inform the undertaking in writing of its reasons. Where CCS imposes a penalty, it must serve a written notice on the undertaking required to pay the penalty, specifying the date before which the penalty is required to be paid.<sup>35</sup> The date for payment must not be earlier than the end of the period within which an appeal against the direction may be brought.<sup>36</sup>

### *Liability for Payment*

- 6.22 CCS may direct:
- any party to an agreement which has infringed the section 34 prohibition;
  - any person whose conduct has infringed the section 47 prohibition; and/or
  - any person whose conduct has infringed the section 54 prohibition;
- to pay a penalty. Where there has been a finding of joint dominance, so that more than one undertaking has infringed the section 47 prohibition, CCS can direct each undertaking to pay a penalty.
- 6.23 A parent company and its subsidiaries will usually be treated as a single undertaking if they operate as a single economic unit. This will depend on the facts of each case. CCS may need to consider the respective responsibility of both parent and subsidiary for an infringement and therefore for consequent liability to pay a penalty. Where CCS decides to impose a penalty on both parent and subsidiary, it may be imposed jointly and severally.

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<sup>35</sup> Section 69(5) of the Act.

<sup>36</sup> Section 69(5) of the Act.

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- 6.24 A penalty may be imposed on a company that takes over the undertaking that has committed an infringement. Changes in the legal identity of an undertaking will not prevent it or its component parts from being penalised. As far as possible, liability for penalties will follow responsibility for actions. Thus, a subsequent transfer of a business from one economically distinct undertaking to another will not automatically absolve the transferor from responsibility. Where the original undertaking has ceased to exist by the time a penalty comes to be imposed, the penalty may be imposed on the successor undertaking.
- 6.25 The involvement of a trade association in an infringement of the section 34 or 47 prohibition may result in financial penalties being imposed on the association itself, its members or both. Where the infringement relates to activities of its members, the penalty shall not exceed 10% of the sum of the turnover of business of each member of the trade association in Singapore active on the market affected by the infringement, for each year of infringement, up to a maximum of three (3) years.

### *Enforcement of penalty decision*

- 6.26 If an undertaking fails to pay a penalty within the date specified in the direction and it has not brought an appeal against the imposition or amount of the penalty within the time allowed or such an appeal has been made and the penalty upheld, CCS may register the direction to pay a penalty with a District Court in accordance with the Rules of Court and the effect of registration is that the imposition of the penalty has the same force and effect as if it had been an order originally obtained in the District Court<sup>37</sup> and can be executed and enforced accordingly, for example, by writ of seizure and sale. In addition, the District Court may make an award for costs and interest upon the registration of the imposition of the penalty.

### *Appeals against Penalty Decision*

- 6.27 The decision to impose a financial penalty and the decision as to the amount of that penalty can be appealed to the Board.<sup>38</sup> Such an appeal must be brought within the specified time period.
- 6.28 The Board can revoke a penalty or vary its amount.<sup>39</sup> A decision by the Board as to the amount of a penalty can be appealed to the High Court and then to the Court of Appeal<sup>40</sup>. Such an appeal can only be made by a party to the proceedings in which the decision of the Board was made.<sup>41</sup>

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<sup>37</sup> Section 85 of the Act.

<sup>38</sup> Section 71 of the Act.

<sup>39</sup> Section 73(8)(b) of the Act.

<sup>40</sup> Section 74(1)(b) of the Act.

<sup>41</sup> Section 74(2) of the Act.

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6.29 An appeal to the Board against the imposition or amount of a penalty will suspend the penalty until the appeal is determined. The infringement decision itself will remain in effect (unless suspended by an interim order made by the Board or, in the case of a further appeal, the relevant appeal court).

### 7 Enforcement in the courts

7.1 Parties suffering loss or damage directly arising from an infringement of the section 34, 47 or 54 prohibition are entitled to commence a civil action to seek relief against the infringing undertaking.<sup>42</sup>

7.2 Such rights of private action shall 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.<sup>43</sup>

7.3 There is a two (2) year limitation period for the commencement of such private actions from the time that CCS made the decision or from the determination of the appeal, whichever is the later.<sup>44</sup>

7.4 The court will be bound in such proceedings by the relevant infringement decisions.<sup>45</sup>

### 8 Glossary

Applicant(s)	Party(ies) who have filed an application with CCS.
Person	Includes any undertaking.
Undertaking	Refers to any person, being an individual, a body corporate, an unincorporated body of persons or any other entity, capable of carrying on commercial or economic activities relating to goods or services, as the context demands. Includes individuals operating as sole proprietorships, companies, firms, businesses, partnerships, co-operatives, societies, business chambers, trade associations and non-profit-making organisations.

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<sup>42</sup> Section 86(1) of the Act.

<sup>43</sup> Sections 86(2) and 86(3) of the Act.

<sup>44</sup> Section 86(6) of the Act.

<sup>45</sup> Section 86(7) of the Act.