

# Competition law in Singapore

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## Introduction

Singapore is one of the world's most open and competitive economies. In 2014 it was rated No.1 for ease of doing business by the World Bank and the most open economy in the world for enabling trade<sup>1</sup>. As such, it is now a key player on the world economic stage, strongly advocating free-market policies to further its economic growth whilst safeguarding the interests of business consumers.

Since the enactment of the Competition Act in 2004, Singapore's pragmatic approach to competition law has been at the heart of this business-friendly and pro-foreign investment nation.

## The Competition Act

The Competition Act (Cap. 50B) (the "**Act**") was introduced to promote the efficient functioning of the Singapore market by prohibiting anti-competitive business practices with the aim of achieving lower costs and better products for the consumer. The Act is largely based on UK competition legislation, which is itself heavily influenced by the European Commission regime<sup>2</sup>.

The Act adopts an outcome-based approach, focusing on the economic impact of the conduct rather than the conduct itself. It does so by focusing on the following three areas:

- anti-competitive agreements, decisions or practices (Section 34);
- abuse of a dominant market position (Section 47); and
- mergers resulting in a substantial lessening of competition in the marketplace (Section 54).

Overseeing the administration and enforcement of the Act is the Competition Commission of Singapore (the "**CCS**"). The CCS enjoys a wide range of investigative and enforcement powers, largely mirroring those of the Competition and Markets Authority in the UK.

Since its establishment in 2005, the CCS has become increasingly proactive, often initiating investigations independently of any complaint and actively engaging in

market surveillance. To date, the CCS has issued nine infringement decisions; all but one of these related to anti-competitive practices under Section 34 of the Act.

## Section 34 – anti-competitive agreements and practices

Section 34 of the Act prohibits agreements, decisions or concerted practices that have as their object or effect the prevention, restriction or distortion of competition within Singapore (the "**Section 34 prohibition**"). The test is whether there has been an "appreciable adverse effect" on competition; it does not matter whether the agreement is formal or informal, or even whether the parties are based in Singapore provided that the effect is felt in the country.

Examples of prohibited behaviour that falls within the Section 34 prohibition include market sharing arrangements; bid-rigging or collusive tendering; and limiting output by fixing production levels or quotas. Such practices are deemed to always have an appreciable adverse effect on competition regardless of the market share of the entity concerned. Indeed, such is the scope of the Section 34 prohibition that mere attendance at a meeting at which price-sensitive information is exchanged may constitute participation in price-fixing cartel activity.

Market share is a central factor to consider when determining whether the Section 34 prohibition has been breached and the CCS has issued guidance that an agreement is unlikely to have an appreciable adverse effect on competition if:

- the aggregate market share of the parties does not exceed 20% in any of the markets affected (where the agreement is between competitors);
- the market share of each of the parties does not exceed 25% in any of the markets affected (where the agreement is between non-competitors); or
- each undertaking is a small or medium-sized enterprise<sup>3</sup>.

In a landmark decision in 2010, the CCS declared that the Singapore Medical Association's Guidelines on Fees would breach Section 34 of the Act and would

therefore be void, sending a clear signal to trade associations that agreed fee or price schedules may come under fire.

Other infringement decisions under Section 34 have been made against pest-control firms, construction companies and motor vehicle traders for bid-rigging; ferry operators for unlawfully sharing price information; and modelling agencies, employment agencies and bus companies for price fixing.

#### *Excluded agreements*

An agreement that would otherwise breach the Section 34 prohibition will be permitted if it can be shown to have a "net economic benefit"<sup>4</sup>. The rationale is that where competitors share information leading to innovation in a particular industry, lower costs of production or improvements in products, the consumer is better off<sup>5</sup>.

On the same basis, vertical agreements (agreements between entities operating at different levels in the production or distribution chain such as manufacturer and distributor) are also excluded from the scope of the Section 34 prohibition, meaning most distribution, purchasing and franchising agreements will not be caught by the Act.

Agreements relating to certain prescribed activities (such as rail services, the supply of water and the operation of bank accounts) are also outside the scope of the Act, as are agreements between undertakings that form a single economic unit, such as between a parent company and its wholly-owned subsidiary.

Finally, block exemptions (exemptions that apply broadly to an entire industry or sector) may be granted following a recommendation by the CCS. So far only one block exemption has been granted, relating to liner shipping agreements in order to promote Singapore as an attractive shipping hub.

### **Section 47 - monopolies and abuse of a dominant market position**

On 4 June 2010, the CCS issued its first and only infringement decision under Section 47 of the Act against the ticketing operator SISTIC.com for abuse of its dominant position (the "**Section 47 prohibition**").

SISTIC is the largest ticketing service provider in Singapore, handling over 90% of all events. Restrictions in many of its agreements with event venues demanded that they use SISTIC as the sole ticketing service provider, meaning that event organisers had no choice but to sell tickets through SISTIC. SISTIC then increased its fees by 50%. On 1 June 2012, the decision that SISTIC had abused its

dominant position was upheld by the Competition Appeal Board (the "**CAB**").

When deciding whether there has been an infringement of the Section 47 prohibition, the CCS adopts a two-stage test: firstly, does the entity enjoy a dominant position, and secondly, has it abused that dominant position? Both limbs must be satisfied in order for a breach to have occurred. As such, there is no restriction on a company enjoying a dominant position in the market provided that the incumbent party does not exploit its "substantial market power" to negatively impact the competition conditions in Singapore.

#### *1. What amounts to a "dominant position"?*

Whether an entity has "substantial market power" (and therefore enjoys a dominant position) is determined by considering a number of factors, including whether the entity can profitably sustain prices above competitive levels or restrict output or quality below competitive levels.

Although market share is not a fool-proof guide to dominance, a market share greater than 60% (either individually or collectively with another entity) will generally be considered dominant in that market.

#### *2. What amounts to "abuse" of that dominant position?*

With the first limb satisfied, the question under the second limb is whether an abuse of the dominant position has occurred. Examples of abuse include price discrimination, predatory behaviour against competitors (such as selling below cost), discount schemes which have an exclusionary effect (such as fidelity discounts) and refusals to supply. The application of dissimilar conditions to trading partners on equivalent transactions, as well as making the conclusion of contracts subject to additional obligations unconnected to the subject of the contracts, may also be indications of market abuse.

In terms of exclusions, the majority of the activities excluded from the Section 34 prohibition are also excluded from the Section 47 prohibition, save that vertical agreements will still fall within the scope of Section 47 and there are no block exemptions.

### **Section 54 – anti-competitive mergers**

Section 54 of the Act allows the CCS to review and regulate mergers that have resulted, or may result, in a substantial lessening of competition in Singapore (the "**Section 54 prohibition**"). The term "merger" is broadly defined and may even apply to joint ventures in certain cases<sup>6</sup>. The prohibition also has extra-territorial effect, meaning that it applies to companies outside

Singapore if there is a sufficient anti-competitive effect within Singapore.

Again, the CCS has issued helpful guidance in relation to the Section 54 prohibition, stating that a merger is more likely to be anti-competitive if:

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

It should be noted, however, that market share is only one factor to consider in assessing the merger; a merger exceeding the thresholds noted above may be permitted, whilst parties failing to meet the thresholds may be in breach<sup>7</sup>. Essentially, the entity should be able to objectively justify its conduct and show it has behaved in a proportionate manner in defending its legitimate commercial interests.

As for the Section 34 prohibition, a merger will be excluded from Section 54 where it has a net economic benefit and certain mergers are excluded from the Act entirely (for example, water and waste management services, or mergers approved under any written law or code of practice).

### Notification to the CCS

As in the UK (but in contrast to most other competition regimes) notification of agreements, conduct or mergers to the CCS is voluntary. When deciding whether a notification is necessary, a distinction is made between Sections 34 and 47 of the Act on one hand, and Section 54 on the other. Under Sections 34 and 47, an agreement or conduct can only be referred to the CCS once it has been entered into and is effective. In contrast, parties to a merger may apply to the CCS for a decision at any time before, during or after a merger.

Whilst an agreement is being considered by the CCS under Sections 34 or 47, the parties receive provisional immunity from fines such that they may carry on with the notified agreement. However, immunity from CCS penalties does not alleviate the commercial risk that the agreement may subsequently be declared void and unenforceable.

### Merger notifications under Section 54

Undertaking a merger is often a costly and time-consuming process. As such, the parties should decide whether to notify the CCS of a proposed merger at an early stage. This may involve pre-notification discussions with the CCS, allowing an informal avenue for information that may assist in deciding whether a

formal notification is prudent. If a formal notification is made, the parties may either request general guidance on whether the prohibitions are likely to be breached, or they may request a formal decision<sup>8</sup>. In either case, the CCS will adopt a two-stage review process.

The first stage, a "Phase 1 review", will be completed within 30 working days and will clear proposed mergers that clearly do not raise any competition concerns. If the CCS is unable to conclude this based on the information provided, it may decide that a "Phase 2 review" involving a more detailed assessment is necessary. The indicative timeframe for a Phase 2 review is 120 working days following the completion of the Phase 1 review.

At any stage during this review process the parties may offer behavioural or structural commitments to the CCS to alleviate any concerns that the CCS may have. Indeed, on two occasions the CCS has approved mergers in Singapore on the basis of commitments made by the parties in overseas jurisdictions that had worldwide effect and therefore addressed its concerns.

In the case of anticipated mergers, a favourable decision of the CCS may be subject to a validity period during which the merger must complete. Conversely, the CCS may issue an infringement decision and directions to remedy, mitigate or eliminate the adverse effects of the merger. In the case of completed mergers, this may entail heavy financial penalties or a direction that the merger be "unwound".

Such strong enforcement powers are an important consideration when deciding at what stage a notification to the CCS should be made, particularly as the CCS may commence its own investigations into un-notified mergers in any event.

### *Decisions of the CCS under Section 54*

As at October 2014, there had been 42 notifications for mergers or anticipated mergers in Singapore. Notable cases include the proposed mergers between Thomson Corporation and Reuters Group; Kraft Foods and Danone Group; Prudential plc and AIA Group; Johnson & Johnson and Synthes Inc; and Nippon Steel Corporation and Sumitomo Metal Industries.

The CCS is currently considering the proposed acquisition by Ridgeback Acquisition LLC (a wholly-owned subsidiary of Mars, Inc) of the pet care business of Procter & Gamble in certain countries including Singapore. In their initial submissions, the parties argue that there are low barriers to entry given: Singaporeans' lack of brand loyalty; the ease of securing a distribution agreement with a local distributor; the safety focus of regulatory bodies; and steady growth in demand. The parties maintain there

will be strong countervailing buyer power due to limited shelf space and the practice of retailers charging suppliers "listing fees" for displaying the product for sale. The parties also contend that there will be a number of strong international and local competitors to constrain the merged entity. To date, every merger notified to CCS (and not subsequently withdrawn) has been approved, though of course it remains to be seen how the CCS will respond to this notification.

#### Powers of the CCS

The CCS has extensive and wide ranging powers of investigation and enforcement. Its investigative powers include the power to enter premises for inspection (with or without warrant), undertake dawn raids, require the production of specified documents and information (including emails) and request explanations of documents from directors, employees or parent company managers. Failure to cooperate with the CCS is a criminal offence.

Pursuant to its enforcement powers, the CCS may order the parties to:

- modify or terminate the agreement or conduct;
- dissolve or modify the merger;
- make structural changes to a business;
- enter into legally-binding agreements to prevent or lessen the effects of the anti-competitive behaviour;
- dispose of such operations, assets or shares as specified;
- provide a performance bond, guarantee or other form of security; or
- provided the infringement was committed intentionally or negligently, pay a financial penalty capped at 10% of the annual turnover of the business of the relevant parties in Singapore for each year of infringement, up to a maximum of three years.

Directions can be given to any person the CCS considers appropriate (for example, to a parent company where the subsidiary is in breach) and in most cases will have immediate effect, although the CCS may allow a grace period within which to comply.

The CCS may also issue interim directions pending completion of investigations to prevent serious irreparable damage, such as significant financial loss, damage to goodwill or the threat of insolvency proceedings.

#### Leniency and appeals

The Act includes a leniency or "whistle-blower" programme to encourage enforcement, essentially allowing cartel participants to confess their involvement in prohibited activities in return for favourable treatment.

Subject to the fulfilment of certain conditions (for example, the provision of all relevant information and continuous and complete cooperation), the party in breach may benefit from immunity from prosecution if no investigation is underway, or a reduction of up to 100% of any financial penalty if the CCS has already commenced an investigation. Factors influencing the extent of the leniency include the time at which the entity comes forward, the extent of evidence already in the hands of the CCS, and the quality of information provided.

To date, the CCS has received several leniency applications. Indeed, the second ever infringement decision made by the CCS (in relation to a bid-rigging case by electrical works engineers) was also the first to allow a party to benefit from the leniency programme, granting a 100% reduction in the financial penalties imposed<sup>9</sup>. Since then, there has been one other case in which three individuals were successful in their application for leniency.<sup>10</sup>

#### Conclusion

With an increasing number of CCS infringement decisions being reached, many companies are placing a greater focus on safeguarding their operations from competition law exposure (for example, through compliance audits, dawn raid training and consideration of early notification of agreements, conduct or mergers). Importantly, non-legal consequences of an unfavourable decision by the CCS may have equally damaging effects on a business, including negative publicity, diversion of management time in dealing with an investigation, costs of employing industry advisors and an increased risk of on-going surveillance by authorities.

With the CCS becoming increasingly proactive, businesses should be aware of the Act's provisions and take adequate steps to ensure compliance.

For more information about the Act and its impact on your business and/or proposed transactions, please do not hesitate to contact us for advice.

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- <sup>1</sup> Note: World Bank's "Doing Business" Report 2014; World Economic Forum's Global Enabling Trade Report 2014.
- <sup>2</sup> Note: Certain business activities in Singapore are subject to separate regulation, such as broadcasting and media, the telecommunications sector, electricity and gas sectors and the postal service.
- <sup>3</sup> Note: SMEs are defined in Singapore as having a fixed asset investment of less than S\$15 million for manufacturing SMEs, or less than 200 employees for service SMEs.
- <sup>4</sup> Note: A net economic benefit is deemed to occur if the agreement in question contributes to improving production or distribution or promotes technical or economic progress, and is done in the least restrictive way that does not eliminate competition in a substantial part of the market.
- <sup>5</sup> Note: In 2006, for example, Qantas and British Airways successfully argued that although their joint venture was likely to have the effect of appreciably preventing, restricting or distorting competition in the provision of air transport in Singapore, there would be sufficient net economic benefits to consumers such that their joint venture should be allowed. A similar decision was reached by the CCS in 2011 in relation to Japan Airlines and American Airlines.
- <sup>6</sup> Note: For example, where the joint venture performs on a lasting basis all the functions of an autonomous economic entity.
- <sup>7</sup> Note: The proposed acquisition of Synthes Inc by Johnson & Johnson, for example, was cleared by the CCS despite the merged entity holding a 90% market share for trauma devices and a 50% market share for spine devices. This was on the basis that competition in the relevant market was intense, customers had strong countervailing buying power and competitors had only moderate barriers to entry.
- <sup>8</sup> Note: The CCS encourages joint applications by all parties to a merger. Fees per application range from S\$15,000 to S\$100,000 depending on the net aggregate turnover of the target. Confidential treatment is not automatically presumed and should be specially requested should the parties require it. In contrast to the UK, however, no notice will be published by the CCS upon receiving a notification.
- <sup>9</sup> CCS 500/001/09 Collusive Tendering (Bid-rigging) in Electrical and Building Works, 4 June 2010.
- <sup>10</sup> CCS 700/002/11 Ball Bearings Manufacturers involved in an international cartel.

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