

## **COMPETITION LAW GUIDE**

**ANSWERS TO YOUR QUESTIONS ON  
THE COMPETITION ACT 2004**



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## **RODYK'S COMPETITION LAW GUIDE**

### **Introduction**

Competition Law aims to prohibit anti-competitive business practices that inhibit or limit operation of Singapore's open and free market.

While Competition Law is relatively new in Singapore, it is well developed in jurisdictions like the United States of America, Europe, Australia and the United Kingdom. The Singapore Competition Act 2004 ("**the Act**") is modelled after the UK's equivalent legislation.

This booklet compiled by Herman Jeremiah, a Partner in Rodyk's Litigation & Arbitration Practice, in an easy to read FAQ format is intended to provide a basic introduction to the Act. It has been developed with reference to the Competition Act 2004 and the Guidelines and Draft Guidelines issued by the Competition Commission of Singapore.

We hope you find this Guide interesting and informative.

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**SECTION I  
THE COMPETITION ACT 2004**

**1. What is the Act all about?**

Briefly, the Act discourages undertakings from engaging in anti-competitive behaviour and/or abusing their dominant position in the market. The Act serves as the generic competition law of Singapore and also provides for establishment of a body called the Competition Commission of Singapore (“CCS”) for implementation and enforcement of the Act.

The Act defines an ‘undertaking’ as any entity (whether individual, body corporate or an unincorporated body of persons) capable of carrying on commercial or economic activities relating to goods or services. The term is used throughout the Act.

The Act will be supplemented by regulations and non-binding guidelines.

**2. What are the core provisions in the Act?**

There are 3 core provisions, sections 34, 47 and 54.

Section 34 prohibits agreements, decisions and concerted practices which have as their object or effect, the prevention, restriction or distortion of competition. In short, Section 34 is the anti-competitive agreement prohibition.

Section 47 prohibits the abuse of a market player’s dominant position. In short Section 47 is the abuse of dominance prohibition.

Both these sections will come into effect on 1 January 2006.

Section 54 deals with the prohibition of mergers which have resulted or may result in a substantial lessening of competition within any market in Singapore for goods and services. It will come into effect much later and in 2007.

**3. When does the Act come into effect? / What are important dates relating to the Act?**

The Act was designed to be implemented in stages to give you time to understand the Act and bring your affairs within the new law.

- 1 Jan 2005: Phase 1: Commencement of the Act. With that, the CCS was formed.
- 31 Jul 2005: Cut-off date for application of Section 34 prohibition. All agreements made after this date must comply with Section 34.
- 1 Jan 2006: Phase 2: Provisions on anti-competitive agreements, decisions and practices (Section 34); on abuse of dominant position (Section 47) and appeal processes take effect.
- 30 Jun 2006: Agreements made 5 years before 31 July 2005 must comply with the Section 34 prohibition by this date.
- 1 Jul 2006: Deadline for parties to agreements to apply for extension of time to comply with Section 34.
- 2007: Phase 3: Earliest date for Section 54 relating to mergers to come into force.

The Act has retrospective effect when the relevant provisions come into force (i.e. it will apply to all existing agreements and conduct). Therefore we urge you to review your agreements whether verbal or in writing for compliance with the Act.

## **SECTION II THE COMPETITION COMMISSION OF SINGAPORE**

### **4. Who enforces the Act?**

The Act is administered and enforced by the CCS, which is given powers to carry out its duties. Powers and duties of the CCS include:-

- > issuing guidelines to the Act;
- > investigating probable infringement, requiring any person to furnish such information as may be necessary to implement the Act;
- > conducting searches in relation to investigations;
- > issuing interim directions pending completion of investigations to prevent serious irreparable damage (e.g. significant financial loss, significant damage to goodwill and reputation, threat of insolvency proceedings etc);
- > making decisions on infringement of the relevant sections of the Act;
- > consulting with other sectoral regulators in Singapore;
- > representing Singapore internationally in Competition Law matters such as cooperating in international investigations; and
- > advising the government on policy relating to Competition Law.

The priority for the CCS appears to be the curbing of hard-core anti-competitive activities that cause more harm to the economy e.g. price fixing activities, market sharing arrangements between competitors and bid rigging activities.

### **5. What are the Guidelines and their effect?**

Guidelines are issued by the CCS to indicate how the CCS will interpret and give effect to the Act. The intention is therefore to provide transparency and greater clarity to businesses on the competition law regime. The Guidelines published are however not binding on the CCS i.e. they can choose to depart from them and make amendments to them.

Guidelines have been issued in respect of the Section 34 prohibition, the Section 47 prohibition and market definition. Their salient points will be discussed below.

As at 31 August 2005, draft Guidelines have been issued in respect of the:-

- > powers of investigation;
- > enforcement,
- > lenient treatment for undertakings coming forward with information on cartel activity cases;
- > filing of notifications for guidance or decision;
- > transitional arrangements; and
- > appropriate penalties.

These draft Guidelines may, after public consultation, be amended and will be published. The guidelines for the merger provisions are pending.

## SECTION III CORE PROVISIONS

### 6. What amounts to anti-competitive behaviour under the Act? (Section 34)

Agreements, decisions or concerted practices which have the object or effect of preventing, restricting or distorting competition within Singapore are prohibited under Section 34 of the Act.

The word 'agreement' is given a wide meaning and includes both legally enforceable and non-enforceable agreements, whether written or oral, and includes "gentlemen's agreements" as well.

A 'concerted practice' may exist where there is informal cooperation without any formal agreement or decision.

To be objectionable, the prevention, restriction or distortion has to have an appreciable adverse effect on competition.

There would generally be no appreciable adverse effect on competition if:-

- > the total relevant market share of the parties in the agreement is not more than 20% where the parties are competitors;
- > the market share of each of the parties to the agreement in the relevant market is not more than 25% where the parties are non-competitors; or
- > if the agreement is between SMEs (small and medium enterprises). SMEs in Singapore are defined as follows:- manufacturing SMEs if they have Fixed Assets Investment (FAI) of less than S\$15 million and services SMEs if they have less than 200 workers.

Other salient matters in the Guideline on Section 34 issued by the CCS include:-

- > the prohibition does not apply where the entities coming together in fact form one single economic unit e.g. 2 subsidiaries under the control of a 3<sup>rd</sup> parent company where the subsidiary has no real freedom to determine its actions in the market; and
- > the prohibition does not apply where there is net economic benefit and CCS will look at whether the agreement contributes to improving production or distribution or promoting technical or economic progress e.g. sharing of information between competitors may lead to innovation or reduced costs which translates to improved products and lower prices for end consumers.

Examples of Section 34 infringements are:-

- > fixing of prices e.g. by a trade association fixing prices or recommending prices;
- > fixing trading conditions e.g. on which products are to be supplied;
- > bid rigging or collusive tendering. An essential feature of tenders is that bids are prepared and submitted independently. Therefore any form of collusion or cooperation will be regarded as restricting competition appreciably;
- > limiting output or controlling of production by fixing of production levels or quotas;
- > limiting or coordinating future investment plans;
- > limiting or controlling of markets, technical development;

- > sharing markets whether by territory, type or size of customer or sources of supply;
- > applying dissimilar conditions to equivalent transactions with other trading parties thereby placing them at a competitive disadvantage; or
- > 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 such contracts.

## **7. What amounts to an abuse of a dominant position under the Act? (Section 47)**

Any conduct of any undertaking which amounts to the abuse of a dominant position in any market in Singapore, is prohibited under Section 47 of the Act.

The prohibition is not against having a dominant position in the market but is aimed at the abuse of that dominant position. (i.e. an undertaking will not be penalized simply for being the biggest or most successful firm).

The prohibition also applies where 2 or more economic and independent undertakings abuse their collective dominant position.

The 2-stage test for the Section 47 prohibition is as follows:

- > whether an undertaking is 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.

The relevant market must be determined (see below) to assess whether an undertaking is dominant. An undertaking will not be considered dominant unless it has substantial market power. This is assessed through various factors such as:-

- > its market share and the degree of fluctuations in market shares. A market share above 60% is likely to indicate that an undertaking is dominant in the relevant market;
- > existing competitors in the market whom its customers would be able to go to if it raises its prices, its competitors' market share;
- > barriers that potential competitors would face to enter the market. Lower entry barriers usually indicate less dominance by the incumbent market players; and
- > its ability to sustain a long period of sale below cost.

Where the dominant position is achieved or maintained through successful innovation or economies of scale, such conduct is not an abuse of dominance. Abuse of dominance occurs in situations where the dominant firm uses tactics such as sustained extreme low pricing to take unfair advantage of its position to drive out existing and potential competitors. Other predatory behaviour include making sale of one product conditional on other unrelated products or services being purchased together.

## **8. What mergers are caught under Section 54 of the Act?**

Section 54 deals with the prohibition of mergers which have resulted or may result in a substantial lessening of competition within any market in Singapore for goods and services. Mergers inevitably result in concentration of markets, but this does not in itself infringe the Act.

“Merger” is given a wide definition in the Act and includes joint ventures to perform, on an indefinite basis, all the functions of an autonomous economic entity. It appears that the CCS will look into the substance of whether two or more undertakings are in fact under the control of one entity or individual.

There are exceptions to application of Section 54, and these include specific activities such as supply of potable water and wastewater management services. Mergers approved under any written law or any code of practice under any written law are also outside the scope of Section 54.

## **9. What activities are caught under the Act and does the Act affect you?**

The Act is of general application. It applies to all commercial and economic activities by the private sector in all areas except for businesses expressly excluded under the 3<sup>d</sup> Schedule of the Act e.g. where provision of goods and services are already regulated by another authority under law, postal services, supply of waste water management services, supply of scheduled bus services, certain cargo terminal operations etc.

Vertical agreements are also excluded. A vertical agreement is an agreement or concerted practice between 2 or more undertakings operating at different levels of production or distribution chain and relating to conditions of purchase, sale or resale of the goods and services. The exclusion is on the basis that the majority of vertical agreements have a net economic benefit (e.g. in the form of lower costs which translates to lower prices). However, there is a claw-back provision to this exclusion and the Minister may order that certain vertical agreements are subject to the Section 34 prohibition.

Therefore unless, you are within the exempted businesses in the Schedule, chances are you will be affected by the Act.

Even if you are an SME and therefore unlikely to be the subject of a complaint, it would be useful for you to know about competition law as it would allow you to lodge a complaint against other businesses that may be affecting your business either through anti-competitive behaviour or through abuse of their dominant positions.

## **SECTION IV INVESTIGATION & ENFORCEMENT**

### **10. Under what circumstances will the CCS commence investigations ?**

The CCS will investigate if there are reasonable grounds for suspecting that one or more of the core provisions has been infringed. The investigation may be commenced by the CCS on its own, pursuant to a complaint lodged with the CCS or pursuant to information provided by parties with knowledge of the affairs of an undertaking.

### **11. What happens in a formal investigation?**

CCS is empowered to require businesses and individuals (their owners, managers and employees, etc.) to provide information and documents in relation to the prohibitions under Sections 34, 47 and 54. You should promptly seek legal advice when served with such notification.

Almost all information sought would have to be given except for any communication which are legally privileged e.g. the correspondence between your professional legal advisers (including in-house lawyers) and yourself. You are also not permitted to produce or disclose any information or document which might tend to incriminate you or make you liable to a penalty.

It would be an offence to refuse to produce documents or give information requested and if found guilty, a fine and/or imprisonment can be imposed.

Where necessary, CCS has power to enter any premises (with or without a warrant) to obtain the necessary evidence in the form of documents, equipment or information in connection with an investigation.

An occupier (who is not being investigated) of the premises needs to be given at least 2 working days' written notice of intended entry where the premises are entered into without a warrant. This does not apply where there are reasonable grounds for suspecting that the premises are or have been occupied by a party being investigated.

The CCS may also obtain a warrant to enter into the premises in certain situations e.g. where there are reasonable grounds for suspecting that if the documents required to be produced, they would be concealed, removed, tampered with or destroyed. The warrants would authorize the entry into the premises with such force as is reasonably necessary, the search of any persons on those premises, to search the premises, take copies of any document appearing to be relevant, require any person to explain, require any information to be extracted from any electronic form, remove any relevant equipment etc.

### **12. What are the consequences and penalties for breaching the Act?**

Anti-competitive agreements or decisions against Section 34 are void (i.e. of no effect) to the extent of the infringement. There are also penalties and civil liabilities for infringement of the Act.

After investigations are complete and representations made, the CCS has quite wide discretion to make directions. The CCS may make directions to bring the infringements to an end, to modify agreements, to desist from certain conduct, to modify conduct and to pay such financial penalty in respect of the infringement as the CCS may determine.

Where it would hurt most would be if a financial penalty is levied against you. The financial penalty shall not exceed 10% of the turnover of the business in Singapore for each year of infringement, up to a maximum of 3 years. See Section 69(4) of the Act.

However, the CCS may impose a financial penalty only if it is satisfied that the infringement has been committed intentionally or negligently.

In addition, refusal to provide information, destroying or falsifying documents, giving of false or misleading information, obstruction of an officer of the CCS are all offences under the Act. These offences are punishable by a fine not exceeding \$10,000.00 or imprisonment for a term not exceeding 12 months or to both. See Sections 75 to 78 and 83 of the Act.

Officers or members of corporations and associations and partners of partnerships, if implicated (whether by consent, connivance or neglect) in the offence will be guilty of the offence together with the corporation, association or partnership as the case may be. See Section 81 of the Act.

Injured parties have a right to file civil actions against parties that have infringed Sections 34, 47 or 54 of the Act. However there are time restrictions against the commencement of these actions. The aggrieved party must wait until the entire process of appeal or the period for the appeals are exhausted before starting action and he will have 2 years from then to do so. See Section 86 of the Act.

**13. Can I appeal against the CCS's decisions?**

Yes. Appeals against the CCS's decision can be made to the Competition Appeal Board. The Board exercises full powers of a District Court. It may confirm or set aside any part of the decision and may make any decision which the CCS could itself have made.

Further appeals can be made to the High Court and finally to the Court of Appeal on a point of law arising from a decision of the Board or with regard to a decision on the amount of a financial penalty.

**14. How are decisions enforced?**

The **CCS** can register directions in a District Court, the result of which is that the direction will have the same force and effect as if it was a District Court order. Failure to comply with a registered direction without reasonable excuse would be contempt of court punishable by fine or imprisonment.

**15. Is there a leniency programme?**

Yes. There is a leniency or "whistle blower" programme to encourage enforcement of the Act, especially with regard to often highly secretive cartels.

The draft Guideline On Lenient Treatment For Undertakings Coming Forward With Information On Cartel Activity Cases issued on 26 May 2005 provides:-

- > varying degrees of immunity (including total immunity) or reduction of financial penalties depending on whether it was the first to provide evidence of cartel activity, when such evidence is provided, the extent of evidence provided and the undertaking's continued cooperation throughout the investigation until conclusion of any action by CCS; and
- > limited confidentiality in respect of the undertaking's identity throughout the investigation.

However, the leniency programme does not protect the undertaking from the fact that infringing arrangements under the Act are void. The programme also does not protect the undertaking from civil liability nor from prosecution by competition authorities outside of Singapore.

## SECTION V FREQUENTLY ASKED QUESTIONS

### 16. What are the key concepts in Competition Law that a business would have to understand?

- a. "Market definition" is important because it provides a framework within which to assess the critical question of whether a firm or firms possess market power.

Its essential task is to define all the products on the demand side that buyers regard as reasonable substitutes for the product under investigation ("**focal product**") and then to identify all the sellers who supply the focal and substitute products or their potential suppliers.

- b. "The relevant market" is determined by market definition. It is all the products on the demand side that buyers regard as reasonable substitutes for the product under investigation and all the sellers who supply the focal and substitute products or their potential suppliers. There is in addition to what products comprise the market, the geographical area of the market to be considered. Therefore you must look at both the product market and the geographic market.

Once the relevant market has been defined, market shares can be measured.

- c. Market power is more likely to exist if the undertaking has persistently high market share. In assessing market power, the following factors may be considered:-

- > high entry barriers will prevent competitors from joining the market;
- > successful innovation of the undertaking giving rise to persistent high market share; and
- > product differentiation because other products in the market may not be close substitutes, etc.

- d. Predatory behaviour is exploitive or high-handed tactics employed by a dominant firm for the purpose of unfairly suppressing competitors. Examples of predatory behaviour are excessively low prices (even below costs) and intention to eliminate a competitor or prevent entry into the market by potential competitors.

Factors in determining if behaviour is predatory include:-

- > when sale price is below the average variable cost of production (i.e. a loss for each unit of production), in the absence of an objective justification. The justification could be loss leading, short run promotions especially for new products;
- > where the price is above the average variable cost of production but below average total cost of production, other evidence to be considered may include evidence of an intention to harm competition;
- > price above the average total cost of production does not indicate predation;
- > absence of any benefits in having such low prices;
- > discount schemes which have the effect of harming competition e.g. where discounts are conditional upon buyers making all or a large proportion of their purchases from the dominant undertakings (fidelity discounts) or where conditional on the purchase of tied products;

- > applying dissimilar conditions to equivalent transactions with other trading parties thereby placing them at a competitive disadvantage e.g. price discrimination or a difference in service quality;
- > limiting production, markets and technical development to the prejudice of consumers;
- > 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 such contracts; and
- > refusal to supply by a major producer with no objective justification if it causes substantial harm to competition.

**17. Intellectual Property Rights ("IPR") grant monopoly rights. Is the exercise of IPR anti-competitive?**

The exercise of IPR will not usually be considered anti-competitive. Although the existence of IPR may initially impede a competitor's entry into the market, in the long term any other undertaking may develop substitute IPRs. The refusal to grant a licence, even by a dominant undertaking, may not necessarily be considered anti-competitive. However, if the owner of IPR attempts to extend its market power beyond the scope granted by intellectual property law, competition issues may arise.

**18. What are the concerns regarding licensing agreements?**

Licensing agreements between non-competitors usually give rise to less competition concerns than licensing agreements between competitors. In general, clauses commonly found in licensing agreement may give rise to competition issues. Such clauses include:-

- > fixing of purchase or selling prices at certain levels;
- > limitation of markets or production;
- > restriction of licensee's ability to carry out research and development activities;
- > requirement for licensee to assign to the licensor any improvements made by the licensee to the licensed technology; and
- > bundling of technology and products to be licensed to the licensee.

The CCS will assess whether an agreement which contains anti-competitive provisions has a net economic benefit. An agreement has a net economic benefit if it contributes to improving production or distribution or promoting technical or economic progress. The Minister can make an order excluding the application of the Act to individual agreements possessing such characteristics.

**19. Can I apply to the CCS to find out if my agreements comply with the Act?**

Yes, you can but not in respect of prospective (i.e. not yet entered into) agreements or prospective conduct.

The CCS will, upon application, give its guidance or its decision (depending on what has been applied for) on whether the agreement is likely to infringe or has infringed one of the core provisions (Sections 34, 47 or 54), as the case may be. If the CCS determines that the agreement is unlikely to infringe or has not infringed a prohibition, it may also make a determination on whether such agreement/ conduct may be exempt from the prohibition.

**20. What is the effect of such guidance or decisions?**

In cases of infringements under Section 34, penalties may not be imposed from the time the CCS is notified until such time that the CCS may determine.

In all cases, revocable immunity is granted to the entity that made the application for guidance / decision. The immunity can be revoked if it is found after guidance / decision has been given, that there has been a material change of circumstances or incomplete, false or misleading information had been provided etc.

**21. Will I have an opportunity to be heard during investigations and proceedings?**

Before the CCS decides on whether there has been an infringement under the Act, you, as the party complained against or under investigation have the opportunity to make representations to the CCS. You may wish to consult lawyers for assistance in such a case.

**22. When should I consult lawyers on Competition Law?**

You should consult lawyers for more detailed information on the Act in relation to your business. In particular, you should seek legal assistance in the following non-exhaustive situations:-

- > making complaints to the CCS when you feel anti-competitive tactics are being used against your business;
- > defending complaints being investigated by the CCS against you;
- > entering into formal or informal agreements with competitors, suppliers or customers, particularly with regard to pricing and market shares;
- > entering into mergers and acquisitions;
- > formulating a checklist or handbook or compliance manual for your staff on a code of conduct to avoid infringement of the Act;
- > where you are suing or being sued in private actions for the infringement of Sections 34, 47 and 54 of the Act;
- > sharing information with competitors or within a trade association;
- > if you are one of the leading market players in the industry and are making plans to increase your market share;
- > reporting anti-competitive activities that you may be participating in; and
- > applying to the CCS for guidance or decision of agreements you have entered into.

**SECTION VI  
- CONCLUSION**

We hope that you have found this booklet useful as an introduction to Competition Law. If you do have queries or comments, please send them to us at the contact details below. As mentioned previously, the contents of this booklet is only a general outline. If you do have a legal issue, please consult your lawyers.

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