02.004 The importance of market definition has also been highlighted in the decisions of the European Court. For example, in *Europemballage Corp and Continental Can Co Inc v Commission*,[4] the court stressed that "the definition of the relevant market is of essential significance" in determining whether a relevant party holds a dominant position, or to assess the consequences of a disputed merger.[5]

02.005 Clearly, market definition has an important part to play in competition analysis. Accordingly, it is important to understand the purpose of market definition and the way in which markets are defined.

1. Purpose of market definition in competition assessment

02.006 Market definition is usually the first step in a competition analysis. Once a market is defined, this then allows a calculation of market shares and market concentration, and provides the framework for the substantive competition analysis to be undertaken.

02.007 According to the Notice on Definition of the Relevant Market, market definition is a tool to identify and define the boundaries of competition between firms. The main purpose of market definition is to identify in a systematic way the active competitive constraints that the undertakings involved face, taking into account substitutable products and the geographic boundaries of rivalries. In the first instance, the definition of the relevant market will shed light on the scope of those undertakings that competitively constrain each other directly. It can also inform an assessment of which undertakings might potentially constrain such undertakings in the short term.[6]

02.008 The Notice on the Definition of the Relevant Market further elaborates on the role of market definition in the various types of competition inquiries. For example, under the European Community's merger control, the European Commission would assess the competitive impact of a proposed merger within the relevant market. Similarly, in applying Article 102 of the Treaty on the

4 [1973] ECR 215; [1973] CMLR 199.

5 *Europemballage Corp and Continental Can Co Inc v Commission* Case 6/72; [1973] ECR 215; [1973] CMLR 199 at [32].

6 It should be noted that market definition does not reflect the competitive constraints posed by potential entry and buyer power. These factors would have to be considered as part of the overall competition assessment. However, market definition provides the framework for subsequently considering these factors. For further discussion on this point, see Richard Whish & David Bailey, *Competition Law* (Oxford University Press, 7th Ed, 2012) at pp 27–29.

Functioning of the European Union[7] ("TFEU"), the European Commission has to assess whether undertakings in question hold a dominant position, which is intrinsically linked to the definition of the relevant market. Markets may also need to be defined in the application of Article 101 of the TFEU,[8] in particular, in determining whether an appreciable restriction of competition exists or in establishing if the condition under Article 101(3)(b) for an exemption from the application of Article 101(1) is met. Market definition also provides the starting parameters for assessing financial penalties in such cases. The Notice on the Definition of the Relevant Market states that:[9]

> ... market definition makes it possible, *inter alia*, to calculate market shares that would convey meaningful information regarding market power for the purposes of assessing dominance or for the purposes of applying Article 85.

02.009 In the US, the Federal Trade Commission and the Department of Justice state in the Antitrust Guidelines for Collaborations among Competitors that the agencies typically identify and assess competitive effects in all of the relevant product and geographic markets in which competition may be affected by competitor collaboration.[10]

02.010 Similarly, market definition is a key concept in the application of competition law in Singapore. The Competition Commission of Singapore ("CCS") considers that market definition and the measurement of market shares are important for the purposes of determining:

(a) whether agreements, decisions between associations of undertakings or concerted practices have as their object or effect an *appreciable* prevention, restriction or distortion of competition in a market under the section 34 prohibition;[11]

7 Signed 25 March 1957; effective 1 January 1958; amended 1 December 2009.

8 *European Night Services v Commission* joined Cases T-374/94 *etc*; [1998] ECR II-3141; [1998] 5 CMLR 718 at [93] and [105].

9 Article 85 of the Treaty on the Functioning of the European Union (signed 25 March 1957; effective 1 January 1958; amended 1 December 2009) has been renamed Art 101.

10 United States Department of Justice and the Federal Trade Commission, Antitrust Guidelines for Collaborations among Competitors (April 2000) at p 16, § 3.32.

11 See, *inter alia*, *Price-fixing in Modelling Services*, CCS 500/002/09 (23 November 2011) at para 45; *Bid Rigging by Motor Vehicle Traders at Public Auctions of Motor Vehicles* CCS 500/003/10 (28 March 2013) at para 70 and *Infringement of the Section 34 Prohibition in Relation to the Supply of Ball and Roller Bearings* CCS 700/002/11 (27 May 2014) at para 96.

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(b) whether an undertaking has substantial market power amounting to a dominant position in a market under the section 47 prohibition;[12] and
(c) whether mergers that have resulted, or may be expected to result, in a *substantial lessening of competition in a market* under the section 54 prohibition.

02.011 Market definition can also help provide information that allows an investigation to be closed at an early stage. In cases where it is apparent that an activity is unlikely to have an appreciable adverse effect on competition or where undertakings or merged entities will not possess substantial market power, the CCS may be able to dismiss the case quickly without the need to undertake a formal investigation. In particular:

(a) For analysis under the section 34 prohibition, where an agreement involves undertakings, whose combined share of the relevant market is low,[13] the agreement is unlikely to raise competition concerns unless it involves price-fixing, market sharing, bid-rigging or output limitation activities (which are considered by the CCS to always have an appreciable adverse effect on competition regardless of the relevant market shares);
(b) For investigations relating to the section 47 prohibition, undertakings with low market shares will usually not possess market power individually;[14] hence, the investigation of an individual undertaking whose market share is low can be concluded at an early stage unless other overriding factors indicate otherwise that market dominance is present.
(c) For review under the section 54 prohibition, where mergers or anticipated mergers result in a combined market share that is below the thresholds as set out by the CCS,[15] the merger or anticipated merger is unlikely to raise competition concerns.

12 See *Abuse of a Dominant Position by SISTIC.com Pte Ltd* CCS/600/008/07 (4 June 2010) at para 5.1.3.
13 For the Competition Commission of Singapore's ("CCS's") guidance on when an agreement will generally have no appreciable adverse effect on competition, see the CCS Guidelines on the Section 34 Prohibition (June 2007) at para 2.19.
14 For CCS's view as to what level of market share is likely to indicate that an undertaking is dominant in a relevant market, see the CCS Guidelines on the Section 47 Prohibition (June 2007) at para 3.8.
15 For CCS's guidance on when competition concerns are unlikely to arise in a merger situation, see the CCS Guidelines on the Substantive Assessment of Mergers (June 2007) at para 5.15.

02.012 Finally, defining the market is important to the identification of the relevant turnover for the purpose of calculating financial penalties.[16]

02.013 In considering the relevant market definition, there are three important and related observations that should be raised at this point. First, it is important to recognise that market definition is not an end in itself. The CCS Guidelines on the Substantive Assessment of Mergers states that "[i]t is important to emphasize that market definition is not an end in itself. It is a framework for analysing the direct competitive pressures faced by the merged entity".[17] Similarly, the UK Office of Fair Trading Market Definition guidelines (which has since been adopted by UK Competition and Markets Authority)[18] states that:[19]

> Market definition is not an end in itself but a key step in identifying the competitive constraints acting on a supplier of a given product or service. Market definition provides a framework for competition analysis.

02.014 Secondly, it is not always easy to define the boundaries of markets in practice and transactions in the economy do not always fall neatly into a series of discrete and easily observable markets. It is not a simple mechanical process but requires the balancing of various types of evidence and the exercise of judgment. Consequently, it may not be possible to identify the precise boundaries of the particular market. It is important to appreciate that the borders of a market may be fuzzy and therefore it would be erroneous to take the approach that all the products "inside the market definition" are full substitutes for each other while the products "outside the market definition" exert no competitive force.[20] It is more important to focus on the aggregate effects of the full range of economic substitutes whether in the market definition or in other parts of the competition analysis, rather

16 See, *inter alia*, *Price-fixing in Modelling Services* CCS 500/002/09 (23 November 2011) at para 45; *Bid Rigging by Motor Vehicle Traders at Public Auctions of Motor Vehicles* CCS 500/003/10 (28 March 2013) at para 70 and *Infringement of the Section 34 Prohibition in Relation to the Supply of Ball and Roller Bearings* CCS 700/002/11 (27 May 2014) at para 96.
17 CCS Guidelines on the Substantive Assessment of Mergers (June 2007) at para 5.2.
18 The Competition and Markets Authority took over many of the functions of the UK Office of Fair Trading and the UK Competition Commission on 1 April 2014.
19 United Kingdom, Office of Fair Trading, *Market Definition: Understanding Competition Law* (OFT 403) (December 2004) at para 2.1.
20 John Vickers, "Competition Economics and Policy" speech on the occasion of the launch of the new social sciences building at Oxford University (3 October 2002) at p 12 <http://www.oft.gov.uk/shared_oft/speeches/spe0702.pdf> (accessed September 2014).

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than to be overly concerned with classifications. In this regard, to the extent that a particular market definition might encapsulate products that are imperfect substitutes, or might exclude some products that are substitutable to some extent, it is important that such matters are appropriately considered during the substantive competition assessments.

02.015 Thirdly, there may be occasions where it is not be necessary to define the market precisely. For example, precision in market definition may not be necessary should investigations reveal that competition concerns are unlikely to arise irrespective of the market definition. According to the CCS, it may not be necessary to define the market uniquely where there is strong evidence that the relevant market is one of a few plausible market definitions, and the assessment on the state of competition is shown to be largely unaffected whichever market definition is adopted.

02.016 This approach is reflected in the assessment by the CCS of the relevant market in several notified mergers that have been cleared. For instance, in the anticipated joint venture between Intel and STMicroelectronics NV,[21] while the CCS was of the view that it was more likely that separate product markets existed for NOR and NAND (which are two major architectures of flash memory in the market), it considered that a precise market definition was not necessary as the merger was unlikely to lead to competition concerns under any of the alternative product market definitions.[22] Similarly, in the merger of Labroy Marine Ltd and Dubai Drydocks World LLC,[23] the CCS examined whether ship repair and conversion should form a separate relevant product market from shipbuilding. The CCS further examined whether the market for shipbuilding could be further segmented according to the size and type of vessel. As it was of the view that competition concerns would not arise even if the narrower market definitions were adopted, the CCS decided that a precise market definition was not necessary in that case.[24] In the context of assessing the acquisition by Seagate Technology plc of certain assets

21 *Notification for Decision: Anticipated Joint Venture between Intel Corp and STMicroelectronics NV* CCS 400/004/07 (2 October 2007).

22 *Notification for Decision: Anticipated Joint Venture between Intel Corp and STMicroelectronics NV* CCS 400/004/07 (2 October 2007) at paras 16 and 18.

23 *Notification for Decision: Anticipated Merger of Labroy Marine Ltd and Dubai Drydocks World LLC* CCS 400/008/07 (6 December 2007).

24 *Notification for Decision: Anticipated Merger of Labroy Marine Ltd and Dubai Drydocks World LLC* CCS 400/008/07 (6 December 2007) at para 11.

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of the hard disk drive business of Samsung Electronics Co Ltd,[25] the CCS also stated that:[26]

> ... the exact scope of the relevant product market for HDDs can be left open for the purposes of this decision, as the Transaction does not raise competition concerns under any of the alternative product market definitions.

02.017 Distinct market definitions may also not be necessary when establishing infringement decisions against agreements and/or concerted practices that are deemed to appreciably prevent, restrict or distort competition, that is, price fixing, bid rigging, market sharing or output limitations. This approach was taken by the CCS in its notice of infringement against six pest control operators in Singapore for collusive tendering.[27] The CCS notes in its decision that a similar position was taken by the UK Competition Appeal Tribunal in *Argos Ltd v Office of Fair Trading*,[28] in which it was held:[29]

> In our judgment, it follows that in Chapter I cases involving price-fixing, it would be inappropriate for the OFT to be required to establish the relevant market with the same rigour as would be expected in a case involving the Chapter II prohibition. In a case such as the present, definition of the relevant product market is not intrinsic to the determination of liability, as it is in a Chapter II case. In our judgment, it would be disproportionate to require the OFT to devote resources to a detailed market analysis, where the only issue is the penalty ... In our view, it is sufficient for the OFT to show that it had a reasonable basis for identifying a certain product market for the purposes of Step 1 of its calculation.

02.018 Although the CCS did not see the need to define a distinct market to establish an infringement of the section 34 prohibition by the pest control operators, it noted that the exercise of defining the relevant product and geographical market provides the starting point for the purpose of assessing the appropriate level of penalties, and this approach is reflected within the CCS Guidelines on the Appropriate Amount of Penalty.[30]

25 *Notification for Decision: Proposed Acquisition by Seagate Technology plc of Certain Assets of the Hard Disk Drive Business of Samsung Electronics Co Ltd* CCS 400/003/11 (29 November 2011).

26 *Notification for Decision: Proposed Acquisition by Seagate Technology plc of Certain Assets of the Hard Disk Drive Business of Samsung Electronics Co Ltd* CCS 400/003/11 (29 November 2011) at para 25.

27 *Collusive Tendering (Bid-rigging) for Termite Treatment/Control Services by Certain Pest Control Operators in Singapore* CCS 600/008/06 (9 January 2008) at para 66.

28 [2005] CAT 13.

29 *Argos Ltd v Office of Fair Trading* [2005] CAT 13 at [178] and [179].

30 CCS Guidelines on the Appropriate Amount of Penalty (June 2007) at para 2.1.

B. BASIC PRINCIPLES OF MARKET DEFINITION

1. The hypothetical monopolist test

02.019 The hypothetical monopolist test ("HMT"),[31] which is a conceptual approach used by many competition authorities around the world, is similarly employed by the CCS to define the relevant markets. In essence, the HMT seeks to establish the relevant market by including in the market all the products (and their sellers) that constrain the exercise of market power by a hypothetical monopolist over the products and regions of interest.

02.020 The HMT begins by trying to identify all the products that buyers regard as reasonable substitutes for the focal product, that is, the product under investigation. Once these substitute products have been identified, it will allow all the undertakings that could potentially supply the focal product and substitutes also to be identified. These are the competitors that actually constrain the exercise of market power. The market definition process also includes a geographical dimension.

02.021 A relevant market is the smallest product group (and geographical area) over which a hypothetical monopolist controlling that product group (in that area) could profitably[32] sustain "supra competitive" prices, that is, prices that are at least a small but significant amount above competitive levels. Once identified, that product group (and area) usually comprises the relevant market for competition law purposes. If a hypothetical monopolist could not profitably sustain supra competitive prices over that product group, then it would be too narrow to be the relevant market. In other words, the HMT defines the relevant market as the smallest set of products (over the relevant area) that is worth monopolising.

31 This test is also known as the "SSNIP test" (Small but Significant and Non-transitory Increase in Price test) or the "5–10% test". The test has its origins in the US antitrust system.

32 There is no clear consensus across jurisdictions as to whether the hypothetical monopolist would find it merely profitable to implement the 5% or 10% increase in price or whether it would actually maximise his profits by doing so. The two approaches may lead to different outcomes in the market definition process. Simon Bishop & Mike Walker, *The Economics of EC Competition Law: Concepts, Applications and Measurement* (Sweet & Maxwell, 2nd Ed, 2002) at p 87.

2. Steps to applying the hypothetical monopolist test

02.022 As its name implies, the HMT is a thought experiment involving a hypothetical monopolist of a good or service (or a bundle of goods or services) within a particular area. The HMT questions whether the hypothetical monopolist could profitably impose a small but significant increase in price on the good or service or bundle in question. If the answer is no, then the good or service or bundle tested is too narrow in competition terms to be defined as the relevant market.

(a) *The general approach*

02.023 The HMT is an iterative process which begins with a narrow definition of the product and geographical market (which invariably comprises the focal product and the area in which the focal product is currently sold). The question of whether the hypothetical monopolist could profitably impose a small but significant non-transitory price increase is then asked. This would either be possible, or not profitable: that is, such a price increase would be defeated by a sufficiently large number of buyers switching away to close substitutes, or buying products from outside the geographical area.[33] If the price increase would not be profitable, then the next best substitute product is added to the hypothetical monopolist's portfolio and the question is asked again.

02.024 This process is repeated. Most products are likely to have several substitutes. However, the order with which products are added to the relevant market being considered under the HMT is important. Each time a product is being introduced to the relevant market, it is important to ensure that it is the "next closest substitute" and not just any substitute, that is, the product that exerts the greatest competitive pressure on the focal product or the area under investigation. This is to prevent distorting the outcome of the HMT. The market is iteratively widened until the point is reached where a small but significant non-transitory increase in price would be profitable for the hypothetical monopolist (as an insufficient number of buyers would switch to other products or switch to buying products from other areas so as to defeat the price increase). The test is now complete, and the relevant market comprises the smallest set of substitutes (and

33 In carrying out the test, the assumption is that the hypothetical monopolist is not subject to economic regulation that would affect its pricing behaviour and that the prices of products outside of the hypothetical monopolist's control are held constant at their competitive levels.

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TFEU"), formerly Article 81 of the Treaty Establishing the European Community. Courts and competition authorities in the UK are required, for the most part, to interpret the UK Competition Act consistently with the principles of the TFEU and the jurisprudence on Article 101 TFEU of the Court of Justice ("CoJ") and the General Court ("GC") (formerly known as the European Court of Justice and the Court of First Instance respectively); this jurisprudence dates back more than 50 years.[6] For this reason, the text below will refer not only to judgments of the Competition Appeal Board and to decisions of the CCS and its guidelines but also, where appropriate, to relevant jurisprudence of the CoJ and the GC and the courts of the UK, and to decisions of the European Commission and the UK competition authorities that may be of assistance in understanding how the Singapore legislation may be interpreted; references will also be made to passages in relevant textbooks on European Union ("EU") and UK law.[7] The jurisprudence of the EU and UK is not binding in Singapore (nor is that of the US); nevertheless, given the extensive experience of competition law in those three jurisdictions dating back, in the case of the US, to the Sherman Antitrust Act[8] ("Sherman Act") of 1890 and, in the case of the EU, to the Treaty Establishing the European Economic Community of 1957, it is natural that the large body of case law that has accumulated over many years will, at least, have an influence in Singapore. In *SISTIC.com Pte Ltd v Competition Commission of Singapore*[9] the Competition Appeal Board upheld a decision of the CCS that SISTIC.com Pte Ltd had abused a dominant position contrary to section 47 by entering into various exclusive agreements in relation to the provision of ticketing services in Singapore, but reduced the penalty imposed by the CCS from S$989,000 to S$769,000.[10] In the part of its judgment dealing with abuse, various European precedents were cited to the Competition Appeal Board: it stated that:[11]

> The Board respectfully agrees with the CCS that the decisions of the EU/UK Courts on competition law are highly persuasive on the legal test for abuse of dominance cases under section 47 of the Act. The said section 47 is modelled on section 18 of the UK Competition Act 1998 which in turn is modelled on Article 102 of the Treaty on the Functioning of the European Union (formerly, Article 82 of the EC Treaty). Having regard to the decisions of the EU/UK courts cited by the CCS, the Board respectfully adopts the test laid down by these courts [on exclusivity agreements].

03.004 There is no reason to suppose that the Appeal Board would take a different approach in relation to section 34 of the Competition Act[12] compared to its approach in respect of section 47. Frequent citations of EU and UK precedents are and will be found in the decisions of the CCS and judgments of the Competition Appeal Board respectively.

03.005 A final important introductory point to make about the section 34 prohibition in the Competition Act is that it applies only to horizontal agreements, that is to say agreements between undertakings that are actual or potential competitors at the same level of trade in the market. Paragraph 8 of the Third Schedule to the Act[13] provides that the prohibition does not apply to vertical agreements, that is to say agreements between undertakings operating at different levels of trade. This is discussed in detail below in the context of exclusions from the section 34 prohibition.[14] Vertical agreements may, however, violate section 47 of the Act when entered into by a firm in a dominant position.

B. PLAN OF THIS CHAPTER

03.006 The plan of this chapter is as follows. The chapter will: examine the section 34 prohibition in detail, considering what is meant by key expressions in it such as "undertakings", "agreements", "concerted practices" and the concept of restricting, preventing or distorting competition by object or effect;[15] explain the many exclusions that the Competition Act contains from the application of the section 34 prohibition;[16] describe the process of so-called "block exemption" from the prohibition;[17] discuss the process whereby undertakings may request the CCS to examine an agreement and to provide guidance

6 For a discussion on this point, see Richard Whish & David Bailey *Competition Law* (Oxford University Press, 7th Ed, 2012) ch 9 at pp 369–374.

7 In particular reference will be made to Richard Whish & David Bailey, *Competition Law* (Oxford University Press, 7th Ed, 2012); *Bellamy & Child: European Union Law of Competition* (Vivien Rose & David Bailey eds) (Oxford University Press, 7th Ed, 2013); and *Faull & Nikpay: The EU Law of Competition* (Jonathan Faull & Ali Nikpay eds) (US: Oxford University Press, 3rd Ed, 2014).

8 15 USC (US) §§ 1–7 (1890).

9 Appeal No 1 of 2010.

10 *SISTIC.com Pte Ltd v Competition Commission of Singapore* (Appeal No 1 of 2010).

11 *SISTIC.com Pte Ltd v Competition Commission of Singapore* (Appeal No 1 of 2010) at [289].

12 Cap 50B, 2006 Rev Ed.

13 Cap 50B, 2006 Rev Ed.

14 See paras 03.123–03.152 below.

15 See paras 03.007–03.122 below.

16 See paras 03.123–03.152 below.

17 See paras 03.153–03.156 below.

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and/or a decision on the application of the Act to it;[18] and look at how the prohibition has been applied in practice to date.[19]

C. PROHIBITION OF ANTI-COMPETITIVE AGREEMENTS

03.007 Section 34 of the Competition Act[20] prohibits certain anti-competitive agreements: this is referred to as the "section 34 prohibition".[21] The section 34 prohibition came into force on 1 January 2006;[22] the CCS will not impose a penalty in relation to any agreement entered into before 31 July 2005 for a transitional period of six months from 1 January 2006 up to 30 June 2006 provided that the anti-competitive agreement ended prior to 30 June 2006. Where the infringement continued after 30 June 2006 penalties may be calculated and applied from 1 January 2006.[23] Section 35 provides for certain exclusions from the prohibition in section 34. Sections 36 to 41 contain provisions for the creation of so-called "block exemptions" from the section 34 prohibition. The provisions on exclusions, block exemptions and notification for guidance and/or a decision will be explained below.[24] Chapter 6 will consider the provisions in the Act on investigation, enforcement and private actions for damages. The CCS has explained, in its decision in *Collusive Tendering (Bid-rigging) for Termite Treatment/Control Services by Certain Pest Control Operators in Singapore*[25] ("*Pest Control Services*"), that it bears the burden of proving an infringement of the section 34 prohibition, the standard of proof being the civil standard, that is to say the balance of probabilities; however, given the seriousness of the consequences of being found to have infringed the prohibition, the quality and weight of the evidence must be "sufficiently strong" before the CCS can establish an infringement.[26]

18 See paras 03.157–03.164 below.
19 See paras 03.165–03.204 below.
20 Cap 50B, 2006 Rev Ed.
21 Competition Act (Cap 50B, 2006 Rev Ed) s 2(1).
22 Competition Act (Cap 50B, 2006 Rev Ed) s 34(5).
23 See the Competition (Transitional Provisions for Section 34 Prohibition) Regulations (Cap 50B, Rg 4, 2006 Rev Ed), and the announcement by the CCS on transitional arrangements (CCS, "Competition Commission Consults on the Transitional Arrangements and the Appropriate Amount of Penalty" (17 August 2005) at <https://www.ccs.gov.sg>).
24 See paras 03.123–03.152 (exclusions), paras 03.153–03.156 (block exemptions) and paras 03.157–03.164 (guidance and decisions) below.
25 CCS 600/008/06 (9 January 2008).
26 *Collusive Tendering (Bid-rigging) for Termite Treatment/Control Services by Certain Pest Control Operators in Singapore* CCS 600/008/06 (9 January
(*cont'd on the next page*)

03.008 The application of the section 34 prohibition in practice will be considered in the final section of this chapter.

03.009 The text of section 34 of the Competition Act[27] reads as follows:

Agreements, *etc*, preventing, restricting or distorting competition

34.—(1) Subject to section 35, 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 within Singapore are prohibited unless they are exempt in accordance with the provisions of this Part.

(2) For the purposes of subsection (1), agreements, decisions or concerted practices may, in particular, have the object or effect of preventing, restricting or distorting competition within Singapore if they—

(*a*) directly or indirectly fix purchase or selling prices or any other trading conditions;
(*b*) limit or control production, markets, technical development or investment;
(*c*) share markets or sources of supply;
(*d*) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
(*e*) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

(3) Any provision of any agreement or any decision which is prohibited by subsection (1) shall be void on or after 1st January 2006 to the extent that it infringes that subsection.

(4) Unless the context otherwise requires, a provision of this Act which is expressed to apply to, or in relation to, an agreement shall be read as applying, with the necessary modifications, equally to, or in relation to, a decision by an association of undertakings or a concerted practice.

(5) Subsection (1) shall apply to agreements, decisions and concerted practices implemented before, on or after 1st January 2006.

03.010 A number of features of section 34 require explanation.

2008) at paras 63–64; see similarly *Price Fixing in Bus Services from Singapore to Malaysia and Southern Thailand* CCS 500/003/08 (3 November 2009) at paras 79–81 and several subsequent decisions.
27 Cap 50B, 2006 Rev Ed.

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1. Undertakings[28]

03.011 The section 34 prohibition applies only to agreements and concerted practices *between undertakings* and to decisions by *associations of undertakings*. The term "undertaking" is therefore of crucial significance for determining which legal entities fall within the jurisdictional scope of the prohibition. For example an agreement between one legal entity that is an undertaking and another that is not would not be caught by section 34, since the agreement would not be *between* undertakings; similarly, a decision of an association consisting of legal entities that are not undertakings would not be covered. It should be added that even where an agreement is entered into between undertakings or where a decision is made by an association of undertakings, other provisions of the Competition Act provide that the section 34 prohibition would not apply to the activities of the Government or any statutory body, to agreements concerning goods or services that are subject to competition provisions administered by a regulatory authority in Singapore other than the CCS, nor to various activities specified in the Third Schedule to the Act.[29] The cumulative effect of these provisions is to exclude a substantial amount of activity within Singapore from the section 34 (and the section 47) prohibition. A separate point is that legal entities within the same corporate group will sometimes be treated as a single undertaking with various legal consequences, including that an agreement between them would not be subject to section 34: this is discussed below.[30]

03.012 In *Infringement of the Section 34 Prohibition in Relation to the Price of Ferry Tickets between Singapore and Batam*[31] ("*Price of Ferry Tickets between Singapore and Batam*") the CCS concluded that an act of an employee, even if acting outside his or her authority, remains that of an undertaking: the fact that the act was unauthorised or *ultra vires* does not provide the undertaking with a defence;[32] in reaching this conclusion the CCS relied on EU and UK case law, and in particular the English Court of Appeal's judgment in *Safeway Stores Ltd v Twigger*[33] ("*Safeway Stores*"). *Safeway Stores* was also cited with approval by the Competition Appeal Board in one of the appeals in *Price-fixing in Modelling Services*,[34] *Bees Work Casting Pte Ltd v Competition Commission of Singapore*.[35]

28 See Richard Whish & David Bailey, *Competition Law* (Oxford University Press, 7th Ed, 2012) at pp 83–99; *Bellamy & Child: European Union Law of Competition* (Vivien Rose & David Bailey eds) (Oxford University Press, 7th Ed, 2013) at paras 2.003–2.031; and *Faull & Nikpay: The EU Law of Competition* (Jonathan Faull & Ali Nikpay eds) (US: Oxford University Press, 3rd Ed, 2014) at paras 3.23–3.73.

29 See paras 03.123–03.151 below.

30 See paras 03.028–03.036 below.

31 CCS 500/006/09 (18 July 2012).

32 *Infringement of the Section 34 Prohibition in Relation to the Price of Ferry Tickets between Singapore and Batam* CCS 500/006/09 (18 July 2012) at paras 38–43.

(a) Basic meaning of "undertaking"

03.013 Section 2 of the Competition Act[36] provides that:

> 'undertaking' means 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[[37]] or services.[[38]]

03.014 Paragraphs 2.5 to 2.9 of the Section 34 Guidelines indicate how the CCS will interpret the term undertaking. Paragraph 2.5 provides examples of the types of legal entity that might qualify as undertakings including, for example, individuals operating as sole proprietors, companies, firms and co-operatives: consistently with the position under EU and UK law the CCS says that non-profit-making organisations may be undertakings, and that the legal and ownership status and the way in which an entity is financed are irrelevant factors. The CoJ in *Höfner and Elser v Macrotron GmbH*[39] held that:[40]

> ... the concept of an undertaking encompasses every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed.

(b) Need for "functional approach" to undertaking term

03.015 Paragraph 2.6 of the Section 34 Guidelines states that the key consideration is whether an entity is capable of engaging in, or is engaged in, commercial or economic activity. It then makes an important point: that an entity may engage in commercial or economic activities when performing some of its functions but not when performing others. This is clearly based on well-established EU

33 [2010] EWCA Civ 1472.

34 CCS 500/002/09 (23 November 2011).

35 Appeal No 2 of 2012 at [151] and [154].

36 Cap 50B, 2006 Rev Ed.

37 Note that s 2 of the Competition Act (Cap 50B, 2006 Rev Ed) provides a definition of "goods" to include buildings and other structures; ships, aircraft and hovercraft; gas and electricity; and choses in action.

38 Note that s 2 of the Competition Act (Cap 50B, 2006 Rev Ed) provides a definition of service to mean a service of any description whether industrial, trade, professional or otherwise.

39 Case C-41/90; [1991] ECR I-1979.

40 *Höfner and Elser v Macrotron GmbH* Case C-41/90; [1991] ECR I-1979 at [21].

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CHAPTER 4

Abuse of a Dominant Position

By Richard Whish

A. INTRODUCTION

04.001 The provisions of the Competition Act[1] dealing with the abuse of a dominant position are contained in Division 3 of Part III, in sections 47 to 53. The Competition Commission of Singapore ("CCS") has published the following guidelines of interest to the application of these provisions:[2]

(a) Guidelines on the Major Provisions;
(b) Guidelines on the Section 47 Prohibition ("Section 47 Guidelines");
(c) Guidelines on the Treatment of Intellectual Property Rights; and
(d) Guidelines on Market Definition.

04.002 The CCS has also published a less technical document for consumers and the business community as opposed to the legal profession, *A Practical Guide to the Competition Act, Promoting Healthy Competitive Markets – A Guide to the Competition Act.* Where appropriate, the text that follows will refer to relevant paragraphs in the guidelines of the CCS, although it should be understood that they are not a substitute for the Act itself or for any relevant regulations and orders made thereunder.[3]

04.003 As in the case of the section 34 prohibition, the section 47 prohibition is closely modelled upon the UK Competition Act 1998,[4] and in particular the so-called "Chapter II prohibition", which in turn

1 Cap 50B, 2006 Rev Ed.
2 Available at <https://www.ccs.gov.sg>.
3 See s 61(4) of the Competition Act (Cap 50B, 2006 Rev Ed) and the Competition Commission of Singapore ("CCS") Guidelines on the Section 47 Prohibition (June 2007) at para 1.4.
4 c 41.

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is based on Article 102 of the Treaty on the Functioning of the European Union[5] ("Article 102 TFEU"), formerly Article 82 of the Treaty Establishing the European Community. Reference will be made in this chapter to relevant jurisprudence of the Court of Justice ("CoJ") and the General Court ("GC") (formerly known as the European Court of Justice and the Court of First Instance respectively), and to the decisional practice of the European Commission; where appropriate judgments and decisions of the UK competition authorities will also be referred to, along with relevant textbooks on European Union ("EU") and UK law.[6] As noted in chapter 3, in *SISTIC.com Pte Ltd v Competition Commission of Singapore*[7] ("*SISTIC v CCS*") the Competition Appeal Board agreed with the CCS that the decisions of the EU/UK Courts on competition law are highly persuasive on the legal test for abuse of dominance cases under section 47 of the Competition Act.[8] Given that section 47 is modelled on section 18 of the UK Competition Act 1998, which in turn is modelled on Article 102 TFEU, the Board said that it was content to adopt the test laid down by those courts on exclusivity agreements, which were in issue in that case.

04.004 Readers should also be aware that, in December 2008, the European Commission published "Guidance on the Commission's Enforcement Priorities in Applying Article [102 of the TFEU] to Abusive Exclusionary Conduct by Dominant Undertakings"[9] ("Guidance on Article 102 Enforcement Priorities") in which it explained how it intends to select cases for investigation under Article 102: in particular, the Commission's Guidance indicates that it will proceed against the unilateral behaviour of a dominant firm only where it appears likely that the behaviour in question would be likely to have an adverse effect on consumers, for example by leading to higher prices. The Guidance, which does not purport to restate the law of Article 102 TFEU but to explain the Commission's enforcement priorities, is an attempt to respond to the criticism that Article 102 has, in the past, been applied in too formalistic or

5 Signed 25 March 1957; effective 1 January 1958; amended 1 December 2009.

6 In particular, reference will be made to Richard Whish & David Bailey, *Competition Law* (Oxford University Press, 7th Ed, 2012); *Bellamy & Child: European Union Law of Competition* (Vivien Rose & David Bailey eds) (Oxford University Press, 7th Ed, 2013); and *Faull & Nikpay: The EU Law of Competition* (Jonathan Faull & Ali Nikpay eds) (Oxford University Press, 3rd Ed, 2014).

7 Appeal No 1 of 2010.

8 Cap 50B, 2006 Rev Ed. *SISTIC.com Pte Ltd v Competition Commission of Singapore* (Appeal No 1 of 2010) at [287].

9 [2009] OJ C45/02.

legalistic a manner, with insufficient consideration being given to the likely effects of the conduct in question. A shorthand way of describing the Guidance is that it indicates that the Commission will in the future take a "more economic approach" to the enforcement of Article 102. However, it is important to understand that the jurisprudence of the CoJ and GC is unaffected by the Guidance. In *SISTIC v CCS* the Competition Appeal Board was invited by SISTIC.com Pte Ltd ("SISTIC") to adopt the "modern" approach to the enforcement of Article 102 suggested in the Guidance, but the Board determined that it was content to follow the established case-law of the EU and UK courts.[10]

B. PLAN OF THIS CHAPTER

04.005 The plan of this chapter is as follows. After setting out the text of section 47 of the Competition Act;[11] it will examine the meaning of the expression "dominant position" in section 47 of the Competition Act;[12] explain what types of behaviour may be considered to amount to an abuse of a dominant position;[13] set out the various exclusions that the Act contains from the section 47 prohibition;[14] look at the provisions on notification to the CCS for guidance and/or a decision;[15] and briefly consider the application of the section 47 prohibition in practice.[16]

04.006 This chapter does not discuss the term "undertaking" in section 47 of the Act, since, as paragraph 2.6 of the Section 47 Guidelines explains, it has the same meaning as in section 34: this was covered in chapter 3.[17]

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10 See para 04.035 below.

11 See para 04.007 below.

12 See paras 04.008–04.031 below.

13 See paras 04.032–04.066 below.

14 See paras 04.067–04.068 below.

15 See para 04.069 below.

16 See paras 04.070–04.072 below.

17 See ch 3, paras 03.011–03.036.

C. TEXT OF SECTION 47 OF THE COMPETITION ACT

04.007 The text of section 47 of the Competition Act[18] reads as follows:

> **Abuse of dominant position**
>
> **47.** —(1) Subject to section 48, any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in any market in Singapore is prohibited.
>
> (2) For the purposes of subsection (1), conduct may, in particular, constitute such an abuse if it consists in—
>
> (*a*) predatory behaviour towards competitors;
>
> (*b*) limiting production, markets or technical development to the prejudice of consumers;
>
> (*c*) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
>
> (*d*) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.
>
> (3) In this section, 'dominant position' means a dominant position within Singapore or elsewhere.

D. MEANING OF "DOMINANT POSITION"[19]

04.008 The section 47 prohibition applies only where one undertaking has a dominant position or two or more undertakings are collectively dominant.[20] When deciding whether there is a dominant or a collective dominant position, it is necessary first to determine the scope of the relevant product and geographic markets. The process of market definition was explained in chapter 2 of this book, including the "hypothetical monopolist test";[21] that chapter also considered certain endemic problems when defining relevant markets including the so-called "cellophane fallacy", whereby the size of the market may be assessed incorrectly – to the advantage of a dominant firm – if the hypothetical monopolist test is applied to a non-competitive, rather

18 Cap 50B, 2006 Rev Ed.

19 See Richard Whish & David Bailey, *Competition Law* (Oxford University Press, 7th Ed, 2012) ch 5 at pp 179–189 and ch 9 at pp 364–367; *Bellamy & Child: European Union Law of Competition* (Vivien Rose & David Bailey eds) (Oxford University Press, 7th Ed, 2013) at paras 10.016–10.052; and *Faull & Nikpay: The EU Law of Competition* (Jonathan Faull & Ali Nikpay eds) (Oxford University Press, 3rd Ed, 2014) at paras 4.122–4.251.

20 For a brief discussion of collective dominance, see para 04.031 below.

21 See ch 2, paras 02.019–02.021.

than to a competitive, market price.[22] This section of this chapter will consider how the CCS will assess whether an undertaking or undertakings have a dominant position in relation to any relevant product or geographic market that it may have identified. Important guidance is provided on this by CCS's Section 47 Guidelines.[23]

1. Dominance and substantial market power

04.009 The expression "dominant position" is not found in textbooks on economics; nor is it defined in Singapore's Competition Act. In the EU, the CoJ laid down a test of what is meant by a dominant position in *United Brands v Commission*:[24]

> The dominant position thus referred to by Article [82] relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customer and ultimately of its consumers.

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04.010 In CCS's Section 47 Guidelines, the CCS states that an undertaking will not be deemed to be dominant unless it has "substantial market power", a term that is known to economics and which competition lawyers and economists are familiar with. The Guidelines explain market power as follows:[25]

22 See ch 2, paras 02.114–02.125.

23 Readers may also find useful the UK Office of Fair Trading's guidelines on the assessment of market power: United Kingdom, Office of Fair Trading, *Assessment of Market Power* (OFT 415) (December 2004).

24 Case 27/76; [1978] ECR 207 at [65].

25 CCS Guidelines on the Section 47 Prohibition (June 2007) at para 3.3; this explanation of market power is similar to that of the European Commission in its "Guidance on the Commission's Enforcement Priorities in Applying Article [102 TFEU] to Abusive Exclusionary Conduct by Dominant Undertakings" [2009] OJ C45/02, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:045:0007:0020:EN:PDF> (accessed 17 November 2014) at para 11:

> The Commission considers that an undertaking which is capable of profitably increasing prices above the competitive level for a significant period of time does not face sufficiently effective competitive constraints and can thus generally be regarded as dominant. In this Communication, the expression 'increase prices' includes the power to maintain prices above the competitive level and is used as shorthand for the various ways in which the parameters of competition – such as prices, output, innovation, the variety or quality of goods or services – can be influenced to the advantage of the dominant undertaking and to the detriment of consumers.

> Market power arises where an undertaking does not face sufficiently strong competitive pressure and can be thought of as the ability to profitably sustain prices above competitive levels or to restrict output or quality below competitive levels. An undertaking with market power might also have the ability and incentive to harm the process of competition in other ways, for example by weakening existing competition, raising entry barriers or slowing innovation. Both buyers and sellers can have market power.

04.011 In *SISTIC v CCS* the Competition Appeal Board upheld CCS's finding that SISTIC had abused its dominant position in the ticketing services market in Singapore by entering into various exclusivity agreements in relation to live entertainment events.[26] In its judgment the Board agreed with the finding of the CCS that SISTIC was able to sustain its prices above the competitive level in the relevant market.[27]

2. Assessing dominance

04.012 When assessing whether an undertaking has a dominant position it is necessary to consider the extent to which it is constrained from exercising any market power it may have, that is to say from profitably sustaining prices above competitive levels or restricting output below competitive levels. As paragraph 3.4 of the Section 47 Guidelines explains, there are three main constraints on a firm's ability to exercise market power:

(a) existing competitors (firms within the relevant market);
(b) potential competitors (firms that are able to enter the relevant market); and
(c) other factors, and in particular buyer power.

(a) Existing competitors

04.013 Paragraphs 3.5 to 3.10 and Annex A of CCS's Section 47 Guidelines discuss existing competitors, that is to say firms that already operate within the relevant product and geographical markets. Existing competitors are the most obvious competitive constraint, and the easiest to identify. The market shares of firms present on the market are helpful in determining the intensity of any competitive constraints, although they are not determinative since they provide no insights into the threat of potential competitors or of any buyer power. Paragraph 3.5 of the Section 47 Guidelines states that there

26 Appeal No 1 of 2010.
27 *SISTIC.com Pte Ltd v Competition Commission of Singapore* (Appeal No 1 of 2010) at [222]–[230].

are no market share thresholds for defining whether an undertaking has a dominant position:[28] an undertaking's market share is an important factor in assessing dominance, but it does not, on its own, determine whether it is dominant. However, the paragraph goes on to say that an undertaking is more likely to be dominant if its competitors have relatively weak positions and it has enjoyed a persistently high market share over time.

04.014 Paragraph 3.6 of the Section 47 Guidelines explains that it is important, when analysing market share figures, to look at them over a period of time: simply taking a "snapshot" of market shares at a single point in time might not reveal the dynamic nature of the market. Where market shares are volatile, this might indicate that the firms in the market are constantly innovating to get ahead of each other. The paragraph goes on to explain that where undertakings with low market shares have subsequently attained large ones, this would indicate that barriers to entry and expansion are low, particularly if the growth is on the part of recent entrants to the market.

04.015 Paragraph 3.8 of the Section 47 Guidelines states that, as a starting point, the CCS will consider a market share above 60% as "likely" to indicate that an undertaking is dominant: the use of the word likely indicates that it remains possible for an undertaking with more than 60% of the market to argue that, in fact, it is not dominant (for example because barriers to expansion and entry are low or because there is sufficient buyer power to prevent the exercise by a seller of market power). The same paragraph concludes by saying that the possibility exists of establishing that an undertaking is dominant where its market share is less than 60%, depending on whether there is strong evidence from other factors to this effect. Paragraph 3.9 makes clear that, although small and medium-sized enterprises are unlikely to be able to have an appreciable effect on competition in Singapore, the CCS reserves the right to investigate possible abuses of dominance on their part if this appears to be warranted: in other words there is no guaranteed "safe harbour" for SMEs.

04.016 In *SISTIC v CCS*, the Competition Appeal Board discussed market share figures. The Board noted that a large market share is an important factor in assessing dominance, and that SISTIC's market share was large (the actual figure is redacted from the public version of the judgment for reasons of confidentiality); after citing the CoJ's

28 Some competition laws contain specific thresholds for dominance and/or presumed dominance: see, for example, s 7(a) of the South African Competition Act 1998 (Act No 89 of 1998), which says that a firm is dominant if it has at least 45% of the market.

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judgment in *AstraZeneca v Commission*,[29] in which earlier case law was cited to the effect that large market shares are a clear indication of dominance, the Board agreed with the proposition of the CCS that SISTIC's persistently high market share over time was indicative of its dominance.[30]

04.017 Paragraphs 9.5 to 9.7 of Annex A of the Section 47 Guidelines discuss the measurement of market shares. Paragraph 9.5 considers the types of evidence that may be of relevance to the calculation of market shares, including:

(a) information provided by undertakings themselves;
(b) information provided by trade associations, customers and suppliers; and
(c) relevant market research reports.

04.018 Paragraph 9.6 says that evidence of market shares may be based on both the value and the volume of sales; data on value will often be more informative, especially where goods are differentiated. Paragraph 9.7 explains that, when considering market shares on a value basis, market share is valued at the price charged to an undertaking's direct customers. The same paragraph also discusses other issues, such as the fluctuation of exchange rates, the treatment of imports and the relevance of "internal production" or "captive sales" to the calculation of market shares.

(b) Potential competitors

04.019 Paragraphs 3.11 to 3.13 and Annex B of the Section 47 Guidelines discuss potential competitors. As paragraph 3.11 explains, discussion of potential competition requires an analysis of entry barriers: the lower they are, the less likely it is that an undertaking already on the market will be able to exercise market power and to sustain prices profitably above competitive levels. Paragraph 10.37 of Annex B adds that, when assessing whether an undertaking has a dominant position, barriers to *expansion*, on the part of firms already in the market, should also be taken into account, as well as barriers to *entry* by firms not already in the market.

04.020 Paragraph 3.12 of the Section 47 Guidelines lists various factors which may contribute to barriers to entry, and Annex B provides some additional discussion of each of them:

29 Case C-457/10 P.
30 *SISTIC.com Pte Ltd v Competition Commission of Singapore* (Appeal No 1 of 2010) at [214]–[221].

(a) Sunk costs, that is to say costs which must be incurred to compete in a market, but which cannot be recovered when exiting the market. Where sunk costs are high, they may confer a strategic advantage upon an undertaking already in the market, if they act as a disincentive to anyone else considering whether to enter the market. 04.021

(b) Limited access to key inputs and distribution outlets, to which an undertaking already in the market has privileged access. An example given in paragraph 10.13 of Annex B of the Section 47 Guidelines is access to a so-called "essential facility", that is to say a facility access to which: 04.022

> … is indispensable in order to compete in a related market and where duplication is impossible or extremely difficult owing to physical, geographic, economic or legal constraints (or is undesirable for reasons of public policy).

(c) Regulation, for example, where a licensing regime limits the number of undertakings that are allowed to operate on a particular market. 04.023

(d) Large economies of scale that make it difficult for a new entrant to enter the market, for example because of the extensive sunk costs that might have to be incurred to be able to enter on a sufficiently large scale. 04.024

(e) Network effects. As paragraph 10.21 of Annex B of the Section 47 Guidelines explains, a network effect arises where the value to users of a network increases as more users join it. An obvious example arises in the case of a telecommunications network: when a new user subscribes to a network, this benefits existing users since an additional person can be contacted on that network. The more users that join the network, the greater the advantage to existing users. Where an undertaking has already established a large and successful network, a new entrant might find it extremely difficult to establish its own rival network. Paragraph 10.22 adds that where the minimum viable scale of a network is large in relation to the size of the market, this may make entry particularly hard, as in the case of economies of scale discussed above. 04.025

(f) Exclusionary behaviour by incumbent firms. Annex B of the Section 47 Guidelines gives examples of such behaviour, namely predatory responses to entry (paragraphs 10.24 and 10.25), vertical restraints such as exclusive purchasing agreements (paragraphs 10.26 and 10.27) and other practices such as (paragraphs 10.26 and 10.27) and other practices such as discounting designed to foreclose markets, margin squeezes and refusals to supply (paragraph 10.28). In *SISTIC v CCS*, the Competition Appeal Board agreed with the CCS that the 04.026

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exclusivity agreements that SISTIC had entered into were themselves barriers to entry to the relevant market.[31]

04.027 Paragraphs 10.29 to 10.36 of Annex B of the Section 47 Guidelines discuss the assessment of barriers to entry and expansion and the types of evidence that may be used to determine how significant they may be. Paragraph 10.30 stresses the desirability of fully documented evidence in support of claims that barriers to entry are low and that there is a real possibility of entry into the market: an example would be evidence that there have been recent, successful entrants into the market. Paragraph 10.31 notes that it may be easier for a firm or firms to enter from a neighbouring market than to do so "from scratch". Paragraph 10.33 explains that entry will usually be more likely where a market is growing or has the potential to grow than where it is static or in decline.

(c) Other factors

04.028 Paragraphs 3.14 and 3.15 of CCS's Section 47 Guidelines consider other factors that might constrain the exercise of market power. Paragraph 3.14 discusses the significance of buyer power. For there to be buyer power, the buyer must have a choice between different sellers: if there are no alternative suppliers available, even a monopsonist (the sole purchaser of goods or services) would not be able to exercise buyer power. The paragraph explains that a buyer may be particularly well placed to exercise buyer power where it:

(a) is well informed about alternative sources of supply and could readily switch substantial purchases from one seller to another while continuing to meet its needs;
(b) could commence production of the product in question itself, or sponsor new entry by another seller relatively quickly, for example by entering into a long-term supply agreement;
(c) is an important outlet for the seller, so that the seller would be prepared to offer the buyer better terms in order to retain its business; and
(d) can intensify competition among sellers by establishing a procurement auction or purchasing through a competitive tender.

04.029 In *SISTIC v CCS*, the Competition Appeal Board agreed with the finding of the CCS that event promoters and ticket buyers in Singapore did not have countervailing buyer power against SISTIC; in

31 *SISTIC.com Pte Ltd v Competition Commission of Singapore* (Appeal No 1 of 2010) at [245]–[247].

particular there was hardly any evidence to suggest that the threat of switching to alternative service providers by the key venue operators was realistic, and they had weak incentives to do so anyway.[32]

04.030 Paragraph 3.15 notes that in some markets there may be economic regulation, for example of an undertaking's prices, and that this is a factor that should be taken into account when determining whether that undertaking has market power. However, the paragraph notes that the fact that a sector is regulated does not, in itself, mean that undertakings operating in that sector do not have market power.

3. Collective dominance

04.031 Paragraphs 3.16 and 3.17 of CCS's Section 47 Guidelines discuss the concept of collective dominance. Paragraph 3.16 explains that two or more undertakings may be collectively dominant where they are linked in such a way that they adopt a common policy on the relevant market. An example given is where they adopt the same pricing policy, without entering into an agreement of the kind that would infringe section 34 of the Competition Act[33] to do so. Parallel behaviour of this kind is often referred to as tacit co-ordination. Paragraph 3.17 explains that tacit co-ordination is more likely to occur when:

(a) there is transparency in the market, with the result that each undertaking is able to monitor the compliance of the other undertakings with the common policy;
(b) deviations from the common policy are easy to detect and punish with the result that undertakings have an incentive to maintain their co-ordinated behaviour; and
(c) the benefits of the common policy are not likely to be undermined by competitive constraints from third parties or powerful buyers.

32 *SISTIC.com Pte Ltd v Competition Commission of Singapore* (Appeal No 1 of 2010) at [231]–[244].
33 Cap 50B, 2006 Rev Ed.

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