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CCS GUIDELINES ON THE APPROPRIATE AMOUNT OF PENALTY

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THE APPROPRIATE AMOUNT OF PENALTY

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1 INTRODUCTION

1.1 The Competition Act (Chapter 50B) (“the Act”) gives the Competition Commission of Singapore (“CCS”) the power to issue directions¹ and impose financial penalties² on undertakings for infringing the section 34³ prohibition, ~~or the section 47⁴ prohibition~~ and the section 54 prohibition⁵ under the Act (~~“section 34 or 47 prohibition” respectively~~).

1.2 ~~The~~ CCS’s powers to issue directions and impose financial penalties are described in the *CCS Guidelines on Enforcement*.

1.3 These guidelines provide general ~~advice~~ guidance and information about the basis on which ~~the~~ CCS will calculate financial penalties for infringements of the section 34, ~~or section 47~~ and section 54 prohibitions.

~~1.3~~1.4 The *CCS Guidelines on Merger Procedures 2012* has set out some key considerations in the calibration of penalties for the infringement of the section 54 prohibition. These considerations may be applied in accordance with the six-step process set out in paragraphs 2.1 to 2.22 below.

Statutory ~~B~~background

~~1.4~~1.5 The Act provides that ~~the~~ CCS may impose a financial penalty only if it is satisfied that an undertaking, which has committed an infringement of the section 34 prohibition, ~~or section 47 prohibition~~ or section 54 prohibition has done so intentionally or negligently.^{6,5}

~~1.5~~1.6 The financial penalty may not exceed ~~ten (10) per cent~~ 10% of such turnover of the business of the undertaking in Singapore for each year of infringement, up to a maximum of three (3) years.^{7,6}

Policy ~~O~~objectives

~~1.6~~ 1.7 In imposing any financial penalty, ~~the~~ CCS has the following twin objectives:

- to impose penalties on infringing undertakings which reflect the seriousness of the infringement, and
- to ensure that the threat of penalties will deter both the infringing undertakings and

¹ Section 69(1) of the Act.

² Section 69(2)(d) of the Act.

³ Agreements between undertakings, decisions by associations of undertakings or concerted practices which have as their object or effect the prevention, restriction or distortion of competition. Further information can be found in the *CCS Guidelines on the Section 34 Prohibition*.

⁴ Conduct on the part of one or more undertakings which amounts to the abuse of a dominant position. Further information can be found in the *CCS Guidelines on the Section 47 Prohibition*.

⁵ Mergers that have resulted or may be expected to result in a substantial lessening of competition within any market in Singapore for goods or services are prohibited. Further information can be found in the *CCS Guidelines on Merger Procedures and the CCS Guidelines on Substantive Assessment of Mergers*.

⁶ Section 69(3) of the Act.

⁷ Section 69(4) of the Act.

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other undertakings from engaging in anti-competitive practices.

~~1.71.8~~ The imposition of a financial penalty is discretionary. ~~The CCS will, where appropriate, impose financial penalties which are severe, particularly, in respect of cartel activities, for example, in price fixing, market sharing, bid rigging (collusive tendering) or, limiting or controlling production or investment arrangements, and serious abuses of a dominance as they are among the most serious infringements of competition law. This a nd~~ is aimed at deterring not only the infringing undertaking but also other like-minded undertakings which might be considering activities contrary to the section 34, ~~prohibition or~~ section 47 or section 54 prohibitions.⁸

~~1.81.9~~ The assessment of an appropriate penalty to be imposed for all types of infringement will depend on the facts of each case.

~~1.91.10~~ These guidelines are not a substitute for the Act, the regulations and orders. They may be revised should the need arise. The examples in these guidelines are for illustration. They are not exhaustive, and do not set a limit on the investigation and enforcement activities of ~~the~~ CCS. In applying these guidelines, the facts and circumstances of each case will be considered. Persons in doubt about how they and their commercial activities may be affected by the Act may wish to seek legal advice.

~~1.101.11~~ A glossary of terms used in these guidelines is attached.

2 DETERMINING THE AMOUNT OF PENALTY

2.1 A financial penalty imposed by ~~the~~ CCS under section 69 of the Act will be calculated ~~taking into consideration the~~ following a six-step approach:

- Calculation of the base penalty having regard to the seriousness of the infringement (expressed as a percentage rate) ~~and~~; the turnover of the business of the undertaking in Singapore for the relevant product and relevant geographic markets affected by the infringement in the undertaking's last business year. In this context, an undertaking's last business year is the financial year preceding the year when the infringement ended ("relevant turnover");
- Adjustment for the duration of the infringement;
- Adjustment for other relevant factors, e.g. deterrent value; ~~and~~
- Adjustment for any further aggravating or mitigating factors.; -
- Adjustment if the statutory maximum penalty under section 69(4) of the Act is exceeded; and
- Adjustment for immunity, leniency reductions and/or fast-track procedure discounts.

Step 1 – Calculation of the base penalty

2.2 The base penalty will be determined having regard to:

- The seriousness of the infringement (expressed as a percentage rate); and

⁸ In respect of an infringement of the section 54 prohibition, CCS may impose financial penalties where the merger parties were aware, or could not have been unaware that the merger infringed the section 54 prohibition, or where the merger parties ought to have known that the merger would, or was reasonably likely to infringe the section 54 prohibition. An example is where the merger parties, after having received an unfavourable decision from CCS in respect of an anticipated merger, proceed with an allegedly different merger which is simply a sham restructuring of the anticipated merger: Paragraph 6.27 of the CCS Guidelines on Merger Procedures 2012.

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- The relevant turnover of the undertaking.

Assessment of Seriousness of the Infringement

2.22.3 CCS will consider the seriousness of the infringement and set a percentage starting point for calculating the base penalty. The amount of the financial penalty to be imposed will depend in particular upon the nature of the infringement and how more serious and widespread the infringement, the higher the starting percentage point is likely to be is. Serious infringements of the section 34 prohibition include, for example, price-fixing, market sharing, bid-rigging (collusive tendering) and limiting or controlling production or investment arrangements. Conduct which infringes the section 47 prohibition and which by virtue of the undertaking's dominant position and the nature of the conduct has, or is likely to have, an adverse effect on the process of competition, for example, predatory pricing, is also considered to be a serious infringement. With respect to the section 54 prohibition, the seriousness of the substantial lessening of competition within the relevant market that has resulted, or which may be expected to result from the merger may be a factor used in assessing the percentage starting point.

2.32.4 In assessing the seriousness of the infringement, the CCS will consider a number of other factors, including the nature of the product, the structure and condition of the market, the market share(s) of the undertaking(s) involved in the infringement, entry conditions and the effect on competitors and third parties. The impact and effect of the infringement on the market, direct or indirect, will also be an important consideration. The assessment will be made on a case-by-case basis for all types of infringements, taking into account all of the circumstances of the case.

Determination of relevant turnover

2.42.5 An undertaking's relevant turnover is In assessing the impact and effect of the infringement on the market, direct or indirect, the CCS will take into consideration, among other things, the turnover of the business of the undertaking in Singapore for the relevant product and geographic markets affected by the infringement in the undertaking's last business year. In this context, the undertaking's last business year is the financial year preceding the date when the infringement ended. CCS will require undertakings to provide their relevant turnover pursuant to a section 63 request for information and, if necessary, to provide further evidence to substantiate the section 63 responses. Generally, CCS will base relevant turnover on figures from the undertaking's audited accounts. However, CCS retains the discretion to use different figures, for example, where the audited accounts are not available or where the audited accounts do not reflect the true scale of an undertaking's activities in the relevant market.

2.52.6 The business year, for this purpose, will be the one preceding the date on which the CCS will require undertakings to provide their relevant turnover pursuant to a section 63 request for information and, if necessary, to provide further evidence to substantiate the section 63 responses. Generally, CCS will base relevant turnover on figures from the undertaking's audited accounts. However, CCS retains the discretion to use different figures, for example, where the audited accounts are not available or where the audited accounts do not reflect the true scale of an undertaking's activities in the relevant market. decision of the CCS is taken or, if figures are not available for that business year, the one immediately preceding it.

2.6 Where an infringement involves several undertakings, the turnover of the business of each of the undertakings concerned in Singapore for the relevant product and geographic markets affected by the infringement in the undertaking's last business year will be considered in order to take account of the real

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~~impact of the infringing activity of each undertaking on competition.~~

2.7 Where an undertaking is unable or refuses to provide CCS with its relevant turnover or is suspected of providing CCS with incomplete or very low relevant turnover, CCS may attribute a relevant turnover to that undertaking.

Base Penalty – Application of percentage rate to relevant turnover

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2.8 The base penalty will be calculated by applying the percentage rate to the relevant turnover.

Step 2 – Adjustment for the Duration of Infringement

~~2.72.9 The amount of financial penalty to be imposed will also depend on the duration of the infringement. The base penalty will be multiplied by the duration of the infringement.~~

~~2.82.10~~ An infringement over a part of a year may be treated as a full year for the purpose of calculating the duration of the infringement. Therefore, penalties for infringements that last more than one year may be multiplied by the number of years of the infringement and a part of a year may be treated as a full year for the purpose of calculating the duration of the infringement. However, CCS may, in cases involving duration over one year, round down part years to the nearest month.

~~2.9 The amount of financial penalty to be imposed may be adjusted, as appropriate, on a case by case basis, to achieve the policy objectives outlined in paragraph 1.6 above, in particular, to deter undertakings from engaging in anti-competitive practices. Other considerations may include, but not limited to, an objective estimate of any economic or financial benefit derived or likely to be derived from the infringement by the infringing undertaking and any other special features of the case, including the size and financial position of the undertaking in question. Where relevant, any gains which might accrue to the undertaking in other product or geographic markets as well as in the relevant market under consideration may be taken into account.~~

~~2.11~~ Where the total duration of an infringement is less than one year, CCS will treat the duration as a full year for the purpose of calculating the number of years of the infringement. However, in exceptional circumstances, CCS may round down the duration of the infringement to the nearest month subject to a minimum duration of one month.

~~2.12~~ The effects of bid-rigging or collusive tendering are generally irreversible, cannot be easily rectified, and continue to be felt long after the duration where the bid-rigging or collusive tendering conduct occurred. For this reason, CCS will generally not set a duration of infringement that is less than one year.

Step 3 – Adjustment for Aggravating and Mitigating Factors

~~2.102.13~~ The financial penalty, adjusted as appropriate at Step 2, may be increased where CCS considers there are aggravating factors, or decreased where CCS considers there are mitigating factors. In assessing the amount of financial penalty to be imposed, the CCS will consider any aggravating or mitigating factors.

~~2.11~~ 2.14 Aggravating factors include:

- role of the undertaking as a leader in, or an instigator of, the infringement;
- involvement of directors or senior management;
- retaliatory or other coercive measures taken against other undertakings aimed at ensuring the continuation of the infringement;
- continuance of the infringement after the start of investigation;
- repeated infringements by the same undertaking or other undertakings in the same group;

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- unreasonable failure by an undertaking to respond to a request for financial information on business turnover and/or relevant turnover;
- in the case of bid-rigging or collusive tendering, CCS may treat each infringement that an undertaking participates in, after the first infringement, as an aggravating factor and calibrate with a proportionate percentage increase in penalties;
- infringements which are committed intentionally rather than negligently; and
- retaliatory measures taken or commercial reprisal sought by the undertaking against a leniency applicant.

2.12 2.15 Mitigating factors include:

- role of the undertaking, for example, that the undertaking was acting under severe duress or pressure;
- genuine uncertainty on the part of the undertaking as to whether the agreement or conduct constituted an infringement;
- adequate steps taken with a view to ensuring compliance with the section 34 prohibition or section 47 prohibition, for example, existence of any compliance programme;
- termination of the infringement as soon as ~~the~~ CCS intervenes; and
- co-operation which enables the enforcement process to be concluded more effectively and/or speedily.

2.13 2.16 In considering how much mitigating value to be accorded to the existence of any compliance programme, ~~the~~ CCS will consider:

- whether there are appropriate compliance policies and procedures in place;
- whether the programme has been actively implemented;
- whether it has the support of, and is observed by, senior management;
- whether there is active and ongoing training for employees at all levels who may be involved in activities that are touched by competition law; and
- whether the programme is evaluated and reviewed at regular intervals.

Step 4 – Adjustment for ~~O~~ther ~~R~~elevant ~~F~~actors

2.17 ~~2.9~~ The amount of financial penalty to be imposed after Step 3 may be adjusted by CCS applying an uplift, as appropriate, on a case by case basis, to achieve the policy objectives outlined in paragraph ~~1.6-1.7~~ above, in particular, to deter ~~the~~ undertakings concerned as well as other undertakings from engaging in anti-competitive practices.

2.18 In determining whether to impose an uplift CCS may take into account ~~o~~Other considerations, including ~~may include~~, but not limited to, an objective estimate of any economic or financial benefit derived or likely to be derived from the infringement by the infringing undertaking and any other special features of the case, including the size and financial position of the undertaking in question. Where relevant, any gains

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which might accrue to the undertaking in other product or geographic markets as well as in the relevant market under consideration may be taken into account.

Step 5 – Adjustment if ~~T~~the statutory ~~M~~maximum ~~P~~penalty is exceeded

2.142.19 The amount of the financial penalty to be imposed may not exceed the statutory maximum penalty under section 69(4) of the Act, i.e. 10% ~~per cent~~ of the turnover of the business of the undertaking in Singapore for each year of infringement, up to a maximum of ~~3~~three years (“total turnover”). The total turnover of the business of the undertaking in Singapore for the purposes of section 69(4) of the Act is ~~–~~defined in the Competition (Financial Penalties) Order 2007 as the applicable turnover for the business year preceding the date on which the decision of the Commission is taken, or if figures are not available for that business year, the previous business year. The financial penalty will be adjusted if necessary to ensure that the statutory maximum is not exceeded.

2.152.20 The involvement of an association of undertakings (e.g. a trade association) in an infringement of the section 34 prohibition or section 47 prohibition may result in financial penalties being imposed on the association itself, its members or both. Where the infringement by an association of undertakings relates to the activities of its members, the penalty shall not exceed 10% ~~per cent~~ of the sum of the turnover of business of each member of the association of undertakings in Singapore active on the market affected by the infringement, for each year of infringement, up to a maximum of ~~3~~three years.

Step 6 – Adjustment for Immunity, ~~leniency~~ or ~~R~~reductions and/or fast-track procedure discounts ~~from~~ Penalty

2.21 An undertaking participating in cartel activity may benefit from total immunity from, or a significant reduction in the amount of financial penalty to be imposed if it satisfies the requirements for immunity or lenient treatment set out in the *CCS Guidelines on Lenient Treatment for Undertakings Coming Forward with Information in Cartel Activity Cases*. CCS will make the necessary adjustments to the financial penalty calculated after Step 5 to take into account immunity or any leniency reductions conferred on an undertaking.

2.22 CCS will also adjust the penalty to take into account the discount applicable for an undertaking that agrees to CCS’s fast-track procedure. The discount for the fast-track procedure will be in addition to any applicable leniency reductions.

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3 GLOSSARY

Business year Refers to a period of more than six months in respect of which an undertaking publishes accounts or, if no such accounts have been published for the period, prepares accounts.

Relevant turnover Refers to the turnover of the business of the undertaking in Singapore for the relevant product and geographic markets affected by the infringement in the undertaking's last business year. In this context, the undertaking's last business year is the financial year preceding the date when the infringement ended.

Total turnover Refers to the turnover of an undertaking for the business year preceding the date on which the decision of the CCS is taken or, if figures are not available for that business year, the one immediately preceding it which is set out in the Competition (Financial Penalties) Order 2007.

Undertaking Refers to any person, being an individual, a body corporate, an unincorporated body of persons or any other entity, capable of carrying on commercial or economic activities relating to goods or services, as the context demands. Includes individuals operating as sole proprietorships, companies, firms, businesses, partnerships, co-operatives, societies, business chambers, trade associations and non profit-making ~~organizations~~ organisations.

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CCS GUIDELINES ON ENFORCEMENT

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ENFORCEMENT

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1 INTRODUCTION

1.1 The Competition Act (Chapter 50B) (“the Act”) gives the Competition Commission of Singapore (“CCS”) the power to enforce the section 34¹ prohibition, ~~the or~~ section 47² prohibition and the section 54³ prohibition under the Act (~~“section 34 or 47 prohibition”~~ respectively).

1.2 ~~The~~ CCS’s investigation and enforcement powers are set out in Part III Division 5 of the Act. These guidelines describe the power of ~~the~~ CCS to:

- give directions to bring an infringement to an end (Part 2);
- give directions on interim measures during an investigation (Part 3); and
- impose financial penalties on undertakings for infringing the sections 34 and/or 47 prohibition (Part 4).

1.3 In respect of the section 54 prohibition, the *Guidelines on Merger Procedures 2012* provide guidance on CCS’s powers to give directions to bring an infringement to an end, to give directions on interim measures and to impose financial penalties on undertakings for infringing the section 54 prohibition.

1.4 The powers of investigation of ~~the~~ CCS under the Act are described in ~~the~~ CCS *Guidelines on the Powers of Investigation*.

~~1.3~~ 1.5 These guidelines are not a substitute for the Act, the regulations and orders. They may be revised should the need arise. The examples in these guidelines are for illustration. They are not exhaustive, and do not set a limit on the investigation and enforcement activities of ~~the~~ CCS. In applying these guidelines, the facts and circumstances of each case will be considered. Persons in doubt about how they and their commercial activities may be affected by the Act may wish to seek legal advice.

~~1.4~~ 1.6 A glossary of terms used in these guidelines is attached.

2 DIRECTIONS TO BRING AN INFRINGEMENT TO AN END

2.1 The Act provides that where ~~the~~ CCS has made a decision that the sections 34

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

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

³ Mergers that have resulted or may be expected to result in a substantial lessening of competition within any market in Singapore for goods or services are prohibited. Further information can be found in the *CCS Guidelines on Merger Procedures 2012* and the *CCS Guidelines on the Substantive Assessment of Mergers*.

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- ~~and/or~~⁴⁷ ~~and 54~~ prohibitions has or have been infringed, ~~the~~CCS may give such directions as it considers appropriate to bring an infringement to an end.⁴
- 2.2 The directions may be given to such person(s) as ~~the~~CCS considers appropriate.⁵ This includes individuals and undertakings.⁶ ~~The~~CCS is not limited to giving directions to the infringing parties. For example, directions may be addressed to a parent company which, though not the actual instigator of the infringement, has a subsidiary which is the immediate party to the infringement.
- 2.3 Directions may in particular require the person concerned to modify the agreement or conduct, or to terminate the agreement or cease the conduct in question.⁷ Directions may require positive action, such as informing third parties that an infringement has been brought to an end and reporting back periodically to ~~the~~CCS on certain matters. In some circumstances, the directions appropriate to bring an infringement to an end may be (or include) directions requiring an undertaking to make structural changes to its business.

Procedure for Giving Directions

- 2.4 The directions must be in writing and may be given to such person(s) as ~~the~~CCS considers appropriate.⁸ They are likely to form part of the infringement decision in cases where the decision and the directions are addressed to the same person. If ~~the~~CCS proposes to make an infringement decision, it must give the person likely to be affected by such decision, a written notice setting out the facts on which ~~the~~CCS relies and its reasons for the proposed decision, ~~and~~ ~~Such person will be given~~ an opportunity to make written representations to ~~the~~CCS. The person receiving the written notice may request in his written representations a meeting with ~~the~~CCS to make oral representations to elaborate on the written representations ~~already made in this regard~~.
- 2.5 ~~The~~CCS will give these persons or their authorised representatives a reasonable opportunity to inspect the documents in ~~the~~CCS's file relating to the matters referred to in the notice. ~~The~~CCS may withhold any documents to the extent that they contain confidential information or are internal documents.
- 2.6 Any direction given by ~~the~~CCS will set out its reasons for giving the direction. The direction will be published on the register maintained by ~~the~~CCS, which is open to public inspection on ~~the~~CCS's website.

⁴ Section 69 of the Act.

⁵ Section 69(1) of the Act.

⁶ See section 2 of the Act.

⁷ Sections 69(2)(a) and (b) of the Act.

⁸ Section 69(1) of the Act.

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Enforcement of Directions

- 2.7 In most cases, directions will take immediate effect. In some cases, ~~the~~ CCS may allow the undertaking a period of time within which to comply with a direction.
- 2.8 If there is non-compliance with a direction, ~~the~~ CCS may apply to register the direction with a District Court in accordance with the Rules of Court (Chapter 322, Rule 5). On registration, the direction shall have the same force and effect as if it had been an order originally obtained in the District Court and will be enforced accordingly.⁹ Any person who fails to comply with a registered direction without reasonable excuse will be in contempt of court. The normal sanctions for contempt of court will apply, i.e., the court may impose a fine or imprisonment. The Court may also make orders to secure compliance with the direction, or to require any person to do anything to remedy, mitigate or eliminate any effects arising from non-compliance with the direction. In addition, the District Court may also make an award for costs upon the registration of the direction.

Appeals against Directions

- 2.9 A direction imposed can be appealed to the Competition Appeal Board ('Board').¹⁰ Such an appeal must be brought within the specified time period.
- 2.10 The Board can impose, revoke or vary a direction as long as it is a direction that ~~the~~ CCS could itself have given.¹¹ A decision by the Board as to any direction can be appealed to the High Court and then to the Court of Appeal on a point of law arising therefrom.¹² Such an appeal can only be made by a party to the proceedings in which the decision of the Board was made.¹³
- 2.11 An appeal to the Board against a direction imposed will not operate to suspend that direction. The infringement decision and the direction will remain in effect (unless suspended by an interim order made by the Board or, in the case of a further appeal, the relevant appeal court).

3 DIRECTIONS ON INTERIM MEASURES

- 3.1 The Act provides that ~~the~~ CCS may give directions on interim measures pending its final decision as to whether there has been an infringement of the section 34, ~~or~~ 47 or 54 prohibitions.¹⁴ Directions on interim measures will not affect the final decision.
- 3.2 ~~The~~ CCS may give directions on interim measures before it has completed its

⁹ See Section 85 of the Act.

¹⁰ See Section 71 of the Act.

¹¹ See Section 73(8) of the Act.

¹² Section 74(1)(a) of the Act.

¹³ Section 74(2) of the Act.

¹⁴ Section 67 of the Act.

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investigation of the suspected infringement if:

- it has begun an investigation under section 62 of the Act, the investigation is ongoing and it has not completed the investigation;¹⁵ and
- it considers that it is necessary to act urgently either to prevent serious, irreparable damage to a particular person or category of persons, or to protect the public interest.¹⁶

3.3 What constitutes serious damage is a question of fact and will depend upon the circumstances of each case. Damage may be serious where a particular person or category of persons may suffer considerable competitive disadvantage likely to have a lasting effect on their position. Serious damage is likely to include significant financial loss to a person (to be assessed with reference to that person's size or financial resources as well as the proportion of the loss in relation to the person's total revenue), and significant damage to the goodwill or reputation of a person.

3.4 A threat of insolvency will generally be sufficient to constitute serious, irreparable damage although it need not always be so. Less extreme forms of serious damage may still be irreparable, in so far as they cannot be remedied by later intervention. Serious and irreparable damage are cumulative, though inter-related, requirements. Thus, serious damage which is not irreparable will not suffice. The serious, irreparable damage must be shown to result from the alleged anti-competitive behaviour.

3.5 ~~The~~ CCS may consider that it is necessary to act urgently to protect the public interest, for example, to prevent damage being caused to a particular industry or to consumers as a result of the suspected infringement. It may also take action to prevent damage to competition more generally.

3.6 Directions on interim measures may be given by ~~the~~ CCS on its own initiative or after receiving a request, provided that the ~~conditions tests~~ in paragraph 3.2 above are satisfied. Any person requesting a direction on interim measures should provide as much evidence as possible, demonstrating that the alleged infringement is causing, or is likely to cause, serious, irreparable damage or that it is necessary that ~~the~~ CCS act to protect the public interest. Such a request should also indicate as precisely as possible the nature of the interim measure sought.

3.7 ~~The~~ CCS may give such directions on interim measures as it considers appropriate. ~~The~~ CCS may in particular require the person(s) concerned to terminate the agreement or cease the conduct in question, or to modify the agreement or conduct.

3.8 When the investigation is complete and ~~the~~ CCS has decided that an infringement

¹⁵ Section 67(1)(a) of the Act.

¹⁶ Section 67(1)(b) of the Act.

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has taken place, it may replace the direction on interim measures with a direction described in Part 2 above. Otherwise, a direction on interim measures has effect until ~~the~~ CCS has discontinued or completed its investigation into the matter or until ~~the~~ CCS considers there is no longer any necessity to act as a matter of urgency to prevent any serious, irreparable damage to a particular person or category of persons or for the protection of public interest.

Procedure on giving Directions on Interim Measures

- 3.9 Before giving a direction on interim measures, ~~the~~ CCS must give ~~written notice~~ to the person to whom it proposes to give the direction, a written notice indicating the nature of the direction it proposes to give and the reasons for deciding to give it.¹⁷ ~~Such person will be given and~~ an opportunity to make written representations to ~~the~~ CCS. The person receiving the written notice may request in his written representations a meeting with ~~the~~ CCS to make oral representations to elaborate on the written representations ~~already made in this regard~~.
- 3.10 ~~The person who receives written notice from the CCS about the proposed direction on interim measures may inspect the CCS' file on the case. The CCS~~ will give such a person or his authorised representative a reasonable opportunity to inspect the documents in ~~the~~ CCS's file relating to the proposed direction. However, ~~the~~ CCS may withhold any documents to the extent that they contain confidential information or are internal documents.
- 3.11 The directions on interim measures will be published on the register maintained by ~~the~~ CCS, which is open to public inspection on ~~the~~ CCS's website.
- 3.12 A direction on interim measures can be appealed to the Board. Such an appeal must be brought within the specified time period. The making of an appeal will not suspend the effect of the direction on interim measures but the Board may suspend its effect by an interim order.

Enforcement of Directions on Interim Measures

- 3.13 Directions on interim measures can be enforced following the procedure set out in paragraphs 2.7 to 2.8 above.

Appeals against Directions on Interim Measures

- 3.14 Directions on interim measures can be appealed following the procedure set out in paragraphs 2.9 to 2.11 above.

¹ Section 67(2) of the Act.

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Assurances in lieu of Interim Measures Directions

- 3.15 ~~The~~ CCS may accept informal interim assurances offered by the person(s) concerned where it is satisfied that these will prevent any harm which might otherwise form the basis for imposition of a direction on interim measures.
- 3.16 One of the prerequisites for an interim remedy is that it is necessary to act as a matter of urgency. The ability to accept informal interim assurances in appropriate circumstances helps facilitate quick action by ~~the~~ CCS.
- 3.17 ~~The~~ CCS may replace informal interim assurances by a direction on interim measures.
- 3.18 Informal interim assurances will include a provision that they will come to an end when an investigation is complete. If ~~the~~ CCS has decided that an infringement has taken place, it may replace any informal interim assurances with a direction described in Part 2 above.

4 PENALTIES

- 4.1 The Act provides that ~~the~~ CCS may impose a financial penalty¹⁸ on any party to an agreement that infringes the section 34 prohibition or any person whose conduct infringes the section 47 prohibition or 54 prohibition provided that infringement has been intentionally or negligently committed.¹⁹ ~~on or after 1 January 2006~~. The amount of the penalty imposed may be up to 10 per cent of the turnover of the business of the undertaking in Singapore for each year of infringement, up to a maximum of 3 years.²⁰ It is for ~~the~~ CCS to determine whether a financial penalty should be imposed. ~~The~~ CCS can impose penalties for infringements that have already stopped as well as for ongoing infringements.
- 4.2 ~~The~~ CCS will use this power to impose penalties on infringing undertakings to reflect the seriousness of the infringement and to serve as an effective deterrent, both to the undertaking concerned and to other undertakings which might be considering activities contrary to the section 34, ~~or 47~~ or 54 prohibitions. The setting of the maximum penalty at 10% of the turnover of the business of the undertaking in Singapore for each year of infringement, up to a maximum of 3 years, allows ~~the~~ CCS to adjust, where appropriate, the levels of penalties to ensure that deterrence is achieved.

Intentionally or Negligently

- 4.3 Before exercising the power to impose a financial penalty, ~~the~~ CCS must be satisfied, as a threshold condition, that the infringement has been committed

¹⁸ Section 69(2)(d) of the Act.

¹⁹ Section 69(3) of the Act.

² Section 69(4) of the Act.

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intentionally or negligently.

- 4.4 For intention or negligence to be found, it is not necessary for there to have been action by, or even knowledge on the part of, the partners or principal managers of the undertaking concerned; action by a person who can act on behalf of the undertaking suffices.
- 4.5 ~~The~~ CCS may consider the existence of past decisions or directions made against an undertaking when considering whether or not an infringement of the section 34, ~~or~~ 47 or 54 prohibitions by similar anti-competitive activities of that undertaking was committed intentionally or negligently.
- 4.6 The fact that a particular type of agreement or conduct has not previously been found to be in breach of the section 34, ~~or~~ 47 or 54 prohibitions does not mean that the infringement cannot be committed intentionally or negligently.

Intention

- 4.7 The circumstances in which ~~the~~ CCS might find that an infringement has been committed intentionally include the following:
- the agreement or conduct has as its object the restriction of competition;
 - the undertaking in question is aware that its actions will be, or are reasonably likely to be, restrictive of competition but still wants, or is prepared, to carry them out; or
 - the undertaking could not have been unaware that its agreement or conduct would have the effect of restricting competition, even if it did not know that it would infringe the section 34, ~~or~~ 47 or 54 prohibitions.
- 4.8 The intention (or negligence, referred to below) relates to the facts, not the law. Ignorance or a mistake of law (i.e. ignorance that the relevant agreement or conduct is an infringement) is thus no bar to a finding of intentional infringement.
- 4.9 In establishing whether or not there is intention, ~~the~~ CCS may consider internal documents generated by the undertakings in question. ~~The~~ CCS may regard deliberate concealment of an agreement or practice by the parties as strong evidence of an intentional infringement. It may be inferred that an infringement has been committed intentionally where consequences giving rise to an infringement are plainly foreseeable from the pursuit of a particular policy by an undertaking.

Negligence

- 4.10 ~~The~~ CCS is likely to find that an infringement of the section 34, ~~or~~ 47 or 54 prohibitions has been committed negligently where an undertaking ought to have

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known that its agreement or conduct would result in a restriction or distortion of competition.

Involuntary Infringement

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

Provisional Immunity from Penalties under the Section 34 Prohibition from the Date of Notification to ~~the~~ CCS

- 4.12 The Act provides for parties to notify their agreements or conduct to ~~the~~ CCS for guidance or a decision.²¹ Where an agreement to which the section 34 prohibition applies has been notified, ~~the~~ CCS cannot impose a penalty in respect of any infringement of the section 34 prohibition, during the period beginning with the date of notification and ending on such date as may be specified in a notice given in writing to the applicant by ~~the~~ CCS on determination of the application.²² The date specified in the notice may not precede the date on which the notice is given.²³ No such immunity exists for notifications in respect of conduct under the section 47 or 54 prohibitions.
- 4.13 Provisional immunity only arises after the application for guidance or a decision has been made. Further information on such applications can be found in the *CCS Guidelines on Filing Notifications for Guidance or Decision with respect to the Section 34 Prohibition and Section 47 Prohibition*.

Immunity after Guidance or Decision

- 4.14 Where ~~the~~ CCS has given a favourable guidance or decision in respect of any agreement or conduct notified to it under sections 43, 44, 50 and 51 respectively, no penalty may be imposed in respect of any infringement under the section 34 or 47 prohibition, as the case may be. However, ~~the~~ CCS may remove the immunity from such penalties if –
- it takes further action with respect to the agreement or conduct in one of the following circumstances –
 - i. it has reasonable grounds for believing that there has been a material change of circumstance since the guidance or decision, as the case may be, was given; or

²¹ See sections 42 and 49 of the Act.

²² Sections 43(4) and 44(3) of the Act.

²³ Sections 43(5) and 44(4) of the Act.

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- ii. it has reasonable grounds for suspecting that the information on which the guidance or decision was based was incomplete, false or misleading in a material particular; or
 - iii. in the case of guidance on infringement of the section 34 prohibition only, one of the parties to the agreement applies for a decision with respect to the agreement; or
 - iv. in the case of guidance only, a complaint about the agreement or conduct is made to ~~the~~ CCS;
- it considers it likely that the agreement or conduct will infringe the section 34 or 47 prohibition; and
 - it gives written notice to the party or undertaking on whose application the guidance was given or the decision was made, that it is removing the immunity as from the date specified in the notice.

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

Turnover

4.16 The definition of turnover for the purposes of determining the maximum financial penalty that may be imposed by ~~the~~ CCS under section 69(4) of the Act ~~will~~ has been prescribed [in the Competition \(Financial Penalties\) Order 2007](#).

Amount of a Penalty

4.17 ~~The~~ CCS's approach on the calculation of a financial penalty to be imposed has been ~~will~~ be set out in the *CCS Guidelines on the Appropriate Amount of Penalty*.

4.18 In brief, a financial penalty imposed by ~~the~~ CCS for an infringement of the section 34, ~~or~~ 47 or 54 prohibitions will be calculated taking into consideration, amongst other things, the nature, duration and seriousness of the infringement, the turnover of the business of the undertaking in Singapore for the relevant product and geographic markets affected by the infringement, market conditions, aggravating factors including the existence of any prior anti-competitive practices and behaviour of the infringing party, and mitigating factors including the existence of any compliance programme and the extent to which the infringing party has co-operated with ~~the~~ CCS. In line with the procedure for giving directions set out in paragraphs 2.4 to 2.6 above, the proposed amount of financial penalty will be set out in the proposed infringement decision so as to permit addressees of the proposed infringement decision to make representations, written and oral, to CCS on matters of liability as well as penalty. After taking in

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representations, should CCS decide to issue an infringement decision including a financial penalty, CCS may request updated applicable turnover figures¹, where necessary, to ensure that the statutory maximum for financial penalty is not exceeded.

¹ Refer to section 69(4) of the Act and the Competition (Financial Penalties) Order 2007.

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Lenient Treatment for Undertakings Coming Forward with Information

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

4.20 Further information on immunity from, or reduction in the amount of financial penalties is set out in the *CCS Guidelines on Lenient Treatment for Undertakings Coming Forward with Information in Cartel Activity Cases*.

Payment

4.21 Where ~~the~~CCS ~~directs~~ ~~requires~~ an undertaking to pay a financial penalty, it must, at the same time, inform the undertaking in writing of its reasons. Where ~~the~~CCS imposes a penalty, it must serve a written notice on the undertaking required to pay the penalty, specifying the date before which the penalty is required to be paid.²⁴ The date for payment must not be earlier than the end of the period within which an appeal against the ~~direction notice~~ may be brought.²⁵

Liability for Payment

4.22 ~~The~~CCS may ~~direct~~~~require~~:

- any party to an agreement which has infringed the section 34 prohibition; and/or
- any person whose conduct has infringed the section 47 prohibition;

to pay a penalty. Where there has been a finding of joint dominance, so that more than one undertaking has infringed the section 47 prohibition, ~~the~~CCS can ~~direct~~ ~~require~~ each undertaking to pay a penalty.

4.23 A parent company and its subsidiaries will usually be treated as a single undertaking if they operate as a single economic unit. This will depend on the facts of each case. ~~The~~CCS may need to consider the respective responsibility of both parent and subsidiary for an infringement and therefore for consequent liability to pay a penalty. Where ~~the~~CCS decides to impose a penalty on both

²⁴ Section 69(5) of the Act.

²⁵ Section 69(5) of the Act.

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parent and subsidiary, it may be imposed jointly and severally.

- 4.24 A penalty may be imposed on a company that takes over the undertaking that has committed an infringement. Changes in the legal identity of an undertaking will not prevent it or its component parts from being penalised. As far as possible, liability for penalties will follow responsibility for actions. Thus, a subsequent transfer of a business from one economically distinct undertaking to another will not automatically absolve the transferor from responsibility. Where the original undertaking has ceased to exist by the time a penalty comes to be imposed, the penalty may be imposed on the successor undertaking.

The involvement of a trade association in an infringement of the section 34 or 47 prohibition may result in financial penalties being imposed on the association itself, its members or both. Where the infringement relates to activities of its members, the penalty shall not exceed 10 per cent of the sum of the turnover of business of each member of the trade association in Singapore active on the market affected by the infringement, for each year of infringement, up to a maximum of 3 years.

Enforcement of Penalty Decision

- 4.25 If an undertaking fails to pay a penalty within the date specified in the direction and it has not brought an appeal against the imposition or amount of the penalty within the time allowed or such an appeal has been made and the penalty upheld, ~~the~~ CCS may register the direction to pay a penalty with a District Court in accordance with the Rules of Court and the effect of registration is that the imposition of the penalty shall have the same force and effect as if it had been an order originally obtained in the District Court²⁶ and can be executed and enforced accordingly, for example, by writ of seizure and sale. In addition, the District Court may make an award for costs and interest upon the registration of the imposition of the penalty.

Appeals against Penalty Decision

- 4.26 The decision to impose a financial penalty and the decision as to the amount of that penalty can be appealed to the Board.²⁷ Such an appeal must be brought within the specified time period.
- 4.27 The Board can revoke a penalty or vary its amount.²⁸ A decision by the Board as to the amount of a penalty can be appealed to the High Court and then to the Court of Appeal²⁹. Such an appeal can only be made by a party to the proceedings

²⁶ See Section 85 of the Act.

²⁷ See Section 71 of the Act.

²⁸ See Section 73(8)(b) of the Act.

²⁹ Section 74(1)(b) of the Act.

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in which the decision of the Board was made.³⁰

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

³⁰ Section 74(2) of the Act.

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5 ENFORCEMENT IN THE COURTS

- 5.1 Parties suffering loss or damage directly arising from an infringement of the section 34 or 47 prohibition are entitled to commence a civil action to seek relief against the infringing undertaking seeking relief.³¹
- 5.2 Such rights of private action shall only arise after ~~the~~ CCS has made a decision of infringement in respect thereof, and in the event the decision is subject to an appeal, upon expiry of the appeal period or upon determination of the appeal if an appeal is brought.³²
- 5.3 There is a 2 years' limitation period for the commencement ~~taking~~ of such private actions from the time that ~~the~~ CCS made the decision or from the determination of the appeal, whichever is the later.³³
- 5.4 The court will be bound in such proceedings by the relevant infringement decisions.³⁴

³¹ Sections 86(1) of the Act.

³² Sections 86(2) and (3) of the Act.

³³ Section 86(6) of the Act.

³⁴ Section 86(7) of the Act.

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6 GLOSSARY

Person	Includes any undertaking
Undertaking	Refers to any person, being an individual, a body corporate, an unincorporated body of persons or any other entity, capable of carrying on commercial or economic activities relating to goods or services, as the context demands. Includes individuals operating as sole proprietorships, companies, firms, businesses, partnerships, co-operatives, societies, business chambers, trade associations and non profit-making organizations