

DOMINANCE

Singapore



Dominance

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Quick reference guide enabling side-by-side comparison of local insights, including into the general legal framework and sector-specific rules, the definition of collective dominance, and relevance of dominant purchasers; abuse of dominance and related defences; specific forms of abuse, enforcement, sanctions, remedies and appeals; and current trends.

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GENERAL FRAMEWORK

Legal framework

What is the legal framework in your jurisdiction covering the behaviour of dominant firms?

The abuse of a dominant position is prohibited under general competition law by the operation of section 47 of the Singapore Competition Act (Cap 50B) (the Competition Act), which states that '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' (section 47 Prohibition).

However, it is noteworthy that (pursuant to paragraph 5 of the Third Schedule to the Competition Act), where goods and services are subject to any written law or code of practice relating to competition that gives another regulatory authority jurisdiction in the matter, the section 47 Prohibition will not apply to such. In this regard, other pieces of sector-specific legislation contain provisions relating to an abuse of dominance and are enforced separately by the respective regulator.

The Competition Act is enforced by the Competition and Consumer Commission of Singapore (CCCS). Previously known as the Competition Commission of Singapore (CCS), the CCS was renamed the CCCS when it took on the additional function of administering the Consumer Protection (Fair Trading) Act (Cap 52A) with effect from 1 April 2018. The CCCS has also issued guidelines on the application of the section 47 Prohibition (the CCCS Guidelines).

As at 31 December 2021, the CCCS has only issued one infringement decision in respect of a violation of the section 47 Prohibition since the provision took effect on 1 January 2006, namely, an abuse of a dominant position by SISTIC.com Pte Ltd CCS 600/008/07 (4 June 2010) (the SISTIC case).

Law stated - 31 December 2021

Definition of dominance

How is dominance defined in the legislation and case law? What elements are taken into account when assessing dominance?

No definition of dominance is contained within the Competition Act. However, the CCCS Guidelines state that an undertaking will not be deemed dominant unless it has substantial market power. The CCCS Guidelines go on to state that 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.

The CCCS will generally take into consideration the market share of the entity in question, constraints on market power by way of existing competition (having regard to barriers to expansion), constraints on market power by way of potential competition (having regard to barriers to entry), and the significance of any countervailing buyer power.

As there has only been one abuse of dominance infringement finding issued by the CCCS to date, it is unclear as to how matters of 'relative dominance' or 'heightened market power' would be treated under Singapore competition law.

Law stated - 31 December 2021

Purpose of legislation

Is the purpose of the legislation and the underlying dominance standard strictly economic, or does it protect other interests?

The objective of the Competition Act (and by extension the section 47 Prohibition) is to promote the efficient functioning of markets in Singapore and to enhance the competitiveness of the economy through prohibiting anticompetitive activities that unduly prevent, restrict or distort competition. This was clearly expressed during the second reading of the Competition Bill, by the then Senior Minister of State for Trade and Industry (Vivian Balakrishnan).

Law stated - 31 December 2021

Sector-specific dominance rules

Are there sector-specific dominance rules, distinct from the generally applicable dominance provisions?

The Competition Act does not apply to any conduct in relation to any goods and services that are subject to any written law or code of practice relating to competition that gives another regulatory authority jurisdiction in the matter. In this regard, the following sectors have their own sector-specific abuse of dominance provisions:

- electricity, under the Electricity Act (Cap 89A) – enforced by the Energy Market Authority;
- gas, under the Gas Act (Cap 116A) – enforced by the Energy Market Authority;
- newspapers and broadcasting, under the Info-communications Media Development Authority Act 2016 (No. 22 of 2016) and the Code of Practice for Market Conduct in the Provision of Media Services 2010 – enforced by the Info-communications Media Development Authority;
- postal services, under the Postal Services Act (Cap 237A) and the Postal Competition Code 2017 – enforced by the Info-communications Media Development Authority;
- telecommunications, under the Telecommunications Act (Cap 323) and the Code of Practice for Competition in the Provision of Telecommunication Services 2012 – enforced by the Info-communications Media Development Authority; and
- airport services and facilities, under the Civil Aviation Authority of Singapore Act (Cap 41) and the Airport Competition Code 2009 – enforced by the Civil Aviation Authority of Singapore.

The section 47 Prohibition also does not apply to certain specified activities set out in paragraph 6 of the Third Schedule to the Competition Act (including, inter alia, cargo terminal operations carried out by a person licensed and regulated under the Maritime and Port Authority of Singapore Act (Cap 170A)).

Law stated - 31 December 2021

Exemptions from the dominance rules

To whom do the dominance rules apply? Are any entities exempt?

The section 47 Prohibition applies generally to all undertakings in Singapore, and section 33 of the Competition Act specifies that the abuse of dominance prohibition will apply to undertakings that are outside of Singapore, where they are engaging in conduct that would infringe the section 47 Prohibition.

However, under section 33(4) of the Competition Act, the section 47 Prohibition will not apply to any activity carried on by, any agreement entered into by, or any conduct on the part of: the government; any statutory body; or any person acting on behalf of the government or that statutory body, as the case may be, in relation to that activity, agreement or conduct.

The Third Schedule to the Competition Act also sets out various exclusions from the application of the section 47

Prohibition, which include (inter alia) the activities of clearing houses, conduct pertaining to the supply of piped potable water, the supply of wastewater management services, the supply of scheduled bus services by a licensed and regulated person, the supply of rail services by a licensed and regulated person, and cargo terminal operations carried on by licensed and regulated persons.

The section 47 Prohibition does not apply to any conduct in relation to any goods and services that are subject to any written law or code of practice relating to competition that gives another regulatory authority jurisdiction in the matter.

Law stated - 31 December 2021

Transition from non-dominant to dominant

Does the legislation only provide for the behaviour of firms that are already dominant?

The section 47 Prohibition requires both that the undertaking in question holds a dominant position and that the undertaking engages in conduct that would amount to an abuse of that dominant position. The section 47 Prohibition applies to conduct that protects, enhances or perpetuates the dominant position of an undertaking in ways unrelated to competitive merit. Accordingly, if it were determined that the undertaking in question was not dominant, its conduct would not fall for consideration under the section 47 Prohibition.

Law stated - 31 December 2021

Collective dominance

Is collective dominance covered by the legislation? How is it defined in the legislation and case law?

There is no specific reference in the Competition Act relating to collective dominance although the Competition Act provides for it. In particular, section 47(1) of the Competition Act states that subject to excluded cases, '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'. Additionally, the CCCS Guidelines also refer to the concept, and specifically state that a collective dominant position may be held when two or more legally independent undertakings, from an economic point of view, present themselves or act together on a particular market as a collective entity. Essentially, undertakings holding a collective dominant position are able to adopt a common policy on the market and, to a considerable extent, act independently of their competitors, customers and consumers.

For the purpose of analysing whether undertakings have engaged in conduct that amounts to an abuse of a collective dominant position, the CCCS will consider:

- whether the undertakings concerned together constitute a collective entity vis-à-vis their competitors, their trading partners and consumers on a particular market;
- if so, whether that collective entity is dominant in a relevant market, either in Singapore or elsewhere; and
- if it is, whether there is or has been an abuse of that dominant position in a market in Singapore.

To date, there have been no enforcement actions involving the concept of collective dominance and, accordingly, the boundaries of the concept are yet to be fully tested.

Law stated - 31 December 2021

Dominant purchasers

Does the legislation apply to dominant purchasers? Are there any differences compared with the application of the law to dominant suppliers?

There is no distinction or specific reference in the Competition Act or the CCCS Guidelines with regard to the application of the section 47 Prohibition to sellers and purchasers. Accordingly, the section 47 Prohibition can be applied to both purchasers and sellers in appropriate circumstances. There is no further guidance from the CCCS as to how the application of the prohibition to purchasers and sellers may differ (if at all).

Law stated - 31 December 2021

Market definition and share-based dominance thresholds

How are relevant product and geographic markets defined? Are there market-share thresholds at which a company will be presumed to be dominant or not dominant?

The CCCS employs the hypothetical monopolist test (otherwise known as the SSNIP test) in its approach to defining the relevant market. This essentially involves the consideration of a hypothetical monopolist of the focal product in question and questioning whether that monopolist could profitably impose a small but significant, non-transitory increase in price. Through the use of this test, the market will be defined as the smallest product group (and geographical area) over which the hypothetical monopolist controlling that product group in that area could profitably sustain such a price increase.

Notwithstanding the analytical framework above, given data limitations in reality, the CCCS will commonly rely on qualitative assessments of demand-side and supply-side substitutability in the process of market definition. The conceptual approach in relation to market definition for abuse of dominance cases (ie, the hypothetical monopolist test) will essentially be the same as that employed in the context of merger cases. However, the test in an abuse of dominance context will be likely to contemplate price increases against 'competitive price levels' (rather than against 'prevailing price levels' in merger cases) in order to avoid the well-known 'Cellophane Fallacy'.

The CCCS Guidelines specifically state that 'there are no market share thresholds for defining dominance under the section 47 Prohibition'. However, the CCCS Guidelines go on to state that, generally, and as a starting point, the CCCS will consider a market share in excess of 60 per cent as likely to indicate that an undertaking is dominant in the relevant market. However, this starting point does not preclude dominance being established at a lower market share. In the SISTIC case, the CCCS argued that 'SISTIC's persistently high market share over time, as opposed to high market share at a point in time, is indicative of its dominance'. The Competition Appeal Board (CAB) agreed with this proposition and stated that there were no exceptional circumstances shown by SISTIC to rebut such indication.

Law stated - 31 December 2021

ABUSE OF DOMINANCE

Definition of abuse of dominance

How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

The issue of abuse is assessed by the Competition and Consumer Commission of Singapore (CCCS) on a case-by-case basis, and the analysis will be an effects-based analysis, rather than a form-based analysis. That being said, it seems

clear from the CCCS Guidelines, and from the SISTIC case, that the focus of the CCCS will be on exclusionary behaviour, which may include 'excessively low prices, certain discount schemes, refusals to supply, or vertical restraints, which foreclose (or are likely to foreclose) markets or weaken competition'. The CCCS Guidelines state that this conduct may be abusive to the extent that it harms competition, for example, by removing an efficient competitor, limiting competition from existing competitors or excluding new competitors from entering the market.

In relation to the SISTIC case, in lodging an appeal to the Competition Appeal Board (CAB), one of SISTIC's grounds of appeal was that its conduct was not abusive and, accordingly, the definition of abuse (and the test for such) was considered by the CAB. In issuing its decision, the CAB determined that an abuse will be established where a competition authority demonstrates that a practice has, or is likely to have, an adverse effect on the process of competition, in particular: it is sufficient for the competition authority to show a likely effect and it is not necessary to demonstrate an actual effect on the process of competition; and if an effect, or likely effect, on restricting competition by the dominant firm is established, the dominant undertaking can advance an objective justification. An objective justification entails adducing evidence to demonstrate that its behaviour produces countervailing benefits such that it has a net positive impact on welfare. However, the burden is on the undertaking to demonstrate an objective justification.

No category of conduct has been established as prohibited per se. However, the CCCS may presume that pricing below average variable costs amounts to predatory abuse in the absence of objective justification for this pricing strategy.

Law stated - 31 December 2021

Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

Despite the Competition Act being modelled on the UK Competition Act (and the European competition laws), purely exploitative conduct would arguably not constitute an abuse of dominance in Singapore. Critically, while UK and European laws contain a specific reference to the direct or indirect imposition of 'unfair purchase or selling prices or other unfair trading conditions', this was removed from the Competition Act before it was enacted in Singapore. Moreover, the CCCS Guidelines contain no reference (or any examples) with regard to exploitative conduct constituting an abuse of dominance. However, the CCCS is yet to make a definitive and binding statement in relation to whether exploitative conduct could constitute an abuse and the position is yet to be legally tested.

Law stated - 31 December 2021

Link between dominance and abuse

What link must be shown between dominance and abuse? May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

No causal link between dominance and abuse must be shown as a matter of law, and the CCCS will assess the issues of dominance and abuse separately.

That being said, there may be instances where the dominance of an undertaking might cast light on the issue of whether its conduct is abusive and vice versa. In the SISTIC case, the conduct in question involved exclusive contracts between SISTIC and its venue operator and event promoter partners. In considering the question of barriers to entry (in the context of considering whether SISTIC held a dominant position), the CCCS observed that SISTIC's strategic conduct (ie, its exclusive agreements with key industry players) made large-scale entry even harder. In particular, the CCCS stated in the SISTIC case that 'the barrier to entry in relation to network effect is artificially erected and sustained by SISTIC's strategic conduct'. In this regard, and in appropriate circumstances, it is possible that the CCCS

will not make determinations of dominance and abuse completely in isolation from one another.

In addition to the above, it is also noted that the CCCS Guidelines specifically state that it is not necessary for the dominant position, the abuse and the effects of the abuse to be in the same market. The CCCS noted in the CCCS Guidelines that abusive preferencing can occur where a dominant undertaking leverages its market power in one market and accords favourable treatment to itself or other undertakings, resulting in harm (or likely harm) to competition in another market.

Law stated - 31 December 2021

Defences

What defences may be raised to allegations of abuse of dominance? When exclusionary intent is shown, are defences an option?

In assessing whether conduct is abusive, the CCCS Guidelines state that the CCCS may consider whether the dominant undertaking is able to objectively justify its conduct. However, to rely on this defence, it will be necessary for the dominant undertaking to show that it has behaved in a proportionate manner in defending its legitimate commercial interest and that it had not taken any measures that are more restrictive than necessary in doing so. While the CCCS Guidelines indicate that objective justifications will be taken into consideration when assessing whether conduct is abusive, the test arising from the CAB's decision in the SISTIC case instead suggests that objective justifications can be a defence after the conduct has already been classified as abusive, and that the burden is on the dominant undertaking in question to establish those objective justifications.

Law stated - 31 December 2021

SPECIFIC FORMS OF ABUSE

Types of conduct

Rebate schemes

The Competition and Consumer Commission of Singapore (CCCS) Guidelines state that in certain circumstances, discounts or rebates could give rise to abuse of dominance concerns. In particular, the CCCS Guidelines state that the CCCS will consider a range of factors in assessing such discounts, including whether the discounts simply reflect competition to secure orders from valued buyers or whether such discounts have beneficial effects. The CCCS Guidelines continue to state that a key question is whether the discount scheme will have an exclusionary effect on competition, which might arise where the discount arrangement amounts to a 'fidelity discount' or where the discount schemes are conditional on the buyer purchasing products as a bundle. The CCCS Guidelines also state that it is necessary for the dominant undertaking to show that its conduct is proportionate to the benefits produced.

In March 2012, the CCCS commenced investigations in the local soft drinks market after receiving a complaint that Coca-Cola Singapore Beverages (CCSB) had incorporated restrictive provisions in its supply agreements with on-premise retailers, such as exclusivity conditions and conditional rebates. In response to the investigations, CCSB voluntarily amended its supply agreements to remove potentially anticompetitive provisions. In particular, CCSB's voluntary undertaking to the CCCS included a commitment to not grant loyalty-inducing rebates that have an effect of inducing on-premise retailers to purchase exclusively or almost exclusively from CCSB. The CCCS ceased its investigation into CCSB in January 2013 following CCSB's voluntary undertaking.

Law stated - 31 December 2021

Tying and bundling

The CCCS Guidelines state that in certain circumstances, an undertaking that is dominant in one product market of a tie or bundle (the tying market or tying product) can harm competition by leveraging its market power through tying or bundling to foreclose the market for the other products that are part of the tie or bundle (the tied market or tied product) and, potentially, the tying market. Tying occurs when buyers that purchase one product are also required to purchase another product from the dominant undertaking, and can take place on a technical or contractual basis.

Bundling refers to the way that products are offered and priced by the seller. There are two types of bundling: mixed bundling and pure bundling. In the case of mixed bundling, a seller offers a lower price if two products are purchased as a package. In the case of pure bundling, the two products are only sold together in a fixed proportion and are not available for purchase on a stand-alone basis.

In determining whether the tie or bundle infringes the section 47 Prohibition, the CCCS may consider (1) whether the products that are sold in a tie or bundle are distinct products and (2) the anticompetitive effects in the tied market, the tying market or both at the same time.

There have been no relevant enforcement cases in Singapore to date.

Law stated - 31 December 2021

Exclusive dealing

Exclusive purchasing agreements (or vertical restraints with similar effect), non-compete provisions, full-line forcing and single branding may amount to an abuse of a dominant position, and the CCCS elaborates on such in the CCCS Guidelines. It is noteworthy that the SISTIC case, being the only abuse of dominance infringement decision issued by the CCCS to date, primarily involved exclusivity provisions within supply contracts. In the SISTIC case, the CCCS observed that the imposition of exclusive purchasing obligations is a common practice in commercial life, which may not be anticompetitive per se. The CCCS continued to observe that in many circumstances, exclusive purchasing, especially those that come with discounts and other incentives, may bring about some pro-competitive outcomes such as lower prices and higher efficiency. Accordingly, it would seem that the primary consideration in assessing whether such restrictions are abusive is the extent to which competitors are foreclosed as a result.

In the CCSB investigation, the CCCS also considered whether exclusivity conditions in CCSB's supply agreements amounted to an abuse of a dominant position. CCSB's voluntary undertaking to the CCCS contained commitments to: not impose any exclusivity restrictions on its on-premise retailers for CCSB brands of non-alcoholic beverages, except in limited circumstances; and not require its on-premise retailers who wish to sell other brands of beverages to first negotiate with CCSB.

The CCCS ceased its investigation into CCSB in January 2013 following CCSB's voluntary undertaking.

In June 2014, the CCCS commenced an investigation on Cordlife Group Limited (Cordlife) in relation to its exclusive agreements with baby fair organisers and hospitals that potentially have the effect of limiting competition from other providers of cord blood bank services in Singapore. Cordlife provided the CCCS with voluntary commitments to remove the existing exclusive arrangements that were the subject of the CCCS's investigation and to ensure that it does not have such exclusive arrangements with any baby fair or private maternity hospital in Singapore going forward. The CCCS ceased its investigation in June 2015 as the voluntary commitments adequately addressed its concerns.

The CCCS also investigated Asia Pacific Breweries (Singapore) Pte Ltd (APBS) in relation to its practice of supplying draught beer to retail outlets solely on an exclusive basis (outlet-exclusivity practice). APBS provided the CCCS with a voluntary commitment to cease its outlet-exclusivity practice for all draught beer contracts entered into with retailers

on and after 28 December 2015, including new and renewal contracts. The CCCS ceased its investigation in October 2015 as the voluntary commitment adequately addressed its concerns.

Law stated - 31 December 2021

Predatory pricing

The Competition Act, at section 47(2)(a), specifically states that 'predatory behaviour towards competitors' may constitute an abuse of dominance. Factors relevant to an assessment of whether predation is taking (or has taken) place may include: pricing below cost, intention to eliminate a competitor, and the feasibility of recouping losses.

The CCCS Guidelines state that, in assessing predatory pricing cases, the CCCS will have regard to the relevant price level against two measures of cost: average variable cost (AVC) and average total cost (ATC). In the absence of an objective justification, predation may be presumed where the dominant undertaking sets prices below the AVC. Where price is above the AVC, but below the ATC, then the CCCS will have regard to other evidence on whether an undertaking has the intention to harm competition. Where price is above the ATC, the CCCS Guidelines state that this will not indicate predation.

To date, there have been no enforcement actions taken by the CCCS involving predatory pricing.

Law stated - 31 December 2021

Price or margin squeezes

Where a dominant, vertically integrated undertaking discriminates in the supply of an input to downstream entities (ie, providing preferential terms to its own downstream affiliate), such actions could be considered abusive according to the CCCS Guidelines. Such actions can be called 'price squeezes' or 'margin squeezes'. The CCCS Guidelines state that, in testing for a margin squeeze, the CCCS will generally determine whether an efficient downstream competitor would earn (at least) normal profit when paying input prices set by the vertically integrated undertaking, given its revenues at the time of the alleged margin squeeze. To date, there have been no enforcement actions in Singapore involving price squeezes.

Law stated - 31 December 2021

Refusals to deal and denied access to essential facilities

The CCCS Guidelines state that undertakings generally have the freedom to decide whom they will deal with and not deal with and, accordingly, that a refusal to supply, even by a dominant undertaking, will generally not be abusive. However, a refusal to supply may amount to an abuse of dominance where the dominant undertaking stops supplying an existing buyer, withholds supplies from a new buyer or refuses to supply or provide access to key inputs (including physical assets, proprietary rights or data), with the result of (likely) substantial harm to competition.

A refusal (or constructive refusal) to allow access to an essential facility might also be considered abusive behaviour. The CCCS Guidelines state that a facility will be viewed as essential only where it can be demonstrated that access to it 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 highly undesirable for reasons of public policy).

Following a complaint received, the CCCS commenced an investigation into the allegation that several companies were refusing to supply lift spare parts for maintenance of lifts in public housing estates in Singapore. E M Services Pte Ltd (E M Services) provided the CCCS with voluntary commitments to supply BLT lift spare parts in Singapore to third-party

lift maintenance contractors in Singapore. The CCCS ceased its investigation into E M Services in 2016 as the voluntary commitments adequately addressed its concerns.

The CCCS conducted a public consultation exercise from 15 to 28 November 2017 in relation to proposed voluntary commitments from two other suppliers namely, BNF Engineering (S) Pte Ltd (BNF), which supplies spare parts for the BNF brand of lifts, and C&W Services Operations Pte Ltd (CWO), which supplies spare parts for the Ulift brand of lifts in Singapore. On 28 March 2018, the CCCS announced that it considered that the voluntary commitments provided by BNF and CWO fully addressed the competition concerns raised by the CCCS in relation to the supply of their respective brand of lift spare parts.

On 28 May 2019, the CCCS announced that it has concluded its investigations into the supply of lift spare parts for the maintenance of lifts, after accepting voluntary commitments from another two companies under investigation, namely, Chevalier Singapore Holdings Pte Ltd and Fujitec Singapore Corporation Ltd. This marked the end of a three-year investigation by the CCCS.

Law stated - 31 December 2021

Predatory product design or a failure to disclose new technology

Predatory product design or failure to disclose new technology is not specified as potentially abusive conduct within the CCCS Guidelines, nor has it been considered specifically by the CCCS in any case to date. Notwithstanding this, the CCCS has indicated that it will consider the likely effects on competition based on the specific facts and circumstances of each case.

Law stated - 31 December 2021

Price discrimination

The CCCS Guidelines state that price discrimination is a usual business practice in a wide range of industries, including those in which competition is effective. However, it goes on to acknowledge that price or non-price discrimination (ie, discrimination in relation to quality of service) may be abusive in certain circumstances. The CCCS Guidelines highlight that price discrimination by a dominant undertaking could give rise to a predatory pricing issue, a loyalty-inducing rebate or discount issue or a margin squeeze issue. The CCCS Guidelines also state that refusal by a standard essential patent holder to license its technology on fair, reasonable, or non-discriminatory (FRAND) terms may give rise to competition concerns. To date, there have been no cases in Singapore involving price or non-price discrimination taken by the CCCS.

Law stated - 31 December 2021

Exploitative prices or terms of supply

Exploitative prices or supply conditions would arguably not constitute the abuse of a dominant position in Singapore.

Law stated - 31 December 2021

Abuse of administrative or government process

The CCCS Guidelines do not specifically identify 'abuse of government process' as a potential abuse of dominance, and there have been no relevant enforcement cases in Singapore to date. Notwithstanding this, the CCCS has indicated that

it will consider the likely effects on competition based on the specific facts and circumstances of each case.

Law stated - 31 December 2021

Mergers and acquisitions as exclusionary practices

The CCCS Guidelines do not specifically identify structural issues arising from mergers or acquisitions as potentially amounting to an abuse of dominance, and there have been no relevant enforcement cases in Singapore to date. Notwithstanding this, the CCCS has indicated that it will consider the likely effects on competition, based on the specific facts and circumstances of each case.

Law stated - 31 December 2021

Other abuses

There are no other types of abuse specifically identified in the CCCS Guidelines. However, the CCCS has indicated that it will consider the likely effects on competition, based on the specific facts and circumstances of each case. In this regard, it may be open to the CCCS to consider other abusive conduct depending on the circumstances.

Law stated - 31 December 2021

ENFORCEMENT PROCEEDINGS

Enforcement authorities

Which authorities are responsible for enforcement of the dominance rules and what powers of investigation do they have?

The Competition and Consumer Commission of Singapore (CCCS) enforces the Competition Act and, accordingly, the abuse of dominance provisions thereunder. Generally, the CCCS has the power to require the provision of documents and information from any person, to enter premises with or without a warrant and to search premises with a warrant. In requiring the provision of documents and information, the CCCS has the ability to specify how that information is to be provided and routinely conducts interviews. The CCCS also has a range of powers related to those powers already indicated (for instance, when entering premises under a warrant, the CCCS may, inter alia, use such force as is reasonably necessary for that purpose or search any person on the premises in certain circumstances).

Law stated - 31 December 2021

Sanctions and remedies

What sanctions and remedies may the authorities impose? May individuals be fined or sanctioned?

Under section 69 of the Competition Act, the CCCS can make such directions as it considers appropriate to bring an infringement to an end or to remedy, mitigate or eliminate any adverse effect of the infringement (which potentially could involve structural or behavioural directions). In this regard, the CCCS has a general discretion in relation to the sanctions it imposes, although it may (inter alia):

- require parties to an agreement to modify or terminate the agreement;
- require an undertaking to pay to the CCCS such financial penalty in respect of the infringement as the CCCS may

determine (where it determines that the infringement has been committed intentionally or negligently), but not exceeding 10 per cent of the turnover of the business of the undertaking in Singapore for each year of infringement for a period of up to a maximum of three years;

- require an undertaking to enter such legally enforceable agreements as may be specified by the CCCS that are designed to prevent or lessen the anticompetitive effects that have arisen;
- require an undertaking to dispose of such operations, assets or shares of such an undertaking in such a manner as may be specified by the CCCS; and
- require an undertaking to provide a performance bond, guarantee or other form of security on such terms and conditions as the CCCS may determine.

In the SISTIC case, SISTIC was directed to pay a financial penalty of S\$989,000 (which was reduced on appeal to S\$769,000). Moreover, SISTIC was required to remove exclusivity clauses from certain agreements.

More generally, pursuant to the Competition (Amendment) Act 2018, which came into force on 16 May 2018, the CCCS is now empowered to accept binding and enforceable commitments for cases involving the section 47 Prohibition (pursuant to section 60A(3) of the Competition Act). This followed a public consultation concluded by the CCCS in January 2018, which concerned the then-proposed amendments to the Competition Act that were aimed at providing the CCCS with appropriate enforcement tools and to streamline existing processes.

Previously, the CCCS's powers only enabled it to accept voluntary undertakings from entities under investigation for breaches of the section 47 Prohibition. However, should these entities breach their voluntary undertakings subsequently, the CCCS's only recourse would have been to undertake the resource-intensive approach of reopening the investigation into the matter. This approach did not allow the CCCS to address the harm to the relevant market or markets in a timely manner because voluntary undertakings, unlike commitments, are not binding and enforceable. The amendments empowering the CCCS to accept binding and enforceable commitments were intended to, therefore, assist the CCCS in its enforcement efforts, enabling it to promptly enforce the commitments with the Singapore courts in the event of a subsequent breach by any of the same entities of the section 47 Prohibition.

Individuals would be sanctioned under the Competition Act should they cause or permit the destruction of evidence or provide false or misleading information to the CCCS.

Law stated - 31 December 2021

Enforcement process

Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

Yes, the CCCS has the ability to impose directions and sanctions (including financial penalties) that it considers appropriate to bring an infringement to an end, or to remedy, mitigate or eliminate any adverse effect of the infringement.

Law stated - 31 December 2021

Enforcement record

What is the recent enforcement record in your jurisdiction?

The SISTIC case remains the only enforcement decision made by the CCCS to date, relating to the abuse of a dominant position. The case is a landmark case in so far as it clarified the test for abuse of dominance in Singapore.

However, the CCCS is known to actively investigate potential violations of the section 47 Prohibition and may have a number of such investigations open at any one time. The CCCS has made several public statements noting the closure of several abuse of dominance investigations following the receipt of voluntary undertakings from the parties under investigation.

Law stated - 31 December 2021

Contractual consequences

Where a clause in a contract involving a dominant company is inconsistent with the legislation, is the clause (or the entire contract) invalidated?

While provisions of agreements that are determined to be anticompetitive under section 34 of the Competition Act are void in accordance with section 34(3), there is no equivalent provision in respect of violations of the section 47 Prohibition. However, should the CCCS determine that a contractual provision gives rise to an abuse of dominance concern, it can impose any such direction that it considers appropriate to bring the infringement to an end, or to remedy, mitigate or eliminate any adverse effect of the infringement.

Law stated - 31 December 2021

Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or other authority to order a dominant firm to grant access, supply goods or services, conclude a contract or invalidate a provision or contract?

The Competition Act only provides a right of follow-on actions for relief in civil proceedings in court where the finding of an infringement by the CCCS is a necessary precondition and where all avenues of appeal have been exhausted.

The right extends only to those parties who have suffered loss or damage directly as a result of an infringement of an operative provision of the Competition Act, and all such actions must be brought within two years of the expiry of the relevant appeal periods.

The court may grant relief by way of injunction or declaration, damages and such other relief as the court thinks fit.

Law stated - 31 December 2021

Damages

Do companies harmed by abusive practices have a claim for damages? Who adjudicates claims and how are damages calculated or assessed?

Parties may bring private actions for a breach of competition law under section 86 of the Competition Act, which provides that any person who suffers loss or damage directly as a result of an infringement (including, inter alia, of the section 47 Prohibition) shall have a right of action for damages in civil proceedings before the courts. The Competition Act does not allow parties to claim for double or treble damages.

Such rights are predicated on an infringement finding by the CCCS, and may only be brought within two years following the expiry of any applicable appeal periods.

To date, there have been no cases in Singapore on the award of damages relating to abuse of dominance infringements.

Appeals

To what court may authority decisions finding an abuse be appealed?

Appeals of the CCCS's decisions are made to the Competition Appeal Board (CAB), which is an independent body established under section 72 of the Competition Act. The CAB comprises 12 members including lawyers, economists, accountants, academics and other business people. In the usual course, a panel of five members will be appointed to hear an appeal. The CAB's powers and procedures are set out primarily in section 73 of the Competition Act and the Competition (Appeals) Regulations.

Appeals are made by lodging a notice of appeal, in accordance with the Competition (Appeals) Regulations, within two months from the date of the CCCS's infringement decision. Thereafter, the CCCS has six weeks to file its defence. The procedure and timetabling of the appeal may be determined at any time during the proceedings by the CAB, usually through holding a case management conference with the parties. The CAB has broad powers to make directions it thinks fit to determine the just, expeditious or economic conduct of the appeal proceedings. The CAB may review issues of facts and law.

With effect from 2 January 2021, parties may further appeal the CAB's decisions, in accordance with section 74 of the Competition Act, to the General Division of the High Court on a point of law arising from a decision of the CAB, or in respect of any decision made by it as to the amount of the financial penalty. Appeals are brought by way of originating summons, and the procedure governing the appeal is set out in Order 55 of the Rules of Court (2014 Rev Ed).

Parties may also appeal decisions of the General Division of the High Court to the Court of Appeal under section 74(4) of the Competition Act. Such right of appeal is the same right that exists in the case of decisions made by the General Division of the High Court in the exercise of its original civil jurisdiction. There is no further right of appeal from the Court of Appeal.

Law stated - 31 December 2021

UNILATERAL CONDUCT

Unilateral conduct by non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms?

No. There are no specific restrictions under the Competition Act relating to unilateral conduct by non-dominant firms.

Law stated - 31 December 2021

UPDATE AND TRENDS

Forthcoming changes

Are changes expected to the legislation or other measures that will have an impact on this area in the near future? Are there shifts of emphasis in the enforcement practice?

Between September and October 2020, the Competition and Consumer Commission of Singapore (CCCS) carried out a public consultation on proposed changes to six sets of guidelines, including the CCCS Guidelines. Relevant to this guide on abuse of dominance are the proposed changes to the CCCS Guidelines and the CCCS Guidelines on Market Definition (the Market Definition Guidelines).

The CCCS completed its review of the relevant guidelines on 31 December 2021 and the revised guidelines will come into effect from 1 February 2022. The revised guidelines considered amendments made to the Competition Act in 2018, findings and recommendations from the CCCS's E-commerce Platforms Market Study (the Market Study), the CCCS's experience in applying the Competition Act since the guidelines were last revised in 2016, and international best practices.

Where the market is characterised by innovation and rapidly changing competition dynamics, the CCCS has indicated that it will place more focus on barriers to entry, the degree of innovation, the strength of network effects and the control or ownership of key inputs, rather than on market shares.

The CCCS also introduced alternative measures of market shares such as production volumes, sales volumes, capacity and reserves. Where the relevant undertaking is a multi-sided platform, measures such as the number of monthly active users, the number of transactions and gross merchandise value may also be considered. A multi-sided platform refers to an undertaking acting as a platform that facilitates interactions between two or more groups of users and creates value for sellers or buyers on one side of the platform by matching or connecting them with sellers or buyers on the other side of the platform.

Furthermore, the CCCS also proposed more detailed guidance on how entry barriers will be analysed. This includes guidance on its approach to economies of scope, network effects, consumption synergies and the effect of multi-homing by users of multi-sided platforms.


In defining the market, the CCCS has proposed guidance on the concept of single-sided and multi-sided markets, with reference to externalities such as potential indirect network effects (ie, where the value of the platform to users on one side of the platform depends on the number of users on the other side(s) of the platform). The CCCS stated that it may also consider non-monetary aspects of the product such as the platform's data security, access and sharing policies, the platform's speed and ease of use, and the level of innovation (eg, through the number of new features on the platform).

The above proposed changes have been incorporated into the CCCS Guidelines and the Market Definition Guidelines. The changes proposed seek to provide greater clarity to relation to market definition, market power and types of potentially abusive conduct in the digital era and in the context of multi-sided platforms. The changes made to the CCCS Guidelines and the Market Definition Guidelines do not depart significantly from the current case-by-case, effects-based approach.

A significant shift in enforcement practice is not expected as the CCCS concluded in its Market Study that 'no major competition concerns involving e-commerce platforms in Singapore have been identified at this time'.

Law stated - 31 December 2021

Jurisdictions

| | | |
|---|-----------------------|--|
|  | Australia | Gilbert + Tobin |
|  | Austria | Schima Mayer Starlinger |
|  | Belgium | Cleary Gottlieb Steen & Hamilton LLP |
|  | Brazil | Mattos Filho Veiga Filho Marrey Jr e Quiroga Advogados |
|  | Bulgaria | Wolf Theiss |
|  | Canada | Baker McKenzie |
|  | China | DeHeng Law Offices |
|  | Denmark | Bruun & Hjejle |
|  | Ecuador | Robalino |
|  | European Union | Cleary Gottlieb Steen & Hamilton LLP |
|  | France | UGGC Avocats |
|  | Germany | Cleary Gottlieb Steen & Hamilton LLP |
|  | Greece | Nikolinakos & Partners Law Firm |
|  | Hong Kong | Eversheds Sutherland (International) LLP |
|  | India | Shardul Amarchand Mangaldas & Co |
|  | Indonesia | ABNR |
|  | Ireland | Matheson |
|  | Italy | Rucellai & Raffaelli |
|  | Japan | Anderson Mōri & Tomotsune |
|  | Morocco | UGGC Avocats |
|  | Nigeria | Streamsowers & Köhn |
|  | Norway | Advokatfirmaet Thommessen AS |
|  | Poland | Linklaters LLP |
|  | Portugal | Gómez-Acebo & Pombo Abogados |
|  | Saudi Arabia | Al Tamimi & Company |

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|---|-----------------------|--------------------------------------|
|  | Slovenia | Odvetniska družba Zdolsek |
|  | South Korea | Yoon & Yang LLC |
|  | Spain | . |
|  | Switzerland | CORE Attorneys Ltd |
|  | Turkey | ELIG Gurkaynak Attorneys-at-Law |
|  | United Kingdom | Cleary Gottlieb Steen & Hamilton LLP |
|  | USA | Cleary Gottlieb Steen & Hamilton LLP |