Introduction

On 1 November 2016, the Competition Commission of Singapore ("CCS") announced that it had finalised its amendments to various guidelines and the amended guidelines will come into effect on 1 December 2016. These amendments follow from a consultation held by the CCS between 25 September 2015 and 27 November 2015, and which we wrote about in this previous Client Update. This announcement by the CCS marks the conclusion of the first major overhaul of most, if not all, of the CCS’ guidelines since the Competition Act (CAP. 50B) first came into force on 1 January 2006.

In addition to the amendments to the guidelines, the CCS has also introduced a new fast track procedure for Section 34 and Section 47 investigations, which is independent and separate from the leniency procedure. Drawing on similar procedures from other jurisdictions such as the European Commission and the UK Competition Market Authority, the fast track procedure provides parties with an opportunity to admit liability for an infringement in exchange for a slight reduction in financial penalties. This is an interesting development and one that businesses can capitalise on if it is clear that an infringement had been committed.

This Update sets out an overview of the key changes to the guidelines as presented by the CCS, and briefly highlights other key points businesses should be aware of.

Summary of Key Changes And Implications

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| Guidelines on the Substantive Assessment of Mergers | • Clarify when the acquisition of minority shareholdings may lead to decisive influence, resulting in a reviewable merger.  
• Explain the factors considered in assessing a merger.  
• Clarify what is meant by a “substantial lessening of competition” in assessing a merger, namely the types of efficiencies and remedies that can be considered. | • Make clear that transactions by venture capitalists and private equity investors, including acquisition of a minority stake, can amount to a merger, i.e. may need to be notified to the CCS.  
• Make clear that the setting-up of joint-ventures which are not full function, i.e. cooperative joint-ventures, should be assessed in light of the prohibition of anti-competitive agreements. This will primarily apply to joint-ventures between competitors, although co-operative joint-ventures between parties in a vertical relationship could be caught as well.  
• Clarify that a non-compete clause may |
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| Guidelines on Lenient Treatment for Undertakings coming forward with information on Cartel Activity | - Clarify that coercers and initiators of cartels may also apply for leniency and may qualify for a 50% discount in financial penalty, but they must unconditionally admit the conduct they engaged in that may be an infringement of the Act.  
- Clarify that CCS requires a waiver of confidentiality from leniency applicants to communicate with other competition or regulatory authorities in other jurisdictions where the applicant has also sought leniency.  
- Clarify the process by which a leniency applicant can apply and perfect a marker, and the threshold of information required from a leniency applicant to perfect a marker. | Two new conditions imposed on all leniency applicants – admission to the conduct (not liability) and waiver of confidentiality - have been formally introduced by CCS for leniency to be granted. These were, in practice, already generally required by CCS so the change is not as important as it may seem.  
- Coercers and initiators of cartels can now apply for leniency although they are not eligible for full immunity but only to a reduction of up to 50% of the financial penalties.  
- Clarify that the records by CCS of the applicant’s oral submission are internal documents of CCS. This means that such records do not have to be made accessible to other parties when access to the file is granted.  
- Clarify that CCS will inform a leniency applicant in writing on whether immunity or leniency is granted and of the scope of such leniency or immunity when the Proposed Infringement Decision is issued.  
- Clarify that the extent of the information to be provided to secure a marker: name of the applicant, description of the cartel activity, relevant market(s) to which the conduct relates, duration of the cartel activity, names of the parties to the cartel and description of the impact on these markets in Singapore. This latter is for CCS to ensure that there is a sufficient nexus with Singapore. |

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<td>section 34 prohibition</td>
<td>&quot;vertical agreements” and explain that parties in a vertical relationship with each other does not preclude the finding of a horizontal agreement or concerted practice between them.&lt;br&gt;- Clarify that aside from agreements relating to price-fixing, bid-rigging, market sharing and output limitations, if an agreement is found to restrict competition, it will be similarly regarded as restrictive of competition to an appreciable extent, and there is no need to prove appreciable adverse effects on competition.&lt;br&gt;- Clarify that, in general, any provision and /or exchange of information, including price or non-price information, with the objective of restricting competition, will be considered as a restriction of competition by object.&lt;br&gt;- Explain that price recommendations by a trade or professional recommendations may be harmful to competition.&lt;br&gt;- Amend the definition of a small or medium sized enterprise (SME) in alignment with that used by SPRING Singapore.</td>
<td>will typically be viewed as vertical agreements, the changes make clear that an anti-competitive agreement is likely to be found in agreements of a hub-and-spoke nature (eg. the use of a common supplier by retailers to exchange competitive information such as the implementation of a price increase).&lt;br&gt;- The category of anti-competitive agreements by object is not closed, i.e. there may be more and more instances where the CCS will try to avoid having to prove that the agreement had an effect on competition in Singapore.&lt;br&gt;- An anti-competitive exchange of information includes unilateral disclosure of competitive information. This means that the recipients of competitive information from a competitor must take appropriate steps to ensure they appropriately distance themselves. This express statement reflects the strict approach relating to exchange of information.</td>
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<td>Guidelines on section 47 prohibition</td>
<td>Clarify that a finding of dominance can be established at a market share below the indicative threshold of 60%.&lt;br&gt;- Amend the definition of a small or medium sized enterprise (SME) in alignment with that used by</td>
<td>Expand on what is intended by collective dominance. In particular, a factor to be considered is whether the undertakings concerned together form a collective entity vis-à-vis their competitors, customers or suppliers and consumers. This could be the case where there are structural links such as common ownership. However, it can also be established in the absence of</td>
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### CLIENT UPDATE

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<td><strong>SPRING Singapore.</strong></td>
<td>• Clarify that in general, CCS's assesses that an undertaking which is an SME is unlikely to be capable of conduct that has an appreciable adverse effect on competition in Singapore, but CCS will assess each case based on its own facts and merits.</td>
<td>structural links, for instance a cooperation agreement that lead the undertakings to adopt a common policy in the market. Whilst the clarification is helpful, it is important to note that the revision to these Guidelines read together with those to Section 34 Guidelines mean that a co-operative joint-venture could be assessed both under Section 34 and Section 47 of the Act.</td>
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<td>• Clarify what constitutes a collective entity and a collective dominant position.</td>
<td>• Confirm that to establish an abuse of dominance CCS does not have to conduct a counterfactual analysis although CCS may do so. In short, the likelihood of a foreclosure suffices for CCS to decide that an abuse of dominance has occurred. This change can have serious consequences.</td>
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<td>• Clarify the legal test for section 47 cases.</td>
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<td>• Clarify that CCS may use counterfactual analysis as a tool for assessing abuse of dominance where appropriate.</td>
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<td>• Explain CCS's considerations for remedial actions in abuse of dominance cases.</td>
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<td><strong>Guidelines on filing notifications for guidance or decision with respect to section 34 and section 47 prohibitions</strong></td>
<td>• Simplify the requisite forms for filing notifications for guidance or decision with respect to section 34 and section 47 prohibitions and clarify the information / documents required.</td>
<td>• Make clear that applicants can request for state-of-play meetings, i.e. notably an opportunity to discuss with the CCS the timing when the guidance or decision will be issued.</td>
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<td>• Clarify that it is possible to draw CCS's attention to the urgency of the matter, which CCS will take into account if properly justified.</td>
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<td>• Clarify that SMEs will generally not be asked to pay additional fees where CCS requests for a Form2 to be submitted.</td>
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<td><strong>Guidelines on the appropriate amount of penalty; Guidelines on the powers of Investigations and Guidelines on Enforcement</strong></td>
<td>• Clarify that CCS adopts a 6-step approach to determine the penalty amount.</td>
<td>• As there is no limitation period for infringements to the Act, businesses may now face difficulties in providing the CCS with the financial information needed to determine the relevant turnover, especially in cases where the infringement ceased more than five years before the</td>
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<td>the undertaking’s turnover in the relevant market affected by the infringement, in the financial year preceding the year when the infringement ended.</td>
<td>investigation has commenced.</td>
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<td>• Explain the concepts of “relevant turnover” (for the purpose of calculating the base penalty) and “total turnover” (for the purpose of calculating the statutory maximum penalty)</td>
<td>• Confirm that CCS will not prorate the financial penalties based on the actual duration of the infringement in cases where an infringement lasts for less than a year only. In other words, an infringement which lasts 1 month will be treated the same way as an infringement which lasts 6 months or a year.</td>
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<td>• Clarify that CCS will not usually make an adjustment for duration in bid-rigging or collusive tendering cases, i.e. the duration multiplier will be set at 1.</td>
<td>• The ‘unreasonable failure by an undertaking to respond to a request for financial information on business turnover and/or relevant turnover’ is now an aggravating factor, i.e. the financial penalties can be increased on that sole basis.</td>
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<td>• Clarify the circumstances in which CCS will consider as aggravating factors at Step 3.</td>
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<td>• Clarify that CCS may impose an uplift for deterrence at Step 4, and that CCS may consider leniency or fast track procedure discount at Step 6.</td>
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<td>• Clarify that CCS may set out the proposed amount of financial penalty in the proposed infringement decision (“PID”) and addressees of the PID may make representations, written and oral, to CCS on matters of liability as well as penalty.</td>
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<td>• Clarify that CCS may request updated applicable turnover figures prior to issuing an infringement decision (“ID”).</td>
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<td>Practice Statement on Fast Track Procedure for</td>
<td>• Explain the purpose of the fast track procedure and that it may be initiated by CCS</td>
<td>• New 4-step procedure introduced by the CCS to ensure efficient settlement of cases – initiation, discussion,</td>
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## Concluding Words

Businesses are well advised to take note of the key changes highlighted above and be appraised of the implications of such changes on their commercial practices moving forward. This is to avoid infringing the provisions of the Competition Act, particularly in light of the fact that the amendments make clear that certain conduct, such as exchange of strategic business information, is likely to be viewed as an infringement by the CCS.

If you would like to discuss any of the above, please feel free to reach out to any of the team at the contact details listed in the following page.

Separately, the Competition & Antitrust and Trade Team will host a seminar on the changes to be introduced on 30 November at 9:00 a.m. We will circulate more details shortly.
Please feel free to also contact Knowledge and Risk Management at eOASIS@rajahtann.com

ASEAN Economic Community Portal

With the launch of the ASEAN Economic Community ("AEC") in December 2015, businesses looking to tap the opportunities presented by the integrated markets of the AEC can now get help a click away. Rajah & Tann Asia, United Overseas Bank and RSM Chio Lim Stone Forest, have teamed up to launch “Business in ASEAN”, a portal that provides companies with a single platform that helps businesses navigate the complexities of setting up operations in ASEAN.

By tapping into the professional knowledge and resources of the three organisations through this portal, small- and medium-sized enterprises across the 10-member economic grouping can equip themselves with the tools and know-how to navigate ASEAN's business landscape. Of particular interest to businesses is the "Ask a Question" feature of the portal which enables companies to pose questions to the three organisations which have an extensive network in the region. The portal can be accessed at http://www.businessinasean.com/.
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Please note also that whilst the information in this Update is correct to the best of our knowledge and belief at the time of writing, it is only intended to provide a general guide to the subject matter and should not be treated as a substitute for specific professional advice for any particular course of action as such information may not suit your specific business and operational requirements. It is to your advantage to seek legal advice for your specific situation. In this regard, you may call the lawyer you normally deal with in Rajah & Tann Singapore LLP or e-mail Knowledge & Risk Management at eOASIS@rajahtann.com.