

# CCCS GUIDELINES ON THE SECTION 47 PROHIBITION 2016

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# 1 INTRODUCTION

- 1.1 Section 47 of the Competition Act (Chapter 50B) (“the Act”) prohibits any conduct on the part of one or more undertakings, which is an abuse of a dominant position, in any market in Singapore (“the section 47 prohibition”). The section 47 prohibition came into force on 1 January 2006.
- 1.2 These guidelines set out some of the factors and circumstances which the Competition and Consumer Commission of Singapore (“CCCS”) may consider in determining whether an undertaking has engaged in conduct amounting to an abuse of a dominant position in a market. They indicate the manner in which CCCS will interpret and give effect to the provisions of the Act when assessing abuse of dominance.
- 1.3 CCCS will set its strategic priorities and consider each case on its merits to see if it warrants an investigation.
- 1.4 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 CCCS. 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.
- 1.5 A glossary of terms used in these guidelines is attached.

# 2 SECTION 47: THE PROVISIONS

## Scope of the Provisions

- 2.1 Conduct that constitutes an abuse of a dominant position in a market, includes conduct that protects, enhances or perpetuates the dominant position of an undertaking in ways unrelated to competitive merit. The section 47 prohibition only prohibits **abuse** of a dominant position. It does not prohibit undertakings from having a dominant position or striving to achieve it. In considering whether there has been an abuse of dominance, CCCS will conduct a detailed examination of the relevant markets concerned and the effects of the undertaking’s conduct.
- 2.2 The section 47 prohibition also applies to undertakings in a dominant position outside Singapore, and which abuse that dominant position in a market in Singapore.
- 2.3 Section 47(2) of the Act provides an illustrative list of such conduct:
  - a. predatory behaviour towards competitors;
  - b. limiting production, markets, or technical development to the prejudice of consumers;
  - c. applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
  - d. making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.

## Undertakings

- 2.4 Undertaking means any person, being an individual, a body corporate, an unincorporated body of persons or any other entity, capable of carrying on commercial or economic activities relating to goods or services. It includes individuals operating as sole proprietorships, companies, firms, businesses, partnerships, co-operatives, societies, business chambers, trade associations and non-profit-making organisations, whatever its legal and ownership status (foreign or local, government or non-government), and the way in which it is financed.
- 2.5 The key consideration in assessing whether an entity is an undertaking for the application of the section 47 prohibition is whether it is capable of engaging, or is engaged, in commercial or economic activity. An entity may engage in commercial or economic activity in some of its functions but not others. The term “undertaking” has the same meaning for the section 47 prohibition as for the section 34 prohibition.

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- 2.6 The section 47 prohibition will also apply where the conduct is engaged in by entities which form a single economic unit, where the single economic unit is dominant in a relevant market. Whether or not the entities form a single economic unit will depend on the facts and circumstances of each case.<sup>1</sup>
- 2.7 The section 47 prohibition extends to conduct on the part of two or more economically independent undertakings, where there is an abuse of a collective dominant position. Please refer to paragraphs 3.16 to 3.21 for more details on collective dominance.
- 2.8 As the intent of the Act is to regulate the conduct of market players, it will not apply to any activity carried on by, any agreement entered into or any conduct on the part of the Government, statutory bodies or any person acting on their behalf.

### 3

## CONCEPT OF DOMINANCE

- 3.1 There is a two-step test to assess whether the section 47 prohibition applies:
- whether an undertaking is dominant in a relevant market, either in Singapore or elsewhere; and
  - if it is, whether it is abusing that dominant position in a market in Singapore.

### Market Definition

- 3.2 To assess whether an undertaking is dominant, the relevant market<sup>2</sup> must be determined. The relevant market will have two dimensions:
- the relevant product (“the product market”); and
  - the geographic scope of the market (“the geographic market”).

### Assessing Dominance

- 3.3 An undertaking will not be deemed dominant unless it has substantial market power. Market power arises where an undertaking does not face sufficiently strong competitive pressure and can be thought of as the ability to profitably sustain prices above competitive levels or to restrict output or quality below competitive levels. An undertaking with market power might also have the ability and incentive to harm the process of competition in other ways, for example by weakening existing competition, raising entry barriers or slowing innovation. Both buyers and sellers can have market power.
- 3.4 In assessing whether an undertaking is dominant, the extent to which there are constraints on an undertaking's ability to profitably sustain prices above competitive levels will be considered. Such constraints include:
- Existing competitors: This refers to competition from undertakings already in the relevant market, to whom buyers might switch if the alleged dominant undertaking sustained prices above competitive levels. The market shares of competitors in the relevant market are one measure of the competitive constraints from existing competitors;
  - Potential competitors: This refers to the possibility that undertakings will enter the relevant market and gain market share at the expense of an alleged dominant undertaking seeking to sustain prices above competitive levels. The strength of potential competition is affected by barriers to entry;
  - Other factors, such as the existence of powerful buyers and economic regulation.

### Extent of Existing Competition: Market Shares

- 3.5 There are no market share thresholds for defining dominance under the section 47 prohibition. An undertaking's market share is an important factor in assessing dominance but does not, on its own, determine whether an undertaking is dominant. For example, it is also important to consider the positions of other undertakings operating in the same market and how market shares have changed over time. An undertaking is more likely to be deemed as dominant if its competitors have relatively weak positions and it has enjoyed a persistently high market share over time.

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<sup>1</sup> Please see paragraphs 2.7 and 2.8 of the *CCCS Guidelines on the Section 34 Prohibition 2016* for more details on the term “single economic unit”.

<sup>2</sup> Please refer to the *CCCS Guidelines on Market Definition*.

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- 3.6 The history of the market shares of all the undertakings within the relevant market is often more informative than considering market shares at a single point in time, partly because such a snapshot might not reveal the dynamic nature of the market. For example, volatile market shares might indicate that undertakings constantly innovate to get ahead of each other. This is consistent with effective competition. Evidence that undertakings with low market shares have grown rapidly to attain relatively large market shares might suggest that barriers to expansion are low, particularly when such growth is observed for recent entrants.
- 3.7 Market shares, by themselves, may not necessarily be a reliable guide to market power. Other determinants of competition, such as entry barriers, the degree of innovation, product differentiation, the responsiveness of buyers to price increases, and the price responsiveness of competitors, may need to be considered as well. High market shares are not necessarily an indication that competition in the market is not effective. For example, a persistently high market share could be the result of persistently successful innovation in a market, where undertakings compete to improve the quality of their products.
- 3.8 Generally, as a starting point, CCCS will consider a market share above 60% 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. An undertaking's market share does not, on its own, determine whether that undertaking is dominant. Other factors mentioned earlier, where relevant, may be considered in determining if an undertaking is dominant.
- 3.9 In general, an undertaking which is a small or medium sized enterprise ("SME")<sup>3</sup> is unlikely to be capable of conduct that has an appreciable adverse effect on competition in Singapore. Nevertheless, CCCS will assess each case on its own facts and merits and the markets concerned.
- 3.10 Please refer to **Annex A** for details on market power and market shares.

### Extent of Potential Competition: Entry Barriers

- 3.11 Entry barriers are important in the assessment of potential competition. The lower the entry barriers, the more likely it will be that potential competition will prevent undertakings already within a market from profitably sustaining prices above competitive levels. Even an undertaking with a large market share would be unlikely to have market power in a market where there are very low entry barriers. An undertaking with a large market share in a market protected by significant entry barriers is likely to have market power.
- 3.12 There are many ways in which different types of entry barriers can be classified, but it is useful to distinguish between the following factors which, depending on the circumstances, can contribute to barriers to entry:
- Sunk costs;
  - Limited access to key inputs and distribution outlets;
  - Regulation;
  - Economies of scale;
  - Network effects;
  - Exclusionary behaviour by incumbents.
- 3.13 Please refer to **Annex B** for details on entry barriers.

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<sup>3</sup> With effect from 1 April 2011, SMEs in Singapore are defined as enterprises with annual sales turnover of not more than S\$100 million; or enterprises with employment size of not more than 200 workers.

## Other Constraints

- 3.14 The strength of buyers and the structure of the buyers' side of the market may constrain the market power of a seller. Buyer power requires that the buyer has a choice between alternate sellers. A buyer's bargaining strength might be enhanced if:
- the buyer is well-informed about alternative sources of supply and could readily, at little cost to itself, switch substantial purchases from one seller to another while continuing to meet its needs;
  - the buyer could commence production of the item itself, or "sponsor" new entry by another seller relatively quickly, for example, through a long-term contract, without incurring substantial sunk costs (i.e. irretrievable costs);
  - the buyer is an important outlet for the seller, that is, the seller would be willing to cede better terms to the buyer in order to retain the opportunity to sell to that buyer;
  - the buyer can intensify competition among sellers through establishing a procurement auction or purchasing through a competitive tender.
- 3.15 In some sectors, the economic behaviour of undertakings (such as the prices they set or the level of services they provide) is regulated by the Government or an industry sector regulator, and an assessment of market power may need to take that into account. Although an undertaking might not face effective constraints from existing competitors, potential competitors or buyer power in the market, it may still be constrained from profitably sustaining prices above competitive levels by the Government or an industry sector regulator. However that is not to say that market power cannot exist when there is economic regulation. It is feasible, for example, that regulation of the average price or profit level across several markets supplied by an undertaking may still allow for the undertaking to profitably sustain prices above competitive levels in (one or more of) these markets and/or to engage in exclusionary behaviour of various kinds.

## Collective Dominance

- 3.16 The section 47 prohibition extends to conduct on the part of **two or more** undertakings, where there is an abuse of a collective dominant position. 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. It is not necessary that they adopt identical conduct on the market in every respect.
- 3.17 For the purpose of analysing abuse of a collective dominant position, it is necessary to 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/has been an abuse of that dominant position in a market in Singapore.
- 3.18 In order to assess whether the undertakings concerned together constitute a collective entity, CCCS will examine whether there are links or factors that give rise to a connection between the undertakings concerned.
- 3.19 CCCS may find that an agreement between undertakings, or the way in which an agreement is implemented, leads the undertakings concerned to present themselves or act together as a collective entity. For example, the undertakings may have entered into cooperation agreements that lead them to adopt a common policy on the market. Connecting factors may also be structural, i.e. they may arise from ownership interests and other links in law that lead the undertakings concerned to coordinate their conduct on the market. That said, the existence of an agreement or of other links in law is not indispensable to a finding that the undertakings concerned constitute a collective entity.
- 3.20 The structure of the market as well as the way in which the undertakings concerned interact on the market may also lead to a finding that the undertakings concerned constitute a collective entity. For instance, there might be a relationship of interdependence between firms in an oligopolistic market, where those parties become aware of common interests and consider it economically rational to adopt a common policy that might protect, enhance or perpetuate their collective position in the market.
- 3.21 Once it is assessed that the undertakings together constitute a collective entity, CCCS will consider whether that collective entity actually holds a dominant position (as explained in paragraphs 3.3 and 3.4 above), and whether there is/has been an abuse of that dominant position (as explained in section 4 below).

## 4 ABUSE

### Legal Test for Abuse of Dominance

- 4.1 Where it is established that an undertaking is dominant in the relevant market, the second part of the test is to assess whether the undertaking's behaviour might be regarded as an abuse of its dominant position. The conduct of a dominant undertaking has the potential to significantly impact competitive conditions in Singapore. However, where a dominant position is achieved or maintained through conduct arising from efficiencies, such as through successful innovation or economies of scale or scope, such conduct will not be regarded as an abuse of dominance. Section 47(2) of the Act lists broad categories of business behaviour within which particular examples of abusive conduct are most likely found.
- 4.2 The legitimate exercise of an intellectual property right, even by a dominant undertaking, will not, in general, be regarded as an abuse. It is however possible that the way in which an intellectual property right is exercised may give rise to concerns if it goes beyond the legitimate exploitation of the intellectual property right, for example, if it is used to leverage market power from one market to another. More details can be found in the *CCCS Guidelines on the Treatment of Intellectual Property Rights in Competition Cases 2016*.
- 4.3 Exclusionary behaviour 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. Such 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. However, the likely effect of each particular kind of behaviour will be assessed on the particular facts of each case.
- 4.4 In conducting an assessment of an alleged abuse of dominance, CCCS will undertake an economic effects-based assessment in order to determine whether the conduct has, or is likely to have, an adverse effect on the process of competition.<sup>4</sup> The process of competition may be adversely impacted, for instance, by conduct which would be likely to foreclose, or has foreclosed, competitors in the market. CCCS considers that factors which would generally be relevant to its assessment include: the position of the allegedly dominant party and its competitors; the structure of, and actual competitive conditions on, the relevant market; and the position of customers and/or input suppliers.
- 4.5 If the conduct has, or is likely to have, an adverse effect on the process of competition, CCCS may consider if the dominant undertaking is able to objectively justify its conduct. For example, a refusal to supply might be justified by the poor creditworthiness of the buyer. However, the dominant undertaking will still have to show that it has behaved in a proportionate manner in defending its legitimate commercial interest. It should not take more restrictive measures than are necessary to do so. CCCS may also consider if the dominant undertaking is able to demonstrate any benefits arising from its conduct. It will still be necessary for a dominant undertaking to show that its conduct is proportionate to the benefits claimed. Such conduct will not be allowed if its primary purpose is to harm competition.
- 4.6 Please refer to **Annex C** for examples of conduct that may amount to an abuse.

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<sup>4</sup> Re *Abuse of a Dominant Position by SISTIC.com Pte Ltd* [2012] 1 SGCA 1 at [290] to [291], the CAB agreed with CCCS that the "correct and proper test" in determining an abuse of dominance is as follows:

"...an abuse will be established where a competition authority demonstrates that a practice has, or likely to have, an adverse effect on the process of competition. In particular:

(a) It is sufficient for the competition authority to show a likely effect, and is not necessary to demonstrate an actual effect on the process of competition.

(b) If an effect, or likely effect, on restricting competition by the dominant undertaking is establish[isic], the dominant undertaking can advance an objective justification. If it can adduce evidence to demonstrate that its behaviour produces countervailing benefits so that it has the net positive impact on welfare. However, the burden is on the undertaking to demonstrate an objective justification."

**Abuse in Related Markets**

4.7 It is not necessary for the dominant position, the abuse and the effects of the abuse, to be in the same market. The table below sets out the different possible scenarios where the section 47 prohibition may apply to the undertaking Y. The scenarios set out below are for illustration; whether such conduct will amount to an abuse will depend on the facts and circumstances of each case.

**Dominance, Abuse and Related Markets**

Scenarios	Market A	Market B
Y may be dominant in Market A and use a predatory strategy to eliminate competitors from Market A.	Dominance Abuse Effect	
Y may be dominant in Market A, and it provides the raw material essential to production in Market B, in which it is also a market player. To strengthen its own position in Market B, it may abuse its dominant position in Market A, by refusing to supply the raw material in question to its competitors in Market B.	Dominance Abuse	Effect
Y may be dominant in Market A, but not dominant in the related Market B. Y may offer special discounts in Market B, to buyers who remain loyal to it in Market A, so as to help maintain its dominant position in Market A.	Dominance Abuse	Abuse
Y may be dominant in Market A. It may try to leverage its market power in Market A to Market B, by tying the sale of its products in Market A to the sale of its products in the related Market B.	Dominance	Abuse Effect

**Counterfactual**

4.8 Counterfactual analysis serves as a means of assessing whether a given conduct has restrictive effects on competition by considering whether an alternative realistic situation from which the relevant conduct has been removed would be more competitive. The Competition Appeal Board in its decision on the *SISTIC* appeal has stated that the role of counterfactual assessment is not a legal requirement in the assessment of abuse of dominance investigations.<sup>5</sup> However, CCCS will, where appropriate, use counterfactual analysis as a tool for assessing abuse of dominance.

<sup>5</sup> *Re Abuse of a Dominant Position by SISTIC.com Pte Ltd* [2012] SGCA 1 at [316].

## 5 EXCLUSIONS

- 5.1 The section 47 prohibition does not apply to the matters specified in the Third Schedule to the Act (“the Third Schedule”) by virtue of section 48. These are:
- an undertaking entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly, insofar as the prohibition would obstruct the performance, in law or fact, of the particular tasks assigned to that undertaking. **Annex D** sets out how this exclusion will be applied;
  - conduct to the extent to which it is engaged in order to comply with a legal requirement, that is any requirement imposed by or under any written law;
  - conduct which is necessary to avoid conflict with an international obligation of Singapore and which is also the subject of an order by the Minister for Trade and Industry (“the Minister”);
  - conduct which is necessary for exceptional and compelling reasons of public policy and which is also the subject of an order by the Minister;
  - conduct which relates to any product to the extent to which any other written law, or code of practice issued under any written law, relating to competition gives another regulatory authority jurisdiction in the matter;
  - conduct which relates to any of the following specified activities:
    - the supply of ordinary letter and postcard services by a person licensed and regulated under the Postal Services Act (Chapter 237A);
    - the supply of piped potable water;
    - the supply of wastewater management services, including the collection, treatment and disposal of wastewater;
    - the supply of scheduled bus services by any person licensed and regulated under the Public Transport Council Act (Chapter 259B);
    - the supply of rail services by any person licensed and regulated under the Rapid Transit Systems Act (Chapter 263A);
    - cargo terminal operations carried out by a person licensed and regulated under the Maritime and Port Authority of Singapore Act (Chapter 170A);
    - conduct which relates to the clearing and exchanging of articles undertaken by the Automated Clearing House established under the Banking (Clearing House) Regulations (Chapter 19, Rg 1); or any related activities of the Singapore Clearing Houses Association;
  - any conduct that is directly related and necessary to the implementation of a merger; and
  - any conduct (either on its own or when taken together with other conduct) to the extent that it results in a merger.
- 5.2 The Minister may at any time, by order, amend the Third Schedule.

## 6 BLOCK EXEMPTIONS

- 6.1 The provision for block exemptions does not apply to the section 47 prohibition.

## 7 NOTIFICATION FOR GUIDANCE/ DECISION

- 7.1 There is no requirement for undertakings to notify conduct to CCCS. It is for an undertaking to ensure that its conduct is lawful and decide whether it is appropriate to make a notification for guidance or decision.
- 7.2 Guidance may indicate whether an undertaking’s conduct would be likely to infringe the section 47 prohibition. If CCCS considers that the conduct is not likely to infringe the section 47 prohibition, its guidance may indicate whether that is because of the effect of an exclusion.
- 7.3 CCCS will generally take no further action once guidance has been given that the section 47 prohibition is unlikely to be infringed, unless there are reasonable grounds for believing that there has been a material change of circumstance since the guidance was given; or CCCS has a reasonable suspicion that the information on which it had based its guidance was materially incomplete, misleading or false; or a complaint is received from a third party.



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- 7.4 A decision will indicate whether an undertaking's conduct has infringed the section 47 prohibition. CCCS will state reasons for its decision. If the section has not been infringed, the decision may indicate whether it is because of the effect of an exclusion.
- 7.5 CCCS will generally take no further action once a decision has been given that the section 47 prohibition has not been infringed unless there are reasonable grounds for believing that there has been a material change of circumstance or there is a reasonable suspicion that the information on which it had based its decision was materially incomplete, misleading or false. Unlike guidance, a decision cannot be reopened because a complaint is made by a third party.
- 7.6 Unlike the notifications of agreements under section 43 or 44 of the Act, notification of conduct to CCCS by an undertaking does not give rise to any immunity from financial penalty in respect of the infringements by the conduct occurring between the giving of the notification and CCCS's determination of the notification.
- 7.7 If CCCS determines a notification by giving guidance that the conduct is unlikely to infringe the section 47 prohibition, or by giving a decision that the conduct does not infringe the section 47 prohibition, the conduct will receive an immunity from financial penalties for infringements of the section 47 prohibition. CCCS may remove the immunity conferred by the favourable guidance or decision if it takes further action under one of the circumstances described in paragraph 7.3 (in a case for guidance) or paragraph 7.5 (in a case for decision), and considers that the conduct will likely infringe the section 47 prohibition. In doing so, CCCS will issue a notice to the undertaking informing that the immunity is being removed as from the date specified in the notice. If CCCS removes the immunity because the information supplied by the undertaking was materially incomplete, false or misleading, the effective date of the immunity removal may be earlier than the date of the notice.
- 7.8 Please refer to the *CCCS Guidelines on Filing Notifications for Guidance or Decision with respect to the Section 34 Prohibition and Section 47 Prohibition 2016* on how undertakings may notify CCCS of its conduct and seek guidance or decision from CCCS.

## 8

# CONSEQUENCES OF INFRINGEMENT

### Financial Penalty

- 8.1 A financial penalty not exceeding 10% of the turnover of the business of an undertaking in Singapore for each year of infringement may be imposed for a maximum period of three (3) years, where there is an intentional or negligent infringement of the section 47 prohibition.

### Remedies

- 8.2 Once CCCS has made a decision that any conduct has infringed the section 47 prohibition, CCCS may require such a person as it thinks appropriate, to take such action as is specified in the direction to remedy, mitigate or eliminate any adverse effects of such infringement or circumstances and to prevent the recurrence of such infringements or circumstances. Different remedies will have varying administrative and compliance/monitoring costs. However, the design of remedies for abuse cases must be done on a case-by-case basis and take into account the features of each case, including the severity and duration of the abusive conduct, the structure of the relevant market and existing competition, and the possible impact of the remedies on efficiency and innovation.
- 8.3 Remedies can take the form of prohibitory conduct remedies, affirmative conduct remedies, structural remedies, or a combination of these remedies where appropriate.<sup>6</sup>

### Rights of Private Action

- 8.4 A party who has suffered any loss or damage directly as a result of an infringement of the section 47 prohibition has a right of action in civil proceedings against the relevant undertaking.
- 8.5 This right of private action can only be exercised after CCCS has determined that an undertaking has infringed the section 47 prohibition and after the appeal process has been exhausted.

<sup>6</sup> Refer to section 69 of the Act for CCCS's powers to enforce its infringement/unfavourable decisions.

- 9.1 This part considers the extent to which market shares indicate whether an undertaking possesses market power, how market shares may be measured, the sort of evidence likely to be relevant, and some potential problems. These issues are important when considering the intensity of existing competition.
- 9.2 In general, market power is more likely to exist if an undertaking (or group of undertakings) has a persistently high market share. Likewise, market power is less likely to exist if an undertaking has a persistently low market share. Relative market shares can also be important. For example, a high market share might be more indicative of market power when all other competitors have very low market shares.
- 9.3 The history of the market shares of all undertakings within the relevant market is often more informative than considering market shares at a single point in time, partly because such a snapshot might not reveal the dynamic nature of a market. For example, volatile market shares might indicate that undertakings constantly innovate to get ahead of each other. This is consistent with effective competition. Evidence that undertakings with low market shares have grown rapidly to attain relatively large market shares might suggest that barriers to expansion are low, particularly when such growth is observed for recent entrants.
- 9.4 While the consideration of market shares over time is important when assessing market power, an analysis of other factors affecting competition is also important. The following factors may be considered:
- **Low entry barriers:** An undertaking with a persistently high market share may not necessarily have market power where there is a strong threat of potential competition. If entry into the market is easy, the incumbent might be constrained to act competitively so as to avoid attracting entry over time by potential competitors.
  - **Bidding markets:** Sometimes buyers choose their suppliers through procurement auctions or tenders. In these circumstances, even if there are only a few suppliers, competition might be intense. This is more likely to be the case where tenders are large and infrequent (so that suppliers are more likely to bid), where suppliers are not subject to capacity constraints (so that all suppliers are likely to place competitive bids), and where suppliers are not differentiated (so that for any particular bid, all suppliers are equally placed to win the contract). In these types of markets, an undertaking might have a high market share at a single point in time. However, if competition at the bidding stage is effective, this currently high market share would not necessarily reflect market power.
  - **Successful innovation:** In a market where undertakings compete to improve the quality of their products, a persistently high market share might indicate persistently successful innovation and so would not necessarily mean that competition is not effective.
  - **Product differentiation:** Sometimes the relevant market will contain products that are differentiated. In this case, undertakings with relatively low market shares might have a degree of market power because other products in the market are not very close substitutes.
  - **Responsiveness of customers:** Where undertakings have similar market shares, this does not necessarily mean that they have similar degrees of market power. This may be because their customers differ in their ability or willingness to switch to alternative suppliers.
  - **Price responsiveness of competitors:** Sometimes an undertaking's competitors will not be in a position to increase output in response to higher prices in the market. For example, suppose an undertaking operates in a market where all undertakings have limited capacity (e.g. are at, or close to, full capacity and so are unable to increase output substantially). In this case, the undertaking would be in a stronger position to increase prices above competitive levels than an otherwise identical undertaking with a similar market share operating in a market where its competitors are not close to full capacity.

## Measuring Market Shares

### Evidence

- 9.5 Data on market shares may be collected from a number of sources including:
- information provided by undertakings themselves. Undertakings are usually asked for data on their own market shares, and to estimate the shares of their competitors;
  - trade associations, customers or suppliers who may be able to provide estimates of market shares; and
  - market research reports.
- 9.6 The appropriate method of calculating market shares depends on the case at hand. Usually sales data by value and by volume are both informative. Often value data will be more informative, for example, where goods are differentiated.
- 9.7 The following issues may arise when measuring market shares:
- **Production, sales and capacity:** Market share is usually determined by an undertaking's sales to customers in the relevant market. Market share is normally measured using sales to direct customers in the relevant market rather than an undertaking's total production (which can vary when stocks increase or decrease). Sometimes market shares will be measured by an undertaking's capacity to supply the relevant market: for example, where capacity is an important feature in an undertaking's ability to compete or in some instances where the market is defined taking into account supply side considerations.
  - **Sales values:** When considering market shares on a value basis, market share is valued at the price charged to an undertaking's direct customers. For example, when a manufacturer's direct customers are retailers, it is more informative to consider the value of its sales to retailers as opposed to the prices at which the retailers sell that manufacturer's product to final consumers.
  - **Choice of exchange rates:** Where the relevant geographic market is international, this may complicate the calculation of market shares by value as exchange rates vary over time. It may then be appropriate to **consider** a range of exchange rates over time, including an assessment of the sensitivity of the analysis to the use of different exchange rates.
  - **Imports:** If the relevant geographic market is international, market shares will be calculated with respect to the whole geographic market. If the relevant geographic market is not international, it is possible that **imports** will account for a share of that market. If so, and if information is available, the sales of each importing undertaking are usually considered and market shares calculated accordingly, rather than aggregating shares as if they were those of a single competitor. Where the relevant geographic market is domestic, the share of an undertaking that both supplies within and imports into that market<sup>7</sup> would usually include both its domestic sales and its imports.
  - **Internal production:** In some cases, a supplier may be using some of its capacity or production to meet its own internal needs. In the event of a rise in price on the open market, the supplier may decide to divert some or all of its "captive" capacity or production to the open market if it is profitable to do so, taking into account effects on its downstream business that is now deprived of the captive supply. The extent to which "captive" capacity or production is likely to be released onto the open market (or might otherwise affect competition on the open market) will be taken into account in assessing competitive constraints.

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<sup>7</sup>This includes situations where the undertaking in question is part of the same group as an importer into that market.

## 10 ENTRY BARRIERS

- 10.1 This part considers barriers to entry and expansion and how they may be assessed in practice.
- 10.2 Entry barriers are important in the assessment of potential competition. The lower the entry barriers, the more likely it will be that potential competition will prevent undertakings already within a market from profitably sustaining prices above competitive levels.
- 10.3 Entry barriers are factors that allow an undertaking to profitably sustain supra-competitive prices in the long term, without being more efficient than its potential rivals. Even if there are no existing competitors, an undertaking is unlikely to be able to sustain supra-competitive prices in the long term, in the absence of entry barriers.
- 10.4 Even an undertaking with a large market share in a market with very low entry barriers would be unlikely to have market power. However, an undertaking with a large market share in a market protected by significant entry barriers is likely to have market power.
- 10.5 Entry barriers arise when an undertaking has an advantage (not solely based on superior efficiency) over potential entrants from having already entered the market and/or from special rights (e.g. to production or distribution) or privileged access to key inputs. Entry barriers may make new entry less likely or less rapid by affecting the expected sunk costs of entry and/or the expected profits for new entrants once they are in the market, or by establishing physical, geographic or legal obstacles to entry.
- 10.6 There are many ways in which different types of entry barriers can be classified, but it is useful to distinguish between the following factors which, depending on the circumstances, can contribute to barriers to entry:
- Sunk costs;
  - Limited access to key inputs and distribution outlets;
  - Regulation;
  - Economies of scale;
  - Network effects;
  - Exclusionary behaviour by incumbents.
- 10.7 For simplicity, most of the following examples refer to a situation where there is one incumbent already in the market and one potential entrant or “rival”. Although in reality the existence of several incumbents and several potential entrants may complicate the analysis, the principles outlined remain valid.

### Sunk Costs

- 10.8 Entry will occur only if the expected profit from being in the market exceeds any sunk costs of entry.
- 10.9 Sunk costs of entry are those costs which must be incurred to compete in a market, but which are not recoverable on exiting the market. When a new entrant incurs sunk costs when entering a market, it is as if that entrant has paid a non-refundable deposit to enable it to enter.
- 10.10 Sunk costs might give an incumbent a strategic advantage over potential entrants. Suppose an incumbent has already made sunk investments necessary to produce in a market while an otherwise identical new entrant has not. In this case, even if the incumbent charges a price at which entry would be profitable (if the price remained the same following entry), entry may not occur. This would be the case if the entrant does not expect the post-entry price to be high enough to justify incurring the sunk costs of entry.
- 10.11 It is useful to consider the extent to which sunk costs give an incumbent an advantage over potential new entrants and to what extent sunk costs might affect entry barriers. The mere existence of sunk costs in any particular industry, however, does not necessarily mean that entry barriers are high or that competition within the market is not effective.

### Limited Access to Key Inputs and Distribution Outlets

- 10.12 Entry barriers may arise where inputs or distribution outlets are scarce, and where an incumbent obtains an advantage over a potential entrant due to privileged access (or special rights) to those inputs or outlets.

### Essential Facilities

- 10.13 At one extreme, an incumbent might own or have privileged access to an essential facility, which its rival does not. Although the assessment of whether a particular facility is essential must be on a case-by-case basis, essential facilities are rare in practice. A facility will only be viewed as essential 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). Generally if a rival does not have access to an essential facility, it cannot enter the market.
- 10.14 There will be circumstances in which difficulties accessing inputs or resources constitute an entry barrier without those assets or resources meeting the strict criteria required to be defined as “essential facilities”.

### Intellectual Property Rights

- 10.15 Intellectual property rights (“IPRs”) can be entry barriers, although this is not always the case. In particular, when an IPR does not prevent others from competing with the IPR holder in the relevant market, it would not normally be a barrier to entry. In those cases where IPRs do constitute a barrier to entry, it does not always imply that competition is reduced. Although an IPR may constitute an entry barrier in the short term, in the long term a rival undertaking may be able to overcome it by its own innovation. The short term profit which an IPR can provide acts as an incentive to innovate and can thus stimulate competition in innovation.

### Regulation

- 10.16 Regulation may affect barriers to entry. For example, regulation may limit the number of undertakings which can operate in a market through the granting of licences. Also, licences may be restricted so that there is an absolute limit to the number of undertakings that can operate in the market. In this case a licence can be thought of as a necessary input before production can take place and so regulation will act as an entry barrier.
- 10.17 Sometimes regulation sets objective standards. Where these apply equally to all undertakings, such as health and safety regulations, they might not affect the costs for new entrants any more than they affect the costs for incumbents. However, regulation can lead to entry barriers when it does not apply equally to all undertakings. For example, incumbents might lobby for standards that are relatively easy for them to meet, but harder for a new entrant to achieve.

### Economies of Scale

- 10.18 Economies of scale exist where average costs fall as output rises. In the presence of large economies of scale, a potential entrant may need to enter the market on a large scale (in relation to the size of the market) in order to compete effectively. Large scale entry might require relatively large sunk costs and might be more likely to attract an aggressive response from incumbents. These factors may in some circumstances constitute barriers to entry.
- 10.19 Attaining a viable scale of production may take time and so require the new entrant to operate in the market for some time at a loss. For example, a new entrant at the manufacturing level might need to secure many distribution outlets to achieve a viable scale. If, perhaps due to long term contracts, many input suppliers or distributors are locked-in to dealing with the incumbent, the new entrant might not be able to achieve an efficient scale of production over the medium term. This could deter entry.
- 10.20 Even when entry is not completely deterred, entrants may take time to achieve efficient levels of production, obtain the relevant information, raise capital and build the necessary plant and machinery. In this case, even if entry occurs, the incumbent could nevertheless retain market power for a substantial period of time.

### **Network Effects**

- 10.21 Network effects occur where users' valuations of the network increase as more users join the network. For example, as new customers enter a telephone network, this might add value to existing customers because they would be connected to more people on the same network. If customers benefit from being on the same network (e.g. due to incompatibility with other networks), an incumbent with a well-established network might have an advantage over a potential entrant that is denied access to the established network and so has to establish its own rival network.
- 10.22 Network effects, just like economies of scale, may make new entry harder where the minimum viable scale (e.g. in terms of users of the network) is large in relation to the size of the market.

### **Exclusionary Behaviour**

- 10.23 The term "exclusionary behaviour" refers to anti-competitive behaviour which harms competition, for example, by removing an efficient competitor, limiting competition from existing competitors, or excluding new competitors from entering the market. The following paragraphs set out some examples of how exclusionary behaviour can create barriers to entry.

### **Predatory Response to Entry**

- 10.24 An undertaking contemplating entering a market weighs up its expected profit from being in the market with the expected sunk costs of entering. Expected profits from being in the market may depend on how the entrant expects the incumbent to react when it enters the market: the potential entrant might believe that the incumbent would, for example, reduce prices substantially if it entered and so reduce the prospective profits available.
- 10.25 While low prices are generally to be encouraged, if a new entrant expected an incumbent to respond to entry with predatory prices, this could deter entry. For example, if an incumbent has successfully engaged in predatory behaviour in the past, it may have secured a reputation for its willingness to set predatory prices. Any future potential entrants to this market (or to any other market where the incumbent operates) might then be deterred from entering due to the likelihood of facing an aggressive response.

### **Vertical Restraints**

- 10.26 In general, vertical restraints are restrictions imposed by either a buyer or seller operating at different stages of the production and distribution chain. Many vertical restraints may be beneficial or benign, especially if there is effective competition at both the upstream and downstream levels. However, a vertical restraint imposed by a dominant undertaking may also affect entry.
- 10.27 For example, a dominant manufacturer might have a series of exclusive purchasing agreements with most retailers in a particular geographic market. This might limit the ability of a new manufacturer to operate on a viable scale in that market and therefore deter entry.

### **Other Exclusionary Practices**

- 10.28 Discounts designed to foreclose markets, margin squeezes, and refusals to supply might also be used in a way that raises entry barriers.

### **Assessing Entry Barriers**

- 10.29 Assessing the effects of entry barriers and the advantages they give to incumbents can be complex. A variety of steps may be involved. For example, incumbents and potential entrants might be asked for their views on: the sunk costs associated with a commitment to entry; the relative ease of obtaining the necessary inputs and distribution outlets; how regulation affects the prospect of entry; the cost of operating at a minimum viable scale; and any other factors that may impede entry or expansion in the market.

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- 10.30 Claims that potential competition is waiting in the wings are more persuasive if there is fully documented evidence of plans to enter a market or where hard evidence of successful entry in the recent history of the market is provided. In the latter case, such evidence might include a historical record of entry into the market (or closely related markets), including evidence that new entrants had attained in a relatively short period of time a sufficient market share to become effective existing competitors.
- 10.31 It is important, but not necessarily straightforward, to assess the time that may elapse before successful entry would occur. Some producers, most likely those in neighbouring markets, may be able to enter speedily (e.g. in less than a year) and without substantial sunk costs by switching the use of existing facilities. Where this is possible, it will sometimes be taken into account in defining the market (as supply-side substitutability). New entry from scratch tends to be slower than entry from a neighbouring market, for a variety of reasons, which depend on the market concerned – obtaining planning permission, recruiting and training staff, ordering equipment, appointing distributors and so on. The nature of the market may also limit the times at which entry may occur. For example, where customers award long-term contracts, a potential entrant may have to wait until these contracts are renewed before it has an opportunity to enter the market. It may be also important to assess whether enough contracts would come up for renewal to allow the entrant to attain a viable scale.
- 10.32 Sometimes the relevant geographic market will be international. Where this is not the case, foreign suppliers may nevertheless exert a constraint on domestic undertakings, in the absence of entry barriers, as potential competitors. However, trade barriers – whether tariff or non-tariff – are an example of a barrier to entry that could impede international competition and shield market power.
- 10.33 Growth, or prospective growth, of a market will usually have a bearing on the likelihood of entry. Entry will usually be more likely in a growing market than in a static or declining one because it will be easier for an entrant to achieve a viable scale, for example by selling to new customers.
- 10.34 In markets where products are differentiated, undertakings compete not only on price but also on features such as quality, service, convenience and innovation. Where there is a scope for differentiation, this may facilitate entry, for example where a new entrant targets untapped demand by differentiating itself from incumbents (provided that incumbents have not already pre-empted all possible niches in the market).
- 10.35 In markets where brand image is important, a new entrant may have to invest heavily in advertising before it can attain a viable scale. However, even where advertising expenditure is a sunk cost, this does not necessarily mean that entry barriers are high. For example, incumbents may have had to establish their brands and may also have to advertise heavily to maintain them, and so will not necessarily have a cost advantage over potential entrants.
- 10.36 The rate of innovation is also important. In markets where high rates of innovation occur, or are expected, innovation may overcome product market barriers to entry relatively quickly (provided that there are no barriers to entry into innovative activity). Indeed, any profits that result from an advantage created by successful innovation (e.g. from intellectual property rights) may be an important incentive to innovate.

### Barriers to Expansion

- 10.37 New entry is not simply about introducing a new product to the market. To be an effective competitive constraint, a new entrant must be able to attain a large enough scale to have a competitive impact on undertakings already in the market. This may entail entry on a small scale, followed by growth. Barriers to entry are closely related to barriers to expansion and can be analysed in a similar way. Many of the factors discussed above that may make entry harder might also make it harder for undertakings that have recently entered the market to expand their market shares and hence their competitive impact.

## 11 EXAMPLES OF CONDUCT THAT MAY AMOUNT TO AN ABUSE

- 11.1 This part provides more details on how CCCS may assess certain types of conduct by dominant undertakings (whether individually or collectively dominant) that may infringe the section 47 prohibition. The examples are not exhaustive; and conduct not covered by or referred to in this part, should not be assumed to be beyond the scope of the section 47 prohibition. CCCS will consider the likely effects on competition, based on the specific facts and circumstances of each case.
- 11.2 This part covers various categories of conduct, including predatory behaviour, discount schemes, price discrimination, margin squeezes, vertical restraints and refusals to supply (and essential facilities). This part will also elaborate upon some of the considerations for assessing if the conduct could amount to an abuse.

### Predatory Behaviour

- 11.3 An undertaking may engage in predatory behaviour, for example, by setting prices so low that it forces one or more undertakings out of the market. The undertaking may deliberately incur losses in the short run, in order to harm competition, so as to be able to charge higher prices in the longer run. While consumers may benefit in the short run from lower prices, in the longer term, consumers will be worse off due to weakened competition which in turn leads to higher prices, reduced quality and less choice. 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.

### Pricing Below Cost

- 11.4 In assessing if predation is taking (or has taken) place, CCCS will usually first consider the question of whether the dominant undertaking is pricing below the relevant measure of cost. While the cost benchmarks to be used may differ according to the facts of each case,<sup>8</sup> in general, the following benchmarks may be applied in determining predation:
- Price is below the average variable cost (“AVC”) of production - Predation may be presumed in the absence of objective justification for this pricing strategy.
  - Price is above AVC but below average total cost (“ATC”) of production – This pricing strategy may be evidence of predation; in determining if predation is taking (or has taken) place, CCCS may consider other evidence on whether the conduct is intended to harm competition.
  - Price is above ATC - Evidence on costs does not indicate predation.

### Price is Below AVC

- 11.5 Pricing below AVC is unlikely to be rational, because an undertaking that does so is, on average, making losses on each unit of output it produces. The undertaking could increase its profitability by reducing its output, or by ceasing supply altogether. Thus if a dominant undertaking sets prices below AVC, it may be presumed that it is doing so for predatory purposes unless it can prove otherwise.
- 11.6 However, CCCS will consider any evidence that the undertaking’s behaviour may be objectively justified. Some possible legitimate commercial reasons for such conduct may include **loss leading**, where a retailer cuts the price of a single product in order to increase sales of other products, **short-run promotions**, which involves selling below AVC for a limited period, especially where a new product is introduced to a market, or **option value**, where in response to an unexpected fall in demand, an undertaking incurs short-run losses so as to maintain a presence in the market, in case demand returns to profitable levels.

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<sup>8</sup>For example, in some cases, incremental costs may be a more appropriate cost benchmark.



### Price is Above AVC but Below ATC

- 11.7 Where an undertaking prices above its AVC but below its ATC, CCCS may consider other evidence on whether an undertaking has the **intention** to harm competition. CCCS may consider, for example, if the undertaking's strategy makes commercial sense only because it harms competition. It may also be relevant to consider if there might be other strategies open to the dominant undertaking that would have met its other commercial objectives just as well, while being less likely to harm competition.
- 11.8 Direct documentary evidence may be used to determine whether an undertaking intended to engage in predatory behaviour. Internal documents or evidence from a credible witness may prove that an undertaking intended to harm competition.
- 11.9 The behaviour of the undertaking may also provide indirect evidence of its intention to engage in predatory behaviour. For example, if the dominant undertaking targeted price cuts against a competitor, while maintaining higher prices elsewhere, that might indicate predatory intent. Or, if the alleged predatory behaviour was part of a pattern of aggressive pricing or other conduct that harms competition, then it is more likely to provide evidence of predatory intent than if it had been isolated.

### The Feasibility of Recouping Losses

- 11.10 It may also be relevant to consider the effect of the alleged predatory behaviour, i.e. whether it would be likely to harm competition. In determining predation, CCCS may consider the feasibility of recouping losses.

### Discounts

- 11.11 Discount schemes are commonly employed as a form of price competition and are generally to be encouraged. However, certain discount schemes offered by dominant undertakings may have the effect of harming competition and thereby constitute an abuse. In assessing the effects of a dominant undertaking's discount scheme, it is important to consider if the scheme is commercially rational only because it has the effect (or likely effect) of foreclosing all, or a substantial part, of the market to competition.
- 11.12 CCCS will consider whether the dominant undertaking's discount scheme simply reflects competition to secure orders from valued buyers or whether it has beneficial effects. For example, the discount scheme may:
- expand demand and thereby help to cover fixed costs efficiently;
  - lower input costs for downstream undertakings and thereby encourage them to compete more effectively on price;
  - reflect efficiency savings resulting from supplying particular buyers; or
  - provide an appropriate reward for the efforts of downstream undertakings to promote the dominant undertaking's product.

However, it will still be necessary for the dominant undertaking to show that its conduct is proportionate to the benefits produced.

- 11.13 There are many different types of discount schemes, but it is important to note that it is the effect of the discount scheme on competition, rather than its form, which will determine whether or not it is an abuse. For example, discounts may be used to bring prices down to predatory levels. Examples of other discount schemes which may similarly have exclusionary effects, include schemes where discounts are conditional on buyers making all or a large proportion of their purchases from the dominant undertaking (**fidelity discounts**) or where they are conditional on the purchase of **tied products** (i.e. products that buyers would have preferred to purchase separately).

### Price Discrimination

- 11.14 Price discrimination is the application of dissimilar conditions to equivalent transactions with other trading parties. An undertaking may charge different prices to different buyers, or different categories of buyers, for the same product - where the differences in prices do not reflect any differences in relative cost, quantity, quality or any other characteristic of the products supplied. Conversely, an undertaking may charge different buyers, or categories of buyers, the same price even though the costs of supplying the product, are in fact very different. Price discrimination is only possible where the undertaking is able to differentiate between different buyers or categories of buyers, and there is no arbitrage between them. It should be noted that price discrimination is a usual business practice in a wide range of industries, including industries where competition is effective.

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- 11.15 Price discrimination may raise issues under the section 47 prohibition only where there is evidence that it is used to harm competition. For example, a dominant undertaking may use a discriminatory pricing structure to set predatory prices (see paragraphs 11.3 -11.10) and/or to set discounts which have the effect (or likely effect) of foreclosing all, or a substantial part of a market (see paragraphs 11.11-11.13). Where a vertically integrated undertaking is dominant in an upstream market and a competitor in a related downstream market, it may use discriminatory pricing to apply a margin squeeze that distorts competition in the downstream market (see paragraphs 11.18 -11.19).
- 11.16 When considering whether price discrimination is an abuse, it may often be relevant to consider whether such a practice can generate efficiencies or benefits, such as the efficient recovery of fixed costs, the substantial expansion of demand or the opening up of new market segments. This might occur, for example, in industries characterized by relatively high fixed costs, where in order to efficiently recover those fixed costs, buyers are split into groups according to their willingness to pay, and where groups with low willingness to pay would not buy in the absence of price discrimination.
- 11.17 Discrimination does not have to take place on the basis of price only. For example, an undertaking which controlled the supply of a key input might supply a downstream undertaking with a poorer quality of service than it provides to its own business competing in the same downstream market (longer delivery times, for instance). If the difference in service quality were not reflected in the pricing by the upstream undertaking, the undertaking could be regarded as acting in a discriminatory way. As with the analysis for price discrimination, non-price discrimination will not necessarily be abusive. It would be abusive only where it harms (or is likely to harm) competition.

### Margin Squeeze

- 11.18 A vertically integrated undertaking may be dominant in the supply of an important input for a downstream market in which it also operates. In such a case, the vertically integrated undertaking could potentially harm competition by setting such a low margin between its input price (e.g. wholesale price) and the price it sets in the downstream market (e.g. retail price) such that an equally efficient downstream competitor is forced to exit the market or is unable to compete effectively. This is known as a "margin squeeze", and is likely to constitute an abuse of a dominant position where it harms (or is likely to harm) competition.
- 11.19 In testing for a margin squeeze, CCCS will generally determine whether an efficient downstream competitor would earn (at least) a normal profit when paying input prices set by the vertically integrated undertaking. The test is typically applied to the downstream arm of the vertically integrated undertaking. The test asks whether the integrated undertaking's downstream business would make (at least) a normal profit if it paid the same input price that it charged its competitors, given its revenues at the time of the alleged margin squeeze.

### Vertical Restraints

- 11.20 Vertical restraints are restrictions imposed by either a buyer or seller operating at different stages of the production and distribution chain. Most vertical restraints are beneficial or benign, especially if there is effective competition at both the upstream and downstream levels. For example, vertical restraints can generate benefits through the promotion of efficiencies, non-price competition (to the benefit of consumers) and investment and innovation. CCCS will consider evidence of such benefits in its assessment; however, it will still be necessary for the dominant undertaking to show that its conduct is proportionate to the benefits produced.
- 11.21 A vertical restraint imposed by a dominant undertaking may be abusive where it harms (or is likely to harm) competition. Vertical restraints can take many forms, and again, it is important to note that it is the effect of the vertical restraint on competition, rather than its form, which will determine whether or not it is abusive.
- 11.22 A vertical restraint can be an agreement between a manufacturer and a retailer, a manufacturer and a wholesaler, a wholesaler and a retailer, a retailer and an end buyer or between two manufacturers (or wholesalers or retailers) which for the purposes of the agreement, operate at different stages in the production and distribution chain.

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- 11.23 Vertical restraints can either be imposed unilaterally by the dominant firm or made by agreement. While vertical agreements<sup>9</sup> are excluded from the section 34 prohibition in the first instance, they are not excluded from the section 47 prohibition. Vertical restraints involving dominant undertakings may still be prohibited.

### Examples of Foreclosure

- 11.24 Where a dominant manufacturer has an **exclusive purchasing** requirement with a retailer, this may amount to an abuse. There are other types of vertical restraints that may have a similar effect to exclusive purchasing agreements. For example, a dominant manufacturer might require that its retailers purchase a minimum quantity of its product. If the minimum quantity is set close to each retailer's total input requirement, the effect may be equivalent to that of an exclusive purchasing arrangement (i.e. **quantity forcing**). Other examples of vertical restraints that may be considered under the section 47 prohibition are **tying**<sup>10</sup> and **full-line forcing**<sup>11</sup>. Whether such exclusive purchasing agreements (or vertical restraints with similar effect) will amount to an abuse will depend on the facts and circumstances of each case.
- 11.25 Where a dominant manufacturer requires that its retailers give it the opportunity to match any price offered by a rival, this might harm competition among the manufacturers as it reduces rivals' incentives to compete on price. However, there may be no effect on competition if only a small proportion of the retail market is subjected to this restraint.

### Refusals to Supply and Essential Facilities

- 11.26 Undertakings generally have the freedom to decide whom they will deal, or not deal with. Therefore, a refusal to supply, even by a dominant undertaking, would not normally be an abuse. However, in certain circumstances, a refusal to supply by a dominant undertaking may be considered an abuse if there is evidence of (likely) substantial harm to competition and if the behaviour cannot be objectively justified. Objective justifications might include the buyer's poor creditworthiness, or capacity constraints, for example.
- 11.27 A refusal to supply may constitute an abuse, for example, where a dominant undertaking stops supplying an existing buyer, or withholds supplies from a new buyer, with the result of (likely) substantial harm to competition. A refusal to supply could result from a refusal to allow access to an essential facility.

### Essential Facilities

- 11.28 Facilities are rarely considered to be "essential". 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).
- 11.29 Market definition will be important in determining if a particular facility is essential. An asset will not be regarded as an essential facility, if other similar facilities compete within the same relevant market (i.e. if there are potential substitutes), or if the facility is not indispensable to the provision of the product in question.
- 11.30 As with refusals to supply in general, a refusal to allow access to an essential facility will constitute an abuse only if there is evidence of (likely) substantial harm to competition and there is no objective justification for the dominant undertaking's behaviour.
- 11.31 In determining whether a refusal to allow access to an essential facility constitutes an abuse, and if so, on what terms access should be granted, care must be taken not to undermine the incentives for undertakings to make future investments and innovations, especially where the essential facility is a result of a previous innovation.

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<sup>9</sup> The section 34 prohibition does not apply to vertical agreements entered into between 2 or more undertakings each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain products, other than such vertical agreement as the Minister may by order specify.

<sup>10</sup> Tying occurs where the manufacturer makes the purchase of one product (the tying product) conditional on the purchase of a second product (the tied product).

<sup>11</sup> Full-line forcing is a form of tie-in sales where, in order to obtain one product in the manufacturer's range, the retailer is required to stock all the products in that range.

## 12 EXCLUSION FROM THE SECTION 47 PROHIBITION FOR AN UNDERTAKING ENTRUSTED WITH THE OPERATION OF SERVICES OF GENERAL ECONOMIC INTEREST OR HAVING THE CHARACTER OF A REVENUE-PRODUCING MONOPOLY (PARAGRAPH 1 OF THE THIRD SCHEDULE TO THE ACT)

- 12.1 CCCS intends to apply this exclusion very narrowly. The onus is on the undertaking seeking to benefit from the exclusion, to demonstrate that all the requirements of the exclusion are met. The undertaking will have to (i) satisfy CCCS that it has been entrusted with the operation of a service of general economic interest or having the character of a revenue-producing monopoly; and (ii) show that the application of the section 47 prohibition would obstruct the performance, in law or in fact, of the particular task entrusted to it.

### Entrusted

- 12.2 The undertaking will need to demonstrate that it has been entrusted with the service in question by a public authority. The public authority can be part of the Government, or one of the statutory boards. The act of entrustment can be made by way of legislative measures such as regulation, or the grant of a licence governed by public law. It can also be done through an act of public authority, such as by way of ministerial orders. Mere approval by a public authority of the activities carried out by the undertaking will not suffice.
- 12.3 The exclusion applies only to the particular tasks entrusted to the undertaking and not to the undertaking or its activities generally. Further, the exclusion applies only to obligations linked to the subject matter of the service of general economic interest in question and which contribute directly to that interest.

### Services of General Economic Interest

- 12.4 Services of general economic interest are different from ordinary services in that public authorities consider they should be provided in all cases, whether or not there is sufficient economic incentive for the private sector to do so.
- 12.5 The term **economic** refers to the nature of the service itself, rather than the interest. Further, to be considered a service of **general** economic interest, the service must be widely available and not restricted to managing private interests or to a certain class, or classes, of customers. However, this does not exclude selective criteria in the supply of service.

### Restrictions on Competition

- 12.6 Restrictions on competition from other economic operators must be allowed only insofar as they are necessary to enable the undertaking entrusted with the service of general economic interest to provide the service in question. It would be necessary to consider the economic conditions in which the undertaking operates and the constraints placed on it, in particular the costs which it has to bear.

12.7 It would not be sufficient for the undertaking to show that it has been entrusted with the provision of a public service in order to benefit from this exclusion. An undertaking seeking to benefit from this exclusion would have to show that the application of the section 47 prohibition would require it to perform the task entrusted to it in economically unacceptable conditions. For instance, the undertaking may be required to meet a “universal service obligation”.<sup>12</sup> Without the benefit of the exclusion, competition would allow new entrants to cherry-pick and target the profitable customers, while leaving unprofitable customers to the incumbent. Such a risk may compromise the incumbent’s economic viability and thus obstruct the performance of its obligations.

**Character of a Revenue-Producing Monopoly**

12.8 To benefit under this exclusion, the undertaking must have as its principal objective, the raising of revenue for a public authority in Singapore through the provision of a particular service. It must have been granted an exclusive right to provide the service, rendering it the monopoly provider of that service. As in the case of services of general economic interest, the undertaking must show that the application of the section 47 prohibition would obstruct the performance, in law or in fact, of the particular tasks assigned to it.

**13 GLOSSARY**

<b>Agreement</b>	Includes decisions by associations of undertakings and concerted practices unless otherwise stated, or as the context so demands.
<b>Buyer</b>	Refers to the end-user consumer, and/or an undertaking that buys products as inputs for production or for resale, as the context demands.
<b>Product</b>	Refers to goods and/or services
<b>Seller</b>	Refers to the primary producer, an undertaking that sells products as inputs for further production, and/or an undertaking that sells goods and services as a final product, as the context demands.
<b>Undertaking</b>	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 organisations.

<sup>12</sup>This refers to an obligation to provide a minimum set of services of specified quality to all users at an affordable price, independent of their geographical locations. This includes guaranteeing services to non-profitable areas.