COMMENTS OF THE AMERICAN BAR ASSOCIATION
SECTION OF ANTITRUST LAW AND SECTION OF INTERNATIONAL LAW
IN RESPONSE TO THE SINGAPORE COMPETITION COMMISSION’S PROPOSED
CHANGES TO CERTAIN GUIDELINES ISSUED UNDER THE COMPETITION ACT

The views stated in these Comments are presented on behalf of the Section of Antitrust Law and the Section of International Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore may not be construed as representing the policy of the American Bar Association.

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I. Introduction

The American Bar Association Section of Antitrust Law and Section of International Law (the “Sections”) are pleased to offer comments on the proposed changes to certain Guidelines published by the Competition Commission of Singapore (“CCS”).

The Sections commend the CCS for the substantial effort the CCS is devoting to providing market participants with meaningful guidance about the CCS’s operations and the Competition Act and for seeking input on the proposed Guidelines through this consultation.

These comments concern some of the most important areas of (i) the draft CCS Guidelines on the Section 47 Prohibition (“Section 47 Guidelines”), (ii) the draft CCS Guidelines on Lenient Treatment for Undertakings Coming Forward with Information on Cartel Activity (“Leniency Guidelines”), and (iii) the draft CCS Guidelines on the Substantive Assessment of Mergers (“SAM Guidelines”).

II. Section 47 Guidelines

The principal changes to the Section 47 Guidelines are found under the heading “Collective Dominance,” paragraphs 3.16 through 3.21. As such, the Sections limit their comments to these provisions.

A. Extending the Concept of Collective Dominance

American antitrust law has rejected the concept of joint dominance or shared monopoly.1 One principal reason for that rejection is the difficulty in determining what collective action or

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1 See Flash Elecs. v. Universal Music, 312 F. Supp. 2d 379, 396 (E.D.N.Y. 2004) (“The idea of ‘shared monopoly’ giving rise to Section 2 liability repeatedly has been received with skepticism by courts who have squarely addressed the issue.”); Sun Dun, Inc. v. Coca-Cola Co., 740 F. Supp. 381, 391 (D. Md. 1990) (“An examination of the history of the Sherman Act reveals that Congress’ concept of ‘monopoly’ did not include ‘shared monopolies’ or ‘oligopolies’ at all, but rather the complete domination of a market by a single economic entity.”). See also Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law, 810g (3d ed. 2008) (“[C]ourts and the Federal Trade Commission have universally rejected claims that § 2 condemns ‘shared’ monopoly.”).
“jointness” will result in independent firms being found collectively dominant. The changes to the Section 47 Guidelines with respect to collective dominance, as we read them, seek to extend the circumstances under which firms may be found collectively dominant.

Paragraph 3.19 notes that firms may be found collectively dominant if they enter into agreements, including cooperation agreements, that lead to the adoption of a common policy on the market. Similarly, firms may be found collectively dominant when they have structural connecting factors such as shared ownership interests and other links in law. Notwithstanding these verifiable and tangible connecting factors, Paragraph 3.19 also provides that “the existence of an agreement or of other links in law is not indispensable to a finding that undertakings concerned constitute a collective entity.”

Moreover, Paragraph 3.20 provides that undertakings in oligopolistic markets, for example, may be able to coordinate their conduct on the market without entering into agreements. Accordingly, the cumulative effect of Paragraphs 3.19 and 3.20 is that firms may be found collectively dominant even where there are no express agreements, connecting factors, or other legal links between the firms.

B. Finding Collective Dominance Absent Links in Law Between Firms

The Sections caution against finding collective dominance and imposing remedies on firms absent any actual links in law between the firms. Firms may act in parallel fashion simply because economic logic dictates doing so given the marketplace situation they experience. As noted above, under Paragraphs 3.19 and 3.20, independent firms may constitute a collectively dominant entity without express agreements or “other links in law.” Thus, as a matter of fairness, firms that have not expressly entered into a relationship, and that are not independently dominant, may have no reasonable basis for understanding that they are jointly dominant and that their conduct is subject to challenge under the relevant provisions of the Section 47 Guidelines.

Second, and more fundamentally, crafting appropriate and effective remedies under the proposed changes to the Guidelines may prove extremely difficult. If, for example, firms are found to have behaved in a collectively dominant fashion, but in fact have merely responded logically to marketplace factors without any agreement or coordination between them, they may be ordered to contradict economically logical behavior. Such orders, requiring firms to ignore the existence of parallel firms, are not likely to be an appropriate or effective remedy. For these two reasons, in particular, the Sections believe that the concept of collective dominance is a very

difficult one, and extending it beyond firms that have express legal or contractual links represents a practical difficulty.

At the outset we noted that American antitrust law does not recognize the concept of collective dominance. We are, however, aware that other legal systems recognize it including, for instance, the Canadian Competition Act. But no contested case in Canada has ever defined the concept of collective dominance, or what is required to establish firms’ collective dominance. Further, collective dominance cases under the Canadian Competition Act have all been dealt with on consent, and all but one involved situations where there were express links between the parties.

Similarly, theories of collective or joint dominance have been recognized in the case law of the European Courts under Article 102 of the European Treaty (“Article 102”). Under Article 102, collective dominance requires two or more undertakings “from an economic point of view, present themselves or act together on a particular market as a collective entity.” Like the proposed changes to the Section 47 Guidelines, under Article 102—the European analogue to Competition Act’s Section 47 Prohibition—express agreements or other links in law between various firms are not indispensable to finding a collective entity. Article 102, however, has not been interpreted to apply the concept of collective dominance as broadly as envisioned by the proposed changes found in Paragraphs 3.19 and 3.20 of the Guidelines because, generally, the finding of a collectively dominant entity in the absence of express agreements or other links in law is dependent on other connecting factors and an assessment of the structure of the market in question.

III. Leniency Guidelines

A. References to Initiators

The Sections suggest that references in the Leniency Guidelines to “initiators” and “initiating” should be removed as it is often difficult for applicants to determine if they are “initiators” and thus such references may lead to a high degree of uncertainty in the leniency process.

Predictability is a hallmark of effective leniency programs. For this reason, many jurisdictions have done away altogether with all eligibility disqualifiers based on the applicant’s

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5 Id.
6 Id.
7 Id.
role in the offense.  Making an “initiator” of a cartel ineligible for leniency injects a high degree of uncertainty into the process. The term “initiator” is vague and subject to widely varying interpretations. The determination of which applicants meet this criterion is an inherently subjective and unpredictable exercise. Nevertheless, and despite the importance of certainty, the CCS should have the flexibility to deny leniency where there was strong evidence that the ringleader of a conspiracy has coerced others to join in a cartel.

The Sections therefore commend the CCS’s repeal of the sixth bullet point under paragraph 2.2(b), as it is difficult for an applicant to determine who has initiated a cartel. Thus, the proposed change should enhance the leniency program’s effectiveness as it will give prospective leniency applicants confidence that the CCS will not disqualify them by applying ill-defined criteria.

For the same reasons, the Sections suggest that the words “has initiated or” be removed from paragraph 2.4.

B. Significant Value

The Sections recommend that the requirement that the applicant’s information adds “significant value to CCS’s investigation in that it genuinely advances the investigation” should be removed. This requirement injects significant uncertainty into the leniency process, as an applicant is not in a position to know what evidence is already in the CCS’s possession and has no way of determining if it will meet this requirement. Moreover, the question of whether or not evidence adds significant value is inherently subjective—for example, it is arguable that an applicant submitting evidence of illegal conduct that duplicates evidence already in the possession of the CCS is either providing significant value to the CCS’s investigation (because the applicant’s evidence corroborates the evidence in the CCS’s possession) or does not provide significant value (because the applicant’s evidence does not permit the CCS to expand its investigation).

Accordingly, the Sections recommend that the fourth bullet under paragraph 3.1 (“the information adds significant value to CCS’s investigation (i.e. it genuinely advances the investigation)”) and the phrase “or to add significant value to CCS’s investigation” in paragraph 7.1 should be removed.

C. Timing for Providing Information

The Sections recommend that the CCS remove the requirement to “immediately” provide information, documents and evidence to the CCS at the marker stage.

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8 Instead of addressing questions of instigation at the level of eligibility for immunity or leniency, other jurisdictions have made instigation a relevant factor for the purposes of fine setting. See, European Commission DG Competition, Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (Jan. 1, 2006), para. 28, available at http://ec.europa.eu/competition/cartels/legislation/leniency_legislation.html.
Such a requirement may force applicants to delay applying for markers for a long period of time in order to gather such materials. During that time, they may lose their ability to apply for immunity or leniency. In the intervening period, the CCS may be deprived of important information regarding illegal conduct and the CCS’s investigation might not advance at the rate it otherwise would have.

Separately, many aspects of the timing of an applicant’s perfecting its marker are out of its control. Information may be difficult to gather or a key witness may be unavailable or uncooperative. In addition, in multijurisdictional cases, applicants face the expanding burden (and concomitant cost) of satisfying the cumulative cooperation requirements in the ever-increasing number of jurisdictions with leniency programs.

Accordingly, the Sections recommend that the word “immediately” in the first bullet point under paragraph 2.2(b) be removed and that in new paragraph 5.4 the words “where an undertaking is not able to immediately provide all information, documents and evidence available to it regarding the cartel activity” be removed.

The Sections recognize the importance associated with the CCS receiving full cooperation from applicants in a timely manner. However, the Sections submit that this objective can be achieved without imposing absolute rules on timing that can also have unintended consequences. For example, in the United States and Canada an applicant under the U.S. Department of Justice’s Leniency Program or the Canadian Competition Bureau’s leniency guidelines has a “limited period of time, usually 30 calendar days, to provide the U.S. Department of Justice or the Canadian Competition Bureau with a detailed statement.”

By further example, in the European Union where an application for immunity is submitted based on hypothetical facts, the applicant can be granted immunity if it supplies a corporate statement by a date agreed with the European Commission.

As a related matter, we note that the first bullet point under paragraph 2.2(b) also provides that the application must give information that provides the CCS with a “sufficient basis to commence an investigation.” The “sufficient basis” standard is vaguely defined and permits the CCS to exercise significant discretion. The risk of discretion being exercised may affect the decision-making of potential applicants whether to apply for leniency or not. The meaning of “sufficient basis” should be clarified or, if this is not possible, it should be eliminated to reduce the CCS’s discretion and improve the predictability of the operation of the Leniency Guidelines.

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D. Information Sharing

The Sections maintain that eligibility for a leniency program should never be conditional upon a grant of a waiver of confidentiality to permit communication with an agency in another jurisdiction. The decision whether or not to grant a waiver is complex. Considerations include the applicant’s eligibility for leniency in the other jurisdiction (e.g., does the other jurisdiction have an immunity or leniency program and is a marker still available,) the legal risks in the other jurisdiction (including the possibility of criminal sanctions for firms and individuals, which are not available under Singaporean law for violations of s. 34 of the Competition Act 2004), and the strength and application of privilege and confidentiality rules in the other jurisdiction. These considerations, all legitimate, militate against a requirement that applicants grant waivers as a condition for participation in a leniency program. Moreover, such a requirement is antithetical to the notion of self-reporting.

Accordingly, regarding the second bullet point under paragraph 2.2(b), the Sections note that the sharing of an applicant’s leniency information by the CCS should occur only if there is a voluntary waiver from the applicant. In addition, paragraph 8.2 should contain clear language stating that the CCS will not disclose information to foreign agencies unless a waiver is granted by the applicant. Finally, there should be a clear statement in the Leniency Guidelines that the CCS will not require any waiver of the attorney-client privilege (or its equivalent) as a condition for the granting of leniency.11

E. Effect on Competition

The Sections recommend that the requirement for an applicant to detail the extent to which the applicant’s conduct has prevented, restricted or distorted competition in Singapore be removed. This requirement requires evidence, including expert evidence, generally not in the applicant’s possession. The inability to identify competitive effects is especially likely to prevail at the marker stage, which is early in the process. The applicant should be required only to provide a full account of its own involvement in the conduct.

F. Other Comments

The Sections recommend the following additional changes be made to the Leniency Guidelines:

1. Following paragraph 2.2, the first two bullet points should be identified as “a” and “b” to allow for a more precise identification when referring to these bullets in subsequent paragraphs.

2. In paragraph 2.3, “2.2” should be replaced with “2.2(a)”.

11 Similarly, there should be no requirement that any documents protected by attorney-client privilege be produced as a condition for the granting of leniency.
3. In the third bullet under paragraph 3.1, remove “the second bullet in paragraph 2.2” and replace with “paragraph 2.2(b)”. 

4. The third bullets under paragraph 3.2 and 4.2 ("the quality of the information provided by the undertaking.") should be removed. This requirement is difficult to assess by the applicant, and thus creates uncertainty.

5. The fifth and sixth bullets under paragraphs 3.1 are repetitive of information appearing under paragraph 2.4.

6. In paragraph 4.1, the words “under the second bullet in paragraph 2.2” should be removed and replaced with “paragraph 2.2(b)”. 

7. Paragraph 5.7 should be expanded to also inform the applicant if the applicant is “second” in. The applicant needs to know if leniencies are available.

8. In the new paragraph 5.9, if the "marker system" does not apply, it is unclear how CCS would be able to identify the next undertaking in the marker queue (see new paragraph 5.8).

9. It is unclear whether the “conditions” referred to in paragraph 5.12 are the same conditions as those specified in paragraph 2.2(b). If so, they should be clearly identified. If they refer to other conditions, those conditions should also be clearly identified. 

IV. SAM Guidelines

A. Monopsony Theory of Harm

In explaining the potential competitive effect of mergers between competing buyers on upstream market participants under paragraph 4.11 and 5.31, the Sections recommend that the SAM Guidelines make clear that the accumulation of additional buyer power as a result of a merger (and the ability to obtain lower prices) is not anti-competitive and does not represent a substantial lessening of competition. Instead, the Sections recommend that this section expressly note that the CCS will not find that a merger gives rise to monopsony power unless it is established that the exercise of such monopsony power has an effect on output of the upstream good in the total market (as opposed to the price for the upstream good paid by the merged firm only).

A focus on output effects would be consistent with the approach adopted by the U.S. Department of Justice and the Federal Trade Commission in the Horizontal Merger Guidelines. Example 24 in the Horizontal Merger Guidelines, which concerns the acquisition of monopsony power, is notable because as a result of the exercise of monopsony power, prices are depressed and supply is inefficiently reduced. A focus on output effects would also be consistent with the

approach adopted in the European Commission’s Horizontal Merger Guidelines, which at para. 61 expresses concerns about firms able to command lower prices by reducing their overall consumption (and, correspondingly, their downstream output).

B. Treatment of Efficiencies

The SAM Guidelines explain that the CCS is “generally sceptical” that gains in efficiencies might offset an SLC. The Sections respectfully submit that such skepticism (or any other presumption or assumption) in the SAM Guidelines is misplaced. The U.S. Department of Justice and Federal Trade Commission’s Horizontal Merger Guidelines reference a skepticism about efficiency claims in respect of efficiency claims that are “vague, speculative, or otherwise cannot be verified by reasonable means” or where the evidence has been generated “outside the usual business planning process.” Whether or not a merger creates an SLC and whether or not efficiencies are timely, likely, and sufficient to offset such an SLC is a question of evidence in every case, to be tested by the CCS in the regular course of its review. That evidence of efficiencies comes from the merging parties is not a reason to consider the evidence less reliable or probative; instead, like every other piece of evidence obtained from market participants, the reliability and probity of this evidence should be evaluated on an individual basis.

Paragraph 5.70 of the SAM Guidelines also explain that pre-merger planning and strategy documents regarding efficiencies are probative evidence for an efficiencies analysis. The Sections respectfully suggest that this paragraph should also acknowledge that post-announcement planning and strategy documents, including those prepared with the assistance of external consultants and experts, can be similarly probative. The reality of many transactions – particularly those involving public companies – is that pre-merger very few people within a firm know about the fact of the planned merger. As a result, fewer employees are consulted about the likely efficiencies that may arise from a planned merger, and as a result pre-merger documents regarding efficiencies often reflect a narrow, undeveloped view of what efficiencies a transaction might produce.

Paragraph 7.17 of the SAM Guidelines explains how the CCS intends to compare the adverse effects of an SLC created by a merger against the Net Economic Efficiencies that merger might also create. The Sections recommend that the SAM Guidelines clarify whether, in conducting such an exercise, the CCS will weigh Net Economic Efficiencies against the adverse effect of an SLC only if those Net Economic Efficiencies and the adverse effect of the SLC are in the same antitrust market. If instead the CCS will also weigh “out-of-market” efficiencies against the adverse effect of an SLC, the SAM Guidelines should make this clear.

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14 See supra, note 12

15 There recently has been significant discussion in the United States and other jurisdictions about the treatment of “out-of-market” efficiencies, and whether they should be cognizable for the purposes of conducting...
V. Conclusion

The Sections appreciate the opportunity provided by the Competition Commission of Singapore to comment on the proposed changes to its Guidelines. The Sections would be pleased to respond to any questions the CCS may have regarding these comments or to provide any additional comments that may assist the CCS in finalizing its proposed changes to its Guidelines.

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