

Unclassified**English - Or. English**

29 May 2019

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Cancels & replaces the same document of 29 May 2019****Working Party No. 3 on Co-operation and Enforcement****The standard of review by courts in competition cases – Note by Singapore****4 June 2019**

This document reproduces a written contribution from Singapore submitted for Item 2 of the 129th OECD Working Party 3 meeting on 4 June 2019.

More documents related to this discussion can be found at

<http://www.oecd.org/daf/competition/standard-of-review-by-courts-in-competition-cases.htm>

Please contact Ms. Despina Pachnou if you have any questions about this document.
Email: Despina.pachnou@oecd.org.

JT03448160

Singapore

1. Legal Framework for competition law enforcement

1. Competition law in Singapore is administered and enforced by the Competition and Consumer Commission of Singapore (“CCCS”), a statutory body established under the Competition Act (Cap. 50B) (“**Competition Act**”). The three prohibitions in the Competition Act are:

- Section 34 prohibition - agreements, decisions or concerted practices which prevent, restrict or distort competition within any market in Singapore.
- Section 47 prohibition - any conduct which amounts to the abuse of a dominant position in any market in Singapore.
- Section 54 prohibition - mergers and acquisitions that substantially lessen competition within any market in Singapore.

2. Singapore has an administrative competition enforcement system, where CCCS is vested with the powers to investigate infringements of the prohibitions as well as the power to enforce the Competition Act by issuing a decision of infringement and directing the infringing parties to bring the infringement to an end. CCCS’s coercive powers of investigation includes the power to conduct dawn raids and request for information and production of documents.¹ Upon concluding its investigation and finding that an infringement has taken place, CCCS may impose financial penalties on the infringing parties and issue directions to remedy, mitigate or eliminate any adverse effects of the infringement and to prevent the recurrence of such infringement. CCCS’s decisions and directions may be enforced in the Singapore courts, if necessary.

3. The Competition Act also provides for a commitment procedure that is applicable to all three prohibitions. CCCS can accept commitments offered by the parties under investigation or notifying a merger or anticipated merger that will prevent, restrict or distort competition which has resulted or may be expected to result from the anti-competitive conduct. Upon accepting commitment(s) from the parties, CCCS is required to make a decision that the Competition Act has not been infringed.²

4. With regard to merger control, CCCS has a voluntary merger notification regime. Merging parties are encouraged to perform a self-assessment to determine if their merger would lead to a substantial lessening of competition. CCCS may conduct an investigation where the merging parties failed to notify and CCCS is of the view that there are reasonable grounds for suspecting that the merger has resulted or may be expected to result in a substantial lessening of competition.

5. For antitrust cases (i.e. anti-competitive agreements and abuse of dominant position cases), CCCS is open to enter into settlement with the parties. The settlement procedure aims to achieve procedural efficiencies and administrative resource savings, and is used for cases where the evidentiary standard of proof has been met such that CCCS would have

¹ Sections 63 to 65 of the Competition Act.

² Sections 60A and 60B of the Competition Act.

been prepared to issue an infringement decision against the party in any event. When the party under investigation does not dispute its liability for the infringement, CCCS may adopt a streamlined provisional infringement decision or infringement decision and provide for a reduction in the financial penalty that would otherwise be imposed on the party.

2. Review of CCCS's decisions and standard of review

2.1. Appeal against CCCS's decisions

6. Parties to whom the infringement decision is addressed have the right to appeal against the decision. The first instance of appeal is to the Competition Appeal Board (“**CAB**”) and must be brought within a specified time period. A further appeal against a decision of the CAB can be made to the High Court on a point of law arising from the CAB's decision or the amount of financial penalty. The final right of appeal against the decision of the High Court lies to the Court of Appeal, which is the highest level of court in Singapore.

7. The CAB is an independent body comprising not more than 30 members established under section 72(1) of the Competition Act. Members of the CAB are appointed by the Minister for Trade and Industry (“**the Minister**”) on the basis of their ability and experience in industry, commerce or administration or their professional qualifications. The chairman of the CAB shall be a person who is qualified to be a judge of the Supreme Court of Singapore.³ For the hearing of an appeal, a committee of at least three members would be formed, one of whom may be the chairman.⁴

8. The decisions of CCCS that are appealable to the CAB includes decisions concerning the three prohibitions, directions to enforce the infringement decisions such as financial penalty and directions to cease or modify conduct, interim measures adopted by CCCS concerning the three prohibitions, and any other as may be prescribed by the Minister by way of regulations.⁵ Under regulation 6A of the Competition (Appeals) Regulations, it is specified that a decision by CCCS to refuse to vary, substitute or release commitments, and a decision in relation to the cancellation of a block exemption, are decisions that are appealable.

2.2. Locus standi to appeal

9. Parties who may appeal against such decisions are those who participated in the anti-competitive conduct of which CCCS has made a decision (i.e. the parties to the anti-competitive agreement, the parties who carried out the abuse of dominant position and the parties to the merger) and those to whom CCCS has given a direction under sections 58A, 67 and 69 of the Competition Act (broadly, these section refers to CCCS's interim measures, directions to cease or modify conduct and directions to pay financial penalty).

³ The current Chairman of the CAB is a retired High Court Judge.

⁴ Section 72(8) of the Competition Act.

⁵ Section 71 of the Competition Act.

10. An illustrative case on the standing of a third party to appeal to the CAB against a CCCS's decision or direction is *Calvin Cheng Ern Lee v Competition Commission of Singapore* (No. 1/2012).⁶ In that case, the appellant was an individual who was the president of a trade association, and director and shareholder of one of the infringing parties. In a cartel infringement decision, CCCS found that the appellant played a central role in coordinating the actions of the association members. There was no finding of infringement or direction made against the appellant or the trade association. However, the appellant appealed to set aside certain portions of the infringement decision relating to him on grounds that they are highly damaging to his character. The CAB held that the right of appeal against CCCS's decision is a statutory right and in the absence of a clear provision in Competition Act, the appellant in his personal capacity had no right of appeal.

2.3. Nature of Review

11. The CAB is vested with the right to review on all points of fact and law *de novo*, including an unlimited review of the evidence. In determining an appeal, the CAB conducts a full review on the merits and may do any of the following⁷:

- confirm or set aside all or part of the decision
- remit the matter back to CCCS
- impose or revoke, or vary (either increase or decrease) the amount of financial penalty
- give such directions, or take other steps as CCCS itself could have given or taken to the infringing parties
- make any other decision which CCCS itself could have made.

12. The CAB has held that CCCS bears the burden of proving that an infringement of the prohibitions has been committed and the legal standard required for CCCS to discharge the burden of proof is that of the civil standard i.e. on a balance of probabilities.⁸ This is not surprising in view of the structure of the Competition Act, that is, the decisions by CCCS follow an administrative procedure, and directions and financial penalties are enforceable by way of civil proceedings under section 85 of the Act by registering the directions in a District Court. This standard of review of on a balance of probabilities has been applied by CCCS in its subsequent cases, and has not been challenged by parties on subsequent appeals before the CAB.

2.4. Review of economic evidence

13. As described earlier, members of the CAB come from diverse backgrounds and discipline. The current CAB consists of members from business, financial, accounting, economics and legal sectors.⁹ The fact that a committee of the CAB hearing an appeal

⁶ CCCS was named the Competition Commission of Singapore ("CCS") prior to 1 April 2018.

⁷ Section 73 of the Competition Act.

⁸ *Konsortium Express & Others v CCS, Appeals Nos. 1 and 2 of 2009* [2011] SGCAB 1 at [85].

⁹ <https://www.mti.gov.sg/-/media/MTI/Legislation/Legislation/Competition-Appeal-Boards-Website/List-of-CAB-members-2017-2019.pdf>

consists of members trained not only in law enables the CAB to have economic expertise in understanding the competition assessment undertaken in an investigation or merger assessment. In any event, the appeal hearing process before the CAB is adversarial in nature and each party is entitled to call economic experts to prove its case and cross-examine the other side's expert to discredit the evidence.

14. At the hearing of an appeal, the CAB is at liberty to admit or exclude evidence, whether or not the evidence was available when the contested decision was made. The CAB may also at any time before making its decision, call for further evidence or explanation from all or any of the parties to be given, in the presence of the other parties, as it may consider necessary.¹⁰ Based on the reported decision of *SISTIC.com Pte Ltd v Competition Commission of Singapore* (No. 1 of 2010) where issues on appeal include market definition and whether or not the appellant was dominant in the relevant market, the review of economic evidence has not been expressed to be subjected to a different standard. The CAB has been free to interpret the economic assessment tendered by the parties and their expert witnesses.

15. On the other hand, the High Court and the Court of Appeal are general courts. Since the enactment of the Competition Act in 2004, a specialised competition court or a competition chamber in a general court has not been established to hear competition cases. As there has not been an appeal against a decision of the CAB to the High Court to date, there is currently no reform being contemplated to create such a specialised court or chamber with judges having the relevant expertise to adjudicate on competition matters.

2.5. Appeal to the High Court and Court of Appeal

16. An appeal against the CAB's decision lies to the High Court limited to points of law arising from the CAB's decision and any decision of the CAB as to the amount of a financial penalty.¹¹ Points of law include misinterpretation of a statute or any other legal document or a rule of common law; asking oneself and answering the wrong question, taking irrelevant considerations into account or failing to take relevant considerations into account when purporting to apply the law to the facts; admitting inadmissible evidence or rejecting admissible and relevant evidence; exercising a discretion on the basis of incorrect legal principles; giving reasons which disclose faulty legal reasoning or which are inadequate to fulfil an express duty to give reasons; and misdirecting oneself as to the burden of proof.¹² The right of appeal is only available to a person who was a party to the proceedings in which the CAB's decision was made.¹³ Thus far, no decision of the CAB has been appealed to the High Court.

17. The High Court when hearing an appeal against a decision of the CAB is exercising its appellate civil jurisdiction.¹⁴ While the Competition Act is silent on the standard of review to be applied when hearing an appeal from a decision of the CAB, it is inconceivable

¹⁰ Regulation 22 of Competition (Appeals) Regulations.

¹¹ Section 74(1) of Singapore Competition Act.

¹² *Ng Swee Lang and another v Sassoon Samuel Bernard and others* [2007] SGHC 190, affirmed by *Ng Eng Ghee and others v Mamata Kapildev Dave and others (Horizon Partners Pte Ltd, intervener) and another appeal* [2009] SGCA 14.

¹³ Section 74(2) of the Competition Act.

¹⁴ Section 20(c) of the Supreme Court of Judicature Act (Cap. 322).

that the High Court will apply a different or higher standard of review (e.g. beyond a reasonable doubt) from that used when the High Court is exercising its appellate civil jurisdiction to review decisions from the District Courts, Magistrates Courts and other tribunals.

2.6. Judicial review

18. CCCS is an administrative body whose decisions are subject to judicial review before the High Court, with a further right of appeal to the Court of Appeal. Judicial review is distinct from an appeal as a judicial review examines the legality of CCCS's decision, whilst an appeal evaluates the substantive merits of the decision arrived at by CCCS. For judicial review, the reviewing court cannot substitute its decision for that of the administrative body. This is because the task of determining the rights of the parties have been statutorily conferred on the administrative body, not the court. Thus, the reviewing court may declare that the task has been performed badly in law but it cannot take the further step of actually performing the task itself.¹⁵

19. Thus far, there has been no application for judicial review of CCCS's decision. However, based on reported decisions of judicial review of other administrative bodies, it is likely that complaints against procedural decisions made by CCCS in the course of the investigation are subject to judicial review.¹⁶ Possible judicial review challenges include challenging the propriety of CCCS's procedural acts in areas such as exercise of coercive powers of investigation in the requests for information,¹⁷ conduct of interviews and dawn raids, as well as challenging the disclosure of documents in order for the parties under investigation to provide their representations to a proposed infringement decision.¹⁸

20. The established grounds of judicial review are illegality, irrationality and procedural impropriety.¹⁹ Prior to the court examining the legality of CCCS's decision, the applicant would need to obtain leave of court to commence judicial review proceedings. The three requirements are:

- the subject matter of the complaint has to be susceptible to judicial review;
- the applicant has to have sufficient interest in the matter; and
- the materials before the court have to disclose an arguable or *prima facie* case of reasonable suspicion in favour of granting the remedies sought by the applicant.

21. The threshold of granting leave for judicial review is not high; it suffices if there appears to be a point which might, on further consideration, turn out to be an arguable case in favour of granting the applicant the remedies sought. The requirement to obtain leave for judicial review is intended to filter out groundless or hopeless cases at an early stage, and its aim is to prevent a wasteful expenditure of judicial time as well as protect public

¹⁵ *Wong Keng Leong Rayney v Law Society of Singapore* [2006] SGHC 179.

¹⁶ *Per Ah Seng Robin and another v Housing and Development Board and another* [2015] SGCA 62.

¹⁷ Section 63 of the Competition Act.

¹⁸ Regulation 8 of the Competition Regulations 2007.

¹⁹ *Chee Siok Chin v Minister for Home Affairs* [2005] SGHC 216.

bodies from harassment (whether intentional or otherwise) when the legality of their decisions is challenged.²⁰

22. The legal test for whether the subject matter of the complaint is susceptible to judicial review is whether the source of the power is public law. The test will typically be satisfied if the source of the power is statute or secondary legislation.²¹ The decisions of CCCS whose powers stem from the Competition Act would satisfy this element.

23. In respect of standing of a party to commence judicial review proceedings, the test is whether the party has sufficient interest. To determine whether a party has sufficient interest, the legal test is whether: (a) the tribunal or other public authority had breached a public duty; and (b) the applicant's private right or public right was interfered with, and in the case of the latter, that the applicant had suffered special damage peculiar to himself as a result of the breach of public duty. It is likely that the undertakings under investigation or who are subject of the infringement decisions will have sufficient interest to apply for judicial review. It remains untested whether the right to apply for judicial review extends to third parties whom are not the subject of the investigation or decision, but are affected by the competition decision in an indirect manner, for example, competitors and customers.

3. Conclusion

24. The CAB is an independent body that is conferred with wide powers to review the decisions and directions of the CCCS. Notably, the CAB is vested with all the powers and duties of the CCCS and could make any decision and direction that CCCS could have made in the performing its functions and discharging its duties under the Competition Act. Additionally, the CAB has the powers, rights and privileges vested in a District Court on the hearing of an appeal, including the enforcement of the attendance of witnesses and their examination on oath and the compelling of the production of documents.²² This means that the decisions and directions made by CCCS are subject to robust review by the CAB.

25. The possibility of a further review by the High Court and Court of Appeal provides an additional check to CCCS's enforcement powers. While there has been no appeal to the High Court, given that the standard of review of CCCS's decisions is the civil standard of proof (i.e. balance of probabilities), it is highly likely that the High Court in the exercise of its appellate civil jurisdiction will adopt the same standard of review (i.e. on a balance of probabilities) when hearing an appeal from a decision of the CAB.

²⁰ *AXY and others v Comptroller of Income Tax* [2018] SGCA 23.

²¹ *Manjit Singh s/o Kirpal Singh and another v Attorney-General* [2013] SGHC 62.

²² Section 73 of the Competition Act.