Competition-IP Interface: Transactions, Collaboration, and Unilateral Conduct (Singapore)

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A Practice Note considering the interface between competition law and intellectual property (IP) law. This Note discusses mergers and acquisitions (M&A); licensing, collaboration, or other arrangements; and unilateral conduct, relating to the commercialisation of IP in Singapore. This helps private practice lawyers and in-house counsel manage the legal risks commonly associated with the transfer or use of IP, including merger control, joint ventures, collaboration agreements, exclusivity, territorial or customer restrictions, excessive pricing, pay-for-delay agreements, divisional patents, and disparagement campaigns.

While intellectual property (IP) and competition laws both seek to promote economic efficiency and innovation, they do so in different ways. IP laws incentivise innovation by granting IP owners the right to exclude others from doing certain things in relation to their intellectual creations. These rights can be monopolistic or quasi-monopolistic in nature. On the other hand, competition law prohibits various forms of exclusionary conduct and seeks to restrict how monopoly power may be used on a market. While ownership of an IP right does not, in and of itself, necessarily give a party a significant degree of power in a relevant market, it is often a key competitive asset enabling a party to obtain this. There is accordingly an inherent tension between the IP and competition law regimes.

In certain circumstances, competition law places a special responsibility on companies not to exploit their IP in ways that could otherwise be considered ordinary business practices. This is particularly the case where competitors are involved, or where a company holds a significant degree of market power (known as dominance) in a particular market.

In practice, IP rights holders can encounter competition law risks when IP rights:

- Are transferred as part of a transaction.
- Form the subject of a collaboration.
- Are licensed to third parties (or where the IP rights owner refuses to grant a licence).
- Lead to disputes and litigation.

It is important for companies and their counsel to appreciate the complex interplay between the IP and competition rules. Regulatory guidance issued by (for example) the *Competition and Consumer Commission of Singapore* (CCCS) is invaluable in helping businesses to consider whether the exercise of their IP rights raises any competition concerns.

This Note:

- Explores the interface between IP and competition law in Singapore.

- Discusses the relevant provisions in the *Competition Act 2004*, the CCCS IP Guidelines, and other Singapore legislation that govern the interaction between IP and competition law.
- Highlights the potential competition law risks involved in IP-related arrangements and provides guidance to help manage these risks.

Regulatory Framework

Competition Law Prohibitions

In Singapore, the primary statute that governs competition law is the *Competition Act 2004* (Competition Act). The CCCS enforces the Competition Act and has extensive powers of investigation and enforcement, including powers to:

- Enter premises for inspection.
- Conduct dawn raids.
- Require the production of documents and information.
- Enforce its directions through the Singapore court system.

The Competition Act prohibits three types of anti-competitive conduct:

- Agreements that prevent, restrict, or distort competition (the Section 34 Prohibition).
- Abuse of a dominant position (the Section 47 Prohibition).
- Mergers that substantially lessen competition (the Section 54 Prohibition).

Depending on how the IP-related arrangements are structured, there may be a risk of infringing one or more of the above prohibitions.

The CCCS publishes guidelines indicating how it interprets and gives effect to the provisions of the Competition Act (Section 61, Competition Act). The CCCS follows these guidelines (where possible) when deciding whether there is an infringement of the Competition Act, though it is not legally bound to do so.

The CCCS published its Guidelines on the Treatment of Intellectual Property Rights (CCCS IP Guidelines) in 2005. These cover the interface between IP rights and competition law. The CCCS updated the CCCS IP Guidelines in 2022 to account for various changes in the legal landscape for IP rights, and to clarify how IP and competition laws interact in certain situations. While challenges to IP-related arrangements based on competition law are rare in Singapore, the CCCS IP Guidelines provide useful markers on what arrangements are considered acceptable, or otherwise.

The Competition Act does not apply to certain specific sectors, where sectoral regulations govern the exercise of competition law. These include areas such as:

- Broadcasting and media.
- Telecommunications.

- Electricity and gas.
- The auxiliary police.
- The supply of wastewater management services.
- The provision of public transport.
- The provision of cargo terminal operations.
- The operation of clearing houses.
- The postal service.

The relevant sectoral regulator enforces any competition issues in each of these sectors, including in relation to the exploitation of IP rights.

Intellectual Property Framework

Under Singapore law, IP rights are granted under the following statutes:

- *Trade Marks Act 1998* (registered trade marks).
- *Patents Act 1994* (patents).
- *Copyright Act 2021* (copyright).
- *Registered Designs Act 2000* (registered designs).
- *Plant Varieties Protection Act 2004* (plant varieties).
- *Geographical Indications Act 2014* (geographical indications).
- *Layout-Designs of Integrated Circuits Act 1999* (layout designs of integrated circuits).

Certain IP rights also arise under common law, including rights in confidential information, including know-how and trade secrets, and unregistered trade marks.

Some of these statutes contain provisions that limit the exercise of IP rights.

Private Enforcement

Persons who suffer direct loss or damage from an infringement of any of the *Competition Law Prohibitions* can commence court proceedings against the infringer seeking damages and other remedies (Section 86 of the Competition Act).

However, unlike some other jurisdictions, a party cannot bring a private enforcement action in Singapore as a stand-alone action. It must be brought as a "follow-on" claim, meaning that the interested party must rely on a prior decision of the CCCS, the Competition Appeal Board, the General Division of the High Court, or an appellate court that establishes an infringement of the Competition Act. An interested party must wait until the issue of this decision and for the exhaustion of all rights of appeal (see *Country Q&A, Litigation and Enforcement in Singapore: Overview: Appeals*), before commencing the private action on the basis of the decision.

Mergers and Acquisitions Involving IP

The CCCS treats IP rights as comparable to other forms of property, so the Section 54 Prohibition applies to mergers and acquisitions involving IP as it applies to any other transaction.

The CCCS's guidelines provide insight on how the Section 54 Prohibition applies to IP transactions. For example, the CCCS recognises that a merger between two innovative companies that have pipeline products may affect the competitive dynamics of that product market, even though the companies do not have a significant combined market share (paragraph 6.7, *CCCS Guidelines on the Substantive Assessment of Mergers*).

In terms of enforcement trends, the CCCS is aware of the concerns posed by so-called killer acquisitions involving digital platforms, where an incumbent platform acquires a smaller innovative rival with a view to eliminating competition between them. In its *E-Commerce Platforms Market Study*, published in September 2020, the CCCS indicated that the existing merger regime was "sufficiently robust and flexible" to deal with killer acquisitions (paragraphs 182 and 183, E-Commerce Platforms Market Study). While the CCCS revised several guidelines (including the CCCS IP Guidelines) in 2022 in light of its E-Commerce Platforms Market Study, it did not make any specific revisions to address killer acquisitions.

Application of Merger Control to IP Transfers

Under section 54(2) of the Competition Act, a merger occurs if any of the following occur:

- Two or more undertakings, previously independent of one another, merge.
- One or more persons or other undertakings acquire direct or indirect control of the whole or part of one or more other undertakings.
- One undertaking (the first undertaking) acquires the assets (including goodwill), or a substantial part of the assets, of another undertaking (the second undertaking), where the first undertaking can replace or substantially replace the second undertaking in the relevant business (or the part concerned of the business) in which the second undertaking was engaged immediately before the acquisition.

Section 54(5) of the Competition Act provides that the creation of a full function joint venture that performs, on a lasting basis, all the functions of an autonomous economic entity is considered a merger, and therefore subject to the merger control regime.

A transaction involving a transfer of IP rights is considered a merger if it falls within one or more of the above categories. There has not yet been any reported decision where the CCCS has considered a transfer of IP (without more) to be a merger under the Competition Act. There is no CCCS guidance on this specific issue. The CCCS may therefore rely on precedent from other jurisdictions when considering this point.

IP transfers that are not subject to the merger control regime can also raise potential competition concerns under the Section 34 Prohibition and the Section 47 Prohibition (see *Competition Law Prohibitions*), for instance:

- Where undertakings transfer competing technologies to each other and agree to provide each other exclusively with future improvements of their respective technologies, this can reduce the undertakings' abilities or incentives to carry out independent R&D, potentially harming competition.
- Where a dominant undertaking forces its licensees to transfer any competing technologies that they may develop, as a condition of granting them IP licences, this can constitute an abuse of dominance.

For more information on merger control, see *Quick Compare Chart, Merger Control*.

Competition Restrictions Ancillary to M&A

Ancillary restrictions are competition restrictions in an agreement or on conduct that are directly related and necessary to the implementation of a merger. These restrictions are exempted from the Section 34 Prohibition and the Section 47 Prohibition under paragraph 10 of the Third Schedule to the Competition Act.

In a merger transaction, the seller may need to retain ownership of certain IP rights and know-how to continue to operate the remaining parts of their business. In these circumstances, the seller typically licenses the IP rights and know-how to the purchaser. The CCCS has expressly acknowledged that in this context, competition restrictions in licences of IP and similar rights may be necessary to implement the merger, in which case they are considered ancillary restrictions. These licences can restrict:

- Their scope to the activities of the business acquired.
- Their term to:
  - the registration period of any registered IP such as patents and trade marks; or
  - the normal economic life of know-how that was recorded before the merger.

Other types of restrictions in IP licences are likely to fall outside the definition of an ancillary restriction (paragraph 11.12, *CCCS IP Guidelines*).

Competition Remedies

Where the CCCS identifies competition concerns arising from a merger, it considers whether structural or behavioural remedies can address these concerns. These remedies are implemented through commitments from the merger parties that address the competition concerns, or through directions issued by the CCCS.

In the IP context, these remedies can include:

- Divestment of assets (including IP rights) from the acquirer and target company to form a viable business post-divestment.
- Amendments to the terms of IP licences.
- Licensing IP to third parties on fair, reasonable, and non-discriminatory (FRAND) terms. For more information, see *Practice Note, FRAND Framework: FRAND and RAND*.

Foreign Investment Control

Singapore does not impose any general restrictions on foreign direct investment. While foreign investment in certain sectors such as media, financial services, and real estate is regulated, these regulations are not specific to IP.

Joint Ventures Involving IP

The creation of a joint venture that performs, on a lasting basis, all the functions of an autonomous economic entity, is considered a merger under section 54(5) of the Competition Act. A joint venture that does not fulfil these conditions is not considered a merger but may be subject to the Section 34 Prohibition.

When considering whether a merger involving IP could lead to a substantial lessening of competition, the CCCS typically considers the merger's effects on competition within the relevant product markets affected by the merger. However, the CCCS acknowledges that this analysis may also require assessing the effects on competition in the markets for technology or research and development. For instance, the CCCS may consider whether the merger reduces the innovation or R&D efforts of the merger parties, and (where it is possible to identify R&D poles) whether post-merger, there are enough competing R&D poles to maintain effective competition in innovation.

IP Licensing and Collaboration Agreements

There are potential competition law risks that can arise from IP licensing and collaboration agreements.

IP Licensing

While the CCCS recognises that IP licensing is pro-competitive in most cases, competition concerns can arise in various scenarios where:

- The IP licensing agreement is between competitors.
- One or more of the parties to an IP licensing arrangement has a dominant position in a market.

When assessing an IP licensing agreement, the CCCS considers:

- Whether the licensing agreement is made between competitors or non-competitors. Agreements between competitors are more likely to raise competition law risks.
- Whether the agreement and the licensing restraints restrict actual or potential competition that would have otherwise existed. The CCCS assesses the impact on competition both from an inter-technology perspective (competition using different technologies) and an intra-technology perspective (competition using the same technology).
- If an IP licensing agreement falls within the scope of the Section 34 Prohibition (see *Competition Law Prohibitions*), whether, on balance, the agreement has a net economic benefit. If so, it will not infringe the Section 34 Prohibition (paragraph 3.5, CCCS IP Guidelines).

Collaboration Agreements

IP-related collaborations between parties, including joint ventures, strategic alliances, or other commercial arrangements, can raise concerns under one or more of the *Competition Law Prohibitions*, depending on:

- The parties involved.
- The structure of the collaboration.

- The commercial terms of the collaboration.

For instance:

- Restraints in collaboration agreements between competitors can infringe the Section 34 Prohibition if they amount to price fixing, market sharing, or output limitation.
- Sharing commercially sensitive information between the parties can also raise competition concerns (see *Information Exchange*). For a non-IP-related example, see *Application for Decision by Mr. Tan Chin Long, Kee Song Holdings Pte. Ltd., Sinmah Holdings (S) Pte. Ltd., Tong Huat Poultry Processing Factory Pte. Ltd. and Tysan Food Pte. Ltd.* (Case No. CCCS 400/005/17), where the CCCS raised concerns that a joint venture between competitors to establish a poultry slaughtering hub would potentially facilitate the sharing of confidential and commercially sensitive information.
- Tying or exclusivity arrangements can infringe the Section 47 Prohibition if:
  - one or more parties to the arrangement has a dominant position in a relevant market; and
  - the arrangement would have the effect of foreclosing competition.

The creation of a full function joint venture is considered a merger under section 54(5) of the Competition Act, and therefore subject to the merger control regime (see *Mergers and Acquisitions Involving IP*).

Vertical Agreements

The Section 34 Prohibition (*Competition Law Prohibitions*) does not apply to vertical agreements, which:

- Are entered into between two or more undertakings each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain.
- Govern the conditions under which the parties may purchase, sell, or resell certain products.

This exclusion covers IP provisions within vertical agreements, only if they do not constitute the primary object of such agreements, and are directly related to the use, sale, or resale of products (paragraph 8, Third Schedule, Competition Act; paragraph 3.15, CCCS IP Guidelines). Accordingly, licences and other IP agreements are not excluded from the Section 34 Prohibition (paragraph 2.14, *CCCS Guidelines on the Section 34 Prohibition*).

In any event, vertical agreements are not excluded from the Section 47 Prohibition (*Competition Law Prohibitions*). Vertical restraints (including IP-related restraints) imposed by a dominant company can constitute abusive conduct.

Exclusivity

Competition law risks can arise in several common scenarios involving IP licensing and collaboration arrangements, including in relation to exclusivity.

Exclusive Licenses

Strictly speaking, an exclusive licence (as defined in IP legislation) authorises the licensee to use IP to the exclusion of all other persons, including the licensor (see, for example, section 43, Trade Marks Act 1998; section 103, Copyright Act 2021). A sole licence is like an exclusive licence, except that the licensor also retains the right to use the licensed IP itself. However, for the purposes of this Note, the term exclusive licence refers to both exclusive and sole licences.

An exclusive IP licence can lead to competition law risks if one or more of the parties has a dominant position in a related market. For example, if the licensed IP is needed for downstream entry into a specific product market (because the licensed technology is an essential input for products in that market), an undertaking with a dominant position in that downstream product market who obtains an exclusive IP licence can limit the ability of potential competitors to enter the market, thereby foreclosing competition and breaching the Section 47 Prohibition.

Nevertheless, the CCCS recognises that the grant of an exclusive licence may be necessary to incentivise a licensee to invest in, or further develop, the licensed technology (paragraph 3.33, CCCS IP Guidelines). This can provide an objective justification for conduct that would otherwise breach the Section 47 Prohibition.

Exclusive Dealing

Non-compete clauses (restrictions imposed on a licensee preventing it from dealing with competing technologies) may raise competition concerns where:

- They are used for the purpose of market sharing in licensing arrangements between competitors.
- Where competition in a related market is likely to be foreclosed because the licensor has a dominant position in that market.

(Paragraph 3.33, CCCS IP Guidelines).

Other Customer or Territorial Restrictions on Resellers

Although licensing restraints may appear to restrict competition, the CCCS has acknowledged that they can in fact be pro-competitive by promoting IP licensing. For example, these restraints can protect the IP owner from competition (in its own technology) in its core areas, thereby incentivising the IP owner to license its IP to third parties for use in other areas. Licensing agreements containing these restraints are therefore unlikely to breach the Section 34 Prohibition (paragraphs 3.31 and 3.32, CCCS IP Guidelines).

Resale Price Maintenance

As resale price maintenance (RPM) agreements are vertical agreements, they are excluded from the Section 34 Prohibition. However, they are not excluded from the scope of the Section 47 Prohibition (see *Competition Law Prohibitions*). A dominant undertaking can breach the Section 47 Prohibition if it engages in RPM to protect, enhance, or perpetuate its dominant position in ways that do not relate to competition on the merits.

Information Exchange

Information exchange can adversely affect competition where it reduces or removes uncertainties inherent in the competitive process (paragraph 3.20, CCCS Guidelines on the Section 34 Prohibition). Risk factors include:

- Sharing of commercially sensitive information.

- Sharing of individualised price information.
- Information exchange between competitors.
- Frequent sharing of information.
- Sharing of recent or current information, or future business intentions.

(Paragraphs 3.7 to 3.9, *CCCS Business Collaboration Guidance Note*.)

For a non-IP-related example, see *Infringement of the section 34 prohibition in relation to the exchange of confidential corporate customer information in the provision of hotel room accommodation in Singapore* (Case No. CCCS 700/002/14).

Grantback Obligations

A grantback is a provision in IP and technology agreements that requires the licensee to grant to the licensor rights to use any improvements to the licensed technology that the licensee makes. The CCCS recognises that there are often pro-competitive reasons for grantback provisions. However, grantback provisions can adversely affect competition where they substantially reduce the licensee's incentives to engage in research and development, therefore reducing innovation (paragraph 3.28, CCCS IP Guidelines).

An exclusive grantback provision involves the licensee:

- Granting the licensor an exclusive licence to the licensee's improvements.
- Assigning the licensee's improvements to the licensor.

An exclusive grantback prevents the licensee from exploiting any improvements, including, for example, by licensing those improvements to third parties (paragraph 3.29, CCCS IP Guidelines), so it is likely to reduce the incentives for the licensee to innovate.

Non-exclusive grantback provisions are less likely to be anti-competitive, though they can negatively affect innovation if there is cross-licensing between competitors where both of the following apply:

- There is a grantback obligation on both parties.
- Both parties are obliged to share improvements of their technology with the other party.

The sharing of all improvements between competitors can prevent either of them from gaining a competitive lead over the other (paragraph 3.30, CCCS IP Guidelines).

Non-Challenge (Non-Assertion) Clauses

A non-challenge clause prohibits the licensee from challenging the validity of the licensor's IP. These clauses can negatively affect competition, as:

- A licensee would be in a good position to assess the validity of the licensed IP.
- There is a public interest in eliminating invalid IP rights.

Whether a non-challenge clause is anti-competitive depends on the circumstances. The CCCS considers multiple factors, including:

- The market positions of the licensor and licensee.
- Whether the clause forms part of an exclusive licensing agreement (which could make it less acceptable, although the CCCS IP Guidelines do not specify this)

(Paragraphs 3.37 and 3.38, CCCS IP Guidelines.)

Termination Right if Licensee Challenges IP

Clauses that allow a licensor to terminate an IP licence if the licensee challenges the validity of the licensor's IP are comparable to non-challenge clauses. These clauses deter the licensee from challenging the validity of the licensor's IP, as the licensee may incur significant losses if forced to switch to an alternative technology (paragraph 3.37, CCCS IP Guidelines).

For more information, see *Practice Note, Terminating Licences of IP Rights (Singapore): Termination if the Licensee Challenges the Validity of the Licensed IP Rights*.

Tying Arrangements

Tying occurs where a purchaser of a particular product is required to purchase a separate product. Tying can take place on:

- A technical basis (where the tying product is designed so that it only works with the tied product).
- A contractual basis (where the purchaser that purchases the tying product is contractually obliged to purchase the tied product).
- A combination of the above.

(Paragraph 11.27, CCCS Guidelines on the Section 47 Prohibition).

In the IP context, an example of tying is where an IP owner only agrees to license its IP rights if the potential licensee agrees to purchase an additional product, which the licensed IP rights do not cover (paragraph 4.12, CCCS IP Guidelines).

A dominant undertaking carrying out a tying arrangement can infringe the Section 47 Prohibition (*Competition Law Prohibitions*). The undertaking could leverage its dominance in the tying market to force consumers to purchase products in the tied market, thereby harming competition in the tied market and potentially the tying market (paragraph 11.26, CCCS Guidelines on the Section 47 Prohibition).

A tying arrangement does not infringe the Section 47 Prohibition if it can be shown that the arrangement is objectively justified and proportionate (paragraph 4.12, CCCS IP Guidelines). For instance, an IP-related tying arrangement could be justified if it is necessary for the satisfactory exploitation of the IP rights, for example to ensure that the licensee conforms to quality standards or for technical interoperability.

Settlement of IP Litigation

While IP settlement agreements may save time and resources that would otherwise have been spent on litigation, certain terms in IP settlement agreements can raise competition concerns.

A pay-for-delay type settlement agreement, where a pharmaceutical patent owner compensates a generic drug manufacturer for not putting its product onto the market, may infringe the Section 34 Prohibition. This is especially likely where:

- The parties to the agreement are actual or potential competitors.
- There is a significant amount of compensation.

The CCCS could, in principle, consider a pay-for-delay settlement agreement to be a market allocation, market sharing, or market exclusion agreement (paragraph 3.40, CCCS IP Guidelines) although there are no practical examples of this to date.

An IP settlement agreement where parties cross-license and impose restrictions on the use of their IP rights may also infringe the Section 34 Prohibition, especially where:

- The parties have a significant degree of market power.
- The restrictions clearly go beyond the resolution of the dispute.

(Paragraph 3.41, CCCS IP Guidelines.)

Clauses in settlement agreements can also allow use of each party's technology and future developments. These clauses can reduce the parties' incentive to innovate. Where the parties have a significant degree of market power, and the agreement prevents the parties from gaining a competitive lead over each other, the agreement is likely to infringe the Section 34 Prohibition (paragraph 3.42, CCCS IP Guidelines).

Patent Pools

A patent pool is an arrangement where two or more parties put together a package of technology to license to members of the pool as well as third parties. A patent pool can be pro-competitive if it:

- Helps to clear blocking patents.
- Integrates complementary technologies.
- Reduces transaction costs by reducing the number of parties involved in licensing.

If a patent pool only comprises technologies that are complementary and essential to a technical standard (see *Practice Note, FRAND Framework: Standard-Essential Patents (SEPs)*), it is likely to be pro-competitive regardless of the market positions of the contributors.

However, where a patent pool solely or predominantly comprises substitute technologies, the pool:

- Leads to limited efficiency gains.
- May risk foreclosing alternative technologies outside the pool.
- May amount to price fixing in breach of the Section 34 Prohibition (*Competition Law Prohibitions*).

Competition concerns can also arise if pool members either:

- Discriminate against non-member licensees.
- Restrict the independent licensing of the patents outside of the pool.
- Use the pool to share commercially sensitive information (see *Information Exchange*).

(Paragraph 3.34, CCCS IP Guidelines.)

For general information about patent pools, see *Practice Note, Antitrust Issues in Patent Pools and Cross-Licenses* and *Practice Note, FRAND Framework: Patent Pools*.

Safe Harbours

Agreements that fall under a block exemption order made under Section 36 of the Competition Act are also exempt from the Section 34 Prohibition (see *Competition Law Prohibitions*). As of August 2023, the only block exemption is the *Competition (Block Exemption for Liner Shipping Agreements) Order*.

Individual Exclusions and Exemptions

The Third Schedule to the Competition Act sets out a list of exclusions and exemptions from the Section 34 Prohibition and the Section 47 Prohibition (*Competition Law Prohibitions*). Counsel should consider whether the IP-related arrangements constitute:

- **IP-related provisions in a vertical agreement.** These do not infringe the Section 34 Prohibition, if they do not constitute the primary object of the agreement, and are directly related to the use, sale, or resale of products (paragraph 8, Third Schedule, Competition Act and paragraph 3.15, CCCS IP Guidelines).
- **An agreement that has a net economic benefit.** This type of agreement is exempted from the Section 34 Prohibition, if it contributes to improving production or distribution, or promotes technical or economic progress. In addition, the agreement must not:
  - impose on the undertakings concerned restrictions that are not indispensable to the attainment of those objectives; or
  - afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question.

Mitigation Strategies

In the context of IP collaborations where a party could share sensitive information with a competitor, it is prudent to implement safeguards to minimise the resulting competition law risks. These include:

- Only disclosing information that is strictly necessary to implement the collaboration.

- Ringfencing commercially sensitive information, for example, by using clean teams and firewalls to prevent unnecessary sharing.

(Paragraph 3.17, CCCS Business Collaboration Guidance Note.)

If there is any uncertainty over whether an agreement is anti-competitive, a party can notify the CCCS and seek formal guidance or a decision as to whether the agreement infringes the Section 34 Prohibition. Under the Competition Act, after notifying the CCCS, the undertaking receives provisional immunity from any penalty for breaching the Section 34 Prohibition (sections 43(4) and 44(3), Competition Act). (See further *Ask for guidance or a decision | CCCS*).

Unilateral Conduct

A dominant undertaking's exercise of its IP rights can constitute an abuse of dominance if it protects, enhances, or perpetuates its market power in ways unrelated to competition on the merits. Various types of conduct can be abusive.

Pricing Conduct

In certain circumstances, a dominant undertaking can carry out price-related conduct that can raise concerns under the Section 47 Prohibition (*Competition Law Prohibitions*):

- Predatory pricing can be anti-competitive if a dominant undertaking prices products below cost:
    - with the intent to eliminate a competitor; or
    - where it will be possible to recoup losses after the exclusion of competitors.

  (Paragraphs 11.3 to 11.9, CCCS Guidelines on the Section 47 Prohibition).
- Certain discount schemes can harm competition and constitute an abuse of dominance. For example, where discounts are conditional on buyers purchasing all or most of their supplies from the dominant undertaking, this can have a similar effect to an exclusive purchasing requirement. Discount schemes that are conditional on the buyer purchasing products as a bundle, where these products can be purchased separately, can constitute an anti-competitive bundling arrangement (paragraph 11.13, CCCS Guidelines on the Section 47 Prohibition).
- Price discrimination can be abusive (see *Unfair or Discriminatory Licensing Practices*).
- Depending on the factual circumstances, excessive pricing can amount to a constructive refusal to supply, which could be considered abusive in certain situations (paragraphs 11.34 to 11.36, CCCS Guidelines on the Section 47 Prohibition). However, the CCCS has not expressly indicated that excessive pricing can infringe the Section 47 Prohibition. If a dominant undertaking carries out excessive pricing as part of a price discrimination strategy, it can also be abusive.

These forms of conduct can infringe the Section 47 Prohibition regardless of whether the conduct relates to IP rights. However, businesses should also keep pricing conduct in mind when commercialising their IP rights.

Gaming the Patent System

Pharmaceutical patent owners can exploit the patent system by filing patent applications for minor variations or improvements to a drug when the original patent is about to expire (among other tactics). This conduct:

- Extends the monopoly that these patent owners have on their drugs by preventing manufacturers of generic drugs from entering the market.
- Often allows the patent owners to increase the prices of their drugs significantly.

The competition laws of several jurisdictions consider gaming the patent system to be an abuse of market power. However, the CCCS has not expressly indicated that gaming the patent system constitutes an abuse of dominance. If a dominant undertaking carries out this conduct, with the intent of unreasonably extending its market power beyond the lifetime of its patent, this can in principle infringe the Section 47 Prohibition (*Competition Law Prohibitions*).

Misuse of a Regulatory Process

Regulators in other jurisdictions have considered misuse of regulatory processes, such as a pharmaceutical patent owner's selective deregistration of marketing authorisations to prevent generic drug manufacturers from entering a market, to be an abuse of market power (see, for example, *AstraZeneca AB and AstraZeneca plc v European Commission (Case T-321/05) ECLI:EU:T:2010:266*. Like gaming the patent system (*Gaming the Patent System*), this misuse can in principle infringe the Section 47 Prohibition if carried out by a dominant undertaking to foreclose competition.

Misuse of the Litigation Process

The CCCS recognises that the legitimate exercise of an IP right by a dominant undertaking in itself is not usually an abuse when limited to the specific product that the IP right protects (paragraph 4.4, CCCS IP Guidelines). In this regard, an IP rights owner can enforce its rights against an infringer, including through litigation in the Singapore courts.

However, any conduct that amounts to an abuse of the litigation process, for example filing unfounded or vexatious claims, could potentially amount to an abuse of dominance if carried out by a dominant undertaking in a manner that harms or is likely to harm competition.

For information on pay-for-delay settlement agreements, see *Settlement of IP Litigation*.

Unfair or Discriminatory Licensing Practices

Ownership of an IP right allows the owner to exclude others from using that right. In this regard, a refusal to license IP is not normally considered anti-competitive. However, in limited circumstances, a dominant undertaking's refusal to license its IP can infringe the Section 47 Prohibition (*Competition Law Prohibitions*), for example, if:

- The IP right relates to an essential facility.
- The refusal to license is likely to substantially harm competition.

(Paragraph 4.6, CCCS IP Guidelines).

Owners of standard-essential patents (SEPs) can provide a voluntary commitment to standard setting organisations, undertaking to license their SEPs on fair, reasonable, and non-discriminatory (FRAND) terms. If an SEP holder is dominant in a market and has given a FRAND undertaking (regarding that or a related market):

- Its refusal to license its SEPs on FRAND terms to a licence applicant can infringe the Section 47 Prohibition.
- If the owner seeks an injunction based on an alleged infringement of an SEP, but the alleged infringer is willing to enter into a licence agreement on FRAND terms, this can also infringe the Section 47 Prohibition.

(Paragraphs 4.9 to 4.11, CCCS IP Guidelines.)

For general information on FRAND undertakings and SEPs, see *Practice Note, FRAND Framework: FRAND and RAND*.

If an IP rights owner engages in price discrimination when licensing its IP, this can infringe the Section 47 Prohibition where there is evidence that it is used to harm competition. For instance, using a discriminatory pricing structure to set predatory prices or discounts that foreclose competition can infringe the Section 47 Prohibition (paragraph 11.15, CCCS Guidelines on the Section 47 Prohibition).

Exploitative or Exclusionary Conduct

The Competition Act and the CCCS's guidelines expressly provide that certain categories of conduct can constitute an abuse of dominance. In addition, other forms of exploitative or exclusionary conduct can, at least in principle, raise competition concerns under the Section 47 Prohibition if carried out by a dominant undertaking, where the conduct has (or is likely to have) an adverse effect on the process of competition. This conduct can include:

- Disparagement campaigns against competitors.
- Excessive pricing (see *Pricing Conduct*).
- Exploiting the patent system (see *Gaming the Patent System*).
- Abusing the litigation process (see *Misuse of the Litigation Process*).

Relevant Market and Dominance

For IP-related arrangements, the CCCS normally analyses the effects on competition within the relevant markets for the products affected by these arrangements. However, the CCCS recognises that in some cases, it may be necessary to assess further the effects on competition in:

- The markets for technology. These consist of the licensed IP in question and its close substitutes.
- The markets for research and development (R&D), that is, innovation markets. These consist of the R&D directed at creating new or improved goods or processes, and any close substitutes for that R&D that significantly constrain the exercise of market power with respect to the relevant R&D.

When defining the relevant market(s) affected by an IP-related arrangement, the CCCS can also consider the geographical and temporal dimensions for each market, and the context and circumstances associated with the IP arrangement, including the existence of any applicable technical standard(s) (paragraphs 2.1 to 2.2.6, CCCS IP Guidelines). For general information on standards, see *Practice Note, FRAND Framework: Purpose of Standard Setting*.

The CCCS acknowledges that ownership of an IP right does not necessarily create a dominant position in a relevant market. Whether or not an IP owner is dominant in the relevant market(s) depends on the extent to which there are substitutes for the technology, product, process, or work to which the IP right relates (paragraph 4.2, CCCS IP Guidelines). The CCCS assesses whether an IP right owner is dominant based on the particular facts of each case.

Objective Justification for Unilateral Conduct

When assessing whether an undertaking has abused its dominance, the CCCS can consider whether the undertaking can objectively justify its conduct. For example:

- If a dominant IP rights owner refuses to license its IP rights to a willing licensee, they could justify this based on the poor creditworthiness of that licensee.
- An IP rights owner could justify tying practices, by showing they are necessary for the satisfactory exploitation of the IP rights (*Tying Arrangements*).

However, the dominant undertaking must show that it has behaved in a proportionate manner. It should not take more restrictive measures than are necessary to protect its legitimate commercial interests (paragraph 4.5, CCCS Guidelines on the Section 47 Prohibition and paragraph 4.6, CCCS IP Guidelines).

Mitigation Strategies for Unilateral Conduct

Before entering into any IP related arrangement that could constitute a potential abuse of dominance, an undertaking should assess whether it is likely to be dominant in any of the relevant markets where its conduct may affect competition. If so, it should be careful about entering into the arrangement and should (if applicable) consider adapting its conduct to minimise any anti-competitive effects.

If an undertaking is dominant, it can still objectively justify conduct that would otherwise be abusive. From a mitigation perspective, it is prudent to record that objective justification in writing, including:

- Its commercial objectives or interests in carrying out the conduct.
- An analysis of why the conduct is proportionate, that is it does not go further than necessary to meet these commercial objectives or interests.
- Whether it has considered any other strategies to meet these commercial objectives or interests, and if so, why it did not adopt these other strategies.

Exhaustion of IP Rights

An infringer can raise exhaustion as a defence to a patent infringement claim under section 66(2)(g) of the Patents Act 1994. However, the exhaustion defence does not apply in certain circumstances, for example, the use of a patented process in Singapore.

The defence of exhaustion also applies in the context of registered trade marks, under section 29(1) of the Trade Marks Act 1998 (subject to statutory exceptions).

Therefore, it is permissible to import and sell parallel imports of patented products and goods bearing registered trade marks.

An agreement that prevents the lawful parallel import of a product into Singapore can constitute an unlawful restriction of competition if the IP owner or its licensee is active in Singapore (paragraph 3.31, CCCS IP Guidelines).

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