A BIG-TICKET ISSUE FOR SINGAPORE'S BIGGEST TICKETING ISSUER

The Approach to "Abuse" of Dominance in Singapore

The growing significance of abuse of dominance law and economics is underscored by the seriousness with which lawmakers and regulators around the world are increasingly viewing violations of it and the record-breaking size of fines recently imposed. In Singapore, the Competition Commission of Singapore has issued its first ever infringement decision for abuse of dominance under s 47 of the Competition Act. This article examines, with particular reference to the *SISTIC* decision, issues relating to what approach is acceptable, and what elements are required to be shown, in establishing that conduct of a dominant undertaking is "abusive" under s 47.

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I. Introduction

1 Section 47 of Singapore's Competition Act sets out one of three substantive prohibitions in Singapore's relatively new competition framework.[1] It prohibits undertakings from engaging in "conduct which amounts to the abuse of a dominant position" in any market in Singapore.[2] The provision is closely modelled after s 18 of the UK

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1 Cap 50B, 2006 Rev Ed. The other two are the s 34 prohibition against agreements or concerted practices which have as their object or effect the prevention, restriction or distortion of competition within Singapore, and the s 54 prohibition against mergers that have resulted, or may be expected to result, in a substantial lessening of competition in any market in Singapore. For a discussion of Singapore's competition legislation generally, see Burton Ong, "The Competition Act of 2004: A Legislative Landmark on Singapore's Legal Landscape" (2006) Sing JLS 172.

2 Competition Act (Cap 50B, 2006 Rev Ed) s 47, in full, provides:

(1) Subject to section 48, any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in any market in Singapore is prohibited.

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Competition Act 1998,[3] which is in turn based on Article 102 of the Treaty on the Functioning of the European Union[4] ("TFEU"). Art 102 TFEU, problematically, is worded in broad terms and neither defines what an "abuse" of a dominant position is, nor provides criteria or guidance as to what is required to be proven in order to establish a case of abuse, leaving EU enforcement and judicial organs considerable difficulty in grappling with its many uncertainties. Indeed, it has been argued before the Court of Justice that the concept of an "abuse" of a dominant position, along with the concept of a dominant position itself, are "among the most indeterminate and vague concepts both in community law and the law of member states".[5] Despite the fact that the same statutory breadth and lack of definitional guidance exists in Singapore's own corresponding provision, these problems have not yet been discussed much in Singapore. Singapore courts have so far not had to address these issues because no abuse of dominance case has ever reached a Singapore court,[6] and in fact, until

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(2) For the purposes of subsection (1), conduct may, in particular, constitute such an abuse if it consists in –

(*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; or

(*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.

(3) In this section, 'dominant position' means a dominant position within Singapore or elsewhere.

3 Competition Act 1998 (c 41) (UK).

4 Formerly Art 82 of the Treaty Establishing the European Community or the Treaty of Rome. Art 82 EC is now Art 102 of the Treaty on the Functioning of the European Union ("TFEU"), as a result of changes made by the Treaty of Lisbon which came into force on 1 December 2009. As a result of other changes made, in this article the European Court of Justice or ECJ will now be referred to as the Court of Justice, and the Court of First Instance as the General Court, except in the context of cases decided before the Treaty of Lisbon came into force.

5 Case 85/76 *Hoffmann-La Roche & Co AG v Commission* [1979] ECR 461, [1979] 3 CMLR 211 at [4]–[5]. This article focuses on the concept of "abuse".

6 Suspected infringements of the Competition Act (Cap 50B, 2006 Rev Ed) are investigated and, where found to be a violation, sanctioned by the Competition Commission of Singapore ("CCS"), a statutory body established under the Competition Act. Section 71 of the Competition Act provides that appeals against the decisions of CCS may be made to the Competition Appeal Board, an independent body comprising members appointed by the Minister of Trade and Industry. Section 74 provides that appeals against the decision of the Competition Appeal Board may be made on points of law and on the amount of the financial penalty. Such appeals are made to the Singapore High Court and thereafter to the Singapore Court of Appeal.

only recently,[7] no infringement decision for abuse of dominance had ever been issued by the regulatory authority here since s 47 came into force.[8]

2 Difficult issues surrounding s 47 may soon have to be confronted squarely. On 4 June 2010, the Competition Commission of Singapore ("CCS"), Singapore's competition authority, issued its first ever infringement decision for an abuse of dominance against SISTIC.com Pte Ltd ("SISTIC").[9] In its decision, CCS found that SISTIC had contravened s 47 by entering into various agreements with venue organisers and event promoters that contained explicit exclusivity restrictions requiring the use of SISTIC as sole ticketing provider. These agreements, totalling 19 in number, included an agreement with The Esplanade Co Ltd that required the use of SISTIC as sole ticketing provider for all events held at the Esplanade and another with the Singapore Sports Council that required the use of SISTIC as sole ticketing provider for all events held at the Singapore Indoor Stadium.[10] SISTIC has since filed a notice of appeal against the decision, seeking that the infringement decision be set aside or, in the alternative, that the financial penalty be reduced.[11]

3 The appeal will now be heard by the Competition Appeal Board. Significantly, depending on the outcome of that hearing, the case may finally come before Singapore's judicial system for consideration, as further appeals from the Competition Appeal Board's decision on points of law and the amount of the financial penalty are available first to the Singapore High Court and thereafter to the Singapore Court of Appeal.

4 The significance of abuse of dominance law, not only in Singapore but in many other jurisdictions, is underscored by the seriousness with which regulatory authorities around the world are increasingly viewing violations of it and the large and growing size of fines recently imposed. In Singapore, the S$989,000 financial penalty imposed on SISTIC for its abuse of dominance is the largest CCS has

7 Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010).

8 Singapore's Competition Act (Cap 50B, 2006 Rev Ed) was implemented in stages. Section 47 came into effect on 1 January 2006.

9 Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010).

10 Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [1.1].

11 Notice of Appeal by SISTIC.com dated 3 August 2010 <http://app.mti.gov.sg/default.asp?id=3945> (accessed 1 August 2011).

ever handed out, across all possible Competition Act violations;[12] in July 2009, the Korea Fair Trade Commission imposed a record-breaking fine of approximately KRW260bn (S$296m) on Qualcomm for abusing its dominance;[13] and in May 2009, the European Commission imposed on Intel a €1.06bn (S$1.83bn) fine, Europe's largest ever competition fine, also for abusing its dominance.[14]

5 This article examines, with particular reference to the *SISTIC* decision, the issue of what approach is acceptable, and what elements are required to be shown, in establishing that conduct of a dominant undertaking is "abusive" under s 47.[15] Is it necessary under Singapore law to show in every case that the conduct complained of has resulted in provable anti-competitive harm (often described as an "effects-based" approach)? Does Singapore reject rules that classify certain categories of behaviour as being so clearly harmful to competition by their very nature that showing that conduct falls within those categories would of itself suffice for establishing an abuse (often described as "*per se* rules")? Or, as a further possibility, will Singapore explicitly recognise alternative approaches residing somewhere in between a pure effects-based approach on the one hand and *per se* rules on the other?[16]

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12 "Competition body hands SISTIC big fine" *The Straits Times* (5 June 2010) available online at <http://app.casebank.ccs.gov.sg/> (accessed 1 August 2011).

13 Press release available at <http://eng.ftc.go.kr/bbs.do> (accessed 1 August 2011) dated 23 July 2009. According to the press release, the exact amount was to be determined following confirmation of Qualcomm's turnover. The Korean Fair Trade Commission found that Qualcomm had abused its dominant position by charging discriminatory royalties and offering conditional rebates. The decision was appealed by Qualcomm.

14 Case COMP/C-3/37.990 *Intel*, Summary of Commission Decision of 13 May 2009, dated 22 September 2009. Press release available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/745> (accessed 1 August 2011) dated 13 May 2009. Intel has appealed the decision.

15 The answer to this is sometimes analysed as a choice between two possibilities: an "effects-based" approach on the one hand and a "form-based" approach on the other. The crux of the former is the requirement to show that the dominant undertaking's conduct resulted in some actual anti-competitive effect, such as harm to the consumer in the form of higher prices, fewer choices and so on. The latter approach is significantly different in that it does not require showing such a result. Instead, what is determinative is the type and nature of the conduct itself. The latter approach is often characterised by the application of so-called "*per se* rules" of unlawfulness.

16 Two that are discussed in this article are the "capability-based" approach, and an intent- or purpose-based approach.

II. Establishing an "abuse" of dominance

A. The EU background: An intermediate approach?

6 The starting point in establishing an "abuse" involves the fundamental question whether a competition authority must demonstrate the occurrence of actual, adverse effects in order to make a determination that a dominant undertaking has abused its dominant position. If so, then a failure to establish the presence of such effects, or a failure to establish that the effects were caused by the conduct in issue, would be fatal to any abuse of dominance case. In examining the issue, the regulatory and judicial experience in the EU in interpreting and enforcing Art 102 TFEU is particularly significant because Singapore's s 47 is very similar to, and has its origins ultimately in, Art 102 TFEU. Case law on abuse of dominance in the EU is also fairly extensive and developed, with a number of cases having been adjudicated upon by the EU's highest court.

7 In the EU, it was somewhat clear after the pivotal cases of *Manufacture francaise des pneumatiques Michelin v Commission*[17] ("*Michelin II*") and *British Airways plc v Commission*[18] ("*British Airways*"), for a while at least, that there was no requirement under EU law to show that adverse effects have actually and already occurred in order to establish an abuse. *Michelin II* was a case involving a scheme of conditional rebates offered by a tyre manufacturer designed to induce loyalty among its dealers. It was specifically argued on behalf of the dominant undertaking that its conduct must be shown to have at least some actual anti-competitive effect in order to be considered abusive, and that the European Commission's decision against it should be set aside because it had failed to carry out the sort of detailed analysis required to demonstrate the occurrence of such effects.[19] The applicant relied on prior case law and in particular *Hoffmann-La Roche & Co AG v Commission* ("*Hoffmann-La Roche*"), where the European Court of Justice, the EU's highest court, had held that an abuse is one which "… has the *effect* of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition"[20] [emphasis added].

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17 Case T-203/01 *Manufacture francaise des pneumatiques Michelin v Commission* [2003] ECR II-4071, [2004] 4 CMLR 923.

18 Case T-219/99 *British Airways plc v Commission* [2003] ECR II-5917, [2004] 4 CMLR 1008, upheld on appeal in Case C-95/04 *British Airways plc v Commission* [2007] ECR I-2331.

19 Case T-203/01 *Manufacture francaise des pneumatiques Michelin v Commission* [2003] ECR II-4071, [2004] 4 CMLR 923 at [235]–[236].

20 Case 85/76 *Hoffmann-La Roche & Co. AG v Commission* [1979] ECR 461, [1979] 3 CMLR 211 at [4]–[5]. The passage from *Hoffmann-La Roche* has often been taken to be the general definition of abuse under Art 102 TFEU. There was, therefore,

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8 This *Hoffmann-La Roche* formulation appeared to suggest that a showing of actual effects is necessary. However, on appeal, the Court of First Instance rejected this argument, disagreeing that Art 102 TFEU requires the European Commission to make such a showing.[21] Reasoning that the "effect" referred to in *Hoffmann-La Roche* and other case law did not necessarily mean *actual* effect,[22] the court then went on to say that, for the purposes of establishing an infringement of Art 102 TFEU, it is sufficient to show that the abusive conduct of the undertaking in a dominant position "tends to restrict competition[23] or, in other words, that the conduct *is capable of having* that effect" [emphasis added].[24]

9 In *British Airways*, the court endorsed the same conclusion:[25]

> … for the purposes of establishing an infringement of [Art 102 TFEU], it is not necessary to demonstrate that the abuse in question had a concrete effect on the markets concerned. It is sufficient in that respect to demonstrate that the abusive conduct of the undertaking in a dominant position tends to restrict competition or, in other words, that the conduct is capable of having or likely[26] to have such an effect.

10 This case law, however, was not without difficulty. Despite *Michelin II* and *British Airways*, a strict "effects based" or "actual effects" approach continued occasionally to be advocated. To some extent, the

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some difficulty from the point of view of precedent and a question of how strict an approach the European Court of Justice in *Hoffman-La Roche* had laid down, in particular as to whether a showing of actual effects was required. Relying on this and similar authority, the applicant argued that the European Commission was required to show that the allegedly infringing conduct had resulted in actual economic effects. The Court of First Instance, of course, has no authority to overrule the European Court of Justice.

21 Case T-203/01 *Manufacture francaise des pneumatiques Michelin v Commission* [2003] ECR II-4071, [2004] 4 CMLR 923 at [246].

22 Case T-203/01 *Manufacture francaise des pneumatiques Michelin v Commission* [2003] ECR II-4071, [2004] 4 CMLR 923 at [239].

23 This part of the formulation is somewhat problematic because it appears to treat as equivalent a showing that conduct "tends to" restrict competition and a showing that the conduct is "capable of having" such effect – although not much has been made of this so far. As a matter of plain English, the two are clearly not equivalent: the former connotes a degree of probability while the latter connotes mere possibility. This leaves open the question whether a competition authority would have to show that the allegedly infringing conduct was *likely* to result in some anti-competitive harm or only that it was possible (in a non-*de minimis* sense) that it could. This issue is discussed further below. See paras 69–73 of this article.

24 Case T-203/01 *Manufacture francaise des pneumatiques Michelin v Commission* [2003] ECR II-4071, [2004] 4 CMLR 923 at [239].

25 Case T-219/99 *British Airways plc v Commission* [2003] ECR II-5917, [2004] 4 CMLR 1008 at [293].

26 Being "capable of having" a certain effect is not the same as being "likely to have" such effect. See also n 23 above.

judgments of *Michelin II* and *British Airways* continued to be fertile soil for seeds of doubt, perhaps because their unequivocal rejection of an "actual effects" approach was not accompanied by any equally unequivocal explanation of what an acceptable approach would be – at least not with exposition and detail sufficient to assure observers that the approach envisioned would be a robust, rigorous and economics-oriented one. Indeed, there was concern that the judgments were suggestive of, or even synonymous with, a judicial retreat to blanket disallowances and "*per se* rules" against certain entire categories of commercial conduct.[27]

11 The rejection of an "actual effects" requirement and the validity of an alternative, "capability-based" approach were reaffirmed by the General Court in the recent case of *Tomra v Commission*[28] ("*Tomra*"). On appeal, the General Court confirmed once again,[29] citing *Michelin II* and *British Airways*, that EU law did not require showing that the conduct under consideration had an actual impact on the relevant markets for the purposes of establishing an infringement of Art 102 TFEU. The test was "whether, following an assessment of all the circumstances and, thus, also of the context in which those agreements operate, those practices are intended[30] to restrict or foreclose competition on the relevant market or are *capable* of doing so" [emphasis added].[31] On a related point, *Tomra* was also significant because in its judgment, the General Court finally made clear that it was not endorsing, and did not endorse, a *per se* approach to establishing an abuse of dominance, even in the relatively notorious context of exclusivity restrictions.[32]

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27 See, *eg*, Denis Waelbroeck, "*Michelin II*: A *Per Se* Rule against Rebates by Dominant Companies?" (2005) 1(1) *Journal of Competition Law and Economics* 149–171.

28 Case T-155/06 *Tomra v Commission* (judgment of the General Court dated 9 September 2010). A further appeal to the Court of Justice was brought on 22 November 2010.

29 Case T-155/06 *Tomra v Commission* (judgment of the General Court dated 9 September 2010) at [219] and [289].

30 The first alternative limb of the test, intention, is discussed below at paras 74–81 of this article.

31 Case T-155/06 *Tomra v Commission* (judgment of the General Court dated 9 September 2010) at [215].

32 The applicants argued on appeal that the European Commission had erred in its decision by adopting a *per se* approach in relation to the exclusivity restrictions imposed by the Tomra group on its counterparties. The General Court disagreed that the European Commission had in fact done so, but agreed with the applicant that such an approach would not have been consistent with the requirements of EU law: Case T-155/06 *Tomra v Commission* (judgment of the General Court dated 9 September 2010) at [215]–[289]. Prior to *Tomra*, some observers had questioned whether Case T-203/01 *Manufacture francaise des pneumatiques Michelin v Commission* [2003] ECR II-4071, [2004] 4 CMLR 923 and Case T-219/99 *British Airways plc v Commission* [2003] ECR II-5917, [2004] 4 CMLR 1008, along with

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12 *Michelin II*, *British Airways* and *Tomra* therefore represent a consistent line of authority, establishing a tremendously significant development in the case law on abuse of dominance. They reject the strict and inflexible requirement to show "actual effects", but, importantly, and equally, they also reject the blanket "*per se* rules" of unlawfulness that some thought had been introduced or indicated by previous case law. The judicial restatements in these cases make clear (and *Tomra* is best understood as having established) that in their place, EU courts have endorsed a new, intermediate requirement – one sitting somewhere in between the requirement to show actual effects on the one hand and *per se* rules on the other.

13 However, this was not quite the end of this chapter on abuse. Just one month after the *Tomra* judgment was delivered, the Court of Justice delivered its judgment in *Deutsche Telekom v Commission*[33] ("*Deutsche Telekom*"), upholding the judgment of the General Court dismissing the appeal of the European Commission's decision that Deutsche Telekom had abused its dominance by engaging in a practice known as "margin squeeze" and unfairly charging its competitors for access to its telephone network. What is significant, however, is that the court cited the general "definition" of abuse set out in *Hoffmann-La Roche*,[34] and then said:[35]

> [T]he General Court correctly rejected the [European] Commission's arguments to the effect that the very existence of a pricing practice of a dominant undertaking which leads to the margin squeeze of its equally efficient competitors constitutes an abuse within the meaning of Article [102 of TFEU], and that it is not necessary for an anti-competitive effect to be demonstrated.

14 While the first part of this statement seems fairly uncontroversial, in that it appears simply to confirm the court's rejection of a *per se* approach (which had similarly been rejected in *Tomra*), the last part of the statement appears to be a reversal of a consistent line of cases in the last ten years which had rejected the necessity to show that actual anti-competitive effects had already occurred in establishing an abuse of dominance in favour of a more flexible, intermediate approach.[36]

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their wholesale rejection of the need to show actual effects, indicated that EU courts were moving towards widespread adoption of a *per se* approach.

33 Case C-280/08 P *Deutsche Telekom v Commission* (judgment of the Court of Justice dated 14 October 2010).

34 See n 20 above.

35 Case C-280/08 P *Deutsche Telekom v Commission* (judgment of the Court of Justice dated 14 October 2010) at [250].

36 The European Commission's decision was still upheld because on the facts it had been able to show that Deutsche Telekom's pricing practices had "actually restricted competition in the retail market in end-user access services", and

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15 On the other hand, the court in other places goes on to speak in the language of tendency, capability and possibility, the very terms used to formulate the intermediate approach in *Michelin II*, *British Airways* and *Tomra*. For example, the court says that it is necessary to consider "whether the practice *tends to* remove or restrict the buyer's freedom to choose his sources of supply …"[37] [emphasis added] and whether the practice is "*capable of* making market entry very difficult or impossible"[38] [emphasis added]. It also held that "the anti-competitive effect which the [European] Commission is required to demonstrate … relates to the *possible* barriers which the appellant's pricing practices *could* have created …"[39] [emphasis added].

B. The UK background

16 Unfortunately, it does not appear that much further assistance may be gleaned from case law in the UK in determining a suitable general approach for Singapore. The position is not much clearer in the UK than it is in the EU, perhaps in part because the UK's statutory provisions on abuse of dominance are also based on Art 102 TFEU, and the interpretation and enforcement of s 18 of the UK Competition Act in UK courts in turn also depend on the clarity of EU jurisprudence.

17 Recently, in *Gas and Electricity Markets Authority v National Grid plc*,[40] the UK Court of Appeal dismissed the substantive appeal by National Grid against the decision of the UK Competition Appeal Tribunal, which had upheld the regulatory authority's decision that National Grid had infringed s 18 of the UK Competition Act in the gas metre market. Although the court eventually reduced the amount of the penalty to be imposed, the £15m sum finally decided upon was the highest financial penalty for abuse of dominance imposed in the UK to date.

18 The regulatory authority, in its decision, cited the *Michelin II* approach, clearly taking the position that "it is sufficient to show that

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Deutsche Telekom was unable to rebut this finding: Case C-280/08 P *Deutsche Telekom v Commission* (judgment of the Court of Justice dated 14 October 2010) at [258]. The question arises whether the decision would have been set aside if the European Commission had not been able to demonstrate those actual effects, since the court appears to disagree with the view that it is not necessary for an anti-competitive effect to be shown.

37 Case C-280/08 P *Deutsche Telekom v Commission* (judgment of the Court of Justice dated 14 October 2010) at [175].

38 Case C-280/08 P *Deutsche Telekom v Commission* (judgment of the Court of Justice dated 14 October 2010) at [177].

39 Case C-280/08 P *Deutsche Telekom v Commission* (judgment of the Court of Justice dated 14 October 2010) at [252].

40 [2010] EWCA Civ 114, [2010] All ER (D) 296 (Feb).

the abusive conduct of the undertaking in a dominant position tends to restrict competition or, in other words, that the conduct is capable of having such an effect … Article [102 TFEU] prohibits exclusionary conduct which produces actual or likely anti-competitive effects in the market …".[41] In the UK Court of Appeal, the general approach to establishing an abuse was briefly considered. After referring[42] to the "classic description" of an abuse in *Hoffmann-La Roche*,[43] the court proceeded to note that counsel for National Grid itself submitted (amongst other things) that the relevant provisions of competition law are concerned with the "actual or likely effects on competition".[44] In other words, both applicant and respondent were either explicitly or implicitly of the view that it was not necessary to show actual effects; showing likely effects on competition was a sufficient alternative, and the matter never become a point of dispute in the appeal. Little more was said on the matter. The case was also decided before the General Court's judgment in *Tomra* and the Court of Justice's judgment in *Deutsche Telekom* and therefore did not discuss those cases in respect of the issues raised above.

C. Determining an approach in Singapore

19 In Singapore, the issue as to what general approach is appropriate in establishing an "abuse" of dominance has yet to be judicially determined. Many of the same questions are likely to arise in Singapore because the same statutory breadth that troubles Art 102 TFEU exists in Singapore's s 47.

20 Singapore's competition authority, CCS, has published a number of guidelines on the provisions of the Competition Act, including one on s 47 specifically.[45] These do not have the legal status of primary or secondary legislation,[46] although they usefully reveal CCS's prevailing view on s 47 and are a broad insight into how CCS generally intends to interpret and enforce the prohibition. The *SISTIC* decision is significant because it is the first (and has so far been the only) case in which the competition authority in Singapore has found a violation of s 47, and is therefore the first and only case to concretely establish, in

41 Case CA98/STG/06 *Investigation into National Grid (formerly known as Transco)* (decision of the Gas and Electricity Markets Authority dated 21 February 2008).

42 Case CA98/STG/06 *Investigation into National Grid (formerly known as Transco)* (decision of the Gas and Electricity Markets Authority dated 21 February 2008) at [16].

43 See n 20 above.

44 Case CA98/STG/06 *Investigation into National Grid (formerly known as Transco)* (decision of the Gas and Electricity Markets Authority dated 21 February 2008) at [31] and [53].

45 *CCS Guidelines on the Section 47 Prohibition* (June 2007).

46 *CCS Guidelines on the Section 47 Prohibition* (June 2007) at para 1.4.

decisional practice, CCS's approach to showing an abuse of dominance in Singapore. Aside from the fact that the dominant undertaking found to have abused its position, SISTIC, is also a government-linked company,[47] the case is additionally significant because SISTIC is contesting and appealing the decision of CCS, and if the case is subsequently appealed to the Singapore courts, it will represent the first, and a much anticipated, opportunity for these issues to be judicially decided in Singapore.[48]

21 Section 47(2) of the Competition Act provides a non-exhaustive list of four types of conduct that may be considered abusive under Singapore law.[49] As a preliminary issue, which particular paragraph of s 47(2) CCS based its decision in the *SISTIC* case upon, if any, is of some interest because expressly contained in the statutory language of one, or arguably two, of the four illustrative types of abusive conduct appears to be a requirement to show certain specific effects, whereas no such requirement appears in the other paragraphs of s 47(2) or in s 47 generally. Section 47(2)(*b*), for example, refers to limiting production, markets or technical development "to the prejudice of consumers", indicating that an abuse of dominance case brought under this paragraph might need to be based on at least some specific evidence of consumer harm, whereas s 47(2)(*d*), which is the provision CCS relied upon in its decision,[50] makes no mention of any such or similar requirement. Any requirement that the competition authority demonstrates actual, or even likely or possible, effects must therefore be read into certain portions of the Singapore statute. What approach exactly should be read in is the essential question.

22 In its landmark *SISTIC* decision, CCS made clear that it endorsed and was following[51] the approach taken in *Tomra*, namely, that it is sufficient to show that allegedly infringing conduct of the dominant undertaking "tends to restrict competition[52] or, in other words, that the

47 SISTIC is 65% owned by the Singapore Sports Council, a statutory board, and 35% by The Esplanade Co Ltd, which in turn is owned by the Ministry of Information, Communications and the Arts: Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [4.4.3].

48 See n 5 above.

49 See n 2 above. That this is an not exhaustive list of all possible types of abuse of dominance is also made clear by the language of s 47(2) of the Competition Act (Cap 50B, 2006 Rev Ed) itself, which prefaces the list by saying that "conduct may, *in particular*, constitute such an abuse" [emphasis added] if it consists in one of the types of conduct specified in the list.

50 Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [7.2.1].

51 Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [7.3.6].

52 See n 23 above.

conduct is capable of having that effect".[53] At first sight, it might appear that this approach establishes a fairly low threshold to cross. It might seem that the test in effect requires little by way of economic and factual analysis and, in the context of exclusivity restrictions, would almost always necessarily be satisfied. This is because exclusivity restrictions, by their very nature, remove or limit a purchaser's freedom of choice in selecting who to buy from;[54] make it difficult for new competitors to gain a foothold in the market by prohibiting customers from trying out a competitor and allocating it a portion of their needs;[55] prevent competitors from picking up residual demand and progressively growing their capacities and reputations;[56] disincentivise (or at least reduce the incentive for) competitors to invest in the market by tying up and removing a portion of the demand and profits in the market up for grabs;[57] act as artificial barriers for producers seeking to enter and compete in the market;[58] and arguably reduce prospects for dynamic efficiencies.[59] All this might appear to lead inescapably to the conclusion that exclusive restrictions imposed by dominant undertakings will almost always "tend to" (or even almost always be "likely to") restrict competition, or at the very least are "capable of having" such effect.[60]

23 Closer examination, however, reveals that this is not necessarily or invariably so. If, for example, the dominant undertaking's exclusivity restrictions relate only to a portion of the market, leaving a substantial portion unrestricted, it is entirely possible that competition might not be foreclosed. Alternatively, it might be possible, depending on the

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53 The decision in Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) cites the decision of the European Commission in Case Comp/E-1/38.113 *Prokent-Tomra* (29 March 2006). As the Competition Commission of Singapore notes, the case was on appeal to the General Court at the time. The European Commission's decision has since been upheld by the General Court and the appeal dismissed on all grounds: Case T-155/06 *Tomra v Commission* (judgment of the General Court dated 9 September 2010).

54 This was the European Court of Justice's view of exclusivity restrictions in Case 85/76 *Hoffmann-La Roche & Co AG v Commission* [1979] ECR 461, [1979] 3 CMLR 211 at [90]. See also Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [7.2.4].

55 Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [7.5.2].

56 Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [7.5.2].

57 Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [7.5.6].

58 Case 85/76 *Hoffmann-La Roche & Co AG v Commission* [1979] ECR 461, [1979] 3 CMLR 211 at [90].

59 Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [7.5.5].

60 Indeed, to some observers, this is why anything short of requiring proof of actual anti-competitive impact is effectively equivalent, or at least dangerously close, to endorsing a rule that exclusivity restrictions are *per se* abusive.

particular facts and circumstances, for existing or new competitors to contest the portion of the market subject to exclusivity restrictions, after the expiry of such restrictions.[61] Or in certain circumstances, exclusive dealings might in fact create productive efficiencies and valuable certainties, sometimes for both the purchaser as well as the dominant undertaking.

24 The requirement to show that that conduct by a dominant undertaking is capable of restricting competition, even in the context of exclusivity restrictions, is therefore not necessarily a shallow one. The question is how to import content into the approach in order to apply it in a meaningful and suitably rigorous manner. Several possibilities, as well as how the *SISTIC* decision contributes to this still-growing body of thought, are examined in the following sections.[62]

D. Terminology and differences in approach

25 A short note on terminology may be useful. As the case law on abuse develops, the intermediate approach formulated in *Tomra* and its predecessor case law may increasingly come to be recognised as distinct and entirely separate from the traditional "effects-based" approach, since a showing that actual effects have occurred is not required. However, it is equally possible that the *Tomra* approach could simply come to be viewed as part and parcel of a "wider" conception of the traditional effects-based approach, because it requires a showing that such effects *may* occur. Or it could be that the effects-based approach will eventually be renamed and thought of as a "likely effects" approach. Whichever prevails is, in some sense, only a matter of nomenclature, although in this article different terminology is employed in order to highlight certain differences in the *Tomra* approach.

26 Although both an "actual effects" requirement on the one hand, and a requirement to show that a particular practice is "capable of having" or is "likely to have" anti-competitive effects on the other hand, share the same ultimate point of reference – namely, anti-competitive effects – it should be appreciated that the two are conceptually distinct. It would not, for example, be entirely accurate to say that the former is simply a stricter version of the latter. What is required for the former (at least as it was traditionally understood) is to show that the conduct complained of had actually and already produced some anti-competitive harm, whereas what is required for the latter is merely to show that the conduct might. An actual effects approach is thus

61 This possibility is recognised by the Competition Commission of Singapore: Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [A7.2.2].

62 See paras 29–51 and 52–61 of this article.

essentially factual in nature ("*did* the conduct have such-and-such effect?") whereas a capability-based inquiry is essentially hypothetical in nature ("*could* the conduct have such-and-such effect?"). The former is concerned with the past, while the latter is concerned with possibility.

27 The conceptual distinction between the two in turn shapes important practical differences in establishing a case of abuse, notably in the evidence-building process, such as the type of information to be gathered, the analysis to be conducted and the conclusions required to be drawn. An actual effects analysis is almost necessarily highly empirical in nature. The task may, for example, involve identifying variables an adverse change in which may be an indicator of a restriction in competition or a foreclosure of the market (such as the price of the goods or services concerned or the number of competing firms in the particular market), observing whether any adverse change has in fact occurred following the conduct of the dominant undertaking in question, and determining whether there is a causal relationship between the dominant undertaking's conduct and the adverse change observed.

28 This is not necessarily the focus with a capability-based approach. However, it should not be thought from this that a capability-based inquiry need only be superficial, theoretical or "light" on evidence. As this article endeavours to show, and as illustrated by the *SISTIC* decision, such an approach can and should entail the careful application of economic theory to the case, to determine whether current economic thinking supports the claim that a particular course of conduct is capable of having an anti-competitive effect, taking into account factors such as the particular type of industry or market in question and the particular type of abuse in question,[63] as well as close and rigorous examination of the surrounding facts and circumstances of the case, such as the exact nature of the contractual obligations imposed by the allegedly infringing conduct and the scope and duration of such obligations.[64]

III. An economics-driven analysis

29 The *SISTIC* decision is notable for the extent to which it was driven by economic analysis, consistent with the trend in many other jurisdictions of moving towards the greater integration of economics and the law in the context of abuse of dominance analysis. Exactly how (or how much) economics should assist, however, is still in many ways undecided. A useful idea was suggested by the Economic Advisory

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63 See paras 29–51 of this article.
64 See paras 52–61 of this article.

Group on Competition Policy ("EAGCP") in its 2005 report.[65] The report describes the use of an "economic account" or "story" in analysing whether a particular practice amounts to an abuse of dominance:[66]

> [A]nalyse the practice in question to see whether there is a consistent and verifiable economic account of significant economic harm. The account should be both based on sound economic analysis and grounded on facts … A natural process would consist of asking the competition authority to first identify a consistent story of competitive harm, identifying the economic theory or theories on which the story is based, as well as the facts which support the theory as opposed to competing theory.[67]

30 In other words, the process of establishing an abuse would involve an economic narrative of competitive harm, together with evidence that the conditions required for its supporting theories to hold true in fact exist. This not only firmly situates economic analysis within abuse analysis – it requires that it plays a central role. It is one way in which a capability-based regime is rendered meaningfully rigorous: it insists that establishing a dominant undertaking's conduct "tends to" or is "capable of" restricting competition should not simply be an exercise in intuition or a vague appeal to common sense, but instead a detailed study of identifiable economic theory and the careful application of such theory to the fact and circumstances of the case.

31 Although CCS did not refer to the EAGCP report or expressly say it was adopting the idea of building around an economic story, this structure is apparent from the architecture of the chapters on abuse[68] (as well as other parts) in the decision. CCS constructed its abuse analysis upon a foundation of specifically-identified economic theory, supported

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65 *An Economic Approach to Article 82*, Report by the European Advisory Group on Competition Policy (July 2005). The report at p 15 goes on to say:

> [I]n the absence of evidence to the contrary, an argument based on established economic theory and supported by facts that according to the theory, are material to the assessment of the practice in question should be deemed more credible than a counterargument that does not have such a basis.

66 *An Economic Approach to Article 82*, Report by the European Advisory Group on Competition Policy (July 2005) at pp 12–17. In its report, the European Advisory Group on Competition Policy considered such an approach to be an effects-based procedure. However, as suggested above (see paras 25–28 of this article), this might be viewed as conceptually and practically a different analysis from one that depends on showing actual effects. The European Advisory Group's guidance is nevertheless entirely consistent with, and workable within, a capability-based regime.

67 *An Economic Approach to Article 82*, Report by the European Advisory Group on Competition Policy (July 2005) at p 13.

68 Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010). See generally ch 7 and Appendix 7.

by facts consistent with and that demonstrated the applicability of the body of theory it relied on (in opposition to other competing theories). Various economic schools of thought were discussed,[69] specific literature on the economics of exclusive dealing examined[70] and theory was meticulously applied to fact.[71]

32 In the *SISTIC* story, several themes are of particular interest, in that they illustrate this methodology as well as establish an analytical framework for examining and assessing other allegedly abusive conduct in different markets in the future. These are discussed in further detail below.

A. Network externalities in the ticketing service industry

33 Integral to CCS's decision was the idea that SISTIC operates in an industry in which the generation of substantial network effects is likely.[72] The more event promoters and venue operators are contractually obligated to ticket (exclusively) through SISTIC, the more potential ticket buyers will "cluster around" the advertising, promotion and distribution channels of SISTIC, as opposed to other ticketing service providers, to look for upcoming events.[73] In turn, the more potential ticket buyers do so, the more attractive SISTIC becomes to event promoters and venue operators, including those not restricted to an exclusive arrangement with SISTIC, thus completing the loop.

34 A dominant undertaking exploiting this shapes the demand curves of both it and its competitors, causing them to differ significantly. All other things being equal, the quantity demanded by ticket buyers for SISTIC's service at any given price will necessarily be greater than that of any other competitor, in part because certain events are contractually excluded from being ticketed through any other ticketing agent, and in part because even for events that may be ticketed elsewhere, the number of potential ticket buyers clustering around SISTIC will be greater due to the network effects triggered in the first instance by SISTIC's exclusive contracts. In other words, even a competitor that is as equally as efficient as SISTIC, charging the *same price* for its service as SISTIC, will not be able to compete with SISTIC

69 For example Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [A7.1.1]–[A7.1.5].

70 For a summary, see Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [A7.1.6].

71 For a summary, see Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [A7.1.10] and [A7.2.2]–[A7.2.9].

72 Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [7.10.4] and [6.5.11].

73 Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [7.10.4].

on an equal footing.[74] An equally-efficient competitor in such circumstances will in reality face a fundamentally different and lower demand curve than the dominant undertaking, directly as a result of the very conduct of the latter that is the subject of the complaint. (Indeed, this is one reason an "equally efficient firm" test,[75] if it is to be applied in such contexts, must be done carefully in order to produce an acceptable outcome.[76])

35 Additionally, although network effects are often analysed as a demand-side phenomenon, it is suggested that they could also be viewed in terms of supply-side considerations in such cases. The indirect network effects artificially triggered by SISTIC's exclusive dealings have a direct and negative impact on competitors' costs and efficiency. For example, competitors' internet presences will be affected in terms of searchability and visibility[77] (compared to SISTIC's), given how search engines typically work.[78] This is likely to be important both to potential ticket buyers on the one hand as well as event promoters and venue operators on the other hand, especially in a highly web-savvy country such as Singapore.[79] Therefore, a competitor, even one that is equal in every other respect to SISTIC, would nevertheless face a different cost structure: it would have to invest much more in search engine optimisation or advertising simply to attain the same level of online and overall presence as SISTIC. There are similar problems with physical distribution channels as well. At popular locations, a landlord may not wish to allocate space to more than one ticket service provider. This is likely to be SISTIC, given the fact that many events cannot even be ticketed through other providers due to SISTIC's exclusivity restrictions and given the accompanying network effects.[80] A competitor must therefore offer the landlord some highly compelling reason,

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74 Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [7.9.13] and [7.10.3].

75 OECD Policy Roundtable, "Competition on the Merits" (2005). This test is discussed in para 11.18 of the *CCS Guidelines on the Section 47 Prohibition* (June 2007), and referred to in Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [7.3.3].

76 The Competition Commission of Singapore also noted that it is not bound to apply any test in isolation, including the "as-efficient firm" test: Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [7.3.4].

77 Including whether a website appears on certain keyword searches and how high a website ranks on a given search.

78 Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [6.5.13] confirms that this is in fact the case. A portion of the paragraph has been redacted.

79 Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [A3.2.4]. Respondents were asked to rank the importance of the popularity of a ticket service provider's website on a scale of 1 to 10, with 1 being most important. The mean rating was 3.3 and the median was 2.

80 Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [6.5.24].

perhaps significantly higher rents, for it to even stand a chance of it being given space instead of SISTIC. Alternatively it may forgo such channels but spend more on other channels in order to compensate. Thus, through its conduct, SISTIC can ensure that an otherwise equally efficient competitor will always face higher business operating costs than SISTIC will, and therefore cannot, even hypothetically, be an "as-efficient" firm.[81]

36 Chicago School scholars have doubted whether a dominant undertaking can ever truly profitably exploit its market power and exclude competition through the use of exclusivity restrictions, the argument being that even a dominant undertaking must pay something or compensate its purchasers for giving up choice and giving it exclusivity.[82] However, the analysis is different in the presence of network effects. The value that accrues to the dominant undertaking is likely to be greater than any value that the dominant undertaking might[83] have to compensate the purchaser for, because the dominant undertaking will also capture surplus value[84] from the network effects generated by its exclusivity restrictions and can therefore, on a net basis, profitably exploit the use of such restrictions.[85]

37 Furthermore, dominant undertakings are able profitably to exclude competition in the presence of network effects by using exclusivity restrictions as a means of denying competitors the level of

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81 For another way in which a dominant undertaking can render its competitors inefficient as a result of its exclusive dealings, see para 37 of this article. Under such circumstances, the "equally efficient firm" test cannot apply in the same way it normally could because competitors cannot, even hypothetically, become as efficient as the dominant undertaking, as a result of the very conduct of the dominant undertaking that is the subject of the complaint.

82 See, *eg*, Robert H Bork, *The Antitrust Paradox* (Free Press, 1978) at p 309: "A seller who wants exclusivity must give the buyer something for it. If he gives a lower price, the reason must be that the seller expects the arrangement to create efficiencies to justify the lower price." Bork argues that exclusivity restrictions would otherwise be "foolish and self-defeating behaviour".

83 It is conceivable that a dominant undertaking may not even have to pay, or pay fully, for this portion (the loss in welfare that purchasers give up when they agree to exclusivity restrictions) if the purchasers are small and have weak bargaining positions *vis-à-vis* the dominant undertaking, which is the case for many small event promoters in the industry.

84 See, *eg*, S J Liebowitz & Stephen E Margolis, "Network Effects and Externalities" in *The New Palgrave Dictionary of Economics and the Law* (Peter Newman ed) (Palgrave Macmillan, 1998) for a brief exposition on the "synchronisation value" arising from network effects.

85 Purchasers might also be unable to internalise fully or capture for themselves the benefits that accrue from network effects if they are large in number and cannot organise or co-ordinate themselves in order to negotiate as a group (which is certainly the case on the ticket buying side of the market, and probably also the case on the event promoter side). The excess value may therefore be retained by the dominant undertaking.

activity required in order to reach their minimum efficient scale ("MES").[86] Such a strategy would ultimately force the exit of these firms from the market.[87] This ability of a dominant undertaking to bring about economic conditions that will guarantee a competitor's failure through its use of exclusivity restrictions is also likely to be a significant deterrent for new entry into the market, thus foreclosing competition in this manner as well. The applicability of this to the *SISTIC* case was noted by CCS,[88] which observed that competitors in the relevant market "cannot, even in principle, be 'as efficient' without first attaining a critical mass of ticketing transactions to match SISTIC's indirect network effect",[89] and that exclusivity restrictions stood to "critically impair competition" in such a market by preventing a potentially as-efficient firm from achieving such critical mass.[90] This was an important part of the analysis which altogether led CCS to conclude that SISTIC's conduct was clearly capable of resulting in an anti-competitive effect.

38 In its investigations, CCS sought not only to verify the presence of these indirect network effects but to assess the strength and significance of those effects on the market as well, by examining the impact in three specific areas: websites, distribution outlets and customer databases.[91] It concluded that, on the facts, the indirect network effects effectively constituted a barrier to entry in the relevant market.[92]

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86 See Eric Ramusen, Mark Ramseyer & John Wiley, "Naked Exclusion" American Economic Review 1991; 81(5): 1137–1145, Ilya Segal & Michael Whinston, "Naked Exclusion: Comment" American Economic Review 2000; 90(1): 296–309 as well as Eric Ramusen, Mark Ramseyer and John Wiley, "Naked Exclusion: Reply" American Economic Review 2000; 90(1): 310–311.

87 The minimum efficient scale ("MES") is the smallest possible output level, or scale, at which a firm must produce in order to minimise its long-run average costs. The significance of this concept is that a firm which is unable to reach and operate at its MES cannot be profitable in the long run, and hence will ultimately be forced to exit the market.

88 The Competition Commission of Singapore also noted that under the circumstances, the "equally efficient firm" test could not apply in the same way it normally would.

89 Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [A7.2.3].

90 Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [A7.2.4].

91 Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [6.5.13]–[6.15.31].

92 Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [6.15.32].

B. *Two-sided markets and recoupment*

39 A second economic theme central to the *SISTIC* story[93] is the idea that the ticketing service industry is a two-sided market.[94] In this market, there are two distinct groups of consumers: event promoters and venue operators on the one hand (who use ticketing service providers to sell their tickets) and event-goers on the other hand (who use ticketing service providers to buy their tickets). The ticketing service provider acts as a middleman, contracting with each side of the market separately.[95]

40 The significance of this in the context of abuse analysis is its relevance to the concept of recoupment. As outlined above, Chicago School scholars have often questioned whether a dominant undertaking can profitably employ the use of exclusivity restrictions, compared to simply exploiting its dominant position without such practices, since a dominant undertaking must generally pay its purchasers (usually in the form of discounts) for exclusivity, potentially negating the very profits they might otherwise expect to make from exclusivity.[96] If dominant undertakings cannot profitably exclude competition through the use of such restrictions, then no rational profit-maximising undertaking would engage in their use. This is unless, of course, such practices in fact create significant efficiencies.[97] If they do, then such restrictions, on a net basis, would not produce anti-competitive loss, since they would create offsetting efficiencies, and if this is so, then even the intermediate "capability-based" test described in *Tomra*[98] cannot be satisfied.

41 Post-Chicago scholars have responded to this objection. Several counter-arguments to this were discussed above,[99] and an additional,

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93 Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at Appendix 5.

94 See generally David S Evans, "The Antitrust Economics of Two-sided Markets" (*AEI-Brookings Joint Center for Regulatory Studies*, September 2002).

95 It is important that these two groups are unwilling or unable to negotiate and contract with each other directly, thereby creating the need for a middleman. This is the case in the ticketing service industry in Singapore. Another defining characteristic in two-sided markets is the existence of network effects, which is also the case in the ticketing service industry. See paras 33–38 of this article.

96 See n 82 above.

97 These might include efficiencies created from economies of scale or from having a stable customer base.

98 Case T-155/06 *Tomra v Commission* (judgment of the General Court dated 9 September 2010) at [215].

99 See paras 33–38 of this article for a the discussion on how exclusivity restrictions may be profitably implemented and competition harmfully foreclosed where there are network externalities, where manipulation and control of certain demand-side effects and supply-side effects are possible and where such restrictions may be used to prevent competitors from reaching minimum efficient scale. Also see the market

(*cont'd on the next page*)

important response is that a dominant undertaking may be able to employ exclusivity restrictions profitably if it is able to implement a recoupment strategy to regain some or all of what it is required to pay those purchasers who have given it exclusivity. In an ordinary one-sided market, the dominant undertaking might have to do this by dividing its activity into phases, beginning with an "aggressive phase" in which it engages in exclusionary conduct (even at a cost to itself), followed by a "recoupment phase" in which it raises prices once it has successfully excluded competition. The success of such a strategy, however, depends on a number of factors, including there being sufficient barriers to entry such that new competitors do not re-enter the market during the recoupment phase when the dominant undertaking raises its price.[100]

42 In a two-sided market, where there are two distinct groups of customers, recoupment is easier, because a dominant undertaking can impose exclusivity restrictions on one side of the market while *simultaneously* recouping profits from the other side of the market. There is no need to have a separate phase for recoupment (during which the dominant undertaking is vulnerable to re-entry), and neither is there a need to choose between excluding and recouping at any given point in time, since they can both be done at the same time. There is no need to impose restrictions on both sides of the market because once one side is effectively secured, the other side will have no choice but to use the dominant undertaking's services. Ticket buyers, for example, will have no choice but to buy using SISTIC's service if the event they want to attend is being ticketed exclusively through SISTIC.[101]

43 In its decision, CCS found that there was sufficient evidence to support this analysis.[102] Based on a study of SISTIC's pricing strategy over a number of years, it found that SISTIC consistently offered discounts and incentives to event promoters and venue operators (one side of the market), but not to ticket buyers (the other side of the market),[103] suggesting that SISTIC was indeed employing the simultaneous exclusion-and-recoupment strategy discussed above. In fact, CCS also found that over the years SISTIC had repeatedly increased the booking fees it charges to ticket buyers, sustaining the fees at above-

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problems relating to a lack of bargaining power on the part of event promoters (n 83 above) and a lack of co-ordination among ticket buyers (n 85 above).

100 See, *eg*, *An Economic Approach to Article 82*, Report by the European Advisory Group on Competition Policy (July 2005) at pp 18–19.

101 Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [A7.2.6].

102 Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [7.11].

103 Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [7.11.3].

competitive levels.[104] On the facts, CCS concluded that SISTIC had deliberately employed a "holistic strategy of concurrent foreclosure, recoupment and perpetuation of dominance".[105]

C. Unavoidable trading partner

44 Under certain conditions, it may become unavoidable for purchasers in a market to transact with a dominant firm, making such a firm an "unavoidable trading partner".[106] This may happen where, for example, the dominant undertaking is the sole supplier of a particular good, where the dominant undertaking is the only firm with a regulatory licence to engage in a restricted trade, or even where the purchaser's requirements for a particular good or service are so large that the other market players cannot fulfil the purchaser's requirements such that the purchaser must buy from the dominant undertaking as well.

45 The concept is significant to abuse analysis in a number of ways. The fact that a dominant undertaking is an unavoidable trading partner gives it substantial bargaining power over such purchasers. Such purchasers, being economically dependent on the dominant undertaking's willingness to provide goods or services to them, may be forced to accept certain terms – including exclusivity restrictions – that they might otherwise not accept, or that they might otherwise demand compensation for. This gives the dominant undertaking who is an unavoidable trading partner the capability to implement an anti-competitive strategy, at minimal cost.[107] When this happens, as it did in the *SISTIC* case, competition is harmfully foreclosed because a competitor, even one that is equally efficient, will find itself unable to contest even a portion of the purchaser's business if it is unable to fulfil the entirety of the purchaser's needs.[108] This is because whenever purchasers must unavoidably deal with the dominant undertaking for at least some of its needs, then (as pointed out above) the dominant

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104 Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [7.10.1].

105 Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [7.11].

106 The concept has also been used in the context of assessing dominance. See, *eg*, Case 85/76 *Hoffmann-La Roche & Co AG v Commission* [1979] ECR 461, [1979] 3 CMLR 211 at [41].

107 See n 99 above and para 51 of this article for a discussion of other ways in which an anti-competitive strategy involving exclusivity restrictions may be profitably implemented, and competition harmfully foreclosed, by a dominant undertaking.

108 This is necessarily the case, *ex hypothesi*. If a competitor could fulfil the entirety of the purchaser's needs, the dominant undertaking would not be an unavoidable trading partner.

undertaking is able to leverage upon this fact to force the purchaser to contract with it exclusively. As the European Commission cautioned:[109]

> The capacity for exclusive purchasing obligations to result in anticompetitive foreclosure arises in particular where, without the obligations, an important competitive constraint is exercised by competitors who either are not yet present in the market at the time the obligations are concluded, or who are not in a position to compete for the full supply of the customers. Rivals may not be able to compete for an individual customer's entire demand because the dominant undertaking is an unavoidable trading partner at least for part of the demand on the market, for instance because its brand is a 'must stock item' preferred by many final consumers or because the capacity constraints on the other suppliers are such that a part of demand can only be provided for by the dominant supplier.

46 A particularly troubling situation is where the dominant undertaking becomes an unavoidable trading partner to purchasers not from the result of market conditions but through its own (abusive) conduct *in the first place*, and that position then results in the dominant undertaking becoming an unavoidable trading partner in relation to more purchasers, which widens the net of exclusionary effects, as well as augments the power and position of the dominant undertaking to enter into further (abusive) exclusive agreements with even more purchasers.

47 This appears to have been a concern in the *SISTIC* case. After analysing the circumstances surrounding SISTIC's exclusive agreement with The Esplanade Co Ltd ("TECL"),[110] CCS found that SISTIC was an unavoidable trading partner in relation to TECL at the relevant time and that an equally efficient firm to SISTIC would not have been able to contest for TECL's business.[111] The exclusive agreement with TECL, in

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109 *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty* [now Art 102 TFEU] *to abusive exclusionary conduct by dominant undertakings* (24 February 2009) (the "European Commission Guidance") at para 36. The European Commission Guidance goes on to say: "In general, the longer the duration of the obligation, the greater the likely foreclosure effect. However, if the dominant undertaking is an unavoidable trading partner for all or most customers, even an exclusive purchasing obligation of short duration can lead to anticompetitive foreclosure."

110 The Competition Commission of Singapore ("CCS") also reached a similar conclusion in relation to SISTIC's agreement with the Singapore Sports Council that required the use of SISTIC as sole ticketing provider for all events held at the Singapore Indoor Stadium. CCS concluded that SISTIC had become an unavoidable trading partner in relation to both the Singapore Sports Council as well as the event promoters concerned (although the way the Singapore Sports Council agreement worked was somewhat different from the way the Esplanade agreement worked): Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [7.9.10].

111 Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [7.8.12].

turn, made SISTIC an unavoidable trading partner in relation to many other event promoters, including event promoters who wished to stage some of their events at Esplanade venues (or who had to, due to staging considerations), because such promoters would be forced to ticket exclusively through SISTIC for their Esplanade events as a result of the Esplanade agreement. CCS then observed that once these promoters became unavoidable trading partners to SISTIC in relation to events to be held at the Esplanade, it became unlikely, perhaps even impossible, that a firm (even one equally as efficient as SISTIC) could compete for the business of those event promoters – even in relation to events not held at the Esplanade.[112] The result is a broadened scope, and perhaps a vicious cycle, of competition foreclosure.

D. *Near-zero marginal costs and the "extension period" of dominance*

48 One other important feature, not discussed in the *SISTIC* decision, characterises the ticketing service industry as well as many other modern-day industries, and warrants further examination. This is, namely, the extremely low (sometimes even near-zero) marginal costs of businesses in certain industries. In the ticketing service industry, it is quite likely the case that there is often only a very low cost to the ticketing service provider associated with each additional ticketing transaction that it carries out.[113] There may be minor printing costs, perhaps occasional customer service costs and so on associated with the ticketing of each additional seat, but essentially once a ticketing service provider's back-end systems are in place, the marginal cost of each additional ticketing transaction is likely to be very low. The ticketing service industry is thus fundamentally unlike "old economy" industries, which are characterised by significant diminishing returns to scale, rising average costs and decreasing profits. Instead, "new economy" industries enjoy almost-ever-decreasing average costs and almost-ever-increasing profits with scale.[114]

112 Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [7.5.5].

113 Richard A Posner, "Antitrust in the New Economy" (John M Olin Law and Economics Working Paper No 106 (2d Series)) points out that the principal output in "new economy" industries is in fact intellectual property: value resides in the firm's software and systems which allow it to handle orders, billings, refunds and customer queries, complaints and concerns seamlessly and efficiently. There may or may not be high up-front costs involved in creating the necessary software and systems, but what is clear is that once created, the firm's marginal costs of doing business is often extremely low.

114 It is sometimes argued on behalf of dominant undertakings in such industries that they would be justified in engaging in conduct that would otherwise be considered anti-competitive if they are required to make significant up-front investments which need to be made back over time. Indeed, this was one of the arguments SISTIC raised: Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com*

(*cont'd on the next page*)

49 Very low or near-zero marginal costs mean that a correspondingly high proportion (perhaps almost all) of the marginal revenue obtained from each additional transaction is profit. The significance of this in terms of abuse of dominance economics is, as Judge Richard Posner observes,[115] that it creates an important and exceptional circumstance in which dominant undertakings may profitably engage in exclusionary and anti-competitive exclusive dealing practices, despite the general need to pay for exclusivity,[116] and even in the absence of an implementable recoupment strategy. This is due to the very high profits that the dominant undertaking in a low marginal cost industry can make during the "extension period",[117] or the period in which its dominance is artificially extended due to its exclusionary conduct.

50 Even though Posner is of the view that exclusivity restrictions are generally unlikely to be an effective means of excluding competition and entry, he believes that the opposite is true in a market with low marginal costs:[118]

> In the extreme case, which is approximated in some software markets, marginal cost is close to zero, meaning that almost all the revenues earned by a firm that monopolizes[119] the market go directly to the bottom line. This makes it plausible that the profit from extending the monopoly another year or two will exceed the cost of the exclusionary practices required to achieve the extension. To put this differently, there is no reason to think that the cost of an exclusionary practice in such markets will exceed the additional monopoly profits that the practice makes possible …

Pte Ltd (4 June 2010) at [8.2.1]. A detailed discussion on the merits of this defence and the conditions required for its application is outside the scope of this article. However, in this particular case, the Competition Commission of Singapore found that SISTIC had not in fact made any significant investments in the relevant market to begin with, and that there thus was no objective justification for the exclusivity restrictions imposed by SISTIC: at [8.2.19]–[8.2.20].

115 Richard A Posner, "Antitrust in the New Economy" (John M Olin Law and Economics Working Paper No 106 (2d Series)).

116 See n 82 above.

117 Richard A Posner, "Antitrust in the New Economy" (John M Olin Law and Economics Working Paper No 106 (2d Series)) at p 7 also argues that:

> The likelihood that the monopoly profits obtained during the extension period (as we may call the period for which a monopoly is extended by means of exclusionary practices) will exceed the costs of the exclusionary practice to the monopolist is enhanced by the fact that … in parallel new-economy cases, the monopoly is of intellectual property.

118 Richard A Posner, "Antitrust in the New Economy" (John M Olin Law and Economics Working Paper No 106 (2d Series)) at pp 6–7.

119 Although written in the language of monopoly power, the same applies to dominant firms with substantial market power.

51 The ability of a dominant undertaking simply to extend or perpetuate its dominance in a very low or near-zero marginal cost environment, even for only a while, is of particular concern because it enables a dominant undertaking to generate the additional profits sufficient to make anti-competitive practices profitable in circumstances where they otherwise might not be economically worthwhile to pursue.[120] It also follows that from a planning or business strategy perspective, the prospect of such extension or perpetuation of dominance alone also provides a strong incentive for a dominant undertaking in such an industry to engage in such practices.

IV. Factual and contextual analysis

52 In *Tomra*, the central question in abuse analysis was framed by the General Court as being "whether, following an assessment of all the circumstances and, thus, also of the context in which those agreements operate, the practices in question were intended[[121]] to restrict or foreclose competition on the relevant market or are capable of doing so".[122] It is readily seen that despite the fact that a "capability-based" inquiry is conceptually hypothetical in nature[123] – or perhaps because of that fact – a study of any allegedly infringing conduct must be grounded in careful scrutiny of all the surrounding facts and circumstances of each case. Looking at conduct in a vacuum or examining only the nature of the conduct without the specific context in which it operates, would effectively be equivalent to assessing only the *genus* of the conduct in question – which in turn is only one short step away from re-establishing *per se* rules against entire categories of conduct.

53 Of course in most cases a significant portion of the factual matrix of any given case should and would necessarily already have been scrutinised as part of the process of applying economic theory to the facts and in determining whether current economic thinking supports the claim that a particular course of conduct is capable of having an anti-competitive effect (as was the case in the *SISTIC* decision).[124] This section discusses certain of the factual, contextual and contractual analyses over and above that.

120 See also paras 34, 35, 37 and 42 of this article.

121 The first alternative limb of the test, intention, is discussed below. See paras 74–81 of this article.

122 Case T-155/06 *Tomra v Commission* (judgment of the General Court dated 9 September 2010) at [215].

123 The question being, could such conduct have such an effect? See paras 25–28 of this article.

124 See paras 29–51 of this article.

A. Factual inferences

54 Of particular interest in the *SISTIC* decision are the facts which supported several important inferences drawn by CCS. At first sight, it might seem slightly unsatisfactory to rest something as important as the determination as to whether conduct is abusive on something on factual inferences. In reality, there is nothing alarming about this: drawing inferences from facts and evidence is routinely done in courtrooms and judicial decision-making; certain ideas in abuse of dominance literature, such as the "no economic sense" test,[125] are themselves intrinsically inferential in nature; and in the case at hand only a part (one might say a supporting part and not an independently determinative fraction) of the decision was inference.

55 One instance of this concerns the factual finding that the exclusivity restrictions in the various agreements were initiated by SISTIC and unilaterally imposed on its counterparties.[126] (This fact was itself in dispute,[127] although based on evidence that all of the exclusive contracts between SISTIC and event promoters were based on a single standard-form template, and a statement made by a representative of TECL, CCS concluded the restrictions were indeed initiated and unilaterally imposed by SISTIC.[128]) The significance of this was in that in CCS's view, SISTIC's behaviour would make no economic sense[129] unless it had the effect (or likely effect) of foreclosing competition.[130] If an

125 The "no economic sense" test is discussed in para 11.11 of the *CCS Guidelines on the Section 47 Prohibition* (June 2007), and referred to in Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [7.3.3]. It is the idea that in assessing a dominant undertaking's discount scheme, one should consider if the scheme would be commercially rational or economically sensible only if it has the effect or likely effect of foreclosing the market to competition. A similar idea was discussed at the OECD Policy Roundtable, "Competition on the Merits" (2005).

126 Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at sub-chapter 7.4.

127 SISTIC suggested that it was the event promoters and venue operators who wanted exclusivity and that the exclusive contracts were a way for event promoters and venue operators to "leverage on their combined bargaining power" in order to "extract the best competitive terms": Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [7.4.1] and [7.4.2].

128 Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [7.4.2] and [7.4.3].

129 See n 125 above.

130 Note that is no general requirement, in establishing an abuse of dominance, to show that the allegedly abusive restrictions be imposed by the dominant undertaking. See, *eg*, Case 85/76 *Hoffmann-La Roche & Co AG v Commission* [1979] ECR 461, [1979] 3 CMLR 211 at [89]: "An undertaking which is in a dominant position on a market and ties purchasers – *even if it does so at their request* – by an obligation or promise on their part to obtain all or most of their requirements exclusively from the said undertaking abuses its dominant position within the meaning of [Art 102 TFEU] …" [emphasis added].

event promoter or venue operator would patronise SISTIC in any case, then any potential efficiency gains would be achieved with or without the exclusivity restrictions. On the other hand, if SISTIC was at risk of losing volume from a particular event promoter or venue operator and the restrictions eliminate this risk, then foreclosure effects would have been achieved. CCS therefore reasoned: "SISTIC's exclusivity restrictions are either redundant or anti-competitive. Given SISTIC's insistence on exclusivity restrictions, such restrictions cannot be redundant."[131]

56 Another concerns the "natural monopoly" claim. It is sometimes argued by dominant undertakings that the market in question involves such high fixed costs, and is so small, that it would only be efficient for a single firm to operate in it. Another way of expressing this idea is that in such markets competition should be "for the market" (or competition for a monopoly) rather than competition "in the market".[132] In the *SISTIC* case, however, the fact that SISTIC felt it necessary to insist on exclusivity restrictions in its contracts suggested to CCS that this was not a natural monopoly market. CCS reasoned that if it were, customers would see the benefits themselves and ask for single-agent contracts without the need for SISTIC to demand them. It concluded that if the market were a natural monopoly, "a single winner would emerge with or without exclusive agreements, and any efficiency

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131 Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [7.4.6] and [7.4.7]. SISTIC also argued that even if its conduct was *prima facie* an abuse of dominance, it was objectively justified because (amongst other things) the conduct generated economic efficiencies for SISTIC. See generally *SISTIC* ch 8. This defence raises a number of important questions that Singapore courts will ultimately have to decide. Unfortunately, length does not permit a discussion in full here. The most fundamental of these questions include: Can efficiency gains, typically, productive efficiency gains, which accrue to the dominant undertaking, serve as a legitimate basis for objectively justifying conduct that would otherwise be considered an abuse of market power? How should the gains be weighed against other harms where those gains accrue solely to the dominant undertaking but are generated at the expense of other economic actors – as would be the case where the conduct which generated those gains simultaneously has the effect of foreclosing competition, restricting output, raising prices and harming purchasers? Will Singapore courts also apply a proportionality test for evaluating claims of objective justification, as has widely been done elsewhere, and if so what will be the elements of this test in Singapore? How will courts weigh inherently difficult-to-quantify or even difficult-to-prove benefits and harms, such as the harm to innovation and dynamic efficiency that (arguably) results from a foreclosure of competition? Should objective justification be treated as an affirmative defence? Which party should bear the burden of proving (or disproving) the real existence of the legitimate justification (in this case, efficiency gains) and the burden of satisfying a proportionality test and demonstrating that the gains outweigh the harms?

132 This was one of the arguments made by SISTIC: Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [7.5.1].

could be achieved in any case".[133] Instead, the exclusivity restrictions had the effect of artificially and harmfully shifting the mode of competition from one in the market to one for the market.[134]

B. Contractual scope

57 If the dominant undertaking's allegedly abusive practice relates only to a small portion of the market and leaves a substantial portion unrestricted, it is entirely possible that competition might not be harmfully foreclosed at all. An important part of the analysis should therefore concern the scope, and extent, of the practice in question and the proportion of the relevant market to which they apply. CCS estimated that in total about 60%–70% of the relevant market was foreclosed by SISTIC's exclusive agreements.[135] However, there is no specific threshold percentage to be reached in order for a practice to be considered abusive;[136] all the other facts and circumstances of the case matter as well.

58 In the *SISTIC* case, one relevant consideration was the fact that the contractual arrangements in question involved total restrictions, in each case requiring 100% of the counterparty's volume to be ticketed through SISTIC, as opposed to a partial requirement to ticket, say, 75% of one's volume through SISTIC.[137] It seems logical that, in general, totality exclusivity restrictions would have a greater capability or tendency to foreclose and harm competition than partial requirements.[138] Another important factor was that the nature of the industry (a two-sided market characterised[139] by strong feedback loops

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133 Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [7.5.15].

134 For a discussion on why "competition for exclusives" was considered harmful and unworkable in the relevant market, see paras 29–51 of this article. For example, new entrants would not be able to build capacity and reputation gradually to challenge the incumbent – "competition for exclusives" is an all or nothing mode of competition. It was also the Competition Commission of Singapore's view that in the relevant market, it was probably not even possible for an equally-efficient firm to compete for these exclusives, given for instance the fact that SISTIC had established itself as an unavoidable trading partner to many event promoters and venue operators.

135 Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [7.12.3]–[7.12.4].

136 Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [7.12.2].

137 Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010), see sub-chapter 2.4 for details on the contractual arrangements with venue operators and event promoters at issue.

138 Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [7.6.1].

139 See paras 39–43 of this article.

and indirect network effects[140]) and SISTIC's position in it (as an unavoidable trading partner to many purchasers[141]) mean that each exclusivity restriction SISTIC imposes has the capability or tendency to create ripple effects on purchasers and competition in the market that extend well beyond the individual agreement to which it relates. Another way of saying this is that the scope of foreclosure effects on the market as a whole (including other ticket services providers, event promoters and ticket buyers) was disproportionate to the immediate scope of the exclusive agreements and the number of parties they applied to, and disproportionate to any benefits that might have accrued to those parties.[142]

C. Contractual duration

59 As with the issue of scope, there is no specific period of time required for an allegedly infringing practice to go on for before it will be considered abusive. However, it is logical that, in general, the longer the actual or contractual duration of the practice in question, the more likely there are to be foreclosure effects and the greater such foreclosure effects are likely to be,[143] a position shared by CCS.[144]

60 In examining the 19 exclusive agreements in the *SISTIC* case, CCS rightly took the view that what mattered was not merely the formal terms of the contracts but the reality of the entire situation.[145] The fact that an otherwise anti-competitive agreement is expressed to be for only a short duration or to be terminable upon short notice without penalty is of little significance if the arrangements are typically renewed as a matter of course, or if none are in fact ever terminated, because in such a situation the theoretical possibility of those restrictions coming to an end would not have, in fact, ever materialised and therefore would not have operated in any way to reduce or negate foreclosure in the market. In *Van den Bergh Foods v Commission*,[146] it was argued on behalf of the

140 See paras 33–48 of this article.

141 See paras 44–47 of this article.

142 Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [7.9.14]–[7.9.16] and [7.10.6].

143 *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty* [now TFEU Art 102] *to abusive exclusionary conduct by dominant undertakings* (24 February 2009) at para 36: "In general, the longer the duration of the obligation, the greater the likely foreclosure effect. However, if the dominant undertaking is an unavoidable trading partner for all or most customers, even an exclusive purchasing obligation of short duration can lead to anticompetitive foreclosure."

144 Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [7.13.2].

145 Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [7.13.2].

146 Case T-65/98 *Van den Bergh Foods v Commission* [2003] ECR II-4653.

dominant undertaking that exclusivity restrictions entered into by Van den Bergh Foods with ice cream retailers were not abusive, given that the retailers had the option of terminating the underlying agreements at any time upon two months' notice. The court rejected this argument, holding that:[147]

> … the option of terminating their distribution agreements with [the dominant undertaking] at any time … in no way precludes the effective enforcement of the agreements in question during the period in which that option is not used. Consequently, in assessing the effects of the distribution agreements on the relevant market, the Court must take their actual duration into consideration … Such an argument might be convincing if that option were exercised in practice and if outlets were thus to become regularly available to new entrants on the relevant market. However, as the [European] Commission has shown, that is not the case …

61 In the *SISTIC* case, none of the 19 exclusive agreements with event promoters and venue operators that existed as of 1 January 2006[148] had ever been terminated,[149] even though most were expressed to be of short durations and terminable at short notice without penalty.[150] Important surrounding considerations also include the fact that SISTIC was an unavoidable trade partner to many purchasers, which is relevant both to the question of how likely it was that its exclusive agreements would be terminated, and the fact that even a short duration can lead to harmful foreclosure effects when the restricting party is an unavoidable trading partner.[151] On the basis of all this, CCS concluded that the duration of the exclusive restrictions was sufficient to foreclose competition.[152]

V. Actual effects analysis

62 Under the approach affirmed in *Tomra* and adopted in the *SISTIC* decision, it is no longer the case that a competition authority may only make a finding of abuse if and only if there is proof of actual,

147 Case T-65/98 *Van den Bergh Foods v Commission* [2003] ECR II-4653 at [105].

148 This is the date that s 47 of the Competition Act (Cap 50B, 2006 Rev Ed) came into force.

149 In the case of the 17 agreements other than the TECL and Singapore Sports Council agreements, none had ever been terminated or even modified upon renewal, as of March 2009: Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [7.13.5]. A portion of this paragraph is redacted.

150 Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [7.13.1].

151 See n 143 above.

152 Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [7.13.10].

adverse effects on competition.[153] Nevertheless, in its decision, CCS went on to examine the actual effects of SISTIC's exclusivity restrictions on competition in the relevant market as well, which are briefly considered in this section.

63 As CCS itself made clear, its examination of the actual effects of SISTIC's conduct was a step over and above the legal requirements to establish an abuse.[154] It should therefore not in any way be interpreted as a tacit concession that a showing of actual effects is legally necessary. It also follows that even supposing that one is unconvinced by this portion of the decision, that by itself should not necessarily be fatal to the entire case on abuse, bearing in mind that the approach does not require a showing of actual harm and keeping in mind the rationale behind such an approach. This includes, amongst other things, the idea that conduct which at a given point in time cannot yet be proven to have already resulted in anti-competitive effects may nevertheless already be on a collision course towards producing such effects, and may (in the absence of intervention) in fact produce such effects in the future; early intervention on the basis of economic and factual evidence that those effects could or are likely to occur may not only be economically and socially desirable but necessary as well.[155]

64 One aspect of the evaluation is the price ticket buyers are charged for SISTIC's ticketing service. In January 2008, SISTIC increased its booking fees by 50% to $3 per ticket.[156] (In fact, SISTIC had previously increased its fees by 100% to $2 per ticket in 2004, although this was prior to s 47 coming into force.)[157] One might of course query whether there could have been one or more market-based reasons for

153 See paras 6–24 of this article.

154 The decision unequivocally states that "it is sufficient to establish the likely effects of competition foreclosure for the purpose of the section 47 prohibition. In this particular case, however, CCS has nonetheless examined both the actual and likely effects" Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [7.3.6].

155 For example, Whish writes in his textbook: "It is obvious that the [European] Commission should not have to show that actual adverse effects *have already occurred*: that would mean that Article [102 TFEU] can be applied only after the damage is done." Richard Whish, *Competition Law* (Oxford University Press, 6th Ed, 2008) at p 198. A full discussion on the rationale and justification for an intermediate, capability-based approach to s 47 of the Competition Act (Cap 50B, 2006 Rev Ed) in Singapore's context would need to take place within a wider discussion of the legislative history and the parliamentary intent behind the enactment of Singapore's competition laws, as well as against the wider backdrop of Singapore's national and international economic imperatives. This will be left to a future article.

156 Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [7.10.1]. This fee applies to tickets with a face value of $20 or more.

157 Singapore's Competition Act (Cap 50B, 2006 Rev Ed) was implemented in stages. Section 47 came into effect on 1 January 2006.

SISTIC raising its prices, such as rising labour costs, inflation, and so on, and indeed this demonstrates some of the difficulties competition authorities face in demonstrating actual harm resulting from a dominant undertaking's conduct.[158] However, two points are significant. Firstly, CCS found that SISTIC's profitability, measured by return on capital invested, actually increased significantly after it increased its fees and principally as a result of the increased fees,[159] and therefore it could not be said that the fees were increased in line with, or merely to reflect, rising costs or changing market conditions. In fact, SISTIC's return on invested capital increased during a period in which the Singapore economy experienced negative growth.[160]

65 Secondly, CCS also found that the prices SISTIC charged ticket buyers were "sustained above competitive levels".[161] This finding was based on a comparison of SISTIC's fees against other ticketing service providers in Singapore, namely, Tickets.com and Gatecrash.[162] In response to this, SISTIC claimed that the premium in price was justified by its premium level of services. Interestingly, CCS was also able to show that SISTIC's fees were significantly higher than the fees charged by ticketing service providers in Hong Kong, South Korea and Taiwan. For example, the total cost of buying four tickets (including a handling fee) through SISTIC would amount to $13, compared to only $2.24 through Ticket.com.tw.[163] However, CCS recognised that conditions vary across countries, and did not rely on the cross-country price evidence in reaching its conclusions.[164]

66 Further indications of anti-competitive harm could also be seen from statements by customers to the public media and in public forums expressing dissatisfaction with SISTIC's fee increases and with problems

158 The inquiry is often complex because it typically involves measuring and studying variables across time (such as price and market share), and depends, amongst other things, on there being sufficient data available to show the separate impact of the dominant undertaking's conduct on the indicator being studied, as distinct from a multitude of other possible explanatory factors.

159 Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [6.2.5]–[6.2.7]. Parts of these paragraphs and several of the figures have been redacted.

160 Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [6.2.5]–[6.2.7]. Parts of these paragraphs and several of the figures have been redacted.

161 Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [6.2.17] and [7.10.1].

162 Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [6.2.8].

163 Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [6.2.10].

164 Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [6.2.11].

as to the quality of SISTIC's services.[165] Of course, to some extent such comments may be self-serving, but many businesses themselves take customer surveys seriously and use such information as a gauge for whether their products are competitively priced; CCS was arguably doing no more than considering similar feedback in a similar manner.

67 In addition to considerations of price, considerations of "price structure" in a two-sided market (*ie*, the relative price levels between the two sides of the market) are also important.[166] Taking into account other surrounding facts and circumstances, the fact that SISTIC continued to offer discounts and incentives to event promoters and venue operators (one side of the market), while concurrently increasing prices for ticket buyers (the other side of the market), strongly suggested that SISTIC was implementing an anti-competitive simultaneous exclusion-and-recoupment strategy, using supernormal profits (and creating a net loss of welfare) on one side of the market to pay for exclusivity on the other side in order to strengthen and extend its dominance.[167] CCS concluded that SISTIC had indeed put in place "a strategic price structure that forecloses competition on one side, extracts monopoly rent from the other side, and perpetuates its dominance on both sides …".[168]

68 Finally, one other way in which foreclosure effects are sometimes demonstrated is by showing that a dominant undertaking's practices led to the actual reduction or elimination of competition from the relevant market, or, perhaps more contentiously, that it led to a significant lack of entry into the market over a period of time. In the *SISTIC* case, CCS found that there had been actual exits by competitors.[169] The evidence is brief (parts of it have been redacted), although it was also noted that SISTIC's high market share, which was roughly 85%–95% by ticket sales volume between January 2006 and March 2009, on an aggregated basis, was substantially higher than those of top ticketing service providers in other countries.[170]

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165 Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [7.10.7].

166 Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [A5.3.1].

167 See also paras 39–43 of this article.

168 Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [A5.3.4].

169 Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at sub-chapter 6.3 and [7.5.14].

170 Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at sub-chapter 6.4 and [7.5.14].

VI. Remaining uncertainties in abuse analysis

A. *Tends to, is likely to, or is capable of*

69 A problem with some of the case law formulations for establishing an "abuse" of dominance is that they seem to treat as equivalent, or substitutable, a showing that conduct "tends to" restrict competition with a showing that conduct is "capable of having" that effect. The Court of First Instance in *Michelin II* framed the question as being whether the conduct of the dominant undertaking "tends to restrict competition *or, in other words*, that the conduct is capable of having that effect"[171] [emphasis added]. In *British Airways*, the Court of First Instance framed the question as whether the conduct "tends to restrict competition *or, in other words*, that the conduct is capable of having *or likely* to have such an effect"[172] [emphasis added], thereby introducing yet another variation.

70 As a matter of plain English, however, "tends to" (or is "likely to") on the one hand, and "is capable of" on the other hand, are not equivalent: the former connotes a degree of probability or likelihood while the latter connotes mere possibility. If both standards were intended to be acceptable or interchangeable, then one could and should treat the lower standard (*ie*, capability) as operative and discard references to the higher as redundant. When *British Airways* was subsequently appealed to the EU's highest court, the European Court of Justice, unfortunately, did not take the opportunity to clarify the matter. However, notably, the European Court of Justice often spoke in the language of capability, rather than likelihood or probability, for example in holding that:[173]

> [I]t first has to be determined whether those discounts or bonuses *can* produce an exclusionary effect, that is to say whether they are *capable*, first, of making market entry very difficult or impossible for competitors of the undertaking in a dominant position and, secondly, of making it more difficult or impossible for its co-contractors to choose between various sources of supply or commercial partners. [emphasis added]

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171 Case T-203/01 *Manufacture francaise des pneumatiques Michelin v Commission* [2003] ECR II-4071, [2004] 4 CMLR 923 at [239].

172 Case T-219/99 *British Airways plc v Commission* [2003] ECR II-5917, [2004] 4 CMLR 1008 at [293].

173 Case C-95/04 *British Airways plc v Commission* [2007] ECR I-2331 at [68].

71 In the subsequent case of *Tomra*, the General Court appeared at one point to confirm that capability was the controlling standard, by expressing only that particular limb of the formulation:[174]

> It may be concluded from that line of cases … [that] it is necessary to ascertain whether, following an assessment of all the circumstances and, thus, also of the context in which those agreements operate, those practices are intended[[175]] to restrict or foreclose competition on the relevant market or are capable of doing so.

72 Unfortunately, the court also later went on to repeat the alternative "tends to" formulation again, citing *Michelin II* and *British Airways*.[176]

73 The position in Singapore remains undecided. The problem of differing standards was not explicitly discussed in the *SISTIC* decision, although CCS indicated clearly that it was measuring its case against the higher "likely to" standard.[177] This makes strategic sense given the uncertainty in the EU and because *SISTIC* is Singapore's first "test case". If CCS had made its decision based on the lower threshold and Singapore courts subsequently held that a higher threshold was necessary, then its decision might have to be set aside. By contrast, if CCS showed that the case meets even the higher threshold, then the decision is more likely to survive appeal, at least as far as this issue is concerned. However, this should not be interpreted as CCS being bound, or having bound itself, to the "likely to" standard in all future cases. To be specific, CCS's position is that "it is *sufficient* to establish the likely effects of competition foreclosure" for the purpose of the s 47 prohibition[178] – not that it is necessary. The question whether the various formulations are to be treated as equivalent (and which should prevail if they not) remain open for judicial determination.

B. The relevance of intention

74 Should it make a difference to the outcome of the case if a dominant undertaking's conduct was intentionally carried out in order to bring about an anti-competitive object? In other words, can conduct be considered abusive solely on the basis that it was the dominant

174 Case T-155/06 *Tomra v Commission* (judgment of the General Court dated 9 September 2010) at [215].

175 The intent-based aspect of this formulation is discussed below. See paras 74–81 of this article.

176 Case T-155/06 *Tomra v Commission* (judgment of the General Court dated 9 September 2010) at [289].

177 Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [7.3.6].

178 Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [7.3.6].

undertaking's aim to restrict competition all along, and even if such an aim was not achieved? The answer is potentially relevant to the *SISTIC* case, because CCS found as a matter of fact that CCS's conduct was part of a deliberate plan to restrict competition in the market. In its decision, CCS concluded that SISTIC's exclusive contracts were part of a "strategic price structure that forecloses competition on one side, extracts monopoly rent from the other side, and perpetuates its dominance on both sides",[179] a "holistic strategy of concurrent foreclosure, recoupment and perpetuation of dominance"[180] and an "overall strategy in foreclosing competition".[181]

75 The idea that the anti-competitive intent of a dominant undertaking might be relevant in establishing that its conduct is abusive is suggested by EU case law. In *Michelin II*, for example, the Court of First Instance said:[182]

> [F]or the purposes of applying Article 82 EC, establishing the anti-competitive object and the anti-competitive effect are one and the same thing … If it is shown that the object pursued by the conduct of an undertaking in a dominant position is to limit competition, that conduct will also be liable to have such an effect …

76 The court went on to agree that it had been sufficiently demonstrated that the purpose of the discount systems applied by the dominant undertaking was to tie the dealers to it. It then held that those practices *tended* to restrict competition because they *sought* to make it more difficult for the applicant's competitors to enter the relevant market.[183]

77 This, however, raised an important question: did the court mean to say that establishing an anti-competitive object is in and of itself legally sufficient for a finding of abuse, given that it is "one and the same thing" as establishing an anti-competitive effect (as the first half of the quoted text above appears to suggest)? Or does it merely create a strong but rebuttable presumption, based on the common sense idea

179 Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [A5.3.4].

180 Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [7.11].

181 Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [7.9].

182 Case T-203/01 *Manufacture francaise des pneumatiques Michelin v Commission* [2003] ECR II-4071, [2004] 4 CMLR 923 at [241]. The Court of First Instance has elsewhere also expressed the view that when a dominant undertaking actually implements practices with the aim of restricting competition, the fact that the result sought is not achieved is not enough to avoid the application of Art 102 TFEU.

183 Case T-203/01 *Manufacture francaise des pneumatiques Michelin v Commission* [2003] ECR II-4071, [2004] 4 CMLR 923 at [244].

that a deliberate anti-competitive strategy is "liable" to produce an anti-competitive effect (as the second half of the quoted text appears to suggest)?

78 The intent-based rule was reaffirmed by the General Court in *Tomra*. What was even more significant, however, was what appeared to be a decoupling of the rule from its effects-centric justification. The court held that the fundamental question was whether the dominant undertaking's practices "are *intended* to restrict or foreclose competition on the relevant market *or* are capable of doing so"[184] [emphasis added]. This formulation suggests that the intent-based rule may have developed into an entirely separate alternative to establishing an abuse in EU jurisprudence, no longer depending on the fact that conduct carried out by a dominant undertaking designed to limit competition was "liable" to have such an effect,[185] but standing as an independent alternative to showing that the conduct was capable of restricting competition.

79 In the *SISTIC* case, this alternative was not discussed, and CCS expressed no view on the issue. This may have been because CCS was of the view that there was sufficient evidence to show that SISTIC's conduct was at least likely to result in anti-competitive effects, and even to show that it had "actually led to substantial and perennial foreclosure effects".[186] It is possible that CCS was of the view that there was therefore no need to rely on, or even mention, the (contentious) intent-based alternative to establishing an abuse. Whether such an alternative should be accepted, or will be accepted, by a Singapore court, remains open to debate. If, on appeal, it is decided that CCS had not sufficiently demonstrated the likely (or actual) anti-competitive effects of SISTIC's conduct, then intent-based jurisprudence may become important, as it appears to offer an alternative, non-effects based means of establishing an abuse of dominance.

80 If such an alternative is accepted in Singapore, its outer boundaries must be carefully demarcated. There is a danger that over time the scope and applicability of such an approach may grow beyond desirable limits. One important question is what exactly must be intended by the dominant undertaking. It would clearly suffice if the dominant undertaking intends to bring about certain effects which, if achieved, would be considered anti-competitive. Short of that, what else

184 Case T-155/06 *Tomra v Commission* (judgment of the General Court dated 9 September 2010) at [215].

185 Case T-203/01 *Manufacture francaise des pneumatiques Michelin v Commission* [2003] ECR II-4071, [2004] 4 CMLR 923 at [241].

186 Case CCS 600/008/07 *Abuse of a Dominant Position by SISTIC.com Pte Ltd* (4 June 2010) at [7.14.11].

would suffice? For example, would it suffice if the dominant undertaking intended in some general way to drive its competitors out of business? The object of driving a competitor, or even all of one's competitors, out of business is in the very nature of doing business and arguably cannot in and of itself be considered abusive. A court must be careful to distinguish between the legitimate commercial intent to reduce, or even eliminate, one's competition on the merits, from the abusive intent to reduce or eliminate one's competitors in an anti-competitive manner.

81 Another question is whether eventually other sorts of states of mind, short of intention, will suffice. For example, should it suffice that a dominant undertaking believes that certain conduct is likely to restrict competition in an anti-competitive manner, but does not intend that it does so? What if there is a mix of intentions which include anti-competitive objectives as well as legitimate commercial objectives? Would the existence of the anti-competitive objective alone be enough to establish an abuse of dominance, or must the anti-competitive object be the primary one? Or suppose that a dominant undertaking clearly intended to restrict competition abusively through a particular course of conduct, but due to miscalculation or some other error it was in fact impossible that such conduct could have achieved the result sought. Should impossibility be a defence? These questions have not come before EU courts for consideration. They might, however, come before a Singapore court soon.

82 While abuse of dominance law seeks to promote competition, efficiency, innovation and opportunity in the playing field, it is by no means a single-edged sword. Its requirements impose substantive limitations on what might otherwise be thought of as acceptable commercial conduct by dominant undertakings operating in a free market system and its impact extends to all undertakings generally, not only dominant ones, as it introduces new uncertainties and legal and compliance risks at the individual business level. The costs of managing these risks and these new obligations will, however, hopefully decrease over time as abuse of dominance law in Singapore develops and clarity emerges.