CCCS'S RESPONSE TO THE PUBLIC CONSULTATION ON THE BUSINESS COLLABORATION GUIDANCE NOTE

28 December 2021

Introduction

The Competition and Consumer Commission of Singapore ("CCCS") conducted a public consultation between 30 July 2021 and 27 August 2021 in relation to the proposed issuance of the Business Collaboration Guidance Note ("Guidance Note"). A total of 10 submissions were received from the business community, bar and business associations, law firms, and government agencies.

CCCS is grateful to all respondents for their feedback. Most were supportive of CCCS's initiative to issue the Guidance Note, with many offering suggestions on how the Guidance Note could be improved. CCCS has reviewed the feedback carefully and made the additions and amendments as appropriate to the Guidance Note. This document outlines the main changes made, as well as the reasons why some suggestions have or have not been adopted.

Proposed Business Collaboration Guidance Note

General clarifications: Some respondents queried the relationship between the Guidance Note and the existing *CCCS Guidelines on the Section 34 Prohibition 2016* ("Section 34 Guidelines") and whether the Guidance Note should form part of the said guidelines. In this regard, CCCS has clarified in paragraph 1.3 of the Guidance Note that the note is intended to supplement the Section 34 Guidelines and should be read in conjunction with it.

A respondent noted that certain categories of collaborations could benefit from a Block Exemption Order ("BEO") to provide greater certainty to businesses. The issuance of a BEO is outside the scope of the Guidance Note however CCCS has noted the suggestion.

One respondent requested that the Guidance Note provide for further clarity on the proportion of common variable costs between collaborating businesses that would raise competition concerns. Given the general applicability of the Guidance Note to different industries, it may not be practical/possible to indicate one single percentage that would be applicable to all scenarios. CCCS has however explained further in paragraph 4.12 that the concern arises when the common cost structure increases the incentive and ability of businesses to collude as their interests become more aligned. This concern may arise across a range of percentages of common costs, depending on the type of product or the market structure.

A number of respondents sought further guidance on situations where collaboration is recommended or required by regulators (but falls short of a legal requirement) or where a

government agency is involved in an industry initiative. In this regard, CCCS has added a section in the Guidance Note (paragraphs 2.11-2.14) to provide further guidance on the considerations for excluding agreements from the Competition Act under section 33(4)[1], and clarified the approaches businesses should take where businesses have doubts as to whether their collaborations fall within the section 33(4) exclusion or if any request by a Government or statutory body raises competition implications.

Application of Guidance Note to horizontal, vertical and lateral collaborations: With regard to the application of the Guidance Note to lateral collaborations, one respondent noted that the competition concerns that may arise from such collaborations typically assume that at least one party has significant market power and would, a priori, fall under the section 47 prohibition rather than under the section 34 prohibition. CCCS notes that agreements or collaborations that raise competition concerns under the section 47 prohibition are not precluded from being considered under section 34 of the Competition Act. That said, CCCS recognises that competition concerns generally tend to arise more from horizontal collaborations than lateral collaborations, hence the Guidance Note's usefulness for businesses.

In response to a query on how fast market entry should be for a business to be considered a potential competitor, CCCS has also clarified, in footnote 4 of the Guidance Note, that two years would be an indicative period within which CCCS would consider entry by a potential competitor as a "short period of time" and "fast enough", although this will be assessed on a case-by-case basis.

In relation to vertical collaborations, CCCS has added an example in footnote 7 setting out an illustration of when CCCS may find that a horizontal collaboration exists even if businesses are in a vertical relationship and/or appear to have a vertical agreement.

Object/effect: In response to one respondent's query on how CCCS assesses whether an agreement restricts competition by object, a new footnote 11 has been added to clarify. CCCS has also clarified in paragraph 2.9 of the Guidance Note that most of the collaborations set out and discussed in the Guidance Note would typically be assessed on the basis of their effects on competition, except where otherwise highlighted.

The same respondent also suggested that the considerations to assess Net Economic Benefits set out in paragraph 2.6 of the Guidance Note need not be conjunctive and that CCCS should take into consideration whether an agreement delivers benefits to end consumers directly or benefits the industry or community. CCCS however notes that paragraph 9 of the Third Schedule to the Competition Act sets out the necessary conditions for an agreement to be excluded from the section 34 prohibition on grounds of net economic benefit and the conditions set out are conjunctive/cumulative. CCCS also highlights that while direct benefits to end consumers, the industry, or community can be relevant

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[1] Section 33(4) of the Competition Act provides that nothing in Part III of the Competition Act shall apply to any activity carried on by, any agreement entered into or any conduct on the part of

a. The Government;

b. Any statutory body; or

c. Any person acting on behalf of the Government or that statutory body, as the case may be, in relation to that activity, agreement or conduct.

considerations, the conditions in paragraph 9 of the Third Schedule to the Competition Act do not limit the exclusion to such benefits.

CCCS respectfully disagrees with a respondent's suggestion that limb (b) of paragraph 2.6 should read "*the economic benefits cannot be substantially achieved without the agreement and any restrictions in it*" but instead have amended it to read "*these economic benefits cannot be achieved without the agreement and any restrictions in it*" to make clear that the economic benefits should arise from the agreement.

Information sharing: One respondent suggested that CCCS further clarify the distinction between information sharing that is permissible and information that may give rise to competition concerns. In particular, the respondent suggested refinements on the discussions within the Guidance Note on the level of aggregation and age of the data, as well as on the frequency of information exchange. In this regard, the example following paragraph 3.4 and paragraph 3.12 have been revised to take in the feedback and provide more clarity for businesses.

One respondent suggested that the Guidance Note incorporate a discussion on the market shares of the businesses for which information sharing will not generally have an appreciable adverse effect on competition. Whilst CCCS notes that the market share thresholds for an appreciable adverse effect on competition are applicable to all forms of agreement and not just information sharing, CCCS has inserted new paragraphs 3.11 to 3.12 to improve the usefulness of the Guidance Note for businesses.

A number of respondents suggested that specific guidance be provided on additional categories of data sharing arrangements that have not been included in the Guidance Note. CCCS notes that the general principles set out in the Guidance Note are equally applicable in these scenarios.[2] Regardless of the type of arrangement under which information is shared, businesses should be mindful of whether the information sharing impedes independent competitive decision-making.[3] Where the information shared allows businesses to reduce uncertainty from competition, such information sharing is likely to raise competition concerns.

Nonetheless, in response to specific queries by respondents, CCCS would like to highlight the following points to businesses. Where a third party (e.g. a consultant) facilitates an arrangement for businesses to share commercially sensitive information between them, such conduct could potentially raise competition concerns. Where a business is at the receiving end of a one-way disclosure of information, **regardless of whether it was a deliberate or inadvertent disclosure**, it should have regard to paragraphs 3.14 to 3.16 of the Guidance Note, including steps to publicly distance oneself.

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[2] One respondent suggested that additional guidance be provided on data pooling and data sharing agreements. In this regard, CCCS refers to its publication "*Data: Engine for Growth – Implications for Competition Law, Personal Data Protection and Intellectual Property Rights*", in which CCCS previously discussed how business practices relating to data analytics and data sharing may be assessed under the Competition Act. Businesses who wish to understand this in greater detail may refer to paragraphs 133 to 146 of the paper, which is available here.

[3] Information shared may include human resource information, including "pricing" information relating to salaries and terms of compensation and other non-price information, between employers. Similar considerations as set out in the section on information sharing in the Guidance Note would apply.

One respondent submitted that the case examples cited in paragraph 3.13 of the Guidance Note cause confusion as they relate to "*basic price-fixing agreements*". CCCS disagrees with this submission, and notes that the Singapore Medical Association's Guideline on Fees case example does not relate to price-fixing agreements. Instead, it serves as a useful reference for trade associations that wish to issue price recommendations.

Joint production: One respondent sought clarity on a purported inconsistency between the Section 34 Guidelines and the Guidance Note in relation to an agreement on the output of a joint production facility. Another respondent suggested that further clarity be provided on the circumstances in which joint production agreements are regarded as restricting competition by object. Paragraphs 4.7 to 4.9 have been amended to provide further clarity, including taking in a proposed suggestion by a respondent in relation to reciprocal subcontracting collaborations.

One respondent noted that paragraph 4.7 of the Guidance Note emphasises that joint production agreements must not be used to achieve certain forms of plainly anti-competitive effects although it refers only to four common types of agreements with particularly severe anti-competitive effects: market sharing, bid-rigging, price fixing, and output limitation, and recommends that the CCCS clarify that this is a non-exhaustive list. CCCS notes that the Guidance Note already sets out the general point that agreements can be anti-competitive either by object or effect and it is not necessary to further clarify this.

One respondent made suggestions to improve the clarity of the diagrams after paragraph 4.4. The same respondent also made suggestions to improve the illustration following paragraph 4.11. CCCS welcomes the suggestions and has adopted these to improve clarity.

One respondent suggested that further guidance be given in relation to joint production agreements in the "*knowledge economy*" or the "*production of services*". Whilst the examples provided thus far have been in relation to the production of physical goods, CCCS notes that the general principles are equally applicable to other contexts. However, to make this clear, paragraphs 4.1 and 4.14 have been revised. A footnote has also been added to the diagrams following paragraph 4.4 to explain that the examples can similarly apply to services.

Joint commercialisation: One respondent had suggested including in paragraph 5.2 an example of pro-competitive commercialisation agreements involving small competitors without market power as being unlikely to raise competition concerns. CCCS has further amended paragraph 5.2 to include the example, with some caveats.

Another respondent had also indicated that paragraph 5.2 of the Guidance Note may be misunderstood as saying that the only joint commercialisation agreements allowed are those where businesses involved would not have been able to attain the goals individually. Joint commercialization agreements that can be allowed are not limited to such a situation and CCCS has amended the paragraph to avoid giving such an impression.

One respondent suggested that the characterisation of joint-selling agreements in paragraph 5.8 of the Guidance Note as being anti-competitive by object was unwarranted. CCCS notes that this characterisation refers to joint selling agreements between competitors that contain restrictions relating to important competitive factors such as prices and

quantities to sell to customers. However, CCCS also recognises that joint-selling agreements may not always be anti-competitive by object, such as where the businesses would not be able to sell in a market without joint sales (i.e., they are not actual or potential competitors in that particular product or geographic market). In this vein, CCCS has amended paragraph 5.5 of the Guidance Note to clarify that the determination of whether an agreement is anti-competitive will depend on various factors, such as how restrictive its terms are. In general, agreements with less restrictive terms are less likely to result in competition concerns. One respondent also highlighted a purported inconsistency between CCCS's position on joint selling in the Guidance Note and the Section 34 Guidelines. In this regard, CCCS highlights that the Guidance Note is meant to supplement and provide more details to the Section 34 Guidelines. For greater clarity, CCCS has amended paragraph 5.8 of the Guidance Note to clarify the position on joint selling agreements and will look to making further clarificatory amendments to the Section 34 Guidelines in future reviews.

Joint-bidding, or the submission of joint bids as a consortium in a tender was raised by one respondent as an example of a commercialisation agreement that would benefit from CCCS's guidance and ought to be included in the Guidance Note. CCCS agrees and has included a paragraph on joint-bidding agreements in the Guidance Note (paragraph 5.9).

Joint purchasing: One respondent suggested for the indicative market share threshold of parties in a joint purchasing agreement to be adjusted to fall just under the threshold for substantial market power. CCCS notes that paragraph 3.15 of the Section 34 Guidelines when read together with paragraph 2.25 of the same guidelines set out the indicative market shares "threshold" for horizontal agreements to have an appreciable adverse effect on competition, and this same threshold is applicable for joint purchasing agreements. CCCS would also highlight that the market shares threshold is indicative and the mere fact the threshold has been crossed does not necessarily mean that the joint purchasing collaboration will be considered anti-competitive. As such, CCCS will retain the market share threshold for joint purchasing agreements.

Clarification has been sought from a respondent on the permissibility of collaborators to jointly decide on the price to purchase inputs. In this regard, CCCS has added clarifications in paragraph 6.3 of the Guidance Note to set out that the joint determination of purchase prices by buyers in the context of a joint purchasing collaboration that does not amount to a buyers' cartel would not be considered as a restriction by object. Instead, this would be taken into consideration as part of the overall assessment of the effects of the joint purchasing collaboration.

Another respondent sought more guidance on how joint purchasers can address concerns relating to the foreclosure of competitors from suppliers in the purchasing market to which CCCS has added an example in paragraph 6.12 for greater clarity.

Joint research & development: In response to a respondent's suggestion to clarify what "multiple viable alternative R&D projects" refer to, an elaboration has been added to the relevant section's summary explaining that these are ongoing alternative R&D projects undertaken by competing innovators that can produce close substitutes to the collaborators' product or technology from their R&D collaboration agreement.

One respondent suggested for CCCS to specifically recognise the positive impact R&D outcomes can achieve such that competition concerns are less likely to arise, for example where there is free and unrestricted access to technology that results in greater economic efficiency. In this regard, CCCS notes that paragraphs 7.3 to 7.5 of the Guidance Note recognise the positive outcomes an R&D collaboration might bring about and has set out in paragraphs 7.8 to 7.12 the assessment factors, including the outcomes of R&D collaborations, that would be unlikely to raise competition concerns. However, CCCS notes that if the collaboration to create new technology (even if access is unrestricted) is entered into between competing firms with market power, especially when there is no competing R&D, there may be competition concerns. Having said that, even if an agreement is considered to restrict competition, the agreement may still qualify for the Net Economic Benefit exclusion as set out in paragraph 9 of the Third Schedule to the Competition Act.

Another respondent suggested a more lenient assessment of R&D collaborations as there may be better long-term benefits for consumers. CCCS is cognisant of the suggestion and notes that paragraph 7.11 of the Guidance Note states that even if the market shares of the parties exceed the threshold levels set out, it does not necessarily mean that the parties have market power or that the agreement would have appreciable adverse effects on competition as a more detailed assessment may be required. CCCS further notes that the summary conditions in the Guidance Note also list out the conditions under which competition concerns are unlikely, for example in the case of new products or technologies, competition concerns are unlikely if there are multiple on-going viable alternative R&D projects undertaken by competing innovators.

Standardisation and standard terms and conditions: One respondent provided feedback that the section on standardisation and standard terms and conditions may be confusing for readers, who may not be able to differentiate between these. CCCS clarifies that standardisation agreements refer to the setting of technical or quality standards in industries, typically via standard-setting organisations but which can also be undertaken by individual businesses and trade associations. Standard terms and conditions, on the other hand, refer to standard conditions of sale found in contracts between businesses or between businesses and consumers. For clarity, CCCS has split up the section into two separate and discrete sections.

Multiple respondents have provided feedback relating to Standard Essential Patents (SEPs), Intellectual Property Rights (IPRs), and Fair, Reasonable and Non-Discriminatory (FRAND) terms when discussing standardisation agreements. CCCS thanks all respondents for the feedback and notes that respondents should refer to the *CCCS Guidelines on the Treatment of IP Rights* ("IP Guidelines"). CCCS will consider such feedback in the review of the IP Guidelines. CCCS has also included a footnote to reference the IP Guidelines for readers' reference in paragraph 8.5 of the Guidance Note.

Two respondents provided feedback that it is insufficient to solely rely on the term "access" to standards as owners of the standard may still be able to effectively deny access by refusing to license the standards to interested stakeholders. CCCS thanks the respondents for sharing their industry experience and the Guidance Note has accordingly been clarified to note that licensing and licensing terms are also important factors in considering whether "access" has been granted to the standards.

One respondent had suggested for CCCS to provide more guidance and examples on what constitutes "unrestricted" when discussing whether a standard was set with unrestricted rights for relevant stakeholders to participate or provide feedback. CCCS clarifies that all stakeholders that are likely to be affected by the eventual, established standards should be able to participate or provide feedback during the standard-setting process. CCCS has included an example of how Enterprise Singapore, as the national standard-setting body, ensures this by announcing the initiation of any standards project for transparency purposes and holding a public consultation before any Singapore standard is published or established.

<u>Additional information for trade associations</u>: A number of respondents suggested that CCCS provide clearer guidance on the steps that trade associations can take to avoid breaching section 34 of the Competition Act. CCCS notes that paragraphs 10.1 to 10.4 (previously numbered paragraphs 9.1 to 9.4) of the Guidance Note set out the relevant information. To improve the usefulness of the Guidance Note, CCCS has also made amendments to paragraphs 3.16 and 10.4 to set out additional steps that trade associations and its members can take to avoid infringing section 34 of the Competition Act.