# CCCS GUIDELINES ON THE TREATMENT OF INTELLECTUAL PROPERTY RIGHTS IN COMPETITION CASES 2016



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# 1 INTRODUCTION

1.1 These guidelines explain how the Competition and Consumer Commission of Singapore ("CCCS") expects the Competition Act (Chapter 50B) ("the Act") to operate in relation to agreements and conduct which concern intellectual property rights ("IPRs"). They set out how the CCCS views the interface between IPRs and competition law, and indicates some of the factors and circumstances that the CCCS may consider when assessing agreements and conduct which concern IPRs.

1.2 For the purposes of these guidelines, the term "intellectual property rights" refers to the rights granted under the Patents Act, Copyright Act, Plant Varieties Protection Act, Layout-designs of Integrated Circuits Act, Registered Designs Act and trade secrets.

1.3 The Act prohibits:

- agreements between undertakings, decisions by associations of undertakings or concerted practices which have as their object or effect the prevention, restriction or distortion of competition within Singapore unless they fall within an exclusion in the Third Schedule to the Act ("the Third Schedule") or meet all of the requirements specified in a block exemption order ("the section 34 prohibition");
- any conduct on the part of one or more undertakings, which is an abuse of a dominant position in any market in Singapore ("the section 47 prohibition") unless they fall within an exclusion in the Third Schedule.

The section 34 and 47 prohibitions came into force on 1 January 2006.

1.4 Details of how the CCCS expects to apply these prohibitions in general are contained in the *CCCS Guidelines on the Section 34 Prohibition 2016* and the *CCCS Guidelines on the Section 47 Prohibition 2016*.

1.5 The CCCS will set its strategic priorities and consider each case on its merits to see if it warrants an investigation.

1.6 These guidelines are not a substitute for the Act, the regulations and orders. They may be revised should the need arise. The examples in these guidelines are for illustration. They are not exhaustive, and do not set a limit on the investigation and enforcement activities of the CCCS. In applying these guidelines, the facts and circumstances of each case will be considered. Persons in doubt about how they and their commercial activities may be affected by the Act may wish to seek legal advice.

1.7 A glossary of terms used in these guidelines is attached.

# 2 THE INTERFACE BETWEEN IPRs & COMPETITION LAW

2.1 Both intellectual property ("IP") and competition laws share the same basic objective of promoting economic efficiency and innovation. IP law does this through the provision of incentives for innovation and its dissemination and commercialisation, by establishing enforceable property rights for the creators of new and improved products and processes. Competition law does this by helping to promote competitive markets, thereby spurring firms to be more efficient and innovative.

2.2 IP has certain characteristics that may make it difficult for IP owners to restrict access to, and therefore, exercise their rights over it. For example, IP is costly to develop, but often easy and inexpensive to copy, thus making it difficult to prevent others from free-riding on the discovery in the absence of IP law. The use of IP is also typically non-rivalrous, meaning that one person's use does not reduce its use by another person. While these characteristics will be taken into account in competition analysis, they do not warrant the application of fundamentally different analytical principles to IPRs.

2.3 For competition law purposes, the CCCS will regard IPRs as being essentially comparable to any other form of property. The right to exclude is the basis of private property rights. An IPR bestows on the IP owner certain rights to exclude others, and the CCCS recognises that these rights are necessary in order to allow IP owners to recover the costs of their investments and profit from the use of their property. However, as with other forms of private property, certain types of agreements or conduct with respect to IP may have anti-competitive effects which come under the purview of competition law.

2.4 Although there are clear and important differences in the purpose, extent and duration of protection provided under the IP regimes mentioned in paragraph 1.2, the general analytical principles to be applied are the same. These guidelines address mainly issues relating to technology transfer and innovation. In evaluating the specific circumstances of each case, the differences between the various forms of IPRs will be taken into account.

2.5 The possession of an IPR does not necessarily create market power in itself. While an IPR may confer a 'legal' monopoly over a product, process or work, it does not necessarily confer an 'economic' monopoly. While the IPR may confer the right to exclude with respect to the specific product, process or work in question, there may be sufficient actual or potential close substitutes that constrain the exercise of market power by the IP owner.

## Relevant Markets

2.6 These guidelines address some aspects of market definition which may be relevant where licensing arrangements are concerned. These guidelines should be read together with the *CCCS Guidelines on Market Definition*.

2.7 Licensing arrangements can raise competition concerns if they are likely to adversely affect the price, quantity, quality or variety of products currently or potentially available. The CCCS will normally analyse the competitive effects of licensing arrangements within the relevant markets for the products affected by such arrangements ("product markets"). In some cases however, the analysis may require the further assessment of competitive effects on the markets for technology ("technology markets") or markets for research and development ("innovation markets").

## Product Markets

2.8 An IP can be integrated either into a product or production process. A number of different product markets may be relevant in evaluating the effects of a licensing arrangement. A licensing restraint may have competitive effects in markets for final or intermediate products made using the IP, or it may have effects upstream, in markets for products that are used as inputs, along with the IP, for the production of other products.

## Technology Markets

2.9 A technology market consists of the IP that is licensed ("licensed technology") and its close substitutes, that is, the technologies to which licensees could switch in response to an increase in the IP licence fee or royalty.

## Innovation Markets

2.10 An innovation market consists of the research and development ("R&D") directed at particular new or improved goods or processes, and the close substitutes for that R&D that significantly constrain the exercise of market power with respect to the relevant R&D. The CCCS may consider the effects of licensing arrangements on innovation markets, where the licensing arrangements reduce the innovation efforts of the undertakings in question, or restrict or prevent the innovation efforts of others.

## Pro-competitive Benefits of Licensing

2.11 In the vast majority of cases, licensing is pro-competitive. IP is typically one of a few components in a production process and derives value from its combination with complementary factors such as manufacturing and distribution facilities. Licensing can facilitate the integration of the IP with other complementary factors of production, thus leading to more efficient exploitation of the IP.

2.12 Licensing also promotes the dissemination of technologies; this in turn leads to a reduction of the production costs of the licensee or the introduction of new or improved products. Licensing may also promote innovation by helping IP owners reap the full commercial potential of their inventions.

2.13 Efficiencies may result from agreements where IP owners assemble a technology package for licensing to contributors of the pool and to third parties; such pooling arrangements may reduce transaction costs. In sectors where large numbers of IPRs exist and where products require a combination of IPRs, such licensing agreements may often be pro-competitive.

# 3 IPRs & THE SECTION 34 PROHIBITION

3.1 An agreement will fall within the scope of the section 34 prohibition if it has as its object or effect the appreciable prevention, restriction or distortion of competition within Singapore. An agreement will not be prohibited if it falls within an exclusion in the Third Schedule or meets all of the requirements specified in a block exemption order. This section sets out the general framework that the CCCS will apply when assessing licensing agreements within the context of the section 34 prohibition. These guidelines should be read together with the *CCCS Guidelines on the Section 34 Prohibition 2016* and the *CCCS Guidelines on Market Definition*.

## General Framework for Assessing Licensing Agreements

3.2 **Step 1:** The CCCS will first distinguish if the agreement is made between competing or non-competing undertakings. In general, agreements between non-competitors pose significantly smaller risks to competition than agreements between competitors. would have been actual or potential competitors in the absence of the agreement. The CCCS will review the competitive relationship between the undertakings at the time the agreement is made.

**Step 2:** The CCCS will then consider if the agreement and the licensing restraints restrict actual or potential competition that would have existed in their absence. The CCCS will consider the impact on both inter-technology competition (i.e. competition between undertakings using different technologies) and intra-technology competition (i.e. competition between undertakings using the same technology).

**Step 3:** The CCCS will consider if an agreement that falls within the scope of the section 34 prohibition may, on balance, have a net economic benefit.[1] An agreement may have a net economic benefit, where it contributes to improving production or distribution or promoting technical or economic progress and it does not impose on the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services in question. Such an agreement will be excluded by virtue of section 35 of the Act, no prior decision by the CCCS to that effect being required.

## Licensing Agreements between Competitors

3.3 Licensing agreements between competitors are agreements made between parties that, in the absence of the agreement, would have been actual or potential competitors on a relevant market.

3.4 Restraints in licensing agreements between competitors may harm competition if they facilitate, or amount to price-fixing, market-sharing or output limitation. Such restraints may also harm competition if they adversely affect the licensee's ability or incentive to carry out independent R&D. This may occur, for example, where undertakings transfer competing technologies to each other and impose a reciprocal obligation to provide each other exclusively with future improvements of their respective technologies.

## Licensing Agreements between Non-Competitors

3.5 Licensing agreements between non-competitors are agreements made between parties that, in the absence of the agreement, would not have been actual or potential competitors on a relevant market. The relationship between the undertakings will be defined as the status that existed at the time the agreement was made. The CCCS will not consider that the status of this relationship has changed as a result of the competition that may develop following the licensing agreement, unless the agreement is subsequently amended materially.

3.6 Licensing agreements made between undertakings on the same level, e.g. two manufacturers, are considered agreements made between non-competitors so long as they are not actual or potential competitors in a relevant market.

[1] Annex C of the *CCCS Guidelines on the Section 34 Prohibition 2016* sets out how the CCCS will determine if an agreement meets the criteria for the exclusion of individual agreements under the Third Schedule.

3.7 Most licensing agreements between non-competitors are made between parties in a complementary relationship, and generally do not pose competition concerns. In general, such agreements are more likely to have an adverse impact on competition in the relevant product market where at least one party to the agreement enjoys high market power. Adverse impact on competition may arise, for example, if the licensing agreement forecloses access to, or increases competitors' costs of obtaining important inputs.

3.8 Agreements between non-competitors may contain certain licensing restraints that could adversely impact competition in the technology market. Foreclosure effects may stem from licensing restraints that prevent licensees from licensing competing technologies or create disincentives for them to do so, where the licensor enjoys a high degree of market power. Sellers of substitutable technologies may be foreclosed where licensors with a sufficient degree of market power pool together various parts of a technology and license them together as a package when only part of the package is essential to produce a certain product.

3.9 Agreements between non-competitors may also have an adverse impact on competition between competing licensees if they facilitate coordination to increase prices or to reduce output in a relevant market. For example, if owners of competing technologies impose similar restraints on their licensees, the licensors may find it easier to coordinate their prices. Similarly, licensees that are competitors may find it easier to coordinate their pricing if they are subject to common restraints in licences with a common licensor or competing licensors. The risk of anti-competitive coordination is increased when the relevant markets are concentrated and difficult to enter. The use of similar restraints may, however, be common and pro-competitive in an industry, because they contribute to efficient exploitation of the IP. The facts and circumstances of each case will need to be considered.

## The Exclusion of Vertical Agreements under Paragraph 8 of the Third Schedule

3.10 The section 34 prohibition does not apply to vertical agreements, other than such vertical agreements as the Minister for Trade and Industry may by order specify. This exclusion is provided for under paragraph 8 of the Third Schedule. Vertical agreements are agreements entered into between 2 or more undertakings each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain products. This includes IPR provisions contained in such agreements, provided that they do not constitute the primary object of such agreements, and are directly related to the use, sale or resale of products.

3.11 The exclusion covers agreements which concern the purchase or redistribution of products, such as a franchise agreement where the franchisor sells to the franchisee products for resale. This includes IPR provisions contained in the franchise agreement, such as the trademark and know-how which the franchisor licenses the franchisee in order to market the products.

3.12 Agreements with IPR provisions, which do not fall under the exclusion under paragraph 8 of the Third Schedule, such as agreements which have as their primary object the assignment or the licensing of IPRs for the manufacture of products, will be assessed in accordance with the framework set out in paragraph 3.2.

## The Appreciable Adverse Effect on Competition Test

3.13 In assessing the potential effect on competition, it is necessary to consider the degree of market power enjoyed by the parties to the agreement. The likelihood that the pro-competitive effects will outweigh any anti-competitive effects due to restrictions contained in the licensing agreement depends, to a large extent, on the degree of market power of the undertakings concerned. In general, there is less potential for harm to competition where there is a lower concentration of market power in the relevant markets, and where a lower proportion of licensees in those markets are subject to similar restraints.

3.14 A licensing agreement will generally have no appreciable adverse effect on competition:

- if the aggregate market share of the parties to the agreement does not exceed 25% on any of the relevant markets affected by the agreement, where the agreement is made between competitors;
- if the market share of each of the parties to the agreement does not exceed 35% on any of the relevant markets affected by the agreement, where the agreement is made between non-competitors.

Where it may be difficult to classify an agreement as an agreement between competitors or an agreement between non-competitors, the 25% threshold will be applicable.

3.15 As with other types of agreements, a licensing agreement between competitors which involves price-fixing, market-sharing or output limitations will always have an appreciable adverse effect on competition, notwithstanding that the market shares of the parties are below the threshold levels mentioned in paragraph 3.14.

3.16 The fact that the market shares of the parties to a licensing agreement exceed the threshold levels mentioned in paragraph 3.14 does not necessarily mean that the effect of that agreement on competition is appreciable.

3.17 Whether a licensing agreement falls within the threshold levels set out in paragraph 3.14 will be determined by reference to the product market only, unless the analysis of the product market alone would inadequately address the effects of the licensing agreement on competition among technologies or in R&D.

3.18 If an examination of the effects on technology markets is required, it is generally the case that in the absence of restrictions involving price-fixing, market-sharing or output limitations, there is unlikely to be an appreciable adverse effect on competition where there are four or more independently controlled technologies in addition to the technologies controlled by the parties to the agreement, that may be substitutable at comparable cost, for the licensed technology in question.

3.19 If an examination of the effects on innovation markets is required, it is generally the case that in the absence of restrictions involving price-fixing, market-sharing or output limitations, there is unlikely to be an appreciable adverse effect on competition where there are four or more independently controlled entities in addition to the parties to the agreement, that possess the required specialised assets or characteristics and the incentive to engage in R&D that is a close substitute of the R&D activities of the parties to the agreement.

3.20 Where an examination of the effects on innovation markets is required, the CCCS may have regard, in particular, to the specific licensing restraints set out in paragraphs 3.22 and 3.23.

## Considerations in the Application of the Section 34 Prohibition to Various Types of Licensing Restraints or Arrangements

3.21 This section sets out some of the considerations in the application of the section 34 prohibition to particular licensing restraints or licensing arrangements. The facts and circumstances of each case will need to be considered in assessing whether such agreements fall within the scope of the section 34 prohibition.

## Autonomy of Licensees to Engage in Independent R&D

3.22 Licensing agreements which, directly or indirectly, restrict the ability or incentive of any of the parties, to carry out independent R&D, may have anti-competitive effects. This is because such agreements can reduce potential competition on the technology and innovation markets, which would have existed in the absence of the agreement.

## Grantbacks

3.23 A grantback is an arrangement under which a licensee assigns to the licensor, or agrees to extend to the licensor, the rights over the licensee's improvements to the licensed technology. Grantback provisions can increase a licensor's incentives to license, and promote the dissemination of licensees' improvements to the licensed technology. There are often pro-competitive reasons for including grantback provisions, and these generally do not pose competition concerns, especially where they are non-exclusive in nature. They may, however, have an adverse impact on competition, where they substantially reduce the incentives of the licensee to engage in R&D and thereby reduce innovation.

### Territorial and Field-of-Use Restrictions

3.24 While licensing restraints such as territorial or field-of-use limitations, appear restrictive of competition, they may in fact serve pro-competitive ends by promoting licensing, and thus the dissemination and more efficient exploitation of the technology. For example, by protecting the IP owner from competition (in its own technology) in its core areas, they may increase the IP owner's incentive to license its IP to parties for exploitation in other areas. Licensing agreements containing such restraints do not normally fall within the scope of the section 34 prohibition because such restraints may not be viewed as restrictions of competition as such, but simply a sub-division of the licensor's original right granted by IP law. These licensing restraints are generally no more restrictive of competition than if the original IP owner had exercised the rights itself.

### Licensing Agreements Involving Exclusivity

3.25 The grant of an exclusive licence, for example, where a licensor is obliged not to license another licensee in the same territory, may be necessary to give the licensee an incentive to invest in the licensed technology or to further develop the technology. Licensing restraints such as non-compete clauses[2], may also promote licensing by reducing the risk of misappropriation of the licensed technology, and may also help ensure that the licensees have an incentive to invest in and exploit the licensed technology. Non-compete clauses generally do not pose competition concerns, unless they provide a basis for market-sharing in licensing agreements between competitors; or there are (likely) foreclosure effects as a result of high market power on the part of the licensor.

### Technology Pools

3.26 Technology pools are arrangements whereby two or more parties assemble a package of technology which is licensed not only to contributors to the pool but also to third parties. These may have pro-competitive benefits, in clearing blocking patents, integrating complementary technologies and reducing transaction costs. Where a pool is composed only of technologies that are essential and complementary, it is generally pro-competitive regardless of the market position of the parties involved. However, technology pools may have anti-competitive effects in certain circumstances. For example, where pools are composed solely or predominantly of substitute technologies, this leads to little efficiency gains and may amount to price-fixing. In addition to reducing competition between parties, there is also the risk of foreclosing alternative technologies that are outside the pool.

## 4 IPRs & THE SECTION 47 PROHIBITION

4.1 The section 47 prohibition prohibits any conduct on the part of one or more undertakings, which is an abuse of a dominant position in any market in Singapore. This section sets out some of the considerations that the CCCS will have with regard to assessing conduct involving IPRs, within the context of the section 47 prohibition. These guidelines should be read together with the *CCCS Guidelines on the Section 47 Prohibition 2016* and the *CCCS Guidelines on Market Definition*.

4.2 Ownership of an IPR will not necessarily create a dominant position. Whether or not an IP owner enjoys dominance in the relevant market will depend on the extent to which there are substitutes for the technology, product, process or work to which the IPR relates.

4.3 Although the existence of an IPR may impede entry into the market in the short term, any other undertaking may in the long term be able to enter the market with its own innovation. In markets where undertakings regularly improve the quality of their products, a persistently high market share may indicate no more than persistently successful innovation. The CCCS will make its assessment of dominance, based on the particular facts of each case.

[2] Non-compete clauses oblige the licensee not to deal with competing technologies.

4.4 The exercise of an IPR by a dominant undertaking will not usually be an abuse when limited to the market for the specific product which incorporates it. However, competition concerns may arise where the dominant undertaking attempts to extend its market power into a neighbouring or related market, beyond the scope granted by IP law. In defining markets, care will have to be taken in choosing the initial focal product and in identifying if secondary products formed a separate but related market, or part of the same market as the primary product.[3]

4.5 Conduct that constitutes an abuse of a dominant position in a market includes conduct that protects, enhances or perpetuates the dominant position of an undertaking in ways unrelated to competitive merit. Conduct may be abusive to the extent that it harms competition, for example, by removing an efficient competitor, limiting competition from existing competitors, or excluding new competitors from entering the market. The likely effect of each particular kind of behaviour will be assessed on the particular facts of each case. The paragraphs below set out some considerations that the CCCS may have, with regard to assessing certain types of conduct involving IPRs, when carried out by dominant undertakings.

## Refusals to Supply a Licence

4.6 The basis of property rights is the right to exclude. Ownership of an IPR does not normally impose on the IP owner an obligation to license the use of that IP to others, even where the IPR confers market power on the IP owner. Therefore, a refusal to supply a licence, even by a dominant undertaking, is not normally an abuse. However, in limited circumstances, a dominant undertaking's refusal to supply a licence may constitute an infringement under the section 47 prohibition. For example, this may occur if the refusal concerns an IPR which relates to an essential facility, with the effect of (likely) substantial harm to competition. The CCCS may consider if the dominant undertaking is able to objectively justify its conduct, and whether the dominant undertaking has behaved in a proportionate way in defending its legitimate commercial interest.

4.7 A facility will be viewed as essential only if there are no potential substitutes (through duplication or otherwise), and if the facility is indispensable to the exercise of the activity in question. Essential facilities are rare in practice; IPRs by themselves are generally unlikely to create essential facilities.

4.8 In determining whether a refusal to supply a licence constitutes an abuse under the section 47 prohibition, the impact on the technology and innovation markets will be considered. Care must be taken not to undermine the incentives for undertakings to make future investments and innovations.

## Tying

4.9 An undertaking may be found to be abusing its dominant position where it attempts to leverage on its substantial market power in one market, to harm competition in another market, through practices such as tying. For example, an undertaking who is dominant in the market might impose a condition that he will grant a licence to his IPR only if the potential licensee agrees to buy an additional product or set of products, which is not covered by the IPR. However, the conduct of the dominant undertaking may be an objectively justified and proportionate response, if it can show that such provisions are necessary for a satisfactory exploitation of the IPR, such as for ensuring that the licensee conforms to quality standards or for technical interoperability.

4.10 On the relation between tying and patents, please have regard to section 51 of the Patents Act.

## Acquisition of an IPR

4.11 The acquisition of exclusive rights to a competing technology by a dominant undertaking may be found to be an abuse, where the (likely) effect of the conduct is to harm competition.

[3] Please refer to Part 6 of the *CCCS Guidelines on Market Definition* for more details on market definition for after markets.

# 5 GLOSSARY

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| **Agreement** | Includes decisions by associations of undertakings and concerted practices unless otherwise stated, or as the context so demands. |
| **Buyer** | Refers to the end-user consumer, and/or an undertaking that buys products as inputs for production or for resale, as the context demands. |
| **Intellectual Property Rights (IPRs)** | Refers to the rights granted under the patents Act, Copyright Act, Plant Varieties Protection Act, Layout-designs of Integrated Circuits Act, Registered Designs Act and trade secrets. |
| **Product** | Refers to goods and/or services. |
| **Seller** | Refers to the primary producer, an undertaking that sells products as inputs for further production, and/or an undertaking that sells goods and services as a final product, as the context demands. |
| **Undertaking** | Refers to any person, being an individual, a body corporate, an unincorporated body of persons or any other entity, capable of carrying on commercial or economic activities relating to goods or services, as the context demands. Includes individuals operating as sole proprietorships, companies, partnerships, co-operatives, business chambers, trade associations and non profit-making organisations. |