CCCS'S RESPONSE TO THE PUBLIC CONSULTATION ON PROPOSED AMENDMENTS TO THE CCCS GUIDELINES

31 December 2021

Introduction

1. Between 10 September 2020 and 8 October 2020, the Competition and Consumer Commission of Singapore ("CCCS") conducted a public consultation for proposed changes to six of its Guidelines on the Competition Act (Cap. 50B) (the "First Public Consultation"). Feedback was sought on proposed amendments to the following guidelines: *CCCS Guidelines on Market Definition*, *CCCS Guidelines on the Section 47 Prohibition*, *CCCS Guidelines on the Substantive Assessment of Mergers*, *CCCS Guidelines on Merger Procedures*, *CCCS Guidelines on Enforcement*, and *CCCS Guidelines on the Treatment of Intellectual Property Rights*. A total of 12 submissions were received.

2. Between 16 July 2021 and 5 August 2021, CCCS conducted another public consultation on the proposed changes to the *CCCS Guidelines on the Appropriate Amount of Penalty in Competition Cases* (the "Second Public Consultation"). For this round of public consultation, CCCS received 2 submissions.

3. We are grateful to all contributors for their feedback. Contributions were received from law firms, bar associations, the business community and academia. Most were supportive of the proposed amendments to the Guidelines, with many offering suggestions on how the Guidelines could be improved. CCCS has reviewed the feedback carefully and made appropriate changes to the relevant Guidelines. Following these changes and for consistency, consequential amendments have also been made to the *CCCS Guidelines on the Section 34 Prohibition* and the *CCCS Guidelines on the Major Competition Provisions* to reflect the same changes made to the other Guidelines. This document outlines the feedback received and how CCCS has incorporated this feedback into its amendments to the respective Guidelines. It also sets out reasons why some suggestions were not adopted.

Guidelines on Market Definition ("Market Definition Guidelines")

4. Purpose of market definition: One respondent highlighted that proposed amendments to paragraphs 1.6 and 2.10 of the Market Definition Guidelines may be misinterpreted to mean that CCCS may adopt an overly narrow market definition in order to support a theory of harm. CCCS clarifies that the proposed amendments are intended to reflect CCCS's existing practice towards market definition as part

of its competition assessment. Consistent with the approach taken by many overseas competition authorities, market definition is not performed in a silo and is not an end in itself. Instead, market definition is a useful tool to provide a framework for the competition analysis. Nonetheless, to avoid any misinterpretation, further amendments have been made to paragraphs 1.6 and 2.10 (now 5.14) of the Market Definition Guidelines to clarify the purpose of market definition.

5. Market definition for multi-sided platforms: Having taken into account feedback from respondents, CCCS has resituated paragraphs 2.10 to 2.15 of the Market Definition Guidelines on defining multi-sided markets to paragraphs 5.14 to 5.19, in order to better contextualise the proposed amendments. CCCS clarifies this newly inserted section serves to supplement, and not replace, traditional frameworks for market definition, which may not be as informative in cases involving digital platforms. To better explain this clarification, paragraph 5.14 has been amended to note the practical complexities when performing market definition in cases involving multi-sided platforms.

6. CCCS has also highlighted within paragraph 5.14 that the relevant market defined may vary on a case-by-case basis depending on the market circumstances and the extent of substitution by both buyers and sellers and has inserted a footnote to reference past cases for guidance. These demand- and supply-side factors are not unique to multi-sided markets, and are already elaborated upon in paragraphs 3.2 to 3.22 (in relation to product markets) and in paragraphs 4.3 to 4.11 (in relation to geographic markets) of the Market Definition Guidelines.

7. One respondent sought further guidance on how the proposed "*small but significant, non-transitory decrease in quality*" test will be applied. CCCS clarifies that this proposed amendment is intended to clarify that CCCS may supplement the traditional market definition framework by considering non-monetary factors taken into account by users. It should be highlighted that the objective of giving consideration to non-monetary factors is identical to that underlying the traditional framework, namely to identify the products that users regard as reasonable substitutes for the product under investigation. Nonetheless, CCCS notes that the language "*small but significant, non-transitory decrease in quality*" may not assist businesses in understanding how market definition may be performed in cases involving zero-price markets. As such, paragraph 5.19 has been amended to provide a non-exhaustive list of non-monetary factors which may be taken into consideration by CCCS. Depending on the facts of the case, evidence such as internal documents, user surveys or feedback, and natural experiments, may be used by CCCS when assessing non-monetary factors.

8. One respondent provided feedback that the proposed amendments fail to recognize that the beneficial price reduction on one side of the platform must be taken into account to assess whether a "*supra competitive*" pricing strategy exists. CCCS highlights paragraph 5.14 already sets out that the interdependencies, or lack thereof, between different sides of a multi-sided platform should be considered in a market definition exercise. CCCS clarifies that the discussion of a "supra competitive strategy" in paragraph 5.17 is to reflect the idea that the market definition exercise should consider whether the platform is able to sustain prices

above competitive levels, taking into account the change in prices on its various sides, rather than simply whether the platform is able to sustain prices above competitive levels on one side of the platform.

9. Product ecosystem: Respondents expressed reservations about CCCS's proposed amendment to paragraph 5.12, in relation to the newly inserted "product ecosystem" concept. CCCS clarifies that the proposed amendment to paragraph 5.12 is not intended to replace the traditional framework of analysis used to define markets. Instead, it serves to supplement the analysis in cases where the traditional framework applied may not adequately deal with the issue of whether products which may not be in adjacent markets or considered complementary should be included in a relevant market. CCCS also notes that it is not unprecedented for a focal product to be defined as a package or bundle of products. Indeed, at paragraph 5.11, CCCS has expressly stated that distinct products may be included in the relevant market. To make its intent clearer, CCCS has proposed further amendments to paragraphs 5.11 and 5.12.

10. CCCS also clarifies that it may be possible for a seller of only one component of a bundle of distinct products to pose a competitive constraint on a seller offering a bundle of distinct products. The exact analysis would depend on the evidence, and would differ on a case-by-case basis.

11. Geographic market: In relation to the proposed amendment at paragraph 4.11, respondents provided feedback that worldwide-to-worldwide market shares are still relevant and market shares should not be limited to those to Singapore in certain cases. CCCS clarifies that the proposed amendment applies specifically to a market definition that is broader after taking into consideration supply-side substitution through significant imports and has further amended paragraph 4.11 accordingly.

12. One respondent provided feedback that paragraph 4.11 appears to contradict paragraphs 4.1 to 4.8 and 4.10. In response to this feedback, CCCS clarifies that the extent of the competitive constraints imposed by such substitutes should be taken into account in the overall competition analysis. Whether such substitutes are considered in the definition of the relevant market or during the subsequent competition assessment should not affect the results of the overall competition analysis. Nonetheless, to address this feedback, paragraph 4.10 has been amended further to avoid any impression of a contradiction.

13. Respondents also provided feedback that there may be practical difficulties in obtaining worldwide-to-Singapore market shares. CCCS notes that there may be instances where parties may genuinely be unable to provide such specific market shares and in such circumstances, parties should consider submitting other proxies instead.

14. Chains of substitution: One respondent highlighted that there may be practical difficulties and costs involved in tracking data on chains of substitution, and such data may not always be available. CCCS clarifies that it is open to receiving both quantitative and qualitative evidence that shows that chains of substitution exist.

The proposed amendment at paragraph 3.16 seeks to provide non-exhaustive examples of what parties may provide to CCCS as actual evidence of such chains of substitution, where available. CCCS has amended paragraph 3.16 further to clarify this point.

15. One respondent queried whether the proposed amendment at paragraph 3.16, read together with the proposed amendments at paragraph 5.12, suggests that CCCS may be more inclined to define markets more broadly going forward. CCCS clarifies that it is not its intent to suggest, from the proposed amendments, that chains of substitution may be more easily accepted or established by CCCS. Instead, CCCS clarifies that only those indirect substitutes that constrain the focal product, or products that have been shown to exhibit price interdependence or similar price levels would be included in the relevant market. CCCS further clarifies that the proposed amendments at paragraph 3.16 and 5.12 are not intended to signal that CCCS will be more inclined to define markets more broadly going forward. CCCS reiterates that paragraph 5.12 is not intended to replace the traditional framework used to define markets, but is rather to supplement the analysis in cases where the traditional framework may not adequately deal with the issue of whether products which may not be in adjacent market segments or considered complementary should be included in a relevant market. The underlying objective of these proposed amendments are to identify what buyers regard as reasonable substitutes for the product under investigation.

16. One respondent requested further guidance on the situations where CCCS will consider indirect substitutes or indirect competition constraints in its analysis. In this regard, CCCS stresses that the conduct of a competition assessment, including market definition, is performed, on a case-by-case basis, taking into account the market circumstances and state of competition at that point in time. As such, it is not possible for CCCS to identify exact situations where substitute products may be included in the relevant market, and where they may be assessed as providing indirect competitive constraints from outside the relevant market, as this may vary depending on the circumstances at the point in time.

Guidelines on the Section 47 Prohibition ("Section 47 Guidelines")

17. Consumption synergies and economies of scope as factors in assessment of barriers to entry: Respondents highlighted that "consumption synergies"[1] and "economies of scope" could have pro-competitive benefits and should not be solely viewed as entry barriers. CCCS clarifies that the insertion of "consumption synergies" now referred to as "purchasing efficiencies" for clarity and "economies of scope" as factors in the assessment of barriers of entry is intended to highlight their relevance to CCCS's assessment of barriers to entry. The presence of purchasing efficiencies and economies of scope does not necessarily lead to the conclusion that an undertaking is dominant. The assessment of whether an undertaking has market power is a fact-specific assessment, performed on a case-by-case basis that is made in view of a number of factors set out at paragraph 9.4 of the Section 47 Guidelines including barriers to entry. CCCS will carefully consider evidence based on the industry and product(s) in question. Further, paragraph 4.1 makes it clear that "*where a dominant position is achieved or maintained through conduct arising from efficiencies, such as through successful innovation or economies of scale or scope, such conduct will not be regarded as an abuse of dominance*." Paragraph 4.5 also provides that where a particular conduct has, or is likely to have, an adverse effect on the process of competition, CCCS may consider if the dominant undertaking is able to demonstrate any benefits arising from its conduct.

18. One respondent expressed the view that "economies of scope" is less likely to be a barrier to entry, compared to "economies of scale". CCCS highlights that its proposal to include "economies of scope" as a factor in the assessment of barriers to entry is consistent with international practice. For example, the European Commission's *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings* states that barriers to expansion or entry can "*take the form of advantages specifically enjoyed by the dominant undertaking, such as economies of scale and scope*". CCCS also clarifies that the relevance of economies of scope is not limited to digital markets.

19. For consistency with the revisions made to the proposed amendments in the Market Definition Guidelines, CCCS has made further amendments to paragraphs 3.13, 10.6 and 10.26 to 10.27 of the Section 47 Guidelines.

20. Preferential leveraging of market power: Respondents suggested that CCCS reconsider the proposed introduction of the "self-preferencing" concept, or to provide more guidance on when "self-preferencing" conduct will be considered problematic. CCCS notes that the crux of "self-preferencing" conduct is the leveraging of market power from one market to obtain a competitive advantage which then is used to foreclose competitors in a separate market. The intent of the proposed amendment is to highlight that certain forms of such preferential conduct could raise competition concerns where they result in competition harm. The use

[1] The term "consumption synergies" is revised to "purchasing efficiencies" in subsequent parts of this document to reflect the term used in the amended Section 47 Guidelines.

of the term “self-preferencing” at this point in time may however obscure, rather than illuminate, CCCS’s intent.

21. In order to give better effect to CCCS’s intent, CCCS has made the following revisions to the Section 47 Guidelines:
    a. Revised the text of the proposed amendment – the proposed amendment builds upon the existing paragraph 4.7 and emphasizes the exclusion of competing sellers.
    b. Moved the amendment to paragraph 11.33, immediately after the section on “tying and bundling” to improve the coherence of the discussion on the leveraging of market power.
    c. Amended paragraph 4.3 to reinforce that leveraging market power, of which self-preferencing conduct is a subset, is simply an example of abusive exclusionary behaviour.

22. One respondent submitted that preferential treatment is inherent in vertical integration. CCCS recognises the benefits that vertical integration could bring, but highlights that it is possible for a vertically integrated dominant undertaking to conduct itself on the market without causing harm or likely harm to competition. As clearly indicated at paragraphs 4.4 to 4.5 and 11.1 of the Section 47 Guidelines, CCCS highlights that it will assess the likely effects of the conduct on competition. Where a dominant undertaking leverages its market power in one market, and accords favourable treatment to itself or other undertakings, resulting in harm or likely harm to competition in another market, such conduct may infringe section 47 of the Competition Act.

23. CCCS also notes that its proposed addition of this concept has found support with a respondent.

24. Alternative measures of market share: CCCS clarifies that the examples provided in the amended paragraph 9.7 are illustrative, and the appropriate method of calculating market share depends on the case at hand. CCCS is open to consider other relevant measures of market shares, depending on the facts of the case. The appropriate measures for market share to use can vary across different markets depending on the nature of competition within a market, and the availability of data. This is reflected in CCCS’s existing practice for the assessment of mergers. For example, in the SEEK-Jobstreet merger[2], CCCS considered the market shares based on a number of parameters, including the number of job seekers, number of visits, revenue, and number of job listings. In CCCS’s investigation of the Grab-Uber merger[3], CCCS considered market shares based on the number of rides matched and rental fleet size. In the context of abuse of dominance cases, businesses are able to propose and utilise evidence in support of specific market share measures. In any case, while market shares can be indicative of market

[2] *CCCS Grounds of Decision, in relation to the Notification for Decision of the proposed acquisition by Seek Asia Investments Pte. Ltd. of the Jobstreet Business in Singapore pursuant to section 57 of the Competition Act* (13 November 2014).

[3] *CCCS Notice of Infringement Decision, Sale of Uber’s Southeast Asian business to Grab in consideration of a 27.5% stake in Grab* (24 September 2018).

power, further analysis is required to ascertain dominance such as an assessment of the competitive pressure an undertaking faces.

25. One respondent requested that CCCS provide additional examples on how market shares will be calculated when factoring in multi-homing behaviour on multi-sided platforms, and the types/nature of evidence CCCS will rely on and the economic analysis it will conduct. In this regard, CCCS considers that the appropriate economic analysis and market share measures are dependent on the nature of the case, and CCCS does not intend to limit the types of evidence or economic analysis used in its assessment. Businesses may submit any evidence or economic analyses as they deem appropriate for the purpose of furthering arguments relating to the assessment of market shares or any aspects of the operation of a multi-sided platform.

26. One respondent highlighted that market power in digital markets may shift easily with innovation. CCCS notes that the proposed amendments to paragraphs 3.8 and 9.5 of the Section 47 Guidelines already addresses this feedback, and serves to clarify that CCCS will take into consideration the dynamic or innovative nature of the market. CCCS also notes feedback that competitive constraints on market power in digital markets could be global in nature. In this regard, CCCS notes that where there is evidence to support a finding that the geographic market is wider than Singapore, these competitive constraints may be taken into account.

27. Network effects: Respondents highlighted that network effects are not insurmountable. CCCS clarifies that the presence of network effects does not necessarily lead to the conclusion that an undertaking is dominant. The assessment of barriers to entry as well as whether an undertaking has market power is a fact-specific assessment, performed on a case-by-case basis considering the evidence and information obtained on the industry and product(s) in question. CCCS has proposed further amendments to paragraphs 10.25 and 10.42 of the Section 47 Guidelines to ensure the balanced manner in which this factor should be read.

28. In relation to the text in paragraph 10.25 of the Section 47 Guidelines, one respondent submitted that the text "*where users do not or are not able to multi-home across competing suppliers*" should not be a subjective factor that relies on whether users choose to multi-home. CCCS clarifies that the analysis of whether users do in fact multi-home is an objective assessment. The degree of multi-homing may be dependent on the costs to users of multi-sided platforms. Even if the costs of multi-homing are not prohibitive, users may not do so due to a number of factors. This includes the inability to transfer transaction and search histories across different service providers, the inability to transfer endorsements such as customer feedback, ratings, or trusted scores for businesses, technical barriers and inertia. In performing its assessment, CCCS will carefully consider evidence reflecting the actual level of multi-homing activities or the possible growth in multi-homing.

29. Control or ownership of key inputs: One respondent submitted that in addition to the control or ownership of key inputs, the availability of key inputs ought to be considered as well. CCCS clarifies that the availability of key inputs or alternative

inputs are factors which would be taken into account when CCCS assesses whether such factors are relevant indicators of that undertaking's market power. In order to make this clearer, CCCS has made further amendments to paragraph 9.4 of the Section 47 Guidelines to give businesses greater guidance on when the control of key inputs might impact on the assessment of market power.

30. One respondent requested for further clarification on how and under what circumstances access to data would affect the assessment of market power for digital platforms. In this regard, further amendments have been made to paragraph 9.4 of the Section 47 Guidelines to provide greater guidance. Further, CCCS refers the respondent to its E-commerce Platforms Market Study Report[4], which elaborates on how data may be used by e-commerce platforms to gain a competitive advantage.

31. Further amendments have also been made to paragraphs 9.4, 10.12, and 11.35 of the Section 47 Guidelines to minimise repetitiveness.

32. Tying and bundling: Respondents highlighted that tying and bundling should not be regarded as *prima facie* giving rise to an abuse of dominance. CCCS agrees that tying and bundling can give rise to consumer benefits. However, when they are undertaken by a dominant undertaking, such activities will have to be assessed for any foreclosure effects on competitors. CCCS clarifies that its amendments to introduce a section on tying and bundling do not mean that any instance of tying and bundling by a dominant undertaking *per se* represents an infringement of section 47 of the Act. Paragraph 11.1 of the Section 47 Guidelines has been further amended to reiterate these points.

33. In response to one respondent's query about an example of a lasting bundling strategy, CCCS highlights that a possible lasting bundling strategy could involve pure bundling (mentioned in the now renumbered paragraph 11.28) where the two products are only sold together in a fixed proportion and are not available for purchase on a standalone basis.

34. One respondent sought clarification on what is meant by "if the bundle is difficult for a competitor to replicate" in paragraph 11.32 (now renumbered paragraph 11.31). To make clearer that CCCS will be examining whether competitors are able to compete effectively against the dominant undertaking's bundle of products, paragraph 11.32 (now renumbered paragraph 11.31) has been further revised.

35. One respondent provided feedback that the text of paragraph 11.27 (now re-numbered as 11.26) is confusing. To address this feedback, CCCS has amended the text of paragraph 11.27 (now re-numbered as 11.26) to further clarify the meaning of a "tied product" and a "tying product". Consequential amendments have also been made to paragraph 11.28 (now re-numbered as paragraph 11.27).

36. One respondent requested additional guidance on when tying or bundling may be permissible and to identify specific durations. In this regard, CCCS highlights that the effects-based assessment to determine whether the conduct has, or is likely to

[4] E-commerce Platforms Market Study available here, paragraphs 155 to 157 and 203 to 204.

have, an adverse effect on the process of competition, is fact-specific. CCCS has provided guidance at paragraph 11.33 (now re-numbered as paragraph 11.32) by highlighting certain scenarios in which competition concerns may arise. A business can notify its conduct for a decision or guidance from CCCS, if it requires greater certainty about whether its conduct infringes section 47 of the Competition Act.

37. Refusal to supply: In response to the proposed amendment to paragraph 11.37, one respondent submitted that CCCS should apply its usual high bar in determining whether certain data qualifies as "essential facilities". CCCS clarifies that the proposed amendment to paragraph 11.37 is intended to set out illustrations of facilities that may be considered essential, and does not serve to modify the criteria for when a facility will be viewed as essential.

38. One respondent queried why CCCS saw fit to make amendments to paragraphs 11.35 to 11.38, notwithstanding its positions in its "*Discussion Paper on Data Portability*" or its research paper "*Data: Engine for Growth – Implications for Competition Law, Personal Data Protection, and Intellectual Property Rights*" that it is rare that any datasets would be deemed critical. CCCS notes that the proposed amendments are consistent with the abovementioned papers. In the abovementioned papers, CCCS noted that there could be circumstances under which a refusal to supply access to inputs (including data) may constitute an abuse of dominance. In support of its position, CCCS cited and discussed in its research paper existing case precedents from the European Court of Justice.

39. One respondent provided feedback that the language of paragraph 11.38 appears to contradict the language in the Market Definition Guidelines, in relation to the role of market definition. CCCS notes the feedback, and highlights that amendments have been made to the Market Definition Guidelines to clarify the role of market definition, which will improve consistency between both Guidelines.

40. One respondent queried how an order by CCCS requiring a dominant undertaking to share data may look, CCCS notes that this is highly fact-specific and will have to be assessed on a case-by-case basis. CCCS will work closely with relevant stakeholders, including the Personal Data Protection Commission ("PDPC"), in relation to such matters.[5]

41. Other forms of abusive conduct: One respondent submitted that the provision of fidelity discounts should not be taken *prima facie* to be an abuse of dominance. The respondent further submitted that CCCS should take into account the fact that such discounts are sometimes required or negotiated by customers. CCCS clarifies that the proposed amendment at paragraph 11.25 does not mean that any instance of an exclusive purchasing requirement (e.g., a fidelity discount) by a dominant

[5] Indeed, this issue of compliance with the Competition Act and the Personal Data Protection Act 2012 is discussed at paragraphs 241 to 243 of "*Data: Engine for Growth – Implications for Competition Law, Personal Data Protection, and Intellectual Property Rights*". CCCS stated at paragraph 243 of the paper that CCCS and PDPC will continue to work together to understand the boundaries of each agencies' regulations and assess the legitimacy of claims made by businesses seeking to use compliance with one law as a defence against the other.

undertaking *per se* represents an infringement of section 47 of the Competition Act. In this regard, CCCS refers the respondent to paragraphs 4.4 and 4.5, as well as to the newly amended paragraph 11.1. In these paragraphs, CCCS reiterates that it will undertake an economic effects-based assessment in order to determine whether the conduct has, or is likely to have, an adverse effect on the process of competition regardless of whether the exclusive purchasing requirement is unilaterally imposed by the dominant undertaking or upon the request of customers.

42. One respondent requested further elaboration on the different types of discount schemes which may infringe section 47 of the Competition Act. In this regard, CCCS highlights that it is the effect of the discount scheme on competition, rather than its form, which will determine whether or not it is abusive.

43. One respondent provided feedback in relation to paragraphs 11.4 to 11.9, to which no amendments were proposed by CCCS. CCCS notes the feedback, and will consider providing more guidance on matters related to predatory pricing at a future date when more enforcement experience has been had in this area.

44. One respondent provided feedback on the forms of consumer harm that should be considered when assessing whether the section 47 prohibition has been infringed. CCCS highlights that the competition policy in Singapore adopts the total welfare standard instead of the consumer welfare standard. As such, CCCS will consider the theories of harm from the perspective of both consumers and producers.

45. Objective justification: Respondents submitted that further clarity should be provided in relation to how conduct may be objectively justified. The principles that CCCS considers in assessing objective justifications are already set out in paragraph 4.5 of the Section 47 Guidelines. Should a business seek to objectively justify its conduct to CCCS, it can provide reasons for the conduct together with evidence and any quantitative analysis deemed necessary to support such reasons.

Guidelines on the Substantive Assessment of Mergers ("Merger Substantive Guidelines")

46. Substantial lessening of competition: One respondent commented that the proposed amended language in paragraphs 2.1, 2.3, 2.5, 4.2, 5.16, 6.3 and 7.1 of the Merger Substantive Guidelines from "CCCS assesses whether a merger situation is likely to substantially lessen competition…" to "CCCS assesses whether a merger situation results or may be expected to result in a substantial lessening of competition…" would increase uncertainty about the threshold that applies when CCCS assesses mergers. In this regard, CCCS clarifies that the proposed amendment serves to reduce uncertainty on the threshold test, as it better aligns with the language in section 54 of the Competition Act, which states that – "…mergers that have resulted, or may be expected to result, in a substantial lessening of competition within any market in Singapore for goods or services are prohibited."

47. Failing divisions: Related to paragraph 4.20 of the Merger Substantive Guidelines, one respondent queried how CCCS will assess a negative cash flow to determine whether a firm or division is failing, including the weight that CCCS may put on history of negative cash flow or investors' willingness to sustain losses. In this regard, CCCS will examine the evidence that demonstrates the negative cash flow and will do so in the context in which such cash flow arises.

48. Market shares: One respondent queried how CCCS will determine the appropriate market share measure to use in each case. In this regard, CCCS notes that the appropriate measure for market share can vary across different markets depending on the nature of competition within a market, and the availability of data. As already set out in paragraph 5.16 of the Merger Substantive Guidelines, market shares are merely indicative measures of potential competition concerns, and that further analysis is required (e.g. on barriers to entry, countervailing buyer power) to determine whether the merger results or may be expected to result in a substantial lessening of competition.

49. Countervailing buyer power: One respondent suggested that CCCS should not focus on relationships between the customers and merged entity in assessing whether customers are commercially significant to the merged entity. The respondent explained that while customers may not be able to exert constraints over the merged entity, they may be able to switch to other suppliers or support new entrants. In this regard, CCCS clarifies that the proposed amendments in paragraphs 6.45 to 6.50 of the Merger Substantive Guidelines are intended to explain more clearly the concept of "countervailing buyer power" and do not change CCCS's approach of assessing whether the ability of a merged entity to raise prices may be constrained by the countervailing buyer power of the merged entity's customers. The mere ability by customers of the merged entity to switch to other suppliers does not in itself indicate that these customers have countervailing buyer power. Countervailing buyer power of a customer exists, for example, where the customer is commercially significant to the supplier and is able to resist price increases by switching or threatening to switch, or disciplining the supplier in other ways such as refusing to buy other products from the supplier, or sponsoring the emergence of a new supplier. The ability of customers to switch, including by

customers that are not commercially significant to the merged entity, is also considered more generally as part of CCCS's assessment on non-coordinated effects.

50. Another respondent queried the meaning of "commercially significant". In this regard, CCCS has further amended paragraph 6.45 of the Merger Substantive Guidelines to clarify that "countervailing buyer power" refers to "the bargaining strength that the buyer has vis-à-vis the seller in commercial negotiations due to the buyer's commercial significance to the seller". In making this assessment, CCCS may consider the proportion of the seller's sales that is generated by the buyer as well as any actual evidence of bargaining.

51. Pro-competitive effects arising from mergers: Respondents suggested to reinstate paragraph 7.5 of the Merger Substantive Guidelines which sets out the factors which may or will lead to an assessment that there are pro-competitive effects arising from mergers. In this regard, CCCS clarifies that the proposed amendments do not change CCCS's existing position and approach with respect to efficiencies which may increase rivalry. Part 8 of the Merger Substantive Guidelines on "Addressing a Substantial Lessening of Competition" already provide details on a range of supply-side, demand-side and dynamic efficiencies that CCCS may consider in its merger assessment, including for vertical mergers. CCCS has added the relevant references within the Merger Substantive Guidelines for clarity.

52. Purchasing efficiencies: Respondents requested clarification on how CCCS would assess consumption synergies (now referred to in the Merger Substantive Guidelines as purchasing efficiencies) in considering whether a merger is likely to give rise to a substantial lessening of competition. In this regard, CCCS notes that "purchasing efficiencies" has been recognized in paragraph 6.36 as a factor contributing to barriers to entry and paragraph 8.6 as a possible demand-side efficiency. The effect of purchasing efficiencies as an entry barrier and possible efficiency will need to be assessed by CCCS on the facts and circumstances of each case, and at different stages of the merger assessment. For example, the assessment of the extent of barriers to entry may take into account a range of factors that may include purchasing efficiencies. Similarly, an assessment of the extent to which efficiencies may increase rivalry (or net economic efficiencies in the event that an SLC is found) may take into account a range of factors that may include purchasing efficiencies.

53. Interim measures and commitments: One respondent suggested not to delete a paragraph on when commitments are appropriate. CCCS clarifies that the discussion previously in paragraph 10.7 of the Merger Substantive Guidelines regarding how commitments must be appropriate to address the competition concerns is set out more generally in a discussion on remedies in paragraphs 2.9 to 2.12 of the *CCCS Guidelines on Directions and Remedies*.

54. Others: CCCS has amended paragraph 11.7 of the Merger Substantive Guidelines to clarify its assessment of ancillary restrictions.

Guidelines on Merger Procedures ("Merger Procedure Guidelines")

55. Outlining of appropriate commitments or directions in CCCS's Statement of Decision (Provisional): One respondent suggested that the Merger Procedure Guidelines should continue to provide certainty in paragraphs 4.62 and 4.83 (which have since been re-numbered to paragraphs 4.63 and 4.84 respectively) that CCCS will outline any appropriate commitments or directions in its Statement of Decision so as to guide merger parties in crafting measures necessary to complete the merger. It should be noted that the proposed amendments are to clarify that there is no legal obligation on CCCS to suggest commitments. Commitments are offered by merging parties to CCCS. To assist merging parties in crafting their commitments, CCCS would already have communicated the competition concerns in Issues Letters sent during CCCS's Phase 1 and Phase 2 of its review even prior to the issuance of any Statement of Decision (Provisional). The Statement of Decision (Provisional) itself will also outline the issues of concern (to the extent that these have not been previously addressed).

56. Details sought on top customers: Respondents indicated that the requirement to include more customer references in paragraphs 31(a) and (b) in Part 2 of Form M1 may be burdensome and increase business costs of the applicant. In this regard, CCCS notes, based on its experience in assessing merger notifications, that the contact information for additional top customers facilitates the garnering of views by CCCS and consequently enhances the efficiency of the merger assessment. Merger applicant(s) can approach CCCS if they face any difficulty in providing the necessary information for their merger notification.

57. Requirements for Confidential Advice: One respondent provided feedback on paragraphs 3.20 and 3.21 of the Merger Procedure Guidelines that merger parties may find it difficult to meet the requirements to seek confidential advice from CCCS, namely the requirement to demonstrate a "good faith intention" to proceed with the merger, and that the anticipated merger not be in the public domain. An example was given by the respondent of listed companies that may be required to publicly disclose the merger discussions to demonstrate "good faith intention" to proceed with the merger, but in doing so, the merger will be made public. CCCS clarifies that "good faith intention" does not necessarily need to be at the threshold standard to trigger public disclosure for listed companies, and applicants are not limited in the evidence that they can use to demonstrate that they intend to carry into effect a merger. For example, CCCS may consider the amount of resources that has been spent to engage relevant consultants on the anticipated merger.

58. CCCS has further amended paragraph 3.18 to clarify that whether a notification is advisable is not necessarily linked to whether an anticipated merger is likely to raise competition concerns in Singapore. For example, CCCS may advise that a notification is advisable where there is insufficient information for CCCS to conclude that an anticipated merger is likely or unlikely to raise competition concerns in Singapore.

59. General clarifications: In relation to paragraph 2.6 of the Merger Procedure Guidelines, one respondent sought to clarify whether the merger regime in Singapore is voluntary and suspensory in relation to CCCS's proposed amendment

to encourage merger parties to notify prior to the completion of the merger. CCCS clarifies that notifying a merger to CCCS is voluntary. Merger parties are not required to notify the merger, though they are expected to conduct their own self-assessment to ensure that their merger does not infringe section 54 of the Act. However, if the merger parties choose to implement their merger without first notifying and obtaining the necessary clearances from CCCS despite potential competition concerns, the merger parties bear the risk of CCCS investigating and finding that section 54 of the Act has been infringed, and the further risk that any voluntary commitments may not be accepted by CCCS. In this regard, CCCS has made further amendments at paragraph 2.6 of the Merger Procedure Guidelines to clarify that CCCS encourages merger parties that are notifying CCCS to do so as soon as possible, preferably prior to the completion of the merger. CCCS also clarifies that the merger regime is non-suspensory, in that CCCS's express approval is not required for mergers to be completed. However, notifying CCCS as early as possible pre-completion allows more scope and opportunity for CCCS to consider potential remedies, instead of requiring merger parties to, for example, unwind their merger or require divestments, which tend to be more costly for the merger parties.

60. Payment mode for notification fee: One respondent suggested that CCCS should retain the flexibility to accept other forms of payment such as cheque due to the possibility that an electronic bank transfer may require additional processing time that could delay the start of the merger review. CCCS clarifies that while it encourages applicants to pay via electronic bank transfer, the applicants can contact CCCS if they prefer to pay through other modes. An applicant can also contact CCCS if it wishes to make payment of the notification fee early.

61. 50-working day administrative timeline: A respondent suggested that the 50-working day administrative timeline should be reduced.

62. CCCS highlights that the additional 50-working day administrative timeline referred to in paragraph 4.57 is applicable to the Phase 1 review process that involves commitments and not to Phase 2. This extension to 50 working days from 30 working days where commitments are involved gives applicants the opportunity for their commitments proposal to be fully considered and market tested during the Phase 1 review without having to go into a Phase 2 review, which entails the submission of Form M2. Further, this 50-working day administrative timeline provides clarity as to the amount of time that may be needed to market test a commitments proposal. If more time is needed, CCCS will give written notice to the applicant to extend this timeline by up to 40 working days.

63. Deadline for submission of commitments proposal: A respondent commented that the proposed stipulated deadline for merger parties to submit the final commitment proposal or a Form M2, is in contrast to the current more "flexible" approach by CCCS in which merger parties are able to submit commitments at any time. The respondent expressed concern that such deadlines, if set too narrowly (or identical to the timeframe for parties to submit responses to the Phase 1 Issues Letter or Form M2), stand a risk of not factoring in sufficient time required for merger parties

to consider the commercial considerations and conduct an appropriate assessment of possible commitments in response to the Phase 1 Issues Letter.

64. CCCS notes that the respondent's concern regarding the sufficiency of time to submit a commitments proposal after the receipt of the Phase 1 Issues Letter will be addressed by the amendment to paragraph 3.4 of the *CCCS Guidelines on Directions and Remedies*.

65. CCCS also highlights that paragraph 4.57 is a summary overview of the detailed process for commitments at Phase 1 set out in the *CCCS Guidelines on Directions and Remedies* and provides a reference to the *CCCS Guidelines on Directions and Remedies* where more details can be found. For consistency, CCCS has also included a brief summary of the Phase 2 commitments process at paragraph 4.62.

66. Discussion of preliminary concerns prior to issuance of Phase 1 Issues Letter: A respondent sought clarification on whether CCCS would prior to the issuance of the Phase 1 Issues Letter allow merger parties the opportunity to discuss with CCCS any of its preliminary concerns, and if any commitments will likely be necessary.

67. If an applicant has itself identified competition issues at the outset, an applicant is able to propose commitments early to CCCS. Where an applicant seeks to engage CCCS to discuss CCCS's preliminary concerns prior to the issuance of the Phase 1 Issues Letter, CCCS's response will depend on the state of assessment of the notified merger. As the Phase 1 review is carried out under a very tight timeline, CCCS may not be ready to discuss its preliminary competition concerns until near the end of the review process where a Phase 1 Issues Letter would be issued. CCCS will give applicants a reasonable amount of time to submit a commitments proposal following the Phase 1 Issues Letter and may, in addition, accede to a request for an extension of time if justified.

68. Others: CCCS has removed Annex A containing Form M1 and Form M2, as the updated versions of those forms are available on CCCS's website.

CCCS Guidelines on Directions and Remedies ("Directions and Remedies Guidelines") (formerly the CCCS Guidelines on Enforcement)

69. Submission of commitments proposals: CCCS has amended "will" to "may" in paragraph 3.13 of the Directions and Remedies Guidelines where CCCS informs the applicant in a notification for decision under section 44 or 51 of the Competition Act that it is able to submit a commitments proposal by a stipulated deadline. This provides CCCS with the flexibility to not have to give the applicant a deadline to offer commitments where CCCS considers that commitments would not be appropriate for that situation.

70. One respondent suggested having more flexibility regarding the timelines for submission of commitment proposals to avoid a merger assessment moving into a Phase 2 review. To address this, CCCS has amended paragraph 3.4 of the Directions and Remedies Guidelines to explicitly mention that where applicants seek a time extension, CCCS may agree in instances where merger parties are able to sufficiently justify the need for such a time extension.

71. Commitment proposals requiring substantial changes (Phase 1 merger review): One respondent expressed concern that with the proposed insertion of paragraph 3.2 of the Directions and Remedies Guidelines, CCCS may reject a commitments proposal which has undergone substantial changes and requires a second market test, solely on the grounds that there is insufficient time to assess the proposal, which would lead to uncertainty on the part of the applicant as to the reason for the rejection.

72. CCCS notes that applicants have a number of opportunities to submit commitments proposals to address CCCS's concerns. I Applicants are informed of CCCS's concerns in Issues Letters provided at Phase 1 and at Phase 2 review as well as in a Statement of Decision (Provisional) if issued. The tight timelines governing commitments proposals in Phase 1 and 2 are to encourage applicants to make their best offers early to address a current issue where merger parties start with initial low offers with the hope of providing the "minimum possible" commitments to meet CCCS's competition concerns, resulting in an unnecessarily protracted review process. For clarity, CCCS will be moving the last sentence of paragraph 3.2 of the Directions and Remedies Guidelines to paragraph 3.6 to clarify that CCCS may reject commitments proposals requiring substantial changes and a second market test in Phase 1, and instead proceed to a Phase 2 assessment.

73. Commitment proposals which have undergone substantial changes (notifications for decision): A respondent raised concerns regarding how a "substantial change" of a commitment proposal is to be assessed practically and the standards by which the assessment by CCCS will take place.

74. CCCS highlights that the purpose of paragraph 3.16 of the Directions and Remedies Guidelines is to clearly set out that in cases where CCCS is satisfied based on the feedback and evidence received from market testing that the commitments proposal will not be able to address the competition concerns identified, and that a significantly different proposal would be necessary to address these concerns, CCCS has the discretion to stop the commitment process and

proceed to request a Form 2 or issue a proposed/provisional unfavourable decision or unfavourable decision as the case may be.

75. Commitment proposals which require minor refinements: In relation to commitments proposals submitted during: (i) the Phase 2 merger review process; (ii) Form 2 review process for notifications for decision; and (iii) investigations, CCCS has amended paragraphs 3.9, 3.16 and 3.18 of the Directions and Remedies Guidelines to state that CCCS will generally accept the commitments proposal where only minor refinements are necessary to address any concerns raised during the market testing.

76. State of Play Meeting ("SOPM"): A respondent commented that the express ability for the parties to meet CCCS at a SOPM during the Phase 2 merger review process is a positive step. The respondent suggested that parties ought to be allowed to call for SOPMs and have a discussion as of right rather than seeking permission and hoping for the best.

77. CCCS highlights that SOPMs are specifically called for by CCCS to discuss key aspects of cases with applicants. Instituting mandatory SOPMs called by the applicants could disrupt CCCS's merger review, and would not be constructive to the process if such meetings are not called at a stage where CCCS is prepared to discuss the state of its review. Nonetheless, an applicant may request a SOPM with CCCS, and CCCS will decide whether a SOPM is appropriate.

78. Interim measures: A respondent commented that in relation to paragraph 5.7 of the Directions and Remedies Guidelines: (i) the proposed insertion does not address the specific circumstances in which CCCS will exercise and order interim measures; and (ii) the extent of interim measures listed is very wide and there is no specific time period or validity period for the exercise of interim measures.

79. CCCS considers that paragraphs 5.2 to 5.8 of the Directions and Remedies Guidelines already sets out the circumstances in which CCCS will order interim measures. Further, the specific time period for the exercise of interim measures and the validity period for the interim measures imposed have already been stated in the specified paragraphs. In relation to the range of interim measures that can be imposed, CCCS's amendments to paragraphs 5.5 and 5.8 of the Directions and Remedies Guidelines retain the flexibility to select, tailor and combine measures in response to the specific facts and circumstance of the merger.

80. Market testing: CCCS has amended paragraphs 3.6 and 3.22 of the Directions and Remedies Guidelines to define market testing as either a public consultation or where CCCS seeks the views of relevant third parties and to insert the word "relevant" wherever third party feedback and market testing is mentioned. These amendments clarify that when market testing, CCCS need not publicly consult, but could instead consult with "relevant third parties", as set out in section 60A(5) of the Competition Act.

81. CCCS has also inserted the phrase "unless exceptional circumstances exist" wherever mention is made of market testing to align the Directions and Remedies

Guidelines with section 60A(5) of the Competition Act which requires that CCCS consult with such person that it thinks appropriate "except in exceptional circumstances".

82. One respondent asked for clarification as to whether CCCS will conduct market testing as a default when accepting commitments from parties under investigation. CCCS has amended paragraph 3.18 of the Directions and Remedies Guidelines to clarify that, where a commitments proposal in an investigation is accepted in-principle, CCCS will market test the commitments unless exceptional circumstances exist.

83. Statement of Decision (Provisional) ("SDP"): A respondent indicated that parties should be allowed to submit further written representations to the SDP in the event that CCCS rejects the commitments proposal. The same respondent also sought clarification as to whether CCCS will issue a fresh SDP to allow the parties to set out their written representations with regard to CCCS's rejection of the commitments proposed after the SDP was issued.

84. CCCS highlights that the applicant's representations in response to the SDP on the one hand, and the commitments proposal of the parties on the other, are separate parallel processes. The applicant's representations to the SDP serve to provide CCCS with an infringing party's view on CCCS's proposed SLC findings, while the commitments proposal serves to address the SLC concerns identified. CCCS will undertake a review of the commitments proposal of the parties, including engaging the applicant to discuss and refine the commitments proposal where necessary, and undertake market testing should the proposal be accepted in-principle by CCCS. Where a commitments proposal is rejected by CCCS, the competition concerns articulated in the SDP would remain, such that no further SDP is required.

Guidelines on the Appropriate Amount of Penalty in Competition Cases ("Penalty Guidelines")

85. Application of the Penalty Guidelines: CCCS takes the view that any form of involvement in activity that infringes section 34 of the Competition Act, even if limited, lends strength to the anti-competitive activity, and will have an adverse effect on competition. The application of the Penalty Guidelines and the assessment as to whether there are mitigating factors that justify a reduction in financial penalties, amongst other things, arises only after an infringement has been established. In this regard, CCCS would like to clarify a possible misconception that arose from a respondent's feedback. The respondent raised a scenario where an association member receives minutes of a trade association meeting discussing a co-ordinated increase of prices among members but did not attend the meeting or read the minutes, suggesting that the undertaking would be a passive participant. In situations where an undertaking can show that it did not know or could not have known of the anti-competitive agreement, this will be assessed to determine whether liability for infringing section 34 of the Competition Act arises. If there is no liability found, the Penalty Guidelines will not apply.

86. Application of the proposed mitigating factor: In relation to feedback received regarding the application of mitigating discounts, CCCS reiterates that situations where an undertaking is found to be less culpable and therefore deserving of a mitigating discount should be narrowly circumscribed. An infringing undertaking will need to show that it has done more than simply being "passive",[6] for example, by clearly and substantially departing from the understanding or consensus and disrupting the anti-competitive effects of the infringing activity, in order to justify a reduction in its financial penalty. CCCS is of the view that a high threshold would prevent an undertaking from exploiting its knowledge of the anti-competitive activity to benefit itself. For example, an undertaking deciding to raise its prices by a lower quantum after agreeing to a higher price with other members of a cartel would be benefiting from its knowledge of a coordinated increase in prices even though it may contend that it had played a less prominent role in the cartel. CCCS believes that a higher threshold requiring an undertaking to have "adopt[ed] competitive conduct in the market" is desirable in order to address such a scenario.

87. High threshold of the proposed mitigating factor: Feedback from one respondent suggested that the phrasing "and demonstrates that" in the proposed amendment to paragraph 2.15 of the Penalty Guidelines sets a higher bar than the EU Guidelines on Fines 2016 which uses the phrasing "and thus demonstrates that". However, CCCS notes that the General Court of the European Union held in *Eni SpA v Commission* (Case T-558/08) (at paragraph 241) that (a) "substantially limited involvement" and (b) "actually avoided applying it by adopting competitive conduct in the market" are intended to be cumulative conditions which an undertaking must fulfil in order to avail itself of this mitigating factor. This is consistent with CCCS's policy stance. If an undertaking had knowledge of an anti-

[6] In paragraphs 4 and 5 of the Penalty Guidelines public consultation document, CCCS noted that an undertaking's mere presence at a meeting without participating or contributing in any way to the discussions, or acting on any information shared during the meeting or anti-competitive strategy agreed upon during the meeting, may be perceived as "passive" behaviour.

competitive agreement, it would need to meet a high threshold in order to disassociate itself from the knowledge that it had been tainted with and justify receiving a mitigating discount. The difference in language between the EU Guidelines on Fines 2016 and the proposed amendments to CCCS's Penalty Guidelines seeks to make the position clearer.

88. Request for additional examples or elaboration to the proposed mitigating factor: CCCS received feedback from respondents who were uncertain about how the proposed amendments to the Penalty Guidelines would be applied in certain hypothetical scenarios and suggested the need for additional examples to provide more guidance. A query was also made in relation to the illustration provided in footnote 6 of CCCS's public consultation document as to whether the proposed amendments to paragraph 2.15 of the Penalty Guidelines would make it difficult for an undertaking to prove that it had acted competitively.

89. The illustration used by CCCS, where an infringing undertaking's decision to raise its prices at a lower quantum than what was agreed with the rest of the cartel members might not be viewed as a *bona fide* act to apply competitive conduct on the market, was intended to serve as an example. This should not be treated as an absolute statement that price increases by an infringing undertaking that had substantially limited involvement in a cartel will automatically preclude a mitigating discount. As set out in the same footnote, the burden lies on the infringing undertaking that seeks the benefit of the mitigating factor to prove that its conduct was in fact competitive on the facts. When assessing whether an infringing undertaking had indeed adopted competitive conduct on the market, CCCS will assess all relevant circumstances that contributed to the infringing party's pricing decision and the state of the relevant market.

90. While each case must be decided on its facts, businesses may wish to take note of the high standards applied in the European Union when assessing whether an undertaking has applied competitive conduct. In the case of *SCA Holding v Commission* (Case T-327/4), the European Court of First Instance noted that an undertaking that had colluded with its competitors but followed a more or less independent policy on the market may simply be trying to exploit the cartel for its own benefit. It consequently rejected the applicant's contention that its financial penalty should be reduced on the basis that its prices did not correspond to the cartel's announced prices (even though it did not deny that it participated in the collusion on prices). The court observed that as the evidence adduced by the applicant of its prices simply did not show that its prices differed significantly from those of other participants in the infringement, the applicant was unable to show that its actual conduct on the market was likely to defeat the anti-competitive effects of the cartel. A similar conclusion was also reached by the Court of First Instance in *Bolloré SA and Others v Commission of the European Communities* (Case T-109/02) where it observed that the appellant had failed to demonstrate that it actually avoided applying the infringing agreements by adopting competitive conduct on the market. In reaching this conclusion, the court observed that the appellant's own evidence indicated that its margins and sales prices increased considerably during the relevant period notwithstanding structural overcapacities and a market in decline.

91. For the reasons outlined above, CCCS considers that it may not be appropriate to set out a list of examples as to how the Penalty Guidelines would be applied in practice, as it is not feasible for the Penalty Guidelines to anticipate every single scenario. However, the Penalty Guidelines are not exhaustive and CCCS would be prepared to consider all relevant factors when making a determination as to whether an undertaking deserves a mitigating discount, based on the facts of the case.

92. CCCS also noted feedback from a respondent that it was unclear how the new mitigating factor in paragraph 2.15 of the Penalty Guidelines would be applied in tandem with the clarifications in the new paragraph 2.16 of the Penalty Guidelines. The respondent detailed various hypothetical scenarios on conduct by an undertaking in anti-competitive activities and sought clarification on the difference between a non-proactive role versus a passive role, and the meaning of "substantially limited involvement".

93. It is not CCCS's intention to prescribe to parties what "substantially limited involvement" is as that will depend on the relevant factual matrix and the evidence that the infringing undertaking is able to adduce in assessing whether a mitigating discount is warranted. Some of the factors that CCCS may take into account in determining if an undertaking had "substantially limited involvement" would include the regularity and degree of the undertaking's involvement in a cartel.

94. The clarification to paragraph 2.16 is simply to make clear that an undertaking should not expect a mitigating discount simply on account of it not being a leader or instigator or not playing a pro-active role.

95. CCCS further notes that in the European Commission's ("EC") *Freight Forwarding* decision (Case AT.39462), the EC held that a passive or 'follow-my-leader' role does not generally constitute a mitigating circumstance, as the undertaking still participates in the cartel; deriving, on one hand, its own commercial benefits from its participation in the cartel, and, on the other hand, encouraging other cartelists to participate and implement the arrangements. The EC rejected the claims of several parties that their 'passive' conduct such as not hosting or participating in some meetings, not pressuring other cartelists and limited participation in email exchanges ought to be mitigating. The EC observed that the parties "did not in any way indicate that they objected to the agreed measures or participated in the meetings in a different spirit". Where an applicant claimed to have been added to an email list without consent, the EC observed that it did not provide any evidence indicating that it "objected to being included on the mailing list". Instead it "continued with its participation at the next meeting and kept on receiving the updates from the group".

96. <u>Evidential burden on undertakings:</u> CCCS notes feedback that it has powers to gather evidence and information that undertakings do not have and that the proposed amendments to the Penalty Guidelines may be placing a heavy evidential burden on many undertakings. CCCS considers that the onus should be on the individual undertaking to provide evidence to show that it had acted competitively

on the market, as it is the party seeking the benefit of such a mitigating factor. Further, an undertaking is in the best position to provide evidence to show its internal considerations had led to a *bona fide* decision to act competitively on the market.

97. Enforcement practice in other jurisdictions: CCCS notes that there was feedback that the proposed amendments to paragraph 2.16 of the Penalty Guidelines may not be aligned with the practice in other jurisdictions where the fact that the undertaking did not play a leader role is considered to be a mitigating factor. CCCS notes that different jurisdictions may take differing approaches depending on the framework that they have to determine liability for an infringement involving an anti-competitive agreement. As pointed out during the public consultation, CCCS considers even the mere presence of an undertaking at anti-competitive meetings without any subsequent public distancing to be an infringement. While CCCS does recognise aggravating or mitigating factors to justify an upward or downward adjustment in financial penalties, one cannot be characterised as being "passive" and entitled to a downward adjustment without more, since the fact of "passive" involvement already establishes liability.

98. However, the Penalty Guidelines are not exhaustive and CCCS is prepared to consider all relevant factors when making a determination as to whether an undertaking is deserving of a mitigating discount, based on the facts of the case.

Guidelines on the Treatment of Intellectual Property Rights ("IP Guidelines")

99. Standard Essential Patents ("SEPs") and Licensing on Fair, Reasonable and Non-Discriminatory ("FRAND") Terms: In light of the feedback received on the draft provisions relating to SEPs, CCCS has made edits to the language in paragraphs 4.9 and 4.11 to provide further clarity, including circumstances where seeking an injunction by an SEP owner could give rise to competition concerns under section 47 of the Competition Act. Some respondents suggested that CCCS prescribe in its IP Guidelines how FRAND terms should be interpreted or provide more guidance on the factors CCCS is likely to consider when assessing if a commitment is FRAND. CCCS would observe from the outset that there is no one-size-fits-all definition of what can constitute FRAND terms. In other words, what is fair, reasonable and non-discriminatory may vary between industries and over time. Further, negotiations between SEP holders and potential licensees may conclude with a different set of FRAND rate/terms and conditions depending on the relevant facts and circumstances. In light of this, CCCS does not consider it appropriate to be prescriptive.[7]

100. Technology (Patent) Pools: Some respondents suggested specific additions to the section on technology pools at paragraphs 3.34 to 3.36. CCCS is of the view that it is not necessary to make the suggested amendments given that the examples stated in paragraph 3.34 are not intended to be exhaustive. CCCS assesses whether an infringement of the Competition Act has occurred on a case-by-case basis depending on the particular factual context in which the conduct arises.

101. Intellectual Property Rights ("IPRs") and the Section 47 Prohibition: One respondent highlighted that the distinction between the (mere) exercise of market power and acting "beyond the scope of legal monopoly granted by IP law" needs to be made clearer. In light of the feedback, CCCS has made certain edits to paragraphs 4.4 and 4.5. A consequential amendment has also been made to the hypothetical at paragraph 4.8. One respondent submitted that if there are alternative licences available, tying should not be regarded as an abuse of dominance. CCCS notes that the presence of alternative licences is one relevant factor in its assessment of whether there is an abuse of a dominant position. In the context of the hypothetical example at paragraph 4.12, CCCS notes that the availability of alternative operating software licences would be a relevant factor in

[7] In its past cases, CCCS has also not prescribed FRAND terms in the context of directions under section 69 of the Competition Act. However, CCCS considered the following when accepting commitments (containing FRAND terms) provided to CCCS by the undertakings in those cases: (1) all terms must be "fair", "reasonable", and "non-discriminatory" in the implementation of the FRAND commitments; (2) a fair and reasonable rate should strike a balance between the interests of the offering parties and the parties requesting access to the goods/services/technology subject to FRAND commitments (in particular, it should preserve the incentives for risk-taking, investment and innovation on the part of offering parties whilst ensuring requesting parties are able to access the good/service/technology in question); and (3) the offering parties cannot discriminate between licensees that are similarly situated, unless it can be shown that there are objective grounds for treating them differently. See for example, Grounds of Decision in relation to the acquisition by Times Publishing Limited of Penguin Random House Pte. Ltd. and Penguin Books Malaysia Sdn. Bhd. CCS 400/001/17 (25 September 2017).

the assessment of whether Firm A is in a dominant position. Since Firm A in the hypothetical example is already assessed to be dominant in the supply of personal computer operating systems, CCCS would further assess whether the tying has foreclosed suppliers of competing music player software as well as any other possible objective justification.

102. In response to feedback, CCCS has also made amendments to paragraph 3.12 to make clear that a tying agreement could, under certain circumstances, give rise to section 34 concerns.

103. Refusal of Access to Data: One respondent commented that the provisions relating to a refusal to provide access to data at paragraphs 4.13 to 4.15 suggest that CCCS is able to "circumvent intellectual property law…". CCCS wishes to clarify that the enforcement of the Competition Act does not "circumvent" IP law. Competition law does not apply to invalidate IPRs which are properly obtained under the IPR regime in Singapore. Competition law would apply, however, to prohibit certain types of agreements or conduct with respect to the *exercise* of an IPR which could have an adverse impact on the process of competition. CCCS is empowered to investigate and to take action against businesses which enter into anti-competitive agreements or engage in conduct which infringe the Competition Act by abusing its dominant position. Paragraphs 4.13 to 4.15 explain circumstances of when a refusal to provide access to data (notwithstanding copyright protection if any) may raise competition concerns and consequently warrant CCCS's intervention. The discussion at paragraph 4.15 and the hypothetical example also sets out how CCCS may conduct its assessment, as well as the facts and circumstances that CCCS may take into account in cases involving a refusal to provide access to data (e.g. factors affecting whether data is a key competitive input and factors affecting whether competition intervention is appropriate). As such, CCCS has not removed or amended the paragraphs as suggested by the respondent.

104. Another respondent submitted that CCCS should focus its assessment on the "firm's market power or ability to leverage any such power to foreclose competition" rather than its role as a "first compiler" of data. This feedback appears to reflect a misunderstanding of the proposed paragraphs 4.13 to 4.15. CCCS wishes to clarify that paragraphs 4.13 to 4.15 make the point that in certain circumstances, a dominant undertaking that refuses to share access to data on the basis that it is protected by IPRs (e.g. by claiming that there is copyright protection over its compilation of the data), may run afoul of section 47 of the Competition Act. Whether data is a "key competitive input" for the purposes of CCCS's assessment (of whether there has been an abuse of dominance) does not depend on whether the data is compiled or otherwise. For the avoidance of doubt, CCCS will consider the undertaking's market power or ability to foreclose competition when assessing whether its refusal to provide access to data raises competition concerns.

105. One respondent asked about the significance of data protection laws in CCCS's assessment of a matter involving an undertaking's refusal to allow access to data. CCCS notes that undertakings may seek to use compliance with data protection

rules as a reason for not sharing data.[8] In assessing the legitimacy of such a claim, CCCS will consider alternative ways in which undertakings are actually able to share data in compliance with data protection rules. For example, it may be possible for undertakings to share anonymised or aggregated data. CCCS will work closely with PDPC where appropriate cases arise.

106. Licensing Agreements Between Competitors / Non-Competitors: One respondent suggested that the revised IP Guidelines should explicitly articulate that if there are no substitutes for an SEP, then it is a one-technology market which gives the patent holder a dominant position. CCCS has considered this feedback and notes that in a scenario where there are no substitutes for the technology (and thus there exists a one-technology market), this one-technology market may not necessarily be the "relevant" market for CCCS's assessment, depending on the facts and circumstances of the case. Further, even if the one-technology market is the relevant market, dominance is not determined by the lack of substitutes alone (e.g. there could be countervailing buyer power; or the market is one that is highly dynamic). Given that there are other factors that CCCS may consider in determining the existence of a dominant position in the relevant market, CCCS has not made the suggested edit.

107. The Appreciable Adverse Effect on Competition Test: One respondent asked why the threshold (for determining whether licensing agreements are likely to infringe section 34) appears to have been lowered from "high" and "sufficient" market power to "significant" market power. The same respondent similarly asked why the market share thresholds in paragraph 3.19 have been lowered. CCCS wishes to clarify that the amendments to "significant" do not reflect a lowering of the threshold. Instead, the amendments are made for internal consistency within the IP Guidelines. The standard of "significant" degree of market power is also consistent with that in Europe.[9] The amendments to the market share thresholds in paragraph 3.19 are to update the IP Guidelines to mirror those in paragraph 2.25 of the *CCCS Guidelines on the Section 34 Prohibition*. Consistency across all the guidelines will provide greater clarity to businesses.

108. CCCS received mixed feedback in relation to its proposed insertion at paragraph 3.20 regarding the inclusion of a '*licensing agreement between competitors which involves the restriction of a licensee's ability to exploit its own technology rights*' as a type of agreement which will always have an appreciable adverse effect on competition. One respondent commented that the proposed insertion should be broader. Another respondent submitted that CCCS should be slow to classify a certain conduct as an object infringement; and that classifying agreements as such fails to recognise any potential pro-competitive benefits of such agreements, notwithstanding the restrictions to competition.

109. Having considered these responses, CCCS has retained the proposed amendment in paragraph 3.20, as the inclusion of this example appropriately

[8] See paragraph 241 of CCCS's research paper "Data: Engine for Growth – Implications for Competition Law, Personal Data Protection, and Intellectual Property Rights", published in August 2017.

[9] See European Commission's Guidelines on the Application of Article 101 of the Treaty on the Functioning of the European Union to Technology Transfer Agreements.

reflects the seriousness of the impact to competition arising from this particular type of licensing agreement between competitors while balancing the need to not be overly broad in its categorisation. This is consistent with the language the European Commission's Technology Transfer Block Exemption Regulation (TTBER)[10]. That said, CCCS would like to highlight that the types of agreements/conduct that constitutes an object infringement are not limited to those listed in paragraph 3.20. In response to the second feedback, CCCS wishes to clarify that the classification of a type of agreement as an object infringement does not preclude CCCS from taking into account any potential pro-competitive benefits of such agreements.[11]

110. General Comments: One respondent provided feedback that a section on the types of remedial relief that CCCS might consider would be valuable to send a signal to IP owners as to what consequences they might face if they behave anti-competitively. CCCS agrees that it is important to inform IP owners of the potential consequences if they infringe the Competition Act. In this regard, guidance on CCCS's powers to impose different types of directions and remedies (including financial penalties) under section 69 of the Competition Act is set out in the *CCCS Guidelines on Directions and Remedies*. CCCS does not consider it necessary to include a discussion on IP-specific remedies at this stage; but would note that CCCS is able to give an undertaking such directions as it considers appropriate to bring any competition law infringement to an end; and where necessary to require that undertaking to take such action as is specified in the direction to remedy, mitigate or eliminate any adverse effects of such infringement and to prevent the recurrence of any such infringement.

[10] Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements; Article 4(1)(d).

[11] Step 3 of paragraph 3.5 of the draft IP Guidelines sets out that CCCS does consider if an agreement that falls within the scope of the section 34 prohibition would, on balance, have a net economic benefit. See also paragraph 9 of the Third Schedule of the Competition Act.

Next steps

111. Pursuant to section 61 of the Competition Act, CCCS will proceed to publish the above guidelines in the Gazette on 31 December 2021, and these revised guidelines will take effect on 1 February 2022. The guidelines will be reviewed from time to time to ensure their continued relevance, taking into account best practices from leading competition jurisdictions, experiences gleaned from CCCS's cases and inquiries, as well as the decisions of the Competition Appeal Board and the courts.