Proposed Business Collaboration Guidance Note

1. INTRODUCTION

1.1 The current economy is fast-moving and marked with greater disruptions. Businesses and their industries are transforming the way they deliver their goods and services to adapt and capture new opportunities. Businesses may be seeking ways to collaborate for better and more efficient outcomes both in Singapore and internationally but are unfamiliar with how competition law may apply to collaborations. It is therefore timely for the Competition and Consumer Commission of Singapore ("CCCS") to issue a guidance note on business collaborations to enable businesses to work together with greater confidence.

1.2 The aim of this guidance note is to provide clarity to businesses and trade associations on the ways to collaborate without harming competition. This includes providing greater guidance on the assessment factors that CCCS would generally consider (such as market share and structure) in determining whether a collaboration complies with section 34 of the Competition Act (Cap. 50B) (the "Competition Act"), when specific types of collaborations may give rise to competition concerns, and the conditions under which competition concerns are unlikely. This guidance note focuses on common types of collaborations. For additional information on section 34 of the Competition Act itself, readers may refer to the *CCCS Guidelines on the Section 34 Prohibition 2016*[1].

1.3 This guidance note is not a substitute for the Competition Act or its associated subsidiary legislation. The guidance note sets out CCCS's consideration of different types of collaborations generally and in broad terms. Please note that the examples given in this guidance note are for illustration purposes and are not exhaustive. They should not be understood as limiting CCCS's enforcement or assessment under the Competition Act. In referring to this guidance note, businesses should consider the specific facts and circumstances that apply to their intended collaborations.

1.4 Businesses that have any doubt about whether their commercial activities are compliant with the Competition Act may wish to (a) notify their collaborations to CCCS for guidance or a decision as to whether their collaborations are likely to infringe or have infringed the Competition Act, respectively or (b) seek legal advice.

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[1] https://www.cccs.gov.sg/-/media/custom/ccs/files/legislation/legislation-at-a-glance/cccs-guidelines/cccs-guidelines-on-the-section-34-prohibitions-2016.pdf?la=en&hash=E990CDA262BCD1BBBBD0C9F0E4129BC9B11F8022

2. APPLICABILITY OF GUIDANCE TO DIFFERENT TYPES OF BUSINESS COLLABORATIONS

Horizontal, vertical and lateral collaborations

2.1 Horizontal agreements[2] refer to agreements between two or more businesses[3] that are actual or potential[4] competitors[5]. Horizontal collaborations would typically be assessed under section 34 of the Competition Act, which prohibits agreements between businesses, decisions by associations, or concerted practices[6] that are anti-competitive, unless they are excluded or exempted (the "section 34 prohibition").

2.2 Vertical agreements refer to agreements between businesses operating at different levels of the supply chain in relation to how they may purchase or sell certain products, e.g. a distribution agreement between a manufacturer and its retailer. As vertical agreements are excluded from the section 34 prohibition by virtue of the Third Schedule of the Competition Act, this guidance note does not apply to collaborations or agreements that are purely vertical in nature.[7]

2.3 This guidance note, however, may potentially apply to lateral collaborations. Lateral collaborations refer to agreements between businesses in related or complementary markets. An example of a lateral collaboration could be an agreement between businesses selling complementary products (such as car tyres and safety air bags) to jointly sell or distribute these complementary products to car manufacturers.

Agreements

2.4 This guidance note applies to agreements as well as informal agreements or looser forms of collaborations, whether between businesses or through an association. [8] An

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[2] For the purposes of this guidance note, the terms collaboration and agreement may be used interchangeably.
[3] In this guidance note, businesses also refer to undertakings (as defined in the Competition Act) as 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. The terms may be used interchangeably.
[4] Two businesses are treated as actual competitors if they are currently selling competing products. A business is treated as a potential competitor of another business if, in the absence of the agreement, it is likely that the former, within a short period of time, would supply a competing product. For a business to be considered a potential competitor, it would need to enter the market fast enough so that the threat of potential entry constrains the behaviour of the existing businesses in the market.
[5] This would include agreements between actual or potential competitors coordinated by a facilitator that does not compete with them.
[6] A concerted practice may exist where there is informal co-operation, without any formal agreement or decision. A concerted practice would be found to exist if businesses, even if they did not enter into an agreement, knowingly substituted the risks of competition with co-operation between them.
[7] The fact that businesses are in a vertical relationship and/or have a vertical agreement does not, however, preclude the finding of a horizontal agreement which has as its object or effect the prevention, restriction or distortion of competition within Singapore.
[8] Collaborations would include agreements, decisions by an association of businesses or concerted practices as set out in paragraphs 2.10, 2.15 and 2.18 of the *CCCS Guidelines on the Section 34 Prohibition 2016*, respectively.

example of a loose form of collaboration would be an informal buying arrangement between members of a trade association for joint purchases of inputs.

2.5 The guidance note would also apply to joint ventures between businesses not amounting to a merger within the definition as set out under section 54(5) of the Competition Act.[9]

Restriction, prevention or distortion of competition by object or effect

2.6 An agreement is prohibited if it appreciably prevents, restricts or distorts competition, i.e., it is anti-competitive to an appreciable extent, unless it is excluded or exempted under the Competition Act. There are certain agreements that are considered, by their very nature, to be anti-competitive to an appreciable extent, such that they infringe the Competition Act without the need for CCCS to examine the competitive effects of such agreements. These agreements are said to restrict competition 'by object' or otherwise referred to as object restrictions. For example, agreements that have the purpose of price-fixing[10], bid-rigging[11], market-sharing[12] or imposing output limitations[13], will always be considered to have an appreciable adverse effect on competition. That said, any such agreement may still fall within the Net Economic Benefit ("NEB") exclusion[14]. If such agreements fail to meet the conditions for the NEB exclusion, they will be considered an infringement of the section 34 prohibition.

2.7 Under the NEB exclusion, an agreement that restricts competition appreciably would still be in compliance with the Competition Act if (a) it leads to economic benefits (for instance lower costs, improvements in the quality or services, or new innovative products) that outweigh the negative competition effects; (b) the economic benefits cannot be achieved without the agreement and any restrictions in it; and (c) competition is not eliminated in a substantial part of the market.

[9] Section 54(5) of the Competition Act defines that a joint venture constitutes a merger if it performs, on a lasting basis, all the functions of an autonomous economic entity. As set out in paragraph 3.23 of the *Substantive Assessment of Mergers Guidelines 2016*, a joint venture must thus fulfil the following three criteria before falling within the definition under section 54(5) of the Competition Act: (1) it must be subject to joint control; (2) it must perform all the functions of an autonomous economic entity; and (3) it must do so on a lasting basis.

[10] An elaboration on price-fixing is found at paragraphs 3.3 to 3.7 of the *CCCS Guidelines on the Section 34 Prohibition 2016.*

[11] An elaboration on bid-rigging is found at paragraph 3.8 of the *CCCS Guidelines on the Section 34 Prohibition 2016.*

[12] An elaboration on market-sharing is found at paragraphs 3.9 to 3.10 of the *CCCS Guidelines on the Section 34 Prohibition 2016.*

[13] An elaboration on the imposition of output limitation is found at paragraphs 3.11 to 3.12 of the *CCCS Guidelines on the Section 34 Prohibition 2016.*

[14] Paragraph 9 of the Third Schedule to the Competition Act lists out the conditions of the NEB exclusion.

2.8 More information on the NEB exclusion can be found in Annex C of the *CCCS Guidelines on the Section 34 Prohibition 2016*.[15]

2.9 In some collaborations, there may be potential object restrictions included amongst other broader provisions relating to the collaboration. An example would be a provision in a joint purchasing agreement requiring the collaborators to jointly decide on the price to purchase inputs from a supplier. These issues will be discussed in the relevant sections below, in relation to whether such collaborations could be regarded as restrictions by object as opposed to being assessed based on their effects on competition.

2.10 Agreements that do not have as their object the prevention, restriction and distortion of competition would be subject to an economic assessment of their effects on competition. The assessment of the effects of any such agreement may result in a finding that either (a) it has an anti-competitive effect, or (b) it brings about pro-competitive effects or has no effect on competition. The outcome of the assessment depends on the specific circumstances and market conditions surrounding each agreement. This guidance note sets out factors that CCCS will consider when carrying out an assessment of the effects of various collaborations. Collaborations that are anti-competitive by effect could similarly benefit from the NEB exclusion highlighted in paragraph 2.7 above.

CCCS'S GUIDANCE ON SPECIFIC TYPES OF COLLABORATIONS

3. INFORMATION SHARING

3.1 CCCS recognises that information sharing between businesses may often be helpful in allowing businesses to understand the market and plan their affairs, e.g. to understand historical developments in the industry to plan their individual strategies. However, the sharing of commercially sensitive information between businesses, particularly between competitors, can harm competition. This section will cover the types of information that businesses might wish to share and the competition assessment of such information sharing.

3.2 The sharing of both price and non-price variables, such as output, quality, future business strategies or other important variables that are important to a business' decision on how to compete,[16] can affect competition.

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[15] https://www.cccs.gov.sg/-/media/custom/ccs/files/legislation/legislation-at-a-glance/cccs-guidelines/cccs-guidelines-on-the-section-34-prohibitions-2016.pdf?la=en&hash=E990CDA262BCD1BBBBD0C9F0E4129BC9B11F8022

[16] Depending on the specific product or service, such factors may also include customer lists, production costs, turnovers, sales, capacities, inventories, stocks, marketing plans, trading terms and strategic risks and investment options.

3.3 Information sharing includes indirect forms of information sharing, such as sharing conducted through an intermediary like a consultant. Additionally, businesses should also be mindful that sensitive information may be shared through a variety of means, including informal channels such as social media or text messaging software applications or through price announcements to their competitors.

Information sharing can be pro-competitive

3.4 In the normal course of business, businesses share information on a variety of matters legitimately and with no risk to the competitive process. Generally, where businesses share historical, aggregated or publicly available information, it is unlikely that competition concerns will arise. Risks of competition concerns are further reduced if independent third parties collated and aggregated the information. For example, the sharing of aggregated statistical data, market research, and general industry studies is unlikely to be anti-competitive, since the sharing of such information is unlikely to reduce individual businesses' commercial and competitive independence.

Historical or aggregated information

Industry participants, such as business alliances or trade associations, often publish data such as statistics of past records, claims or awards, etc. For instance, in one case, an industry association would like to publish historical prices and capacities. CCCS is of the view that so long as the information is sufficiently historical, it is generally not objectionable. Further, if the data is also aggregated such that parties are unable to reverse engineer the statistics to ascribe the data to individual players, such data sharing would tend not to be objectionable from the competition perspective.

What constitutes as sufficiently historical – be it whether a few days, a few weeks or longer – would depend on the circumstances of each case. For instance, if it can be shown that data that is a few days old would be obsolete and is unlikely to influence individual businesses' commercial and competitive independence by the time it is published, such data is unlikely to have an appreciable effect on competition.

3.5 Indeed, competition may be enhanced by the sharing of information, for example, on new technologies or market opportunities, particularly where consumers are also informed. For instance, independent third parties may collect information from trade association members, aggregate and anonymise the data, to allow some performance benchmarking to be done by industry participants. Information may also be shared publicly or directly to consumers to allow consumers to be better aware about quality differences in products or to reduce information asymmetry between businesses and consumers. As a general principle, the more informed consumers are, the more effective competition is likely to be. Therefore, making information available to the public does not usually harm competition.

3.6 As another example, information may also be shared to ensure that there is interoperability between different technologies. This increases the options customers have when choosing between different technologies, or ensures that there is an effective transfer of technological know-how. In the context of research and development ("R&D"), information may also be shared to further technological innovation. The scope of such information sharing in the context of R&D and whether such sharing will affect the competitive state of the market will be considered in section 7 below.

Common competition concerns with information sharing

3.7 Information sharing may be anti-competitive where it impedes independent competitive decision-making. This occurs when the information shared allows businesses to reduce uncertainty from competition such that it reduces competitive pressure between competitors.

3.8 Generally, the more commercially sensitive the information shared, particularly between competitors, the more likely that the information sharing is anti-competitive. Further, the more recent or current the information shared, the more likely that the sharing could be anti-competitive.[17] This would also apply to the sharing of future business intentions. Competition concerns may also arise where the sharing of commercially sensitive information takes place in (a) a highly concentrated market with few competitors, (b) a highly homogenous and stable market with products or services that are not differentiated, or (c) a market where businesses have similar cost structures.

Price and non-price information sharing

3.9 The sharing of individualised price information is likely to lead to price coordination and therefore diminish competition that would otherwise be present between the competitors. This will be the case regardless of whether the information shared relates directly to the prices to be charged or to the elements of a pricing policy, for example, discounts, surcharges, pricing terms, and dates of price change. Sharing between competitors of their individualised intentions regarding future prices or elements of their pricing policies will normally be considered a restriction of competition by object as such sharing generally has the object of fixing prices.[18]

3.10 Whether sharing information on non-price variables is anti-competitive depends on the type of information shared, the structure of the relevant market and if such information reveals important factors that impact how businesses compete. Such non-price variables may include customer lists, production costs, turnovers, sales,

[17] An elaboration on the impact of different information shared on competition can be found in paragraph 3.20 of the *CCCS Guidelines on the Section 34 Prohibition 2016*.

[18] An elaboration on price and non-price information can be found in paragraphs 3.22 to 3.23 of the *CCCS Guidelines on the Section 34 Prohibition 2016*.

capacities, inventories, stocks, marketing plans, trading terms and strategic risks and investment options. For example, information about individual production costs may allow businesses to estimate the pricing intentions of their closest competitors. Another example of a potentially sensitive non-price variable would be information on a business's intended future output.

Discussions about prices

In an infringement decision against certain owners/operators of hotels for exchanging commercially sensitive information (CCCS 700/002/14[19]), CCCS found that the sales representatives from the owners/operators of the hotels had shared commercially sensitive information through phone conversations, face-to-face meetings and even text messages, in connection with the provision of hotel rooms in Singapore to corporate customers.

Specifically, the information shared was about confidential corporate room rates that were individually negotiated between each customer and hotel. In addition, the sales representatives also discussed future price-related strategies such as their proposed price increases for the following contractual year, their proposed bid prices in response to customer requests and their intentions to agree to a customer's price reduction request during negotiations.

The sharing of such information was considered anti-competitive by object, as the information was likely to have influenced the hotels' subsequent behaviour in the market. Without such information, the sales representative of each hotel would have had to independently determine their hotel's behaviour on the market, and there would have been more competitive pressure on rates or terms offered to customers.

Price recommendation by trade associations

3.11 Recommendations or guidelines by trade associations on prices to be charged by its members (including surcharges or discounts) are generally considered to be anti-competitive, since such recommendations (even if non-binding) can act as focal points for competitors to co-ordinate or fix prices. This can include a decision requiring members to post their prices where other members can access them e.g. where such prices are meant to be confidential as between each member and its customers.

Price guidelines

In a Statement of Decision[20] issued by CCCS[21], CCCS considered the impact of a set of Guideline on Fees ("GOF") issued by the Singapore Medical Association ("SMA"). The GOF

[19] https://www.cccs.gov.sg/public-register-and-consultation/public-consultation-items/id-against-hotels
[20] https://www.cccs.gov.sg/public-register-and-consultation/public-consultation-items/singapore-medical-association--guidelines-on-fees
[21] CCCS was known as the Competition Commission of Singapore at that time.

was a set of recommendations on private doctors' professional fees, which included fees for consultations, surgeries, preparation of medical reports and court appearances.

CCCS found that the GOF restricted competition by object and infringed section 34 of the Competition Act. Specifically, the GOF limited market players' independent decision-making and formed a focal point for prices to converge. Also, the fees were not based on actual price data, but were a recommendation by the SMA on what prices *should be*. Further, the GOF included minimum prices, contrary to the SMA's aim of preventing overcharging. CCCS also found that the GOF influenced new entrants' pricing decisions, and fostered compliance by pressuring medical practitioners to keep within the recommended fee range. The SMA subsequently withdrew the GOF.

Discussions about surcharges

In an infringement decision issued by CCCS against ten freight forwarders (CCS 700/003/11[22]), CCCS found that the freight forwarders, which were foreign-registered companies in Japan with Singapore subsidiaries or affiliates, had engaged in information sharing at meetings of an association of which they were members. CCCS found that the freight forwarders shared their views on the security surcharges and the fuel surcharges, decided collectively what action they would take, fixed the prices they would charge customers and discussed the implementation of the security charges and fuel surcharges, including how successful they were in collecting these charges and surcharges from customers. This was found to have infringed the section 34 prohibition.

Unilateral disclosures of information

3.12 A one-way disclosure of information by one business to its competitor may also constitute a concerted practice between businesses to restrict competition where the latter requests it, or at the very least, accepts it. Such disclosure, if it relates to commercially sensitive information such as pricing intentions, reduces uncertainty amongst the competitors involved and increases the risk of collusive behaviour.

3.13 In fact, simply attending a meeting where a company discloses its pricing plan (whether current or future intention) to its competitors is likely to be caught under the section 34 prohibition, even in the absence of an explicit agreement to raise prices. When a business receives commercially sensitive information like pricing from a competitor, it will generally be presumed to have considered the information and influenced its market behaviour accordingly.

[22] https://www.cccs.gov.sg/public-register-and-consultation/public-consultation-items/ccs-fines-10-freight-forwarders-for-price-fixing

Discussions about ticket prices

In the infringement decision against two ferry operators, CCCS found that the ferry operators had shared price information in relation to ferry tickets sold to corporate clients and travel agents (CCS 500/006/09[23]). This was a restriction of competition by object.

CCCS found that one of the ferry operators had copied the other operator in an email to a travel agent (a corporate customer) regarding its prices for ferry tickets.

CCS found that the one-way flow of information from one ferry operator to another was anti-competitive, even though there was no reciprocal sharing. The second operator's future behaviour on the market was presumed to no longer be independent due to it receiving sensitive price information from the first operator.

Further, as this was a market with only these two players at the time, the flow of information made it easier for these two competitors to act in concert when there was already limited opportunity for competition.

3.14 In order to show that a business did not participate in an anti-competitive sharing of information such as pricing intentions at a meeting, it is important for the business to publicly distance itself from the anti-competitive information sharing. This means that the business needs to take clear and unambiguous steps to denounce the conduct at the meeting, not attend subsequent meetings with similar information sharing, and determine its behaviour on the market independently.

Information sharing in the context of other types of collaborations

3.15 Information sharing often takes place in the course of businesses carrying out other types of collaborations. While the considerations around information sharing above generally apply, the information also needs to be viewed in the context of the collaboration within which the information sharing takes place. For example, some commercially sensitive information may need to be used for an efficiency-enhancing collaboration to take place. In such situations, there may be ways for the collaboration to continue while applying safeguards that minimise competition concerns arising from the use of the information, including only revealing information that is strictly necessary to implement the collaboration and ringfencing commercially sensitive information to prevent unnecessary sharing.

[23] https://www.cccs.gov.sg/public-register-and-consultation/public-consultation-items/ccs-imposes-financial-penalties-on-two-competing-ferry-operators-for-engaging-in-unlawful-sharing-of-price-information

Information sharing in the context of another type of collaboration

In the Poultry Hub Joint Venture ("JV") Notification for Decision (CCCS 400/005/17[24]), CCCS was concerned that the JV could facilitate anti-competitive information sharing between competitors. In particular, the JV parties were shareholders who were able to appoint directors to the JV's Board of Directors, but they also remained as competitors in the downstream markets. As a result, CCCS was concerned that the JV could potentially facilitate the sharing of confidential and commercially sensitive information relating to the respective parties' chicken supplies and slaughtering requirements. The sharing of such information would reduce competitive pressure and potentially lead to less competitive prices for customers. However, when the collaboration was viewed in its entirety, there were also economic efficiencies to be gained from the JV.

Ultimately, CCCS allowed the JV after accepting commitments from the parties not to share commercially sensitive information with one another and to ringfence such information required in the running of the JV. The parties committed to forming a clean team to manage any such confidential information within the JV, and an independent third party (known as a "monitoring trustee") was also appointed to monitor compliance with the commitments. The parties also implemented a competition compliance programme. These measures helped to minimise competition concerns arising from the sharing of commercially sensitive information while allowing the collaboration to achieve the potential efficiencies.

[24] https://www.cccs.gov.sg/public-register-and-consultation/public-consultation-items/proposed-joint-venture-poultry-slaughtering-hub

Summary of how to minimise competition concerns for information sharing

> **In summary, competition concerns are less likely to arise when:**
>
> a. **Information is publicly available or is not related to price or other important factors that impact how businesses compete;**
> **OR**
>
> b. **Information is historical, aggregated (especially by independent third parties) and cannot be attributed to individual businesses;**
> **OR**
>
> c. **The market has a large number of players with frequent entry and exits, and the relevant goods/services are highly differentiated or changes rapidly (on condition the information shared does not facilitate price-fixing, bid-rigging, market sharing or output limitation);**
> **OR**
>
> d. **In the context of a collaboration where commercially sensitive and individual information is needed, only information strictly necessary to implement the collaboration is shared and there are safeguards to ringfence commercially sensitive information so that businesses are unable to access information affecting competition between them.**
>
> **If the conditions above are not met, a more detailed assessment may be required as to whether the information sharing may be considered anti-competitive and whether it may still qualify for the NEB exclusion.**

4. JOINT PRODUCTION

4.1 There are various types of joint production agreements. For instance, businesses may enter into a collaboration agreement or arrangement, in which a jointly controlled company operates one or several production facilities like a production factory to jointly produce required inputs that the businesses then use to produce competing products. Businesses may also choose to enter into looser forms of collaborations, such as agreements to share resources (e.g. production capacity) or subcontracting agreements. Subcontracting agreements generally refer to the situation where one party entrusts to another party the production of a good or service. These types of agreements may be horizontal or vertical[25]. Horizontal subcontracting agreements refer to:

a. Unilateral subcontracting agreements;
b. Reciprocal subcontracting agreements; or
c. Subcontracting agreements to expand production.

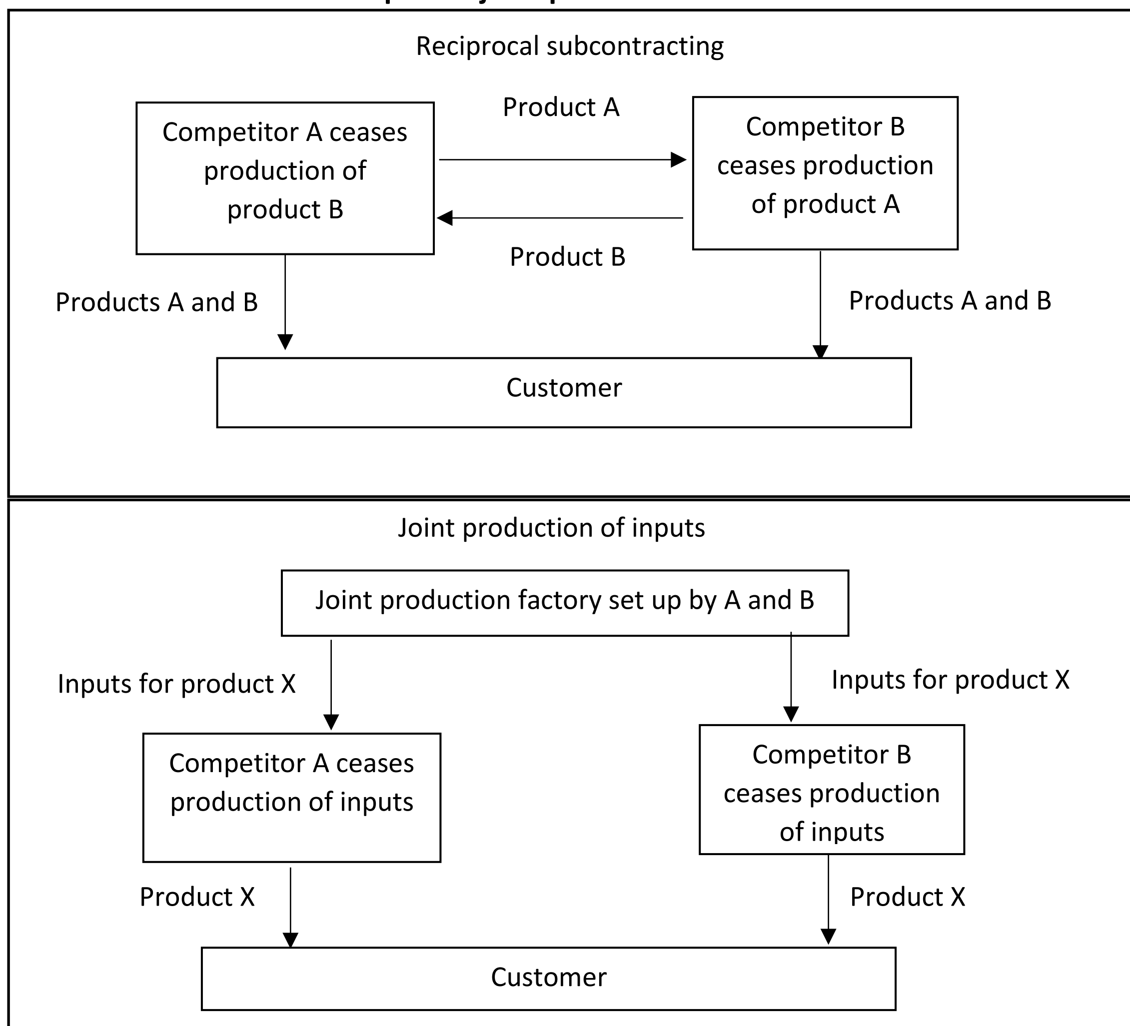
[25] This guidance note and more generally the Competition Act does not apply to pure vertical agreements.

4.2 Unilateral subcontracting agreements refer to the situation where between two competing businesses, one business agrees to fully or partly cease production of certain products and to purchase them from the other business, which in turn agrees to produce and supply the products. The subcontracting is therefore one-way from one business to another.

4.3 Reciprocal subcontracting agreements refer to the situation where two or more competing businesses agree, on a reciprocal basis, to fully or partly cease production of certain products and to purchase them from the other businesses in the agreement.

4.4 Subcontracting agreements to expand production refer to those where a contractor entrusts a subcontractor (who is a competitor) with the production of a product, but the contractor does not cease or limit its own production of the same product in question.

Examples of joint production collaborations



Joint production agreements may be pro-competitive

4.5 Joint production agreements can generate economic efficiencies and be pro-competitive. For instance, such agreements may generate efficiency gains, by allowing businesses to achieve cost savings in production, or to utilise more efficient technologies. Production agreements may also help businesses achieve economies of scale by expanding production at a lower cost per unit.

4.6 In addition, such agreements may also help businesses to combine complementary technical know-how to innovate and produce goods and services of better quality or variety than if the businesses had produced them independently, or even produce goods and services that they could not produce on their own.

Common competition concerns with joint production

4.7 Joint production agreements, however, must not be used to facilitate market sharing, bid-rigging, price-fixing or output limitation. For instance, businesses should not use joint production agreements as a front to share the market and avoid competing with one another in certain products. Agreements where businesses agree to impose production quotas or limit output and increase prices may also be regarded as restricting competition by object and correspondingly may be an infringement of the section 34 prohibition.

Assessment factors

4.8 In assessing whether joint production agreements that do not restrict competition by object are anti-competitive, CCCS will generally take into account the characteristics of the relevant market (such as the characteristics of the product and market structure), as well as the nature of the agreement. For example, subcontracting agreements to expand production are less likely to raise competition concerns compared to reciprocal subcontracting arrangements as the latter arrangement leads to an overall decrease in the number of producers of certain products and increases the common cost of both businesses due to the reciprocal purchasing. Comparatively, a subcontracting arrangement to expand production keeps the same number of competitors while allowing them to optimise production resources as necessary. In a joint production agreement, businesses may also have to agree on certain parameters such as prices they charge one another for sharing capacity to improve production efficiency[26]. In these cases, CCCS will assess on a case by case basis whether the agreement raises competition concerns based on the following factors, which are non-exhaustive:

- The extent to which the joint production increases market power of the businesses in the relevant market;

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[26] Jointly fixing such prices can be distinguished from jointly fixing prices charged to downstream customers, which would restrict competition by object.

- Whether the agreement increases the businesses' commonality of costs (i.e. the extent to which the businesses have similar variable costs);
- The extent to which the businesses may foreclose competition in a neighbouring or downstream market;
- The extent to which the production agreement may facilitate anti-competitive information-sharing.

Market power

4.9 One of the factors for analysing market power of the businesses is their market shares. Generally, an agreement will have no appreciable adverse effect on competition:

- for actual and potential competitors[27] - if the aggregate market share of the parties to the agreement (including other entities belonging to the same group) does not exceed 20%; or
- for non-competing businesses[28] - if the market share of each of the parties to the agreement does not exceed 25% on any of the relevant markets affected by the agreement.

4.10 The 20% threshold, i.e. the threshold for competitors, will be applicable where it is difficult to classify an agreement as an agreement between competitors or an agreement between non-competitors. Further details on market definition are available in the *CCCS Guidelines on Market Definition*.

4.11 The fact, however, that the market shares of the parties exceed the threshold levels set out in the paragraph above does not necessarily mean that they have market power or that the agreement would have appreciable adverse effects on competition. To assess the parties' market power, CCCS will take into account other factors such as whether the parties face strong competitive constraints from other credible competitors in the relevant market, potential competitors, any barriers to entry or expansion, whether the market is dynamic with low entry and expansion barriers, whether customers are able to switch suppliers, or have countervailing buyer power. Further, market concentration (whether most of the market shares are held by a small number of firms), which generally depends on the size and number of participants in the market, is also an indicator of the competitive pressure in the market. A collaboration that does not increase the level of concentration in a market significantly is less likely to be anti-competitive than one which does, because a significant increase in concentration may reduce competition by increasing the

[27] Two businesses are treated as actual competitors if they are currently selling competing products. A business is treated as a potential competitor of another business if, in the absence of the agreement, it is likely that the former, within a short period of time, would supply a competing product. For a business to be considered a potential competitor, it would need to enter the market fast enough so that the threat of potential entry constrains the behaviour of the existing businesses in the market.

[28] Non-competing businesses refer to businesses that are neither actual nor potential competitors.

market power of all businesses in the market and increase the scope for competitors to coordinate their market behaviour.

Assessment of a joint production agreement

In the Poultry Hub JV cited above, CCCS was concerned that the parties to the collaboration account for a substantial amount of market share of [40 – 50%] in the upstream and downstream levels of the supply chain - in the downstream level for the marketing and sale of fresh and frozen chicken products to the wholesale market, the parties remained competitors. As such, competition amongst the JV parties downstream could be adversely affected if there was any sharing of commercially sensitive information arising from the JV.

CCCS also found that the overlapping products sold by the parties were homogenous in nature and there was a certain level of transparency in the market in relation to one another's poultry supply, cost structure and levels, output and even customers. Further, barriers to entry could be high as there was a significant extent of vertical integration in the industry, and consequently new entrants would need to operate at multiple levels of the supply chain to effectively compete with the existing vertically-integrated players. There were also high regulatory barriers to entry.

Hence, even though there was a credible competitor that held a relatively high market share in the upstream market that was comparable to the JV parties, with five other competitors that collectively held only [10 – 20 %] market share and that therefore did not exert a strong competitive constraint, there was a risk that any information sharing amongst the JV parties could facilitate tacit or explicit collusion with this competitor, or the wider poultry industry in Singapore.

Commonality of costs

4.12 Commonality of costs refers to the extent to which variable costs are similar for parties to an agreement. If the joint production agreement increases parties' commonality of costs, the production agreement may make it easier for parties to collude. This is a concern especially if parties already have a high proportion of variable costs in common, or if the increase in the extent of common variable costs following implementation of the agreement is large. In such cases, the common cost structure increases the incentive and ability of businesses to collude as their interests becomes more aligned. However, CCCS recognises that joint production agreements may also reduce costs significantly. Economic efficiencies generated from a reduction in costs as a result of the joint production agreement may outweigh the harm from the increase in common cost structures.

Foreclosure of competition

4.13 The joint production agreement should not be used as a mechanism by which the parties foreclose competition downstream. For instance, a collaboration may be set

up to produce an intermediate good that is an important input for the downstream market while the collaborating businesses also compete in the downstream market. In such cases, CCCS will consider the extent to which the collaborating businesses are able to push prices higher or limit supply of the intermediate good through their control over its production, i.e., the greater their market power, the higher the risk that they will push prices higher or limit supply. The higher prices or limited supply of this important input could then limit the ability of competitors in the downstream market to compete with the collaborating businesses. Relevant considerations in this regard would be the market power of the parties to the joint production agreement in the production of the intermediate input, the strength of other competing suppliers downstream, as well as whether customers of the intermediate good are able to switch to competing suppliers.

4.14 Where the parties engaging in joint production may be able to raise the price or limit supply for a key component for a market downstream, they may raise the costs of their downstream competitors and foreclose competition. This could have the knock-on effect of increasing the parties' market power downstream. Their market power could be further entrenched if the other competitors downstream have weak market power, and customers find it difficult to switch suppliers in response to price changes.

Information sharing

4.15 CCCS will also consider the extent to which the joint production agreement may facilitate anti-competitive information sharing and whether the information shared is necessary for the agreement. For instance, a subcontracting agreement may potentially become a conduit by which parties share sensitive and confidential commercial information with one another beyond what is necessary for the joint production agreement. The sharing of information may serve to reduce or remove uncertainties inherent in the process of competition. For instance, if the joint production agreement allows parties to know each other's sales, pricing or output strategies or future intentions for other products and services, this may have an appreciable adverse effect on competition. However, if information shared relates mostly to historical, aggregated data or industry statistics, this is unlikely to have an appreciable adverse effect on competition. Further, commercially sensitive information that is necessary for the agreement would need to be ringfenced to reduce the anti-competitive effects. More details on information sharing can be found in section 3 above.

Information sharing in the context of joint production

As noted in the Poultry Hub JV case cited above, one of CCCS's concerns was that the JV would facilitate anti-competitive information sharing. The structure of the JV was such that the parties to the JV are shareholders who have the power to appoint directors to the JV's Board of Directors. Yet they remained as competitors downstream. As a result, CCCS was concerned that the JV could potentially facilitate the sharing of confidential and

commercially information relating to the respective parties' chicken supplies and slaughtering requirements. The sharing of such information would reduce competitive pressure and potentially lead to less competitive prices for customers. However, when the collaboration is viewed in its entirety, there are also economic efficiencies to be gained from the JV.

Ultimately, CCCS accepted commitments from the parties not to share any commercially sensitive information with one another. The parties also undertook to establish a special team to manage any such confidential information within the JV, and a monitoring trustee was also appointed to monitor compliance of the parties with the commitments. The parties also implemented a competition compliance programme. This helped to minimise competition concerns arising from the sharing of commercially sensitive information while allowing the collaboration to achieve the potential efficiencies.

Summary of how to minimise competition concerns for joint production agreements

In summary, competition concerns are less likely to arise when:

a. **The collaboration does not facilitate price-fixing, bid-rigging, output limitation and market sharing;**
   AND
b. **Collaborating businesses do not have market power, e.g., they have aggregate market shares of less than 20% (if they are actual or potential competitors) or less than 25% each (if they are non-competitors);**
   AND
c. **The collaboration does not result in collaborating businesses having a significant proportion of common costs unless there is significant cost reduction that outweighs the potential harm arising from such common costs;**
   AND
d. **The collaboration does not raise concerns in relation to the types of information sharing or contain safeguards to minimise concerns with information sharing as summarised below:**
   i. **Information is publicly available or is not related to price or other important factors that impact how businesses compete;**
      OR
   ii. **Information is historical, aggregated (especially by independent third parties) and cannot be attributed to individual businesses;**
      OR
   iii. **The market has a large number of players with frequent entry and exits, and the relevant goods/services are highly differentiated or changes rapidly (on condition the information shared does not facilitate price-fixing, bid-rigging, market sharing or output limitation);**
      OR
   iv. **In the context where the sharing of commercially sensitive and individual information is needed, only information strictly necessary to implement the joint production is shared and there are safeguards to ringfence commercially sensitive information so that businesses are unable to access information affecting competition between them.**

If the conditions above are not met, a more detailed assessment may be required as to whether a joint production collaboration may be considered anti-competitive and whether it may still qualify for the NEB exclusion.

5. JOINT COMMERCIALISATION

5.1 Joint commercialisation refers to agreements between competitors to cooperate in the selling, distribution or promotion of their products. There is a wide spectrum of collaborations possible under joint commercialisation agreements depending on the specific functions that the collaboration intends to cover. Collaboration agreements covering more functions are more likely to limit the extent of each party's independent decision making. For example, if the agreement requires all parties to jointly determine price, each individual party can no longer independently determine its own price. Thus, competition is more likely to be adversely affected when competitors' independent decision making is more limited or when their commercial interests become more aligned.

Joint commercialisation can be pro-competitive

5.2 Commercialisation agreements can also be benign or even pro-competitive. It can enable competitors to collaborate and achieve goals that are unattainable individually due to lack of resources, capabilities or capacities. For example, competitors may collaborate in order to enter a new market, through joint distribution efforts that may be too costly to invest in individually. Consumers may therefore benefit from the collaborations through increased availability of products, higher quality products, increased choices or lower prices in the market.

Joint advertising agreements

5.3 An agreement to jointly advertise, promote or market products is likely to be less restrictive on competition given that fewer commercial and sensitive aspects will need to be coordinated by the parties. For example, businesses independently producing the same product may collaborate to pool resources together to jointly advertise and market the use of the product in a new market whereas they may not have the incentive or resources to do so independently. However, as the agreement does not touch on the need to jointly determine the prices (or quantity) of the product that each of them will sell at, the agreement is less restrictive on competition and is unlikely to adversely affect the competition for the product.

Joint distribution agreements

5.4 While a distribution agreement generally refers to the vertical agreement between a supplier and a distributor for the latter to distribute, promote and potentially sell products, businesses operating at the same level of the supply chain may also collaborate horizontally through joint distribution. For example, competitors in the same market (e.g. selling the same good or providing the same services) may jointly appoint a third party as a distributor for their products in order to enter a new market. In such a scenario, each party remains free to set commercial terms such as price and quantity independently with the distributor, although there may be coordination on

other terms between the parties to maintain the agreement. However, as will be discussed below in paragraph 5.7, reciprocal distribution agreements may raise significant competition concerns.

Common competition concerns with joint commercialisation

5.5 Whether a joint commercialisation agreement is anti-competitive will depend on several factors including its purpose, how restrictive its terms are and the nature and structure of the market.

5.6 Commercialisation agreements must not be used to facilitate collusion or harmful collusive outcomes in the market. For instance, restrictions involving price-fixing, bid-rigging, market-sharing and output limitation are likely to be anti-competitive by their very nature, i.e. restricting competition by object. Thus, agreements such as joint selling, which involves the coordinated setting of prices or leads to market-sharing or output limitation, will be considered to restrict competition by object.

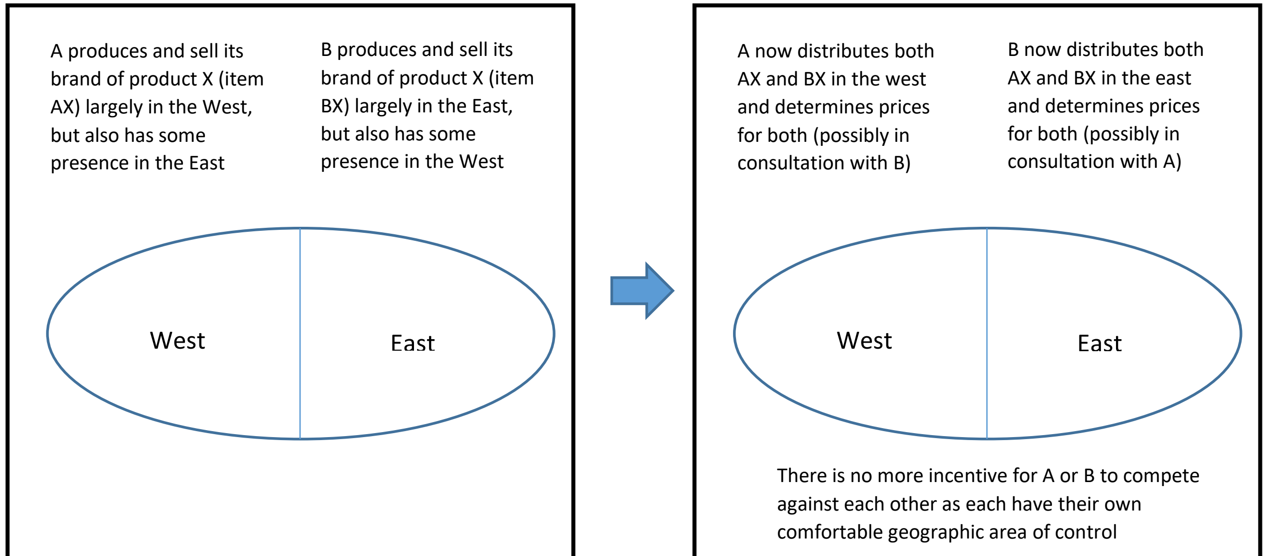
Reciprocal distribution agreements

5.7 While distribution agreements in general are less likely to raise competition concerns, one specific type of distribution agreement known as "reciprocal distribution agreements" can potentially raise significant concerns. Reciprocal distribution agreements refer to agreements where horizontal competitors agree to distribute each other's competing products on a reciprocal basis. There is a concern that these competitors may utilise the agreement to allocate different market segments (especially geographically) or fix prices amongst themselves. For example, producers A and B (both producing "product X") agree to distribute each other's brand of product X in separate geographic markets, with only A selling both brands of product X in geographic market 1 and only B selling both brands of product X in geographic market 2. A and B would also control or agree on the prices of product X in each geographic market. The reciprocal distribution agreement has therefore resulted in A and B splitting geographic markets 1 and 2 between them (market sharing) as well as fixing the prices (price fixing) for each market. As a result, A and B no longer compete with each other in these geographical markets.

Reciprocal Distribution Agreement

A to distribute and sell all item BX in the west;

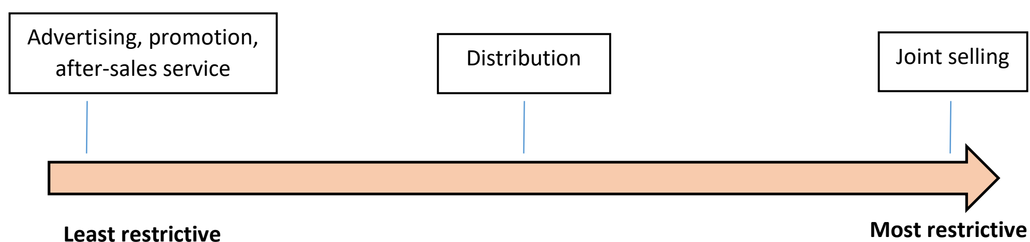
B to distribute and sell all item AX in the east.



Joint-selling agreements

5.8 Another form of commercialisation agreements is a joint-selling agreement, where competitors come together to jointly sell their products or services. This typically involves parties to the agreement jointly determining all commercial aspects relating to the sale of the product(s). This is likely to be the form of commercialisation agreement that restricts competition the most as parties to the agreement will have to agree on a wide-ranging number of factors, such as price and/or quantity to sell to customers, in order to operationalise the agreement. Joint selling agreements would therefore be considered as restricting competition by object and infringe the section 34 prohibition, unless they fulfil the criteria for the NEB exclusion.

5.9 The continuum of various collaborations and how likely they are to restrict competition is presented below.



Other assessment factors

Market power

5.10 One of the factors that CCCS will look at, in considering the competitive effects of the joint commercialisation agreement, is the market power of the collaborating businesses. One of the factors for analysing market power is the parties' market shares. Generally, an agreement will have no appreciable adverse effect on competition:

- for actual and potential competitors - if the aggregate market share of the parties to the agreement (including other entities belonging to the same group) does not exceed 20%; or
- for non-competing businesses - if the market share of each of the parties to the agreement does not exceed 25% on any of the relevant markets affected by the agreement.

5.11 The 20% threshold, i.e., the threshold for competitors, will be applicable where it is difficult to classify an agreement as an agreement between competitors or an agreement between non-competitors. Further details on market definition are available in the *CCCS Guidelines on Market Definition*.

5.12 The fact, however, that the market shares of the parties exceed the threshold levels set out in the paragraphs above does not necessarily mean that they have market power or that the agreement would have appreciable adverse effects on competition.

5.13 Apart from market share figures, CCCS will also take into account other factors when assessing parties' market power, such as whether the parties face strong competitive constraints from other credible competitors in the relevant market, potential competitors, any barriers to entry or expansion, whether the market is dynamic with low entry and expansion barriers, whether customers are able to switch suppliers, or have countervailing buyer power. Further, the market concentration (whether most of the market shares are held by a small number of firms), which generally depends on the size and number of participants in the market, is also an indicator of the competitive pressure in the market. A collaboration that does not increase the level of concentration in a market significantly is less likely to be anti-competitive than one which does, because a significant increase in concentration may reduce competition by increasing the market power of all businesses in the market and increase the scope for competitors to coordinate their market behaviour. For example, if two businesses jointly distribute their products through a third-party distributor, the supply of both businesses' products becomes concentrated through one distributor. If this results in a significant increase in the concentration, customers have less channels through which to purchase the products and the businesses and distributor may be able to raise prices.

Commonality of costs

5.14 Commonality of costs is a concern if parties already have a high proportion of variable costs in common, or if the increase in the extent of common variable costs following implementation of the agreement is large. In such cases, the common cost structure increases the incentive and ability of businesses to collude as their interests become more aligned.

5.15 To illustrate, suppose we have two firms in the business of selling product X, which is a high-tech product that requires significant marketing and promotion efforts for consumers to understand its benefits. Both firms therefore individually spend significant sums to advertise and raise awareness of product X, making advertising and marketing expenditure a large component of the costs of selling product X. As both firms have an interest to promote product X, they enter into a joint advertising agreement to share resources and research on how best to market product X. The agreement therefore further increases the commonality of a significant proportion of costs between the two firms, as they no longer have to individually decide on the amount of resources to invest in marketing (which is now fixed under the agreement). With a highly similar cost structure, the two firms may find that it is no longer worthwhile to differentiate themselves and to compete with each other, and may engage in collusive behavior instead.

5.16 Commonality of costs is most likely to increase the risk of a collusive outcome if the parties have market power and if commercialisation costs constitute a large proportion of variable costs related to the products concerned. However, CCCS recognises that joint commercialisation agreements may also reduce costs significantly. Economic efficiencies generated from a reduction in costs as a result of the joint production agreement may outweigh the harm from the increase in common cost structures.

Information sharing

5.17 CCCS will also consider the extent to which the joint commercialisation agreement may facilitate anti-competitive information sharing and whether information shared is necessary for the arrangement. Businesses should not leverage on a joint commercialisation agreement to share commercially sensitive information that is not required to achieve the objective(s) of the agreement. For example, even though some degree of information sharing is required in order to implement the agreement, such as the amount of marketing budget available for each business, competitors should not be discussing commercially sensitive information such as prices if it is not necessary for the agreement. Further, commercially sensitive information that is necessary for the agreement would need to be ringfenced to reduce the anti-competitive effects. For more details on information sharing, you may refer to section 3 above.

Summary of how to minimise competition concerns for joint commercialisation agreements

In summary, competition concerns are less likely to arise when:

a. **The collaboration does not facilitate price-fixing, bid-rigging, output limitation and market sharing;**
   AND
b. **Collaborating businesses do not have market power, e.g., they have aggregate market shares of less than 20% (if they are actual or potential competitors) or less than 25% each (if they are non-competitors);**
   AND
c. **The collaboration does not result in collaborating businesses having a significant proportion of common costs unless there is significant cost reduction that outweighs the potential harm arising from such common costs;**
   AND
d. **The collaboration does not raise concerns in relation to the types of information sharing or contain safeguards to minimise concerns with information sharing as summarised below:**
   i. **Information is publicly available or is not related to price or other important factors that impact how businesses compete**
      OR
   ii. **Information is historical, aggregated (especially by independent third parties) and cannot be attributed to individual businesses;**
      OR
   iii. **The market has a large number of players with frequent entry and exits, and the relevant goods/services are highly differentiated or changes rapidly (on condition the information shared does not facilitate price-fixing, bid-rigging, market sharing or output limitation);**
      OR
   iv. **In the context where sharing of commercially sensitive and individual information is needed, only information strictly necessary to implement the joint commercialisation is shared and there are safeguards to ringfence commercially sensitive information so that businesses are unable to access information affecting competition between them.**

If the conditions above are not met, a more detailed assessment may be required as to whether a joint commercialisation collaboration may be considered anti-competitive and whether it may still qualify for the NEB exclusion.

6. JOINT PURCHASING

6.1 Joint purchasing agreements refer to arrangements in which businesses agree to jointly purchase some or all their inputs from one or more suppliers. It will be considered a joint purchasing agreement whether the joint purchasing is done through a formal arrangement, for example through a company formed by a group of businesses (whether jointly controlled or even with minority stakes); or through an informal arrangement, for example collectively purchasing through a buying group, alliance or trade association. Collective bargaining, where businesses come together to jointly negotiate prices with suppliers for the purpose of joint purchasing, is also considered under the joint purchasing agreement.

Joint purchasing can be pro-competitive

6.2 CCCS notes that joint purchasing agreements may be pro-competitive in allowing businesses to combine their purchases together, thereby allowing them greater bargaining power to enjoy efficiencies such as volume discounts, or to share delivery and distribution costs. For instance, a supplier may be unwilling to supply a single buyer because the volume order is too small or will only supply at a higher price. By combining its purchases with other businesses for a larger order, the joint purchasing group will be able to either obtain supplies from the supplier which it may not have able to when purchasing individually, or be able to bargain for a lower price because of greater bargaining power or volume discount.

Common competition concerns with joint purchasing

6.3 As with other types of collaborations, joint purchasing agreements must not be used to facilitate harmful collusive outcomes in the market. For instance, restrictions relating to price-fixing, bid-rigging, market-sharing and output limitation agreements are likely to be considered anti-competitive by their very nature, i.e. restricting competition by object.

6.4 When CCCS assesses the effects of any joint purchasing agreement, two markets are relevant – the purchasing market and the downstream selling market.

Purchasing market

6.5 The purchasing market refers to the market in which the joint purchasing businesses interact with the suppliers, i.e. the market with which the joint purchasing agreement is directly concerned. For example, if healthcare providers purchase medical equipment through a joint purchasing agreement, the purchasing market would then be for medical equipment. One of the competition concerns that may arise in this market is if the buyers have a significant degree of market power when jointly

purchasing or in the extreme, monopsony power[29], and push prices to such depressed levels that suppliers are not be able to supply the products without compromising on safety and quality, or suppliers have to reduce their innovation efforts, leading to less product improvement in future. It would also be a concern if the joint purchasing agreement results in other competing purchasers not being able to purchase from the suppliers, for instance where the joint purchasing agreement results in significantly less supply available for other competing purchasers or if the buying group demands that the suppliers supply them exclusively.

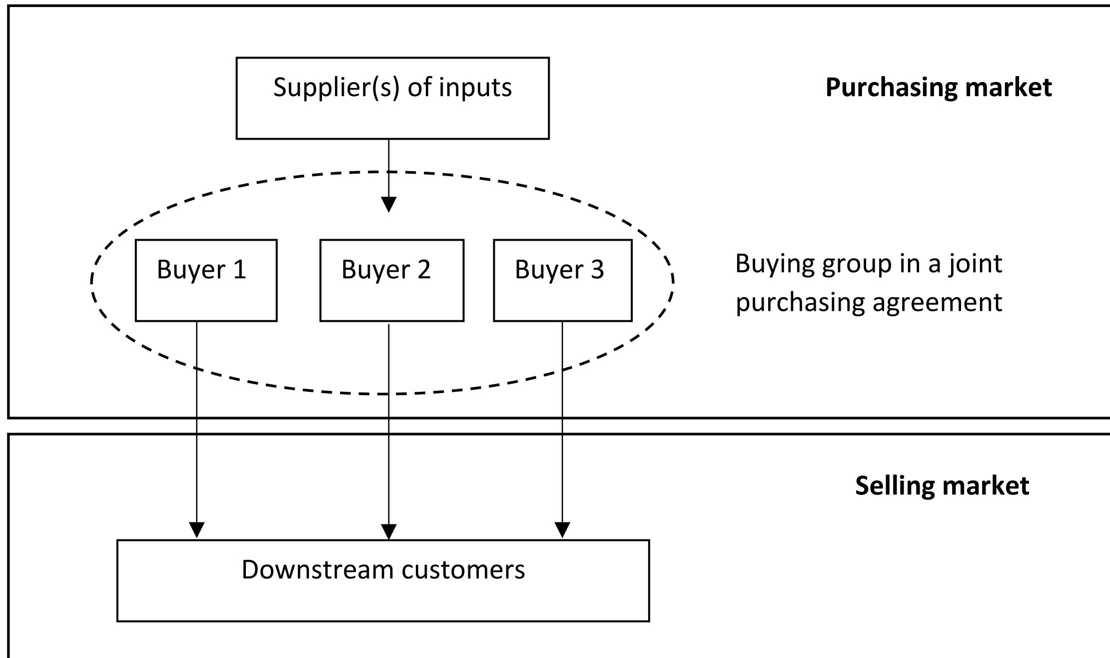
Selling market

6.6 The selling market refers to the downstream market in which the joint purchasing businesses are active as sellers, specifically the markets where the joint purchasing businesses are actual or potential competitors. If the joint purchasing businesses have significant market power in the selling market(s), then it is likely that any potential savings from the joint purchasing agreement will not translate into downstream efficiencies such as lower prices or increased output.

6.7 Further, there may be a lack of price competition on the goods and services which are produced from the jointly purchased inputs, especially if the inputs form a significant portion of the costs of the final good or service, or if the joint purchase results in a high commonality of variable costs. Joint purchasing agreements may also give rise to concerns over the independence of price-setting on the part of the businesses involved in the agreement, e.g., if sensitive commercial information such as purchase volume or margins have to be shared as part of the agreement. The sharing of such information, without safeguards, may facilitate coordination on the output price and volume, and in turn would result in an infringement of the Competition Act in the selling markets.

[29] Monopsony power occurs when there is a single or a group of buyers that has the ability to decrease price below competitive levels and results in a corresponding decrease in the output of the supplier.

The two markets in joint purchasing



Assessment factors

Buyer power / Market power

6.8 One of the factors that CCCS will look at, in considering the competitive effects of the joint purchasing agreement, is the buyer power and market power of the collaborating businesses. One of the factors for analysing buyer power/market power is the parties' market shares in each of the purchasing and selling markets.

6.9 Generally, an agreement will have no appreciable adverse effect on competition:
- for actual and potential competitors - if the aggregate market share of the parties to the agreement (including other entities belonging to the same group) does not exceed 20%; or
- for non-competing businesses - if the market share of each of the parties to the agreement does not exceed 25% on any of the relevant markets affected by the agreement.

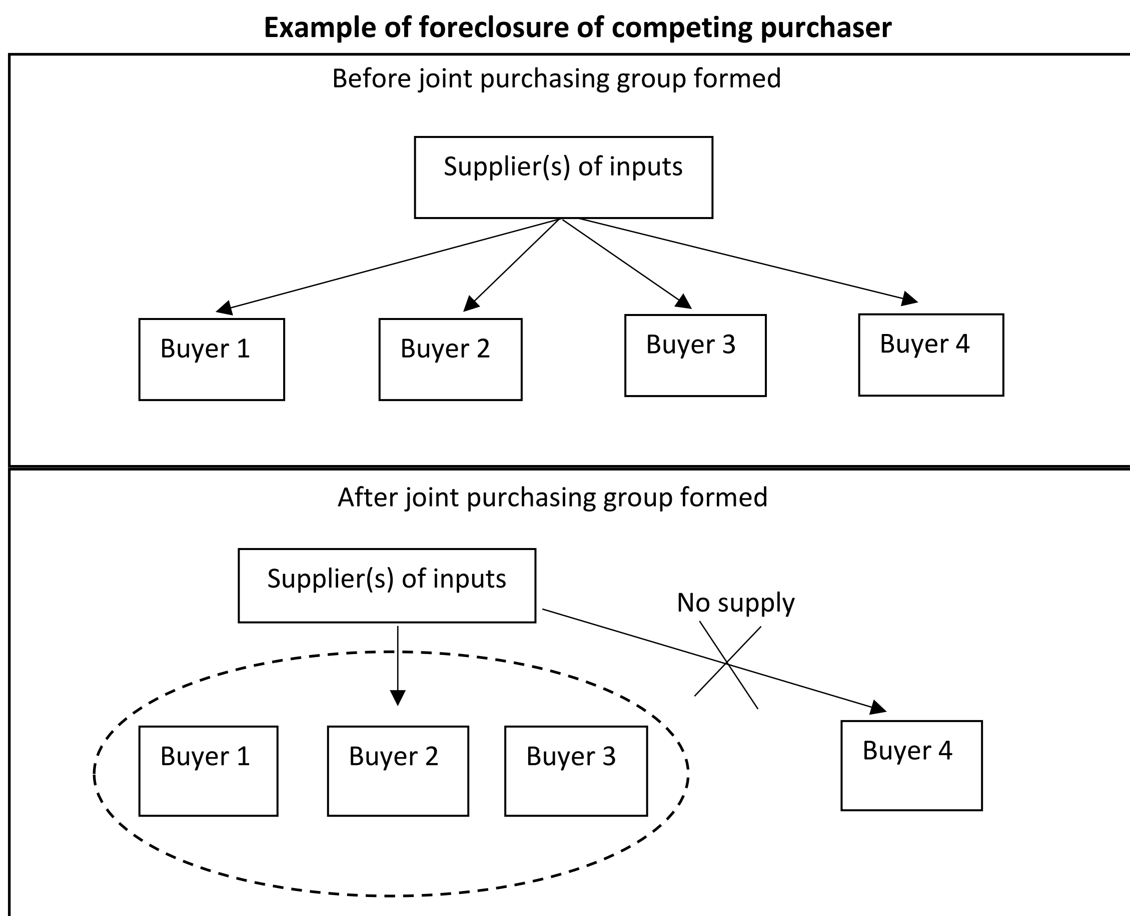
6.10 It does not necessarily mean that the parties have buyer power/market power or that the joint purchasing agreement will have an appreciable adverse effect if the market shares of the joint purchasing businesses exceeds the thresholds highlighted above. CCCS will consider the facts and circumstances of each agreement holistically in assessing the effects of the joint purchasing agreement

6.11 When assessing the joint purchasers' buyer power in a joint purchasing agreement, CCCS will consider the number of actual or potential upstream suppliers, or more accurately the market power of the suppliers in the purchasing market that can

supply the required inputs. If the upstream suppliers have market power, there are more compelling reasons to argue that a joint purchasing agreement will then balance the bargaining power between the suppliers and purchasers and lead to pro-competitive benefits such as lower prices or reduced transaction, delivery and distribution costs in respect of the required inputs.

6.12 Upstream suppliers with market power would also be in a better position to counteract any exercise of joint monopsony power by the joint purchasing businesses. However, the fewer the number of upstream suppliers and the more limited the supply in the purchasing market, the higher the likelihood that businesses competing with the joint purchasing businesses in the purchasing market may be foreclosed from suppliers, i.e. businesses competing with the joint purchasers to buy inputs may face difficulties or be unable to obtain the inputs. Any barriers to entry that may restrict entry of potential upstream supplier(s) would also be an important determinant as to whether other competing purchasers may be foreclosed in the purchasing market.

Example of foreclosure of competing purchaser



Commonality of costs

6.13 CCCS will also consider the proportion of inputs that are jointly purchased by the collaborating businesses. The higher the proportion of each business's costs that the

jointly purchased inputs make up, the higher the commonality of costs of the collaborating businesses. Highly similar cost structures between the collaborating businesses increase their incentive and ability to collude in the selling market(s) as their interests become more aligned, especially if the businesses have significant market power in the selling market.

Information sharing

6.14 CCCS will also consider the extent to which the joint purchasing agreement may facilitate anti-competitive information sharing and whether information shared is necessary for the arrangement. Businesses should not leverage on a joint purchasing agreement to share commercially sensitive information that is not required to achieve the objective(s) of the agreement. For example, even though some consensus on the purchase price is required in collective bargaining, there is no necessity for the collaborating businesses to also discuss their downstream selling prices. Discussing and agreeing on downstream selling prices to customers would be considered a form of price-fixing agreement, which is an infringement of the Competition Act. Certain safeguards such as ringfencing of information may also be needed to minimise adverse competition effects arising from the use of the commercially sensitive and individualised information such as individual business' required inputs to be purchased which may provide indications of capacity or limitations. For example, there would be less concerns if there is a neutral third-party or a clean team responsible for collating the data and aggregating the information necessary for the joint purchase. For more details on information sharing, you may refer to section 3 above.

Summary of how to minimise competition concerns for joint purchasing agreements

In summary, competition concerns are less likely to arise when:

e. **The collaboration does not facilitate price-fixing, bid-rigging, output limitation and market sharing;**
AND

f. **Collaborating businesses (a) do not have buyer power in the purchasing market, e.g. they have aggregate market shares of less than 20% and (b) do not have market power in the selling market(s), e.g. they have aggregate market shares of less than 20% (if they are actual or potential competitors) or less than 25% each (if they are non-competitors);**
AND

g. **The available supply in the purchasing market is not limited and other competing purchasers are not foreclosed from suppliers;**
AND

h. **The collaboration does not result in collaborating businesses having a significant proportion of common costs unless there is significant cost reduction that outweighs the potential harm arising from such common costs;**
AND

i. **The collaboration does not raise concerns in relation to the types of information sharing or contain safeguards to minimise concerns with information sharing as summarised below:**
   i. **Information is publicly available or is not related to price or other important factors that impact how businesses compete;**
   OR
   ii. **Information is historical, aggregated (especially by independent third parties) and cannot be attributed to individual businesses;**
   OR
   iii. **The market has a large number of players with frequent entry and exits, and the relevant goods/services are highly differentiated or changes rapidly (on condition the information shared does not facilitate price-fixing, bid-rigging, market sharing or output limitation);**
   OR
   iv. **In the context where sharing of commercially sensitive and individual information is needed, only information strictly necessary to implement the joint commercialisation is shared and there are safeguards to ringfence commercially sensitive information so that businesses are unable to access information affecting competition between them.**

If the conditions above are not met, a more detailed assessment may be required as to whether a joint purchasing collaboration may be considered anti-competitive and whether it may still qualify for the NEB exclusion.

7. RESEARCH & DEVELOPMENT

7.1 Research and development ("R&D") agreements can take many forms. It may refer to R&D collaborations between businesses on a new or existing product, technology (such as know-how or intellectual property rights which are marketed separately from the product) or innovation (R&D efforts for entirely new products with new demands). It also includes the outsourcing of R&D activities to third parties.

7.2 A collaboration may also include further commercial activities such as joint production or marketing efforts post-R&D The different relevant sections of the guidance note as set out in sections 4 and 5 above would apply to the other activities in an R&D agreement. The different relevant sections of the guidance note as set out in sections 4 and 5 above would apply to the other activities in an R&D agreement.

R&D agreements can be pro-competitive

7.3 R&D collaborations can lead to efficiencies such as newer and/or improvements in products or technologies, or quicker developments as a result of the sharing of technical information, know-how, resources and complementary skillsets. For example, a small business may have the necessary know-how to develop a new drug product but lacks the necessary resources to conduct experiments and trials on a large enough scale to enable the drug to be patented and approved to be marketed to the public. If the business collaborated with another company that has the necessary resources but does not currently produce or have the ability to produce similar drugs in the same category, the drug may have a higher chance of being approved and brought to market, and possibly within a shorter period of time. This would be a pro-competitive outcome. In this case, there is no concern about any loss in competition as both businesses are not considered to be actual or potential competitors.

7.4 The question of whether the businesses are considered actual or potential competitors hinges on objective factors such as whether the businesses were in the midst of independent R&D on the same product or technology and whether the businesses have the separate and necessary capabilities to conduct the full R&D process in its entirety independently. The fact that businesses are currently competing in the R&D of a product or technology does not mean that they cannot collaborate on R&D on other products or technologies in which either one or both businesses do not compete in. That said, for businesses to be considered neither actual nor potential competitors, any R&D collaboration has to be limited to the non-competing product or technology and must not extend to other areas in which the businesses currently compete in.

7.5 Even where the businesses are competitors, R&D collaborations can still lead to pro-competitive outcomes, e.g. the sharing of knowledge may result in better quality

products for both businesses, and may disseminate knowledge that in turn spurs greater innovation.

Common competition concerns with R&D

Existing product or technology

7.6 Competition concerns may potentially arise in a R&D collaboration when the businesses are actual or potential competitors in the market for an existing product or technology, or if the R&D removes a potential maverick[30] from the market. This is because where the businesses are competitors on existing products or technologies, collaborations between the businesses may reduce their incentives to compete and have negative effects on prices, output, quality and/or variety.

New product or technology

7.7 For R&D collaborations on new products or technologies, the competition impact is likely to be on the level of innovation instead of on existing products or technologies. Competition concerns may arise if the collaboration reduces the level of competition to innovate, e.g. by reducing the number of competing innovators significantly or by removing a potential maverick, which will have an impact on the quality and variety of new future products or technologies and on the speed of innovation.

Assessment factors

7.8 An R&D collaboration between businesses that are neither actual nor potential competitors is not likely to be anti-competitive. Some of the other factors CCCS will consider in assessing R&D collaborations are set out below.

Existing product or technology

7.9 Given that a R&D collaboration between competing businesses that is aimed at developing improvements to existing products or technologies may impact competition in these markets, CCCS will consider if the collaborating businesses have market power in the respective markets in the first instance. R&D collaborations between competing businesses would only potentially raise competition concerns if the businesses have some market power in the existing product or technology market.

7.10 One of the factors for analysing market power of the parties is their market shares. Generally, an agreement (between actual or potential competitors) will have no appreciable adverse effect on competition:

[30] Mavericks can be defined as businesses which may exert a disproportionate competitive effect in markets where they compete for example if it threatens to disrupt markets with a new technology or business model or if it has otherwise resisted prevailing industry norms in terms of how it competes.

- if the aggregate market share of the parties to the agreement (including other entities belonging to the same group) does not exceed 20%.

7.11 The fact, however, that the market shares of the parties exceed the threshold levels set out in the paragraph above does not necessarily mean that the parties have market power or that the agreement would have appreciable adverse effects on competition. To assess parties' market power, besides market share figures, CCCS will also take into account other factors such as whether the parties face strong competitive constraints from other credible competitors in the relevant market, potential competitors including any potential mavericks, any barriers to entry or expansion, whether the market is dynamic with low entry and expansion barriers, whether customers are able to switch suppliers or have countervailing buyer power.

New product or technology

7.12 For R&D collaborations which are aimed at developing entirely new products or technologies, CCCS would be concerned about the impact the collaboration has on the innovation efforts for these new product or technology markets. Therefore, CCCS will consider the number of current competing R&D efforts within the same or similar relevant product or technology market. If, for example, the R&D collaboration brings together the two frontrunners in the current race to produce a new product, with few or no viable alternative R&D efforts undertaken by competitors, there may be competition concerns in terms of the impact on prices, output, quality or variety.[31]

[31] If there is no viable alternative R&D, the collaborating businesses may also become sole controllers of a new product/technology. If the product/technology is an essential input for other products, they can gain the ability to foreclose competition by denying access to the essential input.

Summary of how to minimise competition concerns for R&D collaborations

In summary, competition concerns are less likely to arise when:

a. **The collaboration is between businesses that are not actual or potential competitors or does not remove a maverick competitor from the market;**
OR

b. **Where the collaborating businesses are actual or potential competitors for existing products or technologies, they do not have market power, e.g. their aggregate market share is less than 20%;**
OR

c. **Where the collaboration is on new products or technologies, there are multiple viable alternative R&D projects undertaken by competitors going on.**

If the conditions above are not met, a more detailed assessment may be required as to whether a collaboration may be anti-competitive and whether it may still qualify for the NEB exclusion.

8. STANDARDISATION AND STANDARD TERMS AND CONDITIONS

8.1 The standardisation of technical specifications or trade terms helps to reduce information asymmetry, lower transaction costs and fosters trust in the market. CCCS recognises that agreements on standards may benefit consumers by leading to improvements in production through reducing costs or raising quality, or through the promotion of technical and economic progress by reducing waste and consumers' search costs.

8.2 Businesses can also benefit from standards, as they often represent "best practices" in the market. By leveraging on standards, businesses may be able to facilitate new growth and market opportunities, drive productivity, optimise resource efficiency and support safety and social needs.

8.3 There are two broad categories of standardisation that will be covered in this guidance note, namely standardisation agreements and standard terms.

Standardisation agreements

8.4 Standardisation agreements have as their primary objective the definition of technical or quality requirements that current or future products, production processes, services or methods may comply with. They often cover grades, sizes, product or technical specifications and are especially important in areas where compatibility and interoperability with other products or systems are required.

8.5 Standardisation agreements are usually established by standard-setting organisations. In Singapore, the national standard-setting process is largely overseen by Enterprise Singapore, with its Standards Council, Standards Committees, Technical Committees and Working Groups working hand in hand to generate the Singapore Standards.

8.6 This guidance note will not go in-depth into the specifics of developing standards and the standard-setting process. Instead, the focus will be on the applicability of the Competition Act to the various processes involved in the development of standards.

Standard terms

8.7 Standard terms are used in certain industries where the sector regulator or trade association attempts to improve standards in the industry. Standard terms and conditions of sale or purchase can be voluntary (i.e. optional for a business or member to adopt) and are separate from licensing requirements, which are compulsory. When standard terms are widely used within an industry, the conditions of purchase or sale in the industry may become so aligned that there are few alternatives available and less choice.

8.8 For the purposes of this guidance, only standard terms that establish the conditions of sale and purchase of goods and services between competitors and customers are covered. Standard terms that are generated for a business's own internal use are not covered as they do not relate to competition between businesses.

Standardisation and standard terms can be pro-competitive

8.9 Standardisation frequently benefits businesses and consumers, by enabling businesses to lower costs, improve production, improve quality and promote technical progress in the market. Customers also benefit from higher quality products, reduced uncertainty and improved choices. Standard terms can also be pro-competitive as they can help customers compare across competing offers more easily and can improve efficiency in the sales process.

Common competition concerns

Standardisation agreements

8.10 There are however three main potential areas of concern with standardisation agreements:

Foreclosure of innovation – Standardisation agreements may limit technical development and innovation when competing technologies are excluded during the standard setting process. As different technologies compete to be included in the standard, competing technologies may be excluded from the market when the

standard is chosen. Market expansion is thus hampered for these competing technologies, especially if the businesses developing these competing innovations were unjustifiably excluded during the standard-setting process.

Exclusion or discrimination on use of the standards – After the establishment of a standard, certain businesses may be prevented from obtaining effective access to this standard. This can take the form of restricted access, the complete prevention of access or alternatively access only on prohibitive or discriminatory terms. For example, a trade association may set industry standards that only its members can meet, thereby preventing non-members from competing with its members. The organisations holding the rights to intellectual property, e.g. patents, making up the standard could also refuse to license or impose conditions such as excessive royalty fees, thereby effectively preventing access to the standard. This can be especially harmful to competition if the standards represent an important entry barrier to the market(s).

Elimination or reduction of competition –Businesses may engage in anti-competitive discussions, e.g. agree to decrease quality collectively on the pretext of meeting standards, during the standard-setting process, thereby reducing or eliminating competition in the industry or markets concerned, resulting in collusive outcomes.

8.11 In view of the above, businesses or organisations interested in pursuing standardisation agreements should be mindful to avoid any unfair practices during the standard-setting process. Unnecessary restrictions in the terms of access to the standards should also be avoided. Competition concerns are less likely to arise when standards are established fairly through a transparent process and access to the standards are fairly given.

Standard terms

8.12 Standard terms generally do not limit the innovation of products or product quality and variety. However, competition concerns may still arise under certain conditions:

Prescriptive standard terms that define the scope of a product – When standard terms that define the scope of a product or service are established as the industry norm, the incentive to deviate and offer a more competitive and differentiated product offering may be reduced. For example, if standard terms for a particular service is so prescriptive that it must consist of only items A, B, and C and nothing else, there may no longer be any incentive for service providers to compete by offering other options such as sub-sets of the items at a cheaper price, or by including item D into the scope at a significant discount.

Affecting price competition – In circumstances where standard terms relate to or prescribe prices, price competition will be affected. This is especially so when a majority of the industry adopts the prices or pricing components under the standard

terms, reducing incentives for businesses in the industry to compete in terms of prices. For example, if the industry standard for a certain surcharge is stated at $X, or if the standard terms provide that a surcharge is to be charged, there may not be any incentive for firms to compete by offering their products or services without the surcharge or with a lower-priced surcharge (i.e. essentially undercutting other firms that charge the standard surcharge amount).

8.13 In view of the above, businesses or organisations interested in establishing standard terms in their industry should be mindful not to have overly extensive or prescriptive benchmarks, or standard price or non-price terms that facilitate price-fixing, bid-rigging, market sharing or output limitation. Businesses should not be compelled to adopt the standard terms and should retain the ability to come up with their own terms if they wish to. Competition concerns are less likely to arise when standards terms are concise and relate specifically to their objectives in mind and businesses are not compelled to adhere to them.

Assessment factors

Standardisation agreements

8.14 CCCS will generally assess standardisation agreements based on their effect on competition (unless the conduct in question is clearly harmful to competition, e.g. agreements by competitors to fix their selling prices during the standardisation process). CCCS will assess if the standards were established objectively, and whether the standards are used to exclude or discriminate unfairly against certain businesses or if access is granted fairly.

Whether the standards were established objectively – Standards should be set objectively, where all stakeholders that are likely to be affected by the eventual, established standards have the unrestricted right to participate or provide feedback during the standard-setting and adoption process. This will help to ensure that the standard-setting process is clear, transparent, and the standard is established objectively and does not discriminate against any business or stakeholder.

Whether access to the standard is provided fairly – After a standard is established, access to the standards should be provided fairly. This will help to ensure that the standards are accessible and not used to discriminate or exclude certain interested businesses. For example, where there are underlying patents essential to a standard, having the patent holders provide fair, reasonable and non-discriminatory (“FRAND”) commitments to the standard-setting body before their patents can be considered for the standard would allow fair access to the standard and mitigate concerns in relation to refusal to license or the imposition of unreasonable fees. The standardisation agreement should also not restrict members from developing alternative standards or products, which helps to provide room for competition.

Availability of alternatives in the market – Apart from the established standard, the availability of alternatives in the market to the standard is also important in assessing whether competition concerns may arise. For industries where such existing competition to the standards are present, competition concerns are less likely to surface.

Standard terms

8.15 Similar principles relating to restriction, access and transparency are also what CCCS will look at for standard terms. CCCS will assess if the standard terms are unnecessarily prescriptive and/or extensive, the level of existing competition in the market and proportion of the market adopting the standard terms.

Overly prescriptive terms or terms relating to important factors of competition – While standard terms seek to establish the best practices in the industry that businesses can look to adopt, they may be overly prescriptive and establish benchmarks on important metrics of competition such as price, output or the scope of product including ancillary terms such as cancellation charges, after-sale service, warranty, refund policies. If these metrics are established as binding standard terms, individual competitors will have little incentive to deviate from the standard terms and conditions, eliminating competition in that respect. This may be an infringement of the Competition Act. For example, if binding standard terms are established in a service industry on the scope of work, service providers will not have any incentive to innovate and compete to provide value-adding services other than those already included in the standard terms. Customers may therefore face diminished competition and choices in the market. Further, standard terms that facilitate price-fixing, bid-rigging, market sharing or output limitation would infringe the section 34 prohibition.

Existing competition to the standard terms – In industries where there are credible alternatives to the established terms, competition concerns are less likely to surface given that firms in the industries retain the choice to not follow the standard terms. Implicitly, this assumes that any established standard terms are non-binding and competitors remain free to adopt any standards according to their preference.

How extensive the standard terms are – Standard terms can cover a large proportion of the market in two ways. Firstly, it can include the majority of the terms relating to a product offering, leaving little room for competitors to innovate or compete in other ways. Secondly, it can be so well-established in the market that the vast majority of businesses are using the standard terms. This can lead to the scenario where no firms will have any incentive to deviate from the standard, impeding innovation and competition. Furthermore, the two are not mutually exclusive, meaning to say that standard terms can be so entrenched in a market that it covers most of the terms relating to a product offering and is used by most of the industry.

9. ADDITIONAL INFORMATION FOR TRADE ASSOCIATIONS

9.1 CCCS notes that section 34 of the Competition Act also applies to decisions and guidelines by trade associations. CCCS recognises the important role that trade associations play in advancing the interests of its members, the industry and the economy. For example, trade associations may often be the link between government policy makers and the industry in surfacing issues encountered by their members, or to provide suggestions and feedback to proposed policies.

9.2 Trade associations often drive collaborations to enhance the efficiency of its members and the industry, and may spearhead standardisation efforts on products and technologies or dissemination of good industry practices to raise quality and ensure inter-operability. Trade associations may also engage in the preparation of industry studies or the dissemination of aggregate market information to help businesses with performance benchmarking or with their discussions with government policy makers.

9.3 In fact, trade associations are also partners with CCCS in educating its members about competition law compliance. CCCS recognises that trade association activities in general, such as those described above, are important for the continuous development of various industries and the economy. The issuance of this business collaboration guidance note is not meant to curtail such activities. On the contrary, this guidance note is meant to provide greater clarity and assurance on how to collaborate so that businesses and trade associations can be more confident that their collaborations are in compliance with the Competition Act.

9.4 When supporting collaborations, trade associations can take reference from the information set out under the various types of collaborations described in this guidance note. The information highlights the conditions under which competition concerns are less likely, and what factors association members can look out for when considering collaborations. CCCS further highlights that supporting activities that trade associations carry out to help their members' collaborations, such as discussing collaborations with government agencies, searching for possible investors, getting a consultant to carry out feasibility studies, are unlikely to raise competition concerns if information sharing, if any, follows the guidance in section 3 above. As a further safeguard to avoid instances where members unknowingly discuss topics that infringe the competition law at association meetings, associations are encouraged to establish a clear and specific agenda before the meeting.

10. SEEKING GUIDANCE OR DECISION FROM THE CCCS ON COLLABORATIONS

10.1 The guidance set out for the different types of collaborations is meant for businesses to self-assess if the collaborations will raise competition concerns. The assessment

factors and the conditions under which competition concerns are less likely are highlighted in this guidance note to provide businesses greater confidence to collaborate in compliance with the Competition Act.

10.2 Alternatively, if businesses remain in doubt as to whether a specific collaboration complies with the Competition Act, they may wish to notify the collaboration to CCCS for guidance or decision as to whether it would be likely to infringe or has infringed the section 34 prohibition respectively. Please note that there is no legal requirement for businesses to notify their collaborations to CCCS. It is for the businesses to self-assess and decide whether to make a notification for guidance or decision[32] to CCCS. Businesses in doubt as to whether their collaborations comply with the Competition Act can seek independent legal advice.

11. CROSS-BORDER COLLABORATIONS

11.1 Businesses should note that even where the collaborations are cross-border where the agreement is made outside Singapore or any party to the agreement is outside Singapore, the Competition Act could still be applicable where competition in a market in Singapore is affected. The section 34 prohibition applies to any agreement or collaboration which has as its object or effect the prevention, restriction or distortion of competition within Singapore.

11.2 For example, a joint production collaboration between two businesses for products that are to be manufactured overseas and sold to various countries including Singapore may have an effect on competition in Singapore, and therefore need to be evaluated against the Competition Act.

11.3 Conversely, local collaborations could also be subjected to competition law in affected overseas markets, including within the Association of Southeast Asian Nations ("ASEAN") countries. The website[33] of the ASEAN Experts Group on Competition ("AEGC") contains useful information on the competition law and regime in the various ASEAN countries. A particularly useful resource would be the Handbook on Competition Policy and Law in ASEAN for Business 2017, a copy of which can be obtained from AEGC's website.

[32] Notifications for a guidance or decision to CCCS incur a notification fee. More details of the notification process can be found on CCCS's website as well as the *CCCS Guidelines on Filing Notifications for Guidance or Decision with respect to the Section 34 Prohibition and Section 47 Prohibition 2016*.

[33] www.asean-competition.org/aegc

12. CONCLUSION

12.1 This guidance note set outs how CCCS assesses six common types of collaborations, and makes clear the conditions under which competition concerns are less likely to arise. It seeks to serve as a reference to provide businesses and trade associations with the information they need to collaborate with greater confidence.

12.2 However, as noted above, if businesses and trade associations require some form of legal certainty, there is the avenue of coming to CCCS for guidance or decision or to seek independent legal advice.

12.3 For easy reference, the flowchart in Annex A below sets out in summary the various steps for businesses to consider in structuring or assessing their collaborations.

Annex A: Flowchart