

Competition & Antitrust and Trade

CCCS Consults on New General Business Collaboration Guidance Note

Executive Summary

To facilitate businesses' collaboration in this climate of swiftly evolving business conditions, the Competition and Consumer Commission of Singapore ("**CCCS**") has issued a [public consultation](#) on a proposed Business Collaboration Guidance Note ("**Guidance Note**") to help businesses and trade associations understand the competition issues that may arise from their collaboration and provide ways to avoid or alleviate these issues. The Guidance Note focusses on six common types of business collaborations, namely information sharing, joint production, joint commercialisation, joint purchasing, joint research and development and standardisation.

In this Update, we cover salient features of the proposed Guidance Note, such as its applicability, key competition concerns of the common types of collaborations, how CCCS generally assesses compliance of such collaborations with section 34 of the Competition Act ("**Act**"), and how to minimise competition concerns. We will also briefly touch on how trade associations may support collaborations amongst their members without falling foul of the law.

The proposed Guidance Note may be accessed [here](#). The consultation closes on 27 August 2021.

Background

Section 34 of the Act prohibits agreements between businesses which have as their object or effect the prevention, restriction, or distortion of competition within Singapore ("**section 34 prohibition**"). However, agreements and collaborations which generate net economic benefits ("**NEB**") are excluded from the section 34 prohibition. The three criteria to satisfy the NEB exception are: (a) the collaboration improves production or distribution of goods and services; (b) the agreement or restriction must be indispensable to achieving such improvements; and (c) the collaboration does not eliminate competition in respect of a substantial part of the good/service.¹

The Guidance Note sets out the factors that CCCS will consider when carrying out an assessment of the effects of the six common types of business collaborations, and the conditions under which CCCS considers that competition concerns are less likely to be raised. If the conditions are not met, a more detailed assessment may be required as to whether the proposed collaboration may be considered anticompetitive and, if so, whether it benefits from the NEB exclusion.

¹ Please refer to Annex C of the CCCS Guidelines on the Section 34 Prohibition 2016 (available [here](#)) for details on NEB exclusion.

Client Update: Singapore

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Competition & Antitrust and Trade

The various forms of agreements/collaborations² covered under the Guidance Note are not restricted to agreements between two or more businesses that are actual or potential competitors. Interestingly, CCCS indicates that the Guidance Note may apply to "lateral collaborations", i.e. between businesses manufacturing or selling complementary products. This is an important point as non-competing businesses often overlook the competition impact of their agreement(s) and the importance of assessing their compliance with the law.

The Guidance Note also applies to informal or looser forms of collaborations, whether between businesses or through an association, as well as joint ventures between businesses not amounting to a merger (within the definition under section 54(5) of the Act).

Specific Types of Collaborations

1. Information Sharing

CCCS reiterates the point made in its Guidelines on Section 34 Prohibition that "in the normal course of business, undertakings exchange information on a variety of matters legitimately and with no risk to the competitive process". The limit, however, is where such exchange of information reduces uncertainty amongst competitors, increasing the risk of collusion. The key is about the nature of information shared and, more specifically, whether this information may impact the independent decision-making of the recipients of the information.

The Guidance Note unfortunately does not provide much added guidance to businesses as compared to what is already stated in the CCCS Guidelines on Section 34 Prohibition, save to identify some factors that businesses should review when assessing whether their exchange of information with competitors will not lead to a problem:

- Information shared is publicly available or is not related to price or other important factors that impact how businesses compete; or
- Information shared is historical, aggregated (especially by independent third parties), and cannot be attributed to individual businesses; or
- The market has many players with frequent entry and exits, and the relevant goods/services are highly differentiated or change rapidly;³ or
- Where commercially sensitive information needs to be shared for an efficiency-enhancing collaboration, to implement safeguards such as sharing only information that is strictly necessary to implement the collaboration, and ringfencing of commercially sensitive information to prevent unnecessary sharing.

² For purposes of the Guidance Note and this Client Update, the terms "collaboration" and "agreement" may be used interchangeably.

³ On the condition the information shared does not facilitate price-fixing, bid-rigging, market sharing or output limitation

Client Update: Singapore

2021 AUGUST

Competition & Antitrust and Trade

Whilst this is useful, our view is that this is insufficient to address the typical concerns encountered by businesses and trade associations when it comes to conducting benchmarking or understanding business trends. As such, feedback ought to be provided to CCCS during this Consultation.

2. Joint Production

CCCS recognises that joint production agreements, which are varied and may be horizontal or vertical, may generate efficiencies and innovation.

One example of joint production agreements identified by CCCS is the setting up of a joint production factory by two competitors which produces inputs that the two competitors then use to produce competing products. Other examples include (a) "subcontracting agreements", where two competing businesses agree that one will fully or partly cease production of certain products and instead will purchase them from the other; or (b) agreements to expand production where a contractor entrusts a competitor as a subcontractor to produce a product, but the contractor does not cease or limit its own production of the said product.

Yet, by their very nature, while joint production agreements may be economically efficient and be pro-competitive, they may also result or be used to facilitate market sharing, bid-rigging, price-fixing, or output limitation.

In assessing whether joint production raises competition concerns, CCCS typically considers, *inter alia*, the characteristics of the relevant market, the market power of the parties (with and without the agreement), the risk of foreclosure in downstream markets resulting from the joint production agreement, and the potential of the agreement to facilitate information sharing between the competitors to the detriment of competition. Overall, CCCS' views is that the likelihood of competition concerns would be reduced when:

- The collaboration does not facilitate price-fixing, bid-rigging, output limitation and market sharing; and
- Collaborating businesses do not have market power;⁴ and
- 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
- The collaboration does not raise concerns in relation to the types of information sharing, or that it contain safeguards to minimise concerns with information sharing.

⁴ For instance, 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).

Client Update: Singapore

2021 AUGUST

Competition & Antitrust and Trade

Whilst the Guidance Note is helpful in setting out the cumulative conditions CCCS considers relevant in determining that a joint production agreement is not anti-competitive, these are factors which are well established. Hence, one view is that the Guidance Note does not add much.

In any event, experience teaches that these conditions are onerous to meet. To illustrate, CCCS cites the example of the commitments provided by the parties to the Poultry Hub JV, where a tight protocol had to be put in place to limit the exchange of sensitive information between the competitor parties to the JV, with the establishment of a dedicated team to manage confidential information within the JV and the appointment of a monitoring trustee to check compliance with the protocols. Are these truly practical in every case?

3. Joint Commercialisation

Competitors may agree to cooperate in the selling, distribution, or promotion of their products. Though joint commercialisation may be pro-competitive by allowing competitors to attain goals that they will not be able to do so individually, such collaborations may also facilitate collusion or harmful collusive outcomes in the market. In practice, the Guidance Note highlights that there are limited opportunities (or acceptable justifications) to commercialisation agreements between competitors.

In particular, the Guidance Note states clearly that reciprocal distribution agreements (where competitors agree to distribute each other's competing products on a reciprocal basis each in a specific geographic area) will, more likely than not, amount to market sharing agreements as well as, possibly, price-fixing agreements. Similarly, joint selling agreements are described as "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".

The Guidance Note provides some comfort in relation to some types of joint commercialisation agreements such as joint advertising agreements, given that this will not necessarily entail any sharing of sensitive business information. The key is to ensure that the parties do not use the collaboration to exchange sensitive business information that are not relevant to the operation of their collaboration.

4. Other Business Collaborations

The Guidance Note provides clarity to businesses with regards to certain collaborations that are only briefly mentioned in the CCCS Guidelines on Section 34 Prohibition. These include research & development agreements, standardisation agreements, and standard terms and conditions.

We do not discuss these in this Update. One important point to take note of, however, is that businesses entering in such agreements must be wary of the information they exchange and of the risk of foreclosure resulting from such collaborations.

Competition & Antitrust and Trade

Trade Associations

Section 34 of the Act also applies to decisions and guidelines by trade associations. The Guidance Note aims to provide clarity on collaborative efforts that are compliant with the Act, and not curtail activities of trade associations to develop various industries and economy. In particular, the Guidance Note provides "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 recommendations of the Guidance Note. Whilst helpful, again what would aid associations more is more concrete illustrations to be spelt out.

Concluding Words

Businesses are advised to closely review the proposed Guidance Note and provide feedback on it as this will impact their business dealings with competitors in the future.

In particular, businesses should consider whether the Guidance Note addresses the types of collaboration that businesses commonly consider as a practical matter, and whether the Guidance Note provides sufficient clarity on how businesses should approach and implement such collaborations to ensure compliance with the law.

It is critical at this juncture, where a consultation has been put out, for businesses and trade associations to consider the potential impact on them and to propose amendments or make requests for clarification as may be necessary.

If you have any queries on the above development or would like to submit any feedback to the consultation paper, please feel free to contact our team members below who will be happy to assist.

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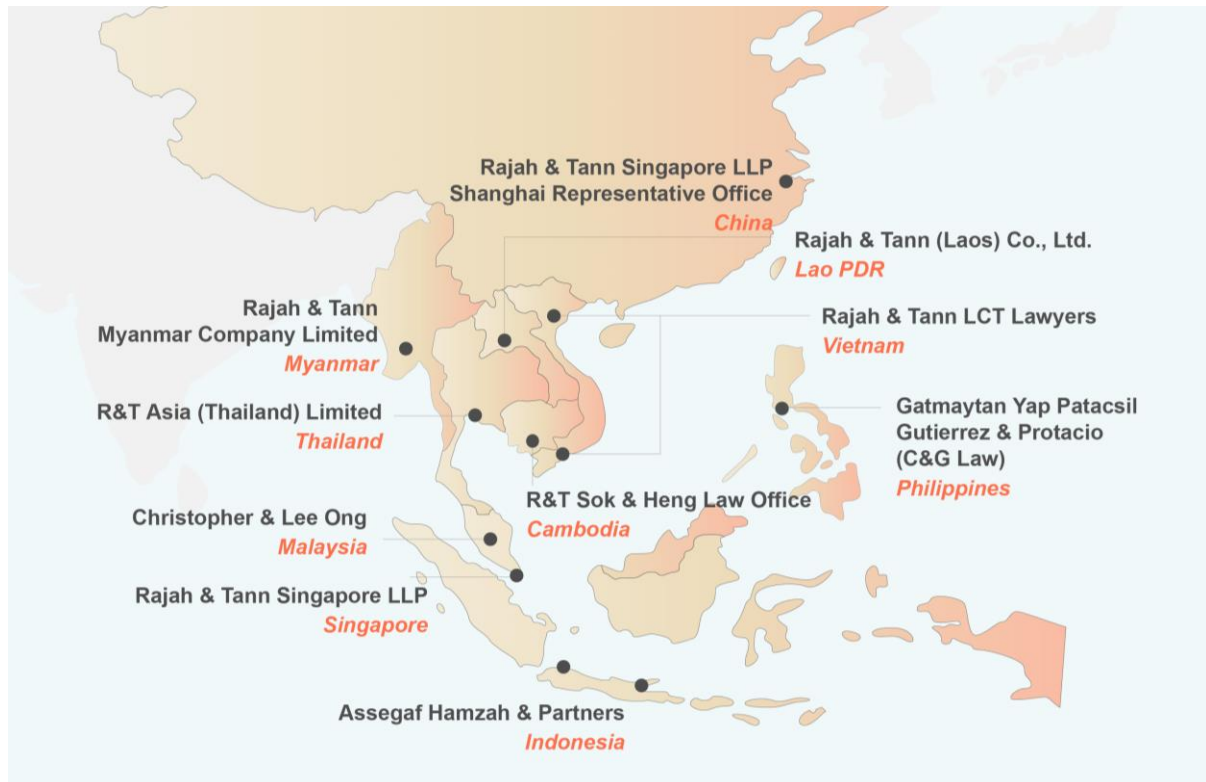
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