

Competition & Antitrust and Trade

Does Your Business Collaboration Breach Competition Law?

CCCS Issues Guidance Note on Business Collaboration

Introduction

Business collaborations and their compliance requirements have been an important topic in the commercial world. As businesses continue to change the way they operate to adapt to the shifting commercial landscape, they may seek to collaborate with other businesses to leverage on their respective strengths. However, one of the key concerns is how competition law applies to such collaborations.

To address this, the Competition and Consumer Commission of Singapore ("**CCCS**") has issued a Business Collaboration Guidance Note ("**Guidance Note**") that clarifies CCCS' position on common types of business collaborations and provides supplementary guidance on how CCCS will generally assess whether such collaborations comply with section 34 of the Competition Act. The Guidance Note also sets out factors and conditions under which competition concerns are less likely to arise.

The Guidance Note addresses the following types of business collaborations:

- (a) **Information sharing** – Exchange of both price and non-price information among businesses;
- (b) **Joint production** – Collaboration to jointly produce a product, share production capacity or subcontract production;
- (c) **Joint commercialisation** – Collaboration in the selling, tendering, distribution or promotion of a product;
- (d) **Joint purchasing** – Collaboration to jointly purchase from one or more suppliers;
- (e) **Joint research & development** – Collaboration on R&D activities, such as joint investment;
- (f) **Standards development** – Setting of industry or technical standards; and
- (g) **Standard terms and conditions in contracts** – Usage of terms shared amongst competitors establishing conditions of sale and purchase of goods and services between them and their customers.

In this Update, we highlight the salient features of the Guidance Note, including the key competition concerns of the common types of collaborations and how CCCS generally assesses compliance of such collaborations.

Client Update: Singapore

2021 DECEMBER

Competition & Antitrust and Trade

Background

A public consultation exercise on the proposed Guidance Note was held from 30 July to 27 August 2021. Rajah & Tann had earlier issued a Client Update on the consultation, "CCCS Consults on New General Business Collaboration Guidance Note", available [here](#). The Guidance Note which has now been issued by CCCS takes into consideration the feedback received from the public consultation.

As highlighted, the Guidance Note sets out the factors that CCCS will consider when carrying out an assessment of the seven common types of business collaborations for compliance with section 34 of the Competition Act, and the conditions under which CCCS considers that competition concerns are less likely to be raised.

Section 34 of the Competition Act prohibits agreements between businesses which have as their object or effect the prevention, restriction, or distortion of competition within Singapore. However, agreements and collaborations which generate net economic benefits are excluded from the section 34 prohibition.

Types of Business Collaborations

1. Information Sharing

Information sharing between businesses may allow them to understand the market and plan their strategies. However, information sharing may be anti-competitive when it impedes independent competitive decision-making.

The Guidance Note provides that, generally, information is more likely to be regarded as anti-competitive the more such information is commercially sensitive, recent or current, and the more frequent the sharing. This may include both price and non-price sharing, recommendations or guidelines by trade associations on prices to be charged by their members, and one-way disclosure of information on commercially sensitive information.

The Guidance Note also provides that competition concerns are less likely to arise where:

- Information shared is publicly available or is not related to price or other important factors that impact how businesses compete;
- Information shared is historical, aggregated (especially by independent third parties), and cannot be attributed to individual businesses;
- The market has many players with frequent entry and exits, and the relevant goods/services are highly differentiated or change rapidly; 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

Competition & Antitrust and Trade

necessary to implement the collaboration, and ringfencing of commercially sensitive information to prevent unnecessary sharing.

2. Joint Production

While joint production agreements can facilitate efficiency gains by allowing businesses to achieve cost savings in production, or utilise more efficient technologies, they may also be used to facilitate market sharing, bid-rigging, price-fixing or output limitation.

CCCS has stated that subcontracting agreements to expand production are less likely to raise competition concerns compared to reciprocal subcontracting and unilateral subcontracting arrangements.

The Guidance Note further states that competition concerns are less likely to arise where:

- The collaboration does not facilitate price-fixing, bid-rigging, output limitation and market sharing;
- Collaborating businesses do not have market power;
- 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 contains safeguards to minimise concerns with information sharing.

3. Joint Commercialisation

Joint commercialisation may enable competitors to collaborate to achieve certain efficiencies that may not be obtained individually. Similar to joint production agreements, there is the risk that joint commercialisation may be used to facilitate collusion.

The Guidance Note sets out the following guidance on specific types of joint commercialisation agreements:

- Joint advertising agreements are less likely to restrict competition.
- Joint distribution agreements may raise concerns where horizontal competitors agree to distribute each other's competing products on a reciprocal basis, but are less likely to do so where each party remains free to set commercial terms such as price and quantity independently.
- Joint bidding agreement are unlikely to raise competition concerns if the businesses in the joint bid are not actual or potential competitors to each other for that particular tender contract.

Competition & Antitrust and Trade

- Joint selling agreements between competitors, if they contain restrictions relating to prices and quantities to sell to customers, would be considered as restricting competition by object and would infringe the prohibition in section 34 of the Competition Act, unless they fulfil the Net Economic Benefit exclusion.

The Guidance Note also provides that competition concerns are less likely to arise in circumstances similar to those set out in the section on Joint Production, as highlighted above.

4. Joint Purchasing

Joint purchasing agreements allow businesses greater bargaining power to enjoy efficiencies such as volume discounts, or to share delivery and distribution costs by combining their purchases. However, there is the risk that they may be used to facilitate harmful collusive outcomes in the market, and are likely to be anti-competitive if they contain restrictions relating to price-fixing, bid-rigging, market-sharing and output limitation.

As part of the overall assessment of the effects of the joint purchasing collaboration, CCCS will assess the effects of any joint purchasing agreement in two relevant markets:

- Purchasing market – where the joint purchasing businesses interact with the suppliers; and
- Downstream selling market – where the joint purchasing businesses are active as sellers, specifically where the joint purchasing businesses are actual or potential competitors.

The Guidance Note further states that competition concerns are less likely to arise where:

- The collaboration does not facilitate price-fixing, bid-rigging, output limitation and market sharing;
- Collaborating businesses do not have buyer power in the purchasing market and do not have market power in the selling market;
- The available supply in the purchasing market is not limited and other competing purchasers continue to be able to obtain supplies from the suppliers;
- 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 contains safeguards to minimise concerns with information sharing.

5. Joint Research and Development

Research and development collaborations can lead to newer or improvements in products or technologies, or quicker developments.

Competition & Antitrust and Trade

The Guidance Note provides that competition concerns are less likely to arise where:

- The collaboration is between businesses that are not actual or potential competitors or does not remove a maverick competitor from the market;
- Where the collaborating businesses are actual or potential competitors for existing products or technologies, they do not have market power; or
- Where the collaboration is on new products or technologies, there are multiple viable, on-going alternative R&D projects undertaken by competing innovators that can produce close substitutes.

6. Standards Development

Standardisation or standards development can help to reduce information asymmetry and to foster trust in the market. However, there are three main potential areas of concern:

- Foreclosure of innovation;
- Exclusion or discrimination on use of the standards; and
- Elimination or reduction of competition.

CCCS has stated that it will generally assess standardisation processes based on their effect on competition, including:

- Whether the standards were established objectively;
- Whether access to the standard through licensing/licenses or otherwise is provided fairly; and
- Availability of alternatives in the market.

7. Standard Terms and Conditions

Standard terms can benefit businesses by helping to lower business costs, and can benefit customers by allowing comparison across competing offers.

Competition concerns may arise where prescriptive standard terms that define the scope of a product or service become industry norm, or where standard terms relate to or prescribe prices. Industry standard terms thus should not have overly prescriptive benchmarks, or standard terms that facilitate price-fixing, bid-rigging, market sharing or output limitation. Businesses should also not be compelled to adopt the standard terms.

Competition & Antitrust and Trade

CCCS has stated that it will assess standard terms based on the following:

- Whether there are overly prescriptive terms or terms relating to important factors of competition;
- Existing competition to the standard terms; and
- How extensive the standard terms are.

Concluding Words

Businesses seeking to engage in collaborations with other businesses should take note of the Guidance Note. Before entering into any agreements or acts of collaboration, businesses should first consider the risks of whether they may be engaging in anti-competitive behaviour. In this regard, the Guidance Note provides valuable guidance, allowing for greater certainty in pursuing such collaborations.

The full Guidance Note is available [here](#).

If you are considering entering into a business collaboration, please do review the competition law concerns that could arise. Our Competition team below would be glad to assist with any queries.

Wishing all of you a Wonderful end to the Year and a Happy 2022!

Contacts



Kala Anandarajah
Partner
Head, Competition & Antitrust
and Trade

T +65 6232 0111

kala.anandarajah@rajahtann.com



Dominique Lombardi
Partner (Foreign Lawyer)
Deputy Head, Competition &
Antitrust and Trade

T +65 6232 0104

dominique.lombardi@rajahtann.com



Tanya Tang
Partner (Chief Economic and
Policy Advisor)
Competition & Antitrust and
Trade

T +65 6232 0298

tanya.tang@rajahtann.com



Alvin Tan
Partner
Competition & Antitrust and
Trade

T +65 6232 0904

alvin.tan@rajahtann.com

Please feel free to also contact Knowledge and Risk Management at eOASIS@rajahtann.com.

Client Update: Singapore

2021 DECEMBER

LAWYERS
WHO
KNOW
ASIA

Our Regional Contacts

RAJAH & TANN | *Singapore*

Rajah & Tann Singapore LLP

T +65 6535 3600
sg.rajahtannasia.com

CHRISTOPHER & LEE ONG | *Malaysia*

Christopher & Lee Ong

T +60 3 2273 1919
F +60 3 2273 8310
www.christopherleeong.com

R&T SOK & HENG | *Cambodia*

R&T Sok & Heng Law Office

T +855 23 963 112 / 113
F +855 23 963 116
kh.rajahtannasia.com

RAJAH & TANN | *Myanmar*

Rajah & Tann Myanmar Company Limited

T +95 1 9345 343 / +95 1 9345 346
F +95 1 9345 348
mm.rajahtannasia.com

RAJAH & TANN 立杰上海

SHANGHAI REPRESENTATIVE OFFICE | *China*

Rajah & Tann Singapore LLP Shanghai Representative Office

T +86 21 6120 8818
F +86 21 6120 8820
cn.rajahtannasia.com

GATMAYTAN YAP PATACSIL

GUTIERREZ & PROTACIO (C&G LAW) | *Philippines* Gatmaytan Yap Patacsil Gutierrez & Protacio (C&G Law)

T +632 8894 0377 to 79 / +632 8894 4931 to 32
F +632 8552 1977 to 78
www.cagatlaw.com

ASSEGAF HAMZAH & PARTNERS | *Indonesia*

Assegaf Hamzah & Partners

Jakarta Office

T +62 21 2555 7800
F +62 21 2555 7899

Surabaya Office

T +62 31 5116 4550
F +62 31 5116 4560
www.ahp.co.id

RAJAH & TANN | *Thailand*

R&T Asia (Thailand) Limited

T +66 2 656 1991
F +66 2 656 0833
th.rajahtannasia.com

RAJAH & TANN LCT LAWYERS | *Vietnam*

Rajah & Tann LCT Lawyers

Ho Chi Minh City Office

T +84 28 3821 2382 / +84 28 3821 2673
F +84 28 3520 8206

RAJAH & TANN | *Lao PDR*

Rajah & Tann (Laos) Co., Ltd.

T +856 21 454 239
F +856 21 285 261
la.rajahtannasia.com

Hanoi Office

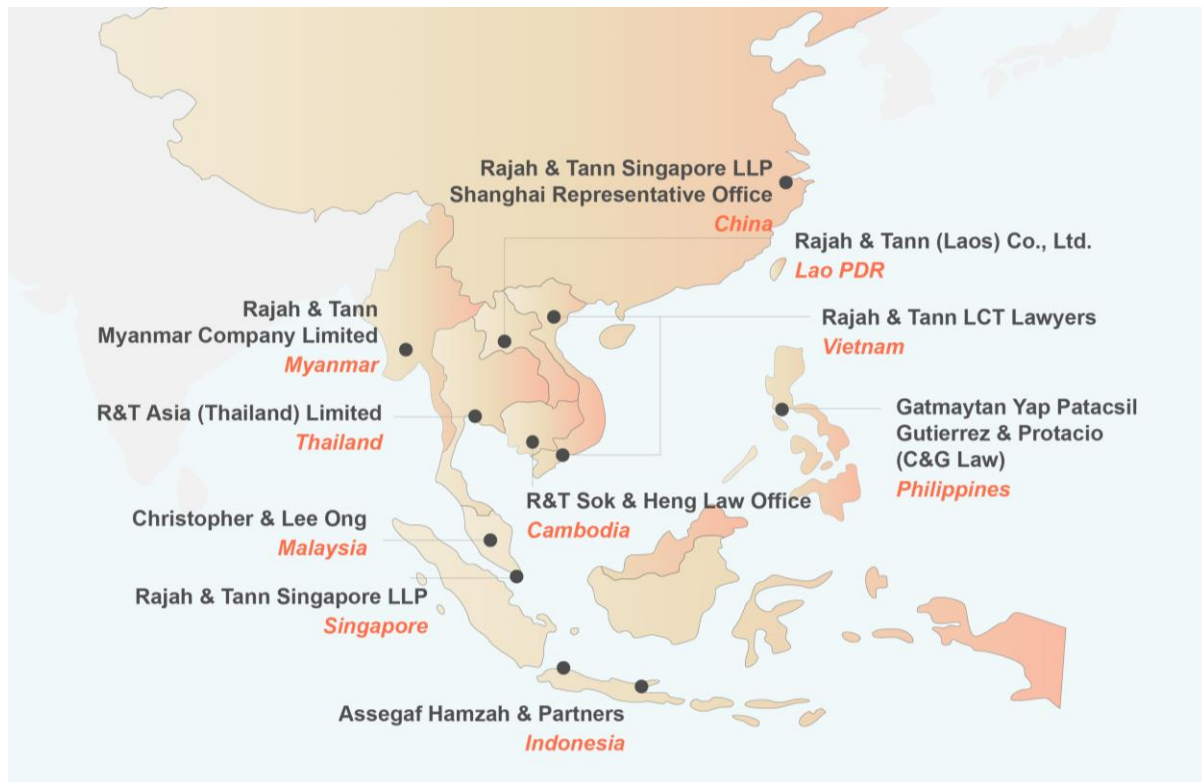
T +84 24 3267 6127
F +84 24 3267 6128
www.rajahtannlct.com

Rajah & Tann Asia is a network of legal practices based in Asia.

Member firms are independently constituted and regulated in accordance with relevant local legal requirements. Services provided by a member firm are governed by the terms of engagement between the member firm and the client.

This update is solely intended to provide general information and does not provide any advice or create any relationship, whether legally binding or otherwise. Rajah & Tann Asia and its member firms do not accept, and fully disclaim, responsibility for any loss or damage which may result from accessing or relying on this update.

Our Regional Presence



Rajah & Tann Singapore LLP is one of the largest full-service law firms in Singapore, providing high quality advice to an impressive list of clients. We place strong emphasis on promptness, accessibility and reliability in dealing with clients. At the same time, the firm strives towards a practical yet creative approach in dealing with business and commercial problems. As the Singapore member firm of the Lex Mundi Network, we are able to offer access to excellent legal expertise in more than 100 countries.

Rajah & Tann Singapore LLP is part of Rajah & Tann Asia, a network of local law firms in Cambodia, China, Indonesia, Lao PDR, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam. Our Asian network also includes regional desks focused on Brunei, Japan and South Asia.

The contents of this Update are owned by Rajah & Tann Singapore LLP and subject to copyright protection under the laws of Singapore and, through international treaties, other countries. No part of this Update may be reproduced, licensed, sold, published, transmitted, modified, adapted, publicly displayed, broadcast (including storage in any medium by electronic means whether or not transiently for any purpose save as permitted herein) without the prior written permission of Rajah & Tann Singapore LLP.

Please note also that whilst the information in this Update is correct to the best of our knowledge and belief at the time of writing, it is only intended to provide a general guide to the subject matter and should not be treated as a substitute for specific professional advice for any particular course of action as such information may not suit your specific business and operational requirements. It is to your advantage to seek legal advice for your specific situation. In this regard, you may call the lawyer you normally deal with in Rajah & Tann Singapore LLP or email Knowledge & Risk Management at eOASIS@rajahtann.com.