

Competition & Antitrust and Trade

Revised CCCS Competition Guidelines – Implications in the Digital Era and Other Guidance

*CCCS Revised Competition Guidelines Take Effect From 1 Feb
2022*

Introduction

Various developments in the legal and business spheres have impacted competition law and its application. For instance, the rise of e-commerce platforms competing in multiple market segments offering distinct products and/or services in Singapore and Southeast Asia has raised unique issues concerning the application of competition law.

Taking into account the findings and recommendations from its e-commerce platform market study report ("**Report**"), amendments to the Competition Act ("**Act**") in 2018, its experience in administering and enforcing the Act since the Guidelines were last revised, as well as international best practices, the Competition and Consumer Commission of Singapore ("**CCCS**") has revised various CCCS Guidelines for enhanced clarity and guidance.

The CCCS Guidelines help businesses understand how CCCS administers and enforces the Act, including the three main prohibitions against: (a) anti-competitive agreements, decisions, and practices ("**Section 34 prohibition**"); (b) abuse of a dominant position ("**Section 47 prohibition**"); and (c) mergers and acquisitions that substantially lessen competition ("**Section 54 prohibition**"). Each of the Guidelines expand upon the nature of the prohibitions and in some instances provide illustrations of potential violations. The Guidelines also spell out procedural and process related aspects of enforcement and the meting out of financial penalties.

The following revised Guidelines on the Competition Act will take effect from **1 February 2022**:

1. CCCS Guidelines on Market Definition;
2. CCCS Guidelines on the Section 47 Prohibition;
3. CCCS Guidelines on the Substantive Assessment of Mergers;
4. CCCS Guidelines on Merger Procedures;
5. CCCS Guidelines on Directions and Remedies (formerly known as CCCS Guidelines on Enforcement);
6. CCCS Guidelines on the Treatment of Intellectual Property Rights;



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7. CCCS Guidelines on the Appropriate Amount of Penalty in Competition Cases;
8. CCCS Guidelines on the Major Competition Provisions; and
9. CCCS Guidelines on the Section 34 Prohibition.

CCCS held two consultations on the proposed changes to the CCCS Guidelines in 2020 and 2021 – the first consultation concerned proposed changes to the first six Guidelines, and the second consultation concerned proposed changes to the CCCS Guidelines on the Appropriate Amount of Penalty in Competition Cases.

On the whole, respondents were supportive of the proposed changes. CCCS has incorporated, where appropriate, the feedback received in the revised Guidelines. Consequential amendments were made to the CCCS Guidelines on the Major Competition Provisions and the CCCS Guidelines on the Section 34 Prohibition, for consistency with revisions made to the other Guidelines.

This Update briefly highlights several key changes to the relevant Guidelines that may be of pertinence to businesses.

Key Changes to the Guidelines

CCCS Guidelines on Market Definition

This set of Guidelines outlines the framework on how CCCS determines relevant markets when CCCS investigates/assesses possible infringements of the Section 34 or Section 47 prohibitions under the Competition Act or assesses mergers in the context of the Section 54 prohibition.

Key changes include clarification of issues related to market definition that may be particularly relevant in digital markets which are characterised by multi-sided platforms. For instance, CCCS included a definition of "multi-sided platform", which refers to "*an undertaking acting as a platform that facilitates interactions between two or more groups of users and creates value for sellers or buyers on one side of the platform by matching or connecting them with buyers or sellers on the other side of the platform*". Paragraph 5.14 dealing with multi-sided platforms also has been amended to reflect the practical complexities when performing market definition in such cases. Depending on the market circumstances and extent of substitution by buyers and sellers, the relevant market may differ on a case-by-case basis.

CCCS has also clarified that it will take into account both demand-side and supply-side factors in considering whether products that are not considered complementary or from adjacent markets should be included in a relevant market. CCCS explained that this concept of "product ecosystem" complements the analysis where the traditional framework may not suffice to deal with whether such distinct products should be included in a relevant market, and that it is not unprecedented for a focal product to be defined as a package or bundle of products.

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CCCS Guidelines on the Section 47 Prohibition

This set of Guidelines outlines the factors and circumstances which CCCS may consider in determining whether an undertaking has breached the Section 47 prohibition by engaging in conduct amounting to an abuse of a dominant position in a market.

The Report, among other things, showed that certain theories of harm may be more prevalent with multi-sided e-commerce platforms. In view thereof and for better clarity, CCCS revised the Guidelines to elucidate issues relating to the assessment of market power and types of potentially abusive conduct in this context.

Some key revisions introduced include how CCCS may assess the strength of network effects in the context of multi-sided platforms and the control or ownership of key inputs in assessing market power. CCCS also removed the originally proposed term "self-preferencing" and explained the harm it intended to prevent behind the concept - that certain forms of preferential conduct could result in competition harm, for instance where an undertaking leverages market power from one market to obtain a competitive advantage which is then used to foreclose competitors in a separate market.

CCCS Guidelines on the Substantive Assessment of Mergers

Under the voluntary merger regime, businesses have to self-assess whether their merger or acquisition is likely to raise competition issues. This set of Guidelines outlines CCCS' framework in assessing mergers and acquisitions and provides guidance to merger parties in conducting self-assessment.

The revisions to these Guidelines are to be welcomed as they provide better guidance to businesses, consumers, and competition practitioners on issues relating to CCCS' assessment of mergers, such as the relevance of proprietary rights and data as barriers to entry or expansion, including those involving digital platforms. The revisions also now provide that the potential impact arising out of conglomerate mergers must be considered and addressed.

On balance, the revisions are positive. Businesses intending to merge or do a joint venture should ensure that, amongst other compliance matters to be addressed, they carefully review whether their transaction will trigger the merger control provisions. Understanding the Guidelines on this front is particularly important.

CCCS Guidelines on Merger Procedures

This set of Guidelines sets out circumstances under which mergers should be notified to CCCS, as well as CCCS' procedures in its review and investigation of mergers.

Various revisions have been proposed to the Guidelines which are aimed at:

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- Reflecting the practices that CCCS has introduced since 2012 when this set of Guidelines was last amended;
- Reducing business costs for merger parties submitting information to CCCS;
- Making the information-sharing process easier between CCCS and other competition authorities; and
- Clarifying certain procedural aspects of Singapore's merger regime, such as the process of notifying mergers to CCCS.

Separately, CCCS has made adjustments to its Form M1 and Form M2 templates for merger notifications in 2022. The key changes are to Form M1 to include an additional question on conglomerate effects (where relevant) and to require details of merging parties' top ten (instead of top five) customers in the section on countervailing buyer power.

CCCS Guidelines on Directions and Remedies

In 2018, changes were made to the Act that enabled CCCS to accept binding commitments offered in respect of notifications and investigations in respect of the Section 34 prohibition and the Section 47 prohibition, and to register with the District Court to legally enforce such commitment.

To give effect to the expanded coverage of commitments and remedies brought about by the amendments to the Act, CCCS shifted the substantive and procedural guidelines relating to commitments and remedies to the CCCS Guidelines on Enforcement of Competition Cases, and renamed it as the CCCS Guidelines on Directions and Remedies. These are more just administrative changes.

Further, revisions were made to clarify CCCS' practices in assessing commitments and remedies. Changes include amendments/clarifications to timelines, processes for companies offering commitments proposals, as well as the information to be submitted for commitments proposals.

CCCS Guidelines on the Treatment of Intellectual Property Rights

This set of Guidelines clarifies how CCCS treats the interface between intellectual property rights and competition law, as well as factors and circumstances CCCS may consider in assessing agreements and conduct involving intellectual property rights.

Since this set of Guidelines was first published in 2005, there have been revisions to the legislative sources of intellectual property rights in Singapore. It was thus a matter of time that revisions had to be made to the Guidelines to reflect the changes to intellectual property law, such as by inserting references to the Trade Marks Act and Geographical Indications Act 2014, as well as clarifying certain concepts/terms such as "patents", "copyrights", "trade marks", and "technology market".

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The revised Guidelines also gives more guidance and clarity on how CCCS may apply competition analysis to certain agreements/conduct involving intellectual property rights and how certain intellectual property- related agreements may give rise to competition concerns.

Overall, the changes here are substantive and given the interface between two laws, this is an area that businesses must pay attention to.

CCCS Guidelines on the Appropriate Amount of Penalty in Competition Cases

This set of Guidelines explains CCCS' approach in determining financial penalties for infringement of the Competition Act. CCCS takes a six-step approach as follows:

- i) Calculate base penalty (taking into account severity of infringement, turnover of business of undertaking in Singapore for the relevant products and relevant geographic markets affected by the infringement in the undertaking's last business year);
- ii) Adjust for the period of infringement;
- iii) Adjust for aggravating or mitigating factors;
- iv) Adjust for other relevant factors, such as deterrent value;
- v) Adjust if statutory maximum penalty under the Competition Act is exceeded; and
- vi) Adjust for immunity, leniency reductions and/or fast-track procedure discounts.

Revisions to the Guidelines are mainly focused on step 3 in the above framework to clarify the list of mitigating factors in the calculation of financial penalties in a Section 34 infringement, for instance by providing a non-exhaustive list of mitigative factors as to when "substantially limited involvement" by an undertaking may be a mitigating factor.

Also, CCCS has made clear that the fact that an undertaking not playing a leader or instigator role or being a pro-active participant in the infringement will not, in itself, be regarded as a mitigating factor. This change came about following the appeal decision in the Chicken Cartel case, in which the Rajah & Tann team was involved and was instrumental in bringing penalties down. The change is an important one, and clearly will aid parties inevitably caught up in cartel activities where they were not the leaders.

Concluding Words

The digital era has ushered in developments that impact the analysis of competition law prohibitions, and the revisions to the relevant Guidelines clarify how CCCS may deal with these situations. Updates to the Guidelines also better reflect CCCS' recent practices in its administration and enforcement of cases under the Competition Act, as well as align the Guidelines with international best practices in the sphere of competition law.

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Given that the revised Guidelines will come into effect shortly, depending on the commercial activities of businesses, a review of the revised Guidelines and the potential impact their business operations/collaborations may have on their operations is necessary. This may call for appropriate adjustments to be made.

If you have any questions or comments in relation to the above development or on competition laws in Singapore, please do not hesitate to contact our team below or email us at competitionlaw@rajahtann.com.

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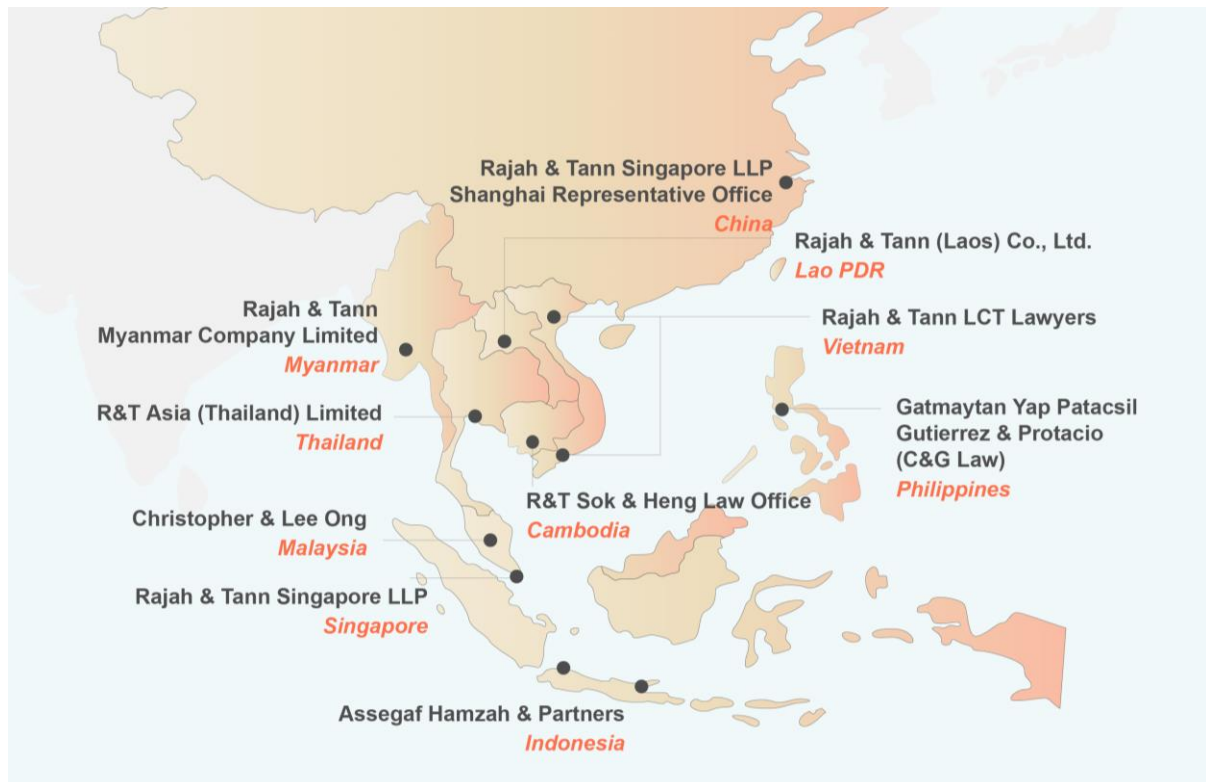
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