

CCCS Seeks Views on Guidance Note For Environmental Sustainability Collaborations

Introduction

Proposals for the [Guidance Note on Business Collaborations Pursuing Environmental Sustainability Objectives](#) ("**Environmental Sustainability Collaboration GN**") have finally been introduced in Singapore, rightly first for consultation by the Competition and Consumer Commission of Singapore ("**CCCS**"). The consultation runs from **20 July 2023 to 17 August 2023**. At a high level, guidelines on the economic benefits of environmental sustainability and sustainability generally have been introduced or are being introduced in various jurisdictions, including the European Union ("**EU**"). Approaches do vary.

From a Singapore perspective, the proposal seems tied only to environmental sustainability. It is said that to meet Singapore's climate goals under the Singapore Green Plan 2030, businesses may collaborate to pursue environmental sustainability objectives and these collaborations may include competitors in existing, emerging or even new markets coming together. The Environmental Sustainability Collaboration GN specifically addresses how businesses can collaborate to achieve environmental sustainability objectives in a way that does not contravene competition laws. Particularly, it seeks to clarify how CCCS will assess such business collaborations in the context of Section 34 of the Competition Act 2004 ("**Act**"), which prohibits agreements between businesses which have as their object or effect the prevention, restriction, or distortion of competition within Singapore ("**section 34 prohibition**").

In addition to the guidance under the Environmental Sustainability Collaboration GN, the assessment of such collaborations will be governed by the principles and considerations in, and should be read in conjunction with, the [CCCS' Business Collaboration Guidance Note](#) ("**Business Collaboration GN**")¹ and the [CCCS Guidelines on the Section 34 Prohibition](#). Whilst this sounds easy enough, one will need to ensure

¹ The Business Collaboration GN was issued in 2021 which provides more general guidance on seven common types of business collaborations. You may read more about the Business Collaboration GN in our earlier Legal Update [here](#).

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that the different guidelines sync as there have been instances when interpretation has had to be undertaken, thus giving rise to a lack of clarity.

This Update outlines salient aspects of the Environmental Sustainability Collaboration GN.

Whether Collaboration is in Pursuit of Environmental Sustainability Objectives

In assessing whether a collaboration is in pursuit of environmental sustainability objectives, CCCS will have regard to the crux or main activity of the collaboration taking into account the specific facts and circumstances of each case, including the starting point and main focus of collaboration and the degree of integration of the different functions required in order to pursue the stated environmental sustainability objectives.

The Environmental Sustainability Collaboration GN provides examples of such environmental sustainability collaboration, including joint R&D and production efforts to develop a more environmentally friendly product. To this end, there are also examples which show where harm could arise.

Agreements That Do Not or Are Unlikely to Raise Competition Concerns

The Environmental Sustainability Collaboration GN provides examples of environmental sustainability collaborations that do not or are unlikely to raise competition concerns. Note that whilst the EU takes a similar approach, the examples identified vary.

- **Agreements that do not affect factors of competition.** Collaborations that do not involve factors of competition such as price, quantity, quality, choice or innovation of goods or services supplied will typically not raise competition concerns. Examples include industry-wide collaborative efforts to reduce the environmental footprint of businesses within the industry in non-competitive areas and an agreement between businesses in the same industry to pool together resources and expertise to encourage training in environmental sustainability-related areas.
- **Agreements which none of the parties could do independently.** An agreement between businesses to jointly carry out activities which none of the parties can do independently (e.g. because

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they do not individually have the necessary technical capabilities or scale) is unlikely to raise competition concerns.

- **Agreements to comply with written law, or in acting on behalf of the Government.** Collaboration agreements made to comply with written law, or in acting on behalf of the Government, are excluded from the section 34 prohibition. However, this exclusion will be narrowly construed, for example the mere encouragement or endorsement by a government agency or statutory body will not be sufficient for the collaboration to benefit from the exclusion.
- **Standards development.** A business collaboration to develop standards to achieve specified environmental sustainability targets or metrics is less likely to give rise to competition concerns if: (i) the standards are established objectively; (ii) the process for developing them is transparent and inclusive; (iii) no commercially sensitive information that is not necessary or relevant for the collaboration is exchanged; (iv) compliance with the standard or code is voluntary and nondiscriminatory; and (v) businesses are not restricted from exceeding such standards or developing alternative standards.
- **Low market power / aggregate market shares.** Where the collaboration does not facilitate price-fixing, bid-rigging, output limitation and market sharing, and the collaborating businesses do not have market power (e.g. aggregate market shares of less than 20%), competition concerns also are less likely to arise in joint production, joint commercialisation and joint R&D collaborations. The Environmental Sustainability Collaboration GN also set out additional factors that further the anti-competitive risks in such instances.

Agreements That Are Highly Likely to Raise Competition Concerns

Certain agreements pursuing environmental sustainability objectives will be anti-competitive. The key reason for this is that the nature of the cooperation is intended to restrict competition rather than to ensure an enhancement to the community and consumers at large through environmental sustainability. Such agreements include:

- **Collaborations which restrict competition by object.** Collaboration which by their very nature are considered to be anti-competitive such as price-fixing, bid-rigging, market-sharing or output limiting agreements will generally give rise to competition concerns.
- **Collaborations which restrict competition by effect.** CCCS will consider factors such as the competitive constraints in the market, the existence of potential competitors, barriers to entry or

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expansion and the level of countervailing buyer power. Importantly, collaborations will generally have no appreciable adverse effect on competition if the aggregate market share of the parties involved does not exceed 20% on the relevant markets affected by the agreement, or where each undertaking involved in the collaboration is a small or medium sized enterprise.

Net Economic Benefits Exclusion

Agreements and collaborations which generate net economic benefits ("**NEB**") are excluded from the section 34 prohibition. The Environmental Sustainability Collaboration GN provides guidance on how CCCS would assess the NEB of such collaborations.

- ***Economic benefits outweigh the negative competition effects.*** Types of economic benefits that can be considered are broad and can include lower costs, improvements in the quality or services, or the production of new innovative products, although arguably, just one such factor will not suffice to clear the test. Specific examples highlighted include collaborations to adopt cleaner but more costly production technology to reduce greenhouse gas emissions, and collaboration by businesses to share delivery capacities to reduce the number of half-filled delivery vehicles on the road. Here, the benefits clearly are multiple and not just one. The economic benefits must be assessed objectively.

For agreements pursuing environmental sustainability objectives, CCCS recognises that it is possible to take into account benefits that are felt more widely than within the relevant market. Where appropriate, CCCS will take into account such economic benefits accruing to Singapore as a whole, and it is possible for an agreement pursuing environmental sustainability objectives leads to a reduction of competition within a relevant market, and yet results in NEB to Singapore as a whole.

The claimed economic benefits must be significant enough to outweigh the anti-competitive effects of the agreement. To substantiate each benefit claimed, businesses will have to demonstrate the magnitude and the likelihood (i.e., how and when) of achieving such benefits.

- ***Economic benefits cannot be achieved without the agreement and any restrictions in it.*** Both the agreement itself, and the individual restrictions within the agreement, have to be reasonably necessary to obtain the benefits claimed. A restriction is indispensable if its absence would eliminate or significantly reduce the efficiencies that flow from the agreement or make them much less likely to materialise. An agreement will not be regarded as indispensable if the parties to the agreement are capable of achieving the efficiencies on their own.

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- **No elimination of competition in a substantial part of the market.** The collaboration cannot have eliminated competition in a substantial part of the market. This criterion may be met even if the collaboration in question covers the entire industry, as long as there remains at least one important parameter of competition on which businesses continue to compete strongly with each other. For example, a standardisation agreement that results in the discontinuation of non-environmentally friendly products and thus eliminates competition on product variety may still satisfy this criterion if price competition for the environmentally friendly options remains unrestricted.

Seeking Guidance or Decision from CCCS

Though businesses are not legally required to notify their collaborations, where there is uncertainty as to whether a specific collaboration pursuing environmental sustainability objectives complies with the Act, they should notify the collaboration to CCCS for guidance or decision as to whether it would infringe the section 34 prohibition. This is a common approach that is taken. For more advice on this, please contact our team below.

CCCS proposes adopting a streamlined two-phased notification process to provide a quicker decision, which is to be welcomed. Phase 1 involves a quick assessment that allows CCCS to give a favourable decision or guidance with regard to agreements pursuing environmental sustainability objectives that clearly do not raise competition concerns. This phase is expected to be completed within 30 working days. A further Phase 2 review of 120 working days can be carried out in complicated cases. The notified agreement may be cleared with commitments at any time during Phase 1 or Phase 2 (including the period in between).

Our Comments

The Environmental Sustainability Collaboration GN is a significant development in Singapore's competition law regime, as it is the first guidance note issued by the CCCS that specifically addresses the issue of business collaborations pursuing environmental sustainability objectives. It follows a worldwide trend of competition regulators, including in the EU, the United Kingdom and Japan, in providing further guidance on how sustainability collaborations amongst competitors can be carried out in a manner that complies with competition laws. It augments the existing guidance and guidelines to provide additional guidance for businesses intending to enter, or entering into, business collaborations that pursue environmental sustainability objectives without contravening competition laws.

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A business seeking to engage in collaborations with other businesses can be assured that the guidance aids them to put appropriate parameters and to collaborate. Yet, it is necessary to carefully review the plan as one moves forward.

This also means that it is necessary to review the proposed Environmental Sustainability Collaboration GN to ensure that it does meet the ends of what a business intends to undertake. Do take the time therefore to review the Environmental Sustainability Collaboration GN. **We plan to host a breakfast session on Friday, 4 August 2023 to discuss some of the key aspects. We will circulate more details soonest.**

If you have any questions in relation to the above development or wish to submit feedback on the consultation, please do not hesitate to contact our team below or email us at competitionlaw@rajahtann.com.

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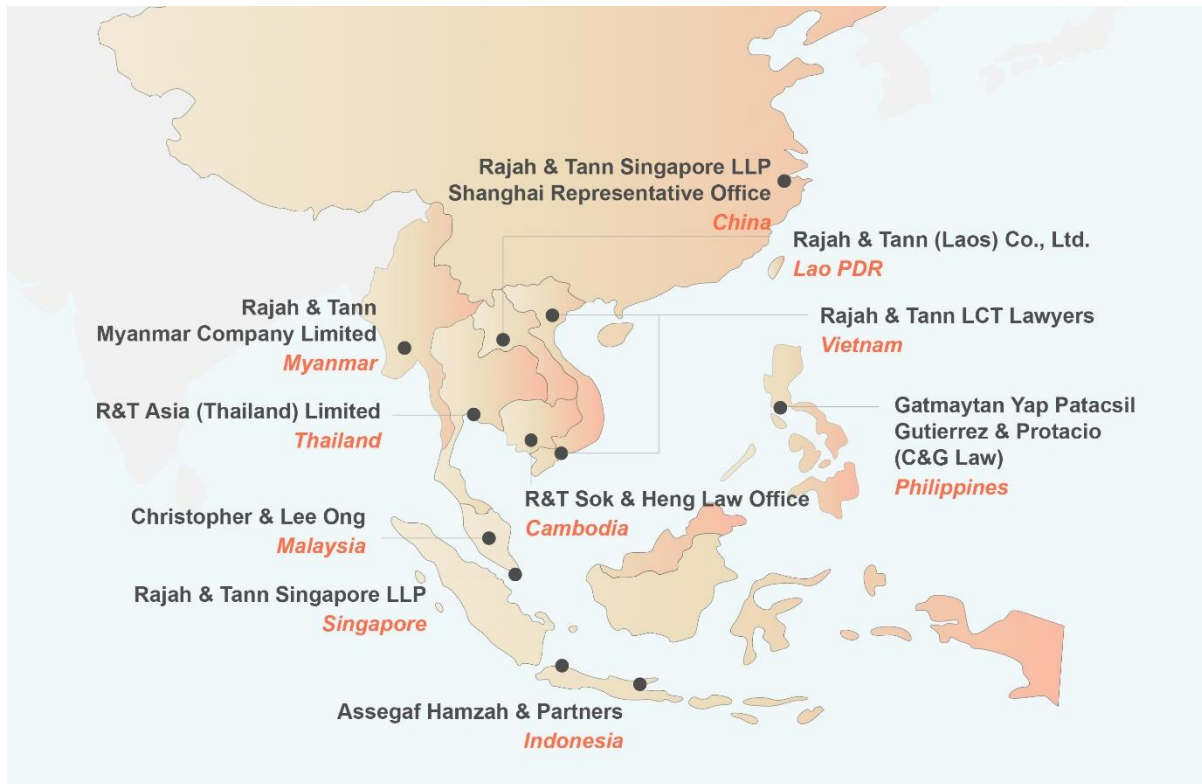
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