

Competition & Antitrust and Trade

# Treatment of Collaborations During COVID-19: CCCS Guidance

## Introduction

The COVID-19 pandemic has resulted in tremendous disruption to logistics and supply chains, and many companies face challenges in respect of demand. To deal with the effects of the outbreak, collaborations may be necessary between competitors.

Against this backdrop, the Competition & Consumer Commission of Singapore ("**CCCS**") has, on 20 July 2020, issued a Guidance Note on Collaborations between Competitors in response to the COVID-19 Pandemic ("**Guidance Note**") to provide clarity to businesses on how CCCS will view collaborations between competitors during this exceptional period.

This Update highlights a few salient points from the Guidance Note on the assessment framework CCCS will use to assess certain collaborations between competitors which are put in place from 1 February 2020 and end by 31 July 2021.

## 1. Collaborations to Improve Supply of Specified Goods or Services Likely to Generate NEB and Unlikely to Infringe Competition Act

Section 34 of the Singapore Competition Act ("**Act**") prohibits agreements between businesses which have as their object or effect the prevention, restriction or distortion of competition within Singapore. Agreements and collaborations which generate net economic benefits ("**NEB**") are excluded.

The three criteria to satisfy the NEB exception are: first, the collaboration improves production or distribution of goods and services; second, the agreement or restriction must be indispensable; and third, the collaboration does not eliminate competition in respect of a substantial part of the good/service.

The Guidance Note clarifies that CCCS will generally not investigate collaborations between competitors which:

- (a) sustain or improve the supply of specified essential goods or services in Singapore. The list of essential goods and services are set out in the Annex to the Guidance Note;
- (b) are put in place from 1 February 2020 and end by 31 July 2021; and
- (c) do not involve price-fixing, bid-rigging, market-sharing or output limitation.

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CCCS will assume that such collaborations are likely to generate NEB and are therefore unlikely to infringe the Act. Collaborations that end after 31 July 2021 will be evaluated under the criteria applicable in normal circumstances for its entire duration. The Guidance Note sets out various illustrations of collaborations covering joint production of goods, joint distribution and marketing, joint purchase and information sharing.

### **2. Agreements and Collaborations Excluded from Scrutiny**

Agreements (including collaborations) that satisfy the NEB criteria applicable in normal circumstances are already excluded from the Section 34 Prohibition under the Act against anti-competitive agreements, and therefore do not need to come under the Guidance Note.

Similarly, agreements entered into with the Singapore Government or any statutory body, or agreements entered into on their behalf, are already excluded under the Act.

### **3. Collaborations that Involve Price-Fixing, Bid-Rigging, Market-Sharing or Output Limitation are Less Likely to Satisfy NEB Criteria**

Collaborations that improve or sustain the supply of essential goods or services in Singapore but involve price-fixing, bid-rigging, market-sharing or output limitation are less likely to satisfy the NEB criteria. For such collaborations, one must additionally consider factors such as the extent of reduction in competition arising from the agreement and the competitive constraints in the market.

However, it is still possible for such collaborations to qualify for the NEB exclusion. The Guidance Note provides an illustration on how it is possible for an agreement to satisfy the NEB criteria when it is necessary for companies to coordinate supply quantities for different medicines to overcome oversupply of some medicine and shortage of others. The first and second criteria on improving production and the indispensability of the collaboration are satisfied so long as "restrictions that may be unnecessary to achieve the improvement, e.g. price-fixing, are excluded". The third criterion is satisfied so long as the companies continue to face competition in the market if, for example, other suppliers could feasibly start production and compete to supply the medicines in the near future.

### **4. Businesses are Encouraged to Conduct Self-Assessment as to Whether their Collaboration Falls Within the Framework in the Guidance Note**

As a first step, businesses are encouraged to perform their own self-assessment to determine whether their collaboration falls within the framework set out in the Guidance Note. Businesses that have queries about the framework in the Guidance Note may contact CCCS for clarification.

Alternatively, business may opt for the standard approach of notifying CCCS for guidance or a decision on the permissibility of their agreement.

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### **5. Businesses Must Not Use COVID-19 as "a Cover to Engage in Anti-Competitive Activities"; CCCS Reserves the Discretion to Investigate**

Businesses cannot take advantage of the COVID-19 pandemic as a cover to engage in anti-competitive activities that do not generate NEB, and CCCS has the discretion to commence investigations in such cases. Businesses must continue to carefully assess the competition impact of their collaboration and ensure that the collaboration is structured in a way that minimises the harm to competition.

The Guidance Note provides the example that even where commercially sensitive information sharing between businesses in collaboration is necessary for essential goods or services, the companies involved have a responsibility to take all necessary precautions to ensure that the information exchange is strictly necessary to bring about improvements in production or distribution, and no other commercially sensitive information is exchanged (e.g. through the setting up of "Chinese walls" to isolate information flows to a limited team).

## **Concluding Words**

The Guidance Note provides welcome clarity to businesses by setting out the scope and time period of collaboration between competitors that CCCS is less likely to consider problematic during this period. This will give businesses more comfort in considering collaborations to deal with ongoing disruptions in demand and supply as a result of the COVID-19 pandemic.

However, the various qualifications in the Guidance Note make clear that COVID-19 does not provide a blank cheque for coordination amongst competitors. All collaborations must continue to be structured carefully, on a limited basis and must be justifiable by reference to their quantifiable efficiencies.

## **Further Information**

Please refer to the [Guidance Note](#) for more details.

If you have any queries or wish to find out more about this development, including whether or not your proposed collaboration is likely to fall within the framework set out in the Guidance Note, please feel free to contact our team members below who will be happy to assist.

Visit our [COVID-19 Resource Centre](#) for views from our lawyers across the region on common issues and legal implications brought about by COVID-19. For specific inquiries, please reach out to your relationship partner or send an email to our [COVID-19 Legal Team](#).

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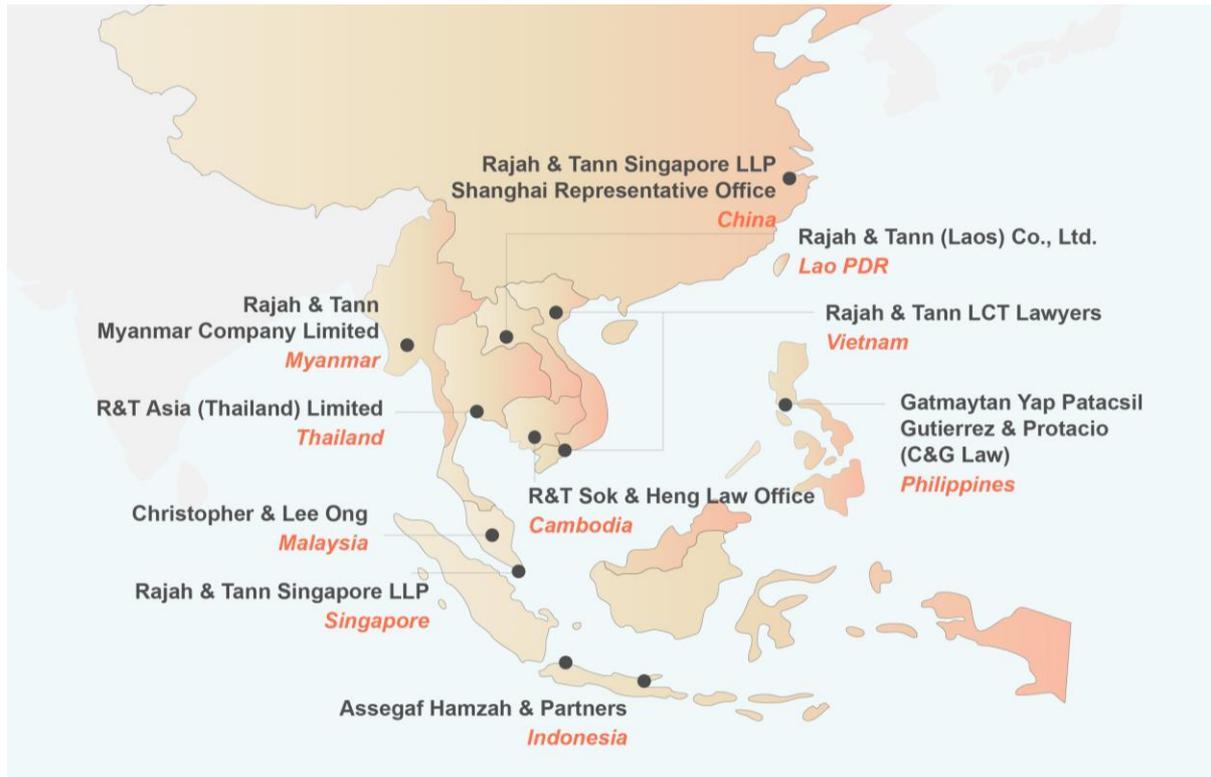
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