Competition Law Update (Q1 2022) – New Guidelines Take Effect, Looking Ahead in 2022

The Competition and Consumer Commission of Singapore ("**CCCS**") has been actively updating its guidelines and procedures in 2021. At the end of last year, the CCCS issued, in quick succession, a new Guidance Note on Business Collaborations ("**Guidance Note**") as well as revised versions of its Competition Act guidelines (which were last reviewed in 2016).

This update looks at some of the key changes in the revised guidelines and the Guidance Note, and their impact on businesses. We also recap some of the notable decisions and pending cases in 2021, and look ahead at the likely enforcement trends going into 2022.

Key highlights covered in this update include:

- a shift in the CCCS' stance in merger review – businesses ignoring merger control risk assessments do so at their own peril;
- updated commitments procedures, including specific timelines for provision of commitments – no more back and forth negotiations with the CCCS; parties have to put their best proposal forward or risk an unfavourable decision;
- more clarity in the Guidance Note for businesses looking to enter into collaborations with competitors – however, no safe harbours are provided and legal assessment is still crucial; and
- a recap of CCCS' highlights from 2021 and likely enforcement trends in 2022.

The CCCS issues revised guidelines

The CCCS' guidelines on the Competition Act assist businesses in understanding how the CCCS will administer and enforce key prohibitions in the Competition Act. Following a consultation conducted in 2020 (which we covered in a separate update entitled "CCCS Proposes Changes to its Guidelines: 4 Key Areas to Note"), the CCCS has amended the following sets of guidelines:

- CCCS Guidelines on Market Definition;
- CCCS Guidelines on the Major Competition Provisions;
- CCCS Guidelines on the Section 34 Prohibition;
- CCCS Guidelines on the Section 47 Prohibition;
- CCCS Guidelines on the Substantive Assessment of Mergers;
- CCCS Guidelines on Merger Procedures;

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- CCCS Guidelines on Directions and Remedies (which replace the previous CCCS Guidelines on Enforcement);
- CCCS Guidelines on the Appropriate Amount of Penalty in Competition Cases; and
- CCCS Guidelines on the Treatment of Intellectual Property Rights.

The revised guidelines came into force on **1 February 2022**. Some of the key changes which we covered in our earlier update, and their impact on businesses are highlighted below.

Merger notification still voluntary – but vital to conduct merger control analysis and assessment of risk of not notifying

As highlighted in our earlier update, the CCCS proposed to:

- delete a paragraph which used to indicate that in an own-initiative investigation of a merger, the CCCS would endeavour to follow the same process in reviewing notified mergers – which meant that parties being investigated may not have visibility on how long the process will last; and
- provide that it may, where it is reviewing or investigating a completed merger, direct that the merger be unwound as an interim measure.

These changes have been reflected in the amended guidelines. In addition, the revised guidelines also "strongly encourage" merger notifications to be made prior to completion of the merger.

This shift in messaging is clear – while the merger control regime in Singapore remains voluntary and non-suspensory (i.e., parties decide whether to notify a merger to the CCCS and are not prohibited from completing the transaction before clearance is obtained from the CCCS), the CCCS is likely to take a dim view of merger parties who choose to complete a transaction prior to seeking clearance (or not seeking clearance at all) when competition concerns are likely to be present.

New procedures for offering commitments in merger reviews

The proposed process under which commitments may be offered to, and reviewed by, the CCCS (outlined in our earlier update) have also been adopted in the revised merger procedures guidelines. The result is a more prescriptive process and timeline for applicants to offer commitments to address concerns identified by the CCCS during their merger review process. To recap:

- the 30-working-day indicative period for a Phase 1 review, which applies to simple mergers that do not raise competition concerns, remains unchanged;
- however, where the CCCS takes the view that a more detailed Phase 2 review will be required (i.e., it cannot reach a favourable decision by the end of the Phase 1 review period), it will first outline its concerns in a letter to the applicant and stipulate a deadline for the applicant to offer commitments or to submit a Form M2 (the form required for the CCCS' detailed Phase 2 review);
- if the applicant chooses to offer commitments, a final proposal will need to be submitted by another deadline set by the CCCS; and

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- if the commitments proposal is accepted, the CCCS will proceed to market testing which may take **up to 90 working days**. If the proposal is not accepted, the CCCS will proceed to a Phase 2 review and require the applicant to submit a Form M2.

A similar process comes into play at the end of the Phase 2 review, which has an indicative timeframe of 120 working days:

- if the CCCS still has competition concerns, it will set these out in a letter to the applicant who will be given a deadline by which to respond; and

- the CCCS is not obliged to complete its evaluation of any commitments which are submitted to the CCCS after this deadline before it issues a provisional decision prohibiting the merger. However, the applicant may resubmit such commitments (or a fresh commitments proposal) when responding to the CCCS' provisional decision.

The new process puts in place a fixed timeframe for applicants to offer commitments, but limits the possibility of a more iterative process where applicants try and make incremental proposals to address the CCCS' concerns when negotiating commitments. Applicants will need to put their best proposal forward when offering commitments or risk proceeding to a Phase 2 review or receiving an unfavourable provisional decision.

Confidential advice – threshold for good faith

The confidential guidance process allows a merger party to seek the CCCS' views on whether it considers that a merger is likely to raise concerns without the CCCS consulting any third parties or publishing the application on its register. One of the prerequisites to seek such guidance is that parties must demonstrate a "good faith intention" to proceed with the merger. This may present an issue for listed companies as demonstrating such an intention may then trigger requirements to publicly disclose the transaction, which would then disqualify them from the confidential guidance process.

The CCCS, in its feedback (which accompanied the release of the revised guidelines), clarified that a "good faith intention" for purposes of the guidelines does not necessarily need to be at the threshold standard to trigger public disclosure for listed companies, and applicants are not limited in the evidence that they can use to demonstrate their intention to carry into effect a merger. An example provided by the CCCS is that the amount of resources that has been spent to engage relevant consultants on a transaction may be used to evidence such a good faith intention.

No more requirement for hard copies

The revised guidelines have formally removed the requirement for merger notifications to be submitted in hard copy (although this practice has been in place in the last two pandemic-hit years). While the CCCS may still request hard copies of certain documents to be provided, this will ease the logistical burden on applicants particularly at a time when many are still working remotely.

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New CCCS Guidelines on Directions and Remedies

The application of the commitments process had been expanded following legislative amendments in 2018 allowing the CCCS to accept and enforce binding commitments offered in respect of notifications / investigations of anti-competitive or abusive conduct (previously, this process only applied in the context of merger reviews). To reflect this expanded scope, the CCCS has included new guidance on the commitments process together with its previous guidelines on enforcement and renamed it the "CCCS Guidelines on Directions and Remedies".

Businesses which are or may be subject to CCCS investigations in respect of their conduct/practices should keep this option in mind, i.e., offering commitments which can address the CCCS' substantive concerns may be a more expedient way to bring what may be a lengthy investigation process to an end.

Greater clarity on collaborations between competitors – CCCS issues Guidance Note on Business Collaborations

The CCCS has also issued the Guidance Note to provide more clarity on the CCCS' position on seven different types of business collaborations which are commonly encountered. These comprise:

- Information sharing arrangements, where businesses may exchange price and non-price related information;
- Joint production arrangements, where businesses collaborate to jointly produce a product, share production capacity or subcontract production;
- Joint commercialisation, where businesses collaborate in marketing, distribution or sale of a product;
- Joint purchasing, where businesses jointly purchase products/services from one or more suppliers;
- Joint research & development ("**R&D**"), where businesses collaborate on R&D activities;
- Standards development, where industry or technical standards are collectively set by the industry; and
- Usage of standardised terms and conditions, which are established by businesses in the same industry.

The Guidance Note provides useful insight into the key factors that the CCCS will consider in assessing if these business collaborations raise concerns under the Competition Act. This is a welcome development as it provides more comfort and certainty to businesses that are seeking to engage in such collaborations within the bounds of the Competition Act. Some helpful takeaways for businesses from the Guidance Note include:

- market shares of the relevant businesses remains an important factor. In other words, the lower the market shares of the relevant parties who are collaborating, the less likely competition concerns will arise;

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- R&D collaborations on new products or technologies are less likely to raise competition concerns where there are multiple alternative ongoing projects that can produce products that are close substitutes;
- as far as joint purchasing, joint commercialisation and joint production arrangements are concerned, the key factors to consider are whether the collaboration results in significant commonality of costs (which raises the incentives and ability for businesses to engage in collusive behaviour), and whether there are sufficient safeguards around sharing of competitively sensitive information; and
- arrangements which involve or facilitate "hardcore" anti-competitive objects such as price-fixing, bid-rigging, output limitations and market sharing remain out of bounds, regardless of how they may be "disguised" as part of a business collaboration.

However, it is important to note that the Guidance Note does not provide for any definitive safe harbours. While it indicates that competition concerns are less likely to arise under certain circumstances, the Guidance Note still stresses that each arrangement must be examined on its own merits. It is also possible for applications to be made to the CCCS to seek guidance or a decision on whether a proposed collaboration would be likely to infringe the Competition Act. **As such, legal advice should be sought early on in the structuring of such collaborations to assess potential concerns and, if necessary, to make the necessary application to the CCCS.**

Recap of CCCS activity in 2021

2021 was the first year since 2015 in which no infringement decisions were issued by the CCCS. This is more likely a consequence of the ongoing pandemic, which would have hampered investigations and extended timelines than any shift in enforcement priorities.

The CCCS was however considerably busier on the merger control filing. It cleared / received 10 merger notifications in the course of 2021, almost one a month, which is a little higher than in previous years. This was not surprising considering the record volume of M&A activity in the last year. This trend looks set to continue into 2022 and the CCCS itself has also indicated in public statements that it expects to receive more merger notifications – there have already been two filed in the first two weeks of January 2022.

In particular, the CCCS showed its willingness to accept long-term behavioural commitments in its conditional clearance of the proposed acquisition by London Stock Exchange plc of Refinitiv Holdings Limited – the only merger cleared in 2021 that went to a Phase 2 review. In that case, the CCCS' concern was that London Stock Exchange Group ("**LSEG**") (a major provider of index licensing and clearing services) would become less incentivised to provide its competitors with access to Refinitiv's foreign exchange benchmarks (which were critical inputs with no readily available substitutes) after the acquisition. To address this, LSEG offered a 10-year commitment to continue to make such benchmarks available to other index providers and clearing houses, which was accepted by the CCCS.

The CCCS also strengthened its ties with competition authorities in the region in 2021. In particular, it signed memoranda of understanding with competition regulators in China and the Philippines to facilitate the exchange of information as well as coordination of enforcement actions on cases of mutual interest.

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Lastly, the block exemption order excluding certain types of liner shipping agreements from the prohibition of anti-competitive agreements/arrangements was extended for an additional three years, i.e., until 31 December 2024. It had been due to expire on 31 December 2021 and the CCCS recommended that the Minister for Trade and Industry extend the exemption order following a consultation conducted in July 2021.

Looking ahead to 2022

Looking ahead, the CCCS expects to see more applications for guidance/decisions on business collaborations, particularly in sectors that have been more affected by the ongoing pandemic such as the food and beverage, and tourism sectors. Relatedly, we also expect to see more notifications involving mergers and acquisitions or collaborations between airlines – one of the sectors that have been more badly hit by the pandemic. One example of this is Korean Air Lines' proposed acquisition of Asiana Airlines, which was notified to the CCCS in July 2021 and is still pending clearance.

With sustainability issues continuing to be in the spotlight across all sectors, as well as a key focus of the Government, the CCCS has also indicated its readiness to prioritise and engage in sustainability-related topics. In November 2021, the CCCS invited researchers to submit proposals for a research grant on "Sustainability, Competition and Consumer Protection in Singapore", and it has indicated that such research may inform the CCCS' formulation of policies and initiatives.

Separately in the telecommunications sector, which has its own sector specific merger control regime that is enforced by the Infocomm Media Development Authority of Singapore ("**IMDA**"), 2022 will likely see a decision on StarHub Limited's proposed acquisition of a majority interest in MyRepublic Limited's competing retail broadband business. Given StarHub Limited's number two position in this market (based on the documents published by IMDA), it will be interesting to see the IMDA's attitude and approach to such a proposed consolidation.

If you would like information or assistance on the above or any other area of law, you may wish to contact the Partner at WongPartnership whom you normally work with or any of the following Partners:

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