

## CCCS Conducts Public Consultation on Draft Environmental Sustainability Collaboration Guidance Note

Collaboration between businesses in the same or adjacent sectors is typically a catalyst for pursuit of environmental sustainability objectives, given the costs involved and potential adverse impact on a business' competitiveness in the short term. However, as with any other form of collaboration between businesses, it is critical to consider whether it may raise competition law concerns. The current set of guidelines issued by the Competition and Consumer Commission of Singapore (**CCCS**) does not contain specific guidance on collaborations with sustainability objectives. To address this gap, the CCCS has recently published a draft Environmental Sustainability Collaboration Guidance Note (**Draft Guidance**) for consultation. The Draft Guidance essentially tracks the same principles set out in the CCCS' Business Collaboration Guidance Note, but with examples that are specific to collaborations with environmental sustainability objectives. In doing so, it aims to provide businesses with a better understanding of how the CCCS views such collaborations, and also targeted guidance on how potential competition issues can be avoided.

In this update, we outline various key areas of the Draft Guidance and consider how it compares against similar guidance issued by the European Commission (**EC**) and a similar draft guidance issued by the UK Competition and Markets Authority (**UK CMA**).

The proposed Draft Guidance can be accessed [here](#), and feedback can be provided using the [Public Consultation Online Form](#). The consultation ends on 17 August 2023.

### Applicability of Draft Guidance

The Draft Guidance is intended to apply to business collaborations where the crux or main activity is the pursuit of environmental sustainability objectives. While there is no bright-line test to determine whether a collaboration is carried out in pursuit of environmental sustainability objectives, the Draft Guidance indicates that the CCCS will consider the starting point and main focus of the collaboration, and the degree of integration of the different functions required to pursue the relevant environmental sustainability objective.

One example provided in the Draft Guidance is of a collaboration between businesses primarily intended to develop and produce more sustainable products. This may entail both joint research and development (**R&D**) as well as joint production between businesses. If the collaborative activities (i.e., joint R&D and production) would take place due to the environmental sustainability objectives being pursued – e.g., the environmental sustainability objectives requires joint R&D to be conducted – then the CCCS would consider that the collaboration falls within the scope of the Draft Guidance.

Another example cited in the Draft Guidance is of a collaboration involving the joint purchase of a new green solution which must amass a critical level of demand so that the underlying green technologies or infrastructure can be developed (e.g., because a minimum scale of operation is necessary for the

solution to be commercially viable). Such a collaboration would also be treated as pursuing environmental sustainability objectives as its crux or main activity.

**As a starting point, businesses should therefore consider the underlying objectives of a proposed collaboration and whether it may fall within the scope of the Draft Guidance.**

## Collaborations Which are Unlikely to Raise Competition Concerns

The Draft Guidance provides examples of collaborations which are unlikely to raise competition concerns. These include:

- (a) Collaborations that do not affect how businesses compete with each other, i.e., they do not involve factors of competition such as price, quantity, or choice or innovation of goods and services. Examples include collaborations to share best practices to reduce environment footprints and pooling of resources to encourage training in environmental sustainability related areas.
- (b) Collaborations which involve activities that objectively cannot be carried out by the parties individually. An example given is of a collaboration where a business that manufactures fuel collaborates with a business that supplies sustainable alternative feedstock not traditionally used as input for the fuel, so as to develop a new and more environmentally friendly type of sustainable fuel.
- (c) Collaborations required to comply with other written laws or where businesses are acting on behalf of the Government or a statutory body. While such agreements are excluded under Singapore's Competition Act 2004 (**Competition Act**), businesses should note that the CCCS construes these exclusions narrowly, requiring explicit direction and not just mere encouragement or endorsement from a governmental or statutory body.

## Collaborations Which are Less Likely to Raise Competition Concerns

The Draft Guidance sets out a second category of collaborations which are "less likely" to raise competition concerns, and provides additional guidance on how such concerns may be minimised. The guidance here largely echoes that provided in the CCCS' Business Collaboration Guidance Note. For example:

- (a) The collaboration should not involve "hardcore" anti-competitive activities (e.g., price-fixing, bid-rigging, output limitation and market sharing) and the businesses involved do not have significant market power (i.e., where they have aggregate market shares of less than 20%).
- (b) The implementation of industry-wide environmental standards or codes of practice should be effected *via* a transparent and inclusive process, commercially sensitive information that is not vital or relevant should not be exchanged, and compliance should be voluntary and non-discriminatory.
- (c) The collaborations should not result in a significant commonality of costs, sharing of commercially sensitive information, or agreements to limit scope or pace of product/service developments.

## Collaborations Where Competition Concerns May Arise

The CCCS has highlighted that collaborations which restrict competition by object, e.g., involving price-fixing, bid-rigging, output limitation and market sharing, will still raise competition concerns – even if there is some environmental sustainability objective involved. **Businesses should keep this in mind and be wary of any proposed collaborations involving such agreements, even if they are made under the guise of sustainability-related objectives.**

The Draft Guidance also indicates that where the aggregate market shares of the parties involved exceed 20%, a more in-depth assessment on the anti-competitive effects of the collaboration should be conducted to determine if it may have an appreciable adverse effect on competition. **Businesses in more concentrated sectors should bear this in mind and undertake a more substantive, effects-based assessment when considering potential collaborations.**

## Collaborations Which Produce Net Economic Benefits

A proposed collaboration that raises competition concerns may still benefit from the net economic benefit exclusion under the Competition Act (**NEB Exclusion**). The Draft Guidance provides more details on the applicability of the NEB Exclusion to collaborations with environmental sustainability objectives. To recap, the NEB Exclusion applies where a collaboration:

- (a) Leads to economic benefits (e.g., if it improves production or distribution of goods and services or promotes technical or economic progress);
- (b) Is necessary for achieving such benefits; and
- (c) Does not allow the businesses involved to eliminate competition in a substantial part of the good or service involved.

### *Economic benefits*

The economic benefits following from collaborations with sustainability objectives may not always accrue directly in the markets where the collaborating businesses operate. Providing much needed flexibility in this regard, the Draft Guidance indicates that the CCCS would be prepared to consider benefits from collaborations with sustainability objectives that extend beyond the relevant markets, such as benefits accruing to Singapore as a whole where appropriate.

Another hurdle to relying on the NEB Exclusion is the requirement to demonstrate the magnitude and likelihood of the benefits claimed and to show that they are significant enough to outweigh the anti-competitive effects of the collaboration in question. This may not be a straightforward exercise in the context of collaborations with sustainability objectives. The Draft Guidance addresses this pain point in a few ways:

- (a) It indicates that a precise quantification of benefits may not be necessary where the harm to competition is clearly limited, and the likelihood of benefits arising is high.

- (b) Even where a more detailed quantitative assessment of the benefits is required, the Draft Guidance recognises that there may be a degree of uncertainty in such assessment, particularly where the collaboration involves nascent products, services or technologies. Businesses should highlight such constraints to the CCCS and the Draft Guidance indicates that the CCCS would be open to considering the same when assessing the benefits that may accrue.
- (c) The Draft Guidance also indicates that businesses should, where possible, try to apply objectively determined and industry recognised methodologies and standards to quantify economic benefits. These include the use of life-cycle assessment / costing or shadow prices. For example, where greenhouse gas emissions reductions are claimed as a benefit, a possible starting point for quantifying such benefits could be the monetary value associated with these emissions.

## *Necessity*

Businesses relying on the NEB Exclusion must also show that the collaboration, as well as the restrictions within the relevant agreements, are reasonably necessary to obtain the benefits asserted.

The CCCS considers that a restriction is necessary only if its absence would eliminate, or significantly reduce the benefits produced by a collaboration, or make them much less likely to materialise. As such, if there are less restrictive methods of achieving the same benefit, or the parties are capable of achieving the benefits independently, the collaboration and the restrictions involved will not be deemed necessary.

## *No elimination of competition*

Finally, businesses must ensure that competition is not eliminated in a substantial part of the market. In determining this, the CCCS will consider the degree of competition prior to the collaboration in question and the expected reduction in competition the collaboration may cause.

The “degree of competition” to be assessed is not limited to the size of the competitors involved – even if the proposed collaboration affects the entire industry *vis-à-vis* one parameter of competition, there may still be other important parameters of competition on which businesses in the industry continue to compete strongly.

An example provided is a standardisation agreement that results in the discontinuation of non-environmentally friendly products, which may significantly reduce the ability of businesses to compete on product differentiation. In such scenarios, the CCCS considers that the condition may still be satisfied if businesses are still able to compete on price and price remains an important parameter for competition.

## **Streamlined Notification Process**

While there is no legal requirement for businesses to notify their collaborations to the CCCS (whether or not they involve the pursuit of environmental sustainability objectives), they may nevertheless wish to do so to seek guidance or a decision on whether their collaboration infringes section 34 of the Competition Act (which prohibits, *inter alia*, anti-competitive arrangements and agreements).

In this regard, the Draft Guidance introduces a streamlined notification process specifically for the assessment of collaborations which claim to pursue environmental sustainability objectives. The streamlined process entails a two-phase approach with timelines similar to that under the CCCS' merger notification review process:

- (a) Phase 1 review: A quick assessment for simple cases, which allows the CCCS to give a favourable decision or guidance regarding collaborations that clearly do not raise competition concerns. This assessment is expected to be completed within 30 working days, assuming that businesses provide complete, concise and relevant information promptly and within specified timeframes.
- (b) Phase 2 review: For more complicated cases that the CCCS considers necessary to conduct a more detailed assessment, such assessment is expected to be completed within 120 working days.

## Comparison with EC / UK CMA Guidelines

The publication of the Draft Guidance follows similar developments in the European Union and the UK:

- (a) The EC published its revised "Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements" on 1 June 2023 which contain a new section on assessment of sustainability agreements; and
- (b) The UK CMA published a draft guidance on environmental sustainability agreements for consultation in February 2023.

In terms of substance, the Draft Guidance is generally similar to these guidance documents from the EC and the UK CMA.

One notable feature of the CCCS' Draft Guidance, however, is the proposed streamlined notification process which is specific to the assessment of collaborations that claim to pursue environmental sustainability objectives. In contrast, the EC and UK CMA documents only highlight the availability of avenues to seek informal guidance regarding such agreements. The CCCS' proposal will certainly be welcomed by businesses seeking a greater degree of certainty and a more defined, and potentially quicker, review process.

## Concluding Observations

The issuance of the Draft Guidance is a welcome development, particularly for businesses keen to jumpstart or join environmental sustainability initiatives that require cooperation with their competitors. The CCCS' acknowledgement that collaboration between competitors may be necessary for the pursuit of environmental sustainability objectives is also encouraging.

Businesses would likely welcome the CCCS' willingness to consider a broader range of benefits, as well as the CCCS' recognition of the difficulties in providing a more precise quantification of such benefits when applying the NEB Exclusion to collaborations involving environmental sustainability objectives. The proposed streamlined notification process will also provide a more defined avenue and process by which businesses may seek formal guidance and certainty on proposed collaborations. It is hoped that these developments will remove or reduce some of the hurdles which businesses face in pursuing environmental sustainability initiatives.

If you would like information and/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:



**Ameera ASHRAF**

Head – Antitrust & Competition

d: +65 6416 8113

e: [ameera.ashraf](mailto:ameera.ashraf@wongpartnership.com)

[@wongpartnership.com](mailto:ameera.ashraf@wongpartnership.com)

Click [here](#) to view Ameera's CV.



**CHAN Jia Hui**

Partner – Antitrust & Competition

d: +65 6416 2794

e: [jiahui.chan](mailto:jiahui.chan@wongpartnership.com)

[@wongpartnership.com](mailto:jiahui.chan@wongpartnership.com)

Click [here](#) to view Jia Hui's CV.

 Connect with WongPartnership.

# WPG MEMBERS AND OFFICES

- [contactus@wongpartnership.com](mailto:contactus@wongpartnership.com)

## SINGAPORE

-

WongPartnership LLP  
12 Marina Boulevard Level 28  
Marina Bay Financial Centre Tower 3  
Singapore 018982  
t +65 6416 8000  
f +65 6532 5711/5722

## CHINA

-

WongPartnership LLP  
Shanghai Representative Office  
Unit 1015 Link Square 1  
222 Hubin Road  
Shanghai 200021, PRC  
t +86 21 6340 3131  
f +86 21 6340 3315

## MYANMAR

-

WongPartnership Myanmar Ltd.  
Junction City Tower, #09-03  
Bogyoke Aung San Road  
Pabedan Township, Yangon  
Myanmar  
t +95 1 925 3737  
f +95 1 925 3742

## INDONESIA

-

Makes & Partners Law Firm  
Menara Batavia, 7th Floor  
Jl. KH. Mas Mansyur Kav. 126  
Jakarta 10220, Indonesia  
t +62 21 574 7181  
f +62 21 574 7180  
w [makeslaw.com](http://makeslaw.com)

## MALAYSIA

-

Foong & Partners  
Advocates & Solicitors  
13-1, Menara 1MK, Kompleks 1 Mont' Kiara  
No 1 Jalan Kiara, Mont' Kiara  
50480 Kuala Lumpur, Malaysia  
t +60 3 6419 0822  
f +60 3 6419 0823  
w [foongpartners.com](http://foongpartners.com)

## MIDDLE EAST

-

Al Aidarous Advocates and Legal Consultants  
Abdullah Al Mulla Building, Mezzanine Suite 02  
39 Hameem Street (side street of Al Murroor Street)  
Al Nahyan Camp Area  
P.O. Box No. 71284  
Abu Dhabi, UAE  
t +971 2 6439 222  
f +971 2 6349 229  
w [aidarous.com](http://aidarous.com)

-

Al Aidarous Advocates and Legal Consultants  
Oberoi Centre, 13th Floor, Marasi Drive, Business Bay  
P.O. Box No. 33299  
Dubai, UAE  
t +971 4 2828 000  
f +971 4 2828 011

## PHILIPPINES

-

ZGLaw  
27/F 88 Corporate Center  
141 Sedeño Street, Salcedo Village  
Makati City 1227, Philippines  
t +63 2 889 6060  
f +63 2 889 6066  
w [zglaw.com/~zglaw](http://zglaw.com/~zglaw)

[wongpartnership.com](http://wongpartnership.com)