CCCS Proposes Changes to its Guidelines: 4 Key Areas to Note

Overview

On 10 September 2020, the Competition and Consumer Commission of Singapore ("**CCCS**") published its Public Consultation on Proposed Changes to Competition Guidelines, seeking feedback on its proposed amendments to six of the CCCS Guidelines.

The proposed changes will involve significant changes to the CCCS' longstanding merger review process, as well as the introduction of a new formal process for the consideration and acceptance of commitments. In addition, the CCCS has included substantial new guidance on its review of multi-sided markets (following its recently concluded market study on e-commerce platforms), and also on its approach to assessing competition issues arising from agreements/conduct relating to intellectual property rights.

These proposed changes will have an impact on the CCCS' application of the Competition Act going forward and consequently on how businesses should plan ahead in their dealings with the CCCS – in particular: (a) in the timelines for merger review and commitments; (b) businesses operating in multi-sided markets may need to assess whether they are dominant and hence risk infringing the Competition Act when taking certain commercial actions in the market; and (c) businesses which own and/or licence intellectual property rights should proactively assess their licensing practices to determine whether competition issues might arise.

This update looks at some of the key proposed amendments.

Amendments to merger review guidelines: Vital to conduct merger control analysis notwithstanding voluntary nature of regime

The CCCS has proposed amending the guidelines which set out its procedures in reviewing notified mergers. The more noteworthy changes include:

(a) **CCCS may not follow merger review procedures in an investigation.** The CCCS has proposed to delete a paragraph which indicates that it will endeavour to follow the same process (in reviewing notified mergers) where it investigates a merger on its own initiative (i.e., where a notification is not made). This means that parties subject to such investigations may not have visibility on how long the process will last (as the CCCS may not follow the indicative timelines set out in the guidelines), which may present challenges from a transaction timeline perspective.

(b) **CCCS may direct completed merger to be unwound as an interim measure.** Where a merger under review (whether notified voluntarily or not) by the CCCS has been completed, interim measures imposed by the CCCS could include requiring the completed merger to be dissolved or modified.

(c) **Merger notifications to be submitted electronically.** The CCCS has also proposed doing away with the requirement for physical copies of merger notifications to be submitted. Merger notifications will have to be submitted electronically instead (in formats to be specified by the CCCS).

Remarks

The proposed amended guidance makes clear that merger parties should undertake an assessment of whether the transaction raises competition concerns in Singapore and whether a voluntary merger filing should be made to the CCCS. The consequences of an investigation may include an indefinite period during which the CCCS may suspend implementation of the merger. If parties had proceeded to complete the merger, the CCCS could even direct that the transaction be unwound pending its investigation.

Offering commitments to address competition concerns: New formal process proposed

The Competition Act was amended in 2018 to formalise the CCCS' ability to accept commitments. In short, parties are able to propose commitments to the CCCS to address competition concerns that have arisen in the course of an investigation or review of a notification. Such commitments may be behavioural, where parties agree to restrictions on their commercial behaviour (e.g., pricing), or structural, where parties agree to divest parts of the relevant business to address competition concerns which may arise from a proposed merger.

The proposed amendments to the CCCS' Guidelines on Enforcement (to be renamed the Guidelines on Remedies, Directions & Penalties) now clarify the process and procedures which the CCCS will adopt in accepting and considering commitments. The key points to note are:

(a) **Formal commitments process with stipulated deadlines.** Where the CCCS has identified competition concerns in the course of reviewing mergers, agreements/arrangements or conduct which are voluntarily notified to the CCCS for a decision (on whether they infringe the substantive prohibitions under the Competition Act):

(i) the CCCS will stipulate a deadline by which parties may submit commitments for its consideration;

(ii) should the CCCS find the commitments acceptable, it would then proceed with market testing, i.e., seeking comments from the public and from relevant stakeholders on the proposed commitments. Following this market testing process, the CCCS will decide whether to accept the commitments and if it does, it will issue a favourable decision subject to these commitments;

(iii) if: (1) no commitments are proposed to the CCCS before the stipulated deadline; (2) the proposed commitments are not acceptable to the CCCS and it does not proceed to market testing; or (3) the CCCS decides not to accept the proposed commitments following market testing, the CCCS will terminate its assessment and proceed to its second, more detailed phase of review (i.e., Phase 2 for merger reviews and Form 2 for reviews of agreements/arrangements or conduct); and

(iv) the same process is repeated in the second phase review. If no commitments are proposed by the deadline or if proposed commitments are not acceptable to the CCCS (whether before or after the market testing process), the CCCS will issue a provisional unfavourable decision. In this case, the parties will have one last chance to propose commitments to the CCCS as part of their representations in respect of the provisional unfavourable decision.

(b) **Incremental proposals unlikely to be entertained.** The proposed amended guidance makes clear that the CCCS is unlikely to entertain repeated revisions of a commitments proposal, and will extend the stipulated deadlines for proposing commitments only in very limited circumstances. Further, where a resubmitted proposal is substantially amended and requires further market testing, the CCCS may reject it if there is insufficient time to adequately assess the proposal.

(c) **Acceptance of commitments at CCCS' discretion for parties under investigation.** On the other hand, where a party is being investigated by the CCCS for a potential infringement of the Competition Act, the acceptance of commitments is entirely at the CCCS' discretion. The CCCS would generally not accept commitments in cases involving restrictions of competition by object, e.g., price fixing or bid rigging, where there is no accompanying net benefit. Should a party being investigated indicate to the CCCS that it wishes to offer commitments, the CCCS will stipulate a deadline for submission of such proposals, and proceed to issue the proposed infringement decision if no acceptable proposal is offered by that deadline.

Remarks

Parties filing notifications involving mergers, agreements/arrangements or conduct which are likely to require commitments to resolve competition concerns should take note of this, and be prepared to put forth their commitments proposal in advance of the stipulated deadline. As far as possible, they would need to avoid floating more favourable "test" commitments to see if the CCCS may be amenable to the same, and try to provide in the first instance, a commitments proposal that addresses the CCCS' concerns.

Parties under investigation should also note that commitments may not be accepted, and that they should engage the CCCS as early as possible if they decide to offer commitments to address the CCCS' concerns.

New guidance on multi-sided markets: Does your platform need to be wary of engaging in abusive market conduct or anti-competitive mergers?

We have seen the rise of multi-sided platforms in the last few years, e.g., for food delivery, ride-hailing, e-commerce. As the name suggests, multi-sided markets/platforms have two or more distinct group of users (or "sides") which interact with, and depend on, each other. Unlike typical markets where there are simply buyers and sellers, multi-sided platforms are essentially "sellers" to both sets of users and the attractiveness of the platform typically depends on whether it is able to attract and retain users on both sides.

A good example would be an e-commerce platform on which businesses market their goods/services to buyers – the two distinct groups being the businesses which are marketing good/services and the buyers. In this case, it is clear that the value of the platform to each of its two groups of users, i.e., the sellers and the buyers, is dependent on the size of each group – the more sellers there are, the more attractive it is to a buyer, and *vice versa*. Similarly, a ride-hailing platform will be successful only if it can attract a large number of users on both sides, i.e., drivers and riders, on to the platform.

The CCCS has proposed supplementing its guidelines to clarify its approach to such multi-sided markets. We set out below, the key points which should be of interest to businesses operating in such markets:

(a) **Assessing dominance of multi-sided platforms.** The proposed changes include specific guidance on the factors to be considered when assessing if multi-sided platforms are dominant.

These are significant to operators of such platforms because a business which is considered "dominant" under the Competition Act has to take additional care not to take certain actions (even if these are unilateral decisions taken without any collusion with any other competitor) which may be deemed abusive, e.g., imposing exclusivity obligations, bundling/tying of services, predatory pricing to drive potential competitors out.

(i) **Network effects.** Multi-sided platforms which exhibit strong network effects, i.e., where the increase in usage on one side of the platform greatly increases its value to users on the other side, may be considered dominant unless there are other mitigating factors, e.g., the prevalence of multi-homing (where users typically utilise more than one competing platform) and low costs involved in switching platforms.

(ii) **Alternative market share measures.** Market share is an important (though not definitive) factor considered by the CCCS when assessing dominance – the CCCS considers a market share of more than 60% as likely to indicate dominance. While market shares are typically computed based on value and volume of sales, the proposed amended guidance lists various alternative measures that may be more appropriate in assessing multi-sided platforms, such as monthly active users (on both sides), transaction volumes and gross merchandise values.

(iii) **Economies of scope / Consumption synergies.** While not unique to multi-sided platforms, it is common to see such platforms expand the scope of their product/service offerings as they scale up. The proposed amended guidance highlights that economies of scope, i.e., savings which are achieved by costs/know-how shared over the provision of a range of products/services, may be a barrier to entry as new entrants which only provide one or a narrow range of offerings may not be able to compete against an incumbent. Similarly, where buyers find it more efficient to purchase multiple distinct products/services from the same platform, such consumption synergies may also present a barrier to entry to incumbents which do not offer such a wide range of offerings initially.

These new factors are significant as it means that a platform which has been able to expand to provide a wide range of complementary products/services could be considered by the CCCS as having created an additional barrier to entry to the relevant market. For the same reason, the merger of platforms which carry different but complementary products/services may raise competition concerns by creating such a barrier to entry.

(b) **Impact of multi-sided nature on scope of defined market.** In defining the scope of a market, the CCCS applies the "hypothetical monopolist" test to identify the narrowest group of products (and smallest area over which it is sold) within which a hypothetical monopolist would be able to maintain prices above competitive levels. The proposed amendments clarify that the CCCS will take a holistic approach to market definition for multi-sided markets, e.g., identifying appropriate theories of harm before applying the "hypothetical monopolist" test, considering interdependencies (or lack thereof) between the different sides of the platform as well as constraints faced.

(i) **Price structure.** Where raising prices on one side of the market reduces the number of users on that side, which then adversely affects the number of users on the other side of the market, this may suggest that a hypothetical monopolist in such a market is not able to sustain pricing above competitive levels.

(ii) **Evaluating non-price changes.** Multi-sided platforms may not charge a positive price to users on one or more sides of the platform, e.g., users of a social media application. In such circumstances, any non-price effects on that side of the platform will still be relevant in the application of the "hypothetical monopolist" test. For example, the CCCS may consider if a significant number of users would switch should there be a decrease in quality of the service offered (instead of an increase in price).

Remarks

The proposed amendments provide much needed clarity on the assessment of multi-sided markets, given the proliferation and significance of such platforms in recent years. Operators of such platforms should take proactive steps to assess the likely scope of the market in which they operate and if they may potentially be dominant. It would also be prudent to understand the restrictions on abusive conduct which would kick in if a business is, or subsequently becomes, dominant – so that problematic conduct may be identified in advance and contingency plans made.

The updated guidance on multi-sided markets, in particular the factors listed above which are relevant towards assessing if a multi-sided platform is dominant, is equally applicable in the assessment of mergers involving multi-sided markets. As such, any assessment of a merger of businesses operating in such markets will need to take these factors into account as well.

Treatment of intellectual property rights: Will proposed amendments affect your existing IPR licensing practices?

The Guidelines on Treatment of Intellectual Property Rights ("**IP Guidelines**") set out how the CCCS views the interface between intellectual property rights ("**IPRs**") and competition law and explains non-exhaustively some of the factors and circumstances that the CCCS may consider when assessing agreements and conduct which concern IPRs. The key proposed changes provide more clarity on the approach that the CCCS would take in assessing various common scenarios.

(a) **Expansion of the scope of the IP Guidelines to address new IPR-related agreements and/or conduct.** The IP Guidelines will be updated to address how the CCCS may view certain arrangements relating to IPR-related agreements and/or conduct involving IPRs. In particular, the updated IP Guidelines signal how the CCCS may treat certain IPR licensing related practices as giving rise to competition concerns under Section 34 of the Competition Act:

(i) non-challenge clauses in agreements where there is a direct or indirect obligation not to challenge the validity of the licensors' IPR;

(ii) agreements which prevent the lawful parallel importation of a product; and

(iii) agreements which restrict a licensee's ability to exploit its technology rights such as:

(A) IPR "pay-for-delay" type settlement agreements which are based on a value transfer from one undertaking in return for a limitation on the entry and/or expansion into the market of another undertaking;

(B) IPR settlement agreements involving cross-licensing between the parties which impose a restriction on the use of their IPRs to *inter alia* share markets or fix reciprocal running royalties that have a significant impact on market prices; and/or

(C) IPR settlement agreements where parties are entitled under the terms of the agreement to use each other's technology and future developments;

(b) **Introduction of various factors to the competition analysis of various types of licensing restraints or arrangements and/or licensing agreements involving exclusivity.** The IP Guidelines will also be updated with additional factors that the CCCS will take into account in their analysis of the following types of licensing restraints or arrangements and/or licensing agreements involving exclusivity:

(i) licensing agreements which restrict the ability or incentive of any of the parties to carry out independent research and development, including independent research and development with third parties;

(ii) grantback arrangements under which a licensee assigns to the licensor, or agrees to extend to the licensor, the rights over the licensee's improvements to the licensed technology; and

(iii) technology pool arrangements whereby two or more parties assemble a package of technology which is licensed not only to contributors of the pool but also to third parties;

(c) **Legitimate exercise of an IPR.** The IP Guidelines will be updated to clearly state that the legitimate exercise of an IPR *per se* by a dominant undertaking will not usually amount to an abuse when limited to the specific product that is protected by the IPR, but that abuse of dominance (prohibited by Section 47 of the Competition Act) related concerns may arise in circumstances where the dominant undertaking attempts to exercise its market power beyond the scope of the legal monopoly granted by the IPR (e.g., agreements which include post-expiration royalty charges);

(d) **Standard-essential patents ("SEPs") and licensing on fair, reasonable and non-discriminatory ("FRAND") terms.** The IP Guidelines will be updated to clearly set out that the refusal by an SEP holder to license its technology on FRAND terms may be considered an abuse of dominance, in particular where the standard-setting process will eliminate all other alternative technologies and may confer a degree of market power to the SEP holder whose technology is included in the standard; and

(e) **Refusal to provide access to data.** The IP Guidelines will also be updated to provide that a refusal to provide access to data may give rise to competition concerns under Section 47 of the Competition Act *vis-à-vis* the "thin" copyright protection afforded over data and facts. In particular, the CCCS makes it clear that to assess whether competition intervention is appropriate in these cases, it will also take into consideration evidence of likely or actual harm to competition, and whether the refusal of access to data can be objectively justified (e.g., on the basis of poor track records of privacy of that competitor, or security concerns over a particular data set).

Remarks

The new concepts set out in the proposed amendments to the IP Guidelines are largely a reflection of approaches that have been taken by authorities/courts in other major jurisdictions or an application of general competition law concepts to more specific situations involving IPRs. Nonetheless, their inclusion suggests that IPR related competition issues are an area that may be of interest to the CCCS. As such, businesses which routinely enter into IPR licensing arrangements (whether as the licensee or licensor) should proactively assess their licensing practices to determine whether competition issues may arise – for example, whether any IPR licensing, grantback or pooling arrangements may adversely affect competition by restricting parties from conducting, or reducing the incentive for parties to conduct, further independent research and development, or whether the refusal to license essential IPR may be an abuse of dominance.

The inclusion of guidance regarding the refusal to provide access to data also serves as a warning that copyright protection in itself cannot justify a dominant entity's refusal to provide such access to third parties if it is a key competitive input.

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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