



CCCS'S RESPONSE TO THE PUBLIC CONSULTATION ON THE ENVIRONMENTAL SUSTAINABILITY COLLABORATION GUIDANCE NOTE

1 March 2024

Introduction

The Competition and Consumer Commission of Singapore (“CCCS”) conducted a public consultation between 20 July 2023 and 4 September 2023 in relation to the proposed issuance of the Guidance Note on Business Collaborations Pursuing Environmental Sustainability Objectives (the “ESCGN”). A total of 5 submissions were received from the business community, bar and business associations, and academic community.

CCCS is grateful to all respondents for their feedback. They were supportive of CCCS’s initiative to issue the ESCGN, with additional suggestions on how the ESCGN could be improved. CCCS has carefully reviewed the feedback carefully and made some additions and amendments to the ESCGN. This document outlines the main changes made, as well as the reasons why some suggestions have or have not been adopted.

Environmental Sustainability Collaboration Guidance Note

Block exemption:

A respondent suggested for CCCS to consider putting in place a block exemption for specific industry-wide environmental standards, codes of practice and associated “green quality marks” given that some of these environmental sustainability collaborations may only be commercially viable if costs can be passed on to consumers (e.g. through industry-uniform surcharges which are on a cost-recovery basis).

In this regard, CCCS notes that in some cases, a certain level of restriction of competition may be necessary in order for an agreement to be commercially feasible. That said, further requirements need to be satisfied before a block exemption as set out in section 41 of the Competition Act 2004 (the “Act”), which are identical to the criteria for Net Economic Benefit Exclusions in paragraph 9 of the Third Schedule of the Act (the “NEB Exclusion”), could be granted. CCCS has not seen evidence to suggest that so long as an agreement pursues environmental sustainability objectives (including any sub-categories of such agreements, like industry-wide environmental standards, codes of practice or “green quality marks”), it will satisfy the requirements in section 41 of the Act. There is also a lack of certainty and details over the types of agreements that will be put in place commercially. Without sufficient details to set proper conditions, there is also a risk of greenwashing by businesses to take advantage

of such a block exemption. As such, CCCS does not consider a block exemption for such agreements to be feasible at this juncture.

Role of ESCGN:

One respondent suggested that CCCS could provide further assurance to businesses that if the ESCGN is followed in good faith, CCCS would not impose financial penalties, even if an infringement is subsequently found. In this regard, CCCS encourages businesses to undertake a self-assessment of their collaboration or engage their own legal advisors to assist in the assessment of the competition risks of any collaboration. They may also utilise the notification regime, for which there is immunity from financial penalty while the agreement is under consideration, if they are uncertain as to whether their collaboration may infringe the Act and wish to seek more legal certainty. In addition, CCCS will take into consideration the extent that the businesses incorporate the guidance from the ESCGN in the design and implementation of their collaborations pursuing environmental sustainability objectives, should CCCS take any enforcement action in connection with such a collaboration.

One respondent also queried whether businesses may rely on the guidance document that is more favourable to them in the event of any inconsistency, in particular between the Business Collaboration Guidance Note and the ESCGN. In this regard, CCCS notes that in general, the principles and approaches set out within these guidance notes are consistent. As highlighted in paragraph 1.5 of the ESCGN, where positions or approaches within the ESCGN differ from CCCS's other guidelines, such as the availability of the streamlined notification process set out in paragraphs 3.4 to 3.10 of the ESCGN, any such position or approach would apply only to business collaborations where the crux or main activity is the pursuit of environmental sustainability objectives.

Three respondents highlighted that the definition of "sustainability" is broad and requested for more specificity in CCCS's definition of "environmental sustainability". In this regard, CCCS has made amendments at paragraph 1.1 of the ESCGN to clarify that environmental sustainability objectives, in the context of the ESCGN, is intended to encompass objectives related to reducing negative environmental externalities such as climate change mitigation measures, improving air and water quality, efficient use of natural resources, and biodiversity preservation.¹

Acknowledgement that collaborations may be necessary to achieve environmental sustainability results:

One respondent suggested for the ESCGN to acknowledge that some collaborations may be necessary to achieve environmental sustainability results more rapidly, or on a larger scale, than if businesses were to act independently. In this regard, CCCS notes that it would assess the benefits of a collaboration achieving environmental sustainability results more rapidly or on a larger scale, against the potential harms to competition vis-à-vis a counterfactual situation where companies act independently. Amendments have been made at paragraphs 1.4 and 2.23 of the ESCGN to acknowledge this in response to the feedback.

Clarifications on agreements that will not or are unlikely to raise competition concerns:

¹ This is generally in line with the definitions adopted by competition authorities in other jurisdictions in their respective guidelines on environmental sustainability collaborations.

One respondent queried whether a lack of necessary scale (as referred to at paragraph 2.6 of the ESCGN) would imply that cooperation would fall outside the competition rules and requested an example of when the scale of a project could lead to a more lenient application of the competition rules. In this regard, CCCS wishes to clarify that paragraph 2.6 of the ESCGN does not describe a more lenient application of the competition rules to any project or type of project. Instead, paragraph 2.6 is meant to note that in some cases, the scale of individual businesses vis-à-vis the scale required to undertake a project may mean that collaboration on such a project does not infringe competition rules to begin with if the collaborating businesses could not have undertaken the activity in question on their own, and hence are not actual or potential competitors in relation to the said activity.

In reference to paragraph 2.9 of the ESCGN pertaining to the exclusion for agreements which are made to comply with any requirement imposed by or under any written law, one respondent suggested that agreements to ensure compliance with foreign laws ought not to raise competition concerns in Singapore. In this regard, CCCS notes that the exclusion referred to in paragraph 2.9 of the ESCGN relates to compliance with Singapore laws, and not foreign or international law.

Conditions under which competition concerns are less likely to arise, and assessment of object/effect and Net Economic Benefits:

One respondent provided feedback regarding the applicability of the section of paragraph 2.11 of the ESCGN regarding standards development, to binding standards. In this regard, CCCS has amended paragraph 2.11 to make clear its position that participation in the development or adoption of the standard should be voluntary, and that any binding requirements (to ensure compliance with the standard) do not restrict businesses from exceeding the standard, in order for businesses to minimise competition concerns when collaborating on standards development.

In relation to paragraph 2.12 of the ESCGN, one respondent suggested that where collaboration is required to achieve economies of scale, wide market coverage would be essential for the collaboration to be effective, and hence the reference to the 20% market share threshold below which concerns are less likely to arise is unlikely to be of much use to businesses. In contrast, another respondent noted that collaborations representing 20% or more of the market should be monitored more closely. In connection with this, CCCS notes that businesses may collaborate to operate at a larger scale to achieve efficiencies, without necessarily having a large market share. Paragraph 2.12 of the ESCGN is meant to address such cases.

One respondent suggested that more details could be provided in situations where collaborations may give rise to restrictive effects on competition but where these do not pose a problem under competition rules due to a lack of appreciability. In this regard, CCCS notes that paragraph 2.13 of the ESCGN explains that CCCS will take into account a number of factors in its assessment. CCCS has also provided an additional example in the same paragraph where a collaboration's limited effect on competitive parameters may mean that it does not have an appreciable adverse effect on competition.

One respondent provided feedback, with reference to paragraph 2.13 of the ESCGN, regarding the purported characterisation of agreements to meet a particular environmental sustainability standard (including binding joint purchasing standards which may amount to an agreement

between purchasers not to buy from particular suppliers in the upstream market) as restrictive of competition by object.

For the avoidance of doubt, CCCS does not consider agreements to meet a particular environmental sustainability standard to always restrict competition by object. Rather, paragraph 2.13 of the ESCGN is meant to highlight that agreements which involve, e.g. price-fixing, would be likely to restrict competition by object even if the agreement may also relate to sustainability objectives. Editorial amendments have been made to paragraph 2.13 in this regard.

As noted in paragraph 2.13 of the ESCGN, businesses should also have regard to the principles and considerations discussed in the Business Collaboration Guidance Note and the *CCCS Guidelines on the Section 34 Prohibition*, and the corresponding form of their collaboration. For example, for joint purchasing agreements, the joint determination of purchase prices by buyers in the context of such a collaboration that does not amount to a buyers' cartel would not be considered as a restriction by object. On the other hand, a joint purchasing collaboration that does not truly concern making joint purchases but is used as a front for collusion on buying prices, may instead be regarded as a buyers' cartel and thus likely to restrict competition by object. (See also paragraph 6.3 and footnote 32 of the Business Collaboration Guidance Note.)

With regard to the assessment of Net Economic Benefits, one respondent suggested that CCCS provide further clarity on the relevance of individual non-use benefits (i.e. indirect benefits resulting from consumers' appreciation of the impact of their sustainable consumption on others) in the analysis for NEB Exclusion. In this regard, CCCS notes that the distinction between individual use benefits and individual non-use benefits has come up in guidelines issued by competition authorities in other jurisdictions to clarify how the requirement for a fair share of benefits to be passed on to the consumers directly affected by the collaboration in question, may be satisfied. In the Singapore context, CCCS adopts a total welfare standard. In assessing the economic benefits to Singapore, businesses may consider the relevant consumer benefits (including individual non-use benefits where appropriate) and producer benefits as discussed in the section on NEB Exclusion. As such, CCCS does not consider it necessary to distinguish between individual use benefits and individual non-use benefits as different types of potentially relevant consumer benefits within this ESCGN.

Streamlined notification processes and pre-notification discussions ("PNDs") for collaborations pursuing environmental sustainability objectives:

One respondent noted that the streamlined notification process for collaborations pursuing environmental sustainability objectives will help industry fast-track their developments, and that, if possible, the time period could be shortened. Another respondent queried whether the PND process is available for businesses to obtain guidance on a discrete point before deciding whether to notify their collaboration to CCCS or self-assess.

CCCS appreciates that the industry is evolving quickly, and in this regard, it always seeks to assess the notified collaborations quickly. As shown through CCCS's experience with merger notifications (where a similar two-phase approach and indicative administrative review timelines for Phase 1 and Phase 2 apply), merger reviews have kept within these administrative timelines, with Phase 2 merger reviews in particular typically not taking the full 120-working day duration.

As for the availability of the PND process for guidance on discrete points, CCCS's notification processes for collaborations pursuing environmental sustainability objectives is intended to provide businesses with greater legal certainty in respect of their collaboration as a whole. Businesses may approach their legal counsel should they require legal advice.

Requests for expanding the scope of the ESCGN, and further details, case studies or specific examples to be provided in the ESCGN:

One respondent suggested that it would be helpful for CCCS to provide guidance on collective dominance issues that may arise from collaborations. In this regard, at this point, CCCS has not received feedback from businesses on specific market developments that could raise concern under section 47. CCCS will continue to monitor market developments to determine if there is a need to issue additional guidance on the other prohibitions under the Act, including section 47.

One respondent requested for the ESCGN to address vertical and so-called "hybrid" or "dual-distribution" agreements. In this regard, CCCS has made amendments to the ESCGN to note that agreements which fall within the scope of paragraph 8 of the Third Schedule of the Act would be excluded from the section 34 prohibition. Further details on the exclusion of vertical agreements and on dual-distribution agreements may also be found in the *CCCS Guidelines on the Section 34 Prohibition*.

Respondents had also made various suggestions for more details and case studies or specific examples to be provided in the ESCGN, including: (i) more details (preferably quantitative ones e.g. relating to the savings in carbon emissions) on how businesses can qualify under the NEB Exclusion; (ii) sector-specific case-studies and examples; (iii) a section on sector-specific best practices; and (iv) additional types of agreements as examples of collaborations that do not affect factors of competition (in paragraph 2.5 of the ESCGN).

Regarding quantitative details on how environmental sustainability collaborations may fulfil the NEB Exclusion, CCCS has mentioned at paragraph 2.22 of the ESCGN that there is no "one-size fits all" method to the substantiation of benefits under the NEB Exclusion, and claimed benefits will be assessed on a case-by-case basis. Suitable quantification methodologies that are fact-based and scientifically supported will be considered by CCCS. It is also difficult for CCCS to provide an absolute figure for carbon emission savings that would automatically enable a business to satisfy the NEB test as the benefits would have to be weighed against the negative competition effects on a case-by-case basis. As set out in paragraph 3.9 of the ESCGN, CCCS is open to having PNDs with businesses, during which businesses may wish to discuss proposed quantification methodologies. In notifying their collaboration to CCCS, businesses may choose to apply for guidance from CCCS (which is usually treated confidentially), or a decision from CCCS (which will be published on CCCS's Public Register and subject to public consultation, and thus is not afforded the same level of confidentiality but provides greater legal certainty to businesses than a notification for guidance).²

Regarding sector-specific best practices, insofar as the feedback pertains to collaborations between businesses to establish best practices on environmental sustainability (e.g. to achieve specified environmental sustainability targets or metrics), businesses may refer to the principles

² More details of the difference between guidance and a decision from CCCS can be found on CCCS's website at cccs.gov.sg/approach-cccs/seeking-guidance-and-decision.

set out in paragraph 2.11 of the ESCGN in respect of standards development for guidance. Businesses may also wish to refer to section 8 of the Business Collaboration Guidance Note for further general principles on the various processes involved in the development of standards, which may also be applicable in the establishing of industry-wide best practices generally.

As for the additional types of agreements that had been suggested to be included, including in paragraph 2.5 of the ESCGN as examples of collaborations that do not affect factors of competition, CCCS has incorporated one of the suggestions in paragraph 2.11 of the ESCGN, as an example of collaborations where, subject to the collaboration satisfying certain conditions, competition concerns are less likely to arise. For the other suggested examples, CCCS notes that while such agreements may not ordinarily give rise to a restriction of competition by object, they would need to be assessed on a case-by-case basis to ascertain the actual or likely effect of such agreements on competition.

CCCS would continue to monitor the market as the industry evolves. Supplemental guidance or revisions to the ESCGN could be issued by CCCS to address new issues that emerge over time.

Other general comments:

A respondent suggested that a platform be set up for businesses to be informed on various collaborations between companies. This could enhance awareness, disclosures or transparency practices and in turn obviate accusations or failure in governance. In this regard, CCCS notes that businesses may refer to CCCS's Public Register as a source of information on collaborations that have been notified or otherwise investigated by CCCS. If trade associations consider it useful, they may wish to engage their members on the usefulness and appropriateness of such a platform (given some collaborations between businesses may be commercially sensitive) subject to compliance with competition law.

One respondent also suggested that businesses could create voluntary guidelines/standards and adopt them (with the support of the government) to display responsible corporate behaviour. The suggestion also highlighted that any such guidelines should not impede innovation and should contain mechanisms for redressal and dispute resolution. In this regard, CCCS notes that businesses are free to work together to create and adopt voluntary guidelines for their sectors, subject to competition law compliance.³ Where necessary, they could seek legal advice from their legal counsel or notify the guidelines to CCCS for guidance or a decision should they wish for more legal certainty.

³ For example, if the voluntary guidelines do not affect how businesses compete with one another (e.g. sharing of best internal corporate practices), this is unlikely to give rise to competition concerns (see also paragraph 2.5 of the ESCGN). If the voluntary guidelines entail a set of industry-wide environmental standards or codes of practice, businesses should refer to the relevant sections of the ESCGN and the general Business Collaboration Guidance Note, for guidance on how businesses can potentially minimise competition concerns (see also paragraph 2.11 of the ESCGN).