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**GUIDANCE NOTE ON BUSINESS  
COLLABORATIONS PURSUING  
ENVIRONMENTAL  
SUSTAINABILITY OBJECTIVES**

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DRAFT FOR PUBLIC CONSULTATION



## 1. INTRODUCTION

- 1.1 Amidst the existential threat of climate change, Singapore has embarked on a whole-of-nation effort to achieve Singapore’s climate pledge under the Paris Agreement, including the Singapore Green Plan 2030 which charts concrete sectoral plans and targets to position Singapore to achieve its long-term net-zero emissions aspiration by 2050.<sup>1</sup> In this regard, the Competition and Consumer Commission of Singapore (“CCCS”) recognises that efforts to realise Singapore’s climate change goals may involve businesses, including competitors, engaging in various forms of collaborations in existing, emerging or even new markets, in pursuit of such environmental sustainability objectives.<sup>2</sup>
- 1.2 In support of Singapore’s whole-of-nation efforts, this Guidance Note aims to afford greater clarity to businesses on how CCCS will assess collaborations pursuing environmental sustainability objectives, so that such collaborations may be pursued in a manner that does not harm competition. This Guidance Note should be read together with CCCS’s Business Collaboration Guidance Note<sup>3</sup>, which provides more general guidance on seven common types of business collaborations; namely, (i) information sharing, (ii) joint production, (iii) joint commercialisation, (iv) joint purchasing, (v) joint research & development (“R&D”), (vi) standards development, and (vii) standard terms and conditions in contracts.
- 1.3 In this Guidance Note, CCCS provides additional guidance on the application of section 34 of the Competition Act 2004 (the “Competition Act”) to business collaborations<sup>4</sup> in the context of environmental sustainability initiatives. Section 34 of the Competition Act prohibits agreements between businesses,<sup>5</sup> decisions by

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<sup>1</sup> <https://www.greenplan.gov.sg>

<sup>2</sup> For example, collaborations which contribute to Singapore’s whole-of-nation effort to tackle climate change, including those in support of the Singapore Green Plan 2030 which targets to position Singapore to meet its international climate change commitments and long-term net zero emissions aspiration by 2050.

<sup>3</sup> The supplementary guidance provided in the CCCS Business Collaboration Guidance Note includes how CCCS will generally assess whether these seven common types of business collaborations comply with section 34 of the Competition Act, and factors and conditions under which competition concerns are less likely to arise from these collaborations. The Business Collaboration Guidance Note itself is intended to supplement and not to modify the *CCCS Guidelines on the Section 34 Prohibition* and should be read in conjunction with it.

The Business Collaboration Guidance Note is published on CCCS’s website and can be found at <https://www.cccs.gov.sg/legislation/competition-act/business-collaboration-guidance-note>.

<sup>4</sup> For the purposes of this Guidance Note, the terms “collaboration” and “agreement” may be used interchangeably and includes agreements as well as informal agreements or looser forms of collaborations, whether between businesses or through an association. This Guidance Note also applies to joint ventures between businesses not amounting to a full-function joint venture performing, on a lasting basis, all the functions of an autonomous economic entity. Full-function joint ventures constitute mergers which fall outside the scope of this Guidance Note. Further information on what amounts to a full-function joint venture is set out in the *CCCS Guidelines on the Substantive Assessment of Mergers*.

<sup>5</sup> In this Guidance Note, “businesses” also refer to “undertakings” (defined in the Competition Act 2004 as any person, being an individual, a body corporate, an unincorporated body of persons or any other entity, capable of carrying on commercial or economic activities relating to goods or services). The terms may be used interchangeably.

associations, or concerted practices that are anti-competitive (the “section 34 prohibition”), unless they are excluded or exempted. One such exclusion, among others, is the Net Economic Benefit (“NEB”) exclusion, which provides that an agreement that restricts competition appreciably would still be in compliance with the Competition Act if:

- (a) it leads to economic benefits (for instance, lower costs, improvements in the quality or services, or the production of new innovative products) that outweigh the negative competition effects;
- (b) these economic benefits cannot be achieved without the agreement and any restrictions in it; and
- (c) competition is not eliminated in a substantial part of the market.<sup>6</sup>

1.4 Collaborations between businesses seeking to prevent, reduce or mitigate negative environmental effects or promote environmental sustainability play an important role in contributing to Singapore’s whole-of-nation effort to tackle the existential threat of climate change. In certain circumstances, such collaborations may be necessary to achieve these environmental sustainability objectives, for example where none of the parties could independently carry out the activity, or where collaboration may be required to overcome a “first mover disadvantage” in creating a new product or a new market. However, environmental sustainability goals should not be used as a guise for anti-competitive conduct. In this regard, this Guidance Note is to assist businesses in assessing their collaborations, and it serves to:

- clarify what are considered as environmental sustainability objectives;
- provide examples of collaborations pursuing environmental sustainability objectives that would typically not be harmful to competition;
- state the conditions under which competition concerns are less likely to arise from collaborations pursuing environmental sustainability objectives;
- for collaborations where competition concerns may arise, explain how CCCS would assess whether such collaborations generate economic benefits and whether they may qualify for the NEB exclusion; and
- set out a streamlined notification process that CCCS is adopting for such collaborations should businesses wish to seek more legal certainty by notifying their agreements to CCCS.

1.5 This Guidance Note is not a substitute for the Competition Act or its associated subsidiary legislation and guidelines. It is intended to supplement and not to modify the *CCCS Guidelines on the Section 34 Prohibition* and should be read in conjunction with it. The positions or approaches stated in this Guidance Note which differ from CCCS’s other guidelines specifically apply to business collaborations where the crux

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<sup>6</sup> More information on the NEB exclusion can be found in Annex C of the *CCCS Guidelines on the Section 34 Prohibition*.

or main activity is the pursuit of environmental sustainability objectives.<sup>7</sup> For additional information on section 34 of the Competition Act itself, readers may refer to the *CCCS Guidelines on the Section 34 Prohibition*.

- 1.6 The examples of collaborations pursuing environmental sustainability objectives that are given in this Guidance Note are for illustrative purposes only and are not exhaustive. These examples should not be understood as being binding on CCCS or limiting CCCS's enforcement or case-by-case assessment under the Competition Act. In referring to this Guidance Note, businesses should consider the specific facts and circumstances that apply to their intended collaborations.
- 1.7 There is no legal requirement for businesses to notify their collaborations to CCCS, generally or specific to collaborations pursuing environmental sustainability objectives. Should businesses be unsure about whether their commercial activities in pursuing environmental sustainability objectives are compliant with the Competition Act, they may: (a) should they desire more legal certainty, notify their collaborations to CCCS for guidance or a decision as to whether their collaborations are likely to infringe or have infringed the Competition Act, respectively<sup>8</sup>; or (b) seek independent legal advice.

## **2. AGREEMENTS PURSUING ENVIRONMENTAL SUSTAINABILITY OBJECTIVES**

- 2.1 Environmental sustainability objectives can be pursued through different types of collaborations, including those discussed in the Business Collaboration Guidance Note. Where an agreement pursuing environmental sustainability objectives involves any of the collaborations described in the Business Collaboration Guidance Note, CCCS's assessment of such collaborations will take into account the analytical approach set out in the relevant section of both the Business Collaboration Guidance Note and this Guidance Note.<sup>9</sup>
- 2.2 In determining whether a particular collaboration is one that is carried out in pursuit of environmental sustainability objectives, and should therefore be assessed based on factors that are set out in this Guidance Note (alongside other factors that are mentioned in Business Collaboration Guidance Note), CCCS will have regard to the crux or main activity of the collaboration. This is a fact-specific exercise that will take into account matters such as the starting point and main focus of the collaboration, and the degree of integration of the different functions required in order to pursue

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<sup>7</sup> Please see paragraphs 2.2 and 2.3 below for further elaboration on what constitutes a collaboration that has as its crux or main activity the pursuit of an environmental sustainability objective.

<sup>8</sup> For further information in this regard, please see section 3 below for collaborations pursuing environmental sustainability objectives, and section 11 of the Business Collaboration Guidance Note and the *CCCS Guidelines on Filing Notifications for Guidance or Decision with respect to the Section 34 Prohibition and Section 47 Prohibition 2016* for business collaborations generally.

<sup>9</sup> Please also see paragraph 1.5 above.

the stated environmental sustainability objective. For example, a collaboration between businesses that is primarily intended to develop and produce a more environmentally friendly product may involve both joint R&D and joint production. In this regard, if the collaborative activities in R&D as well as production would only take place due to the environmental sustainability objective pursued – i.e. the environmental sustainability objective necessitates the joint R&D, and the results of the joint R&D are in turn decisive for the subsequent joint production – then the collaboration is one that has, as its crux or main activity, the pursuit of an environmental sustainability objective. In considering such a collaboration, businesses should accordingly refer to both this Guidance Note, as well as further elaboration on the assessment factors for joint R&D and joint production collaborations that are set out in the Business Collaboration Guidance Note.

- 2.3 Similarly, a joint purchasing collaboration among businesses that takes place only to pool together their demand for a new green solution, with the objective that their aggregated demand is necessary to allow for the underlying technologies or infrastructure to be implemented/built (e.g. because the green solution is unlikely to be commercially viable and sustainable without a minimum scale of operation), is one that is pursuing an environmental sustainability objective as its crux or main activity. Businesses should then refer to both this Guidance Note as well as the further elaboration on the assessment factors for joint purchasing collaborations in the Business Collaboration Guidance Note.

#### **Agreements that will not or are unlikely to raise competition concerns**

- 2.4 CCCS considers that there are collaborations that pursue environmental sustainability objectives that are unlikely to raise competition concerns or are indeed excluded from the section 34 prohibition.

- 2.5 **Agreements that do not affect factors of competition.** Collaborations pursuing environmental sustainability objectives that do not affect how businesses compete with one another (i.e., do not involve factors of competition such as price, quantity, quality, choice or innovation of goods or services supplied) are unlikely to give rise to competition concerns. For example:

- Industry-wide collaborative efforts to reduce the environmental footprint of businesses within the industry in non-competitive areas, such as an agreement to share best internal corporate practices by minimising the printing of hardcopy documents internally and ensuring that office air conditioning temperatures are set above a minimum level, will not give rise to competition concerns.
- An agreement between businesses in the same industry to pool together resources and expertise to encourage training in environmental

sustainability-related areas, or to raise awareness of environmental sustainability challenges within the industry, will not raise competition concerns.

- 2.6 **Agreements which none of the parties could do independently.** An agreement between businesses to jointly carry out certain activities which, objectively, none of the parties could do independently is similarly unlikely to be problematic. This may be the case where the businesses involved do not have all the necessary technical capabilities or lack the necessary scale, individually, to undertake the activity on their own.
- 2.7 In such cases, a collaboration to pursue the initiative is unlikely to raise competition concerns, as the businesses would not have engaged in the initiative (and hence compete in respect of the initiative) in the absence of the collaboration. An example of such a collaboration would be where a business that manufactures fuel collaborates with a business that supplies a sustainable alternative feedstock not traditionally used as an input (or capable of being used as a substitute) for the fuel, to develop and commercialise a new and more environmentally friendly type of sustainable fuel. Each party leverages on the expertise and resources of the other to obtain an outcome that neither party would have been able to achieve independently. In such cases, there is no restriction of actual or potential competition between the collaborating businesses, and competition concerns are unlikely to arise. Businesses should avoid unnecessary restrictions within their collaboration that would otherwise reduce competition in the market (for example, locking up all potential collaboration partners such that other alternative efforts to develop a competing product are prevented or inhibited).
- 2.8 **Agreements to comply with written law, or in acting on behalf of the Government.** Agreements which are made to comply with any requirement imposed by or under any written law are excluded from the section 34 prohibition.<sup>10</sup>
- 2.9 Separately, different Government agencies may engage businesses to facilitate environmentally sustainable initiatives and achieve Singapore's climate change targets, such as the goals set out in the Singapore Green Plan 2030. Businesses which seek to rely on section 33(4)(c) of the Competition Act to exclude any collaborations pursuing environmental sustainability objectives on the basis that they are acting on behalf of the Government or a statutory body should note that the exclusion is to be construed narrowly, and the mere encouragement or endorsement of a particular collaboration by a government agency or statutory body will not be sufficient for the collaboration to benefit from the exclusion. The exclusion set out in section 33(4)(c) of the Competition Act will also only apply to the specific activity, agreement or conduct that businesses carry out on behalf of the

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<sup>10</sup> Third Schedule of the Competition Act at paragraph 2.

Government or statutory body. Please refer to paragraphs 2.10 to 2.13 of the Business Collaboration Guidance Note for more details.<sup>11</sup>

### **Conditions under which competition concerns are less likely to arise**

2.10 As noted above, where an agreement pursuing environmental sustainability objectives involves any of the collaborations described in the Business Collaboration Guidance Note, businesses should also take reference to the guidance set out therein. In particular, businesses may wish to take note of the guidance on conditions under which competition concerns are less likely to arise from the respective collaboration(s), and how businesses can potentially minimise competition concerns. For example:

- **Standards development**: The development of industry-wide environmental standards or codes of practice and associated “green” quality marks can help to reduce information asymmetry and build consumer trust in the market and contribute to encouraging a shift in consumption patterns towards more environmentally sustainable goods and services. A business collaboration to develop such standards to achieve specified environmental sustainability targets or metrics is less likely to give rise to competition concerns if the standards are established objectively, the process for developing them is transparent and inclusive, no commercially sensitive information that is not necessary or relevant for the collaboration is exchanged, compliance with the standard or code is voluntary and non-discriminatory (i.e. open to any business willing and able to participate or benefit from the standard), and businesses are not restricted from exceeding such standards or developing alternative standards.<sup>12</sup>

2.11 Where the collaboration does not facilitate price-fixing, bid-rigging, output limitation and market sharing, and the collaborating businesses do not have market power, e.g. they have aggregate market shares of less than 20%, competition concerns are less likely to arise under certain circumstances:

- **Joint production**: In order to achieve economies of scale and lower costs in using an environmentally friendly but more costly production method for a common input, two businesses set up a joint production factory that allows

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<sup>11</sup> If businesses have any doubts as to whether their collaborations pursuing environmental sustainability objectives fall within the section 33(4) exclusion under the Competition Act or if any request by a Government or statutory body may raise competition concerns, they should raise their concern with the relevant government agency or statutory board and approach CCCS.

<sup>12</sup> Please refer to paragraphs 8.5 to 8.7 of the Business Collaboration Guidance Note for further details on these assessment factors, and when competition concerns may arise, in respect of business collaborations involving standards development. For example, during the standard-setting process, businesses should not engage in anti-competitive discussions, e.g., agree to decrease quality collectively on the pretext of meeting standards, and thereby reducing or eliminating competition in the industry or markets concerned.

them to expand production at a lower cost per unit than if they were to individually undertake such production. The two businesses continue to compete in producing a downstream product X. This collaboration is less likely to give rise to competition concerns if it does not result in the collaborating businesses having a significant proportion of common costs for the production of the competing downstream product X and does not raise concerns in relation to the types of information shared as part of the collaboration or contains safeguards to minimise such concerns.

- Joint commercialisation: Businesses that are independently competing with each other (e.g. producing the same product) may collaborate to share common distribution system(s) such as sharing delivery capacities in order to reduce the number of half-filled delivery vehicles on the road (i.e. joint distribution), or collaborate to pool resources together to jointly advertise, promote or market products that are more environmentally friendly which they may not have the resources to do independently. Such collaborations may be less likely to give rise to competition concerns if the collaboration(s) do not involve joint determination of the prices (or quantity) of the product that each of the parties will sell (in particular for joint advertising), and do not result in the collaborating businesses having a significant proportion of common costs or give rise to concerns in relation to the types of information shared as part of the collaboration.
- Joint R&D: In order to develop a new product or technology that can bring a more environmentally friendly solution to the market, businesses may need to come together to combine their expertise (be it in the same area, or across different areas) in order to conduct joint research and develop the product or technology. This sharing of knowledge and joint development may result in greener and higher quality products for both businesses, and may disseminate knowledge that in turn spurs greater innovation. Such collaborations could however reduce the level of competition to innovate in developing such new products or technologies. In this regard, competition concerns may be less likely to arise from such a collaboration if the collaborating businesses are not in the midst of independent R&D on the same or competing product/technology and do not have the separate and necessary capabilities to conduct the full R&D process in its entirety independently; the collaboration does not involve an agreement to limit the scope or slow down the pace of R&D, innovation and new product development; the collaboration does not remove a maverick competitor or innovator from the market; or there are multiple viable on-going alternative R&D projects undertaken by competing innovators that can produce close substitutes to the collaborators' resulting product or technology.

#### **Agreements where competition concerns may arise**

2.12 Certain agreements pursuing environmental sustainability objectives could potentially be anti-competitive to an appreciable extent, and if so, such agreements are prohibited under the Competition Act, unless excluded or exempted.<sup>13</sup> As agreements pursuing environmental sustainability objectives can entail various forms of collaboration, including those discussed in the Business Collaboration Guidance Note, the assessment of such collaborations will be governed by the principles and considerations discussed in the Business Collaboration Guidance Note and the *CCCS Guidelines on the Section 34 Prohibition*. These include:

- Collaborations which restrict competition by object, i.e. by their very nature they are considered to be anti-competitive to an appreciable extent, such as those with the purpose of price-fixing, bid-rigging, market-sharing or imposing output limitations.<sup>14</sup> For example, an agreement between competitors on a price (or a component of price, such as a surcharge or premium) to sell products that meet a particular environmental sustainability standard is likely to restrict competition by object. Another example is where suppliers of electric charging services agree amongst themselves to divide up the market and keep to certain geographic areas such that they do not bid or compete against each other to supply charging points, which may reduce their profit margins. CCCS reminds businesses that environmental sustainability goals should not be used as a guise for anti-competitive conduct.
- Collaborations which would be subject to an economic assessment of their effects on competition (i.e. whether the effects of the agreement are anti-competitive to an appreciable extent), as they do not restrict competition by object. Such collaborations will generally have no appreciable adverse effect on competition if the aggregate market share of the parties involved does not exceed 20% on the relevant markets affected by the agreement, or where each undertaking involved in the collaboration is a small or medium sized enterprise.<sup>15</sup>

Even if the market shares of the parties exceed these threshold levels, this does not necessarily mean that they have market power or that the agreement would have appreciable adverse effects on competition, and vice versa. When conducting an assessment of a collaboration's effects on competition, CCCS will take into account other factors such as whether the parties face strong competitive constraints from other credible competitors in the relevant market, the existence of potential competitors, any barriers

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<sup>13</sup> See also paragraph 1.3 above, and paragraph 2.5 of the Business Collaboration Guidance Note for further information.

<sup>14</sup> See also paragraph 2.5 of the Business Collaboration Guidance Note for further information.

<sup>15</sup> Paragraph 2.25 of the *CCCS Guidelines on the Section 34 Prohibition*.

to entry or expansion, whether the market is dynamic with low entry and expansion barriers, and whether customers are able to switch suppliers or have countervailing buyer power.<sup>16</sup> For collaborations involving nascent markets where current market shares may be less meaningful or indicative of market power, such factors may be particularly pertinent in assessing the collaboration's effects on competition.

### **Net Economic Benefit exclusion**

2.13 In addition to the above, agreements pursuing environmental sustainability objectives which give rise to competition concerns may still qualify for the NEB exclusion if:

- (a) the agreement leads to economic benefits (for instance, lower costs, improvements in the quality or services, or the production of new innovative products) that outweigh the negative competition effects; and
- (b) these economic benefits cannot be achieved without the agreement and any restrictions in it; and
- (c) competition is not eliminated in a substantial part of the market.<sup>17</sup>

The paragraphs below set out CCCS's approach towards the assessment of environmental sustainability benefits in the context of the NEB exclusion and are to be read in conjunction with Annex C of the *CCCS Guidelines on the Section 34 Prohibition*.

#### **Claiming of economic benefits**

2.14 The first criterion of the NEB exclusion, regarding economic benefits, requires that the agreement "*contributes to (a) improving production or distribution; or (b) promoting technical or economic progress*". The types of efficiencies stated in this criterion are broad categories intended to cover all objective economic efficiencies.<sup>18</sup> In this regard, agreements pursuing environmental sustainability objectives can give rise to economic benefits for the purposes of the NEB exclusion. For example:

- collaborations that adopt cleaner but more costly technologies which reduce greenhouse gas emissions from production processes, or enable

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<sup>16</sup> Paragraph 2.26 and Annex B of the *CCCS Guidelines on the Section 34 Prohibition*.

<sup>17</sup> More information on the NEB exclusion can be found in Annex C of the *CCCS Guidelines on the Section 34 Prohibition*.

<sup>18</sup> Please also see paragraphs 10.5 to 10.7 in Annex C of the *CCCS Guidelines on the Section 34 Prohibition* for further information in this regard. As stated in the aforementioned, there is considerable overlap between the various categories, and there is no need therefore to draw clear and firm distinctions between the various categories.

more efficient production by consuming less energy or other resources, may be considered as agreements that contribute to improving production or promoting technical progress;

- collaborations by businesses to share delivery capacities in order to reduce the number of half-filled delivery vehicles on the road, may be considered as agreements that contribute to improving distribution processes;
- businesses agreeing to jointly create new or improved products which phase out or replace the use of non-sustainable material, and thus improve the quality or variety of products, may be considered as agreements that contribute to improving production or promoting technical progress; or
- businesses collaborating to contribute different technical and commercial expertise to develop a large-scale solution to reduce carbon emissions, may be considered as agreements that contribute to promoting technical or economic progress.

2.15 Any economic benefits claimed under the NEB exclusion must be objective in nature, i.e., they are not assessed from the subjective viewpoint of the parties to an agreement. In addition, there must normally be a direct causal link between the agreement and the claimed benefit.<sup>19</sup>

2.16 In general, the assessment of benefits flowing from agreements would be made within the confines of each relevant market (or closely related markets) to which the agreements relate.<sup>20</sup> In the context of agreements pursuing environmental sustainability objectives, CCCS is cognisant that it is possible for the benefits to be felt more widely than within the relevant market. This is given that environmental sustainability initiatives often seek to reduce negative externalities (e.g. adverse environmental impact from the production or consumption of a non-environmentally friendly product, such as air or water pollution or greenhouse gas emissions), or give rise to positive externalities (e.g. reducing such adverse environmental impact by producing or consuming a more environmentally friendly product) or both, and correcting the market failures associated with such externalities.<sup>21</sup> In this regard, these reductions in negative externalities or generation of positive externalities can benefit the society at large (and not just the direct customers of the businesses). Reductions in negative externalities can also

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<sup>19</sup> See paragraph 10.4 in Annex C of the *CCCS Guidelines on the Section 34 Prohibition*.

<sup>20</sup> See paragraph 10.1 in Annex C of the *CCCS Guidelines on the Section 34 Prohibition*.

<sup>21</sup> Market failures occur when a free market outcome gives rise to economic inefficiencies (absent any interventions in the market). Externalities are a type of market failure where there are costs or benefits arising from the production or consumption of a product that affect other people than the direct market participants (i.e. producers or consumers of the product), and this cost or benefit is not taken into account in the decision-making of individual producers or consumers, i.e. negative and positive externalities. For example, in the case of the negative externalities described above, the failure of direct market participants to take into account the negative externalities results in over-production/consumption of the non-environmentally friendly product. Similarly, the failure of direct market participants to take into account positive externalities results in the under-production/consumption of the more environmentally friendly product.

give rise to improved efficiency, for example by allowing scarce natural resources to be better used. Given the nature of agreements pursuing environmental sustainability objectives, where appropriate, CCCS will take into account such economic benefits accruing to Singapore as a whole.

- 2.17 Consequently, the overall economic benefits to Singapore arising from an agreement pursuing environmental sustainability objectives may, in an appropriate case, outweigh the harm to a particular affected market. For example, an agreement between certain businesses in Singapore to switch to using an alternative clean fuel that will reduce carbon emissions results in higher production costs which may be passed on as higher prices to consumers. However, where such agreement is required to overcome a “first mover disadvantage” and to expedite the adoption of clean fuel more widely in Singapore, the economic benefits of the agreement for Singapore as a whole (such as through expediting reductions in carbon emissions in Singapore, the correction of the negative externalities from over-production/consumption of the less-sustainable fuel, and enabling the large-scale production of clean fuel to supply Singapore and the region) may outweigh the costs to the consumers of the product in question. In this case, it is possible that such an agreement pursuing environmental sustainability objectives leads to a reduction of competition within a relevant market, and yet results in net economic benefits to Singapore as a whole.
- 2.18 Businesses claiming that their agreements satisfy the NEB exclusion should demonstrate that the claimed economic benefits are significant enough to outweigh the anti-competitive effects of the agreement.<sup>22</sup> To substantiate each benefit claimed, businesses will have to demonstrate the magnitude and the likelihood (i.e., how and when) of achieving such benefits.<sup>23</sup>
- 2.19 CCCS will take into consideration relevant qualitative and quantitative evidence of environmental sustainability benefits. The extent to which the magnitude of benefits needs to be quantified would depend on the nature of the collaboration and the claimed benefit. In general, precise quantification of benefits may not be necessary where harm to competition is clearly limited (for instance, where businesses are able to structure their collaboration to clearly achieve this<sup>24</sup>), and the likelihood of benefits arising is high.
- 2.20 While more detailed quantitative assessment is usually required where it is unclear that the claimed benefits are sufficient to outweigh the harm to competition arising from the agreement, CCCS recognises that in some cases, business collaborations pursuing environmental sustainability objectives may involve nascent products,

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<sup>22</sup> See paragraph 10.4 in Annex C of the *CCCS Guidelines on the Section 34 Prohibition*.

<sup>23</sup> *Ibid.*

<sup>24</sup> See paragraph 2.23 below, for an example regarding the structuring of a collaboration to mitigate and reduce anti-competitive effects.

services or technologies and hence entail a degree of uncertainty in terms of the magnitude and timeframe in which the benefits of the collaboration may materialise. Businesses can highlight if such a detailed assessment would be onerous or not possible in the particular circumstances and provide the reasons and basis for this to facilitate CCCS's consideration. Given that agreements pursuing environmental sustainability objectives can relate to different industries, objectively determined and industry recognised methodologies and standards used for quantification of economic benefits can be submitted for CCCS's consideration, to the best of the businesses' ability. These may include the use of life-cycle assessment/costing or shadow prices. For example, where greenhouse gas emissions reductions are claimed as a benefit, one possible starting point for quantifying such benefits is the monetary value associated with these emissions.

- 2.21 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.

#### **Indispensability**

- 2.22 Businesses seeking to rely on the NEB exclusion must show that both their agreement itself, and the individual restrictions within the agreement, are reasonably necessary to obtain the benefits claimed.<sup>25</sup> A restriction is indispensable if its absence would eliminate or significantly reduce the efficiencies that flow from the agreement or make them much less likely to materialise. In other words, there are no less restrictive means of achieving the same benefit, including no alternative means that are less restrictive of competition amongst the businesses. If the parties to the agreement are capable of achieving the efficiencies on their own, the agreement will not be regarded as indispensable.
- 2.23 For example, with reference to the joint production illustrative scenario in paragraph 2.11 above, it may be that the set-up and operation of the joint factory that produces the common input by way of a more environmentally friendly production method requires that commercially sensitive information of the two parties (e.g. relating to the downstream product X where they continue to compete) must be shared in order to achieve the benefits. If the type of information being shared is not restricted to only that which is necessary for the joint production collaboration, then this is unlikely to be regarded as indispensable. Even where the sharing of commercially sensitive information is limited to only information which is necessary to achieve the benefits from the collaboration, mitigating arrangements will still need to be put in place to ringfence the sharing of such information (e.g. clean teams to handle the necessary information), and to prevent

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<sup>25</sup> See paragraphs 10.8 to 10.11 in Annex C of *CCCS Guidelines on the Section 34 Prohibition*.

any unnecessary sharing so as to minimise any anti-competitive effects that this information sharing in the collaboration brings about.<sup>26</sup>

### **No elimination of competition**

2.24 The third criterion for the NEB exclusion is that competition is not eliminated in a substantial part of the market.<sup>27</sup> Under this criterion, CCCS will take into account the degree of competition *prior* to the relevant agreement, and also the reduction in competition that the relevant agreement brings about. This criterion may be met even if the agreement in question that is pursuing environmental sustainability objectives covers the entire industry, as long as there remains at least one important parameter of competition on which businesses continue to compete strongly with each other. For example, a standardisation agreement that results in the discontinuation of non-environmentally friendly product offerings and thus eliminates competition on product variety may still satisfy this criterion if competition on price for the environmentally friendly options remains unrestricted and is an important parameter for competition.

## **3. SEEKING GUIDANCE OR DECISION FROM THE CCCS ON COLLABORATIONS PURSUING ENVIRONMENTAL SUSTAINABILITY OBJECTIVES**

3.1 The guidance set out in this Guidance Note, read alongside the guidance set out in the Business Collaboration Guidance Note for the different types of collaborations, is meant to enable businesses to self-assess if their collaborations pursuing environmental sustainability objectives will raise competition concerns, and whether such collaborations generate net economic benefits (including environmental sustainability benefits that give rise to economic efficiencies) and may thus qualify for the NEB exclusion.

3.2 There is no legal requirement for businesses to notify their collaborations to CCCS, generally or specific to collaborations pursuing environmental sustainability objectives. If a business is unsure as to whether a specific collaboration pursuing environmental sustainability objectives complies with the Competition Act, they may wish to notify the collaboration to CCCS for guidance or decision as to whether it would be likely to infringe or has infringed the section 34 prohibition respectively. It is for the businesses to self-assess and decide whether to make a notification for guidance or decision<sup>28</sup> to CCCS. Businesses that are unsure as to whether their

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<sup>26</sup> See also paragraph 4.15 of the Business Collaboration Guidance Note, and section 3 of the Business Collaboration Guidance Note more generally on information sharing.

<sup>27</sup> See paragraphs 10.12 to 10.13 in Annex C of *CCCS Guidelines on the Section 34 Prohibition*.

<sup>28</sup> Notifications for a guidance or decision to CCCS incur a notification fee. More details of the notification process can be found on CCCS's website as well as the *CCCS Guidelines on Filing Notifications for Guidance or Decision with respect to the Section 34 Prohibition and Section 47 Prohibition 2016*.

collaboration complies with the Competition Act can alternatively seek independent legal advice.

- 3.3 Where an agreement to which the section 34 prohibition applies has been notified, CCCS cannot impose a penalty in respect of any infringement of the section 34 prohibition, during the period beginning with the date of notification and ending on such date as may be specified in a notice given in writing to the applicant by CCCS on determination of the application.<sup>29</sup> The date specified in the notice may not precede the date on which the notice is given.<sup>30</sup>

### **Streamlined process for collaborations pursuing environmental sustainability objectives**

- 3.4 CCCS is adopting a streamlined process for the assessment of agreements pursuing environmental sustainability objectives. The streamlined process is designed to provide quicker decisions by CCCS, and is made available for such collaborations in support of Singapore's whole-of-nation efforts to realise Singapore's climate change goals.
- 3.5 Under the streamlined process, CCCS will undertake a two-phase approach, with a Phase 1 review expected to be completed within 30 working days for simple cases, plus an additional Phase 2 review of 120 working days for complicated cases. The notified agreement may also be cleared with commitments at any time during Phase 1 or Phase 2 (including the period in between).
- 3.6 A Phase 1 review entails a quick assessment and allows CCCS to give a favourable decision or guidance with regard to agreements pursuing environmental sustainability objectives that clearly do not raise competition concerns. To achieve a streamlined process, full cooperation of the businesses must be provided throughout the process. Businesses must provide complete, concise and relevant information promptly and within the timeframes specified, including any additional information required by CCCS (see also paragraph 3.8 below).
- 3.7 Application for the streamlined process must be made in writing with supporting documents, together with the submission of Form 1 accompanied by the appropriate initial fee.<sup>31</sup> The 30-working day indicative timeframe for Phase 1 review will commence after CCCS deems that Form 1 is complete. If it is necessary to proceed to a Phase 2 review in the streamlined process, CCCS will inform the businesses in writing to submit Form 2 together with the appropriate further fee.<sup>32</sup> The businesses will be informed of this no later than the expiry of the Phase 1

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<sup>29</sup> Sections 43(4) and 44(3) of the Act.

<sup>30</sup> Sections 43(5) and 44(4) of the Act.

<sup>31</sup> Please refer to the Second Schedule of the Competition (Fees) Regulations 2007 for the prevailing fee.

<sup>32</sup> Ibid.

review. The 120-working day indicative timeframe commences when CCCS deems that Form 2 is complete.

- 3.8 CCCS may ask businesses to provide additional information related to their application. In situations where the businesses are unable to provide the information within the stipulated timeframe, this may necessitate a “clock-stoppage” mechanism as part of the streamlined process, thereby extending the indicative timeframe for completion of the streamlined process. In both Phase 1 and Phase 2 of the streamlined process, commitments may also be proposed by the businesses as a suitable remedy to address any identified competition concerns.<sup>33</sup> At any time during the course of the assessment of the application, businesses may also request for state-of-play meetings with CCCS for an indication as to when an outcome can be expected. Substantive matters faced in the assessment of the notified agreement may also be discussed at such state-of-play meetings.
- 3.9 Separately, CCCS is open to having pre-notification discussions (“PNDs”) with businesses, during which businesses may wish to provide proposed quantification methodologies. PNDs provide businesses intending to apply for guidance or a decision with an opportunity to discuss the content and timing of their notifications with CCCS, including what information CCCS is likely to require in order to assess their agreements. Businesses are encouraged to contact CCCS at an early opportunity to request for such PNDs.<sup>34</sup>
- 3.10 PNDs may be informal and brief or more formal and detailed, depending on the preferences of the potential applicants, the complexity of the agreement in question, the issues pertaining to the draft application that may need to be discussed, and the competition concerns that the agreement may raise. The more information that is provided at the PND stage, the more useful the process will be.

#### **4. CONCLUSION**

- 4.1 This Guidance Note seeks to serve as a reference to provide businesses with the information they need so that they can collaborate in pursuing environmental sustainability objectives in a manner that does not harm competition. It should be read together with CCCS’s Business Collaboration Guidance Note, and sets out additional guidance on the application of section 34 of the Competition Act to business collaborations pursuing environmental sustainability objectives, including:
- clarifying what are considered as environmental sustainability objectives;

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<sup>33</sup> See the *CCCS Guidelines on Directions and Remedies* for further information.

<sup>34</sup> Please note that PNDs are not intended to relate to purely speculative or hypothetical collaborations. At the point when businesses approach CCCS for PNDs, they should be in a position to show that there is a good faith intention to proceed with the agreement in question.

- providing examples of collaborations pursuing environmental sustainability objectives that would typically not be harmful to competition;
- stating the conditions under which competition concerns are less likely to arise from collaborations pursuing environmental sustainability objectives; and
- for collaborations where competition concerns may arise, explaining how CCCS would assess whether such collaborations generate economic benefits and whether they may qualify for the NEB exclusion.

4.2 As noted above, if businesses require some form of legal certainty, businesses are able to notify CCCS of their collaboration for guidance or decision or can seek independent legal advice.

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