

THE CCS GUIDELINE ON THE TREATMENT OF IPRs

Introduction

1. The Competition Commission of Singapore ('CCS') conducted a public consultation on the *CCS Draft Guideline on the Treatment of IPRs*, from 3rd to 24th October 2005. Besides posting the consultation documents on the CCS website and the Government Online Consultation Portal, the CCS wrote to over 120 business chambers and trade associations to invite comments. The CCS also conducted a briefing on the draft guideline in conjunction with the Singapore Business Federation ('SBF').

2. The CCS received a total of 13 submissions at the close of the public consultation. We thank all the contributors for their feedback on how the draft guideline can be improved. The CCS has made appropriate changes to the guideline after carefully reviewing the submissions. This paper outlines the major changes made, clarifies some of the issues raised, and explains why some suggestions have not been adopted.

The Treatment Of IPRs

3. Scope of the guideline: In response to the feedback received, the CCS has removed the rights granted under the Trade Marks Act and the Geographical Indications Act from the scope of the guideline¹. This guideline is intended to deal with the technology transfer and innovation aspects of IPRs, and will not extend to IPRs relating to product differentiation such as trademarks and geographical indications. The CCS has thus refined the scope of the guideline accordingly.

4. Scope of the exclusion for vertical agreements: Contributors requested clarification on the scope of the exclusion of vertical agreements provided for under paragraph 8 of the Third Schedule ('vertical exclusion'). To clarify, the vertical exclusion covers IPR provisions, provided they do not form the primary object of the agreement, and are directly related to the use, sale or resale of goods and services. The vertical exclusion is meant to apply to purchase and distribution agreements only, and not to IP licensing agreements. The definition of 'vertical agreements' in the Third Schedule will be amended shortly, by order of the Minister published in the Gazette to clarify the scope of the exclusion.

5. IP licensing agreements, especially those made between non-competitors, are generally considered to be pro-competitive. However, where IP licensing agreements are concerned, potential effects on the technology and innovation markets may also need to be taken into account, which is usually not the case for the excluded purchase and distribution agreements. As such, it is not appropriate

¹ The guideline will now apply to the rights granted under the Patents Act, Copyright Act, Plant Varieties Protection Act, Layout-designs of Integrated Circuits Act, Registered Designs Act and trade secrets.

for a blanket vertical exclusion to be extended to IP licensing agreements. IP licensing agreements will instead be assessed, where necessary, using the assessment framework² as set out in the guideline.

6. Franchise agreements: Contributors requested clarification on the status of franchise agreements. Vertical restraints within a franchise agreement are generally covered by the vertical exclusion. This includes IPR provisions like trademarks, provided that the IPR provisions do not constitute the main object of the agreement and are directly related to the use, sale or resale of goods and services.

7. Appreciable adverse effect: Contributors expressed concerns with the approach that agreements involving price-fixing, market-sharing or output limitations will always have an appreciable adverse effect on competition, even where the agreement is made between non-competitors. The CCS has considered the feedback and agrees that while this approach is appropriate in the case of agreements between competitors, it is not necessarily so in the case of agreements between non-competitors. The guideline has been revised to reflect that agreements involving price-fixing, market-sharing or output limitations will be deemed to always have an appreciable adverse effect on competition only in the case of agreements between competitors.

8. Competitive relationship: Contributors requested clarification on whether the competitive relationship between parties will be defined in relation to the Singapore or the wider market, in relation to the products in question or the overall business of the parties. The guideline clarifies that the competitive relationship between parties will be defined according to whether, in the absence of the agreement, they would have been actual or potential competitors on a *relevant market*. The relevant market will be defined in accordance to the framework set out in the *CCS Guideline On Market Definition*.

9. Grantbacks³: Contributors requested greater guidance on factors which would be relevant in the assessment of the competitive effects of grantbacks, particularly with respect to the exclusivity of the grantback. The CCS is of the view that there are often pro-competitive reasons for including grantbacks, and the guideline has been revised to reflect that grantbacks generally do not pose competition concerns, especially when they are non-exclusive in nature.

10. Refusals to supply a licence: Contributors put forth different positions on this issue, reflecting the tension between the need to provide incentives to

² Please refer to paragraph 3.2 of the guideline for more details on the assessment framework.

³ Grantbacks are arrangements under which a licensee assigns to the licensor, or agrees to assign to the licensor, the rights over the licensee's improvements to the licensed technology.

innovate and maintaining effective competition⁴. The CCS' approach is a carefully balanced one; it recognises that there is generally no obligation to supply a licence, even on the part of a dominant undertaking. A dominant undertaking's refusal to supply a licence may constitute an infringement of the section 47 prohibition only in limited circumstances, for example, where the refusal relates to an essential facility, with the effect of (likely) substantial harm to competition. In determining whether an IPR constitutes an essential facility⁵, the CCS will act in full consideration of the potential impact on incentives for undertakings to make investments and innovations.

11. Provisions in IP law: Some contributors enquired as to the interplay between certain provisions in IP law (for example, Section 51 of the Patents Act relating to terms like tying and Section 55 of the Patents Act relating to the grant of a licence to remedy an anti-competitive practice) and CCS' approach as set out in the guideline. The CCS has reviewed the feedback on this issue, with the Ministry of Law and the Intellectual Property Office of Singapore (IPOS). IPOS and MinLaw have agreed to review the relevant sections of IP legislation taking into account the Competition guideline and other relevant factors. The CCS, MinLaw and IPOS will work together to provide greater clarity and alignment in the two systems of law.

Next Steps

12. Pursuant to section 61 of the Act, the CCS will publish the above guidelines in the Gazette before 1 January 2006, when the section 34 and section 47 prohibitions come into force.

13. The guidelines will be reviewed from time to time to ensure their continued relevance, taking into account relevant changes and the decisions of the Competition Appeal Board and the courts.

⁴ Some contributors opined that the potential finding of an infringement for a refusal to supply a licence may harm innovation, while others supported regulation in this area, so as to promote competition and follow-on innovation.

⁵ A facility will be viewed as essential only if there are no potential substitutes (through duplication or otherwise), and if the facility is indispensable to the exercise of the activity in question.