8 October 2020

To
The Competition and Consumer Commission of Singapore (CCCS)

Subject: Industry Submission on Public Consultation on Proposed Changes to Competition Guidelines and the Issued Guidelines on Price Transparency

On behalf of the Asia Internet Coalition (AIC) and its members, I am writing to express our sincere gratitude to the Competition and Consumer Commission of Singapore ("CCCS") for the opportunity to submit comments on the Consultation Paper on Proposed Changes to Competition Guidelines ("CP"). In addition, we would also like to express our recommendation on the recently issued Guidelines on the Price Transparency. In the past AIC submitted a comprehensive set of recommendations on the Price Transparency Guidelines, for CCCS' consideration.

AIC is an industry association comprised of leading Internet and technology companies in the Asia Pacific region with an objective to promote the understanding and resolution of Internet and ICT policy issues. Our current members are Airbnb, Amazon, Apple, Expedia Group, Facebook, Google, LinkedIn, LINE, Rakuten, Twitter,Verizon, and Booking.com.

Firstly, we welcome the CCCS' intention to amend Competition Guidelines that outline the conceptual, analytical and procedural framework applied by CCCS in administering and enforcing the Act in Singapore. We understand that CCCS is updating its competition guidelines to provide more clarity and guidance to businesses in the digital sector. This follows the commission's e-commerce platform market study report (the "Study") released on 10 September 2020. We are of the view that CCCS has also urged e-commerce platform operators to raise sellers' awareness and understanding of the Consumer Protection (Fair Trading) Act (CPFTA) and encouraged sellers to adopt its recommended "good trade practices." The CCCS has been studying the applicability of its competition assessment tools to the digital sector since 2015. The Study's proposed amendments to the CCCS's competition guidelines crystallise its research findings over the last five years. As the COVID-19 pandemic catalyses business digitalisation in Singapore and the region, it is expected that CCCS will continue its focus on competition issues in the digital sector well into 2021.

Secondly, we welcome the recent amendment to the Guideline on Price Transparency, owing to which accurate prices will allow consumers to make informed purchasing decisions which are

essential for a well-functioning market. However, we observe with concern that the CCCS's Guidelines on Price Transparency will come into effect from 1 November 2020, which is relatively short to implement all the requisite changes and make the tech adjustments, as stipulated in the guidelines. We therefore recommend a reasonable extension to the effective date of Price Transparency Guidelines. This will enable more certainty for businesses in complying and will promote competition and innovation. An extended timeline will also help suppliers to review their current pricing or marketing structure.

We would like to respectfully request CCCS to consider our submission which could be a useful feedback for the policy-making process to determine an effective approach to price transparency competition guidelines in Singapore. As responsible stakeholders, we appreciate the ability to participate in this discussion and the opportunity to provide our inputs. **As such, please find appended to this letter detailed comments and recommendations, we would like CCCS to consider when drafting the Competition Guidelines.**

Should you have any questions or need clarification on any of the recommendations, please do not hesitate to contact our Secretariat Mr. Sarthak Luthra at Secretariat@aicasia.org or at +65 8739 1490. Importantly, we also look forward to offering our inputs and insights, directly through meetings and discussions with CCCS and help shape an effective and competitive regulatory framework in Singapore.

Sincerely,

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Detailed Comments and Recommendations

The AIC would like to express principal concerns with the proposed revisions to the Market Definition, Conduct, and Merger Guidelines are the newly inserted "ecosystem" theories. They appear to characterize "ecosystem"-related "efficiencies," "synergies," and "savings" only as barriers to entry without recognizing the procompetitive impact of market entry and its consumer benefits. These new theories affecting both market definition and conduct analysis appear to be completely un-cabined, as they do not have any associated economic tools of analysis, and depart radically from competition law. The proposed revisions appear to lose sight of the fact that the ultimate goal of competition law is still promoting consumer welfare. Further details are set forth below.

By contrast, a principal strength of the proposed guidelines on the treatment of Intellectual Property rights (Annex A) is its recognition that a failure to license a standard-essential patent on FRAND terms may give rise to competition concerns. This is a critical position that aligns with competition principles, recommendations and guidelines in other jurisdictions and by other groups. However, it is important to revise the proposed language of this provision to clarify that it applies only to standard-essential patents that its owner (or predecessor-in-interest) had voluntarily agreed to license on FRAND terms. The provisions on patent pools also could be favorably revised, including to account for FRAND commitments, and the example added to the provision on essential facilities should be deleted.

1. Proposed Revisions to the CCCS Guidelines on Market Definition

1.1.Section 5.12

CCCS proposes to add: "Besides bundling by sellers, buyers may also find that there are synergies in purchasing or consuming distinct products together. For example, buyers may derive significant transactional efficiencies (e.g. convenience or cost savings) by purchasing distinct products or services sold by the same seller. Where a significant proportion of buyers choose to purchase the distinct products together from the same seller (as opposed to purchasing each product from different sellers), the focal product may be a product ecosystem comprising the distinct products sold by the same seller. In subsequently defining the relevant product market, CCCS would carry out the test in considering both the demand-side and

supply-side substitution."

Comment: The proposed revision suggests that a "product ecosystem" should be an analytical tool for assessing substitutability for market definition. Indeed, the proposed addition to the CCCS Guidelines on the Section 47 Prohibition (Conduct Guidelines) state: "Please also refer to the CCCS Guidelines on Market Definition for details on…*how the product market of a seller that offers distinct products may be defined as a product ecosystem*" (emphasis added). It is unprecedentedly vague, and wholly unchartered territory in Singapore and abroad, to define a "product market" as a "product ecosystem". It is important that the CCCS clarify that distinct products must still be analyzed as their own product markets. That is what the economic tools in competition law are equipped to do; otherwise an "ecosystem" market definition is entirely unprincipled and lacking in any analytical tools of market definition. It is important to keep in mind that the "transactional efficiencies" and "convenience or cost savings" described from consumers purchasing distinct products from the same seller are long-term consumer benefits rather than consumer harms. They are also pro-competitive: they incentivize companies to enter new markets or invest in a good brand reputation. Existing competition theories, including bundling and tying, already address the potential consumer harms related to distinct products being sold by the same seller, and those existing theories are meant to strike the right balance between consumer benefits and entry barriers. Hence the reasoning presented in the draft would not justify going beyond assessing the presence of tying and the cost of switching to an alternative. A preference for integrated products does not seem like a harmful barrier to switching.

1.2. Section 2.11

CCCS proposes to add: "This may lead to the outcome where the hypothetical monopolist is not able to profitably sustain the 'supra competitive' pricing strategy if the price increase results in a significant number of users of the platform switching away to other substitutes. However, the number of users who switch to other substitutes may be mitigated if the hypothetical monopolist concurrently lowers the price charged to users on the other side(s) of the platform. This may result in a reduction in the number of users switching away on the side(s) of the platform experiencing a price decrease in the initial instance, and in turn a reduction in the number of users switching to other substitutes on the side of the platform experiencing the price increase. In this regard, changes to the pricing structure may affect the ability of the hypothetical monopolist to profitably sustain a 'supra competitive' pricing strategy."

Comment: The proposed revision seems to suggest that because a two-sided platform can lower the price on one side of the market, the two-sided platform is better able to sustain a "supra competitive" pricing strategy. However, it fails to recognize that the beneficial price reduction on one side of the platform *must be taken into account* to assess whether a "supra competitive" pricing

strategy exists in the first place. As the key U.S. Supreme Court landmark antitrust decision in *American Express* ruled,[1] the effects in both sides of a two-sided market must be taken into account. Therefore, a price reduction on one side of the market is an offsetting or countervailing benefit vis-à-vis the other side of the market, and thus a favorable impact in one side of the market is erosion, not evidence, of a "supra competitive pricing strategy."

2. Proposed Revisions to the CCCS Guidelines on the Section 47 Prohibition

2.1.Section 10.26 to 10.27

CCCS proposes to add: "Consumption synergies refer to efficiencies derived from purchasing multiple distinct products or services together from the same supplier. These efficiencies typically include benefits such as convenience, savings in transaction costs and time, which result in buyers deriving a greater value from purchasing the products or services from the same supplier instead of purchasing each product or service from different suppliers. These consumption synergies could contribute to barriers to entry." For instance, where there are strong consumption synergies for an incumbent's products or services, buyers may find that the costs of switching to a potential entrant's products or services may be higher than the benefits derived from remaining and purchasing the products or services from the incumbent. The potential entrant may hence find it difficult to attract buyers and to compete effectively with the incumbent."

2.2. Section 10.21 to 10.22

CCCS also proposes to add: "Economies of scope arise where an undertaking's average cost of production falls as it produces more types of products or services. These typically result from commonality of production processes and expertise. Cost savings are achieved by sharing an undertaking's resources and know-how across the production of multiple types of products and services. This means that it may be cheaper for a single supplier to produce the multiple products or services compared to having one supplier producing each of the product or service. In the presence of economies of scope, a potential entrant may find it difficult to enter and compete effectively with an incumbent that produces multiple products or services. For example, if the potential entrant only produces one product or service, it is not able to enjoy the same economies of scope as the incumbent and may not be able to reap the same cost savings as the incumbent. A potential entrant who wishes to enter and produce multiple types of products or services simultaneously in order to reap the economies of scope may also find that it faces large sunk costs, which may deter entry. In such cases, economies of scope may constitute barriers to entry."

[1] Ohio et al. v. American Express Co., 138 S. Ct. 2274 (Jun. 25, 2018).

Comment: Similar to the first concern set forth above, these proposed additions only recognize "consumption synergies" and "economies of scope" as entry barriers rather than consumer benefits. CCCS should clarify that analysis of such "consumption synergies" or "economies of scope" must take into account the pro-competitive benefits. It is extremely important not to lose sight of the fact that competition law always encourages organic market entry, which always increases consumer choice and product quality or lowers price. What constitutes "consumption synergies" ("convenience, savings in transaction costs and time") and "economies of scope" ("cheaper for a single supplier to produce the multiple products or services compared to having one supplier producing each of the product or service") translates directly into consumer benefits and are the most basic benefits of procompetitive market entry. Competition authorities should not put their "thumb on the scale" of "small" producers versus "conglomerate" producers. The existing tools of product market definition and theories of tying/bunding already address competition harms that may arise from companies expanding into new markets.

2.3. Section 11.24

CCCS proposes to add: "Self-preferencing occurs when a dominant undertaking that is vertically integrated gives preferential treatment to its own downstream products, over competing sellers that utilise the dominant undertaking's upstream products."

Comment: Prohibiting all forms of self-preferencing without detailed effects analysis would clearly be detrimental to competition and consumer welfare. Even self-preferencing by a dominant firm can in certain circumstances be pro-competitive (e.g., when the firm is a new entrant). Self-preferencing is inherent in vertical integration. The benefits of vertical integration are recognized in both the US and EU Guidelines,[2] as they lead to the elimination of double-marginalization, lowering the marginal cost of selling in downstream markets. These efficiencies lead to lower prices, expanded output, and increased investment — all of which enhance competition and benefit consumers. The prohibition of self-preferencing should only be considered when a platform is deemed an essential facility and when there is clear evidence that the conduct will harm consumers, even if it may harm a given competitor.

[2] U.S. Department of Justice & Federal Trade Commission, Vertical Merger Guidelines (June 30, 2020); European Commission, Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2008).

2.4. Section 11.37

CCCS proposes to add the underlined text: "Facilities are rarely considered to be 'essential.' A facility, which may comprise a physical asset, a proprietary right or data, will be viewed as essential only where it can be demonstrated that access to it is indispensable in order to compete in a related market, and where duplication is impossible or extremely difficult owing to physical, geographic, economic or legal constraints (or is highly undesirable for reasons of public policy)."

Comment: It is important to recognize that data is non-rivalrous, as the Commission knows, unlike the typical conception of an "essential facility". The phrase "proprietary right" is also extremely vague and appears tautological – a right, by virtue of being proprietary, is not open to all. CCCS should reconsider or provide more details for how a "proprietary right or data" could be considered an "essential facility". Given the vast complexities and privacy implications around data as well as potential negative impact that undue regulatory intervention may have on consumer welfare, competition, and innovation, CCCS should apply its usual high bar in determining whether certain data qualifies as "essential facilities", where control of such data carries with it the power to eliminate competition in the downstream market.

3. Proposed Revisions to CCCS Guidelines on the Treatment of Intellectual Property Rights

3.1.Section 3.34

CCCS proposes to add the underlined text: Technology pools are arrangements whereby two or more parties assemble a package of technology which is licensed not only to contributors to the pool but also to third parties. These may have pro-competitive benefits, in clearing blocking patents, integrating complementary technologies and reducing transaction costs. Where a pool is composed only of technologies that are essential and complementary, it is generally pro-competitive regardless of the market position of the parties involved. However, technology pools may have anti- competitive effects in certain circumstances. For example, where pools are composed solely or predominantly of substitute technologies, this leads to little efficiency gains and may amount to price-fixing. In addition to reducing competition between parties, there is also the risk of foreclosing alternative technologies that are outside the pool. Other potential competition concerns are that pool members may discriminate against non-member licensees (which could result in a distortion of competition), restrict the independent licensing of the patents, or use the pool to share confidential business information so as to reduce competition in a downstream market.

Comments: The update to Section 3.34 of the CCCS IP Guidelines appropriately identifies potential competition concerns that could arise if patent pool members "discriminate against non-member licensees", "restrict independent licensing of the patents" or use "the pool to share confidential business information so as to reduce competition in a downstream market."

We recommend that CCCS clarify that the restriction on "independent licensing of the patents" is a concern when the pool's structure and agreements 1) expressly restrict independent licensing of the patents in the pool by pool members to potential licensees outside the pool, or 2) creates incentives that have the same result. Our proposed revision is shown below.

We also recommend that CCCS expressly provide that the failure of the pool administrator to comply with licensing encumbrances voluntarily agreed to by patent holders raise competition concerns, including a failure to license to all potential licensees regardless of their role in the supply chain when the pool's patents are encumbered by a commitment to license on fair, reasonable, and non-discriminatory (FRAND) terms in the context of standard-setting activities. Making this change would accord with the European Commission's position whose guidelines state that parties making such a FRAND licensing commitment with regards to the patents they declare to standards setting organizations must offer licenses to all third parties and that pools also must license such patents on FRAND terms[3]. *EU Horizontal Guidelines* at ¶ 286; *European Commission Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements*, ¶ 261 ("The creation and operation of the pool, including the licensing out, generally falls outside Article 101(1) of the Treaty, irrespective of the market position of the parties, if ... (e) the pooled technologies are licensed out to all potential licensees on FRAND terms")

Adding such a potential harm to section 3.34 would similarly accord with the approach of the Japan's Fair Trade Commission, which states that refusals to license to any party willing to take a license to a FRAND-encumbered standard essential patent may harm competition, including refusals by managers of such patents such as pool licensors. Japan Fair Trade Commission, *Guidelines for the Use of Intellectual Property under the Antimonopoly Act*, Part 3 (e) ("Refusal to license or bringing an action for injunction against a party who is willing to take a license by a FRAND-encumbered Standard Essential Patent holder, or refusal to license or bringing an action for injunction against a party who is willing to take a license by a FRAND-encumbered Standard Essential Patent holder after the withdrawal of the FRAND Declaration for that Standard Essential Patent may fall under the exclusion of business activities of other entrepreneurs by making it difficult to research & develop, produce or sell the products adopting the standards. The description above shall be applied no matter whether the act is taken by the party which made the

[3] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0328(01)&from=EN.

FRAND Declaration or by the party which took over FRAND-encumbered Standard Essential Patent or is entrusted to manage the FRAND-encumbered Standard Essential Patent.")[4]. We propose the following addition to reflect this consideration:

> 3.34. Other potential competition concerns are that pool members may discriminate against non-member licensees (which could result in a distortion of competition), restrict the independent licensing of the patents, or use the pool to share confidential business information so as to reduce competition in a downstream market; *or that the pool licensor fails to comply with licensing encumbrances voluntarily agreed to by pool members, such as failing to offer to license all potential licensees regardless of their role in the supply chain when a member's patents are encumbered by a commitment to license on fair, reasonable, and non-discriminatory (FRAND) terms made in the context of collaborative standard-setting activities.*

3.2.Example in Section 4.7

CCCS proposes to add the following example and analysis:

Example:
Firm A was the first firm to market spreadsheet software for personal computers ("Software A"). Software A established personal computers as an essential tool for businesses, and Firm A outsold its closest competitors significantly. After a few years, Firm B introduced new software ("Software B") that contained a number of features not found in Software A. However, Firm B soon ran into financial difficulties and requested a licence to copy the words and layout of Software A's menu command hierarchy, which Firm A had a copyright in. This would have allowed Software B to read Software A files and ensured compatibility between both products. Firm A refused to grant a licence to Firm B and announced that it would enforce its IP rights against Firm B if it copied the Software A's hierarchy. As a consequence, several other prominent software makers announced the discontinuation of their spreadsheet development programs.

Analysis: To establish whether Firm A's refusal to supply a licence constitutes an abuse under the section 47 prohibition, CCCS would first determine whether the refusal adversely affected competition in a relevant market that was different or significantly larger than the subject matter of Firm A's IPRs or the products or services that result directly from the exercise of such IPRs. In determining the relevant market (e.g. whether it is the market for Software A compatible spreadsheets), CCCS would consider factors such as the extent and importance of network effects

[4] https://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines_files/IPGL_Frand.pdf

and switching costs. CCCS would then determine whether Firm A is dominant in this market taking into account factors such as Firm A's market share and barriers to entry (including the pace of innovation and the potential for a new technology to "leap-frog over" Software A). Assuming that Firm A is dominant, CCCS would determine whether access to Software A's menu command hierarchy is essential for competitors to participate in the relevant market and the extent to which Firm A's refusal to license its IP would adversely alter other firms' incentives to invest in R&D in respect of goods that require the IP as an input. If Software A's menu command hierarchy is an essential input, a refusal by Firm A to license this product to other firms could potentially constitute an abuse of its dominant position (unless there are objective justifications for this refusal, such as poor creditworthiness of the developers of competing software).

Comment: We agree with the statement in revised section 4.7 that "IPRs by themselves are generally unlikely to create essential facilities." We are concerned, however, that the new example suggests that a refusal to license copyrighted software that has become a standard set by the market, a so-called *de facto* standard—one that is not set as a result of collaborative standard-setting—could be deemed an abuse under section 47 when it is not appropriate to do so. We therefore recommend that the new example be deleted.

We make this recommendation because we are concerned that the *forced* licensing of an intellectual property right (that has not been voluntarily encumbered) on the basis of an unconditional, unilateral refusal to license will have two damaging effects on innovation incentives. It will dampen the incentive of other companies to develop competing technologies by allowing them to free ride on the risk-taking of companies that developed and marketed a product that consumers prefer. In turn, such *forced* licensing will undermine the incentives of successful innovative firms to invest in more innovation[5].

3.3.Section 4.9

CCCS proposes to add: "The relationship between patents and standards is fundamental to innovation and economic growth. While standards ensure that interoperable and safe technologies are widely disseminated among companies and end-consumers; patents incentivise technology-contributing companies to participate in future standard setting efforts, and enable innovative companies to receive an adequate return on investments. At the nexus of patents and standards lies a special category of patents, known as SEP, which effectively protects technology essential to a

[5] *See generally* U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition*, at Ch. 1 (2007), https://www.ftc.gov/sites/default/files/documents/reports/antitrust-enforcement-and-intellectual-property-rights-promoting-innovation-and-competition-report.s.department-justice-and-federal-tradecommission/p040101promotinginnovationandcompetitionrpt0704.pdf

standard. In other words, suppliers who wish to manufacture products, which are in compliance with certain standards, will have to obtain the necessary licences to use the technologies covered by one or more SEPs. "

Comment: Patent owners self-declare many patents as SEPs that nevertheless ultimately are not essential, infringed, valid, or otherwise enforceable. Suppliers who wish to manufacture products that comply with those standards accordingly should not have to obtain licenses to those SEPs that are not truly essential. Accordingly, we suggest the following edit to reflect this consideration:

> 4.9 … At the nexus of patents and standards lies a special category of patents, known as SEPs, which effectively protects technology essential to a standard. In other words, suppliers who wish to manufacture products, which are in compliance with certain standards, will need to have the ability to obtain the necessary licences to use the technologies covered by one or more infringed, valid, and otherwise enforceable SEPs.

3.4.Section 4.11

CCCS proposes to add: "Prior to the establishment of a standard, patent holders will have to provide a voluntary commitment to SSOs, undertaking to license their technologies on FRAND terms should their technologies be codified within a standard. The refusal by an SEP holder to license its technology on FRAND terms may give rise to competition concerns under section 47 of the Act."

Comment: Section 4.11 addresses a very important aspect of standards development that has a significant impact on competition, consumer benefit and innovation. When patented technologies are included in a standard and the use of the patented technology is "essential" to comply with the standard, the owners of the patented technologies can gain significant market power upon adoption of the standard[6].

Many standards development organizations balance this dynamic during the standards development process by requesting that participants declare, or otherwise indicate, whether or not they will commit to license their standard essential patents (SEPs) on fair, reasonable, and non-discriminatory (FRAND) terms. The FRAND commitment (which can be royalty bearing or royalty free) represents a voluntary undertaking by the IP owner to license its patented technology

[6] *See, e.g.*, European Commission "*Guidelines on the applicability of Article 101 on Treaty on Functioning of the Functioning of the European Union to horizontal co-operation agreements*" ¶ 268 (2011/C 11/01 ("EU Horizontal Guidelines"), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011XC0114(04)&from=EN.

that is essential to the standard in question to any and all interested parties in return for gaining "*the ability to obtain royalty from a large group of standards implementers – even for patents for which a commercial market might not have existed in the absence of the standard*[7]*."*

Thus, it is critically important that once a FRAND commitment has been voluntarily made that the SEP licensor be held accountable to ensuring that it makes a FRAND license available to *anybody that wants one to implement the relevant standard*[8]. When SEP licensors are allowed to pick and choose among whom they license the patented technology, e.g., to discriminate to whom they will license, they gain the power to exclude parties, including competitors, from exercising the standard, and to cause anti-competitive harm.

Equally important is ensuring that SEP licensors are held accountable to their promise to license SEPs on "fair and reasonable" terms, rather than charging royalties on products or services beyond the scope of their patented inventions. SEPs should be valued based on their own technical merits and scope, not based on downstream values or uses or the value obtained simply from their inclusion in the standard.[9] Companies that seek the value of SEPs "to the end user" or that are based on the price or use of end product are seeking the value created by standardization, and value added by the end product, rather than the value of their own inventions. Their actions also may cause anti-competitive harm, for example, through increased prices to downstream consumers, or reductions in the consumer choice or manufacturer's incentives to engage in research and development.

Accordingly, we strongly support and encourage the CCCS to retain the concept in Section 4.11 that a breach of a FRAND commitment may give rise to a competition violation. This determination is consistent with findings and recommendations in other jurisdictions, including the European Commission's competition guidelines on horizontal co-operation agreements[10].

Doing so would similarly accord with the approach of the Japan's Fair Trade Commission, which states that refusals to license to any party willing to take a license to a FRAND-encumbered standard essential patent may harm competition. Japan Fair Trade Commission, *Guidelines for*

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[7] CEN Workshop Agreement CWA 95000, *Core Principles and Approaches for Licensing of Standard Essential Patents* at 20 (June 2019).
[8] *Ibid.* pp. 9, Core Principle 2
[9] *Ibid.* pp. 10, Core Principle 3
[10] EU Horizontal Guidelines at ¶ 286 ("[i]n order to ensure effective access to the standard, the IPR policy would need to require participants wishing to have their IPR included in the standard to provide an irrevocable commitment in writing to offer to license their essential IPR to all third parties on fair, reasonable and non-discriminatory terms").

the Use of Intellectual Property under the Antimonopoly Act, Part 3 (e) (rev. 2016) ("Refusal to license or bringing an action for injunction against a party who is willing to take a license by a FRAND-encumbered Standard Essential Patent holder, or refusal to license or bringing an action for injunction against a party who is willing to take a license by a FRAND-encumbered Standard Essential Patent holder after the withdrawal of the FRAND Declaration for that Standard Essential Patent may fall under the exclusion of business activities of other entrepreneurs by making it difficult to research & develop, produce or sell the products adopting the standards. The description above shall be applied no matter whether the act is taken by the party which made the FRAND Declaration or by the party which took over FRAND-encumbered Standard Essential Patent or is entrusted to manage the FRAND-encumbered Standard Essential Patent.")[11].

At the same time, we urge CCCS to clarify in Section 4.11 that a patent owner's commitment to an SSO to license its technologies on FRAND terms, should its technology be codified in the standard, is a voluntary commitment. It is also critically important that participants are not forced into licensing their patented technologies on FRAND terms if they do not wish to do so. However, once a participant has voluntarily made a FRAND commitment, then the participant should be held accountable to licensing the patented technology, on FRAND terms, to any party interested in seeking such a license. Accordingly, we suggest the following edits to achieve these objectives:

> 4.11 Prior to the establishment of a standard, patent holders may provide a voluntary commitment to SSOs, undertaking to license their technologies on FRAND terms, to any interested party. Following such a commitment may give rise to competition concerns under section 47 of the Act.

3.5.Section 4.13 to 4.15

CCCS proposes to add:

"4.13 Facts and data *per se* are not protected under copyright law. However, a compilation of facts and data may be protected if it constitutes an intellectual creation by reason of the selection or arrangement of its contents.

4.14 This distinction reflects copyright law's goal of balancing private rights with public needs and interests: while copyright may protect, for a limited period, the copyright holder's efforts in compiling facts and data, the facts and data *per se* must remain free for others to work on so that

[11] https://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines_files/IPGL_Frand.pdf

the public can benefit from further additions to the pool of results. Otherwise, the first compiler could gain a monopoly over the data in the compilation, particularly when the data can only be found in the compiler's work. In such cases, a single compiler would have the power to control the growth of the pool of works for the consumption and benefit of the public.

4.15 Notwithstanding the "thin" copyright protection afforded over data and facts, there is potential scope for competition intervention where a dominant company disallows its competitors access to data which is a key competitive input in the relevant market. Whether the data is a key competitive input may include a consideration of factors such as the availability of substitute data, the ability of competitors to replicate the data under reasonable conditions, as well as the degree of necessity of the data for competitors to compete effectively. Further, in
order to assess whether competition intervention is appropriate, CCCS 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 record of privacy of that competitor, or security concerns over a particular data set).

[Example analysis involving Firm A and its customer data shared with its affiliate Firm B (in a different market), but not with Firm B's competitor Firm C]"

Comment: As discussed above regarding the CCCS' proposed change to Section 11.37, data is generally non-rivalrous and has wide-ranging types, sources, and use cases. Depending on their type, some data are also subject to certain (and often strict) regulatory requirements. Given such diversity and complexities surrounding data, we recommend CCCS to reconsider these proposed additions, or at a minimum clarify the exact scope of what "data" and "a compilation of facts and data" mean in this context. For instance, does CCCS contemplate only certain compilations of business-generated data, such as confidential customer lists (as noted in the CCCS' proposed example), or also other types of data (e.g., operations data, geological data, inferred or trends data, consumer data, etc.).

Further, the proposed sections, as currently phrased, are overbroad and vague on several other key issues. First, how does the "compilation" element come into play when determining whether something amounts to "a key competitive input in the relevant market"? In other words, is it the compilation or the data that is considered "a key competitive input"? If both, how would that analysis unfold in real life situations? For instance, if a firm has developed its own innovative way to compile data from the public domain that creates significant efficiencies and allows that firm to set itself apart from the competition, that generally should not lead to antitrust regulatory intervention—such undue intervention would disincentivize companies from undertaking similar investments, thus stifle innovation and competition.

Second, the proposed sections do not take into account the market position of the "first compiler" other than noting the mere possibility that "the first compiler could gain a monopoly over the data in the compilation, particularly when the data can only be found in the compiler's work." Such focus on timing—"*first* compiler"—rather than the firm's market power or ability to leverage any such power to foreclose competition in an adjacent market ignores the fundamental antitrust jurisprudence that requires first and foremost, analysis of market power in a relevant market. For instance, in a market with an existing dominant player, it is hard to imagine a challenger maverick's access refusal to its data compilation would be considered anticompetitive, regardless of whether the maverick is the first complier or how unique the data is. Also, whether a company is the "first complier" may quickly lose its meaning in highly dynamic markets, where technology is constantly evolving and the compilation at issue may become obsolete or challenged by other innovative alternatives down the road.

We do agree with the requirement in the proposed sections that in determining whether an intervention is necessary, CCCS also consider "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 record of privacy of that competitor, or security concerns over a particular data set)."

Finally, to the extent CCCS considers access to certain data as "a key competitive input", such consideration should occur in the same context as essential facilities under existing competition laws. Also, to the extent the CCCS envisions regulatory intervention and behavioural remedy, such as requiring third party access to user data collected by a digital platform, such intervention could have unintended consequences that in fact harm consumer welfare (including privacy interests), competition, and innovation.

Digital platforms often collect and use various user data for the particular purpose and use case to which their users have consented. In the context of social networks and related user data, untethered third party access to (and use of) such data would diminish transparency and control over consumers' personal data where it is stored, whose policies apply, where it might be shared, how they can manage or delete it. It would also hamper the network's ability to provide data protection, platform abuse monitoring, privacy controls, and trust and safety operations in compliance with the various other regulatory regimes. Further, imposing mandatory third party access to data may disincentivize platforms to invest and innovate in building and improving their services to better attract and grow their user base given the future risk of regulatory intervention and cost.

Thus, such regulatory intervention requires careful examination of the CCCS' proposed factors—such as reasonable replicability of the data, essential (not merely nice-to-have) and unique nature of the data to compete, and platform's rationale for restricting access—and should employ a very

high bar in its application. As the CCCS guidelines (Section 47 Prohibition) note, "[f]acilities are rarely considered to be 'essential'", where a facility is "essential" only if "access to it is indispensable in order to compete in a related market, and where duplication is impossible or extremely difficult owing to physical, geographic, economic or legal constraints (or is highly undesirable for reasons of public policy)." We further posit that certain data is "essential" only if control of such data carries with it the power to eliminate competition in the downstream market.

End of submission