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CONTENTS

Introduction Michael Han, Álvaro Iza and Bruce McCulloch *Freshfields Bruckhaus Deringer* 3
Timelines Michael Bo Jaspers and Claudia Lange-Tramoni *Freshfields Bruckhaus Deringer* 8
Acknowledgements 21

Albania Guenter Bauer, Sokol Nako and Mariana Spasojevic *Wolf Theiss* 23
Argentina Marcelo den Toom *M & M Bomchil* 28
Australia Wendy Peter and Jacqueline Downes *Allens Arthur Robinson* 35
Austria Axel Reidlinger and Heinrich Kühnert *Freshfields Bruckhaus Deringer* 46
Belgium Laurent Garzaniti, Thomas Janssens and Vincent Mussche *Freshfields Bruckhaus Deringer* 52
Bolivia Jorge Luis Inchauste *Guevara & Gutiérrez SC* 57
Bosnia and Herzegovina Guenter Bauer, Sead Miljkovic and Mariana Spasojevic *Wolf Theiss* 61
Brazil José Regazzini and Marcelo Calliari *TozziniFreire Advogados* 66
Bulgaria Nikolai Gouginski and Miglena Ivanova *Djingov, Gouginski, Kyutchukov & Velichkov* 71
Canada Neil Campbell, Mark Opashinov and Sorcha O'Carroll *McMillan LLP* 77
Chile Isabel Díaz *Isabel Diaz & Asociados* 84
China Alex Potter and Michael Han *Freshfields Bruckhaus Deringer* 90
Colombia Javier Cortázar-Mora *Manrique & Associates* 95
Croatia Boris Babic, Marija Gregoric, Katarina Fulir and Boris Andrejas *Babic & Partners Law Firm* 100
Czech Republic Lucie Bányaiová and Alena Bányaiová *Salans Europe LLP* 104
Denmark Morten Kofmann, Jens Munk Plum and Erik Bertelsen *Kromann Reumert* 110
Estonia Katri Paas and Martin Simovart *Lepik & Luhaäär LAWIN* 115
European Union John Davies and Rafique Bachour *Freshfields Bruckhaus Deringer* 120
Faroe Islands Morten Kofmann, Jens Munk Plum and Erik Bertelsen *Kromann Reumert* 129
Finland Christian Wik and Niko Hukkinen *Roschier, Attorneys Ltd* 133
France Jérôme Philippe and Jean-Nicolas Maillard *Freshfields Bruckhaus Deringer* 138
Germany Helmut Bergmann and Frank Röhling *Freshfields Bruckhaus Deringer* 145
Greece Aida Economou *Panagopoulos, Vainanidis, Schina, Economou* 155
Hong Kong Connie Carnabuci, Margaret Wang and Ivy Yam *Freshfields Bruckhaus Deringer* 160
Hungary Zoltán Marosi and Gábor Fejes *Oppenheim* 166
Iceland Helga Melkorka Óttarsdóttir *Logos Legal Services* 172
India Suchitra Chitale and Abhishake Sinha *Chitale & Chitale Partners* 179
Indonesia Rikrik Rizkiyana, Vovo Iswanto and Albert Boy Situmorang *Rizkiyana & Iswanto Antitrust and Corporate Lawyers* 183
Ireland Philip Andrews and Damian Collins *McCann FitzGerald* 187
Israel Eytan Epstein, Tamar Dolev-Green and Michelle Morrison *Epstein, Chomsky, Osnat & Co* 193
Italy Gian Luca Zampa *Freshfields Bruckhaus Deringer* 200
Japan Akinori Uesugi and Kaori Yamada *Freshfields Bruckhaus Deringer* 209
Kenya Richard Harney *Coulson Harney, Advocates* 217
Korea Keum Seok Oh and Seong Un Yun *Bae, Kim & Lee LLC* 222
Latvia Liga Hartmane and Martins Gailis *Klavins & Slaidins LAWIN* 226
Liechtenstein Helene Rebholz and Corina Bölsterli Maier *Dr Dr Batliner & Dr Gasser* 232
Lithuania Marius Juonys and Laura Šlepaitė *Lideika, Petrauskas, Valiūnas ir partneriai LAWIN* 236
Luxembourg Patrick Santer and Léon Gloden *Elvinger, Hoss & Prussen* 242
Macedonia Biljana Cakmakova and Eva Veljanovska *Mens Legis Cakmakova Advocates* 245
Malta Ian Gauci and Cynthia Van Der Weerden *GTG Advocates* 249
Mexico Gabriel Castañeda *Castañeda y Asociados* 256
Netherlands Winfred Knibbeler, Paul Kreijger and Peter Schepens *Freshfields Bruckhaus Deringer* 261
New Zealand Andrew Peterson, Sarah Keene and Troy Pilkington *Russell McVeagh* 267
Nigeria Babatunde Irukera and Ikem Isiekwena *SimmonsCooper Partners* 274
Norway Mads Magnussen and Simen M Klevstrand *Wikborg Rein* 279
Poland Dorothy Hansberry Bieguńska and Andrzej Madała *Wardyński & Partners* 284
Portugal Mário Marques Mendes and Pedro Vilarinho Pires *Marques Mendes & Associados* 289
Romania Anca Ioachimescu *Rubin Meyer Doru & Trandafir SCA* 296
Russia Igor Gerber and Alexander Viktorov *Freshfields Bruckhaus Deringer* 302
Serbia Guenter Bauer, Maja Stankovic and Mariana Spasojevic *Wolf Theiss* 307
Singapore Lim Chong Kin and Ng Ee Kia Joy *Drew & Napier LLC* 314
Slovakia Peter Oravec *PRK Partners sro* 321
Slovenia Pavle Pensa *Jadek & Pensa* 326
South Africa Robert Legh and Tamara Dini *Bowman Gilfillan* 332
Spain Paco Cantos, Álvaro Iza and Margarita Fernández *Freshfields Bruckhaus Deringer* 342
Sweden Tommy Pettersson, Johan Carle and Stefan Perván Lindeborg *Mannheimer Swartling Advokatbyrå* 347
Switzerland Marcel Meinhardt, Benoît Merkt and Astrid Waser *Lenz & Staehelin* 352
Taiwan Mark Ohlson and Charles Hwang *YangMing Partners* 357
Turkey Gonenc Gurkaynak *ELIG, Attorneys-at-Law* 364
Ukraine Alexey Pustovit *Konnov & Sozanovsky* 371
United Kingdom Nicholas French, Alison Jones and Martin McElwee *Freshfields Bruckhaus Deringer* 376
United States Ronan P Harty *Davis Polk* 385
Venezuela José H Frías *D'Empaire Reyna Abogados* 393
Zambia Charles Siamutwa *Corpus Legal Practitioners* 397

Introduction to the ICN John Fingleton *Chair of the steering group of the ICN* 401
Quick Reference Tables 403

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Legislation and jurisdiction

1 What is the relevant legislation and who enforces it?

Prior to the passing of the Singapore Competition Act (Cap 50B) (Competition Act) in October 2004, Singapore did not have a competition statute of general application. Laws against anti-competitive behaviour in respect of particular industry sectors such as telecommunications, media, postal, gas and electricity can be found in certain statutes that regulate such sectors. These industry-specific competition laws are enforced by the respective sector regulators.

The Competition Act is administered and enforced by the Competition Commission of Singapore (the Commission), which was established as a statutory body under the Competition Act on 1 January 2005 and is under the purview of the Ministry of Trade and Industry. The Commission has powers to investigate and impose sanctions. The Competition Act, with some exceptions (set out in Schedules 3 and 4 of the Competition Act), applies generally to prohibit:
- anti-competitive agreements (section 34 prohibition);
- abuse of dominant position (section 47 prohibition); and
- mergers and acquisitions that substantially, or may be expected to substantially, lessen competition within any market in Singapore (section 54 prohibition).

On cross-sectoral competition matters, the Commission will work with the relevant sectoral regulator on which regulator is best placed to handle the case in accordance with the legal powers given to each regulator. The Commission and the sector-specific regulators will cooperate and coordinate closely to prevent double jeopardy and to minimise the regulatory burden in dealing with the case. The lead will be taken by the agency best placed in terms of the ability to investigate the alleged anti-competitive conduct and impose any necessary remedies.

The Competition Act was implemented in three phases. On 1 January 2005, the provisions establishing the Commission came into force. On 1 January 2006, the provisions on anti-competitive agreements, decisions and practices; abuse of dominance; enforcement; appeal processes; and other miscellaneous areas came into force. The provisions relating to mergers and acquisitions came into force on 1 July 2007.

2 What kinds of mergers are caught?

Subject to certain exclusions and exemptions, mergers and anticipated mergers that result, or may be expected to result, in a substantial lessening of competition within any market in Singapore will be caught.

A merger is regarded as occurring for the purpose of the Competition Act if:
- two or more undertakings, previously independent of one another, merge;
- one or more persons or other undertakings acquire direct or indirect control of the whole or part of one or more other undertakings; or
- the result of an acquisition by one undertaking (the first undertaking) of the assets (including goodwill), or a substantial part of the assets, of another undertaking (the second undertaking) is to place the first undertaking in a position to replace or substantially replace the second undertaking in the business or, as appropriate, the part of the business in which that undertaking was engaged immediately before the acquisition.

A merger shall not be deemed to occur if:
- the person acquiring control is a receiver or liquidator acting as such or is an underwriter acting as such;
- all of the undertakings involved in the merger are, directly or indirectly, under the control of the same undertaking;
- control is acquired solely as a result of a testamentary disposition, intestacy or the right of survivorship under a joint tenancy; or
- control is acquired by an undertaking the normal activities of which include the carrying out of transactions and dealings in securities for its own account or for the account of others under certain circumstances.

For the definition of 'control', please refer to question 4.

The section 54 prohibition does not apply to any merger that (Fourth Schedule, Competition Act):
- results in economic efficiencies arising or that may arise from the merger that outweigh the adverse effects due to the substantial lessening of competition in the markets in Singapore;
- is approved by any minister or any regulatory authority where the requirement for approval is imposed by written law (in the case of the Monetary Authority of Singapore, section 54 also does not apply where the requirement for approval is imposed by instruments issued under written law);
- is under the jurisdiction of another regulatory authority under any written law relating to competition or a code of practice relating to competition (eg, in the energy, telecommunications and media industries); or
- relates to the supply of postal services, potable piped water, wastewater management services, licensed bus services, licensed rail services and licensed cargo terminal operations.

Where the Commission proposes to make an unfavourable decision, the merger parties may apply to the minister for trade and industry within 14 days of the date of the notice, for the merger to be exempted on the ground of any public interest consideration. The decision of the minister for the exemption will be final. The minister may revoke any exemption of a merger that has been granted if he or she has reasonable grounds for suspecting that the information on which he or she based the decision was incomplete, false or misleading in a material particular.

3 Are joint ventures caught?

Under the Competition Act, a joint venture is considered a 'merger' if:

- it is jointly controlled by its parent companies;
- it operates in the market and performs all the functions of an autonomous economic entity operating in that market; and
- it is intended to operate on a lasting basis.

A joint venture that merely takes over a specific function (eg, research and development or production) of its parent companies' business activities without having access to the market is not caught by the prohibition.

Whether a joint venture is prohibited will depend on whether it has or might have the effect of substantially lessening competition, and whether any exemptions or exclusions apply.

4 Is there a definition of 'control' and are minority and other interests less than control caught?

The essence of 'control' is the ability to exercise 'decisive influence' in relation to an undertaking.

For this purpose, control of an undertaking is seen to exist if, by reason of rights, contracts or any other means, decisive influence is capable of being exercised with regard to the activities of the undertaking and, in particular, by:

- ownership of, or the right to use all or part of, the assets of an undertaking; or
- rights or contracts which enable decisive influence to be exercised with regard to the composition, voting or decisions of the organs of an undertaking.

The Commission considers that decisive influence is generally deemed to exist if there is ownership of more than 50 per cent of the voting rights. Where the ownership is between 30 per cent and 50 per cent of the voting rights of the undertaking, there is a rebuttable presumption that decisive influence exists. 'Voting rights' refers to all the voting rights attributable to the share capital of an undertaking that are currently exercisable at a general meeting. However, these thresholds are only indicative and control could potentially be established at levels below these thresholds if other relevant factors provide strong evidence of control. Other forms of voting rights will also be taken into account in assessing control.

Besides legal ownership through the acquisition of property rights and securities, de facto control may also be established. As there are no precise criteria for determining when an acquirer gains de facto control of an undertaking's activities, the Commission will adopt a case-by-case approach in light of the particular circumstances.

In determining whether decisive influence is capable of being exercised, all circumstances must be considered, and not solely the legal effect of any instrument, deed, transfer, assignment or other act.

It is possible that decisive influence may be capable of being exercised by a person who has only a minority interest. For example, control may exist where minority shareholders have additional rights which allow them to veto decisions that are essential for the strategic commercial behaviour of the undertaking, such as the budget, business plans, major investments, the appointment of senior management or market-specific rights.

5 What are the jurisdictional thresholds?

The Commission is unlikely to consider that a merger or anticipated merger will raise competition concerns if it falls below the following indicative thresholds:

- the merged entity will have a market share of 40 per cent or more; or
- the merged entity will have a market share of between 20 per cent and 40 per cent and the post-merger market share of the three largest firms, that is, the concentration ratio of three largest firms (CR3) is 70 per cent or more.

If the merger situation meets or crosses either of the two thresholds, the Commission may review the merger situation further. However, since market concentration is one of the various factors used in assessing a merger situation, a merger that meets these thresholds will not be presumed to substantially lessen competition. Conversely, a merger that does not cross the thresholds but that raises competition concerns may be subject to the Commission's consideration.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Notification for decisions to the Commission is voluntary. If a merger or anticipated merger meets or exceeds the thresholds indicated in question 5, the Commission encourages merger parties to consider making an application for decision, as the Commission is likely to give further consideration to the merger situation before being satisfied that it does not raise any competition concerns under the Competition Act.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects test?

Notification to the Commission is voluntary. With regard to foreign-to-foreign transactions, merger parties should note that the Competition Act will apply to any merger or anticipated merger that substantially lessens competition or which may substantially lessen competition in any market in Singapore for goods and services, notwithstanding that the merger takes place outside Singapore or that any party to the merger resides outside Singapore.

See question 2 with regard to when a merger is deemed to have occurred for the purpose of the Competition Act.

Notification and clearance timetable

8 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

Notification is voluntary and the Competition Act does not specify any deadlines for notification. If the merger parties wish to notify their merger to the Commission for a decision, they may do so at any time before, during or after the merger. Parties that wish to apply for a decision for an anticipated merger should only do so when the anticipated merger is no longer confidential. In deciding whether or not to notify a merger and when to notify the Commission, merger parties should bear in mind that the Commission may 'unwind' a merger that has already been effected and (in the case of intentional or negligent infringements) impose financial penalties if the Commission decides that the merger infringes the section 54 prohibition.

As such, while merger parties have the option of giving effect to or proceeding with any anticipated merger that is being considered by the Commission, they do so at their own commercial risk.

9 Who is responsible for filing and are filing fees required?

Any party to a merger or anticipated merger may apply to the Commission for a decision. The Commission encourages joint filing.

In general, the filing fees for mergers or anticipated mergers are as follows:

- where the turnover of the target undertaking or asset is equal to or less than S$200 million, the fee payable is S$15,000;
- where the turnover of the target undertaking or asset is between S$200 million and S$600 million, the fee payable is S$50,000; and

- where the turnover of the target undertaking or asset is above S$600 million, the fee payable is S$100,000.

If the acquiring or merger party is a small or medium-sized enterprise (SME), the filing fee will be S$5,000. SMEs in Singapore are defined as follows: for manufacturing SMEs, if they have fixed asset investment (FAI) of less than S$15 million; and for services SMEs, if they have fewer than 200 workers.

10 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

For waiting periods, refer to question 15 which sets out the general timetable for clearance. Notification is voluntary and there is no requirement to suspend the implementation of a merger or anticipated merger prior to clearance.

However, parties who give effect to or proceed with mergers prior to clearance by the Commission do so at their own commercial risk.

11 What are the possible sanctions involved in closing before clearance and are they applied in practice?

No requirement to suspend a merger or anticipated merger is specified in the Competition Act but the Commission is given power to take interim measures where it has not completed its investigations but has a reasonable suspicion that the section 54 prohibition has been infringed or will be infringed. It may make such directions as it considers appropriate for the purpose of preventing merger parties from taking any action that might prejudice the Commission's ability to consider the merger situation and to impose the appropriate remedies; preventing serious, irreparable damage to a particular person or category of persons; or to protect the public interest. These measures could include a direction that the merger or anticipated merger be suspended. As a matter of practice, the Commission is unlikely to use these powers unless it believes that there is a real possibility of the merger situation raising serious competition concerns.

In view of the risks involved in proceeding to implement a merger which may infringe the prohibition, the parties may well choose to voluntarily suspend it in whole or in part, or to provide for the unwinding of potentially offending parts of it.

12 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

There is no prohibition against closing before clearance. Notwithstanding, the remedies set out in questions 22 and 23 will similarly apply in a foreign-to-foreign merger.

13 Are there any special merger control rules applicable to public takeover bids?

There are no special rules in the Competition Act itself. Takeovers and mergers in Singapore are subject to non-statutory rules in the Singapore Code on Take-overs and Mergers, which is administered by the Securities Industry Council (SIC). Parties involved in public takeover bids should refer to the Singapore Code on Take-overs and Mergers for further information.

14 What is the level of detail required in the preparation of a filing?

The Commission will review a merger situation in one or two phases and the level of detail required will increase with each phase. For each phase, merger parties must submit the duly completed merger review forms, M1 and M2 (available on the Commission's website: www.ccs.gov.sg).

Before submitting form M1, merger parties intending to make an application may approach the Commission for a confidential pre-notification discussion (PND), to facilitate their preparation and expedite the review process. The Commission will not entertain discussion on speculative or hypothetical transactions. Merger parties seeking a PND should submit a request to the Commission in writing and provide details of the merger situation including a brief background of the merger, a brief description of the relevant markets and the likely impact of the merger on competition in general terms. During the PND, the Commission will help to identify the information needed to provide a complete submission and any other useful information that might expedite its review. Where possible, the Commission will indicate potential competition concerns, but such indications do not bind the Commission.

Form M1 requires information relating to, inter alia, the applicant and other parties to the merger; a description of the nature of the merger; the groups to which the parties to the merger belong; market definition; and information on the reportable markets. Information on ancillary restrictions may be included if they are to be included as part of the notification.

Form M2 requires further information relating to, inter alia, the significant relevant product and geographic market(s); the market conditions of these market(s), such as structure of demand and supply and market entry; the position of the relevant undertakings in the relevant product markets; the importance of research and development and prevalence of cooperative agreements; possible efficiency gains arising from the merger; the likely effects of the merger; and any applicable failing firm or division arguments that the merger parties wish to submit. This information may also be submitted voluntarily by the applicant when submitting form M1 in order to expedite the process in more complex cases. Otherwise, the submission of form M2 will only be required when the Commission is of the view that the information contained in form M2 is necessary for examining the agreement or consideration of the conduct in question.

15 What is the timetable for clearance and can it be speeded up?

There are two phases of review; see question 16. The Commission expects to complete a phase 1 review within 30 working days commencing from when the Commission receives a complete form M1. Phase 2 is expected to be completed within 120 working days commencing from when the Commission receives a complete form M2.

The receipt of an application by the Commission does not in any way indicate that the application is complete. The indicative timeframes for the review of the merger notification commence only when the Commission receives a complete form that meets all the applicable filing requirements, accompanied by the relevant supporting documents and the appropriate fee. Merger parties should therefore ensure that the relevant forms are complete and meet all the filing requirements in order not to cause any unnecessary delay.

16 What are the typical steps and different phases of the investigation?

Once a completed form M1 that meets all the applicable filing requirements is submitted, the Commission will first review (investigate) the transaction to determine whether it falls within the meaning of a 'merger' or 'anticipated merger' as defined in the Competition Act, and whether the transaction is excluded under paragraphs 1 and 2 of the Fourth Schedule of the Competition Act. The Commission will then proceed to evaluate the application only if the transaction falls within the purview of the Competition Act.

The Commission adopts a two-phase approach when evaluating applications.

Phase 1

Phase 1 review entails a quick review and allows merger situations that clearly do not raise any competition concerns to proceed without undue delay.

The Commission expects to complete a phase 1 review within 30 working days commencing from when the Commission receives a completed form M1. The Commission may extend the phase 1 review period in exceptional circumstances. By the end of this period, the Commission will decide whether to issue a favourable decision to allow the merger situation to proceed or to carry on to a phase 2 review.

Phase 2

If during the phase 1 review, the Commission is unable to conclude that a merger situation does not raise competition concerns, and is of the view that a more detailed examination of the merger is required, it will notify the merger parties of the decision to carry out a more detailed assessment (ie, phase 2 review). The indicative timeframe of 120 working days for a phase 2 review commences when the Commission receives a complete form M2.

During the review, the Commission may impose interim measures to preserve its ability to review the merger situation further or preserve its ability to impose appropriate remedies later, or both. Interim measures may also be imposed as a matter of urgency to protect public interest or to prevent serious, irreparable damage to persons.

Apart from notifications, the Commission may also investigate a merger arising from a third-party complaint or other means if there are reasonable grounds for suspecting that the section 54 prohibition has been or will be infringed. The Commission may exercise its powers of investigation, which include the right to require the production of specified documents or information, or enter premises without a warrant, and enter and search premises with a warrant. The Commission may also invite comments from interested third parties on the merger situation under investigation through a notice on the Commission's website.

Substantive assessment

17 What is the substantive test for clearance?

To be clear of the prohibition the merger or anticipated merger must not have resulted, or be expected to result, in a substantial lessening of competition within any market in Singapore for goods or services. In applying the substantial lessening of competition test, the Commission will evaluate the prospects for competition in the future with and without the merger (ie, counterfactual). In many cases, the best guide to the appropriate counterfactual will be the prevailing conditions of competition in the market without the merger. However, the Commission will take into account likely and imminent changes in the structure of competition in order to reflect as accurately as possible the nature of rivalry without the merger, for instance, where one of the parties is a failing firm, such that pre-merger conditions of competition might not prevail even without the merger.

Further, a merger or anticipated merger may be exempted on the grounds of public interest with the approval of the minister for trade and industry, or by virtue of one of the exclusions specified in the Competition Act itself.

The section 54 prohibition does not apply to any merger that (Fourth Schedule, Competition Act):

- results in economic efficiencies arising or that may arise from the merger that outweigh the adverse effects due to the substantial lessening of competition in the markets in Singapore;
- is approved by any minister or any regulatory authority where the requirement for approval is imposed by written law (in the case of the Monetary Authority of Singapore, section 54 also does not apply where the requirement for approval is imposed by instruments issued under written law);
- is under the jurisdiction of another regulatory authority under any written law relating to competition or a code of practice relating to competition (eg, in the energy, telecommunications and media industries); or
- relates to the supply of postal services, potable piped water, wastewater management services, licensed bus services, licensed rail services or licensed cargo terminal operations.

18 Is there a special substantive test for joint ventures?

No, see questions 3 and 17.

19 What are the 'theories of harm' that the authorities will investigate?

The Commission has set out in the CCS Guidelines on the Substantive Assessment of Mergers the factors that it will take into account in its assessment of the competitive effects of a merger.

In the case of horizontal mergers, the Commission has stated that a horizontal merger may result in a substantial lessening of competition by virtue of coordinated and non-coordinated effects.

Non-coordinated effects may occur where, as a result of a merger, the merged entity finds it profitable to raise prices (or reduce output or quality) because of the loss of competition between the merged entities. The Commission considers the risk of non-coordinated effects to be higher where the markets concerned possess some of the following characteristics:

- there are few firms in the affected market(s);
- the merger parties have large market share;
- the merger parties are close rivals, and deal with products that are considered by customers to be the 'next best alternative' to each other's products;
- customers have little choice of alternative suppliers, whether because of the absence of alternatives, switching costs, or the ability of suppliers to price discriminate;
- rivals find it difficult to react quickly to changes in price, output or quantity;
- the merged entity's competitors have little or no spare capacity to increase supply of the products in the event that the merged entity reduces output, and there is little prospect of expansion of existing capacity;
- there is no strong competitive fringe capable of sustaining sufficient levels of post-merger rivalry; or
- one of the merger parties is a recent new entrant or a potentially strong new entrant which could have had a significant competitive effect on the market.

This list of considerations, though indicative, is not exhaustive.

Coordinated effects may arise where the merger increases the possibility that, post-merger, firms in the same market may coordinate their behaviour to raise prices, or reduce quality or output. In its assessment of the coordinated effects of a merger situation, the Commission will examine whether the following three conditions that are favourable to coordination may be expected to arise by virtue of a merger situation:

- participating firms should be able to align their behaviour in the market;
- participating firms should have the incentive to maintain the coordinated behaviour. This means, for example, that any deviation from the coordination should be detectable, and the other firms should be able to inflict credible 'punishment' on the deviating firms through retaliatory behaviour; and
- the coordinated behaviour should be sustainable in the face of other competitive constraints in the market.

The Commission will also consider the structure of the market, its characteristics and any history of coordination in the market concerned. The CCS Guidelines on the Substantive Assessment of Mergers also set out the factors that Commission will take into account to analyse the ability of firms to align their behaviour in the market, the incentives that firms have to maintain the coordinated behaviour and the sustainability of coordinated behaviour.

Where a merger might be expected to result in a substantial lessening of competition, the Commission will consider other relevant factors which have the potential to offset this effect, including:
- new entry and the threat of new entry;
- the ability of rival firms in the market to expand their capacity quickly;
- countervailing buying power of customers that may have the potential to constrain the ability of the merged entity to raise prices;
- efficiencies that arise which sufficiently outweigh the detriments to competition in Singapore that are caused by the merger; or
- failing firm or division defence.

In the case of non-horizontal mergers, the CCS Guidelines on the Substantive Assessment of Mergers describe situations in which vertical mergers and conglomerate mergers may trigger competition concerns. With respect to vertical mergers, factors that the Commission will consider include the possibility of foreclosure, increased potential for collusion, and creation of barriers to entry.

With respect to conglomerate mergers, the CCS Guidelines on the Substantive Assessment of Mergers describe the factors to be considered as including the conglomerate merger increasing the feasibility of anti-competitive strategies, or even facilitating coordination or collusion. In assessing whether a conglomerate merger could have anti-competitive effects, the Commission will consider the ability of customers to exercise countervailing power, and potential entry constraining the conglomerate supplier.

20 To what extent are non-competition issues (such as industrial policy or public interest issues) relevant in the review process?

The minister for trade and industry has the power to exempt a merger on the grounds of any public interest consideration. The power may be exercised on the application of a merger party, which has been notified by the Commission that the section 54 prohibition has been infringed.

21 To what extent does the authority take into account economic efficiencies in the review process?

The Competition Act allows the Commission to take efficiency gains into account at two separate points in the analytical framework. First, efficiencies may be taken into account where they increase rivalry in the market so that no substantial lessening of competition would result from a merger. For example, the efficiency gains from the merger between two of the smaller firms in a market enable the merged entity to exert greater competitive pressure on its larger competitors. Second, efficiencies may also be taken into account where they do not avert a substantial lessening of competition, but will nevertheless result in net economic efficiencies in markets in Singapore, that is, these efficiencies are sufficient to outweigh the detriment to competition in Singapore caused by the merger.

In order to be taken into account by the Commission, the efficiencies must be demonstrable (in that they are clear and quantifiable and are likely to arise with the merger within a reasonable period of time) and are merger-specific.

Remedies and ancillary restraints

22 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

Where the Commission, upon completion of its investigations, decides that there has been infringement of the section 54 prohibition or that an anticipated merger if carried into effect will infringe the section 54 prohibition, it will decide on the appropriate action to remedy, mitigate or prevent the harmful effect of such practice and to prevent the recurrence of infringement.

The Commission may implement the remedies by issuing directions or by accepting commitments. The direction may prohibit an anticipated merger from being carried into effect or require a merger to be dissolved or modified in such manner as directed. The direction may also require the merger parties to:
- dispose of such operations, assets or shares of the undertaking as may be specified by the Commission in such a manner as the Commission may require;
- enter into legally enforceable agreements specified by the Commission and designed to prevent or lessen the anti-competitive effects which have arisen;
- provide a performance bond, guarantee or other form of security on such terms and conditions as the Commission may determine; or
- pay to the Commission such financial penalty in respect of the infringement as the Commission may determine if the Commission is satisfied that the infringement has been committed intentionally or negligently.

The financial penalty imposed by the Commission may not exceed 10 per cent of the turnover of the business of the undertaking in Singapore for each year of infringement for such period, up to a maximum of three years. The Commission's basis of calculation of financial penalties is generally set out in its Guidelines on the Appropriate Amount of Penalty and particularly in respect of infringements of section 54, its Guidelines on Merger Procedures.

The Competition Act also gives the Commission power to take interim measures. See also question 11.

23 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

The Commission has the discretion to accept commitments that address competition concerns arising from a merger or anticipated merger. The commitment must aim to prevent or remedy the adverse effects to competition identified.

Generally, the Commission will only accept commitments that sufficiently and clearly address the adverse effects to competition and are proportionate to them. According to the CCS Guidelines on the Substantive Assessment of Mergers, a precondition to accepting any commitment is that the Commission must be confident that the competition concerns identified can be resolved through the commitment. Further, the commitments must not give rise to new competition concerns or require substantial monitoring by the Commission.

Merger parties are encouraged to take the initiative to propose suitable commitments that can appropriately resolve any competition concerns that they foresee arising from the merger situation. The Commission may also invite the merger parties to consider offering commitments if it believes that the competition concerns may be addressed by the appropriate commitments. The Commission may consider commitments at any point during its review of the merger situation prior to the issue of its decision.

24 What are the basic conditions and timing issues applicable to a divestment or other remedy?

There are broadly two types of remedies that the Commission may consider: structural remedies and behavioural remedies.

Structural remedies are generally preferred to behavioural ones because they clearly address the market structure issues that give rise to the competition problems and require little monitoring by the Commission. Typically, structural remedies require the sale of one of the overlapping businesses that has led to the competition concern. In appropriate cases, the Commission will consider other structural or quasi-structural remedies. For example, divestment of the buyer's existing business (or part of it) or an amendment to intellectual property licences in some circumstances.

The Commission will consider behavioural remedies in situations where it considers that divestment will be impractical or disproportionate to the nature of the concerns identified. Further, behavioural remedies may sometimes be necessary to support structural divestment.

In general, in assessing which remedies would be appropriate and comprehensive, the Commission will take into account how adequately the action would prevent, remedy or mitigate the competition concerns caused by the merger. The Commission's starting point will be to choose the remedial action that will restore the competition that has been, or is expected to be, substantially lessened as a result of the merger. Given that the effect of the merger is to change the structure of the market, remedies that aim to restore all or part of the pre-merger market structure are likely to be a more direct way of addressing the adverse effects, although other remedies may be considered in view of the associated effectiveness and costs.

In relation to divestments which can be undertaken as part of a commitment or as directed by the Commission, it will typically require the sale of one of the overlapping businesses that has led to the competition concern. The CCS Guidelines on the Substantive Assessment of Mergers states that ideally, this should be a self-standing business, which is capable of being fully separated from the merger parties, and in most cases, will be part of the acquired enterprise. The sale should be completed within a specified period.

Before the sale of any business, the Commission must approve the buyer. This is to ensure that the proposed buyer has the necessary expertise, resources and incentives to operate the divested business as an effective competitor in the marketplace. If that is not the case, it is unlikely that the proposed divestiture will be considered as an effective remedy for the anti-competitive effects that have been identified.

See question 23 for conditions relating to when commitments may be offered to the Commission.

25 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

None to date. From the publicly available decisions as of 1 June 2009, all notified mergers have been cleared unconditionally.

In respect of the Thomson/Reuters merger, the Commission had cleared the merger on the basis that the commitments made by the parties in the US and EC have worldwide effect.

Please note however that in the Thomson/Reuters merger decision, the Commission stressed that commitments accepted by overseas competition authorities do not, in and of themselves, necessarily imply that the Commission will allow the merger to proceed in Singapore. Any overseas commitments must be viewed in light of the facts and circumstances of the case, to see if they are capable of addressing competition concerns arising within Singapore, if any.

26 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

Ancillary restrictions to an anticipated merger or merger are defined in the CCS Guidelines on the Substantive Assessment of Mergers as agreements, arrangements or provisions which are directly related and necessary to the implementation of a merger. Such ancillary restrictions are excluded from the prohibition against anti-competitive agreements (section 34 prohibition) and the prohibition against abuse of dominance (section 47 prohibition). In order to be directly related, the restriction must be connected with the merger but ancillary or subordinate to its main object. A restriction is likely to be necessary if, for example, in the absence of the restriction, the merger would not go ahead or could only go ahead at substantially higher costs, over an appreciably longer period, or with considerably greater difficulty. In addition, in determining the necessity of the restriction, considerations such as whether its duration, subject matter and geographical field of application are proportionate to the overall requirements of the merger will also be taken into account. Merger parties must demonstrate that they have chosen the alternative that is the least restrictive of competition.

Involvement of other parties or authorities

27 Are customers and competitors involved in the review process and what rights do complainants have?

Details of notified mergers or anticipated mergers accepted by the Commission will be published on the public register. All interested third parties (including non-applicant merger parties) may then provide comments to the Commission. In general, all interested third parties should submit their comments within 10 working days after the notified merger is published on the public register so that the Commission will have sufficient time to give due consideration to their submissions.

The Commission also requires the contact details of customers, suppliers, and competitors to be provided in the notification forms. The Commission may contact them to solicit feedback in relation to the notified mergers.

Complainants are encouraged to use the CCS merger complaint form which is available on the Commission's website (www.ccs.gov.sg). The Commission may ask the complainant for further information and clarifications. A complainant should raise concerns about identity and confidentiality with the Commission as soon as possible.

Parties that suffer loss or damage as a result of the infringement will have a private right of action to seek relief in civil proceedings. Such rights of private action will only arise after the Commission has made a decision that a merger has infringed the section 54 prohibition and the appeal period has expired or, where an appeal has been brought, upon the determination of the appeal. There is also a two-year time bar from the time the Commission has made its decision or from the determination of the appeal, whichever is later. The relief that the court may grant includes an injunction or declaration, damages, and such other relief as the court deems fit.

28 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

When applying to the Commission, merger parties must include all relevant information including information that may be confidential. When submitting an application, parties must provide the Commission with a full version that includes all relevant information; and a non-confidential version, that excludes confidential information such as business secrets and provide such information in a separate annex. Parties must also explain why such information is confidential.

The Commission may share the non-confidential version with third parties, for example by publishing it on the Commission website (www.ccs.gov.sg). Furthermore, if the Commission rejects the reasons for confidentiality or feels that it must share any confidential information with third parties to properly assess the merger situation, it may require the merger parties to re-submit a non-confidential version that includes such information.

In considering whether the information should be disclosed, the Commission will consider factors such as whether disclosure would be contrary to the public interest or might significantly harm legitimate individual or business interests.

29 Do the authorities cooperate with antitrust authorities in other jurisdictions?

Provision is made in the Competition Act for the Commission to enter into cooperation arrangements with any foreign competition body with approval from the minister for trade and industry. Cooperation may take the form of information exchange or any other assistance as will assist in the enforcement or administration of competition laws.

30 Are there also rules on foreign investment, special sectors or other relevant approvals?

Singapore does not have general legislation prohibiting, or requiring consent for, foreign investment. Some sectors and industries may, however, have specific requirements on foreign ownership.

In addition to the general framework provided by the Competition Act, there are also sectoral competition regulatory frameworks. Refer to question 1.

Judicial review

31 What are the opportunities for appeal or judicial review?

There is a right of appeal to the Competition Appeal Board (the Board) against any decision by the Commission in respect of a merger or anticipated merger or any direction (including interim measures) imposed by the Commission. An appeal against the Commission's decision in respect of a merger or anticipated merger may be made by any merger party, while an appeal against a direction may be made by the person to whom the Commission gave the direction. The Board can confirm, impose, revoke or vary a direction, or make any other direction or decision, as long as it is a decision or direction that the Commission itself could have given. There is no right to appeal to the Board against the Commission's refusal to accept any commitments offered, but appeals may be made against the Commission's refusal to vary, substitute or release existing commitments. An appeal to the Board against a direction imposed will not operate to suspend that direction, except in the case of appeals against financial penalties. The infringement decision and the direction will remain in effect (unless suspended by an interim order made by the Board or, in the case of a further appeal, the relevant appeal court).

Parties may make further appeals against the decisions of the Board to the High Court and then to the Court of Appeal for judicial review, but only on points of law and the quantum of the financial penalty. Such an appeal can only be made by a party to the proceedings in which the decision of the Board was made.

32 What is the usual time frame for appeal or judicial review?

A party who wishes to appeal to the Board on a decision as to whether a merger has infringed the section 54 prohibition must lodge a notice of appeal in the prescribed form within four weeks of the date on which the appellant was notified of the contested decision or the date of publication of the decision, whichever is the earlier. The Board may, on the application of the appellant, in its discretion extend the time limit provided for the lodgment of the notice of appeal.

As soon as practicable, the Board shall set a timetable outlining the steps to be taken by the parties in preparation for the oral hearing of the appeal, whether pursuant to the directions of the Board or otherwise; fix the date for the oral hearing; notify the parties in writing of the date and place for the oral hearing and of any timetable for that hearing; and if it considers it necessary for the expeditious disposal of the appeal, send the parties a report which contains a summary of the factual context of the case and the parties' principal submissions.

The Competition Act does not prescribe a timeframe or limitation period for judicial review. Accordingly, the timeframe is prescribed by the Rules of Court (Cap. 322) of Singapore.

Under the Rules of Court, order 53, rule 1(6), the court shall not grant leave for judicial review unless the application for leave was made within three months of the date of the proceedings.

Enforcement practice and future developments

33 What is the recent enforcement record of the authorities, particularly for foreign-to-foreign mergers?

The provisions relating to mergers and acquisitions came into force on 1 July 2007. As of 1 June 2009, there have been 13 notified mergers considered by the Commission, of which one moved to a more substantial 'phase 2' analysis. All 13 have been cleared.

34 What are the current enforcement concerns of the authorities?

At the official launch of the Commission and Competition Law Conference in 2005, Mr Lim Hng Kiang, minister for trade and industry explained that for a start, the Commission would pay greater attention to hard-core offences that are blatantly anti-competitive. This includes cartels that engage in price fixing, market sharing and bid-rigging.

35 Are there current proposals to change the legislation?

There are no current proposals to revise or change the Competition Act.

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