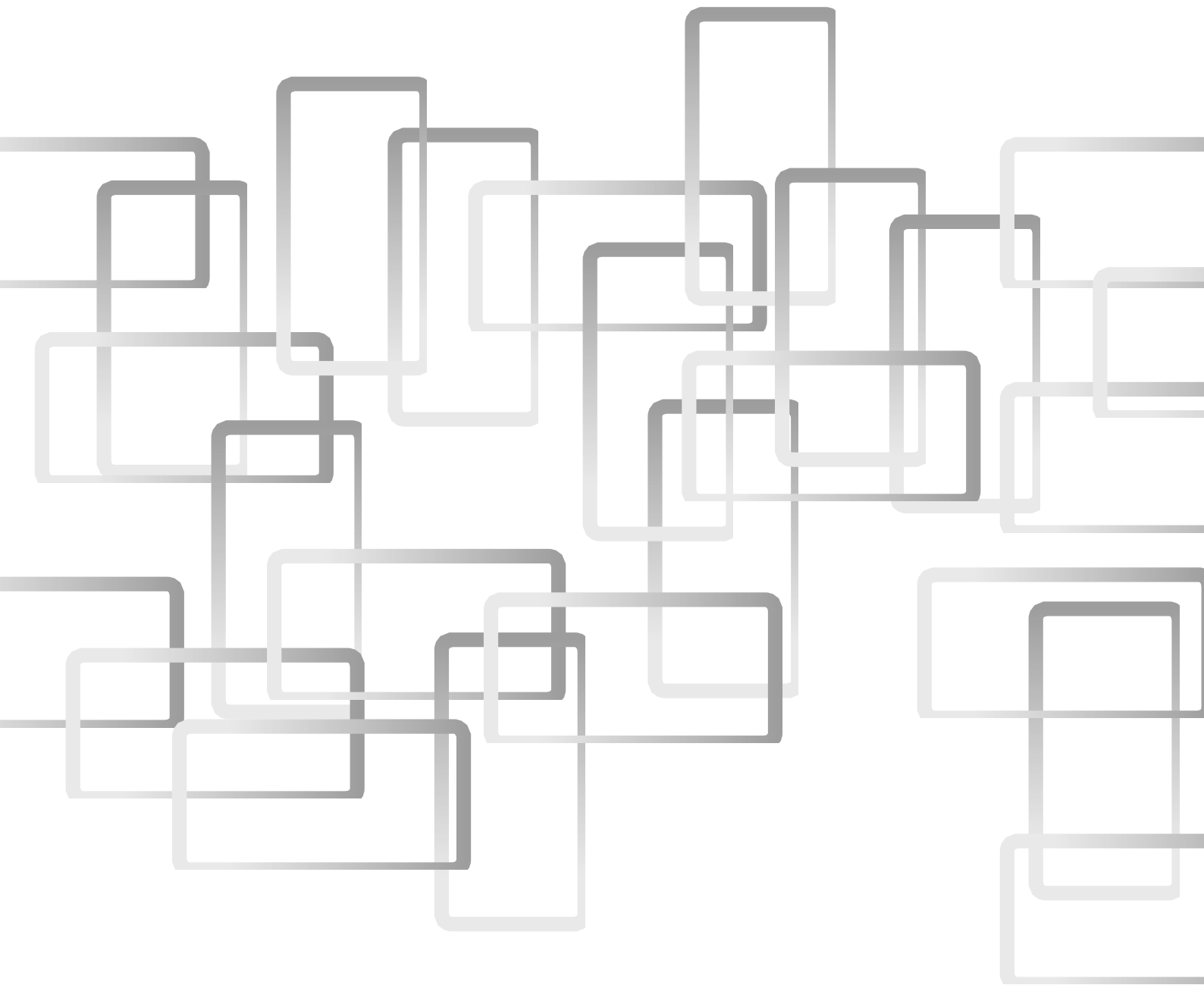


DREW & NAPIER_{LLC}

Your Practical Guide to **Merger Control** in Singapore



DREW & NAPIER LLC
Advocates & Solicitors • Trademark & Patent Agents

Merger Control

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Drew & Napier LLC has made all reasonable efforts to ensure that the information is accurate as of 1 October 2007.

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Introduction

From 1 July 2007, all mergers that have an effect in Singapore are subject to regulation under the Competition Act 2004 (**the Competition Act**).

The new law prohibits mergers or anticipated mergers that substantially lessen competition. It also grants the Competition Commission of Singapore extensive powers of investigation and enforcement. Potentially, every merger, acquisition, joint venture and acquisition of business as a going concern may be affected by these amendments to the Competition Act. This booklet is intended to be your survival guide to the new merger control regime.

How to use this guide

This guide consists of two main sections:

- Pages 1 to 3: Frequently Asked Questions on merger control
- Pages 4 to 6: Pull-out guide to merger control

The Frequently Asked Questions section covers common queries on the main aspects of merger control, from the basics, to what type of transactions are likely to be caught, to procedure and possible outcomes.

The pull-out provides a three-step guide to assist you in assessing whether your transaction is likely to raise merger control concerns.

Frequently Asked Questions : Merger Control in Singapore

1. The Basics

1.1 What is competition law and what are its aims? ..

Competition law in Singapore aims to promote healthy competitive markets that will benefit the Singapore economy. The rationale is that a competitive market spurs firms to be more efficient and responsive to consumer needs. With this in mind, the Competition Act 2004 (Competition Act) prohibits practices that are likely to reduce competition among businesses. The Competition Commission of Singapore (CCS) administers and enforces this competition law.

The Competition Act applies generally to all private commercial and economic activities. However, Singapore already has sector-specific competition laws, for example, in the energy, telecommunications and media industries. The Competition Act does not apply to activities governed by these sector-specific competition laws. The Competition Act also does not apply to activities relating to the supply of licensed bus, rail and cargo terminal operations, etc. (See question 2.7 for details on exclusions to the Competition Act.)

1.2 What is competition law merger control? ..

The operative Competition Act provision that regulates mergers is Section 54. Section 54 prohibits mergers or anticipated mergers that substantially lessen competition or are likely to substantially lessen competition. (This is referred to here as the “Section 54 Prohibition”). A clear example is where a merger results in a monopoly that raises prices and reduces quality.

(For convenience, mergers and anticipated mergers will be collectively referred to here as “merger situations”. See question 2.4 for details on what is an anticipated merger.)

The Competition Act provisions on mergers came into effect on 1 July 2007.

2. Transactions caught by the Section 54 Prohibition

2.1 What is a “merger” under the Competition Act? ..

The definition of “merger” under the Competition Act is wider than the common understanding of the term.

Some common transactions that fall within this definition include:

- (a) mergers and acquisitions, as commonly understood;
- (b) acquisitions of businesses as going concerns;
- (c) substantial acquisitions of company assets; and
- (d) joint ventures, in limited situations. (See question 2.2 for details.)

2.2 When is a joint venture considered a “merger” under the Competition Act ? ..

Under the Competition Act, a joint venture is considered a “merger” if it:

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

Therefore, a joint venture that merely takes over a specific function (e.g. R&D or production) of its parent companies’ business activities without having access to the market is **not** caught by the Section 54 Prohibition.

2.3 What is not a “merger” under the Competition Act? ..

There are 4 situations that clearly are not “mergers” under the Competition Act:

- (a) acquisitions by a receiver, liquidator or underwriter;
- (b) mergers between parent and subsidiary companies or between two subsidiary companies within the same group;
- (c) acquisitions under will or intestacy; and
- (d) in certain circumstances, acquisitions by parties whose normal activities include transacting and dealing in securities.

Also, mergers effected before 1 July 2007 are not subject to merger regulation under the Competition Act.

2.4 What is an “anticipated merger” under the Competition Act? ..

An “anticipated merger” means a merger that parties are still contemplating or one that is still in progress. The Section 54 Prohibition prohibits anticipated mergers that may be expected to substantially lessen competition if they are carried into effect.

2.5 When does a merger situation raise competition law concerns?

Not all merger situations trigger competition law concerns. The Competition Act only prohibits merger situations that substantially lessen competition within any Singapore market, and do not have net economic efficiencies. This may happen, for example, when the merged entity will have sufficient market power to profitably raise prices above the current level; or the merger makes it more likely that the remaining firms in the market will co-ordinate their behaviour to raise prices, or reduce quality or output. The pull-out provides a useful guide to answering this question. This is a question to which there may often be no straightforward answer because the CCS will consider each merger situation in its unique factual context.

2.6 Are transactions which take place outside of Singapore or which involve parties who are not in Singapore caught by the Section 54 Prohibition?

Yes. It does not matter that the merger situation takes place outside Singapore, or that the parties to the merger situation are outside Singapore, as long as the result is that competition is reduced in Singapore.

2.7 Are there any exclusions from the Section 54 Prohibition?

Yes. The Section 54 Prohibition does not apply to merger situations:

- (a) that result in net economic efficiencies;
- (b) approved by any minister, the Monetary Authority of Singapore or any regulatory authority;
- (c) governed by other competition legislation (e.g. in the energy, telecommunications and media industries); or
- (d) relating to the supply of postal services, piped potable water, wastewater management services, licensed bus services, licensed rail services and licensed cargo terminal operations.

(See Step 2 of the pull-out guide for an illustration of when to consider the exclusions.)

2.8 When will the CCS consider that a merger situation results in net economic efficiencies? What are net economic efficiencies?

If a merger situation reduces rivalry in a market but accompanying efficiencies outweigh the loss in rivalry, the CCS will take these efficiencies into account. To prove such net economic efficiencies, parties must be able to clearly show that the merger situation results in lower costs, greater innovation, greater choice or higher quality. These efficiencies must be sufficient to outweigh the anti-competitive effects of the merger situation.

(See Step 2 of the pull-out guide for an illustration of when to consider net economic efficiencies.)

Independent legal and economic analysis may be required to answer this question.

3. Competition Law Merger Control Procedure

3.1 How does the CCS monitor merger situations?

The CCS monitors merger situations in two ways: applications for decisions and investigations.

(i) Applications for decisions

Merger parties may, of their own accord, notify their merger situation to the CCS and apply for a decision on whether their merger situation breaches the Section 54 Prohibition.

(ii) Investigations

The CCS may also conduct its own investigations into a merger situation, where it suspects that a merger situation infringes the Section 54 Prohibition. Investigations may occur when third parties, including suppliers, competitors and consumers, lodge complaints with the CCS.

3.2 Under what circumstances should parties apply to the CCS for a decision?

Application for a decision is voluntary. Merger parties should apply for a decision when their merger situation raises competition law concerns.

See question 2.5 and the pull-out for a guide to when merger situations raise competition law concerns.

The CCS encourages parties to consider making an application where:

- (a) the merged entity will have a market share of 40% or more; or
- (b) the merged entity will have a market share of between 20% to 40% and the post-merger combined market share of the three largest firms is 70% or more.

When determining an entity's market share, please note that the definition of "market" under the Competition Act is different from the common understanding of the term. It is an economic concept and includes all the products that buyers regard as reasonable substitutes for the product in question.

Merger parties may also wish to make an application in respect of a merger situation that does not cross these thresholds but which they think could raise competition concerns.

Independent legal and economic advice may be required to answer this question.

3.3 What are the main steps in an application for decision?

The process of applying for a decision broadly entails the following steps:

- (a) merger parties assess whether to apply for a CCS decision;
- (b) merger parties and the CCS engage in a Pre-Notification Discussion if necessary;
- (c) merger parties apply for a decision;
- (d) the CCS reviews the application;
- (e) the CCS issues the decision; and
- (f) merger parties may appeal the decision.

3.4 What are Pre-Notification Discussions (PNDs)? What are their advantages?

PNDs are confidential informal discussions between merger parties and the CCS. Merger parties may apply for a PND before applying for a CCS decision. This will help them to identify the information to be submitted with the application.

Where possible, the CCS will indicate potential competition concerns, but such indications do not bind the CCS.

3.5 At what stage of the transaction should parties apply to the CCS for decision?

Merger parties may apply for a decision at any time before, after or during the merger, or not at all. Parties who wish to apply for a decision before the merger should only do so when the anticipated merger is no longer confidential.

In deciding when and whether to apply, parties should bear in mind that the CCS may ‘unwind’ a merger that has already been effected and impose heavy financial penalties, if the CCS decides that the merger infringes the Section 54 Prohibition.

3.6 What happens during the CCS’ review?

(i) Two-phase review process

The CCS will review the merger situation in one or two phases. For each phase, merger parties must submit the duly-completed merger review forms, available on the CCS website (www.ccs.gov.sg). During the Phase 1 review, the CCS will quickly review and allow merger situations that do not raise competition concerns. If the CCS requires more information, it will commence a Phase 2 review, which is more extensive.

(ii) Interim measures

During the review, the CCS may impose interim measures to allow it to conduct the review; to impose appropriate remedies; to protect the public; or to prevent serious, irreparable damage.

(iii) Effect on the transaction

If there is no interim measure to the contrary, parties to a merger situation may proceed with the merger while it is under review. However, this is at their own commercial risk.

3.7 To what extent does the CCS protect confidential commercial information during the review process?

When applying to the CCS, merger parties must include all relevant information including information that may be confidential.

When submitting an application, parties must provide the CCS with a full version that includes all relevant information; and a non-confidential version, that excludes confidential information and provides such information in a separate annex. Parties must also explain why such information is confidential.

The CCS may share the non-confidential version with third parties, for example by publishing it on the CCS website (www.ccs.gov.sg). Furthermore, if the CCS 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.

4. Possible Outcomes

4.1 What are the possible outcomes of an application for a decision or a CCS investigation?

The CCS may make a favourable or unfavourable decision.

(i) Favourable decision

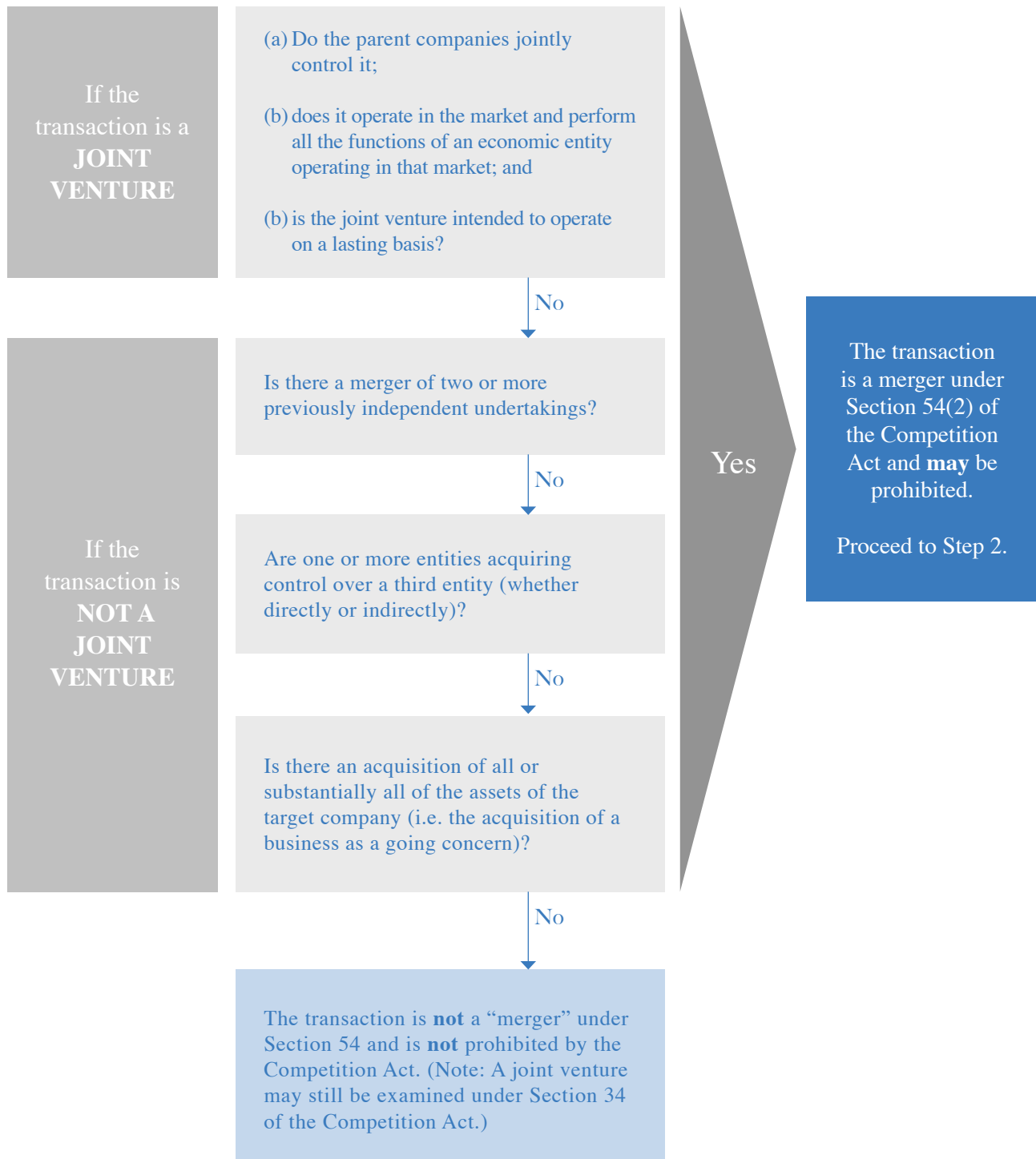
Where the CCS makes a favourable decision, it will generally take no further action. Where the merger situation does not raise competition law issues, the CCS will make a favourable decision. The CCS may also make a favourable decision even when the merger situation raises competition law issues, if the merger parties propose to undertake certain commitments that prevent, reduce or remedy the harm to competition. For example, the merger parties may commit to selling part of the business to an approved buyer.

(ii) Unfavourable decision

Where the CCS makes an unfavourable decision, it has extensive powers to ‘unwind’ the merger, prevent it from taking place or remedy the harm to competition. For example, the CCS can require the merged entity to sell part of its business to an approved buyer. It could require the merged entity not to approach the former customers of the business sold. The CCS may also impose financial penalties of up to 10% of the turnover of each of the merger parties for a maximum of three years.

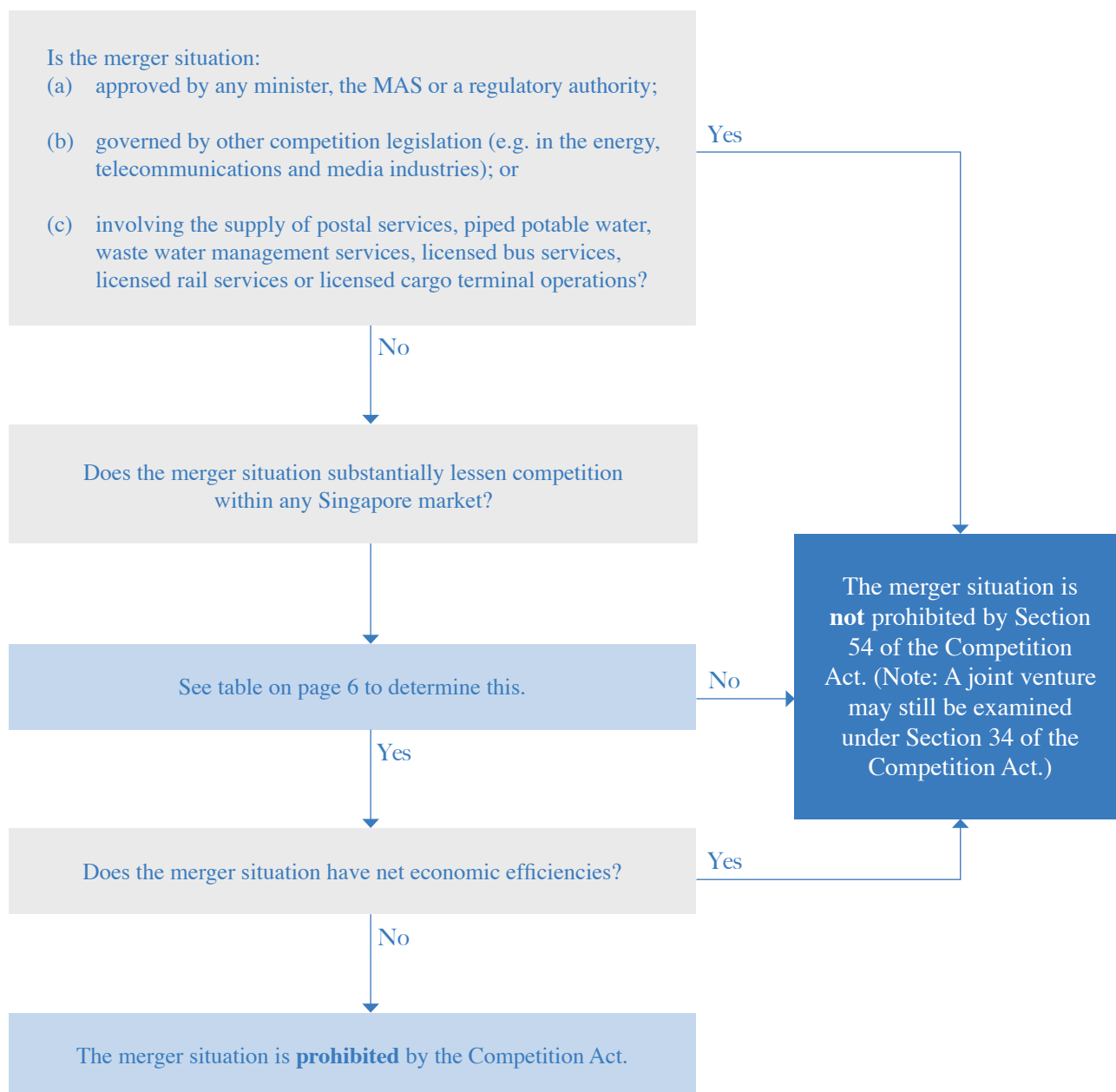
STEP 1

Determining if Transaction is a Merger Situation



STEP 2

Examining the Merger Situation



How Likely is the Merger Situation to Substantially Lessen Competition?

It is important to note that this table is only **indicative** of merger situations that are likely to raise competition concerns. Detailed legal and economic analysis is required to answer this question definitively.

Type of Merger	Horizontal Merger	Vertical Merger	Conglomerate Merger
What is it?	Merger with another entity selling products/services in the same market. (e.g. merger between two manufacturers)	Merger with another entity that operates on a different level of the supply chain. (e.g. merger between manufacturer and distributor)	Merger with another entity selling products/services that have no functional relation to the products/services that it sells. (e.g. merger between manufacturers of unrelated products)
How likely to substantially lessen competition?	Likely	Less likely	Least likely
When most likely to substantially lessen competition?	Parties should consider applying to the CCS for a decision in these situations:		
	<ul style="list-style-type: none"> The merged entity's market share is more than: <ul style="list-style-type: none"> 20% but less than 40%, where the aggregate market share of the three largest firms is at least 70%; or 40% of the market, where the "market" includes all the products that buyers regard as reasonable substitutes for the product. The merger confers market power on the merged entity. Market power is the ability to raise prices consistently above competitive levels, or reduce output. 	<ul style="list-style-type: none"> The merger is between an upstream supplier and a significant downstream purchaser. (The merged entity may jeopardise the commercial viability of upstream suppliers if it only obtains supplies from its own production facilities.) or The merger is between a significant upstream supplier of an input and a downstream purchaser. (The merged entity may reduce downstream competition if it diverts important inputs to its own production facilities, refuses to supply inputs or only supplies inputs at a price that makes downstream rivals uncompetitive.) or The merger is between a firm having access to an essential distribution channel and an upstream supplier. (The merged entity may refuse to allow rivals access an essential distribution channel, or may do so on discriminatory terms.) 	<ul style="list-style-type: none"> The products/services of the merged entity are so complementary or similar that they create a discrete portfolio of products, that purchasers have the incentive to buy from the merged entity (i.e. one source instead of many) to reduce transaction costs.

Drew & Napier LLC - Competition Law Practice Group

The Competition Law Practice Group, co-headed by **Cavinder Bull** and **Lim Chong Kin**, consists of a dedicated and experienced team of lawyers who have handled competition law work both generally under the Competition Act as well as in the carved-out sectors of telecommunications, media, energy and post. The group has a wide range of local and international competition regulatory experience and broad-based knowledge of business concerns, making it well-placed to advise on the full range of competition law matters. The team also has in-house expertise in competition economics led by Director, **Ng Ee Kia Joy**, who was previously Director of Economics at the Competition Commission of Singapore.

Drew & Napier's competition law corporate team, headed by **Lim Chong Kin**, has been at the forefront of competition law merger clearances in Singapore to date. Our competition law merger experience began in 1999 when the team was instructed by the info-comm competition regulator to draft the competition framework for reviewing mergers in the telecommunications industry. This was followed by instructions to assist the regulator to review the first telecommunications merger in Singapore involving StarHub and SCV. The team was then subsequently retained by the media competition regulator to draft the merger framework for the media and print industry in 2002. Most recently in 2006, the team was instructed by the postal competition regulator to undertake drafting of the merger framework for the postal industry.

On merger transactions, Chong Kin successfully obtained competition law merger clearances in Singapore for four of the largest telecommunications consolidations under the Telecom Competition Code (which pre-dates the Competition Act) – AT&T/SBC, AsiaNetcom/C2C, Reliance/FLAG and Pacific Internet/Connect Holdings. Recently, the team filed the first merger notification for Intel/STM under the Competition Act. The team also frequently advises multi-national companies and Singapore conglomerates on all aspects of competition law compliance including competition law audits for transactions and competition law compliance programs.

Drew & Napier's competition law disputes team, headed by **Cavinder Bull**, has represented clients in a wide range of competition law matters for the past eight years. These include investigations by the Competition Commission of Singapore into allegations of abuse of dominance, cartel price-fixing and bid-rigging. The team has also acted for clients in respect of investigations by the US Department of Justice and other competition regulators in Asia. In the telecommunications and media sectors, the team has represented the regulators in appeals against their decisions as well as companies being investigated by sectorial competition law regulators. Cavinder previously practised anti-trust law in New York, working on cases like the Microsoft anti-trust litigation, and obtaining US Department of Justice approval for the merger between Grand Metropolitan and Guinness in one of the world's largest mergers then. Cavinder graduated from Oxford University with First Class Honours in Law. He clerked for the Chief Justice of Singapore as a Justices' Law Clerk. Cavinder also has a Masters in Law from Harvard Law School which he attended on a Lee Kuan Yew Scholarship.

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