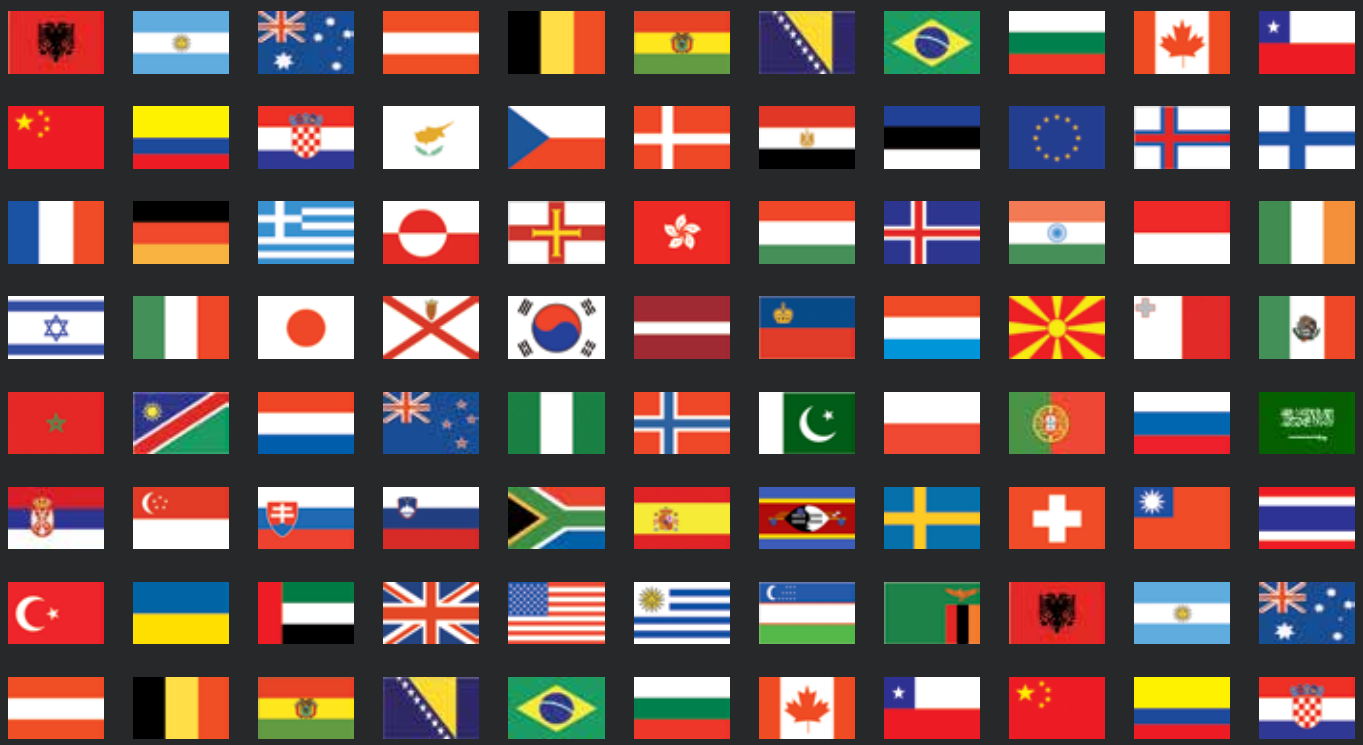
Merger Control

The international regulation of mergers and joint ventures in 74 jurisdictions worldwide

Consulting editor
John Davies



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GETTING THE DEAL THROUGH

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Singapore

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Legislation and jurisdiction

1 What is the relevant legislation and who enforces it?

The relevant legislation is the Singapore Competition Act (Cap 50B) (the Competition Act), which was passed in October 2004. 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, 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 its Third and Fourth Schedules), applies generally to prohibit:

- anti-competitive agreements (section 34 prohibition);
- the abuse of a 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).

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

Laws against anti-competitive behaviour in respect of particular industry sectors such as telecommunications, media, post, gas and electricity can be found in certain statutes that regulate such sectors, and are enforced by industry-specific regulators. These industry sectors are carved out from the Competition Act. On cross-sectoral competition matters, the Commission will work with the relevant sectoral regulator to determine which entity is best placed to handle the case in accordance with the legal powers given to each. 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.

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.

Under section 54(2) of the Competition Act, 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 concerned of the business in which that undertaking was engaged immediately before the acquisition.

Section 54(7) of the Competition Act provides that 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 the circumstances set out in section 54(9) of the Competition Act.

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

As set out in the Fourth Schedule of the Competition Act, the section 54 prohibition does not apply to any merger:

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

Where the Commission proposes to make an unfavourable decision, the merging 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 Guidelines clarify the meaning of 'public interest consideration' with reference to section 2 of the Competition Act. 'Public interest consideration' for the purposes of the Competition Act refer to 'national or public security, defence and such other considerations as the Minister may, by order published in the Gazette, prescribe.' Therefore, for a matter to qualify as a 'public interest consideration' for the purpose of an exemption from section 54 of the Competition Act, such a matter will first have to be gazetted. The Minister's consideration of an application for a transaction to be exempted on the ground of any public interest consideration is hence limited to matters of national or public security and defence, unless other matters are gazetted as such. The decision of the Minister will be final. The Minister may revoke any exemption of a merger (or anticipated 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. As of 16 June 2015, the Minister has not exercised his power to gazette any matter on the basis of the 'public interest consideration' set out under section 2 of the Competition Act.

3 What types of joint ventures are caught?

A joint venture is subject to the section 54 prohibition if it is considered a 'merger' under the Competition Act. A joint venture constitutes a merger when:

- it is subject to joint control;
- 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.

Joint ventures are broadly defined as collaborative arrangements by which two or more undertakings devote their resources to pursue a common objective.

Joint control exists where two or more parties have the possibility of exercising decisive influence over the undertaking, including the power to block actions which determine the strategic commercial behaviour of the undertaking. It is characterised by the possibility of a deadlock resulting from the power of two or more parent companies to reject proposed strategic decisions, and a requirement of consensus in determining the commercial activities of the joint venture. Please refer to question 4 for further elaboration on the definition of control.

A joint venture is subject to the section 54 prohibition only if it operates in the market and performs the functions normally carried out by undertakings operating on that market. Joint ventures that take over one specific function – for example, R&D or production – without access to the market will generally not be caught. However, a joint venture that uses the distribution network of its parent companies or relies heavily or entirely on sales to its parent companies may be performing the functions of an autonomous economic entity, as may a trading company operating in a trade market.

Joint ventures are subject to the section 54 prohibition only if they operate on a lasting basis. This may be shown by the commitment of resources from parent companies to perform its functions. Provisions that provide for the dissolution of the joint venture, the withdrawal of parent companies or a fixed duration for the joint venture do not prevent the joint venture from being considered as operating on a lasting basis. For joint ventures of a fixed duration to be considered as operating on a lasting basis, it must be sufficiently long in order to bring about a lasting change in the structure of the undertakings concerned, or where the agreement provides for possible continuation of the joint venture. On the other hand, a joint venture will not be considered to operate on a lasting basis where it is established for a short finite duration.

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 that 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 taking into account all relevant 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 that 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 for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

In general, mergers should be notified to the Commission if the merger parties think the merger may result in a substantial lessening of competition within any market in Singapore. Merger parties should note the risk that if a merger is not notified, the Commission may investigate a merger or anticipated merger on its own initiative if it has reasonable grounds for believing that section 54 has been infringed or will be infringed, and has the ability to subsequently make directions or impose financial penalties in respect of any infringement.

The Commission is unlikely to consider a merger or anticipated merger to give rise to competition concerns unless it meets or crosses 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 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 only one of the various factors used in assessing a merger situation, a merger that does not cross the thresholds but raises competition concerns may still be subject to the Commission's consideration.

The Commission is also unlikely to investigate a merger situation that only involves small companies, namely where the turnover in Singapore in the financial year preceding the transaction of each of the parties is below S$5 million and the combined worldwide turnover in the financial year preceding the transaction of all of the parties is below S$50 million.

The above thresholds are merely indicative, and the Commission may investigate merger situations that fall below these indicative thresholds in appropriate circumstances. Conversely, merger situations that meet or exceed the thresholds stated in the notification guidelines are not necessarily prohibited by section 54.

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

Notification to the Commission for a decision in respect of a merger or anticipated merger 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 a 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.

To assist with the planning and consideration of future mergers, in particular at the stage when the merger parties consider it necessary to preserve the confidentiality of the transaction, the Commission is prepared to give confidential advice on whether or not a merger is likely to raise competition concerns in Singapore, with the necessary qualification that such advice is provided without having taken into account third-party views. The Commission also qualifies that confidential advice is also only available in certain circumstances, and at the absolute discretion of the Commission, so that its resources may be managed appropriately.

Following self-assessment, merger parties may approach the Commission for confidential advice if the following conditions are met. First, the merger must not be completed but there must be a good faith intention to proceed with the transaction, as evidenced to the satisfaction of the Commission by the party or parties requesting the confidential advice. Second, the merger must not be in the public domain. In exceptional circumstances, the Commission may consider giving confidential advice in relation to mergers that are no longer confidential, but the requesting party or parties must provide good reasons as to why they wish to receive confidential advice. Third, the merger situation must raise a genuine issue relating to the competitive assessment in Singapore. For example, there

may be a genuine issue if there is a lack of relevant precedent and therefore the Commission's approach to the merger situation is genuinely in doubt. On the other hand, there would be no genuine issue if, for example, both merger parties have an insignificant market presence in Singapore. Finally, the requesting party or parties are expected to keep the Commission informed of significant developments in relation to the merger situation in respect of which confidential advice was obtained, for example, completion date or abandonment of the merger.

Prior to 1 July 2012, the Commission was unable to accept the notification of an anticipated merger if it was still confidential. This new process, introduced as part of the Commission's revisions of the merger procedures, allows parties to obtain guidance from the Commission early in the merger process without having to wait until the public announcement of the transaction.

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

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 that 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.

8 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, however, have specific requirements on foreign ownership. For example, sections 11 and 12 of the Newspaper and Printing Presses Act require the approval of the Minister of Communications and Information before any person can become a substantial shareholder (5 per cent), a 12 per cent shareholder, or an indirect controller of a newspaper company. The Telecoms Competition Code requires that approval from the Infocomm Development Authority is obtained before any party becomes a 12 per cent controller, a 30 per cent controller, or obtains effective control of a telecommunications licensee, or obtains a business of a telecommunications licensee as a going concern.

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

Notification and clearance timetable

9 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. In the case of completed mergers, parties are encouraged to notify as soon as possible after completion. 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.

There are no deadlines for notification or sanctions for failure to notify as Singapore operates a voluntary merger regime. Merger parties have the option of proceeding, at their own commercial risk, with any merger during the notification process, before notifying the Commission, or without notifying the Commission at all. The risk, as highlighted in question 5, is that the Commission may investigate a merger or anticipated merger on its own initiative if it has reasonable grounds for believing that section 54 has been infringed or will be infringed, and has the ability to subsequently make directions or impose financial penalties in respect of any infringement.

10 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 have been defined in the Competition (Fees) Regulation 2007 as follows: businesses with annual sales turnover of not more than S$100 million or employing no more than 200 staff.

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

For waiting periods refer to question 17, 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 should note that they do so at their own commercial risk.

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

As mentioned above, no requirement to suspend a merger or anticipated merger is specified in the Competition Act. However, where there is completion before clearance and the Commission subsequently finds that the merger infringes or is likely to infringe the section 54 prohibition, the Commission may take action to remedy, mitigate or prevent the harmful effect of infringement and prevent the recurrence of infringement. The Commission has the power to, inter alia, require a merger to be dissolved or modified. Please see question 24 for more details.

Parties should also note that the Commission has the 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 that may infringe the prohibition, parties may choose to voluntarily suspend implementation in whole or in part.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

Notification of a merger is voluntary and merger parties may, at their own risk, proceed with closing before clearance or without seeking clearance. This applies equally to foreign-to-foreign mergers. Parties should take note of the actions that the Commission may take in the event that the merger is found to have an anti-competitive effect in Singapore (see question 24).

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

There is no prohibition against closing before clearance. However, parties should take note of the actions that the Commission may take in the event that the merger is found to have an anti-competitive effect in Singapore (see question 24).

15 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. Parties involved in public takeover bids should refer to the Singapore Code on Take-overs and Mergers and the Securities Industry Council Practice Statement on the Merger Procedures of the Competition Commission of Singapore for further information.

An offeror making a 'mandatory general offer' subject to the Singapore Code on Take-overs and Mergers is required to include a precondition that the offer lapses if the Commission proceeds to a Phase II review or prohibits the acquisition before the close of the offer. If the Commission prohibits the acquisition, the Securities Industry Council may require the offeror to reduce its shareholding back to the level before the mandatory general offer was triggered.

An offeror making a 'voluntary general offer' subject to the Singapore Code on Take-overs and Mergers is required to impose a precondition that the offer lapses if the Commission proceeds to a Phase II review or prohibits the acquisition before the close of the offer, and may include further conditions that the Commission's favourable decision must be on terms acceptable to the offeror.

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

Before submitting Form M1 and commencing the formal notification process, merger parties intending to make an application may approach the Commission for pre-notification discussions (PNDs), to facilitate their preparation of the form and to expedite the review process. PNDs are intended to help merger parties ascertain what information will be required by the Commission during the merger review process, and to help the Commission plan its work to facilitate an expeditious merger review process. The Commission is prepared to engage in PNDs for anticipated mergers not yet in the public domain, but will not entertain discussions on purely speculative or hypothetical transactions.

Merger parties seeking a PND should contact the Commission by phone or e-mail. The formality and length of the PND process depends on the preference of the merger parties, the complexity of the transaction, and potential concerns raised by the merger. The Commission considers PNDs to be most useful where parties can provide a draft Form M1.

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. For mergers that involve more complex products or that raise potential competition issues, PNDs minimise the risk that the mergers will not be cleared in Phase I. The Commission will generally not, in the context of PNDs, give its views on whether a merger situation is likely to require a Phase II assessment or if it would lead to a substantial lessening of competition.

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 respectively (available on the Commission's website at www.ccs.gov.sg).

Form M1 requires information relating to, inter alia:

- ownership structure;
- the notified transaction;
- the activities of the merger parties;
- the industries affected;
- the market definition;
- market shares;
- efficiency gains; and
- ancillary restrictions, if they are included in the notification.

Merger parties are also required to provide their competitive assessment of the transaction, including:

- their assessment of the counterfactual (the competitive situation without the merger);
- competitors in the market;
- barriers to entry;
- existing and future countervailing buyer power;
- coordinated and non-coordinated effects of the transaction;
- vertical effects, if there is a potential vertical relationship between the merger parties; and
- cooperative effects of the joint venture, if the transaction is a joint venture.

Form M2 requires further information relating to, inter alia:

- the significant relevant product and geographic markets;
- the market conditions of these markets, including the structure of demand and supply;
- the position of the relevant undertakings in the relevant product markets;
- the importance of research and development;
- the 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.

The information required in Form M2 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 it is necessary to proceed to a Phase II review, and in which case the applicant will be notified accordingly.

Parties should note that even where the applicant has submitted complete Forms M1 or M2, the Commission may require the applicant to provide additional information, over and above that which is required under Forms M1 and M2 during its review process in order to enable it to assess the merger situation.

17 What is the statutory timetable for clearance? Can it be speeded up?

There are two phases of review (see question 18). The Commission's Guidelines give an indicative time frame of 30 working days to complete a Phase I review and this time frame commences from the date on which the Commission accepts a complete Form M1 and receives the requisite filing fee. Should the Commission find that it is necessary to proceed to a Phase II review, the indicative time frame for completion is 120 working days, commencing from the date on which the Commission receives a complete Form M2.

The receipt of an application by the Commission does not indicate that the application is complete. The indicative time frames 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. To avoid any unnecessary delay, merger parties should therefore ensure that the relevant forms are complete and meet all the filing requirements upon submission.

While the Commission typically reviews mergers within the indicative time frames, the time frames are not binding on the Commission and the Commission may 'stop the clock' in a review, inter alia, if the merger parties do not respond to the Commission's request for information within the stipulated time period or when commitments are being considered. The indicative time frames may also be extended by the Commission to accommodate the commitments process.

The Commission strongly encourages merger parties to engage the Commission in PNDs. PNDs permit the parties to ascertain information that will be necessary for their notification and help the Commission to plan its work to facilitate an expeditious merger review process. Please see question 16 for details on PNDs.

Merger parties may also wish to request confidential advice from the Commission to seek the Commission's view on whether the merger is likely to raise competition concerns in Singapore and whether a notification is necessary. However, it should be noted that the Commission's confidential advice is not binding and the Commission reserves the right to investigate mergers in all cases where confidential advice is given.

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

Two separate processes are available to parties before notification to the Commission. First, parties may seek confidential advice from the Commission on whether or not a merger is likely to raise competition concerns in Singapore and therefore whether a notification is advisable. Please see question 6 for details on confidential advice. Second, parties may engage the Commission in PNDs to discuss the content and timing of their notifications in order to expedite the merger review process. Please see question 16 for details on PNDs.

Confidential advice may be requested through the Commission's hotline or by e-mail. The Commission will then agree on a provisional timeline for the parties to submit full information similar to that required in Form M1. Third-party contact details are not required and third-party views will not be sought, and the Commission does not expect to request further information. The Commission will carry out an internal assessment of the merger and may meet with the requesting parties and expects to provide

its confidential advice, in the form of a letter stating whether the merger is likely to raise competition concerns in Singapore and whether notification is advisable, within 14 days of receiving all the required information. The advice is not binding on the Commission and the merger may be investigated regardless of the advice given.

PNDs are similarly commenced by contacting the Commission through its hotline or by e-mail. No specific timetable is given, although the Commission states that their length and formality depend on the preference of the merger parties, the complexity of the transaction and the concerns that the merger may raise. The Commission states that PNDs are most useful where a draft Form M1 is provided.

The formal notification process begins with the filing of Form M1 with the Commission. The Commission will first determine if the application is complete, with the necessary supporting documents and filing fees. Once a completed Form M1 that meets all the applicable filing requirements is accepted, the indicative time frame of 30 working days for Phase I review commences and the Commission will review the transaction to determine whether it falls within the meaning of a 'merger' or 'anticipated merger' as defined in the Competition Act (and as outlined in question 2), and whether the transaction is excluded under paragraphs 1 and 2 of the Fourth Schedule of the Competition Act.

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

Phase I

Phase I 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 I review within 30 working days commencing from the date on which the Commission receives a completed Form M1, accompanied by the relevant supporting documents and appropriate fee. The Commission may extend the Phase I 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 II review.

Phase II

If, during the Phase I 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 II review). The indicative time frame of 120 working days for a Phase II 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 sources of information 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, the power to enter premises with or without a warrant, and the power to 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

19 What is the substantive test for clearance?

For the Commission to clear the merger or anticipated merger, it must be satisfied that the merger does not, or will not 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 (commonly termed as a comparison between the 'factual' and the '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, pre-merger conditions of competition might not prevail even without the merger.

Further, a merger or anticipated merger may be exempted on the ground 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.

As set out in the Fourth Schedule of the Competition Act, the section 54 prohibition does not apply to a merger:

- if the economic efficiencies arising, or that may arise, from the merger outweigh the adverse effects due to the substantial lessening of competition in the markets in Singapore;
- 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);
- 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
- relating to the supply of licensed and regulated ordinary letter and postcard services, potable piped water, wastewater management services, licensed and regulated scheduled bus services, licensed and regulated rail services, or licensed and regulated cargo terminal operations.

20 Is there a special substantive test for joint ventures?

No, the same test applies. Please see questions 3 and 19.

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

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

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 or non-coordinated effects, or both.

Non-coordinated effects may occur where, as a result of a merger, the merged entity could raise prices (or reduce output or quality) with the objective of increasing profits due to the loss of competition between the merged entities. Other firms in the market may also find it profitable to raise their prices due to the loss of competitive pressure arising from the merger. For example, the higher prices of the merged entity's products may cause some customers to switch to rival products, thereby increasing demand for the rivals' products.

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. The Commission will also consider the structure of the market, its characteristics and any history of coordination in the market concerned.

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 the creation of barriers to entry.

With respect to conglomerate mergers, factors that the Commission will consider include the likelihood of the conglomerate merger increasing the feasibility of anti-competitive strategies and whether it may facilitate coordination. In assessing whether a conglomerate merger could have anti-competitive effects, the Commission will consider the ability of customers to exercise countervailing power and whether another firm could replicate the portfolio of products offered by the merged entity. The Commission will also consider whether the creation of the portfolio of products itself represents a strategic barrier to entry.

22 To what extent are non-competition issues relevant in the review process?

The Minister for Trade and Industry has the power to exempt a merger or an anticipated merger on the ground of any public interest consideration. The power may be exercised on the application of a merger party, which has been notified that the Commission proposes to issue a decision that the section 54 prohibition has been infringed.

23 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 may enable the merged entity to exert greater competitive pressure on its larger competitors. Second, efficiencies may also be taken into account where they are of sufficient magnitude that the merger could be said to give rise to net economic efficiencies in markets in Singapore.

In order to be taken into account by the Commission, 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 merger-specific.

Remedies and ancillary restraints

24 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 an 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 effects 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 that 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 2012.

The Commission may accept commitments at any time during a review or during an investigation before a final decision on whether there has been an infringement. Commitments are generally proposed by the merger parties. If the Commission considers proposed commitments to be acceptable, it will seek public comments on its website and solicit third-party views. The commitments, if accepted, will be published as part of a favourable decision. The favourable decision may be revoked if the commitments are breached. Applications may be made to the Commission to vary, substitute or release a commitment.

Both directions and commitments are enforceable in the District Court.

The Competition Act also gives the Commission the power to take interim measures. Please also see question 12 on possible sanctions.

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

Merger parties may propose, and the Commission may accept, commitments at any time during a review or during an investigation, before a final decision on whether there has been an infringement. Commitments are generally proposed by the merger parties. The commitment must aim to prevent or remedy the adverse effects to competition identified. If the Commission considers proposed commitments to be acceptable, it will seek public comments on its website and solicit third-party views. The commitments, if accepted, will be published as part of a favourable decision. The favourable decision may be revoked if the commitments are breached. Applications may be made to the Commission to vary, substitute or release a commitment.

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.

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 or assets 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.

In appropriate cases, the Commission will consider other structural or quasi-structural remedies, for example, the divestment of the buyer's existing business (or part of it) or an amendment to intellectual property licences.

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 a 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 costs and effectiveness.

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 previously identified.

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

In the CCS Guidelines on Merger Procedures 2012, the Commission specifically sets out a process whereby the Commission and the merger parties can resolve competition concerns in Phase I by way of commitments. 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. This can be done at any time during the review process.

The Commission will indicate competition concerns in an 'issues letter' to the merger parties where the Commission considers that a Phase II review may be appropriate, although this letter does not constitute a decision to proceed to a Phase II review. At this stage, parties may propose commitments to address the competition concerns in Phase I.

If, towards the end of a Phase II review, the Commission is of the preliminary view that the merger situation is likely to give rise to a substantial lessening of competition, it will issue a Statement of Decision (Provisional) to the merger parties, stating the facts on which the Commission relies and its reasons. It may outline remedies that the Commission considers appropriate. The Commission will give the parties an opportunity to make written representations to the Commission, which will also be the last opportunity to propose commitments or to give its views on remedies

proposed by the Commission. The Commission may consider and impose alternative remedies different from those proposed by the parties.

If the Commission considers proposed commitments to be acceptable, it will seek public comments on its website and solicit third-party views. The commitments, if accepted, will be published as part of a favourable decision. The favourable decision may be revoked if the commitments are breached.

Applications may be made to the Commission to vary, substitute or release a commitment. Such applications must be made in writing and include an explanation as to whether the competition concerns addressed by the commitment still exist and what impact the variation, substitution or release of the commitment will have on the competition concerns. The Commission may consult with persons it thinks appropriate by publishing a notice on its website.

It is likely that Phase I will have to be extended by 20 days or more to accommodate the commitments procedure. Phase II may also have to be extended if a commitment procedure is commenced in Phase II. Time extensions are at the discretion of the Commission, which also reserves the right to terminate the commitments process at any time.

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

From the publicly available decisions as of 16 June 2015, one merger which was cleared required remedies or commitments imposed by the Commission: the Commission's decision on the Notification for Decision of the proposed acquisition by Seek Asia Investments Pte Ltd of the Jobstreet Business in Singapore (November 2014). In 2008, in the Commission's decision on the Notification for Decision: Merger between The Thomson Corporation and Reuters Group PLC, the Commission considered that the commitments offered to other competition authorities (namely the European Commission and the United States Department of Justice) had a worldwide effect and that competition concerns arising in Singapore would be sufficiently addressed by such. The Commission stressed, however, that commitments accepted by overseas competition authorities do not necessarily imply that the Commission will allow the merger to proceed in Singapore and any overseas commitments must be viewed in light of the facts and circumstances of the case to see whether they are capable of addressing competition concerns arising in Singapore, if any.

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

Ancillary restrictions to a merger or anticipated merger are defined in the CCS Guidelines on the Substantive Assessment of Mergers as agreements, arrangements or provisions that 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) under the Third Schedule of the Competition Act. 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 option that is the least restrictive of competition.

Merger parties should conduct a self-assessment as to whether any agreements, arrangements or provisions that are not integral to the merger, but which are concluded in conjunction with the merger, qualify as ancillary restrictions.

Involvement of other parties or authorities

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

The Commission also requires the contact details of the five most significant competitors and customers to be provided in the notification forms, as well as of the five most significant end-users if these are not customers. The Commission may contact them to solicit feedback in relation to the notified mergers.

The Commission will gather information about the competitive effect of the merger situation from the applicant and from third parties, including customers, competitors, suppliers, and other regulatory bodies and government departments, where relevant. The details of the merger will be published on the public register on the Commission's website (please see question 30).

Complainants may make complaints to the Commission by online form, fax, telephone or e-mail. The Commission will acknowledge receipt of the complaint within three working days and may ask for further information and may launch a formal investigation if there are reasonable grounds for suspecting that the merger may result in a substantial lessening of competition. The Commission prefers that complaints are not anonymous, although the Commission will protect the complainant's identity as far 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.

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

Upon acceptance of a satisfactory application, the Commission will publish the details of notified mergers or anticipated mergers on the public register on the Commission website at www.ccs.gov.sg. The information provided will usually include:

- the names of the merger parties;
- a description of the transaction;
- a description of the business activities of the merger parties worldwide and in Singapore;
- a description of the overlapping goods or services, including brand names;
- a description of substitute goods or services; and
- the applicant's views on definition of the relevant markets, the way in which competition functions in these markets, barriers to entry and countervailing buyer power, and the competitive effects of the merger.

Third parties are invited to comment on the merger via an invitation to comment on the Commission's website, and when the Commission consults on commitments.

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 both confidential and non-confidential versions. Non-confidential versions are necessary for the Commission's purposes of facilitating discussions and meetings with third parties and publishing a non-confidential version of its decision.

In the confidential versions of submissions, confidential information must be enclosed in square brackets. In non-confidential versions, redactions must be marked by square brackets containing the word 'confidential', with a separate annexe identifying the confidential information and giving reasons why the information should be treated as confidential.

Information is confidential only if, in the Commission's opinion, disclosure of the information would:

- significantly harm the legitimate business interests of an undertaking, where it is commercial information;
- significantly harm an individual's interest, where it relates to an individual's private affairs; or
- be contrary to the public interest.

Where excessive or unreasonable confidentiality claims are made, the Commission may stop the working time frame until the applicant files an acceptable non-confidential version. In the revised CCS Guidelines on Merger Procedures 2012, the Commission specifically cautioned against blanket and overly wide confidentiality claims.

The Commission will generally treat parties' submissions on confidentiality seriously. In exceptional circumstances, the Commission may wish to disclose confidential information, in which case it will discuss with parties

Update and trends

On 13 November 2014, the Commission granted conditional approval to the proposed acquisition of 100 per cent of the Jobstreet online recruitment business (Jobstreet Business) by SEEK Asia Investments Pte Ltd (SEEK Asia) after accepting the behavioural and structural commitments offered by the merger parties to address the competition concerns arising from the merger. With regard to behavioural commitments, SEEK committed (i) not to enter into exclusive agreements with employer and recruiter customers, and (ii) to cap its prices at current prices, allowing for inflation. These behavioural commitments will be in effect for three years from the date of completion of the proposed acquisition. With regard to structural commitments, SEEK offered to divest, as a going concern, the complete assets of aggregator site, www.jobs.com.sg. SEEK also committed to find a purchaser for the sale of the divestment business within six months of completion. SEEK Ltd announced completion of the acquisition in 21 November 2014. Ultimately, and conditional on the commitments mentioned, the Commission was of the view that any likely adverse effects on competition would be mitigated. The Commission published its Grounds of Decision for the conditional clearance on 13 November 2014.

On 11 March 2015, the Commission informed the parties of its provisional decision to block the proposed acquisition by Parkway Holdings Ltd (Parkway) of 100 per cent of RadLink-Asia Pte Limited (RadLink) and its subsidiaries from Fortis Healthcare Singapore Pte Ltd (Fortis Singapore). The CCS was of the view that if the merger were to be carried out, it would result in a substantial lessening of competition, and accordingly it would infringe section 54 of the Competition Act. In particular, and after extensive consultation with the merger parties, the Commission made the provisional finding that competition concerns would arise in respect of radiopharmaceuticals and in respect of radiology and imaging services.

in advance to minimise any detriment. The Commission will give applicants the opportunity to review its draft decision before publication to determine whether it contains confidential information, though the Commission maintains the ultimate discretion in relation to decisions on confidentiality.

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

Under the Competition Act, the Commission has the ability 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 necessary to assist in the enforcement or administration of competition laws.

Recently, it appears that the Commission intends to cooperate with antitrust authorities in other jurisdictions. Form M1 includes specific questions on which other jurisdictions parties intend to notify (or have notified) the merger. Parties are requested to notify the Commission of any material change in status in relation to any of the notifications to overseas competition agencies, including, for example, approvals, unfavourable decisions and negotiations of commitments. Parties are also asked if they would be willing to provide the Commission with a waiver allowing the Commission to exchange confidential information with competition agencies in other jurisdictions.

Judicial review

32 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, 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. The High Court may determine any such appeal by confirming, modifying or reversing the decision of the Board and making such further or other order on appeal.

It is also possible to bring an action in judicial review. To do so, parties must make an application under order 53 of the Rules of Court, before a judge, for leave to bring an action in judicial review. Once leave is granted, parties must make the judicial review application within 14 days (see question 33).

As of 16 June 2015, the Board has not received any appeals from any Commission decisions in respect of a merger or anticipated merger, although there have been 11 appeals (two of which were withdrawn by the appellants and one of which is currently in progress) in respect of infringement decisions relating to anti-competitive agreements and abuse of dominance. There have to date been no appeals from the Board to the High Court, and no cases of judicial review in respect of Commission decisions.

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

A party who wishes to appeal to the Board must lodge a notice of appeal in the prescribed form within four weeks of the date on which the appellant

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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 lodgement of the notice of appeal.

As soon as is 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 that contains a summary of the factual context of the case and the parties' principal submissions.

The Competition Act does not prescribe a time frame or limitation period for judicial review. Accordingly, the time frame is prescribed by the Rules of Court of Singapore. Under Order 53, Rule 1 of the Rules of Court, no application for a mandatory, prohibiting or quashing order may be made unless leave to make such an application has been granted. For quashing orders, leave will not be granted to apply for the same unless the application was made within three months after the date of the proceedings.

Enforcement practice and future developments

34 What is the recent enforcement record and what are the current enforcement concerns of the authorities?

The provisions relating to mergers and acquisitions came into force on 1 July 2007. As of 16 June 2015, a total of 49 mergers have been notified to the Commission, of which 45 have been cleared, three have been withdrawn, and one anticipated merger abandoned. Most recently, the Commission issued its second proposed decision to block a merger in the Proposed Acquisition by Parkway Holdings Ltd of RadLink-Asia Pte Ltd on 11 March 2015. However, the anticipated merger was subsequently abandoned and the sale and purchase agreement relating to the proposed merger lapsed and ceased to be of effect as of 13 March 2015.

35 Are there current proposals to change the legislation?

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

Getting the Deal Through

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