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# COMMENTS ON PROPOSED CHANGES TO CCS' GUIDELINES ON MERGER PROCEDURES

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## STATEMENT OF INTEREST

Rodyk & Davidson LLP ("Rodyk") is one of Singapore's largest full service law practices having being in practice since 1861. Rodyk has offices in Singapore, Shanghai and Jakarta serving clients in practice areas of corporate, finance, litigation & arbitration, real estate, intellectual property and technology. Rodyk has an established and vibrant regional presence that regularly advises foreign clients on their global expansion projects across the Asian continent. Rodyk frequently advises clients on cross border transactions which includes competition law in Singapore.

Rodyk's Competition Law Practice regularly advises clients on competition law and compliance issues in various industries. In this response we have focused our comments on the practical issues which may be faced by our clients with respect to the Draft Revised CCS Guidelines on Merger Procedures.

Rodyk represents a diverse clientele in a broad spectrum of industries and businesses. The proposed changes will be relevant to our clients especially those who plan to carry out mergers & acquisitions and joint ventures in Singapore. To assist our clients in adopting the proposed changes in their commercial activities, our interest is to review the nature of the proposed changes in light of commercial and practical realities faced by our clients across various jurisdictions.

## SUMMARY OF MAJOR POINTS

1. The introduction of the new section on self-assessment is a welcome step and will assist merger parties in deciding whether or not to notify a merger to the CCS (Part 3 of the Draft Revised Guidelines). However CCS could consider clarifying that complaints of competitiors of the merger parties may hold less weight than the complaints by suppliers and/ or customers.

2. With respect to the proposed turnover thresholds (Part 3, paragraph 3.5 of the Draft Revised Guidelines), the criteria relating to when a merger should be notified to the CCS could be amended, for example, the S$10 million worldwide turnover threshold of each of the small companies could be increased and the definition of the 40% threshold (Part 3, paragraph 3.6) could be clarified. Furthermore clarity is also required whether the existing market share analysis will continue only for vertical and conglomerate mergers.

3. It is useful that the merger parties can obtain confidential advice (Part 3, paragraphs 3.23 – 3.31 of the Draft Revised Guidelines) but the details need some amendments, for example, regarding the fees and CCS' discretion.

4. CCS could consider giving confidential advice in all cases without discretion at all or could limit the discretion to special circumstances as an exception.

5. CCS should define or elaborate on the "certain circumstances" in which confidential advice is not available and the criteria for its use of absolute discretion (Part 3, paragraph 3.23 of the Draft Revised Guidelines).

6. It is helpful that the information requirements to be submitted in Phase 1 in Form M1 have been refined, but the draft Form M1 is still lengthy, particularly if not all the requested information would be relevant or helpful to the assessment of the merger. CCS should consider either developing an optional short form of the draft Form M1, distinguishing between compulsory and optional parts of the draft Form M1, or allowing the merger parties some discretion in deciding which parts of the draft Form M1 to complete, based on the facts of their particular situation.

7. The Draft Revised Guidelines clarify what type of information is likely to be considered confidential by CCS. However, CCS could consider specifying that the applicants will be given an opportunity to review the draft decision for confidential information prior to its release to the public (Part 4, paragraph 4.34 of the Draft Revised Guidelines).

## COMMENTS AND RESPONSES TO QUESTIONS

**1. Do you consider that the proposed changes to CCS' guidance on the circumstances in which notification is likely to be appropriate will be useful to ensure that mergers that raise competition concerns in Singapore are notified to CCS? If not, please explain why and outline what might be a better approach.**

1.1 The introduction of the "self-assessment: deciding whether or not to notify" section will certainly be useful for merger parties. The overall changes in this regard as to when CCS expects a voluntary notification, the risks for not notifying a merger, including the risks of unwinding of the transaction and financial penalties (Part 3, paragraphs 3.14 – 3.17 of the Draft Revised Guidelines) are helpful for merger parties in making a decision to notify to CCS.

1.2 Where merger parties supply goods or services of the same "description" to customers in Singapore, and their combined share of supply of those goods or services in Singapore exceeds 40 %, the merger parties are strongly encouraged to notify their merger situation to CCS (Part 3, paragraph 3.6 of the Draft Revised Guidelines). It is helpful to have such an indication of a critical combined share of supply of goods or services.

Additionally the term "same description" in paragraph 3.8 needs a more precise definition as CCS has simply replaced one interpretable term ("market") with another ("description"). Perhaps CCS could point parties to guidance on applicable goods or services classifications, for example, the North American Industry Classification System (NAICS), or the industry coding and classification systems used by other local authorities including ACRA or Singapore Customs.

1.3 Under Part 3, paragraph 3.15 of the Draft Revised Guidelines, CCS considers that there may be reasonable grounds to suspect that the section 54 prohibition of the Competition Act (hereinafter "the Act") has been or will be infringed, for example, where there are consistent complaints, or one or more substantiated complaints, from third parties. This however may leave the complaint process open to abuse, particularly by competitors of the merger parties. We understand that for this reason, in the United States of America the competition authorities take greater concern with

complaints made by suppliers or customers of the merger parties than by the complaints of competitors of the merger parties.

Therefore, CCS could consider clarifying in Part 3, paragraph 3.15 of the Draft Revised Guidelines, that complaints of competitors of the merger parties may carry less weight than the complaints by suppliers and/ or customers of the merger parties.

1.4 For the avoidance of doubt, CCS must clearly state in paragraph 3.6 of the Draft Revised Guidelines that the self-assessment in relation to mergers between competitors (horizontal mergers) should be made on the basis of their share of supply and not with respect to the current market share thresholds.

**2. Do you consider that the proposed turnover thresholds for mergers involving small companies are appropriate, too wide, or too narrow?**

2.1 We are of the view that the worldwide turnover threshold for each of the merger parties of S$10 million (Part 3, paragraph 3.5 of the Draft Revised Guidelines) may be too narrow.

As CCS is concerned on evaluating the impact of the mergers in Singapore, the S$5 million threshold for Singapore is more important than the S$10 million threshold for the worldwide turnover of the parties. The activities of the parties in Singapore and not elsewhere, is relevant in CCS' analysis. Therefore it is irrelevant for the impact of the mergers in Singapore whether the parties have high turnover figures outside of Singapore.

Should CCS have reasons for retaining this indicator, another possible option would be to increase the S$10 million worldwide turnover threshold for each of the merger parties (Part 3, paragraph 3.5 of the Draft Revised Guidelines) to a higher threshold.

2.2 It may be questioned whether the turnover of the parties in Singapore or worldwide has any connection with the question of whether a merger may infringe the section 54 prohibition, and therefore, whether a notification is advisable or not. However, there could possibly, in some scenarios, be a strong link between a low turnover of the merger parties and the risk of an infringement of a substantial lessening of competition (hereinafter "SLC") in the relevant market in Singapore.

2.3 CCS could possibly clarify that the assessment based on the share of supply test applies only to mergers between parties who sell overlapping goods or services and not to vertical and conglomerate mergers. Therefore mergers between competitors will only be assessed in the light of the share of supply test. Paragraph 3.15 of the Draft Revised Guidelines continues to refer to the SLC test, where CCS will investigate mergers on the basis of the market share thresholds. CCS could clarify that for such purposes, the market share thresholds would only apply in a limited way to vertical and conglomerate mergers.

**3. Do you think that confidential advice will be useful and, if so, would you or your clients be willing to pay a reasonable fee for this advice from CCS?**

3.1 The introduction of confidential advice will indeed be useful in cases where merger parties are concerned to preserve the confidentiality of their transaction.

3.2 We are of the view that clients will be willing to pay a reasonable fee for confidential advice as they would be able to receive the confidential advice within 14 working days from CCS. CCS could possibly charge the merger parties a fixed fee for the confidential advice. CCS could consider charging such a fixed fee, irrespective of the size of the merger parties, the time spent on the matter by the CCS on an individual case and/ or the relative risk of an SLC in that individual case.

**4. Do you think there are any risks or disadvantages associated with the confidential advice process as set out in the draft revised Guidelines and, if so, how could these be mitigated?**

4.1 Some merger parties may find it unacceptable to pay for confidential advice where such advice is at the "absolute discretion" of the CCS (Part 3, paragraph 3.23 of the Draft Revised Guidelines). If there is a reasonable fee for confidential advice, certain clients/ merger parties would expect that there is a right to have confidential advice.

4.2 Furthermore, in cases where CCS is not willing to give confidential advice based on its absolute discretion certain clients/merger parties may feel that they have disclosed to CCS their most confidential business secrets (seeing the risk of an infringement of the Sec. 54 prohibition) and may feel that they are at a high risk of investigation by the CCS at a later stage.

Therefore CCS could consider:

- giving confidential advice in all cases without discretion at all or
- limiting the discretion to special circumstances as an exception.

4.3 A possible risk that clients may also associate with the confidential advice process would be that CCS may share such confidential information with competition law agencies in other countries. In our experience, clients will be willing to share the confidential information while dealing with local competition authorities in each country separately. There may be some level of discomfort if such confidential information during the confidential advice process is shared beyond Singapore.

**5. Are the conditions, caveats, and the process for obtaining confidential advice clear?**

5.1 According to Part 3, paragraph 3.23 of the Draft Revised Guidelines, confidential advice is only available in "certain circumstances". The Draft Revised Guidelines defines conditions under which confidential advice may be requested (Part 3, paragraphs 3.24 - 3.27 of the Draft Revised Guidelines) but the Draft Revised Guidelines do not describe the circumstances in which confidential advice is not available. In particular, the Draft Revised Guidelines do not specify the criteria for the use of CCS' "absolute discretion".

Thus, if CCS does not propose to give confidential advice in all cases without discretion (Part 3, paragraph 3.23 the Draft Revised Guidelines), CCS could define the term "certain circumstances" in which confidential advice is not available and the criteria for its use of "absolute discretion".

**6. What are your views on the information requirements in draft Form M1? If relevant, please explain why you consider that some information may not be required in Phase 1.**

6.1 The information requirements in draft Form M1 are undeniably related to the pertinent issues to be analysed in instances of a merger and the questions have been arranged in a systematic and logical manner.

However, the draft Form M1 is very extensive compared with similar forms of other competition authorities (such as Form CO of the European Commission under the EU

Merger Control Regulation). In certain circumstances, merger parties may use the so-called short form of Form CO under the EU Merger Control Regulation which does not exist for draft Form M1 under the Singapore merger control regime. In our view, in case of a voluntary notification, European or North/ South American clients may be hesitant to provide such an extensive amount of information as requested under draft Form M1 regarding the merger control assessment. One of the reasons why Form CO of the European Commission is so extensive is because it currently covers 27 EU member states and it would be difficult for the European Commission to ask for more information in a second step because the European Commission has to forward copies of a notification to each of the 27 EU member states for review and it would be burdensome for the European Commission to forward additional information to all the 27 EU member states. Contrary to that, it would be easy for the CSS to request more information should a shorter Form M1 not contain all information it needs.

If the merger parties consider that some of the requested information is not relevant to the assessment of their merger they can discuss this with the CCS in pre-notification discussions (Part 4, paragraph 4.10 of the Draft Revised Guidelines). Following the same reasoning, merger parties could also be entitled to decide and submit only the relevant information pertaining to their merger situation.

6.2 Therefore, CSS could consider:

- developing an optional short form of draft Form M1;
- distinguishing between compulsory and optional parts of the draft Form M1; or
- allowing the merger parties some discretion in deciding which parts of the draft Form M1 to complete, based on the facts of their particular situation (voluntary Form M1).

6.3 In the event CCS does not intend to introduce an optional short form of draft Form M1 or transform draft Form M1 into a voluntary Form M1, CCS could consider shortening the draft Form M1.

CCS may further simplify the draft Form M1 by reconsidering the requirements for the details for questions 18, 24 (c), 27, 31 and 37. CCS could further delete the word "all" in question 44 (a) and/ or delete the word "any" in question 44 (h). Further question 22 could be shortened by reducing the data to the last year.

Additionally, the above paragraph could form a basis for a short form of the draft Form M1.

**7. Are there any areas where you think CCS should provide further clarification or consider additional changes?**

7.1 Before CCS decides to publish a merger decision, it could consider giving the applicant an opportunity to review the draft decision in order to determine whether or not it contains confidential information and to check the accuracy of the factual statements relating to, or supplied by, the applicant (Part 4, paragraph 4.34 of the Draft Revised Guidelines). The applicant is in the best position to check which information is confidential and whether the factual statements relating to, or supplied by, the applicant is accurate. Therefore, the CCS should strongly consider giving the applicant the opportunity to check the draft decision. We understand that this is common practice among competition authorities worldwide, (e.g. the European Commission and the German Federal Cartel Office).

Therefore in this regard, CCS could consider amending the wording of Part 4, paragraph 4.34 of the Draft Revised Guidelines to specify that the applicant will be given an opportunity to review the draft decision.

7.2 Some of our clients may take a position that it should not be in the discretion of the CCS to decide whether information is confidential or not (Part 4, paragraph 4.35 of the Draft Revised Guidelines) but CCS should only be concerned in making a sound decision as to whether or not the information is confidential. This is rightly stated in other parts of the Draft Revised Guidelines, (e.g. in Part 4, paragraph 4.76, and paragraph 4.86 of the Draft Revised Guidelines).

Therefore, CCS could consider amending the word "discretion" in Part 4, paragraph 4.35 of the Draft Revised Guidelines. The word "discretion" could be amended to "decision", thus making it clear that CCS must make a sound decision and that it does not merely have discretion to treat confidential information as non-confidential.

7.3 In Part 7, paragraph 7.2 of the Draft Revised Guidelines, the words "of matter" could be deleted.

## CONCLUSION

The Draft Revised Guidelines represents a significant development in streamlining the process of notification and CCS is to be commended for its initiative in keeping the merger activity in Singapore under review and taking a balanced view from various stakeholders in providing greater certainty of Singapore's voluntary merger notification system.

In particular our conclusions include:

1. CCS could consider clarifying that complaints of competitors of the merger parties may hold less weight than complaints by suppliers and/or customers of the merger parties in Part 3, paragraph 3.15 of the Draft Revised Guidelines.

2. CCS could clarify that the self-assessment in relation to mergers where the merger parties supply goods or services of the same description in paragraph 3.6 would be on the basis of their share of supply and not with respect the current market share thresholds.

3. CCS could consider increasing the worldwide turnover threshold for each of the merger parties of S$10 million to a possibly higher threshold.

4. CCS could consider giving confidential advice for a reasonable fee. CCS could charge a fixed fee irrespective of the size of the merger parties, the time spent on the matter by the CCS in an individual case and/or a higher or lower risk of an SLC.

5. The CCS could consider:
   - giving confidential advice in all cases without discretion at all or;
   - limiting the discretion to special circumstances as an exception.

6. In the event CCS does not intend to give confidential advice in all cases without discretion, CCS could define the term "certain circumstances" in which confidential advice is not available and the criteria for its use of "absolute discretion" in Part 3, point 3.24 of the Draft Revised Guidelines.

7. CSS could consider:
   - developing an optional short form of draft Form M1;

- distinguishing between compulsory and optional parts of the draft Form M1; or
- permitting the merger parties to decide which parts of the draft Form M1 to complete based on the facts of their particular situation (voluntary Form M1).

If CSS does not intend to develop a short form of draft Form M1 or to transform draft Form M1 into a voluntary Form M1, CSS could consider shortening the draft Form M1. CCS may further simplify the draft Form M1 by reconsidering the requirements for the details for questions 18, 24 (c), 27, 31and 37. CCS could further delete the word "all" in question 44 (a) and or delete the word "any" in question 44 (h). Further question 22 could be shortened by reducing the data to the last year.

Additionally, the above paragraph could form a basis for a short form of the draft Form M1.

8. The CCS could consider making amendments to the wording of Part 4, paragraph 4.34 of the Draft Revised Guidelines thereby giving the applicant an opportunity to review the draft.

9. CCS could consider amending the word "discretion" in Part 4, paragraph 4.35 of the Draft Revised Guidelines. The word "discretion" could be amended to "decision" to make clear that CCS must make a sound decision and is not free to treat confidential information as non-confidential.

10. The words "of matter" in Part 7, paragraph 7.2 of the Draft Revised Guidelines could be deleted.

We have highlighted a few areas where we believe greater clarification from CCS will be useful with respect to the Draft Revised Merger Guidelines which in turn will help the merger parties with increased certainty. We hope that our above comments will be of assistance to the CCS. Thank you for this opportunity to comment and express our views on the proposed changes to the Merger Guidelines.

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