TOTAL

Comments on Proposed Changes to CCS' Guidelines on Merger Procedures

Questions asked by the CCS	Provisions of the draft guidelines on merger procedures referred to	TOAP Responses

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	- (§ 3.5) (…) 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
	- (§ 3.6) (…) there is no need to carry out an extensive economic assessment to define the relevant market. Instead, merger parties may carry out a two-step analysis to determine if notification is appropriate:
	  - (1) determine if the merger parties supply goods or services of the same description to customers in Singapore using the narrowest reasonable description of goods or services;
	  - (2) determine if the merger parties' combined **share of the supply** of the overlapping goods or services in Singapore exceeds 40% by referring to sales by value, volume, number of (retail) outlets, number of bids won, etc.
	- (§ 3.15) CCS will consider that [a merger should have been notified] where there are preliminary indications that the **combined market share** of the merger parties is more than 20% and the post-merger CR3 is 70% or more
		Although the CCS only requires a simplified self-assessment based on the concept of "share of supply" (§§ 3.5 and 3.6), the CCS suggests to take into consideration the combined market share of the merging parties for its risk assessment analysis (§ 3.15).
		For predictability and coherence purposes, it would be preferable for the merging parties to base their self-assessment on a uniform standard, either the share of supply or market shares.
		Given the fact that the market shares standard is broadly used worldwide, it would likely be easier to use for a majority of companies. This would however require some minimum form of market definition.
		For want of abundant case-law and again, for predictability purposes, the CCS could indicate that it will not sanction companies whom, it concludes, should have notified a merger when these companies relied in good faith on market definition issued by other competition jurisdictions, such as the case law of the European Commission and Courts.

2. Do you consider that the proposed turnover thresholds for mergers involving small companies are appropriate, too wide, or too narrow?	(§ 3.5) CCS considers that competition concerns are unlikely to arise in respect of mergers that only involve small companies. Therefore, where the turnover in Singapore in the financial year preceding the transaction of each of the parties is below S$5 million and the worldwide turnover of each of the parties is below S$10 million, notification is **unlikely** to be required	While the thresholds are clear, the CCS seems not totally to exclude instances where a notification would still be required even though the parties' turnovers would be below the thresholds. Greater certainty and clarity on this issue would be preferable.

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?	CCS may provide a confidential advice in the following circumstances: - (§ 3.25) the merger must not be completed but there must be a good faith intention to proceed with the transaction - (§ 3.26) the merger must not be in the public domain - (§ 3.27) the merger situation must raise a genuine issue relating to the competitive assessment in Singapore, so there must be some doubt as to whether or not the merger situation raises concerns such that notification may be appropriate (§ 3.28) CCS expects to be able to provide advice within 14 working days of receipt of all the required information. (§ 3.29) The requesting party is expected to provide information similar to that required in Form M1. (§ 3.30) At the end of the process, CCS will provide a letter to the requesting party stating whether it considers that the merger is likely to raise competition concerns in Singapore and whether notification is required.	The confidential advice procedure is very positive as it will provide useful and quick guidance to companies with regards to complex situations. However, a fee could only be acceptable provided: - It is reasonable and does not deter companies from requesting the CCS' opinion - Some guarantees are given to companies as to the authority stemming from confidential advice - In the event a notification would be required pursuant to the CCS' opinion, it would be fair that the companies concerned should be granted the right to deduct the confidential advice fee from the fee requested for the assessment of the notification.
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?		Even if it appears to be included in the name of the confidential advice, a confidentiality clause involving the CCS should also be introduced into the guidelines.
5. Are the conditions, caveats and the process for obtaining confidential advice clear?	(§ 3.31) In all cases where confidential advice is given, the CCS reserves the right to investigate the merger situation where the statutory test for doing so is met. Confidential advice does not amount to a decision. The CCS has to be kept informed of significant developments in relation to the merger situation in respect of which confidential advice was requested.	Given the fact that the confidential advice does not amount to a decision, its status remains unclear. It should be clarified if the confidential advice is legally binding for the CCS provided the information provided by the merging parties in the course of the procedure is accurate and remains unchanged.

6. What are your views on the information requirements in Form M1? If relevant, please explain why you consider that some information may not be required in Phase 1.	- (Form M1 – part 5 of the draft guidelines) The information requested is the following: - General information and contact details - Ownership structure - The transaction - Activities of the merger parties - The industry - Market definition - **Competitive assessment** (counterfactual, competitors, barriers to entry, countervailing buyer power, non-coordinated effects, coordinated effects, vertical effects) - Ancillary Restrictions - Supporting documents - Contact details of third parties	The information which must be provided in the Form M1 includes a detailed competitive assessment as to what would happen if the merger does not take place. The parties to the merger are therefore asked to provide information which could have a negative effect on the contemplated operation. An additional section could be added relating to the possible efficiencies that could be significant enough to counter any competitive restraint identified.
7. Are there any areas where you think CCS should provide further clarification or consider additional changes?		Notification in Singapore is said to be voluntary although the CCS prohibits SLC resulting from mergers. The CCS issues to this end several thresholds with the statement that "merger parties are strongly encouraged to notify…" Furthermore, the draft guidelines mention the possibility for the CCS to sanction gun-jumping with financial penalties (§ 3.17). Thus, the merger control system in Singapore could lead to situations where companies would be above the thresholds and nonetheless conclude that the contemplated merger does not raise competition issues and as such rely on the apparently voluntary notification requirement in order not to notify. In view of the draft guidelines, such situations would expose the companies concerned to possible financial sanctions. Therefore, the merger control in Singapore would gain clarity by removing any doubts as to whether notification is mandatory when the thresholds are met.