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10 NOVEMBER 2006

COMMENTS ON THE DRAFT CCS GUIDELINE ON THE SUBSTANTIVE ASSESSMENT OF MERGERS AND THE DRAFT CCS GUIDELINE ON MERGER PROCEDURES

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1. Introduction

1.1 This Memorandum sets out comments on the draft Guideline on the Substantive Assessment of Mergers (the "**Draft Substantive Guideline**") and the draft Guideline on Merger Procedures (the "**Draft Procedure Guideline**") (collectively, the "**Draft Guidelines**") which is the subject of a consultation paper issued by the Competition Commission of Singapore (the "**CCS**") on 20 October 2006.

1.2 We appreciate the opportunity to furnish our comments on the Draft Guidelines and would like to thank the CCS for this opportunity.

2. Summary of Major Points

2.1 The key points made in this Memorandum in relation to the Draft Substantive Guideline include the following:

Market Concentration and Structure

2.1.1 In relation to the measurement of market concentration, HHI (as defined below) should be elaborated and included as an additional measure of concentration to complement the CCS' existing CR_3 threshold, either as a primary measure of concentration (with the CR_3 as an alternative measure) or as an alternative measure to CR_3.

2.1.2 The relevant factors which provide strong evidence of an SLC (as defined below) should include the factors set out in Parts 6 and 7 of the Draft Substantive Guideline even when the thresholds in paragraph 5.14 of the Draft Substantive Guideline are not crossed.

2.1.3 The two references to concentration thresholds in the Draft Guidelines contain different criteria and should be made consistent.

Efficiencies

2.1.4 In relation to net economic efficiencies, the use of the concept of Net Economic Efficiencies (as defined below) in paragraph 7.17 of the Draft Substantive Guideline needs to be rationalised by explaining if such efficiency gains are meant to benefit the market or consumers.

2.1.5 In relation to efficiencies which are claimed to increase rivalry, the criterion for proving that efficiencies are demonstrable is not suitable and should be deleted.

De Facto Control

2.1.6 The CCS should consider including board representation and voting power on the board as a factor when assessing the existence of de facto control.

Other Drafting Comments

2.1.7 In relation to the assessment of horizontal mergers, the finalised guideline should specify the paragraphs that apply only to horizontal mergers.

2.1.8 In relation to countervailing buyer powers, it should be clarified that the existence of competitors post-merger would influence the ability of a buyer to discipline supplier pricing.

2.1.9 In relation to the statement on joint control in paragraph 3.19 of the Draft Substantive Guideline, the phrase "an acquisition or creation of" should be included to provide a triggering event for the merger situation.

2.1.10 In relation to coordinated effects, "tacit coordination" should be consistently used in paragraphs 6.9 and 6.10 of the Draft Substantive Guideline in order to clarify that the factors relating to a successful coordination apply to both tacit coordination and express coordination.

2.1.11 In relation to the usage of the terms "customer" and "buyer" in the Draft Substantive Guideline, for the purposes of consistency, the finalised guideline should refer to just one of the two terms throughout.

2.2 The key points made in this Memorandum in relation to the Draft Procedure Guideline include the following:

Completion and Integration of a Merger in a Non-Takeover Situation

2.2.1 Due to the difficulties (as elaborated in paragraphs 5.1.3 to 5.1.5 of this Memorandum) in providing appropriate directions to remedy an SLC effect where entities are already integrated and where the CCS subsequently concludes that the merger breaches section 54 of the Competition Act, Chapter 50B of Singapore (the "**Competition Act**") (as illustrated by recent cases in Europe and the United Kingdom ("**UK**")), the Draft Procedure Guideline should include a statement that the CCS will, in deciding the appropriate or interim remedy for an infringing merger, take into account the extent that the merger parties have integrated in reliance on their right to do so pursuant to the Draft Procedure Guideline.

Completion and Integration of a Merger in a Takeover Situation

2.2.2 As the Draft Guidelines and the Singapore Code on Take-overs and Mergers (the "**Take-over Code**") are silent on situations of a takeover of a target company, clarity should be sought from the Securities Industry Council (the "**SIC**") on the impact of the Draft Procedure Guideline on a take-over offer under the Take-over Code, including on the following issues:

(i) If the CCS proceeds to Phase 2 prior to the takeover offer (whether mandatory or voluntary) becoming or being declared unconditional as to acceptances, must the offer lapse? If the offer does lapse and the CCS thereafter provides a favourable decision, will the offeror be required to or be able to reinstate the offer?

(ii) If the takeover offer has been completed prior to a CCS decision to proceed to Phase 2, and the CCS thereafter provides an unfavourable decision, what are the remedies imposed following the completion of a takeover offer?

(iii) If the takeover offer is a mandatory offer, can the offer be also made conditional upon there being no decision by CCS to proceed to Phase 2?

We note the position adopted by the UK in relation to the foregoing issues.

"Stop the clock" by CCS in Phase 1 in exceptional circumstances

2.2.3 In order to avoid situations in which a Phase 1 review period is overly extended thereby creating transactional uncertainty for the notifying parties, it would be useful for the CCS to provide certain non-exhaustive examples of such "exceptional circumstances" in its finalised guideline. In addition, in furtherance of the aim for legal and commercial certainty, such extensions by the CCS should also be limited to a specified number of days.

Submissions of Forms 1 and 2 simultaneously in Phase 1

2.2.4 In the event that the parties submit Forms 1 and 2 simultaneously in Phase 1, we seek clarification from the CCS on the indication of the shortened timeline in Phase 1 and in Phase 2 (if applicable).

Deemed Clearance

2.2.5 As the Draft Procedure Guideline is currently silent on what happens in the event that the CCS does not take a decision within the specified time limits (and has not extended such time limits), the merger situation should be deemed to be cleared in the event the CCS does not make such decisions.

Public Domain

2.2.6 There should be further explanation of what the CCS would consider as "in the public domain" for anticipated mergers in respect of paragraph 3.2 of the Draft Procedure Guideline.

Notification Threshold

2.2.7 The notification thresholds set out in the Draft Procedure Guideline may not be suitable for non-horizontal mergers and the finalised guideline should contain alternative thresholds.

Commitments

2.2.8 The Draft Procedure Guideline should include a specified maximum number of extension days in the event that commitments are introduced.

Interested Third Parties

2.2.9 The Draft Procedure Guideline should include timelines for third parties to submit their comments and views in each of Phase 1 and 2.

3. Statement of Interest

3.1 Allen & Gledhill is a full service Singapore law firm which provides services to both local and foreign clients. Administratively, the firm is divided into the following departments according to broad areas of specialty: (i) Corporate & Commercial, (ii) Corporate Real Estate; (iii) Financial Services; (iv) Intellectual Property & Technology; and (v) Litigation & Dispute Resolution.

3.2 The Draft Guidelines will be relevant to our clients. To assist our clients in the understanding of their obligations in respect of the merger provisions in the Competition Act, our interest is that the Draft Guidelines are accurate, clear and precise.

4. Comments on Draft Substantive Guideline

4.1 Market Concentration and Structure

*Elaboration on Herfindahl-Hirschman Index ("**HHI**")*

4.1.1 We respectfully submit that the HHI should be elaborated and included as an additional measure of concentration to complement the CCS' existing CR_3 threshold in paragraph 5.14 of the Draft Substantive Guideline. We propose that the HHI be included either as a primary measure of concentration (with CR_3 as an alternative measure) or as an alternative measure to CR_3.

4.1.2 Currently, the only reference to the HHI in the Draft Substantive Guideline is a line item (Line 9) under the "SLC or no SLC" section of Annex A. There is no further elaboration or explanation as to how the HHI is meant to be applied.

4.1.3 The HHI is used as a standard measure by competition authorities and practitioners in the UK, Europe, the United States ("**US**") and Australia for measuring market concentration. It is a measure of the size of undertakings in relation to a market and is an indicator of the level of competition between such undertakings.

4.1.4 We agree with CCS' statement in paragraph 5.8 of the Draft Substantive Guideline, that the level of concentration in a market can be an indicator of competitive pressure within that market. In this respect, we note that the CCS would use two principal measures, being market share and concentration ratios, to assess the level of concentration and structure of the market.

4.1.5 The merit of the HHI as a measure of concentration is that its formulaic representation recognises the importance of the relative size and distribution of undertakings in a market by attributing higher values to larger undertakings. Accordingly, the HHI approaches "zero" when a market consists of a large number of undertakings of relatively equal size but increases as the number of undertakings in the market decreases and as the disparity in size between those undertakings increases. The HHI is therefore able to measure not only the concentration of a relevant market, but the increase in concentration of the relevant market as well.

4.1.6 Concentration ratios by comparison are inherently linear. As the CCS has rightly pointed out (in paragraph 5.13 of the Draft Substantive Guideline), concentration ratios are absolute measures of concentration, taking no account of the differences in the relative size of the undertakings that comprise the leading group of undertakings.

4.1.7 In this respect, it is possible to envisage merger situations which would fail the HHI but to which the CCS may not give further consideration as the indicative

threshold referred to in paragraph 5.14(i) of the Draft Substantive Guideline is not exceeded.

Illustration

Assume a market of seven undertakings with the following market shares: six undertakings with 15 per cent. and one undertaking with 10 per cent. The HHI of such a market would be 1450 (in the UK, this would be considered as a concentrated market). In the event that one of the undertakings with a 15 per cent. market share merges with the undertaking with a 10 per cent. market share, the HHI with the merged undertaking would be 1750, thereby registering an increase of 300 (the increase is termed a "**delta**"). The UK's Office of Fair Trading ("**OFT**") has stated that a delta in excess of 100 in a concentrated market may give rise to competition concerns.[1] In Europe, the European Commission Horizontal Merger Guidelines specify that the European Commission is unlikely to identify horizontal competition concerns if the post-merger HHI is between 1000 and 2000 and the delta is under 250.[2] The CR_3 of the 3 largest undertakings however, would be 55 per cent. and therefore would not constitute a merger situation which the CCS would, in the first instance, be likely to give further consideration to.

4.1.8 While it is appreciated that one of the weaknesses of the HHI is that its accuracy is dependent on information being available, we submit that where information is available, it is potentially more accurate than, or at least complementary to, the existing CR_3.

Non-concentration factors

4.1.9 We agree with paragraph 5.15 of the Draft Substantive Guideline that a substantial lessening of competition ("**SLC**") could potentially be established below the thresholds set out in paragraph 5.14 of the Draft Substantive Guideline if other relevant factors provide strong evidence of an SLC.

4.1.10 Presumably these other relevant factors would include those stated in Parts 6 and 7 of the Draft Substantive Guideline such as non-coordinated effects, co-ordinated effects, potential for entry and expansion, potential for new entries, countervailing buyer power and efficiencies.

4.1.11 Paragraph 7.1 of the Draft Substantive Guideline however, suggests that the factors stated in Part 7 of the Draft Substantive Guideline are only relevant when the thresholds in paragraph 5.14 of the Draft Substantive Guideline are exceeded. If the assumption in paragraph 4.1.10 of this Memorandum is correct, then paragraphs 6.1 and 7.1 of the Draft Substantive Guideline should indicate that the factors in Part 6 and Part 7 of the Draft Substantive Guideline respectively are capable of providing strong evidence of an SLC even when the thresholds set out in paragraph 5.14 of the Draft Substantive Guideline are not crossed.

[1] Paragraph 4.3 of the OFT's Substantive Assessment Guidance
[2] Paragraph 20 of the Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings ("**Horizontal Merger Guidelines**").

Other issues: Share of supply or market share?

4.1.12 We respectfully submit that the two references to concentration thresholds in the Draft Guidelines contain different criteria and should be made consistent.

4.1.13 We note that the CCS has referred to similar but non-identical thresholds in relation to SLC measurements.

(i) Paragraph 5.14 of the Draft Substantive Guideline states that in the event the merged firm will supply 40 per cent. or more of the market, the CCS is likely to give further consideration to the merger before being satisfied that the merger will not result in an SLC.

(ii) Paragraph 3.3 of the Draft Procedure Guideline makes reference to the thresholds in paragraph 5.14 of the Draft Substantive Guideline but states that the CCS is unlikely to intervene in a merger situation if the merged entity will have a market share below 40 per cent.

4.1.14 As there is no reference to a share of supply test in the Draft Guidelines, it is submitted that the correct version in the Draft Substantive Guideline should be "40 per cent. market share" and not "supply 40 per cent.". According to sections 23(3) and 23(4) of the UK Enterprise Act 2002 ("**UK Enterprise Act**"), the share of supply test is satisfied if the merged enterprises: (i) both either supply or acquire goods or services of a particular description; and (ii) will, after the merger takes place, supply or acquire 25 per cent. or more of those goods or services in the UK as a whole or a substantial part of it.

4.1.15 In making this submission, we have taken into account the fact that the framework in paragraph 5.14 of the Draft Substantive Guideline and the framework in paragraph 3.3 of the Draft Procedure Guideline are inherently different that is, the positive "likely to give further consideration" framework in the Draft Substantive Guideline and the negative "unlikely to intervene" framework in the Draft Procedure Guideline.

4.2 Efficiencies

Perspective of net economic efficiencies

4.2.1 We respectfully submit that the use of the concept of net economic efficiencies ("**Net Economic Efficiencies**") in paragraph 7.17 of the Draft Substantive Guideline needs to be rationalised by explaining if such efficiency gains are meant to benefit the market or consumers.

4.2.2 Although the Draft Substantive Guideline has been inspired by the OFT's Substantive Assessment Guidance, we note that the CCS has omitted consumer benefit considerations from the Draft Substantive Guideline. We note that this is consistent with the CCS' mission statement to promote healthy competitive markets that will benefit the Singapore economy. It is also consistent with the spirit of the Competition Act which seeks to create a conducive environment for businesses, foster greater dynamic competition and promote more efficient and innovative markets.

4.2.3 The Draft Substantive Guideline provides that there are two stages at which efficiency gains in respect of a merger situation may be analysed.

4.2.4 The first stage at which efficiency gains are analysed is where they increase rivalry in the market so that no SLC would result from a merger. An example is where, following a merger between two of the smaller undertakings in a market, the efficiency gains result in the merged undertaking being able to exert greater competitive pressure on its larger competitors.

4.2.5 The second stage at which efficiency gains are analysed is where an SLC is not averted but where Net Economic Efficiencies will nevertheless result. To demonstrate Net Economic Efficiencies, merging parties must show that benefits will be sufficient to outweigh the competition detriments caused by the merger. For example:

(i) the potential benefit of lower costs;

(ii) the potential benefit of greater innovation; and

(iii) the potential benefit of greater choice or higher quality.

4.2.6 In the UK, efficiencies may be taken into account where such efficiencies increase rivalry in the market so that no SLC would result from a merger (similar to the first stage referred to in paragraph 4.2.4 of this Memorandum) or where the efficiencies do not avert an SLC but will nonetheless be passed on after the merger in the form of customer benefits. There is no efficiencies exclusion in the UK but efficiencies are relevant in assessing whether the purpose or effect of the merger is to substantially lessen competition.

4.2.7 It is submitted that most mergers would invariably lead to synergies in one form or another and therefore result in the experience by the merger parties of some form of efficiencies (particularly if the merger parties are in the same industry). However such efficiencies, for example, lower production or marketing costs for the merged entity, may not always benefit the economy since the merged undertaking may not necessarily pass on the savings achieved or compete more efficiently.

4.2.8 In the spirit of the Competition Act, which is to protect the competitiveness of markets in Singapore, it is submitted that it should be made clear that the beneficiary under the Net Economic Efficiencies test should be an objective one whose beneficiary should be the relevant market (competitors and consumers alike), and by extension, the Singapore economy. Any benefit accruing solely to the merged entity should not be considered under the Net Economics Efficiencies test.

Efficiencies Claimed to Increase Rivalry

4.2.9 We respectfully submit that the criterion for proving that efficiencies are demonstrable is not suitable and should be deleted.

4.2.10 Paragraph 7.20 of the Draft Substantive Guideline sets out the criterion that must be fulfilled in order for the CCS to take into account efficiencies claimed to enhance rivalry. The claimed efficiencies must, among other things, be demonstrable and merger-specific.

4.2.11 Efficiencies that enhance rivalry are demonstrable when the claimed efficiencies are clear, will materialise within a reasonable period of time and are likely to arise with the merger. It is submitted however that the criterion in paragraph 7.20(i) of the Draft Substantive Guideline (that is, that the benefits will be sufficient to outweigh the competition detriments caused by the merger) is not appropriate and irrelevant in determining whether efficiencies are demonstrable.

4.2.12 The comment made in relation to paragraph 7.20 of the Draft Substantive Guideline in paragraph 4.2.11 of this Memorandum applies equally to paragraph 10.3 of the Draft Substantive Guideline.

4.3 De Facto Control

4.3.1 We respectfully submit that the CCS should consider including board representation and voting power on the board as a factor when assessing the existence of de facto control.

4.3.2 We agree with the CCS that there should be no definitive criteria for "de facto" control of an undertaking's activities and that a case-by-case approach should be adopted. Paragraphs 3.10 to 3.15 of the Draft Substantive Guideline contain factors which the CCS would take into account when determining de facto control. There is no reference however, in paragraphs 3.10 to 3.15 of the Draft Substantive Guideline, to board representation as a relevant factor.

4.3.3 To this extent, we note that the CCS Guideline on the Section 34 Prohibition, in relation to whether parties to an agreement form part of a single economic unit (and although having a separate legal personality, enjoys no economic independence), states that a relevant factor in the the subsidiary company.

4.3.4 Further, we also note that paragraph 2.10 of the OFT's assessment is whether the parent company has control of the board of directors of Substantive Assessment Guidance states that an important factor in the OFT's assessment of material influence is whether the acquiring entity has, or will have, board representation in the merged entity. In this respect, the OFT will review the proportion of board directors appointed by the acquiring entity and the corporate or industry expertise exercised by members of the board appointed by the acquiring entity.

4.4 Other Drafting Comments

Assessment of Horizontal Mergers

4.4.1 We respectfully submit that the finalised guideline should specify the paragraphs that apply only to horizontal mergers. The Draft Substantive Guideline is structured such that the factors in respect of the assessment of horizontal mergers would apply generally to mergers (which would include vertical and conglomerate mergers). The factors that are unique to horizontal mergers may create confusion when applied to vertical or conglomerate mergers. For example, the non-coordinated effects issues discussed in paragraphs 6.3 to 6.6 of the Draft Substantive Guideline should apply only to horizontal mergers but not vertical mergers.

Countervailing Buyer Power

4.4.2 Countervailing buyer power may act as an effective competitive constraint but it should be in conjunction with pressure from competitors since buyer power can only meaningfully be exercised if effective alternative choices exist for the buyer.

4.4.3 We respectfully submit that in the finalised guideline, it should be clarified that the existence of competitors post-merger would influence the ability of a buyer to discipline supplier pricing.

Joint control - "acquisition or creation of"

4.4.4 In paragraph 3.19 of the Draft Substantive Guideline, it is stated that a joint venture may fall within the scope of the merger provisions where there is joint control by two or more undertakings.

4.4.5 We respectfully submit that the statement be amended in the finalised guideline to read as follows: "A joint venture may fall within the scope of the merger provisions where there is an acquisition or creation of joint control by two or more undertakings, that is, its parent companies (section 54(2)(c))".

4.4.6 Without the phrase "an acquisition or creation of", there would be no triggering event for the merger situation referred to in paragraph 3.19 of the Draft Substantive Guideline, which we do not think is the CCS' intention.

Tacit coordination

4.4.7 In paragraphs 6.7 to 6.10 of the Draft Substantive Guideline, references are made to tacit coordination which may occur post merger. We note that the CCS has omitted the crucial word "tacit" in paragraphs 6.9 and 6.10 of the Draft Substantive Guideline which appears in the equivalent provisions of OFT's Substantive Assessment Guidance.

4.4.8 We respectfully submit that if the CCS intends for paragraphs 6.9 and 6.10 of the Draft Substantive Guideline to apply both to tacit and explicit coordination, it should be clearly set out. The omission of the word "tacit" in paragraphs 6.9 and 6.10 of the Draft Substantive Guideline (especially where "tacit coordination" has already been explained in paragraph 6.7 of the Draft Substantive Guideline) suggests that the factors therein do not apply to tacit coordination but only to express coordination.

Buyer and customer

4.4.9 We note that the CCS has substituted the term "customer" for "buyer" and has used them interchangeably.

4.4.10 We respectfully submit that for consistency, the finalised guideline use just one of the two terms throughout.

4.4.11 In making this submission, we have taken into account the fact that the Draft Substantive Guideline has also replaced the term "retailer" as it appears in the equivalent OFT Substantive Assessment Guidelines with the term "buyer" in paragraph 4.27 of the OFT Substantive Assessment Guidance and paragraph

7.13 of the Draft Substantive Guideline, presumably to extend the effect of the Draft Substantive Guideline to buyers in an entire supply chain.

Annex A - HHI

4.4.12 We note that in Annex A of the Draft Substantive Guideline, the CCS has referred to HHI in the market structure and concentration box.

4.4.13 We respectfully submit that, on the acceptance by the CCS our comments in paragraph 4.1 of this Memorandum, the reference need not be removed.

5. Comments on Draft Procedure Guideline

5.1 Completion and Integration of a Merger in a Non-Takeover Situation

5.1.1 Paragraph 3.2 of the Draft Procedure Guideline provides that while an anticipated merger or merger is being considered by the CCS, merger parties may carry into effect the completion of the anticipated merger or with further integration of a completed merger at their own commercial risk. Such a risk is known as the "antitrust risk" in the UK. The placing of this risk with the merger parties is consistent with the fact that the Draft Procedure Guideline prescribes that notification of mergers is voluntary and also strongly encourages merger parties to conduct a self-assessment to ascertain if notification is necessary.

5.1.2 We respectfully submit that, due to the difficulties (as elaborated in paragraphs 5.1.3 to 5.15 of this Memorandum) in providing appropriate directions to remedy a SLC effect where such entities are already integrated ("**integrated entities**") and where the CCS subsequently concludes that the merger breaches section 54 of the Competition Act (as illustrated by recent cases in Europe and the UK), the Draft Procedure Guideline should include a statement that the CCS will, in deciding the appropriate or interim remedy for an infringing merger, take into account the extent that the merger parties have integrated in reliance on their right to do so pursuant to the Draft Procedure Guideline.

Feasibility of Appropriate Remedies

5.1.3 We note that, under section 69(2) of the Competition Act, the CCS may give such directions as it considers appropriate for the purpose of remedying, mitigating or preventing a SLC if it concludes that a merger situation has infringed section 54 of the Competition Act. This may take the form of a structural remedy (such as the dissolution of the merger or the disposition of operations, assets or shares) or a behavioural remedy (such as legally enforceable agreements, financial penalties or provision of a performance bond, guarantee or other forms of security).

5.1.4 However, at advanced stages of integration, behavioural remedies may be insufficient and structural remedies may be ineffective or may involve substantial cost and effort. It is respectfully submitted therefore, as stated in paragraph 5.1.2 of this Memorandum, that the appropriate remedies to be imposed should always take into account the stage of integration merger parties are at.

5.1.5 In relation to a divestiture, for example, the UK has identified the composition risks, purchaser risks and asset risks which may impair the effectiveness of

divestiture remedies.[3] In addition, a remedy for dissolution of the merger is limited in its effectiveness where, among other things, customers may already have migrated, employees with specialised expertise may already have been laid off (if they serve duplicate functions in both organisations), the two integrated entities may already be directed by one CEO and confidential information may already have been exchanged between the merged undertakings.

5.1.6 Further, any permissive framework such as that in the Draft Procedure Guideline must recognise that there is a possibility that the irreparable effects of an SLC would already have occurred at the point in time any remedies assessment is ready to be made, for example, competitors may already have been driven out of the market.

5.2 Completion and Integration of a Merger in a Takeover Situation

5.2.1 We note that the Draft Procedure Guideline is silent on situations of a takeover offer of a target company which is subject to the Take-over Code. We also wish to highlight that there is currently no express provision in the Take-over Code which deals with a situation of the notification of a merger situation to the CCS.

5.2.2 We respectfully submit that clarity be sought from the SIC on the impact of the Draft Procedure Guideline on a take-over offer under the Take-over Code, including on the following issues:

(i) If the CCS proceeds to Phase 2 prior to the takeover offer (whether mandatory or voluntary) becoming or being declared unconditional as to acceptances, must the offer lapse? If the offer does lapse and the CCS thereafter provides a favourable decision, will the offeror be required to or be able to reinstate the offer?

(ii) If the takeover offer has been completed prior to a CCS decision to proceed to Phase 2, and the CCS thereafter provides an unfavourable decision, what are the remedies imposed following the completion of a takeover offer?

(iii) If the takeover offer is a mandatory offer, can the offer be also made conditional upon there being no decision by CCS to proceed to Phase 2?

If the CCS proceeds to Phase 2 prior to the takeover offer (whether mandatory or voluntary) becoming or being declared unconditional as to acceptances

5.2.3 We respectfully submit that it should be made clear if the decisions of the CCS can be imposed by the offeror as a condition to the offer. In addition, we respectfully submit that the offeror should be permitted to impose a condition that the notification does not proceed to Phase 2 or that there will be no initiation of proceedings by the CCS. As an exception to the general rule that conditions must be phrased in objective terms, we respectfully submit that the offeror may state that any decision by the CCS must be on terms satisfactory to it.

[3] Application of Divestiture Remedies in Merger Inquiries: Competition Commission Guidelines (December 2004)

5.2.4 In this regard, we note that Rule 12.1 of the UK City Code on Takeovers and Mergers ("**City Code**") provides:

"12.1 REQUIREMENT FOR APPROPRIATE TERM IN OFFER

(a) Where an offer comes within the statutory provisions for possible reference to the Competition Commission, it must be a term of the offer that it will lapse if there is a reference before the first closing date or the date when the offer becomes or is declared unconditional as to acceptances, whichever is the later.

(b) Where an offer would give rise to a concentration with a Community dimension within the scope of Council Regulation 139/2004/EC, it must be a term of the offer that it will lapse if either:—

(i) the European Commission initiates proceedings under Article 6(1)(c); or
(ii) following a referral by the European Commission under Article 9.1 to a competent authority in the United Kingdom, there is a subsequent reference to the Competition Commission,

in either case before the first closing date or the date when the offer becomes or is declared unconditional as to acceptances, whichever is the later.

(c) Except in the case of an offer under Rule 9,[4] the offeror may, in addition, make the offer conditional on a decision being made that there will be no reference, initiation of proceedings or referral. It may state, if desired, that the decision must be on terms satisfactory to it."

5.2.5 Further in relation to voluntary offers, it is submitted that a competition issue need not be of "material significance" for an offeror to invoke it to lapse an offer under Note 2 to Rule 15.1 of the Take-over Code. This is the position adopted by the City Code.[5]

5.2.6 Under Rule 33 of the Take-over Code, if the offer lapses, a further offer will not generally be permitted within the subsequent 12 months unless the SIC agrees otherwise. It is suggested that if the position under Rule 12 of the City Code is adopted in Singapore, the position should be clarified as to whether there would be an exception to Rule 33 of the Take-over Code if the offer lapses by reason of the CCS proceeding to Phase 2. The City Code provides for such a similar exception where there is a reference to the relevant competition authorities under Notes on Rules 35.1 and 35.2 of the City Code.

If the takeover offer has been completed prior to a CCS decision to proceed to Phase 2, and the CCS thereafter provides an unfavourable decision

5.2.7 Based on the timetable for Phase 1 as proposed by the Draft Procedure Guideline and the offer timetable under the Take-over Code, the offer may become or be

[4] Rule 9 refers to a mandatory offer under the City Code.
[5] Rules 13.2 and 13.4 of the City Code.

declared unconditional prior to the CCS providing its decision as to whether to proceed to Phase 2.

5.2.8 In the event that the takeover offer is completed in Phase 1 or during Phase 2 (where it is not a requirement that the offer lapses upon the commencement of Phase 2), and the CCS subsequently gives an unfavourable decision, the Take-over Code, as it is currently drafted, does not make any provisions for remedies in such a situation.

5.2.9 Under the provisions of the City Code, if the merger is prohibited by the UK Competition Commission or European Commission, the UK Panel on Takeovers and Mergers ("**Panel**") will consider whether to require the offeror to reduce the percentage of shares carrying voting rights in which it and persons acting in concert with it are interested to below 30 per cent. or to its original level if it was originally 30 per cent. or more.[6] The CCS and the SIC may consider adopting a similar approach.

If the takeover offer is a mandatory offer, can the offer be also made conditional upon there being no decision by CCS to proceed to Phase 2

5.2.10 Under Rule 14.2 of the Take-over Code, except with the consent of SIC, a mandatory offer must only be made conditional upon the offeror having received acceptances in respect of shares which, together with shares acquired or agreed to be acquired, before or during the offer, will result in the offeror and any person acting in concert with it, holding shares carrying more than 50 per cent. of the voting rights.

5.2.11 We wish to clarify whether a mandatory offer may also be subject to the condition of there being no CCS decision to proceed to Phase 2. We note that under Rule 9.4 of the City Code (read with the Notes on Rule 9.4 of the City Code), a mandatory offer that could be referred to the UK Competition Commission or that gives rise to a concentration with a Community dimension that may be investigated by the European Commission, must lapse on these events occurring.

5.2.12 If the offer lapses under such circumstances, and if the merger is subsequently allowed, the offeror must reinstate the offer on the same terms and at not less than the same price as soon as practicable.

5.2.13 However, if the merger is subsequently prohibited and the offer cannot be made, the Panel will consider whether (if there is no order to such effect) to require the offeror to reduce the percentage of shares carrying voting rights in which it and persons acting in concert with it are interested to below 30 per cent. or to its original level before the obligation to make the offer was incurred.

5.2.14 The obligation to make such mandatory offer as referred to in paragraph 5.2.12 of this Memorandum would cease if the offeror and/or its concert parties voluntarily reduce their interest in shares carrying voting rights to below 30 per cent. or to its original level before the obligation to make the offer was incurred (if that original

[6] Notes to Rule 9.4 of the City Code.

level was 30 per cent. or more). The CCS and the SIC may consider adopting a similar approach.

5.3 "Stop the clock" by CCS in Phase 1 in exceptional circumstances

5.3.1 We note from paragraph 3.40 of the Draft Procedure Guideline that the CCS may, in exceptional circumstances, extend the Phase 1 review period upon notifying the applicants in writing.

5.3.2 We respectfully submit that:

(i) in order to avoid situations in which a Phase 1 review period is overly extended thereby transactional uncertainty for the notifying parties, it would be useful for the CCS to provide certain non-exhaustive examples of such "exceptional circumstances" in its finalised guideline, for example, if the CCS discovers certain new facts at a late stage of Phase 1 or if it involves novel competition law questions; and

(ii) in addition, in furtherance of the aim for legal and commercial certainty, we also submit that such extensions by the CCS be limited to a specified number of days.

5.3.3 We agree that the CCS should have a degree of flexibility to extend the timeline for a more accurate review of the parties' applications in Phase 1 as well as to give sufficient additional time to negotiate commitments or remedies that are acceptable to the parties (and therefore may save parties the trouble of having to proceed to Phase 2). However, such an advantage must be balanced with the interests of legal and commercial certainty for all parties involved.

5.3.4 We note that there may be an argument that a limit on the number of "extension days" may detract from the aim for greater accuracy in reviewing an application and in resolving any competition concerns. However, we note that under the UK Enterprise Act, limits are included for "stop the clock" situations by the OFT or UK Competition Commission, as the case may be. By way of illustration, where a Merger Notice (as defined in the UK Enterprise Act) is used, in addition to the specified timeline, the OFT can extend the deadline by a period of 10 working days at the OFT's discretion, to decide whether to refer the transaction to the UK Competition Commission. Following a reference to the UK Competition Commission for a second stage investigation, in addition to the specified timeline, the UK Competition Commission can extend the deadline by up to 8 weeks at the UK Competition Commission's discretion for special reasons.

5.4 Submission of Forms 1 and 2 simultaneously in Phase 1

5.4.1 We note that the Draft Procedure Guideline states that it would "speed up the process" in the event that a Form 2 is submitted together with Form 1 at the same time.

5.4.2 We wish to seek clarification from the CCS in relation to the following, in the event that the parties submit Forms 1 and 2 simultaneously in Phase 1:

(i) an indication of the shortened timeline in Phase 1; and

(ii) in the event that the CCS proceeds to Phase 2, an indication of the shortened timeline in Phase 2 (if any).

5.5 Deemed Clearance

5.5.1 We note that the Draft Procedure Guideline is currently silent on what happens in the event that the CCS does not take a decision within the specified time limits (and has not extended such time limits).

5.5.2 We respectfully submit that in the interests of legal and commercial certainty, the merger situation be deemed not to result in a SLC in the event the CCS does not make such decisions. This is also in line with the approach adopted by the European Commission and the OFT in the UK.

5.6 Public Domain

5.6.1 We respectfully submit that there should be further explanation of what the CCS would consider as “in the public domain” for anticipated mergers in respect of paragraph 3.2 of the Draft Procedure Guideline.

5.6.2 In public takeovers situations, there are two main announcements where the intention of a merger party is made known to the public. For example, announcements where:

(i) a person has the intention to make an offer, the making of which is subject to the satisfaction of certain conditions (a "**pre-conditional offer announcement**"); or

(ii) a person has an intention to make an offer.

5.6.3 It is submitted that a pre-conditional offer announcement should be sufficient to satisfy the requirement to be “in the public domain” as there would be sufficient certainty at such as stage as to what the offer comprises.

5.6.4 In private merger situations, we submit that it should be clarified in the finalised guideline how the CCS would consider anticipated mergers to be in the public domain.

5.7 Notification threshold

5.7.1 We respectfully submit that the notification thresholds set out in the Draft Procedure Guideline may not be suitable for non-horizontal mergers and that the finalised guideline should contain alternative thresholds.

5.7.2 The notification thresholds in paragraph 3.3 of the Draft Procedure Guideline state that the CCS is generally unlikely to intervene in a merger situation if the merger situation falls below the following concentration thresholds:

(i) the merged entity will have a market share of 40 per cent.; or

(ii) the merged entity will have a market share of between 20 per cent. and 40 per cent. and the post-merger combined market share of the three largest firms is 70 per cent. or more.

5.7.3 The notification thresholds however, do not take into account vertical and conglomerate mergers as in such mergers, the market shares in the relevant markets are unlikely to increase. Market share thresholds are also inherently unsuited to vertical and conglomerate mergers because the competition concerns for such mergers are different from the concerns relating to horizontal mergers.

5.7.4 For example, an upstream producer with a market share of 45 per cent. in the relevant market that acquires a small downstream retailer would exceed the notification thresholds as the market share of the merged entity is 45 per cent. This is notwithstanding that the upstream producer had the same market share before and after the merger.

5.7.5 We appreciate that it is challenging to structure a notification threshold which takes into account all circumstances (such as vertical and conglomerate mergers). However, it is submitted that where the market share thresholds set out in paragraph 3.3 of the Draft Procedure Guideline are unsuitable, there would be no notification threshold for merger parties to rely on, other than a subjective assessment on whether the merger may result in an SLC.

5.7.6 It is submitted that the finalised guideline should include alternative notification thresholds such as turnover thresholds, or the share of supply test, taking into account other important factors such as the size and effect on the economy for non-horizontal mergers.

5.7.7 The share of supply test, for example, avoids the need for merger parties to undertake an economic assessment which may be open to varying views but may identify a situation where the merger is capable of the creation or enhancement of buyer power as well as supplier market power, which may have resulted from a vertical merger.

5.8 Commitments

5.8.1 We note that under paragraph 5.7 of the Draft Procedure Guideline, the indicative time frame for the merger review will be stopped during the period of negotiation between the applicant and the CCS on suitable commitments.

5.8.2 We respectfully submit that the CCS should include a specified maximum number of extension days in the event that commitments are introduced. This would balance the need for certainty with the flexibility which the CCS would require to provide an accurate review. This is also in line with the position adopted by the European Commission. By way of illustration, under the *Council Regulation (EC) No 139/2004* of January 20, 2004 on the control of concentrations between the undertakings (the EC Merger Regulation), there is a limit of 15 additional working days to the timeline if the undertakings concerned offer commitments (unless these commitments have been offered less than 55 working days after the initiation of proceedings).

5.8.3 A framework in which there are no specified maximum number of extension days may discourage notifying parties from providing commitments since transactional timelines could potentially become indefinitely delayed.

5.9 Interested Third Parties

5.9.1 We note that under the Draft Procedure Guideline, third parties play a role in that the CCS may invite comments from interested third parties ("**Complainants**") on any merger situation that is notified to the CCS and encourages such Complainants to submit their comments and views as early as possible, to enable the CCS to have sufficient time to give due consideration to their submissions.

5.9.2 We respectfully submit that the CCS should set timelines for third parties to submit their comments and views. In addition, we also seek CCS' clarification if Complainants are required to prove a legitimate interest.

5.9.3 We agree that Complainants should be allowed the right to complain, especially if these are complaints from customers of, suppliers to, or competitors of, the merging parties.

5.9.4 We further agree that such Complainants should submit their comments and views as early as possible. However, it would be useful for CCS to specify a time limit for such Complainants to make their submissions to avoid a situation whereby a Complainant makes a submission, say, one working day prior to the stipulated deadlines for decisions in Phase 1 or Phase 2, as the case may be. In such a situation, it is submitted that CCS should reject such submissions as non bona fide.

5.9.5 We understand that Complainants require time to gather relevant data in order to present an accurate and meaningful submission. However, as discussed in the foregoing paragraphs of this Memorandum, this must be balanced against the need for transactional certainty.

5.9.6 In addition, where there are no time limits for submissions by Complainants, Complainants with an interest in doing so may deliberately submit at the very late stages with a view to frustrating or delaying a transactional timeline.

6. Conclusion

6.1 Allen & Gledhill appreciates having the opportunity to comment on the Draft Guidelines. We welcome the opportunity to discuss our comments and recommendations.

6.2 Should you require any further clarification on the foregoing or any further information, please do not hesitate to contact any of the following:

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