ATMD
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Submissions to the Competition Commission of Singapore

on

Consultation Documents relating to the proposed Merger Regime

From

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A. INTRODUCTION

1. This submission is made in response to the "Public Consultation on Merger Regime" by:

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2. In this submission:

"**Act**" means the Competition Act (Chapter 50B of the 2006 Revised Edition).

"**Draft Amendment Bill**" means the draft Competition (Amendment) Bill.

"**Merger Guidelines**" means the Merger Procedures Guideline and the Substantive Assessment Guideline.

"**Merger Procedures Guideline**" means the draft "CCS Guideline on Merger Procedures" issued by the CCS for public consultation on 20 October 2006.

"**SLC**" means the substantial lessening of competition.

"**Substantive Assessment Guideline**" means the draft CCS "Guideline on the Substantive Assessment of Mergers" issued by the CCS for public consultation on 20 October 2006.

3. The changes proposed to the Act and the Merger Guidelines are most welcome and have addressed in a practical way a number of concerns that we have had in relation to the application of the merger provisions, including the ability to notify anticipated mergers and the relationship between Section 54 and the Sections 34 and 47 prohibitions.

4. Our comments are primarily directed towards seeking further clarification on a number of items in the Draft Amendment Bill and the Merger Guidelines.

B. SUMMARY OF MAJOR POINTS

I. Draft Amendment Bill

We have comments on the following aspects of the Draft Amendment Bill:

- Clarification in Section 54 that mergers effected before 1 July 2007 will not fall under Section 54, even if they have resulted or may be expected to result in a substantial lessening of competition;
- Drafting issues in Section 54(3) on the meaning of "control";
- Drafting issues in Section 54(5) on joint ventures;
- Clarification relating to the exclusion of:

  - pre-1 July 2007 mergers;
  - ancillary restrictions which are preliminary to a merger but which may or may not result in a merger

  from the Section 34 prohibition and the Section 47 prohibition.

II. Substantive Assessment Guideline

We have comments on:

- Legal control – the reference to "voting rights";

- Market concentration and structure, on:

  - the meaning of 'merged firm' in the thresholds;
  - the point in time when the SLC test will be applied;
  - consistency in the thresholds language.

III. Merger Procedures Guideline

We have comments on:

- the level of publicity required for anticipated mergers to be notified;

- the purpose of specifying a validity period for favourable decisions.

C. STATEMENT OF INTEREST

Alban Tay Mahtani & de Silva (ATMD) is a Singapore law firm which provides legal services to local and foreign clients.

ATMD's legal services include advising on commercial transactions, mergers & acquisitions, intellectual property and Competition Law issues in relation to such transactions.

D. COMMENTS

I. Draft Amendment Bill

1. Mergers pre-1 July 2007 excluded from Section 54

1.1 We request clarification that mergers which have occurred before 1 July 2007 are excluded from the Section 54 prohibition, even if they result or may be expected to result in a substantial lessening of competition on or after 1 July 2007.

This clarification may be set out in the Fourth Schedule by adding a new paragraph 4 as follows:

"4. The Section 54 prohibition shall not apply to any merger which has occurred before 1 July 2007."

2. Section 54(3) on the meaning of "control"

2.1 We request clarification as to what the following words in Section 54(3) refer to:

"…in particular, by –
(a) ownership of ….the assets of an undertaking; or
(b) rights or contracts which enable decisive influence to be exercised with regard to …organs of an undertaking".

It is possible to read these words as:

(1) creating 2 other tests for "control", in addition to "decisive influence". In other words, Section 54(2) could be read as creating 3 tests for control, as follows:

"… control … shall be regarded as existing:
(i) if … decisive influence is capable of being exercised with regard to the activities of the undertaking; or
(ii) in particular by ownership of ... the assets of an undertaking; or

(iii) in particular by rights or contracts which enable decisive influence to be exercised with regard to … organs of an undertaking;

or

(2) as particular examples of the term "other means" in Section 54(3);

or

(3) as particular examples of "decisive influence" in Section 54(3).

Paragraph 3.8 of the Substantive Guidelines states that

"[c]ontrol is defined in Section 54(3) as a situation where a person is capable of exercising decisive influence",

but does not refer to or expand on the reference to subsections (a) and (b) in Section 54(3), so there is no further guidance or clarification on the two subsections.

We request that what those words refer to be clarified as follows:

"and in particular **[control shall be regarded as existing]/[by such other means as]/[decisive influence is capable of being exercised]**", by –

(a) ownership of ….the assets of an undertaking; or
(b) rights or contracts which enable decisive influence to be exercised with regard to …organs of an undertaking".

2.2 It is suggested that the phrase "*the activities of*" in relation to "decisive control" in Section 54(3) be deleted.

Section 54(3) contains the following language:

"…decisive influence is capable of being exercised with regard to the *activities* of the undertaking…".

The term "activities" appears to limit decisive influence to active action of an undertaking, and does not appear to cover matters which are not "activities" in the ordinary sense of the word. For example, it is not clear if a long term investment which is passive amounts to an "activity of an undertaking", yet the ability to exercise decisive influence over situations which do not constitute "activities" should qualify as control for the purposes of Section 54(3).

It is therefore suggested that the reference to "activities" be dropped from the decisive control concept as follows:

"… decisive influence is capable of being exercised with regard to ~~the activities of~~ the undertaking…" (changes tracked)

3. Section 54(5) – the application of Section 54 to joint ventures

3.1 Section 54(5) as amended by the Draft Amendment Bill reads as follows:

"The creation of a joint venture to perform, on a lasting basis, all the functions of an autonomous economic entity shall constitute a merger falling within subsection (2)(c)."

We suggest that Section 54(5) be modified to read as follows:

"The creation of a joint venture <u>controlled by two or more persons or undertakings</u> to perform, on a lasting basis, all the functions of an autonomous economic entity shall constitute a merger falling within subsection (2)~~(c)~~<u>(b)</u>." (changes tracked)

The suggested amendments are intended to:

(a) make clear that only joint ventures which are controlled by at least 2 persons need to be considered under the merger regime. This is to bring paragraph 3.19 of the Substantive Assessment Guideline (which refers to "joint control" of joint ventures) in line with Section 54(5), and practically, to make clear to businesses that joint ventures that are effectively controlled by one party need not be assessed as mergers under Section 54; and

(b) correct the cross reference for joint ventures which amount to mergers in the amended Section 54(2) should be to subsection (b) (rather than to subsection (c)).

3.2 We request clarification as to the point at which there is the "*creation*" of a joint venture under Section 54(5). For example, is the joint venture "created" at the point of entering the contract (such as a shareholders agreement, a consortium agreement, a collaboration agreement, etc) to form the joint venture; or is the joint venture "created" when the joint venture has been implemented or has begun to function as an autonomous economic entity (this may be difficult for businesses to determine with certainty)?

4. Third Schedule to the Act, Paragraph 10 – exclusion of mergers and ancillary restrictions from Sections 34 and 47

4.1 We request that it be made clear in the proposed new paragraph 10 of the Third Schedule that all mergers which occur before 1 July 2007 should be excluded from the Section 34 and Section 47 prohibitions, along the following lines:

"10. The Section 34 prohibition and the Section 47 prohibition shall not apply to –
(a) any anticipated merger or merger; or
(b) any agreement or conduct that is directly related and necessary to the implementation of an anticipated merger or a merger,
whether such merger has occurred, or such arrangement constitutes an anticipated merger, before, on or after 1 July 2007." (changes tracked).

We believe that it is the CCS' intention that even now, that is before 1 July 2007 when the merger regime is to come into effect, the CCS does not expect mergers to be reviewed under Section 34 or Section 47.

4.2 We request that preliminary agreements which are directly related and necessary to a merger process but which may or may not result in an "anticipated merger" or "merger", should also be clearly excluded from the Section 34 and 47 prohibitions. Examples of such agreements are agreements for the exchange of information, or competitive bid agreements, or other restrictions that the parties may need to abide by or enter into as part of discussions towards a merger. It would be an anomaly if such agreements enjoy retrospective immunity from the Sections 34 and 47 prohibitions only if the parties eventually succeed in reaching a merger agreement, but not if the parties are unable to reach an agreement on the merger.

II. Substantive Assessment Guideline

1. Legal Control - Paragraph 3.9

The concept of voting rights as stated in the last sentence of paragraph 3.9, that is:

" 'Voting rights' refers to all the voting rights *attributable to the share capital* of an undertaking which are currently exercisable at a *general meeting*"

is narrower than the concept of control in Section 54(3)(b) of the Act which refers to "voting or decisions of the organs of an undertaking".

As more widely contemplated in Section 54(3)(b), voting rights need not be attributable only to share capital, and voting rights need not only be exercisable only at a general meeting.

We therefore suggest that the last sentence of paragraph 3.9 be replaced with broader language consistent with Section 54(3)(b) along the following lines:

"Voting rights" refers to all rights in relation to voting or decisions of any organs of an undertaking, including shareholder resolutions, resolutions of the board of directors or decisions of committees which affect or influence the undertaking's strategic commercial behaviour."

2. Market Concentration and Structure

2.1 The draft Substantive Assessment Guideline refers to the market power of the "merged firm" (see for example, paragraph 5.8 and the thresholds in paragraph 5.14).

We request clarification as to what constitutes "the merged firm" in relation to each of the 3 merger categories set out in Section 54(2)(a), (b) and (c), and in relation to joint ventures.

2.2 We request clarification in the Merger Guidelines that the SLC test is to be assessed at the point in time when a merger occurs, and not continuously beyond this point of time.

2.3 The language for the thresholds in paragraph 5.14 of the Substantive Assessment Guideline is not in the same terms as the threshold language in paragraph 3.3 of the Merger Procedures Guideline. We request that the threshold language in the two Merger Guidelines be made consistent.

III. Merger Procedures Guideline

1. Notifications - Paragraph 3.2

Paragraph 3.2 provides that parties may notify an anticipated merger "after knowledge of the anticipated merger is in the *public domain*". Further, Paragraph 3.2 of the Introduction to the Substantive Assessment Guideline provides that the notification of anticipated mergers for decision will apply only to anticipated mergers "that have been *publicized as to be generally known or readily available*".

We request clarification as to what level of publicity will be sufficient for an anticipated merger to be notifiable. Private mergers are

unlikely to be given the level of publicity that public takeovers are required to disclose. A conditional private merger may only be notified to business partners and employees, but there may be no announcement to the general public. We request that parties be allowed to notify an anticipated merger as long as the anticipated merger is no longer confidential.

2. Favourable Decision – Paragraph 3.55

Paragraph 3.55 provides that the CCS may specify the validity period of a favourable decision.

We request that the Merger Guidelines clarify that CCS' purpose in specifying a validity period for a favourable decision is to allow anticipated mergers to be completed within the validity period, and more importantly, that there is no expiry date for a favourable decision once given in respect of a completed merger.

E. CONCLUSION

Thank you for this opportunity to comment on the proposed merger regime as set out in the Draft Amendment Bill and the two Merger Guidelines.

We would be pleased to clarify any part of foregoing submission if so required.

Susan de Silva