CCS GUIDELINE ON THE SUBSTANTIVE ASSESSMENT OF MERGERS

Competition Commission
SINGAPORE

Draft as of 20 October 2006

THE SUBSTANTIVE ASSESSMENT OF MERGERS

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Note:
This guideline is subject to the passing of the Amendment Bill by Parliament.

1 INTRODUCTION

1.1 The proposed merger provisions of the Competition Act (’Act’) will apply to a merger that infringes the section 54 prohibition and to an anticipated merger that, if carried into effect, will infringe the section 54 prohibition, unless they are excluded or exempt in accordance with the provisions of Part III of the Act. It is intended that these proposed provisions will come into force on 1 July 2007.

1.2 Some aspects of the proposed merger regime will require amendment of the Act. Where references are made to the section numbers of the Act, they will, where applicable, refer to the proposed amended sections as set out in the Draft Amendment Bill.

1.3 The Competition Commission of Singapore (‘CCS’) has published the following guidelines:

- *CCS Guideline on the Substantive Assessment of Mergers* – which sets out some of the factors and circumstances which the CCS may consider in determining whether mergers have resulted, or may be expected to result, in a substantial lessening of competition; and

- *CCS Guideline on Merger Procedures* – which sets out the notification procedures for an anticipated merger or merger and CCS’ investigation procedures.

Interested parties should read both guidelines to better understand the CCS’ merger framework.

1.3 This guideline is not a substitute for the Act, the regulations and orders. It may be revised should the need arise. The examples in this guideline are for illustration. They are not exhaustive, and do not set a limit on the investigation and enforcement activities of the CCS. In applying this guideline, the facts and circumstances of each case will be considered. Persons in doubt about how they and their commercial activities may be affected by the Act may wish to seek legal advice.

2 SUMMARY OF SUBSTANTIVE ASSESSMENT FRAMEWORK

2.1 This guideline indicates the manner in which the CCS will interpret and give effect to the provisions of the Act when assessing mergers. The guideline:

- describes the circumstances in which the CCS has jurisdiction over merger situations affecting competition in Singapore. These include mergers between previously independent undertakings, the acquisition of control. joint ventures that constitute mergers and acquisitions of assets (Part 3);

- explains the concept of a substantial lessening of competition. A description of the types of merger situations and the approach towards identifying an appropriate counterfactual is elaborated in this Part (Part 4);

- provides a summary of the broad analytical elements that the CCS will consider in assessing whether a merger has resulted, or may be expected to result in, a substantial lessening of competition (Parts 5 to 7);

  (i) Part 5 identifies the proper frame (or frames) of reference for analysing the immediate competitive constraints faced by the merged entity. This is done by defining the relevant product and geographic markets affected by the merger, assessing market power and examining market concentration and structure;

  (ii) Part 6 explains the nature and extent of pre- and post-merger competition in the identified relevant markets. This may indicate concerns about a possible loss of rivalry as a result of the merger. Such concerns include non-coordinated effects and coordinated effects; and

  (iii) Part 7 addresses the impact of other competitive effects on rivalry, such as barriers to entry, possibility of expansion by rivals, buyer power, efficiency gains and failing parties.

- explains the principles for assessing the competitive effects of vertical and conglomerate mergers (Part 8). Where relevant, Parts 5 to 7 will similarly apply to the analysis of the competition effects of these non-horizontal mergers;

- describes the types of remedies, factors that may be relevant in deciding on the appropriateness of remedial action and the action(s) to be taken. Action(s) that can be taken by CCS include the issuance of directions and the acceptance of commitments (Part 9); and

- describes situations where the merger provisions do not apply to mergers, such as the exclusions specified in the Fourth Schedule.

Other exclusions such as the exclusion for mergers and ancillary restrictions from the section 34 prohibition and the section 47 prohibition of the Act are also set out (Part 10).

2.2 It should be noted that the principles in Parts 4 to 7 should not be regarded as a mechanical framework for analysis. Different factors may be given greater or less weight depending on the details of a given case and, in many cases, it may not be necessary to consider all of the above factors.

2.3 A flowchart summarizing how the various factors fit together can be found in **Annex A.**

3 WHAT IS A MERGER

Introduction

3.1 Section 54(2) of the Act provides that a merger occurs where:

- two or more undertakings, previously independent of each other, 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 of the assets, or a substantial part of the assets, of another undertaking is to place the first undertaking in a position to replace or substantially replace the second undertaking in the business or the part concerned of the business in which that undertaking was engaged immediately before the acquisition.

An undertaking that buys or proposes to buy a majority stake in another undertaking is the most obvious example. However, the transfer or pooling of assets or the creation of a joint venture may also give rise to merger situations.

3.2 The Act's provisions apply both to mergers that have already taken place and to those that are proposed or in contemplation. The provision for notification of anticipated mergers for decision will apply only to anticipated mergers that have been publicized as to be generally known or readily ascertainable.

3.3 In addition to the definition in section 54(2) of the Act, section 54(5) also provides that 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).

3.4 The determination of the existence of a merger under the Act is based on qualitative rather than quantitative criteria, focusing on the concept of control. These criteria include considerations of both law and fact. It follows, therefore, that a merger may occur on a legal or a de facto basis.

Mergers between Previously Independent Undertakings

3.5 A merger within the meaning of Section 54(2)(a) of the Act occurs when two or more independent undertakings amalgamate into a new undertaking and cease to exist as separate legal entities. A merger may also occur when an undertaking is absorbed by another, with the latter retaining its legal identity while the former ceases to exist as a legal entity.

Acquisition of Control

3.6 Section 54(2)(c) and (d) provides that a merger occurs in the case of an acquisition of control. Such control may be acquired by one undertaking acting alone or by two or more undertakings acting jointly. The object of control can be one or more undertakings which constitute legal entities or the whole or part of the assets of such entities. These assets include brands or licences.

3.7 Control is normally acquired by persons or undertakings which are the holders of the rights or are entitled to rights conferring control (Section 54(4)(a)). There may, however, be situations where the formal holder of a controlling interest differs from the person or undertaking having the real power to exercise the rights resulting from this interest. This may be the case, for example, where an undertaking uses another person or undertaking for the acquisition of a controlling interest and exercises the rights through this person or undertaking, even though the latter is formally the holder of the rights. In such a situation, control is acquired by the undertaking which is behind the operation and in fact enjoys the power to control the target undertaking (Section 54(4)(b)). The evidence needed to establish this type of indirect control may include factors such as the source of financing or family links.

3.8 Control is defined in Section 54(3) as a situation where a person is capable of exercising decisive influence on an undertaking on the basis of securities, contracts or any other means (or a combination thereof) with regard to the activities of the undertaking. Moreover, control exists if ‘decisive influence’ is capable of being exercised rather than the actual exercise of such influence. In determining whether ‘decisive influence’ is capable of being exercised, the CCS will consider all the relevant circumstances and not solely the legal effect of any instrument, deed, transfer, assignment or other acts.

Legal Control

3.9 Assessment of 'decisive influence' requires a case-by-case analysis of the entire relationship between the parties to the merger. In making this assessment, the CCS will have regard to all the circumstances of the case. The variety of commercial arrangements entered into by undertakings makes it difficult to state what will (or will not) constitute 'decisive influence'. The CCS will consider that ownership of more than 50% of the voting rights of an undertaking as likely to indicate decisive influence. Where the ownership is between 30% and 50% 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 which are currently exercisable at a general meeting.

De Facto Control

3.10 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, a case-by-case approach in the light of the particular circumstances will be adopted.

3.11 The CCS may consider whether any additional agreements with the acquired undertaking enable the holder of de facto control to influence the undertaking's activities that affect its key strategic commercial behaviour. These might include the provision of consultancy services to the targeted undertaking or might, in certain circumstances, include agreements between undertakings that one will cease production and source all its requirements from the other.

3.12 Financial arrangements may confer decisive influence where the conditions are such that an undertaking becomes so dependent on a person that the person gains decisive influence over the undertaking's activities (for example, where a lender could threaten to withdraw loan facilities if a particular activity is not pursued, or where the loan conditions confer on the lender the ability to exercise rights over and above those necessary to protect its investment, say, by options to take control of the undertaking or veto rights over certain strategic decisions).

3.13 An option to purchase or convert shares cannot in itself confer control unless the option will be exercised in the near future according to legally-binding agreements. However, the likely exercise of such an option can be taken into account as an additional element which, together with other elements, may lead to the conclusion that there is control.

3.14 Control may exist where minority shareholders have additional rights which allow them to veto decisions which 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. The latter would include decisions on the technology to be used, where technology is a key feature of the merged undertaking. In markets characterized by product differentiation and a significant degree of innovation, a veto right over decisions relating to new product lines to be developed may also be an important element in establishing control. **Annex B** provides more details on this.

3.15 Pure economic relationships may also play a decisive role in certain circumstances. For example, in very important long-term supply agreements, the supplier may be able to exercise decisive influence over the customer by creating a situation of economic dependence.

Joint Ventures

3.16 Joint ventures, as broadly defined, refer to collaborative undertakings by which two or more other undertakings devote their resources to pursue a common objective. In practice, joint ventures encompass a broad range of operations, from merger-like operations to cooperation for particular functions such as R&D, production, or distribution.

3.17 Section 54(5) of the Act defines a joint venture that constitutes a merger as one that performs, on a lasting basis, all the functions of an autonomous economic entity.

3.18 In order to be considered as a merger within the meaning of section 54(5) of the Act, an operation must fulfill the following criteria.

(i) Joint Control

3.19 A joint venture may fall within the scope of the merger provisions where there is joint control by two or more undertakings, that is, its parent companies (section 54(2)(c)). See paragraphs 3.6 to 3.15 for a discussion on the concept of 'control'.

3.20 Joint control exists where two or more undertakings or persons have the possibility of exercising decisive influence over another undertaking. Decisive control in this context includes the power to block actions which determine the strategic commercial behaviour of an undertaking. Unlike sole control, which confers the power upon a specific shareholder to determine the strategic decisions in an undertaking, joint control is characterized by the possibility of a deadlock resulting from the power of two or more parent companies to reject proposed strategic decisions. It follows, therefore, that these shareholders must reach a consensus in determining the commercial activities of the joint venture.

3.21 Please refer to **Annex B** for examples of situations that give rise to joint control.

Structural Change of the Undertakings

3.22 Section 54(5) provides that the joint venture must perform, on a lasting basis, all the functions of an autonomous economic entity. Joint ventures which satisfy this requirement bring about a lasting change in the structure of the undertakings concerned.

(ii) Functions of an Autonomous Economic Entity

3.23 Performing all the functions of an autonomous economic entity essentially means that a joint venture must operate on a market, performing the functions normally carried out by undertakings operating on the same market. In order to do so the joint venture must have a management dedicated to its day-to-day operations and access to sufficient resources, including finance, staff, and assets (tangible and intangible), in order to conduct on a lasting basis its business activities within the area provided for in the joint venture agreement.

3.24 A joint venture does not perform all the functions of an autonomous economic entity if it only takes over one specific function within the parent companies' business activities without access to the market. This is the case, for example, for joint ventures limited to R&D or production. Such joint ventures are auxiliary to their parent companies' business activities. This is also the case where a joint venture is essentially limited to the distribution or sales of its parent companies' products and, therefore, acts principally as a sales agency. However, the fact that a joint venture makes use of the distribution network or outlet of one or more of its parent companies normally will not disqualify it as performing all the functions of an autonomous economic entity, as long as the parent companies are acting only as agents of the joint venture.

3.25 The fact that the joint venture relies almost entirely on sales to its parent companies or purchases from them only for an initial start-up period may still be consistent with the joint venture performing all the functions of an autonomous economic entity.

3.26 Such a start-up period may be necessary in order to establish the joint venture on a market. The essential question is whether, regardless of these sales, the joint venture is geared to play an active role on the market. In this respect the relative proportion of these sales compared with the total production of the joint venture is an important factor. Another factor is whether sales to the parent companies are made on the basis of normal commercial conditions.

3.27 In relation to purchases made by the joint venture from its parent companies, the joint venture may not be performing all the functions of an autonomous economic entity, in particular, where little value is added to the products or services concerned at the level of the joint venture itself. In such a situation, the joint venture may be closer to a joint sales agency.

3.28 However, where a joint venture is active in a trade market and performs the normal functions of a trading company in such a market, it will normally be considered to perform all the functions of an autonomous economic entity rather than an auxiliary sales agency.

3.29 A trade market is characterized by the existence of companies which specialize in the selling and distribution of products without being vertically integrated in addition to those which are integrated, and where different sources of supply are available for the products in question. In addition, many trade markets may require operators to invest in specific facilities such as outlets, stockholding, warehouses, depots, transport fleets and sales personnel. In order to perform all the functions of an autonomous economic entity in a trade market, an undertaking must have the necessary facilities and be likely to obtain a substantial proportion of its supplies not only from its parent companies, but also from other competing sources.

(iii) Lasting Basis

3.30 The joint venture must be intended to operate on a lasting basis. The fact that the parent companies commit to the joint venture the resources described above in paragraph 3.30 normally demonstrates that this is the case. In addition, agreements setting up a joint venture often provide for certain contingencies, for example, the failure of the joint venture or fundamental disagreement between the parent companies. This may be achieved by the incorporation of provisions for the eventual dissolution of the joint venture itself or the possibility for one or more parent companies to withdraw from the joint venture. Such provisions do not prevent the joint venture from being considered as operating on a lasting basis.

3.31 The same is normally true where the agreement specifies a period for the duration of the joint venture which is sufficiently long in order to bring about a lasting change in the structure of the undertakings concerned, or where the agreement provides for the possible continuation of the joint venture beyond this period.

3.32 On the other hand, the joint venture will not be considered to operate on a lasting basis where it is established for a short finite duration. This would be the case, for example, where a joint venture is established in order to construct a specific project such as a power plant, but it will not be involved in the operation of the plant once its construction has been completed.

Exceptions

3.33 Section 54(7) sets out four exceptional situations where the acquisition of a controlling interest does not constitute a merger under the Act.

- First, the person acquiring control is acting in its capacity as a receiver or liquidator or an underwriter (Section 54(7)(a));

- Secondly, all of the undertakings involved in the merger are, directly or indirectly, under the control of the same undertaking (Section 54(7)(b)). In particular, a merger between a parent and its subsidiary company, or between two companies which are under the control of a third company, will not be subject to the merger provisions if, prior to the acquisition or merger, the subsidiary has no real freedom to determine its course of action in the market, and, although having a separate legal personality, enjoys no economic independence. Internal restructuring within a group of companies will therefore not constitute a merger;

- Thirdly, control does not arise if the acquisition of control is brought about as a result of a testamentary disposition or an intestacy. In other words, the controlling interest is obtained, after the death of the original owner, by operation of the probate or intestacy laws. Likewise, if the controlling interest is obtained as a result of a right of survivorship in a joint tenancy, it will not constitute a merger; or

- Lastly, the acquisition of securities by undertakings whose normal activities include carrying out of transactions and dealing in securities for their own account or for the account of others is not deemed to constitute a merger if such an acquisition is made in the framework of these businesses and if the securities are held on only a temporary basis (Section 54(7)(d)). An example of such an undertaking would be one where the acquiring undertaking is a credit or other financial institution or insurance company, the normal activities of which are described above. In order to fall within this exception, the following requirements must be fulfilled:

    i. the securities must be acquired with a view to their resale;

    ii. the acquiring undertaking must not exercise the voting rights of the securities with a view to determining the strategic commercial behaviour of the target undertaking and must exercise these rights only with a view to preparing for the total or partial disposal of the undertaking, its assets or securities; and

    iii. the acquiring undertaking must dispose of its controlling interest within one year of the date of the acquisition, that is, it must reduce its shareholding within this one-year period at least to a level which no longer confers control. This period, however, may be extended by the CCS where the acquiring undertaking can show that the disposal was not reasonably possible within the one-year period.

4 THE SUBSTANTIAL LESSENING OF COMPETITION TEST

4.1 This Part explains the general principles that the CCS will apply in seeking to identify mergers that it believes have resulted, or may be expected to result in, a substantial lessening of competition.

Introduction to Substantial Lessening of Competition

4.2 Competition is a process of rivalry between firms seeking to win customers' business. This process of rivalry, where it is effective, impels firms to deliver benefits to customers in terms of price, quality and choice. When levels of rivalry are reduced (for example, because customers have fewer firms among which to choose or because of coordinated behaviour between firms), the effectiveness of this process may diminish to the likely detriment of customers.

4.3 Not all mergers give rise to competition issues. The CCS believes that many mergers are either pro-competitive (because they positively enhance levels of rivalry) or are competitively neutral. Some mergers may lessen competition but not substantially, because sufficient post-merger competitive constraints will exist to ensure that competition (or the process of rivalry) continues to discipline the commercial behaviour of the merged firm. The merger provisions are only applied to mergers which substantially lessen competition and have no off-setting efficiencies.

Types of Mergers

4.4 There are three basic merger situations that affect competition in different ways.

Horizontal Mergers

- **Horizontal mergers.** Mergers between undertakings that operate in the same economic market can reduce competitive pressure on the merged firm to the extent that it could unilaterally impose a profitable post-merger price increase or otherwise behave anti-competitively. Other firms in the market might unilaterally raise their prices in response, without any collusion among participants. Also, a merger might increase the likelihood (or stability) of coordination, either tacit or explicit, between the firms remaining in the market.

Non-horizontal Mergers

- **Vertical mergers.** Mergers between undertakings which operate at different levels of the supply chain of an industry, though often pro-competitive, may in some circumstances reduce the competitive constraints faced by the merged firm by foreclosing a substantial part of the market to competitors (examples include refusal to supply, enhanced barriers to entry, facilitation of price discrimination, and increase in rivals' costs) or by increasing the likelihood of post-merger collusion. This risk is, however, unlikely to arise except in the presence of existing market power at one level in the supply chain at least, or in markets where there is already significant vertical integration or restraints.

- **Conglomerate mergers.** Mergers between undertakings in different markets will rarely lessen competition substantially. But such mergers might, in some cases, reduce competition, for example, through the exercise of portfolio power.

4.5 The application of the substantial lessening of competition test to these three types of mergers is detailed in later Parts of this guideline.

Identification of the Appropriate 'Counterfactual'

4.6 In applying the substantial lessening of competition test, the CCS will evaluate the prospects of competition in the future with and without the merger. The competitive situation without the merger is referred to as the 'counterfactual'.

4.7 In most cases, the best guide to the appropriate counterfactual will be prevailing conditions of competition, as this may provide a reliable indicator of future competition without the merger. However, the CCS may need to 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 example, in cases where one of the parties is genuinely failing, pre-merger conditions of competition might not prevail even if the merger provisions were applied to the merger. Please refer to paragraphs 7.22 to 7.25 for a more detailed discussion of the failing firm/failing division defence. Other examples include:

- where a firm is about to enter or exit the market. Similarly, the CCS may also take into account committed expansion plans by existing competitors; and/or

- where changes to the regulatory structure of the market, such as market liberalisation, or tighter environmental constraints, will change the nature of competition.

4.8 The focus of CCS' analysis is on the effects that the merger has on competition. Competition concerns that do not result from the merger under consideration are outside the CCS' remit in merger investigation. They may, however, be matters which are appropriate for the CCS to consider, for example, in light of the section 34 and section 47 prohibitions.

5 ASSESSMENT OF THE EFFECT OF A MERGER ON MARKET STRUCTURE

5.1 The focus of the CCS' analysis is on evaluating how the competitive incentives of the merging parties and their competitors might change as a result of the merger. The starting point is to define the relevant market, then review the changes in the market structure resulting from the merger.

Market Definition

5.2 Proper examination of the competitive effects of a merger rests on a sound understanding of the competitive constraints under which the merged firm will operate. The scope of those constraints, if any, is identified through a market definition analysis. It is important to emphasize that market definition is not an end in itself. It is a framework for analysing the direct competitive pressures faced by the merged firm.

5.3 Relevant economic markets have two basic dimensions: products (or services) and geographic scope. The CCS has published a guideline on its methodology for identifying the scope of relevant product and geographic markets in cases under the section 34 prohibition and the section 47 prohibition. Because broadly similarly methodology is used to define markets in merger cases, reference should be made to that guideline. It is important to note a fundamental difference between the nature of the competitive analysis undertaken in assessing the likely competitive effects of a merger and that generally undertaken in the case of anti-competitive agreements or abuses of dominance. In assessing a merger, the main competitive concern is whether the merger will result in an increase in prices above the *prevailing* level. As a result, in defining the market, the relevant price level is the current price.

5.4 Market definition focuses attention on the areas of overlap in the merging parties' activities. This is particularly the case in differentiated products markets, where the parties' products or services may not be identical, but may still be substitutes for each other. In this context, the analytical discipline of market definition is helpful in identifying the extent of the immediate competitive interaction between the parties' products. Once the overlap in the merging parties' products or services has been identified, along with the 'market' in which those products or services compete, the CCS can focus attention on the competitive assessment.

Market Power

5.5 Market power may be described most simply as the ability to raise price consistently and profitably above competitive levels (or where a buyer has market power, the ability to obtain prices lower than their competitive levels). For instance, this might occur through the elimination of an effective source of competition, thereby weakening the rivalry among the players left in the market after the merger.

5.6 Firms with market power may not raise price but may instead simply opt not to compete as aggressively as they otherwise might. In so doing, they allow costs to rise, reduce quality, restrict the diversity of choice and/or slow the rate of innovation.

5.7 In cases where it may be apparent that the merged firm will not possess any market power or that the merger will not enhance its market power within any sensible market definition, it may not be necessary to formally establish a definition of the market.

Market Concentration and Structure

5.8 The level of concentration in a market can be an indicator of competitive pressure within that market. Market concentration generally refers to the number and size of the participants in the market. A merger which increases the level of concentration in a market may reduce competition by increasing the unilateral market power of the merged firm and/or increasing the scope for coordinated conduct among the competitors in the market.

5.9 A merged firm with substantial market power may be able to increase prices or decrease quality or output without being threatened by competitors. It can also undertake strategic behaviour such as predation, which may in turn affect market structure and market power. A reduction in the number of firms in the market may also increase the scope for coordinated conduct, as it becomes easier for competitors to reach agreement on the terms of coordination, signal intentions to other market participants and monitor each other’s behaviour.

5.10 The two principal measures used by the CCS to examine market concentration and structure are market shares and concentration ratios. Since market shares may be more readily available than other information, they are a relatively low-cost means for businesses to screen out mergers which are not likely to result in a substantial lessening of competition.

5.11 Market shares are usually measured by sales revenue. Other measures, such as production volumes, sales volumes, capacity or reserves, may be used as appropriate (for example, where the product concerned is a traded commodity and production capacity therefore represents the best indication of competition strength). Current market shares may be adjusted to reflect expected and reasonably certain future changes, such as a firm’s likely exit from the market or the introduction of additional capacity.

5.12 Comparison of the merged parties’ market shares with those of other players in the market may give an indication of rivalry and potential market power and whether the other players are able to provide a competitive constraint. Historic market shares can also provide useful insights into the competitive dynamics of a market: for example, volatile market shares might suggest that there has been effective competition, although continuing high market shares are not always indicative of market power.

5.13 Concentration ratios measure the aggregate market share of a few of the biggest firms in a market. For example, CR_3 refers to the combined market share of the three largest firms. These are absolute measures of concentration, taking no account of differences in the relative size of the firms that make up the leading group.

5.14 In the event that:

(i) a merger will result in a post-merger combined market share of the three largest firms (CR_3) of 70% or more, and the merged firm has a market share of at least 20%; or

(ii) the merged firm will supply 40% or more of the market,

the CCS is likely to give further consideration to this merger before being satisfied that it will not result in a substantial lessening of competition.

5.15 It must be emphasised that the calculation of market shares is highly dependent on market definition. Parties should be aware that the CCS will not necessarily accept their identification of the relevant market. The thresholds set out in paragraph 5.14 are indicators of potential competition concerns, but they will not give rise to a presumption that such a merger will lessen competition substantially. Further investigation is required to determine whether a merger will substantially lessen competition. Similarly, a substantial lessening of competition could potentially be established at below the thresholds set out in paragraph 5.14 if other relevant factors provide strong evidence of substantial lessening of competition.

6 ASSESSMENT OF THE IMMEDIATE COMPETITIVE EFFECTS OF A MERGER

6.1 A horizontal merger is a merger between two firms active (or potentially active) in the same market at the same level of business (for example, between two manufacturers, two distributors or two retailers). When horizontal mergers occur, competition may be affected in a number of ways. This loss of a competitor (actual or potential) can change the competitive incentives of the merging firms, their rivals and their customers. This will lead to changes in the intensity of competition.

6.2 There are two conceptually distinct means by which a horizontal merger might be expected to result in a substantial lessening of competition: non-coordinated effects and coordinated effects. Although they are conceptually distinct, it is possible that a merger might raise both types of concern.

Non-coordinated Effects[1]

6.3 Non-coordinated effects may arise where, as a result of a merger, the merged firm finds it profitable to raise prices (or reduce output or quality) because of the loss of competition between the merged entities. This is because, pre-merger, any increase in the price of the acquiring firm's products would have led to a reduction in sales. However, post-merger, any sales lost as a result of a price increase will be partially recaptured by increased sales of the acquired undertaking[2] such that sales lost will no longer be foregone. In addition, the firm may find it profitable to also raise the price of the acquired products since it will recapture some of the lost sales through higher sales of its original products. Other firms in the market may also find it profitable to raise their prices because the higher prices of the merged firm's products will cause some customers to switch to rival products, thereby increasing the demand for their products.

6.4 Non-coordinated effects may arise where the market (or markets) concerned possess some of these characteristics:

- there are few firms in the affected market(s);

- the merging firms have large market shares. Generally, the larger the market share, the more likely a firm is to possess market power. In this case, the larger the market share of the merged firm, the more likely it is that a merger will lead to a significant increase in

[1] The term "non-coordinated effects" is used instead of "unilateral effects" to emphasize that the analysis will cover the change in the market structure and the resulting impact of the merger on the behaviour of *other* firms in the market.
[2] In assessing whether a price increase would be profitable, it may also be necessary to take into account whether any reduction in sales would adversely affect a firm's cost base and so render the price increase unprofitable (for example, because economies of scale were lost).

market power. However, a small increment to an already large market share may be regarded as a sufficiently significant change for the merger to lead to a substantial lessening of competition. Although market shares and additions of market shares provide only indications of market power and increases in market power, they are normally important factors in the assessment;

- the merging parties are close competitors, representing for a substantial number of customers the ‘next best alternative’ to each other’s products. Hence, a merger between the two will prevent those customers from switching to the best rival product in the event of a post-merger price increase;

- customers have little choice of alternative suppliers, whether because of the absence of alternatives, switching costs, or the ability of suppliers to price discriminate;

- it is difficult for rivals to react quickly to changes in price, output, or quality, for example, through product repositioning or supply-side substitution;

- there is little spare capacity in the hands of the merged entity’s competitors that would allow them to expand to supply customers in the event that the merged entity reduces output, and there is little prospect of expansion of existing capacity;

- there is no strong competitive fringe capable of sustaining sufficient levels of post-merger rivalry;

- one of the merging firms is a ‘maverick’ – an important rivalrous force in the market representing a competitive constraint greater than its market share indicates. Its elimination may thus be an important change in competitive dynamic; or

- one of the merging firms is a recent new entrant or a strong potential new entrant that may have had a significant competitive effect on the market since its entry or which was expected to grow into an effective competitive force.

6.5 This is not a checklist of factors or characteristics that must all be present before non-coordinated anti-competitive effects are likely to arise. These factors are intended to provide a broad indication of the circumstances in which the CCS may consider the risk of such anti-competitive effects to be high.

6.6 Though the profits from non-coordinated effects are generally captured by the merging parties, rival firms can also benefit from reductions in competitive pressure as a result of a merger. Even if rival firms pursue the same competitive strategies as they did prior to the merger, they may be able to increase their prices in the wake of a merger. In such cases, the firms in the market are not coordinating their competitive behaviour (tacitly or explicitly); they are simply reacting independently to expected changes in each other's commercial behaviour. Such instances of anti-competitive effects are still termed non-coordinated by merger analysts since they are based on the independent actions of firms. The change in the structure of the market may result in other firms behaving differently and reacting to an increase in prices in the market by raising their own prices.

Coordinated Effects

6.7 A merger situation may also lessen competition substantially by increasing the possibility that, post-merger, firms in the same market may tacitly or explicitly coordinate their behaviour to raise prices, or reduce quality or output. This does not necessarily mean express collusion (which is generally an infringement of the section 34 prohibition). Given certain market conditions, and without any express agreement, tacit collusion arises merely from an understanding that it will be in the firms' mutual interests to coordinate their decisions. Coordinated effects may arise where a merger situation reduces competitive constraints in a market, thus increasing the probability that competitors will collude or strengthening a tendency to do so.

6.8 The creation of a joint venture may also increase the probability that post-joint venture, the economically independent parents of the joint venture may tacitly or explicitly coordinate their behaviour to raise prices, reduce quality or output, or curtail output in markets outside the joint venture market. In such cases, these cooperative effects will be assessed in accordance with the criteria of section 34(1) of the Act and paragraph 9 of the Third Schedule, with a view to establishing whether or not the operation poses competition concerns.

6.9 In order for coordination to be successful or more likely, three conditions must be met or be created by a merger:

- Participating firms must be able to align their behaviour in the market;
- Participating firms must have the incentives to maintain the coordinated behaviour. This means, for example, that any deviation from the tacit coordination must be detected, and the other participating firms can inflict credible 'punishment' on the deviating firms through retaliatory behaviour; and
- the coordinated behaviour should be sustainable in the face of other competitive constraints in the market.

6.10 The CCS will examine whether each of these three conditions which are favourable to coordination may be expected to arise. In its assessment, the CCS will also consider the structure of the market, its characteristics, and any history of coordination in the market concerned.

(i) Ability to Align their Behaviour in the Market

6.11 In order to coordinate their behaviour, firms need to have an understanding as to how to do so. This need not involve an explicit agreement on what price to charge, market share quotas or the quality of products to be attained. Nor is it necessary for the firms concerned to coordinate prices around the monopoly price, or for the coordination to involve every single firm in the market. However, it is sometimes possible for firms to find a 'focal' point around which to coordinate behaviour. Market transparency, product homogeneity, stability and symmetry (of size and cost) of the relevant firms are key elements in giving the firms the ability to align on terms of coordination.

(ii) Incentives to Maintain Coordinated Behaviour

6.12 Though coordination is in the collective interests of the firms involved, it is often in their short-term individual interests to 'cheat' on the coordination by cutting price, increasing market share, or selling outside 'accepted' territories. If coordinated behaviour is to be maintained, such 'cheating' must be observable directly or indirectly. For coordination to be sustainable, the market concerned should be sufficiently transparent such that firms can monitor pricing and other terms of competition with a view to detecting cheating in a timely way and responding to it. Firms should have credible ways of 'punishing' any deviation from the tacit coordination, for example, by rapidly cutting prices or expanding output. It should be pointed out that it may be sufficient for coordinated behaviour that participating firms have a strong incentive not to deviate from the coordinated behaviour rather than the existence of a particular punishment mechanism.

(iii) Sustainability of Coordinated Behaviour

6.13 Overall, the conditions of competition in the market should be conducive to coordination in order to sustain the relevant behaviour. Typically, this means that the market should be sufficiently mature, stable and with limited competition (both actual and potential), such that the coordination is not likely to be disrupted. For example, a strong fringe of smaller competitors (or perhaps a single maverick firm) or a strong buyer (with buyer power) might be enough to render coordination impossible.

6.14 The CCS will evaluate all the available information on the characteristics of the market that may facilitate, or may in other ways impinge upon, coordinated effects. These can include:

- a high level of concentration in the market;
- the existence and significance of entry barriers;

- evidence of a long-term commitment to the market by firms;
- a high degree of homogeneity of the firms' products;
- a high degree of homogeneity of firms (i.e. the extent to which firms are similar, for instance, with respect to their size, market shares, cost structures, business strategies and attitudes to risk);
- a high degree of market transparency (the more transparent the market, the easier it is for firms to monitor each other);
- the existence of institutions and practices that may aid coordination, for example, information sharing agreements, trade associations, regulations, meeting-competition or most-favoured-customer clauses, cross-directorships, participation in joint ventures etc;
- the degree of excess capacity in the market (for instance, a high level of excess capacity will make coordination more difficult if some firms have a strong incentive to utilize their excess capacity). However, in other instances, excess capacity may make coordination easier because firms could use the spare capacity as a credible threat to participating firms thinking of deviating from the coordinated behaviour;
- the stability of demand and costs (unpredictable changes in demand or costs may make it more difficult for firms to decipher whether a change in volume sold, for instance, is due to the actions of another firm or due to demand changes in the market as a whole);
- the stability of market shares over time;
- short-term financial pressures on firms (short-term financial pressures may encourage firms to depart from any common patterns of long-term behaviour);
- the extent to which small firms on the fringe of the market, for example, producing specialist 'niche' products might embark on large-scale or more developed production;
- the extent to which there is strategic intervention by interested third parties such as buyers and suppliers (for example, if coordination that aims at reducing overall capacity in the market will only work if non-coordinating firms are unable or have no incentive to respond to this decrease by increasing their own capacity sufficiently to prevent a net decrease in capacity, or at least to render the coordinated capacity decrease unprofitable);

- the scope for, or pressure on, firms to bring new products into the market; or

- the presence of the same firms in several markets (known as multi-market contact).

6.15 The CCS will seek to assess whether, in the circumstances of the case, the above factors interact with the structural changes resulting from the merger to make coordinated effects a likely outcome of the merger. When considering the likelihood of future coordination, the CCS will also consider any existing relationship between the firms and the past history of market conduct - for example, whether it has been characterised by price-fixing, parallel pricing or vigorous price competition - and how such conduct is likely to be affected by the merger.

7 ASSESSMENT OF OTHER COMPETITIVE EFFECTS

7.1 Where a merger might be expected to result in a substantial lessening of competition, it will be necessary to consider other potential competitive constraints which could offset this effect.

Entry and Expansion

7.2 Entry by new competitors or expansion by existing competitors may be sufficient in likelihood, scope and time to deter or defeat any attempt by the merging parties or their competitors to exploit the reduction in rivalry flowing from the merger (whether through coordinated or non-coordinated strategies).

New Entry

7.3 New entry and the threat of entry can represent important competitive constraints on the behaviour of merging firms. If entry is particularly easy and likely, then the mere threat of entry may be sufficient to deter the merging parties from raising their prices, since any price increase or reduction in output/quality would incentivise new entry to take place.

7.4 For new entry (actual or the threat of) to be considered a sufficient competitive constraint, three conditions must be satisfied.

7.5 First, it should be likely that the new entry will occur in the event that the merging parties seek to exercise market power. In this regard, the CCS may review:

- barriers to entry to the market (or markets), including the costs of entry, to determine if new entry is in fact feasible;
- the experience of any firm (or firms) that have entered or withdrawn from the relevant market or markets in recent years;
- evidence of planned entry by third parties; and
- the minimum viable scale needed for entry.

7.6 Entry barriers are factors that allow an undertaking to profitably sustain supra-competitive prices in the long term, without being more efficient than its potential rivals. The following are examples of the types of entry barriers that the CCS will consider:

- absolute advantages, which include situations where government regulations such as licensing, intellectual property rights, or preferential access to essential facilities limit the number of competitors that are able to enter a market;

- strategic advantages, which arise when incumbent firms have advantages over new entrants because of their established position (first-mover advantages) or if incumbent firms are expected to behave strategically, for example, by responding to entry with very low prices or by investing in excess capacity or additional brands to deter entry;

- the costs of entering a market are more likely to deter entry where a significant proportion of those cost are sunk, i.e. the costs cannot be recovered if the entrant fails and is forced to exit. Sunk costs are the costs of entering a market that are not recoverable when exiting, and may include set-up costs (such as market research, finding an office location and getting planning permission). Costs associated with investment in specific assets, research and advertising or other promotion costs may also be considered sunk costs;

- economies of scale arise where average costs fall as the level of output rises[3]. In some circumstances, such scale economies can act as a barrier to entry, particularly where the fixed costs are sunk. As a result, a new entrant may be deterred from attempting to match the costs of the incumbent by entering on a large scale, because of the risks that they would be unable to recover their sunk costs;

- the costs of entry must be considered against the expected revenues from sales and the time period over which costs might be recovered, to assess whether firms wanting to enter the market will find entry profitable and whether or not it may be difficult for them to raise the necessary funds to enter the market. In assessing whether entry would be profitable, the CCS will generally do so by reference to pre-merger prices since this is the price at which the merged entity would need to be constrained to avoid an indication of a substantial lessening of competition; or

- the costs faced by customers in switching to a new supplier are also important in determining whether new entry would be an effective and timely competitive constraint.

7.7 Second, any new entry should be of sufficient scope to constrain any attempt to exploit greater post-merger market power. Small-scale entry may be insufficient to prevent a substantial lessening of competition, even when the entry may provide the basis for later expansion.

7.8 Third, any such prospective new entry, in response to any exercise of market power by the merged firm, would be sufficiently timely and sustainable to provide lasting and effective post-merger competition.

[3] Economies of scope, where average costs fall as more types of products are supplied, may have similar implications to economies of scale.

Entry within less than two years will generally be timely, but this must be assessed on a case-by-case basis.

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7.9 The effectiveness of any given set of barriers to entry or expansion will, to some extent, depend on other characteristics of the market. For instance, if growth in demand is likely to be large and/or rapid, then such barriers are less likely to have a lasting effect. Similarly, in markets characterised by innovation, product cycles may be shorter, which may decrease the probability that some barriers will have a lasting effect.

7.10 Analysis of entry conditions includes considering whether the merged entity would face competition from imports or supply-side substitution, to the extent that these have not already been taken into account in market definition. What is important is that competitive constraints posed by imports and possible supply-side substitutes are counted in the analysis (whether they are counted under the heading of market definition or that of entry). Given the open nature of Singapore's economy, the competitive constraints posed by imports are likely to be an important factor in analysis.

7.11 The effect of a merger on the likelihood of new entry might itself contribute to a substantial lessening of competition if it increases barriers to entry or reduces/eliminates the competitive constraint represented by new entry. This might arise, for example, where the acquired entity was or was genuinely perceived to be one of the most likely entrants.

Expansion

7.12 The ability of rival firms in the market to expand their capacity quickly can also act as an important competitive constraint on the merging parties' behaviour. When considering the likelihood of such expansion in response to price increases, the CCS will similarly consider the factors which have been set out for new market entry.

Countervailing Buyer Power

7.13 The ability of a merged entity to raise prices may be constrained by the countervailing power of buyers. There are different ways in which a powerful customer might be able to discipline supplier pricing:

- most commonly, buyers can simply switch, or credibly threaten to switch, its demand or a part thereof to another supplier, especially if the buyers are well-informed about alternative sources of supply;

- even where buyers have no choice but to purchase the supplier's products, the buyers may still be able to constrain prices if they are able to impose substantial costs on the supplier, for example, by refusing to buy other products produced by the supplier or by delaying purchases;

- buyers may be able to impose costs on the supplier through their own retail practices, for example, by positioning the supplier's products in less favourable parts of the shop;

- buyers might threaten to enter the market themselves, sell own-label products or sponsor market entry by covering the costs of entry, for example, through offering the new entrant a long-term contract[4]; or

- buyers can intensify competition among suppliers through establishing a procurement auction or purchasing through a competitive tender.

7.14 Overall, the key questions are whether buyers will have a sufficiently strong post-merger bargaining position and how much it has changed as a result of the merger. That buyers are large is not sufficient in itself to conclude that buyer power is strong. For example, even large customers may have limited scope to exercise buyer power against suppliers of 'must have' brands. Buyers will also be constrained in their ability to exercise buyer power if there are no alternative suppliers to whom they could turn. To maintain competitive constraints, buyers should have an incentive to exercise their alleged power (because they may not always do so if other buyers would also benefit).

Efficiencies

7.15 The Act allows the CCS to take efficiency gains into account at two separate points in the analytical framework.

7.16 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, this could happen when, following a merger between two of the smaller firms in a market, the efficiency gains result in the merged firm being able to exert greater competitive pressure on its larger competitors. Efficiencies in this sense are discussed in paragraphs 7.18 to 7.21.

7.17 Second, efficiencies may also be taken into account where they do not avert a substantial lessening of competition, but will nevertheless result in net economic efficiencies. For example, if a merger reduces rivalry in a market but accompanying efficiencies are likely to result in producer

[4] As such threats to change the market structure often involve making investments and incurring sunk costs, it may be possible for incumbent suppliers to raise prices to some extent before such threats become credible. Thus, where the sunk costs of sponsoring entry are large, countervailing buyer power is unlikely to act as a strong competitive constraint. Buyers may also have a limited incentive to sponsor entry because the benefit of their investment is shared with their rivals and customers.

benefits that outweigh the loss in rivalry, the CCS would not take these efficiencies into account under the substantial lessening of competition test, but would consider them under the exclusion for mergers with net economic efficiencies. Efficiencies in this latter sense are discussed in paragraphs 10.3 to 10.5 of this guideline.

Efficiencies that Increase Rivalry

7.18 Where efficiency gains are claimed to have a positive effect on rivalry, their impact is assessed as an integral part of the substantial lessening of competition analysis. The key question is whether the claimed efficiency will enhance rivalry among the remaining players in the market. Such efficiencies could occur where the merger between two smaller firms stimulates the combined firm to invest more in R&D and increase rivalry in the market through innovation, or where efficiencies make coordination less likely or effective by enhancing the incentive of a maverick to lower price or by creating a new maverick firm.

7.19 Possible efficiencies may include cost savings (fixed or variable), more intensive use of existing capacity, economies of scale or scope, or demand-side efficiencies such as increased network size or product quality. Efficiencies may also encompass pro-competitive changes in the merged entity's incentives, for example by capturing complementarities such as R&D activity, which in turn increases its incentives to invest in product development in innovation markets.

7.20 In order for the CCS to take account of efficiencies that are claimed to enhance rivalry, they must be:

(i) demonstrable, whereby:

- the claimed efficiencies are clear and, in the case of cost savings, quantifiable. The parties should be able to produce detailed and verifiable evidence of any anticipated price reductions or other benefits;
- the claimed benefits will materialize within a reasonable period of time;
- such benefits are likely to arise with the merger; and
- these benefits will be sufficient to outweigh the competition detriments caused by the merger; and

(ii) merger-specific, whereby the efficiency gains must be a direct consequence of the merger. The key issue is that the efficiencies are judged relative to what would have happened without the merger.

7.21 The CCS is generally sceptical that efficiency gains will arise unless there is compelling evidence. This is partly because of the information asymmetries between the CCS and the merging parties in respect of efficiency claims. The onus is therefore on the merging parties to demonstrate their case on the basis of the information available to them. Such evidence might, for example, include the quantum and source of projected cost-savings, which are contained in pre-merger planning and strategy documents, to be complemented by objective factual and accounting information to verify the proposed cost saving claims. External consultancy reports pre-dating the merger may also be helpful in this context.

Failing Firm/Division Defence

7.22 As described in paragraphs 4.6 to 4.8, the assessment considers whether a merger substantially lessens competition relative to what would have happened without the merger. Where one of the parties to a merger is genuinely failing, the failing party may exit the market in the event that the merger did not occur. In such cases, the counterfactual might need to be adjusted to reflect the likely failure of one of the parties and the resulting loss of rivalry.

7.23 To qualify for the failing firm treatment against a possible finding of substantial lessening of competition, the following conditions need to be met:

- First, the firm must be in such a dire situation that without the merger, the firm and its assets would exit the market in the near future. Firms on the verge of administration may not meet these criteria, whereas firms in liquidation will usually do so. Decisions by profitable parent companies to close down loss-making subsidiaries are unlikely to meet this criterion;

- Second, the firm must be unable to meet its financial obligations in the near future and there must be no serious prospect of re-organising the business, for example, a liquidator has been appointed pursuant to a creditor's winding up petition; and

- Third, there should be no less anti-competitive alternative to the merger. Even if a sale is inevitable, there may be other realistic buyers whose acquisition of the firm and its assets would produce a more competitive outcome. It may also be better for competition that the firm fails and the remaining players compete for its customers and assets than for them to be transferred wholesale to a single purchaser. Any offer to purchase the assets of the failing firm at a commercially reasonable price, even if the price is lower than the price that the acquiring party is prepared to pay, will be regarded as a reasonable alternative offer.

7.24 The firm claiming the failing firm defence would need to provide evidence that:

- the undertaking is indeed about to fail imminently under current ownership (including evidence that trading conditions are unlikely to improve);

- all re-financing options have been explored and exhausted; and

- there are no other credible bidders in the market (by demonstrating that the firm has made good faith and verifiable efforts to elicit reasonable alternative offers of acquisition).

7.25 A similar argument can be made for "failing" divisions. The following conditions will need to be met. First, upon applying appropriate cost allocation rules, the division must have a negative cash flow on an operating basis. Second, absent the acquisition, the assets of the division would exit the relevant market in the near future if not sold. Evidence to demonstrate negative cash flow and the prospect of exit from the relevant market will need to be provided. Third, the owner of the failing division must also ensure that there are no alternative credible bidders in the market, and that all possible options have been explored.

8 NON-HORIZONTAL MERGERS

8.1 A non-horizontal merger is one where the relevant markets in which the parties operate are distinct. In other words, there is no overlap of directly-competing products. Such a merger does not produce any change in the level of concentration in the relevant market. However, while non-horizontal mergers are less likely than horizontal mergers to create competitive concerns, they may still do so in a number of cases.

8.2 There are two broad classes of non-horizontal mergers, namely, vertical mergers and conglomerate mergers.

Vertical Mergers

8.3 Vertical mergers are mergers between firms that operate at different but complementary levels in the chain of production and/or distribution. All vertical mergers involve complementary products or services. Complements have positively-correlated demand, so that a higher price for one reduces the demand for both. The integration of complements within a single firm can be pro-competitive for a variety of reasons:

- Efficiencies may arise because an effort to increase the sales of one product will benefit sales of the other, and more effort will be exerted to increase sales if both are sold within a single firm;

- When a price reduction in one product increases the demand for both products, integration increases the incentives to reduce price, as the integrated firm now captures the benefits of the increased demand for the complementary product as well; or

- Many complements are purchased together by customers, so that integration may give rise to benefits in terms of one-stop shopping.

8.4 The vertical aspects of acquisitions leading to vertical integration are generally efficiency-enhancing and unlikely to result in a substantial lessening of competition in a market, unless market power exists at one of the affected functional levels. In particular, they may give rise to competition concerns in various ways. For example, a vertical merger may foreclose market access anti-competitively (say, by raising rivals' costs of access to a necessary input), or increase the ability and incentive of parties to collude in a market. These issues are discussed in paragraphs 8.5 to 8.9 below. However, common to both issues is the underlying theme that vertical merger concerns are likely to arise only if market power exists or is created in one or more markets along the supply chain.

Market Foreclosure

8.5 A vertically-integrated firm may be able to foreclose rivals from either an upstream market for selling inputs or a downstream market for distribution or sales. Foreclosure does not only refer to a vertically-integrated firm excluding a non-vertically integrated firm from a market (although this may be the case), but may include a range of behaviour:

- if the merged entity is an important downstream customer for a product that it also supplies upstream, it may be able to dampen competition from rival suppliers of that product in certain circumstances. It can do so by, for example, sourcing its future needs entirely from its own production facility, which may jeopardise the continued existence of alternative upstream suppliers of the product;

- if a merged entity supplies a large proportion of an important input to a downstream process where it also competes, it may be able to dampen competition from its rivals in the downstream market, for example, by diverting its production of the input entirely to its own downstream process;

- if the merged entity refuses to supply a product to its downstream rivals, or by only selling the input to its rivals at a price that makes them uncompetitive, this might also foreclose competition. This might be particularly relevant where firms in the downstream market need to stock a full range of products to be competitive; hence, the disruption in the supply of any product could undermine their competitiveness;

- if the merged entity controls an important channel of distribution to a downstream market, it might be able to reduce competition from its rivals by refusing to provide them with access to that means of distribution, or by granting access only at discriminatory prices that favour the merged entity's own business, thus placing rivals at a cost disadvantage;

- if the vertical integration resulting from vertical mergers could create competitively-objectionable barriers to entry. Stated generally, three conditions are necessary (but not sufficient) for this problem to exist:

    (i) the degree of vertical integration between the two markets must be so extensive that entrants to one market (the "primary market") also would have to enter the other market (the "secondary market") simultaneously;

    (ii) the requirement of entry at the secondary market must make entry at the primary market significantly more difficult and less likely to occur; and

(iii) the structure and other characteristics of the primary market must be otherwise so conducive to anti-competitive behaviour that the increased difficulty of entry is likely to affect the new entrant's performance.

8.6 The CCS will be concerned where, in any of the above situations, competitors lack a reasonable alternative to the vertically-integrated firm. In such a situation, competitors may either be deprived of access altogether or might be allowed to obtain the product or the facility only at unfavourable prices, thereby lessening rivalry in the market.

8.7 In assessing whether a merger could have foreclosure effects, it is also important to consider the ability and incentives of the merged firm to foreclose in any market. In certain cases, the merged firm may have the ability to foreclose competition in some ways but lacks the incentive to do so, as the foreclosure may not be profitable.

Increased Potential for Collusion

8.8 In rare cases, vertical integration may facilitate collusion by increasing market transparency between firms. Such concerns may arise, for example, where vertical integration affords the merged entity better knowledge of selling prices in the upstream or downstream market, which facilitates tacit collusion in either of the markets.

Countervailing Factors

8.9 As with horizontal mergers, a firm's ability to exercise vertical market power may be constrained if there is buyer power or if barriers to entry are low. For example, if customers may, in future, be forced to source all their requirements for a particular product from the upstream business of a competitor, the risk of such a situation arising might be mitigated if customers were sufficiently powerful to either resist price increases or to sponsor the emergence of a new supplier. More details on buyer power and barriers to entry can be found in paragraphs 7.1 to 7.14.

Conglomerate Mergers

8.10 Conglomerate mergers involve firms that operate in different product markets. They may be product extension mergers (i.e. between firms that produce different but related products) or pure conglomerate mergers (i.e. between firms operating in entirely different markets). Such mergers rarely lead to a substantial lessening of competition solely because of their conglomerate effects except in exceptional circumstances, such as where the products acquired are complementary to the acquirer's own products, thus giving rise to so-called 'portfolio power'.

8.11 When the market power deriving from a portfolio of brands exceeds the sum of its parts, a firm may be said to have 'portfolio power'. Suppose, for example, that a merger creates a firm with many brands under its control. Where the brands relate to products that share sufficient characteristics to be considered a discrete group, customers may have an incentive to purchase the portfolio from one supplier to reduce their transaction costs. This circumstance may substantially lessen competition if non-portfolio competitors, or those competitors that control only one or a few brands, do not impose an effective competitive constraint on the firm(s) with 'portfolio power'. The circumstances in which such a lessening of competition might arise are discussed below.

Increasing the Feasibility of Anti-competitive Strategies

8.12 Large conglomerates may seek to require or encourage customers to purchase a range of their products, whether through tying or bundling of products or through significant discounts targeted at non-portfolio rivals' customers. A merger may give rise to a significant prospect that tying or bundling may occur, if the merged firm controls complementary goods. However, such conduct is likely to result in adverse effects on competition only if it is difficult for rivals or new entrants to provide competing bundles, which could constrain the behaviour of the merged entity.

8.13 In rare cases, a conglomerate merger may also make predatory behaviour more feasible. A firm may be able to provide an aggressive response to entry or induce exit by using profits earned in one market to subsidise short-run losses in another market. This may substantially lessen competition if the likely long-run outcome is a more concentrated market. Such behaviour is likely only when the merging firms already have market power in some markets and where barriers to entry are already relatively high, so that the short-run losses can be recouped by higher prices in the long run.

Increased Potential for Coordination

8.14 Finally, conglomerate mergers may facilitate coordination. This is especially so if the merged firm's rivals in one market are also rivals in at least one of its other markets, and if other factors facilitating collusion are also present in these markets.

Buyer Power and Barriers to Entry

8.15 In assessing whether a conglomerate merger could have anti-competitive effects, the CCS will consider the ability of buyers to exercise countervailing power[5], and in particular the incentives of buyers to buy the portfolio from one supplier. In a situation where customers can and do source the portfolio products from multiple suppliers, and are likely to continue to do so post-merger, it is unlikely that the merger would substantially lessen competition.

[5] Countervailing buyer power is discussed in greater detail in paragraphs 7.13 to 7.14.

8.16 As for the possibility of entry constraining the conglomerate supplier, the CCS will primarily consider whether another firm could replicate the portfolio of products offered by the merged entity. The CCS will also consider whether the creation of the portfolio of products itself represented a strategic barrier to entry and could limit the ability of competitors to either extend their portfolios or to enter new product markets[6].

[6] Barriers to entry are discussed in greater detail in paragraphs 7.2 to 7.12.

9 COMMITMENTS AND REMEDIES

9.1 Once the CCS has decided that a merger has resulted, or may be expected to result, in a substantial lessening of competition, it has to decide on the action to remedy, mitigate or prevent the substantial lessening of competition or any adverse effects resulting from the substantial lessening of competition.

9.2 This Part describes various factors that may be relevant to a case and which the CCS may take into account when deciding on the appropriateness of taking remedial action and the action(s) to be taken. In practice, these can rarely be considered in isolation from each other. Key to the CCS' choice of remedy will be its ability to remedy the substantial lessening of competition and any resulting adverse effects. In the case of an anticipated merger, should there be no suitable commitments that can address the potential competition concerns, the most effective remedy may be to prohibit the anticipated merger from proceeding.

Types of Remedies

9.3 There are broadly two types of remedies which the CCS may consider:

(i) Structural Remedies

9.4 Since a merger involves a structural change to a market, a structural solution is often the most appropriate remedy if the merger has resulted, or may be expected to result, in a substantial lessening of competition. Structural remedies are preferable to behavioural remedies because they clearly address the market structure issues that give rise to the competition problems. They also require little monitoring by the CCS.

9.5 Typically, structural remedies require the sale of one of the overlapping businesses that have led to the competition concern. Ideally, this should be a self-standing business, which is capable of being fully separated from the merging parties, and in most cases, will be part of the acquired enterprise. The sale should be completed within a specified period. A purchaser may be deemed to be a reasonable alternative purchaser if it is willing to pay a commercially reasonable price, even if the price is lower than the price that the acquiring party is prepared to pay. An independent trustee may be appointed, at the owner's expense, to monitor the operation of the business pending disposal and/or to handle the sale if the owner has not completed the divestiture within the specified period.

9.6 Before the sale of any business, the CCS 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 which have been identified.

9.7 In appropriate cases, the CCS will consider other structural or quasi-structural remedies. For example, divestment of the buyer's existing business (or part of it) might be appropriate, although in such cases, the CCS will also need to consider the competition implications of the asset swap. Alternatively, an amendment to intellectual property licences might, in some circumstances, be an appropriate remedy.

(ii) Behavioural Remedies

9.8 Behavioural remedies can also constrain the scope for a merged company to behave anti-competitively. The CCS will consider behavioural remedies in situations where it considers that divestment will be impractical, or disproportionate to the nature of the concerns identified.

9.9 Behavioural remedies may sometimes be necessary to support structural divestment. For example, where the CCS imposes a partial divestment remedy, a commitment by the merged business not to approach the former customers of the divested business for a limited period of time may increase the CCS' confidence that the acquirer of the divested business will prove a viable and effective competitor

Consideration of the Appropriate Remedy

9.10 In addressing the question of which remedies would be appropriate, and would provide as comprehensive a solution as is reasonable and practicable to address the substantial lessening of competition and any adverse effects resulting from it, the CCS will take into account how adequately the action would remedy, prevent or mitigate the competition concerns caused by the merger.

9.11 The CCS' starting point will be to choose the remedial action that will restore the competition that has been, or is expected to be, lessened as a result of the merger. Given that the effect of the 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. However, in view of other considerations such as the effectiveness of the remedy and the costs associated with the remedy, other types of remedy may need to be considered. The CCS may therefore decide to impose more than one type of remedy.

The Cost of Remedies and Proportionality

9.12 The remedial action to be taken by the CCS will depend on the facts and circumstances of the case. When deciding on the appropriate remedy, the CCS will consider the effectiveness of different remedies and their associated costs, and will have regard to the principle of proportionality.

9.13 It is for the parties concerned to assess whether there is a risk that a merger may infringe the section 54 prohibition in the Act. The CCS will not normally consider the costs of divestment to the parties in the setting of remedies, as it is open to the parties to notify an anticipated merger to the CCS.

Directions

9.14 The CCS' powers to issue directions are set out in the Act. Section 69(2) states that, where the decision is that an anticipated merger, if carried into effect, will infringe the section 54 prohibition, a direction may include provisions prohibiting the anticipated merger from being carried into effect. Where the decision is that a merger infringes the section 54 prohibition, a direction may include provisions requiring the merger to be dissolved or modified in such manner as the CCS may direct. The CCS may also require any party involved in the merger to:

- enter such legally-enforceable agreements as may be specified by the CCS and designed to prevent or lessen the anti-competitive effects which have arisen;
- dispose of such operations, assets or shares of such undertaking in such manner as may be specified by the CCS; and
- provide a performance bond, guarantee or other form of security on such terms and conditions as the CCS may determine.

In the case of a merger, the CCS may, if the infringement was committed intentionally or negligently, also require any party involved in the merger to pay to the CCS such financial penalty as the CCS may determine.

Commitments

9.15 The CCS may accept commitments when there are competition concerns to be addressed. Any commitment must be aimed at remedying or preventing the adverse competition effects identified. In considering any such commitments, the CCS will only accept commitments that are sufficient to address clearly the identified adverse competition effects and are proportionate to them.

9.16 Before it accepts any commitments, the CCS must be confident that the competition concerns identified can be resolved through the commitments. Commitments are therefore appropriate only where the competition concerns raised by the merger and the commitments proposed to address them are clear-cut, and those commitments are capable of ready implementation. It is for this reason that commitments have typically been used in merger cases in other jurisdictions where a substantial lessening of competition arises from an overlap that is relatively small in the context of the merger. Further, the commitments must not give rise to new competition concerns or require substantial monitoring by the CCS.

9.17 In cases where there is doubt over the precise identification of the substantial lessening of competition or the effectiveness or proportionality of the proposed commitments, the CCS considers it unlikely that the 'clear-cut' criteria mentioned above would be met. In these circumstances, acceptance of commitments would not be appropriate.

9.18 Commitments can either be structural or behavioural. As mentioned in paragraph 9.4, the CCS considers that structural commitments are preferable to behavioural commitments. In assessing the suitability of the commitments, the CCS will take into consideration the criteria set out in paragraphs 9.5 to 9.9.

9.19 An acquiring company can always take the initiative to propose suitable commitments if it thinks that they may be appropriate to meet any competition concerns that it foresees. Alternatively, the CCS may invite companies to consider whether they want to offer commitments where it believes that it is, or may be, the case that a merger may raise competition issues potentially warranting investigation or is expected to result in a substantial lessening of competition and which seem amenable to remedy by commitments. However, even if the parties do propose commitments, the CCS may consider alternative remedies.

10 EXCLUSIONS AND EXEMPTIONS

Exclusions in the Fourth Schedule

10.1 The merger provisions do not apply to the matters specified in the Fourth Schedule to the Act ("Fourth Schedule") by virtue of section 55. These are:

- any merger

  (a) approved by any Minister or regulatory authority under any written law; or

  (b) under the jurisdiction of another regulatory authority under any written law relating to competition, or code of practice relating to competition issued under any written law;

- any merger involving any undertaking relating to any specified activity as defined in paragraph 6(2) of the Third Schedule; and

- any merger with net economic efficiencies.

10.2 Paragraphs 10.4 and 10.5 of this guideline will provide further elaboration on the exclusion for mergers with net economic efficiencies. More details on the other Fourth Schedule exclusions can be found in paragraph 7.1 of the *CCS Guideline on Merger Procedures*.

Exclusion for Mergers with Net Economic Efficiencies

10.3 For the CCS to grant exclusions for mergers with net economic efficiencies, the claimed efficiencies must first fulfill the criteria set out in paragraph 7.20, i.e., be demonstrable and merger-specific.

10.4 The merging parties must show that these benefits will be sufficient to outweigh the competition detriments caused by the merger. Illustrations of situations where such benefits might be weighed against the identified loss of competition include the following:

- Lower costs: A merger may, despite leading to a substantial lessening of competition, give clear scope for large cost savings through a reduction in the costs of production.

- Greater innovation: A merger may, in some cases, facilitate innovation through R&D that could only be achieved through a certain critical mass, especially where larger fixed (and) sunk costs are involved.

- Greater choice or higher quality: One situation in which such benefits may arise is where a merger increases the size of a network.

10.5 The claimed efficiencies should arise in markets in Singapore, although they need not necessarily arise in the market(s) where the substantial lessening of competition concerns has arisen. It is conceivable that sufficient efficiencies might accrue in one market as a result of the merger, which would outweigh a finding of substantial lessening of competition in another market(s). To show that efficiencies in one market outweigh an expected substantial lessening of competition in another will require clear and compelling evidence.

Exemption under Public Interest Considerations

10.6 Under sections 57(3), 58(3) and 68(3) of the Act, where the CCS proposes to make a decision that an anticipated merger/merger results or is expected to result in a substantial lessening of competition, the party who notified such merger to the CCS or any party involved in the merger may apply to the Minister for the merger to be exempted from the merger provisions on the ground of any public interest consideration. More details can be found under paragraphs 7.2 to 7.3 of the *CCS Guideline on Merger Procedures*.

Exclusion for Mergers and Ancillary Restrictions from the Section 34 and Section 47 Prohibitions of the Act

10.7 Agreements and conduct that give rise to a merger within the meaning of the Act, as well as any restrictions that are 'directly related and necessary to the implementation or the attainment of the merger' (ancillary restrictions), are excluded by the Third Schedule from the section 34 prohibition and the section 47 prohibition. A merger need not be notified to the CCS to benefit from the exclusion.

10.8 The aim of the exclusion is to prevent agreements or conduct from being subject to both the merger provisions and the section 34 prohibition and the section 47 prohibition. It also aims to prevent agreements giving rise to mergers from being subject to control under the section 34 prohibition and the section 47 prohibition, when it was not thought necessary to control them under the merger provisions of the Act.

Exclusion for Ancillary Restrictions

10.9 Many merger cases involve the acceptance of restrictions which go beyond the merger agreement itself. A seller of a business, for example, sometimes accepts a non-compete obligation which prevents it from competing with that business. Where such restrictions are 'directly related and necessary to the implementation of' the merger agreement', they are known as ancillary restrictions, and are covered by the Third Schedule exclusion, whether or not the restrictions are notified to the CCS.

Definition of Ancillary Restrictions

10.10 The Third Schedule provides that a restriction must be directly related and necessary to the implementation of the merger if it is to benefit from the exclusion.

10.11 In order to be directly related, the restriction must be connected with the merger, but ancillary or subordinate to its main object. For example, the main object of a merger agreement may be for one undertaking to buy a particular manufacturing operation from another. The added obligation of supplying raw materials to enable the manufacturing operation to continue is directly related to the merger agreement, but subordinate to it.

10.12 Any contractual arrangements which go to the heart of the merger, such as the setting up of a holding company to facilitate joint control by two independent companies of a new joint venture company, are not characterised as subordinate. Such arrangements are part of the merger agreement itself and will form part of the assessment of the merger under the Act.

10.13 A restriction is not automatically deemed directly related to the merger simply because it is agreed at the same time as the merger or is expressed to be so related. If there is little or no connection with the merger, such a restriction will not be ancillary.

10.14 In addition to deciding whether a restriction is to be considered to be directly related, it must also be established whether it is necessary to the implementation of the merger. This is likely to be the case where, 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 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. If equally-effective alternatives are available for attaining the same objective, the merging parties must demonstrate that they have chosen the alternative that is least restrictive of competition.

10.15 The CCS will consider all these factors in the context of each case.

Examples of Ancillary Restrictions

10.16 The following examples set out some general principles on how some common ancillary restrictions (for example non-compete clauses, licences of intellectual property and know-how, and purchase and supply agreements) will be handled.

- Non-compete clauses

  Such clauses, if properly limited, are generally accepted as essential if the purchaser is to receive the full benefit of any goodwill and/or know-how acquired with any tangible assets. The CCS will consider the duration of the clause, its geographical field of application, its subject matter and the persons subject to it. Any restriction must relate only to the goods and services of the acquired business and apply only to the area in which the relevant goods and services were established under the previous/current owner.

- Licences of intellectual property and know-how.

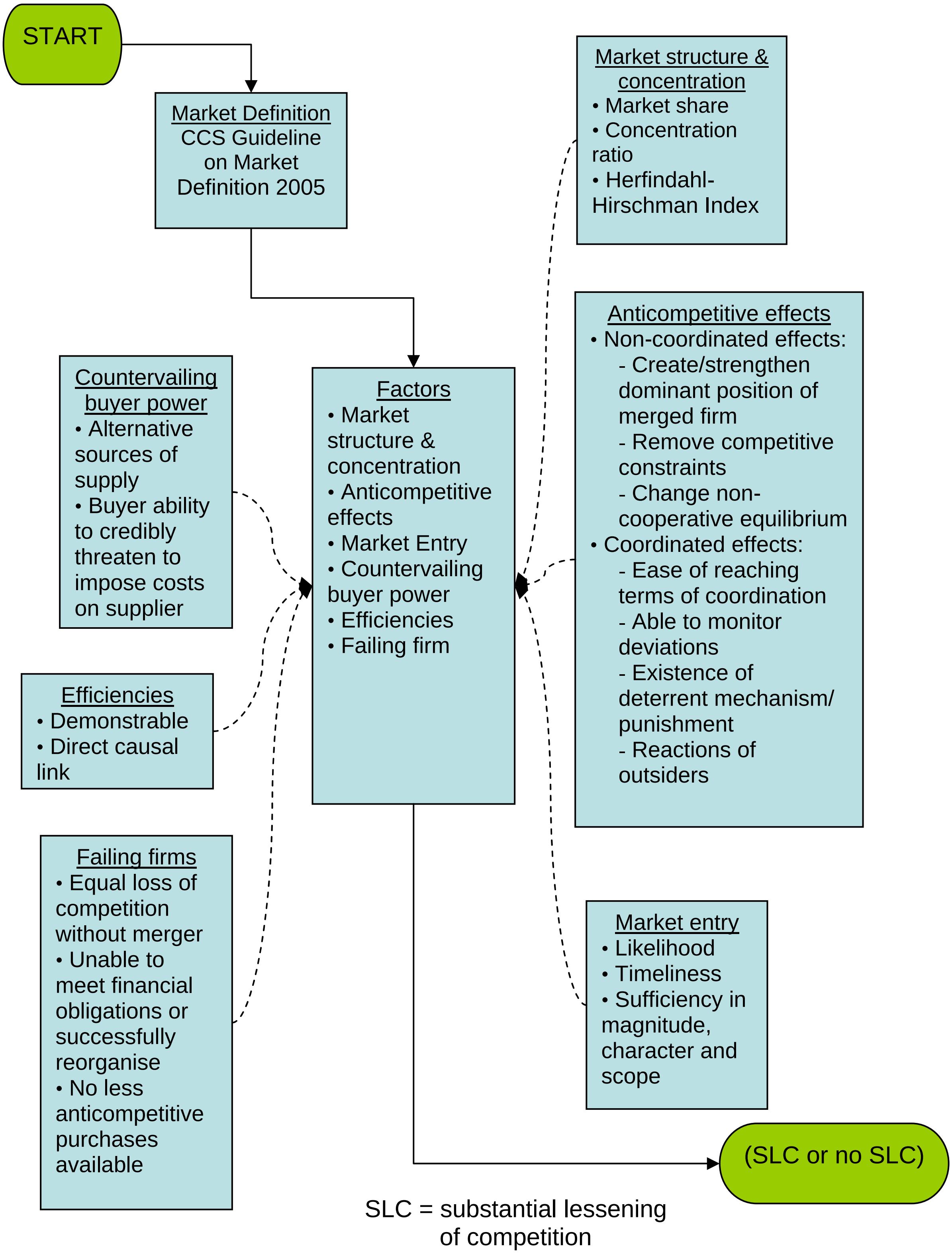
  Where an undertaking acquires the whole or part of another undertaking, the transaction includes the transfer of rights to intellectual property or know-how. In some instances the seller may need to retain ownership of such rights to exploit them in the remaining parts of its business. In such cases, the purchaser will normally be guaranteed access to the rights under licensing arrangements. In this context, restrictions in exclusive or simple licences of patents, trade-marks, know-how and similar rights may be accepted as necessary to the implementation of the merger, and therefore covered by the definition of ancillary restrictions in the Act. The licences may be limited in terms of their field-of-use to the activities of the business acquired, and may be granted for the entire duration of the patents, trade-marks of similar rights, or the normal economic life of any know-how recorded earlier. If the licences contain restrictions, not within any of the above categories, they are likely to fall outside the definition of an ancillary restriction.

- Purchase and supply agreements

  Purchase and supply agreements may be acceptable where an acquired business was formerly part of an integrated group of companies and relied on another company in the group for raw materials, or where it represented a guaranteed outlet for the company's products. In such circumstances, purchase and supply agreements between the new and former owners may be considered ancillary for a transitional period so that the businesses concerned can adapt to their new circumstances. Exclusivity will not, however, be acceptable, save in exceptional circumstances.

ANNEX A

11 GENERAL FRAMEWORK FOR SUBSTANTIVE ASSESSMENT OF MERGERS



ANNEX B

12 EXAMPLES OF SITUATIONS THAT GIVE RISE TO JOINT CONTROL

12.1 This Part provides more details on how the CCS may determine if certain types of situations give rise to joint control. The examples provided are not exhaustive; and situations not covered by, or referred to in this Part, should not be assumed to be beyond the scope of the merger provisions.

12.2 This Part covers various situations that give rise to joint control, including equality in voting rights or appointment to decision-making bodies, veto rights, and joint exercise of voting rights. This Part will also elaborate upon some other considerations in determining if a situation gives rise to joint control.

Equality in Voting Rights or Appointment to Decision-making Bodies

12.3 The clearest form of joint control exists where there are only two parent companies which share equally the voting rights in the joint venture. In this case, it is not necessary for a formal agreement to exist between them. However, where there is a formal agreement, it must be consistent with the principle of equality between the parent companies, by laying down, for example, that each is entitled to the same number of representatives in the management bodies and that none of the members has a casting vote. Equality may also be achieved where both parent companies have the right to appoint an equal number of members to the decision-making bodies of the joint venture.

Veto Rights

12.4 Joint control may exist even where there is no equality between the two parent companies in votes or in representation in decision-making bodies, or where there are more than two parent companies. This is the case where minority shareholders have additional rights which allow them to veto decisions which are essential for the strategic commercial behaviour of the joint venture. These veto rights may be set out in the statute of the joint venture or conferred by agreement between its parent companies. The veto rights themselves may operate by means of a specific quorum required for decisions taken at the shareholders' meeting or by the board of directors, to the extent that the parent companies are represented on this board. It is also possible that strategic decisions are subject to approval by a body such as the supervisory board, where the minority shareholders are represented and form part of the quorum needed for such decisions.

12.5 These veto rights must be related to strategic decisions on the business activities of the joint venture. They must go beyond the veto rights normally accorded to minority shareholders in order to protect their financial interests as investors in the joint venture. This normal protection of the rights of minority shareholders is related to decisions on the essence of the joint venture, such as changes in the statute, an increase or decrease in the capital or liquidation. A veto right, for example, which prevents the sale or winding-up of the joint venture does not confer joint control on the minority shareholder concerned.

12.6 In contrast, veto rights which confer joint control typically include decisions and issues such as the budget, the business plan, major investments or the appointment of senior management. The acquisition of joint control, however, does not require that the acquirer has the power to exercise decisive influence on the day-to-day running of an undertaking. The crucial element is that the veto rights are sufficient to enable the parent companies to exercise such influence in relation to the strategic business behaviour of the joint venture. Moreover, it is not necessary to establish that an acquirer of joint control of the joint venture will actually make use of its decisive influence. The possibility of exercising such influence and, hence, the mere existence of the veto rights, is sufficient.

12.7 In order to acquire joint control, it is not necessary for a minority shareholder to have all the veto rights mentioned above. It may be sufficient that only some, or even one such right, exists. Whether or not this is the case depends upon the precise content of the veto right itself and also the importance of this right in the context of the specific business of the joint venture.

- Appointment of management and determination of budget

  Normally the most important veto rights are those concerning decisions on the appointment of the management and the budget. The power to co-determine the structure of the management confers upon the holder the power to exercise decisive influence on the commercial activities of an undertaking. The same is true with respect to decisions on the budget since the budget determines the precise framework of the activities of the joint venture and, in particular, the investments it may make.

- Business plan

  The business plan normally provides details of the aims of a undertaking, together with the measures to be taken in order to achieve those aims. A veto right over this type of business plan may be sufficient to confer joint control, even in the absence of any other veto right. In contrast, where the business plan contains merely general declarations concerning the business aims of the joint venture, the existence of a veto right will be only one element in the general assessment of joint control but will not, on its own, be sufficient to confer joint control.

- Investments

  In the case of a veto right on investments, the importance of this right depends, firstly, on the level of investments which are subject to the approval of the parent companies and, secondly, on the extent to which investments constitute an essential feature of the market in which the joint venture is active. In relation to the first criterion, where the level of investments necessitating approval of the parent companies is extremely high, this veto right may be closer to the normal protection of the interests of a minority shareholder than to a right conferring a power of co-determination over the commercial activities of the joint venture. With regard to the second criterion, the investment activities of an undertaking is normally an important element in assessing whether or not there is joint control. However, there may be some markets where investment does not play a significant role in the market behaviour of an undertaking.

- Market-specific rights

  Apart from the typical veto rights mentioned above, there exist a number of other veto rights related to specific decisions which are important in the context of the particular market of the joint venture. One example is the decision on the technology to be used by the joint venture, where technology is a key feature of the joint venture's activities. Another example relates to markets characterised by product differentiation and a significant degree of innovation. In such markets, a veto right over decisions relating to new product lines to be developed by the joint venture may also be an important element in establishing the existence of joint control

- Overall context

  In assessing the relative importance of veto rights, where there are a number of them, these rights should not be evaluated in isolation. On the contrary, the determination of whether or not joint control exists is based upon an assessment of these rights as a whole. However, a veto right which does not relate either to commercial activities and strategy or to the budget or business plan cannot be regarded as giving joint control to its owner.

Joint Exercise of Voting Rights

12.8 Even in the absence of specific veto rights, two or more undertakings acquiring minority shareholdings in another undertaking may obtain joint control. This may be the case where the minority shareholdings together provide the means for controlling the target undertaking. This means that the minority shareholders will together have a majority of the voting rights, and they will act together in exercising these voting rights. This can result from a legally binding agreement to this effect, or it may be established on a de facto basis.

12.9 The legal means to ensure the joint exercise of voting rights can be in the form of a holding company to which the minority shareholders transfer their rights, or an agreement by which they undertake to act in the same way (pooling agreement).

12.10 Under exceptional circumstances, collective action can occur on a de facto basis where strong common interests exist between the minority shareholders, to the effect that they would not act against each other in exercising their rights in relation to the joint venture.

12.11 In the case of acquisitions of minority shareholdings, the prior existence of links between the minority shareholders or the acquisition of the shareholdings by means of concerted action will be factors indicating such a common interest.

12.12 In the case where a new joint venture is established, as opposed to the acquisition of minority shareholdings in a pre-existing undertaking, there is a higher probability that the parent companies are carrying out a deliberate common activity. This is true, in particular, where each parent company provides a contribution to the joint venture which is vital for its operation (e. g. specific technologies, local know-how or supply agreements). In these circumstances, the parent companies may be able to operate the joint venture with full cooperation only with each other's agreement on the most important strategic decisions, even if there is no express provision for any veto rights. The greater the number of parent companies involved in such a joint venture however, the more remote the likelihood of this situation occurring.

12.13 In the absence of strong common interests such as those outlined above, the possibility of changing coalitions between minority shareholders will normally exclude the assumption of joint control. Where there is no stable majority in the decision-making procedure and the majority can, on each occasion, be any of the various combinations possible amongst the minority shareholders, it cannot be assumed that the minority shareholders will jointly control the undertaking. In this context, it is not sufficient that there are agreements between two or more parties having an equal shareholding in the capital of an undertaking which establish identical rights and powers between the parties. For example, in the case of an undertaking where three shareholders each own one-third of the share capital, and each elect one-third of the members of the Board of Directors, the shareholders do not have joint control since decisions are required to be taken on the basis of a simple majority. The same considerations also apply in more complex structures, for example, where the capital of an undertaking is equally divided between three shareholders and where the Board of Directors is composed of twelve members, each of the shareholders A, B and C electing two, another two being elected by A, B and C jointly, whilst the remaining four are chosen by the other eight members jointly. In this case, there is also no joint control, and hence no control at all within the meaning of the merger provisions.

Other Considerations in Joint Control

12.14 Joint control is not incompatible with one of the parent companies enjoying specific knowledge of, and experience in, the business of the joint venture. In such a case, the other parent company can play a modest or even non-existent role in the daily management of the joint venture where its presence is motivated by considerations of a financial, long-term strategy, brand image or general policy nature. Nevertheless, it must always retain the possibility of contesting the decisions taken by the other parent company, without which there would be sole control.

12.15 For joint control to exist, there should not be a casting vote for one parent company only. However, there can be joint control when this casting vote can be exercised only after a series of stages of arbitration and attempts at reconciliation or in a very limited field.