COMPETITION COMMISSION OF SINGAPORE MERGER REGIME

Introduction

1. On 20 October 2006, the Competition Commission of Singapore (CCS) launched a public consultation on the proposed merger regime under the Competition Act ("Act") as set out in the following documents:

i) Consultation Document;
ii) Draft Amendment Bill ("Bill");
iii) Draft CCS Guideline on the Substantive Assessment of Mergers ("substantive assessment guideline"); and
iv) Draft CCS Guideline on Merger Procedures ("merger procedures guideline").

2. Besides posting the consultation documents on the CCS website and the Government Online Consultation Portal, the CCS also wrote to 34 business chambers and trade associations to invite comments. In addition, two briefing cum feedback sessions were conducted for the business community.

3. The CCS received 8 submissions at the close of the public consultation. We thank all the respondents for their feedback on how the merger regime can be improved. The CCS has reviewed the submissions carefully, and will be proposing changes to the merger regime in response. This paper outlines the major changes proposed, clarifies some of the issues raised, and explains why some suggestions have not been adopted.

Guiding Principles and Framework of the Merger Regime

4. In reviewing the submissions and the changes they suggested to the merger regime, the CCS is guided by the following principles:

a. Some degree of market rationalisation is necessary to enable businesses to reap efficiencies of scale and scope, especially given Singapore's small and open economy;

b. Only a minority of mergers will raise competition concerns. CCS will focus its efforts on these; and

c. Merger procedures should not impose excessive regulatory or business compliance costs, as this may constrain and discourage merger activities.

5. Voluntary notification: The Act presently provides for a voluntary merger notification system, where it is the responsibility of merger parties to assess if their merger would lead to a substantial lessening of competition. If they are of the view that their merger could raise serious competition concerns, they can notify the merger to CCS for a decision. One respondent felt that this approach could be risky, as substantial damage could have been done before the CCS could detect and challenge a merger which has not been notified. Economists and overseas competition authorities are generally of the view that most mergers are beneficial to an economy. Singapore is a small and open economy, where market rationalisation and consolidation are necessary to achieve economies of scale and scope. Given Singapore's size, the CCS is of the view that mergers that are likely to pose competition concerns are likely to be detected at an early stage, thus allowing the CCS to investigate and stop the merger if necessary. Further, mergers voluntarily notified by parties are more likely to be those that pose competition concerns, thus allowing the CCS to focus its resources on problematic mergers. The voluntary notification system for mergers will therefore be retained.

Key Features of Merger Regime

6. Mergers effected before 1 July 2007: The merger provisions will come into force on 1 July 2007. Mergers (as defined in the Act) effected before 1 July 2007 (i.e. where control has passed) are neither subject to the section 54 prohibition, nor the sections 34 and 47 prohibitions. The Third Schedule to the Act will be amended to make this clear.

7. Ancillary restrictions[1] of mergers effected before 1 July 2007: With the implementation of the proposed merger regime on 1 July 2007, ancillary restrictions (defined as agreements directly-related and necessary to the implementation of a merger) will be excluded from the sections 34 and 47 prohibitions. Just as mergers which are effected before 1 July 2007 are not subject to the Act, ancillary restrictions which are directly-related and necessary to the implementation of these mergers will similarly be excluded from the Act.

[1] A merger may involve arrangements that are anti-competitive in nature, but which are directly-related and necessary to the implementation of the merger. These are known as ancillary restrictions. Such agreements are currently subject to the sections 34 and 47 prohibitions.

8. Pre-merger agreements in merger discussions: An ancillary restriction will be excluded from the sections 34 and 47 prohibitions only if the related merger is eventually effected. Some respondents requested for preliminary agreements directly-related and necessary to merger discussions, such as information exchanges, to be similarly excluded, even if the merger does not eventually take place. The CCS' understanding is that merger parties, cognizant that a merger may not go through, will generally limit the exchange of commercially-sensitive information at the pre-merger stage. There does not seem to be a need or justification to exclude such pre-merger discussions. Further, the CCS is concerned that such an exclusion may facilitate potential abuse, for example, in the form of parties exchanging commercially-sensitive information under the guise of pre-merger discussions. The CCS is not aware of any major jurisdiction that provides such an exclusion.

9. Confidential guidance[2]: A respondent suggested that the present provision in the Act to allow parties to notify their mergers for confidential guidance should be retained. It was felt that a preliminary view from the CCS would help parties decide if they should proceed with their merger. However, the CCS' view is that any guidance provided is unlikely to provide certainty to the parties, as third-party views cannot be sought due to the confidential nature of guidance. This means that a merger, for which favourable guidance has been provided, can be re-assessed when more information becomes available or when a third-party complaint is received. The CCS therefore feels that notifications for guidance should be discontinued, as proposed. Parties can, instead engage the CCS at pre-notification discussions if they are considering filing a notification for decision.

10. Validity period of favourable decisions: The CCS will clarify in the guideline, that the validity period for a decision will apply only to a favourable decision allowing an anticipated merger to proceed. As market circumstances change over time, a validity period of one year to effect a merger is reasonable and necessary. The CCS will not re-open favourable decisions for anticipated mergers effected within the validity period, except where commitments have not been adhered to or where information on which the decision was based was materially incomplete, false or misleading.

[2] The Act currently allows merger parties to notify their mergers on a statutory basis to the CCS for a decision or guidance. Due to its confidential nature, guidance provided may be re-assessed if (i) the information provided was misleading or false, (ii) there was a material change in circumstances, or (iii) a complaint has been received.

11. Mergers approved under "any written law"[3]: A respondent asked what would be the position if a financial institution that is regulated by the Monetary Authority of Singapore ('MAS') is involved in a merger activity that is not subject to approval by MAS. If the merger is not subject to approval by another regulator (MAS), the merger will be assessed by the CCS. As part of its assessment, the CCS will seek inputs from the relevant authorities.

CCS Guideline on Substantive Assessment of Mergers

12. Meaning of control: A number of respondents sought clarification on how the concept of control would be applied to various situations, in determining if a merger had occurred. The CCS will clarify accordingly in the substantive assessment guideline, for example, that Annex B of the guideline provides examples of de facto control, whether solely or jointly exercised, and that the definition of voting rights in the guideline is based on the Takeover Code, although other forms of voting rights will also be taken into account when assessing control. The CCS is also studying whether there should be drafting changes to the Bill.

13. Loans and investment activities: In response to concerns expressed by some respondents, the CCS will clarify in the substantive assessment guideline, that it is likely to have competition concerns on loans only if the loan terms take on a larger strategic significance or purpose, which has an effect on competition. It will also clarify that transactions by venture capitalists and private equity investors could raise possible competition concerns, particularly if there is coordination of conduct among companies within their portfolio that are in the same market.

14. Coordinated effects of joint ventures: To address a query on how the CCS will assess the coordinated effects of a joint venture, the CCS will amend the substantive assessment guideline to clarify that co-ordination between a joint venture's parent companies may fall within the Section 34 prohibition if the co-ordination takes place outside the approved joint venture.

15. Point of assessment of test for substantial lessening of competition (SLC)[4]: In response to requests for clarification on the point in time when the test for SLC would be applied, the CCS will amend the substantive assessment guideline to clarify that the SLC test will be applied prospectively. The starting point for assessing the future will depend on the facts.

[3] The intent of the Act is to exclude mergers that are subject to approval by another regulatory agency.
[4] Section 54(1) of the Act prohibits mergers that have resulted, or may be expected to result, in a substantial lessening of competition within any market in Singapore for goods or services.

16. Concentration thresholds: One respondent requested for the Herfindahl-Hirshman Index (HHI) to be included as a primary measure of concentration[5], or as an alternative measure to the Concentration Ratio of the three largest firms in the market (CR3). The CCS had earlier considered and decided against using the HHI, as it may not be appropriate for a small economy. Other small and open economies, such as New Zealand, have similarly adopted market share and CR as indicators of concentration. As Singapore markets tend to be more concentrated due to our small economy, there is likely to be great disparity between a HHI threshold in Singapore and those of other countries. Calculation of the HHI also requires knowledge of the market shares of other players in the market.

17. Indicative thresholds for non-horizontal mergers: A respondent asked whether indicative thresholds would also be provided for non-horizontal mergers. Although the CCS' recognises that non-horizontal mergers are unlikely to raise competition concerns, it is possible that the merged entity may act to foreclose a part of a market. The CCS will be assessing non-horizontal mergers on a case-by-case basis.

18. Net economic efficiencies[6]: One respondent commented that benefits accruing solely to the merged entity should not be considered efficiencies. The CCS agrees; the benefits should flow to markets in Singapore, and should bring about lower costs, greater innovation, greater choice and/or higher quality. Mergers (with a SLC) that only create profits for the companies concerned, but with no resulting efficiency benefits for a market in Singapore, will not be excluded from the section 54 prohibition. In the same vein, a merger that leads to a SLC in Singapore, but where the primary purpose is to create an enterprise capable of competing in markets outside Singapore, would be excluded if it results in economic efficiencies to Singapore that outweigh any anti-competitive detriment in Singapore. The substantive assessment guideline will clarify these points accordingly.

[5] The level of concentration in a market is one of the indicators of competitive pressure within that market.

[6] The CCS recognises that mergers that result in a SLC could have net offsetting efficiencies, and hence are, on balance, beneficial to the economy. The CCS has therefore proposed that such mergers be allowed to proceed, if the economic efficiencies they bring about can be shown to outweigh the anti-competitive detriment.

19. Remedies[7]: One respondent suggested that the CCS, when deciding on an appropriate remedy for an infringing merger, should take into account the extent that the merger parties have actually integrated their operations. The CCS disagrees. In considering an appropriate remedy, a key factor is whether the remedy will prevent or mitigate the substantial lessening of competition and any resulting adverse effects. It is the responsibility of the merger parties to assess whether there is a risk that their merger may infringe the Act before they decide to carry into effect their anticipated merger or proceed with further integration of a merger. They can notify their anticipated merger, if they assess that there is a risk. Although the CCS will not normally consider the costs of divestment to the parties in the setting of remedies, the CCS will have due regard to the principle of proportionality.

CCS Guideline on Merger Procedures

20. Notification of anticipated mergers that have been 'publicised as to be generally known or readily ascertainable': The CCS had proposed that anticipated mergers can only be notified after knowledge of the anticipated merger is in the public domain. Clarification on this requirement was requested. It was pointed out that the majority of anticipated mergers of private companies will not require any public announcement. As the intention is to enable the CCS to seek third-party views on a notified anticipated merger, the CCS will clarify in the merger procedure guideline, that the CCS will accept the notification of anticipated mergers as long as they are no longer confidential.

21. Pre-notification discussions: The CCS had proposed holding pre-notification discussions for merger parties intending to submit a notification for decision. This is to help them identify the information needs for a complete notification and how the information can be provided to expedite the CCS' review of a merger situation. In response to a suggestion from a respondent, the CCS will now also consider accepting requests for pre-notification discussions from 1 June 2007, to help merger parties prepare for the filing of their notifications from 1 July 2007, when the merger regime comes into effect.

[7] Once the CCS has decided that a merger has resulted, or may be expected to result in a SLC, it has to decide on the action to remedy, mitigate or prevent the SLC or any adverse effects resulting from the SLC. Such actions are called remedies.

22. Third-party consultation: CCS may, when assessing mergers, invite comments from third parties. There is a need to balance the concerns expressed by some respondents on the need to give the public sufficient time to develop full submissions, especially in a complex merger, whilst obviating a situation where views are deliberately submitted late, for example, by competitors, to frustrate a merger transaction. When seeking third-party views, the CCS will request that views be submitted within a stipulated timeframe, so that the CCS will have sufficient time to give due consideration to the submissions. If no comments are received, a favourable decision may be issued earlier than the 30 working day period for a Phase 1 Review. The CCS will scrutinise third-party submissions carefully, to ensure that frivolous ones do not frustrate or delay merger transactions unnecessarily. In addition, the CCS will clarify in the guideline that third parties are not required to prove legitimate interest before acceptance of their submissions.

23. Timelines for review periods: One respondent requested that, in the event that the CCS does not make a decision within the specified time limits or if it extends the time limit for review[8] under the two phases of review, the anticipated merger will be deemed not to result in a SLC. The CCS is unable to accede to the request. Some flexibility in timelines is necessary, especially if more time is needed to negotiate commitments. Mindful of the time-sensitive nature of anticipated mergers, CCS will endeavour to expedite the processing of merger notifications and will inform parties in advance when it extends the time period for each review phase. The situations when a Phase 1 or Phase 2 review will be extended will depend on the facts and circumstances of the case.

24. One respondent asked if the timelines for review[9] would be reduced if both Forms 1 and 2 are submitted concurrently in Phase 1. The CCS will like to clarify that the timelines for Phase 1 and 2 will remain unchanged even if both Forms 1 and 2 are submitted together under Phase 1. This is because Phase 2 will only commence after the CCS has decided that it is not able, at the completion of the Phase 1 review, to form a view that the merger does not infringe the Act. The CCS will amend the merger procedure guideline and/or Forms 1 and 2 to make it clear that Phase 2 commences only when, in addition to the submission of Form 2, the CCS has notified the parties that the merger will be referred to a Phase 2 review.

[8] The CCS has proposed to adopt a two-phase review process for evaluating mergers. By the end of a Phase 1 review, the CCS will determine whether to (a) issue a favourable decision and allow the merger to proceed, (b) proceed to Phase 2, or (c) in exceptional circumstances, extend the Phase 1 review period upon informing the merger parties in writing. By the end of a Phase 2 review, the CCS will determine whether to (a) issue a favourable decision and allow the merger to proceed, (b) issue an unfavourable decision, or (c) in exceptional circumstances, extend the Phase 2 review period upon informing the parties in writing.

[9] The CCS expects a Phase 1 review to last no more than 30 working days, and a Phase 2 review no more than 120 working days.

25. A respondent asked the CCS to specify the maximum number of extension days if commitments[10] are proffered to the CCS for consideration. The CCS is of the view that it is difficult to pre-determine how much time is required for negotiation of commitments. It is not aware of a jurisdiction that has specified a specific extension period. Mindful of the time-sensitive nature of mergers, the CCS will expedite its assessment, where possible.

26. Notification forms: A respondent suggested omitting information on groups to which parties to the merger belong from Form 1, as this requirement imposes unnecessary and onerous obligations on notifying parties. The CCS will like to explain that it requires this information to evaluate the likely effects of a merger in the context of the interests and activities of all the companies in the groups, particularly in the relevant markets. The CCS will, for the purpose of this information item, clarify in the guideline, the terms "group" and "reportable market". Form 1 will also be amended to allow parties to provide any information that they consider relevant but which were not explicitly asked for in the Form.

27. A respondent felt that it was sufficient to provide business plans only for the preceding two years, if available, instead of five years as stated in the guideline. The CCS is of the view that business plans for the preceding five years would be necessary to give a sense of the activities of the parties over the years. Such business plans should be readily available from the parties' business records.

Other Issues raised by Respondents

28. There were various suggestions made by respondents which, where appropriate, the CCS will address via clarification and amendment to the Bill, the substantive assessment or the merger procedures guidelines. They include the following suggestions:

a. The substantive assessment guideline should specify the relevant parts of the guideline relating only to horizontal mergers. The CCS does not share this view, as there may be situations in which non-coordinated effects could apply to non-horizontal mergers;

b. To state that the trigger point/event for the establishment of a joint venture is when there is an acquisition or creation of joint control. The substantive assessment guideline will be amended to reflect this;

[10] Commitments are undertakings given by the merger parties and accepted by a competition authority, binding the former to a course of action which then allows an otherwise anti-competitive merger to proceed. The indicative timeframe for merger review will be stopped during the period of negotiation of commitments between the merger parties and the CCS.

c. The substantive assessment guideline be amended to clarify that one of the two proposed indicative threshold tests relate to market share and not to 'share of supply'. The CCS agrees and will amend accordingly;

d. To state that countervailing buyer power may act as an effective competitive constraint in conjunction with pressure from competitors. The CCS agrees and indeed this point is already reflected in paragraph 7.14 of the substantive assessment guideline;

e. The CCS should use a consistent term instead of using the terms 'customer' and 'buyer' interchangeably. The CCS agrees and will amend the guidelines;

f. Paragraphs 6.7-6.10 of the substantive guideline to be amended to make it clear that they apply to both tacit and explicit coordination. The CCS agrees and will amend the guideline;

g. The current drafting of paragraph 7.17 of the substantive assessment guideline should be changed, as it is not necessary to show that an assessment of efficiencies that enhance rivalry as part of an SLC assessment, does not require that the benefits be sufficient to outweigh the competition detriment caused by the merger. The CCS agrees and will amend the guideline; and

h. Clarification on the term 'merged entity' in relation to the various categories of mergers as set out in section 54. The term 'merged entity' should be viewed in its context, as there are too many scenarios for the CCS to be able to provide specific definitions for each case within the guidelines. The CCS' concern is with the anti-competitive effects arising from a merger and not the form. Where parties are unclear if their merger will pose competition concerns, they may engage the CCS in pre-notification discussions.

Other Proposed Amendments to the Act

29. Power to require documents or information: One respondent requested clarification on the circumstances under which the CCS will exercise its powers under the new Section 7A[11]. Following consultation with the Ministry of Law, the CCS will be proposing that it may exercise the proposed powers only where it has reasonable grounds to suspect that competition is restricted or distorted in a particular market, or in respect of notifications for decisions where it has reasonable grounds for suspecting that there has been an infringement of the Act. The Bill will be amended accordingly.

[11] The proposed section 7A grants the CCS powers to require parties to comply with requests for information and returns, when exercising its functions in carrying out sector studies/inquiries and when dealing with notifications.

Interaction with Singapore Takeover Code

30. A respondent offered suggestions on how the proposed merger regime could be aligned with the provisions under the Singapore Code on Takeovers and Mergers ("Singapore Takeover Code"). CCS will like to highlight that situations involving a takeover offer, which is subject to the Singapore Takeover Code, may also fall under the purview of the merger provisions of the Competition Act, when they come into effect on 1 July 2007. In such a situation, parties to the takeover offer will need to take into account the requirements under both the Singapore Takeover Code and the Act. The CCS and the Securities Industry Council (SIC) are working together to align their processes to ensure the smooth functioning of both regulatory regimes and to provide greater certainty to the market. Details will be provided in due course.

Next Steps

31. The CCS will finalise the Bill, taking into consideration the feedback and comments received. The finalised merger guidelines will be published once Parliament has passed the Bill.