Corporate Acquisitions and Mergers

Volume 3

Editor-in-Chief
Peter F. C. Begg

AUSTIN BOSTON CHICAGO NEW YORK THE NETHERLANDS

Supp 4/2008

Published by Kluwer Law International
P.O. Box 316
2400 AH Alphen aan den Rijn
The Netherlands

Sold and distributed in North, Central and South America by
Aspen Publishers, Inc.
7201 McKinney Circle
Frederick MD 21704
USA

In all other countries, sold and distributed by
Kluwer Law International c/o
Turpin Distribution Services Ltd.
Stratton Business Park
Pegasus Drive
Biggleswade
Bedfordshire SG18 8TQ
United Kingdom

© Kluwer Law International
First published 1986

Basic Work ISBN 978-1-8533-3832-8
British Library Cataloguing in Publication Data

Begg, P.F.C.
Corporate acquisitions and mergers
1. Consolidation and merger of corporations
I. Title
344.206–6626 KD 2127

Volume 3

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without the prior permission of the publisher.

Permission to use this content must be obtained from the copyright owner. Please apply to: Permissions Department, Wolters Kluwer Legal, 76 Ninth Avenue, Seventh Floor, New York, NY 10011, United States of America. E-mail: permissions@kluwerlaw.com. Website: www.kluwerlaw.com

Printed in the Netherlands

General Table of Contents

Volume 1

Preface .... vii–xii
Filing Instructions .... i–ii
Filing Record .... i–ii
Checklist of Pages .... i–iv
Argentina i–68
Australia i–32
Austria i–36
Belgium i–144
Brazil i–24
Canada i–90
Chile i–16
China i–24
Czech Republic i–90
Denmark i–34
European Union i–130
Finland i–50
France i–104

Volume 2

Germany i–138
Greece i–40
Hong Kong i–32
India i–68
Indonesia i–36
Iran i–34
Ireland i–20
Israel i–44
Italy i–24

Japan i–158
Lithuania i–40
Luxembourg i–38
Malaysia i–22
Mexico i–24
The Netherlands i–56
New Zealand i–48
Nigeria i–52
Norway i–34
Pakistan i–32
Peru i–34
Philippines i–26
Poland i–58
Portugal i–48
Romania i–40
Russia i–30

Volume 3

Singapore i–30
Slovak Republic i–72
South Africa i–46
Spain i–22
Sweden i–132
Switzerland i–114
Taiwan i–68
Thailand i–54
Turkey i–36
Ukraine i–28
United Kingdom i–150
United States i–302
Vietnam i–62

Singapore

Andrew M Lim
Lim Mei
Lim Pek Bur
Steven Seow
Daren Shiau
Allen & Gledhill LLP

Updated to October 2008

Corporate Acquisitions and Mergers: Singapore
© Kluwer Law International

Allen & Gledhill LLP

Founded in 1902, Allen & Gledhill LLP is the largest law firm in Singapore with over 290 lawyers, and offers a full range of legal services. The firm is regularly recognized as a leading law firm in various publications. Administratively, the firm is divided into the following core practice areas: corporate and commercial, corporate real estate, financial services, intellectual property and technology, and litigation and dispute resolution. However, members of the firm work in practice groups, where specialists from various practice areas come together as a team to share their expertise and to offer a comprehensive legal solution for the firm's clients. Often engaged in work of an international nature, Allen & Gledhill maintains contacts in jurisdictions all over the world. Our mergers and acquisitions team has advised on many of the largest and most high-profile mergers and acquisitions transactions in Singapore and in the region. Our past transaction experience and proven track record mean that we have the expertise to conduct, coordinate and successfully close such transactions, as well as offer all the resources of a large mergers and acquisition team.

For further information regarding our Mergers & Acquisition practice, please contact:

Andrew M Lim
Tel: +65 6890 7706
andrew.lim@allenandgledhill.com

Lim Mei
Tel: +65 6890 7732
lim.mei@allenandgledhill.com

Contents

The Legal Environment 1

The Regulatory Framework in Outline 1
Merger Controls 1
Securities and Futures Act 1
Companies Act 2
Take-over Code and the SIC 3
Stock Exchange Rules 4
Statutory Shareholding Restrictions in Specific Industries 5

Methods of Take-over 5
Public Offers 5
Cash Purchase and/or Share Swap 6
Reverse Take-overs 6
Scheme of Arrangement 7
Amalgamation Process 9
Shareholder Disclosures 10
Insider Trading 11
Types of Take-over Offers 11
Mandatory Offers 11
Chain Principle 12
Whitewash 12
Voluntary Offers 13
Partial Offers 14
Private Acquisitions 15

Competition Aspects 16
Merger Control Generally 16
Mergers within Singapore 17
Mergers outside Singapore 18
Anti-competitive Mergers 18
Merger Authorization 19

Taxation Aspects 22
Taxation Issues on Acquisitions Generally 22
Stamp Duties 23
Goods and Services Tax 24
Financing Rules and Restrictions 25
Withholding Taxes 25

Employment Considerations 26
Employee Rights 26

Compulsory Transfer of Employees 27
Employees under the provisions of the EA 28
Employees who fall outside the provisions of the Employment Act 28

Emerging Issues and Future Developments 28

THE LEGAL ENVIRONMENT

[01] The Singapore legal system is based on the common law system, where case precedents and statutory provisions exist side by side. Singapore obtained its independence in 1965 and the Companies Act was passed in 1967. The Companies Act of 1967 was based on the Malaysian model, which in turn was based on the Australian model at that time, which was itself derived from the then Companies Act of the United Kingdom. Over the years, the Companies Act has evolved uniquely from its predecessors. The take-over and corporate fund-raising provisions of the Companies Act were transposed to the Securities and Futures Act (the 'SFA'), which came into effect fully on 1 October 2002.

[02] The Companies Act continues to contain general corporate legislation including provisions relating to the incorporation, management, administration and winding-up of companies. Two basic types of companies are provided for in the Companies Act, namely, the private company and the public company. A company is a private company where its memorandum or articles of association contains a restriction on the right to transfer shares and a limitation on the number of members to not more than 50. A public company is a company that is not a private company. Public companies include companies limited by guarantee and companies limited by shares which are incorporated as public companies and which may or may not be listed on a stock exchange. Many public companies incorporated in Singapore are listed on the Singapore Exchange Securities Trading Limited (the 'SGX'), and all companies listed on the SGX are necessarily public companies. The SGX is currently the only securities exchange in Singapore.

THE REGULATORY FRAMEWORK IN OUTLINE

Merger Controls

[03] In Singapore, the merger control regime is prescribed under the Competition Act. The Competition Act is the principal statute governing the competition law regime in Singapore. Merger control provisions under the Act came into force on 1 July 2007. Merger controls are dealt with in detail in paras [70]–[100] below.

Securities and Futures Act

[04] Part VIII of the SFA contains legislative provisions relating to take-over offers in three sections. Section 138 of the SFA provides for an advisory body known as the Securities Industry Council (the 'SIC') to be set up. The SIC is the principal regulator which oversees the Singapore Code on Take-overs and Mergers (the 'Take-over Code'). Section 139 provides that for the more effective administration, supervision and control of take-over offers and matters connected

therewith, the Monetary Authority of Singapore (the 'MAS') shall, on the advice of the SIC issue the Take-over Code. Section 140 lists the offences relating to take-over offers. It is an offence for a person to give notice or publicly announce that he intends to make a take-over offer if he has no intention to make one. It is also an offence to make a take-over offer if a person has no reasonable or probable grounds for believing that he will be able to perform his obligations pursuant to the offer being accepted or approved.

Companies Act

[05] The Companies Act is relevant in the context of corporate acquisitions and mergers. Section 210 of the Companies Act provides for schemes of arrangement. Singapore-incorporated companies may also use the amalgamation process in Section 215A to 215J of the Companies Act to facilitate the combination of such companies. Section 215 of the Companies Act governs the compulsory acquisition of the shares of minority shareholders once an offeror has acquired 90 per cent of the target's shares through a take-over offer (excluding the shares held by the offeror). Shares held by the offeror include shares held by a nominee on behalf of the offeror, as well as shares held by a related corporation of the offeror or a nominee of that related corporation. Under the Companies Act, a related corporation is a subsidiary, a holding company or a fellow subsidiary.

[06] The Companies Act also contains provisions relating to financial assistance in Sections 76 and 76A. Currently, the financial assistance provisions restrict a company incorporated in Singapore from providing financial assistance, whether directly or indirectly, to any person in the acquisition or proposed acquisition of shares in that company or the holding company of that company. The provisions relating to financial assistance are widely drafted. For instance, if a party seeking to acquire shares in a target company procures the target company to charge its assets to refinance a loan taken by the offeror to acquire the target company, this may constitute financial assistance by the target company.

[07] Financial assistance is, however, a restricted but not a prohibited activity under the Companies Act. It is possible to 'whitewash' financial assistance, where the company obtains its shareholders' approval by a special resolution and complies with the procedures set out in Sections 76(10) to 76(14) of the Companies Act, which include the filing of certain prescribed forms with the Registrar of Companies and Businesses (the 'Registrar'), publishing a notice of intention to give financial assistance in the daily newspaper and permitting objections to be made by shareholders, debenture-holders, creditors and the Registrar. A special resolution requires the approval of a majority of not less than 75 per cent of shareholders present and voting at a general meeting for which not less than 21 days' prior notice has been given. Where the company is a subsidiary, the ultimate holding company, if listed or incorporated in Singapore, is also required to obtain its shareholders' approval for giving the financial assistance. Financial assistance may also be given in other circumstances including where the amount of financial assistance is not more than 10 per cent of the company's paid-up capital and

reserves or where the resolution to provide the financial assistance receives the unanimous approval of the shareholders.

Take-over Code and the SIC

[**08**] The Take-over Code applies to the acquisition of voting control of public companies. It applies to corporations (including corporations not incorporated under Singapore law) with a primary listing of their equity securities and business trusts with a primary listing of their units in Singapore. While the Take-over Code was drafted with listed public companies and listed registered business trusts in mind, unlisted public companies and unlisted registered business trusts with more than 50 shareholders or unit holders, as the case may be, and net tangible assets of SD5 million or more must also observe, wherever possible and appropriate, the letter and spirit of the Take-over Code as set out in its General Principles and Rules. The Take-over Code does not apply to take-overs or mergers of other unlisted public companies and unlisted business trusts, or private companies. With respect to foreign-incorporated companies and foreign-registered business trusts, the Take-over Code applies only to those with a primary listing in Singapore.

[**09**] The Take-over Code applies to all offerors, whether they are natural persons or not, be they resident in Singapore or not and whether citizens of Singapore or not, and whether they are corporations or bodies unincorporated, be they incorporated or carrying on business in Singapore or not. The Take-over Code also extends to acts done or omitted to be done in and outside Singapore.

[**10**] The Take-over Code is administered and enforced by the SIC. The SIC is provided with discretion to waive the application of the Take-over Code in relation to (i) Singapore-incorporated companies or Singapore-registered business trusts with a primary listing overseas, and (ii) unlisted public companies and unlisted registered business trusts with more than 50 shareholders or unit holders, as the case may be, and more than SD5 million of net tangible assets.

[**11**] The SIC is made up of representatives from the government, the MAS and the private sector. The day-to-day business of the SIC is conducted by a professionally-staffed full time Secretariat. The MAS is a statutory board formed under the Monetary Authority of Singapore Act and is the *de facto* central bank of Singapore, as well as the integrated regulator of the banking, insurance, financial, securities and futures industries.

[**12**] The Take-over Code contains General Principles, Rules and Notes. Nonetheless, the Take-over Code notes that it is impracticable to devise rules in sufficient detail to cover all circumstances that can arise in take-over and merger transactions. Therefore, both the letter and spirit of the Take-over Code must be observed, especially in circumstances not explicitly covered by any Rules. The SIC may, pursuant to Section 139 of the SFA, also issue rulings on the interpretation of the General Principles and the Rules in the Take-over Code and lay down the practices to be followed by the parties in a take-over offer or a matter connected therewith. In the course of a take-over, it is not unusual to require

rulings from the SIC. The SFA provides that such rulings or practices issued by the SIC shall be final and not be capable of being challenged in any court.

[**13**] The SIC is available at all times for confidential consultation on points of interpretation of the Take-over Code. When there is any doubt as to whether a proposed course of conduct in a take-over offer accords with the General Principles or Rules of the Take-over Code, it is advisable for the parties or their advisers to consult the SIC in advance, as such confidential consultation minimises the risk of breaches of the Take-over Code.

[**14**] The parties to a take-over are primarily responsible for ensuring observance of the provisions of the Take-over Code. If there appears to be a breach of the Take-over Code, the SIC may summon the alleged offenders to appear before the SIC for a hearing, where every alleged offender will have the opportunity to answer allegations and also to call witnesses. The SFA provides the SIC with powers to investigate any acts of misconduct in relation to or connected with a transaction involving a take-over or merger transaction, where it has reason to believe that any party or any financial adviser is in breach of the Take-over Code. In this respect, the SIC is empowered to make enquiries, summon persons to give evidence on oath or affirmation, or to produce any document or material necessary for the purpose of the enquiry.

[**15**] Although the Take-over Code does not have the force of law and does not give rise to criminal proceedings, its breach may result in the imposition of sanctions by the SIC. Sanctions which the SIC may impose include private reprimands, public censure and, where the breach is flagrant, further action designed to deprive the offender temporarily or permanently of its ability to enjoy the facilities of the securities market.

[**16**] If the SIC finds evidence to show that a criminal offence has been committed under the Companies Act, the SFA or any relevant criminal law, it will recommend to the Attorney-General, the prosecutorial authority in Singapore, that the alleged offender be prosecuted. It is noted that the SFA sets out the criminal offence of insider trading and prohibits a person with non-public price sensitive information to deal in the shares of a target company.

Stock Exchange Rules

[**17**] Where either the acquiring company or the target company is a company listed on the SGX, the SGX Listing Manual (the 'Listing Manual') also applies. In summary, the Listing Manual contains rules regulating the general affairs of listed companies and therefore, its provisions have to be taken into account if either the acquiring company or the target company is listed on the SGX.

[**18**] The listing rules set out in the Listing Manual are not statutory in nature. They are issued by the SGX, subject to the approval of the MAS as required under the SFA. The SFA also empowers the SGX to apply to the court for a court order to enforce compliance with the listing rules, though this power has been rarely, if

ever, used. In practice, ready observance of the Listing Manual is advised as failure to comply may lead to a reprimand by the SGX, and at worst, a de-listing. Furthermore, the SFA provides that a company listed on the SGX must not intentionally, recklessly or negligently fail to notify the SGX of information on specified events or matters, as they occur or arise, which are required to be disclosed under the listing rules for the purpose of making information available to the market.

[**19**] The Listing Manual sets out the continuing listing requirements and corporate disclosure policy which a listed company has to comply with. A listed company is required to keep the SGX, its shareholders and other holders of its listed securities informed of all material information relating to it, and this includes information in relation to a take-over, merger or acquisition.

[**20**] A listed company intending to make an acquisition or a listed company which is the target of an offer will have to make the necessary disclosures in a timely manner. The information to be disclosed has to be factual, clear and succinct, and contain sufficient quantitative information to allow investors to evaluate its relative importance to the activities of the listed company. This includes information pertaining to the particulars of the transaction, its rationale, any consideration payable, any analysis of financial impact, the conditions for the transaction and the disclosure of any conflicts of interest.

[**21**] The Listing Manual is also relevant where a listed offeror offers new shares as consideration in its take-over offer. Where the target company is a listed company, the Listing Manual contains provisions relating to reverse take-overs. The approval of the SGX is required in a reverse take-over for the transaction itself as well as for the listing of new shares in the target company.

Statutory Shareholding Restrictions in Specific Industries

[**22**] Other statutes relating to particular industries also govern take-over activity in Singapore insofar as they limit or require prior regulatory approval for share ownership in companies engaged in those industries. Those industries are generally industries perceived to be critical to national interests, for instance, banking, finance, insurance and media.

[**23**] Examples of such statutes include the Banking Act, the Finance Companies Act, the Insurance Act and the Newspaper and Printing Presses Act.

METHODS OF TAKE-OVER

Public Offers

[**24**] A take-over or acquisition of shares may be effected in various ways, taking into account financing preferences, tax considerations and market conditions. The most efficient method for any particular transaction depends on the circumstances

and the objectives of the transaction parties. The more common methods, which will be discussed in further detail, are cash purchases and/or share swaps, reverse take-overs and schemes of arrangement. The amalgamation process, as set out in Sections 215A to 215J of the Companies Act, may also be used.

[**25**] The end result of these various take-over methods is that the target company becomes a subsidiary of the acquiring company. This enables the acquiring company to consolidate the results of the target company with its own. Apart from the above methods, there are other ways to achieve this result, for instance, incorporating a new holding company to acquire both the acquiror and the target company or amalgamating the target company into the acquiror so that the target company ceases to exist as a legal entity.

Cash Purchase and/or Share Swap

[**26**] An acquiring entity may offer cash, shares or other securities or a mixture of any of these as consideration for the take-over bid. The offer may be in the form of cash from the acquiror's own resources, from debt financing, or from an underwritten issue of the acquiror's own shares. In a cash purchase, the acquiring entity makes an offer and acquires the shares of the target company for cash only. In a share swap arrangement, the acquiring entity acquires shares in the target company from the shareholders of the target company and in return, provides shares in itself, the acquiror.

[**27**] The Take-over Code provides that a mandatory offer has to be in the form of a cash offer or be accompanied by a cash alternative. In the case of a voluntary offer, a cash offer or an offer accompanied by a cash alternative has to be made in certain circumstances (see the discussion of mandatory offers and voluntary offers in paragraphs [47]–[58] below). Apart from any mandatory cash and securities components stipulated in the Take-over Code, the choice of consideration for the take-over offer will depend, amongst other things, upon the acquiror's own financial position and, if it is proposing an underwritten share issue to effect a share swap, the market's appetite for its shares. The shareholders of a target company may be given a choice of consideration, for example, cash with a partial share alternative. They may also be offered the facility to be able to mix and match different forms of consideration between themselves by making certain elections to the acquiror.

Reverse Take-overs

[**28**] In a reverse take-over transaction, the acquiror transfers to the target company certain assets and business in exchange for new shares in the target company. The acquiror then may be required to make, or may decide to make, a take-over offer for all the remaining shares in the target company that it does not own. Where the target company is a listed company, the effect of a reverse take-over is that the acquiror gains control of a listed company, and such transactions

are also known as 'back door' listings. These transactions are subject to additional approvals and requirements by the SGX.

[**29**] The Listing Manual contains specific provisions relating to 'very substantial acquisitions or reverse-takeovers'. Whether a transaction is considered a very substantial acquisition or a reverse take-over depends on various calculation modes set out in the Listing Manual or whether the transaction would result in a change in control of the listed company. In calculating whether or not a transaction is a very substantial acquisition for the purposes of the Listing Manual, the following figures are taken into account: the operating profit before income tax attributable to the assets acquired, compared with the operating profit before income tax of the target company and its subsidiaries; the aggregate value of the consideration given or received, compared with the market capitalization of the target company and its subsidiaries; or the number of equity securities issued by the target company and its subsidiaries, compared with the number of equity securities previously in issue. If any one of the relative figures equals 100 per cent or more, the transaction will be regarded as a very substantial acquisition or reverse take-over and the Listing Manual requires the transaction to be made conditional upon the approval of shareholders. Apart from the transaction itself, the shareholders will also have to approve the issue of new shares in accordance with the Companies Act.

[**30**] Furthermore, the transaction as well as the issue and listing of the new shares will have to be approved by the SGX. In this respect, the SGX requires that the enlarged group consisting of the offeror and offeree companies will have to re-comply with the SGX listing requirements. 'Back door' listings are viewed by the SGX in the same regard as initial public offerings.

Scheme of Arrangement

[**31**] Instead of pursuing a take-over under the Take-over Code, an acquisition of a public company may also be effected through a scheme of arrangement provided for in Section 210 of the Companies Act. In a scheme of arrangement, the target company cancels its existing shares and issues new shares in the target company to the acquiror, in consideration of the acquiror paying cash or issuing new shares in the acquiring company to the shareholders of the target company, or a combination of both cash and shares. Alternatively, outstanding shares in the target company may be transferred from the shareholders of the target company to the acquiror. As the Section 210 scheme of arrangement is an arrangement between a company and its members, only the target company may initiate a scheme of arrangement. It is, therefore, not available as an option in a hostile acquisition. A scheme of arrangement will typically be used only in a situation where the acquiror wishes to acquire all the shares of a target company.

[**32**] All schemes of arrangement are subject to compliance with the Take-over Code. However, the SIC may, subject to conditions, exempt a scheme from selected provisions of the Take-over Code. Exemptible provisions include those

relating to the offer timetable and terms of the offer. The SIC will normally grant such exemptions if the following conditions are met. First, the common substantial shareholders of the scheme companies (those holding 5 per cent or more in both the companies to be merged) are to abstain from voting on the scheme. Secondly, persons and their concert parties who as a result of the scheme would acquire 30 per cent or more in a scheme company or a new entity that holds the scheme company or companies, or persons who as a result of the scheme (if they already hold 30 per cent to 50 per cent before the scheme) would increase their voting rights by more than 1 per cent in any period of six months, are to abstain from voting on the scheme. Thirdly, the directors of a scheme company who are also directors of the other scheme company or who are acting in concert with those persons mentioned in the earlier conditions are to abstain from making a recommendation on the scheme to shareholders of the scheme companies. Fourthly, the scheme company which is in effect the offeree company has to appoint an independent financial adviser to advise its shareholders on the scheme of arrangement. Where the scheme of arrangement involves a reverse take-over or a 'merger of equals', each of the scheme companies must appoint an independent financial adviser to advise their respective shareholders. In cases of doubt, the SIC should be consulted.

[**33**] Various other approvals are also required for a scheme of arrangement to take effect. In accordance with Section 210(2) of the Companies Act, a scheme of arrangement requires the approval of a majority in number of members of the target company present and voting in person or by proxy, representing at least 75 per cent in value of the shares voted at a scheme meeting. It is noted that the SGX may impose an additional requirement that not more than 10 per cent in value of the shares should have voted against the proposed scheme. In the voting process, the acquiror and its related parties as well as common substantial shareholders of the acquiror and the target company would have to abstain from voting. A substantial shareholder is one who holds 5 per cent or more of a company's shares. Furthermore, in accordance with the Companies Act, the scheme also requires the sanction of the Singapore High Court (the 'High Court'). Once an order for a scheme of arrangement has been approved by the High Court, it binds all shareholders, including those who had objected to it at the scheme meeting or in the High Court.

[**34**] In a scheme of arrangement, the target company will issue a scheme document to its shareholders. Essentially, the scheme document is a circular to convene, at the direction of the High Court, a general meeting of the shareholders of the target company to approve the scheme of arrangement and which also contains an explanatory statement to explain to shareholders the effect of the implementation of the scheme. In order to satisfy the conditions (set out in paragraph 33) to obtain an exemption from selected provisions of the Take-over Code, the scheme document must disclose the names of those common substantial shareholders, and persons who would acquire more voting rights as a result of the scheme, who are to abstain from voting. The scheme document must also disclose their voting rights in the scheme company and/or the new entity after the scheme of

arrangement, and furthermore state that by voting for the scheme, the shareholders are agreeing to the person acquiring or consolidating effective control without having to make a general offer.

Amalgamation Process

[**35**] As an alternative to the scheme of arrangement, an acquisition of a public company may be effected through an amalgamation process. Such a process may involve either two or more companies amalgamating and continuing as one company or two or more companies amalgamating and forming a new company. The main difference of the amalgamation process is that it does not require the sanction of the High Court, unlike a scheme of arrangement.

[**36**] The clearance of the SIC is required for the exemption of certain provisions of the Take-over Code. Exemptible provisions include those relating to the offer timetable (Rule 22), acceptances (Rule 28), keeping the offer open for 14 days after it is revised (Rule 20.1), and the right of acceptors to withdraw their acceptances (Rule 29). Under the Take-over Code, the application would normally be granted by the SIC if the conditions set out in paragraph 33 which are also applicable to schemes of arrangement are met. Additionally, the SIC would require for the amalgamation proposal to be posted within 35 days of the announcement of the amalgamation, and for the amalgamation to be effective by 5.30 p.m. on the 60th day after the date of posting of the amalgamation proposal

[**37**] The following approvals are required for an amalgamation process:

- (i) an amalgamation proposal, containing the information required by the Companies Act, must be approved by the members of the amalgamating company by special resolution and by any third party if so provided for in the amalgamation proposal;
- (ii) the board of directors of each amalgamating company, before the general meeting, has:
  - (a) resolved that the amalgamation is in the best interest of the amalgamating company; and
  - (b) made a solvency statement in relation to each of the amalgamating company and the amalgamated company, in each case in accordance with the Companies Act;
- (iii) each director who votes in favour of the resolution and the making of the solvency statements described in sub-paragraph (ii)(b) above has signed a declaration that certain specified conditions set out in the Companies Act are satisfied and the grounds of that opinion;
- (iv) the board of directors of each amalgamating company has sent to every member of the amalgamating company, not less than 21 days before the general meeting, inter alia, a copy of the amalgamation proposal, the declaration of the directors set out in sub-paragraph (iii) above, a statement of any material interests of the directors and such further information and explanation as may be necessary to enable a reasonable member of the amalgamating company to understand the nature and implications, for

the amalgamating company and its members, of the proposed amalgamation; and

(v) the directors of each amalgamating company have, not less than 21 days before the general meeting, sent a copy of the amalgamation proposal to every secured creditor of the amalgamating company as well as published in at least one daily English newspaper a notice of the proposed amalgamation.

[**38**] In order to effect the amalgamation, the documents specified in Section 215E of the Companies Act must be filed with the Registrar. Upon the receipt of the relevant documents and fees, the Registrar shall issue a notice of amalgamation. The effective date of the amalgamation is the date shown on such notice of amalgamation, which is either the date of filing with the Registrar or the date specified in the amalgamation proposal on which the amalgamation is intended to be effective (if it is to be on or after the date of such filing).

[**39**] On the effective date of the amalgamation, all property, rights and privileges of each amalgamating company are transferred to and vested in the amalgamated company. All liabilities and obligations of each amalgamated company are transferred to and become liabilities of the amalgamated company.

Shareholder Disclosures

[**40**] The Take-over Code provides that parties to a take-over transaction and their associates are free to trade in the target company's shares but are subject to additional disclosure obligations during the offer period. The parties to a take-over and their associates are required to disclose shares purchased or sold by them on their own account on a daily basis. The term 'associate' will normally include a holder of 10 per cent or more of the equity share capital of the offeror or target company.

[**41**] Disclosure has to be made to the SGX and the SIC. Dealings by an offeror or the target company or by an associate may be disclosed by the party concerned or by an agent, for instance, an investment bank or stockbroker, who acts on its behalf. Where there is more than one agent, particular care should be taken to ensure that the responsibility for disclosure is agreed between the parties and that it is neither overlooked or duplicated.

[**42**] Apart from the Take-over Code, shareholder disclosure obligations are found in the Companies Act and the SFA, and are required by the SGX with regard to companies listed thereon. Disclosure obligations arise when a shareholder becomes a substantial shareholder, being a shareholder who owns 5 per cent or more of the aggregate nominal amount of all the voting shares in a company. Disclosure must subsequently be made if there is a change in the substantial shareholder's 'percentage level' of interest in voting shares in a company. 'Percentage level' is defined in Section 83 of the Companies Act. In summary, substantial shareholders are required to make disclosure of changes of their interest in threshold bands of 1 per cent. Disclosure is required to be made by the shareholder to the listed company under the Companies Act and to the SGX under the SFA.

The listed company is also obliged to pass the details on to the SGX for public release.

Insider Trading

[43] If an offeror is in possession of price-sensitive information regarding the target company, it cannot deal in the target company's shares until the information has become public or is no longer price-sensitive. In the context of a take-over, being in possession of price-sensitive information would prevent the offeror from making the bid unless the information is disclosed to all the shareholders of the target company as well.

[44] The provisions relating to insider dealing are found in the SFA. An insider dealer may be subject to criminal prosecution, to a civil action maintained by an aggrieved investor, as well as to a civil action taken by the MAS.

Types of Take-over Offers

[45] Take-over offers may generally take three forms under the Take-over Code. They may be either mandatory offers which are triggered by the offeror's shareholdings in the target company, or voluntary offers which are not. They could also be partial offers, in which the offeror does not seek to obtain 100 per cent of the shares in the target company. An offeror can seek irrevocable undertakings from the shareholders of the target company to accept its offer. Such undertakings must be publicly disclosed.

[46] Where a company has more than one class of equity share capital, the Take-over Code provides that a comparable offer must be made for each class, and the SIC must be consulted in advance in such cases. The Take-over Code also provides that where a target company has convertible securities in issue, the offeror shall also make an appropriate offer to the holders of those convertible issues. The Notes to the Take-over Code provide guidance on the appropriate offer price for instruments convertible into, rights to subscribe for, and options in respect of, securities being offered or which carry voting rights.

Mandatory Offers

[47] Generally, there are no restrictions on an offeror building a significant stake in a target company as long as a mandatory offer is not triggered. The circumstances wherein mandatory offers are triggered are set out in the Take-over Code. Rule 14 of the Take-over Code provides that a mandatory offer is triggered when an offeror acquires, whether by a series of transactions over a period of time or not, shares which taken together with shares held or acquired by persons acting in concert with it amounts to 30 per cent or more of shares carrying voting rights of the target company. A mandatory offer is also triggered when an offeror and

persons acting in concert with it hold between 30 per cent and 50 per cent of the target company's shares carrying voting rights, and acquire in aggregate more than 1 per cent of the target company's shares carrying voting rights in any rolling six-month period.

[48] In a mandatory offer, the offer price cannot be lower than the highest price paid by the offeror or any of the parties acting in concert with it for any shares carrying voting rights during the offer period and within the six months leading up to the beginning of the offer period. The consideration paid in the mandatory offer should be in cash or be accompanied by a cash alternative. A mandatory offer is conditional upon the offeror obtaining acceptances which will result in the offeror and persons acting in concert with it holding shares carrying more than 50 per cent of the voting rights of the target company. Generally, no other conditions are permitted to be imposed in a mandatory offer. An exception to this rule applies to a mandatory offer where the parties are seeking clearance with the CCS under the Competition Act. In such a situation, the SIC will allow an additional condition relating to the CCS process to be imposed; this is discussed under 'Competition Aspects' below.

Chain Principle

[49] Where an offeror acquires more than 50 per cent of the voting shares of a target company and the target company holds 30 per cent or more of the voting shares of a public company in Singapore, and as a result the offeror acquires or consolidates control of the Singapore public company because the target company itself had effective control of the Singapore public company, the offeror may be required to make a mandatory take-over offer for the Singapore public company. Note 6 to Rule 14.1 of the Take-over Code states that the SIC will not normally require an offer to be made in these circumstances unless the Singapore public company constitutes or contributes significantly to the target company in respect of assets, market capitalization (where both companies are listed), sales or earnings. The SIC should be consulted in all cases which may come within the scope of Note 6 to Rule 14.1 to establish whether, in the circumstances, any obligation arises to make a mandatory offer.

Whitewash

[50] In certain situations, for example, one which involves a 'back door listing', the SIC may on application grant a waiver to an offeror from making a mandatory take-over offer. Such a waiver is typically subject to the condition that a majority of the independent shareholders present at a general meeting of the target company approve, on a poll, a separate resolution (typically referred to as a 'whitewash' resolution) waiving their rights to receive a take-over offer. The offeror and persons acting in concert with it must abstain from voting on the whitewash resolution.

[51] The Take-over Code contains a Whitewash Guidance Note at Appendix 1 and sets out in general the procedure to be followed if the SIC is to be asked to waive the obligation to make a general offer under Rule 14 of the Take-over Code

which would otherwise arise where, as a result of the issue of new securities as consideration for an acquisition or a cash injection or in fulfillment of obligations under an agreement to underwrite the issue of new securities or upon the exercise of conversion of convertibles, a person or group of persons acting in concert acquires shares which give rise to the obligation to make a general offer.

Voluntary Offers

[52] A voluntary offer occurs where the offeror makes an offer for all the shares of the target company and this offer does not trigger the mandatory offer rules in Rule 14 of the Take-over Code. Voluntary offers are provided for in Rule 15 of the Take-over Code. The offeror can make a voluntary offer at any time unless it becomes obliged to make a mandatory offer. A voluntary offer must always be conditional on the offeror and its concert parties acquiring more than 50 per cent of the target company. In addition, the offeror can stipulate other objective conditions such as a particular level of acceptances, shareholders' approval and certain regulatory approvals, where these are applicable, without reference to the SIC. The SIC should be consulted where other conditions save for those specified above are attached. In the case of voluntary offers conditional on high-level acceptances, the SIC will allow such offers where the offeror states clearly in the offer document the level of acceptances upon which the offer is conditional and the offeror satisfies the SIC that it is acting in good faith in imposing such a high level of acceptance. Generally speaking, the conditions which may be attached to a voluntary offer must not be of a kind whose fulfillment is dependent on subjective interpretation or discretion of the offeror. As an exception to this rule, the SIC allows an offeror to subject a voluntary (but not mandatory) offer to a condition that the CCS issues a favourable decision allowing the voluntary offer to proceed on terms acceptable to the offeror; this is discussed under 'Merger Authorization' below.

[53] Note 4 to Rule 15.1 of the Take-over Code provides that the SIC will consider allowing the offeror to revise the initial acceptance level to a lower level (but above the 50 per cent as required by Rule 15.1) during the course of the voluntary offer, provided the revised offer remains open for another 14 days following the revision. In addition, shareholders who have accepted the initial offer should be permitted to withdraw their acceptance within eight days of notification of the revision. The revised acceptance level will take into account withdrawals and new acceptances as at the close of the offer.

[54] In a voluntary offer, the offer price cannot be lower than the highest price paid by the offeror or any of its concert parties for any shares carrying voting rights in the target company during the offer period and within the three months leading up to the beginning of the offer period. The offer may be in cash or securities or a combination thereof.

[55] The Take-over Code provides that where the offeror and any of its concert parties have bought for cash during the offer period, and within six months prior to its commencement, shares of the target company carrying 10 per cent or more of the voting rights of that class, then an offer must be in cash or accompanied by a

cash alternative at not less than the highest price paid by the offeror or any concert parties during the offer period and within six months prior to its commencement. A cash offer may also be required where, in the view of the SIC, there are circumstances which render such a course necessary.

[**56**] In addition, when the offeror and any of its concert parties purchase target company shares carrying 10 per cent or more of voting rights in exchange for securities during the offer period and in the three months prior to the commencement of the offer period, such securities will normally be required to be offered to all other holders of shares of that class in a take-over offer.

[**57**] The SIC is given the discretion to require securities to be offered even in cases where the amount purchased is less than 10 per cent or the purchase took place more than three months prior to the commencement of the offer period, where the vendors are directors or otherwise closely connected with the offeror or the target company.

[**58**] The SIC should be consulted when 10 per cent or more of the voting rights of the target company has been acquired during the offer period and six months prior to the commencement period for a mixture of securities and cash.

Partial Offers

[**59**] Partial offers are voluntary offers for less than 100 per cent of the outstanding shares in a target company. The provisions relating to partial offers are found in Rule 16 of the Take-over Code. All partial offers must be approved by the SIC and Rule 16 sets out situations where the offeror makes an offer for less than 30 per cent, for between 30 per cent and 50 per cent, and for between 50 per cent and 100 per cent of the target company's shares carrying voting rights.

[**60**] The Take-over Code provides that the SIC will normally grant consent for a partial offer which could not result in the offeror and persons acting in concert with it holding shares carrying 30 per cent or more of the voting rights of the target company. There is no requirement for a target company to seek competent independent advice for partial offers that result in an offeror holding less than 30 per cent.

[**61**] The SIC will not grant consent in the case of a partial offer which could result in the offeror and its concert parties holding shares carrying not less than 30 per cent but not more than 50 per cent of the voting rights of the target company.

[**62**] In the case of a partial offer which could result in the offeror and its concert parties holding shares carrying more than 50 per cent but less than 100 per cent of the voting rights of the target company, consent will not normally be granted by the SIC unless the conditions set out in Rule 16.4 of the Take-over Code are satisfied. These conditions include the requirement that the partial offer is not a mandatory offer under Rule 14 of the Take-over Code and that the partial offer must be approved by shareholders of the target company. Furthermore, the offeror

and parties acting in concert with it must not acquire shares in the target company six months prior to the announcement and in the period between applying for approval from the SIC and making the partial offer and during the offer period and during the six-month period after the close of the partial offer.

[**63**] The Take-over Code also provides that the SIC will not normally consent to a partial offer which could result in the offeror and its concert parties holding more than 50 per cent of the voting rights of the target company, unless the partial offer is conditional, not only on the specified number or percentage of acceptances being received, but also on approval by the target company's shareholders, where the offeror together with parties acting in concert with it hold 50 per cent or less in the target company prior to the announcement of the partial offer. Where the offeror and its concert parties hold more than 50 per cent of the voting rights of the target company, approval of the target company's shareholders would be required if the partial offer could result in the offeror and its concert parties holding more than 90 per cent of the target company, or the target company breaching the minimum free float requirement under the SGX Listing Rules. The offeror, parties acting in concert with it, and their associates are not allowed to vote on the partial offer.

[**64**] Generally, the provisions in the Take-over Code applicable to a voluntary offer will also apply to partial offers and the documents required for a partial offer will also be required in relation to a voluntary offer. Consideration for a partial offer may be in the form of cash or securities, or a combination of both. Similar to the situation of a voluntary offer, if the offeror and its concert parties had purchased for cash, shares carrying 10 per cent or more of the voting rights of the target company during the offer period and within six months prior to the commencement of a partial offer, the partial offer shall be in cash or accompanied by a cash alternative at not less than the highest price paid for shares in the target company by the offeror and its concert parties during the offer period and within six months prior to the commencement of the partial offer. Likewise, when the purchase was made in exchange for securities, such securities will normally be required to be offered to all other holders of shares of that class.

Private Acquisitions

[**65**] The acquisition of shares in private companies is largely unregulated aside from merger controls, and parties are generally free to agree on the terms of the acquisition of shares or assets of the target company with few statutory exceptions (e.g. Section 18A of the Employment Act).

[**66**] It is customary for an acquiror to require due diligence to be conducted on the target company. However, there is no legal obligation imposed on the owner of a target company or the target to assist the acquiror with its enquiries or to make any disclosure. Hence, an acquiror seeks protection and comfort through thorough due diligence and providing extensive warranties and indemnities in the purchase agreement.

[67] The main objective of a due diligence exercise is of course to identify legal, financial or commercial obstacles and issues which challenge any basis or assumption of the acquiror in its offer, affect the valuation of the target or the unencumbered ability of the acquiror to own or deal with the assets or continue the business following the acquisition, or otherwise affect the successful closing of the deal.

[68] Where information and records are maintained in public registers, for example, the creation of certain debentures and charges by a Singapore company, title in real property and ownership of trademarks, etc., access to such information and records is easy and fast. Otherwise, the extent of disclosure and the availability of information would depend on the transparency of the owner and his readiness to disclose and this, at least in part, accounts for the importance of warranties and indemnities.

[69] The tension between an acquiror and the owner is usually the scope of the warranties and indemnities and the limitations on the acquiror's right to claim under those provisions, for example, the period of claim, the maximum liability of the owner, the minimum threshold before a claim can be made, etc.

COMPETITION ASPECTS

Merger Control Generally

[70] In Singapore, the merger control regime is prescribed under the Competition Act. The Competition Act is the principal statute governing the competition law regime in Singapore. Merger control provisions under the Competition Act came into force on 1 July 2007.

[71] The statutory authority which oversees and administers the competition law regime in Singapore is the Competition Commission of Singapore (the 'CCS'), a statutory board of the Ministry of Trade and Industry, established under the Competition Act. The Competition Act expressly provides that in performing its functions and duties, the CCS shall have regard to 'the economic, industrial and commercial needs of Singapore and maintaining the efficient functioning of the markets in Singapore'.

[72] Section 54 of the Competition Act prohibits mergers, including anticipated mergers, which substantially lessen competition within any market in Singapore for goods or services (the 'section 54 prohibition'). The merger control regime under the Competition Act may apply even where the merger takes place outside of Singapore, or where any merger party is outside Singapore, so long as the merger has resulted or may be expected to result in a substantial lessening of competition ('SLC') within any market in Singapore.

[73] In addition to the Competition Act, the CCS has also issued a set of guidelines which are officially gazetted documents, which indicate how the CCS will

interpret and give effect to the Competition Act. The CCS guidelines therefore provide a conceptual and analytical framework for the CCS in its analysis and evaluation of cases, and serve as a guide as to how the CCS interprets and implements the competition law regime. It is important to note that the guidelines do not purport to represent a full or binding statement of law. For the purpose of merger control, the CCS has issued Guidelines on the Substantive Assessment of Mergers ('Substantive Assessment Guidelines') and Guidelines on Merger Procedures ('Merger Procedures Guidelines').

Mergers within Singapore

[74] Singapore's merger control regime potentially applies to all mergers, acquisitions and joint ventures whether already carried into effect or anticipated from 1 July 2007.

[75] Therefore, from 1 July 2007 under the Competition Act, a merger occurs when:

- two or more previously independent undertakings 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
- an undertaking acquires the assets (including goodwill) of another undertaking (or a substantial part thereof) with the result that the first undertaking is placed in a position to either replace or substantially replace the second undertaking in the business in which the latter was engaged immediately before the acquisition.

[76] The term 'undertaking' has been defined under the Competition Act to mean any person, being an individual, a body corporate, an unincorporated body of persons or any other entity, capable of carrying on commercial or economic activities relating to goods or services. However, where all of the undertakings involved in the merger are, directly or indirectly under the control of the same undertaking, the transactions will not constitute a merger for the purposes of the Competition Act.

[77] Section 54(2)(b) of the Competition Act 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 control acquired may be over one or more other undertakings, or over the whole or part of the assets of an undertaking. These assets include brands or licences.

[78] A joint venture, which is broadly defined under the Substantive Assessment Guidelines as a collaborative arrangement by which two or more undertakings devote their resources to pursue a common objective, may also fall within the definition of a 'merger' under the Competition Act if it is one that is subject to joint control and performs, on a lasting basis, all the functions of an autonomous economic entity. Joint ventures which satisfy these requirements bring about a lasting change in the structure of the undertakings concerned.

Mergers outside Singapore

[79] As outlined above, the merger control provisions set out in the Competition Act would also be applicable to mergers taking place outside of Singapore, or where any merger party(ies) is/are based outside of Singapore as long as the merger has resulted or may be expected to result in an SLC within any market in Singapore. See section on 'Mergers Control Generally' above.

Anti-competitive Mergers

[80] As set out above, a merger is prohibited by the Competition Act where it has resulted or may be expected to result in an SLC within any market in Singapore for goods or services, subject to any exclusions, exemptions or net economic efficiencies applicable under the Competition Act. In determining whether an SLC exists, the CCS will evaluate the prospects for competition in the future, with and without the merger.

[81] The level of concentration in a market can be an indicator of competitive pressure within that market. In examining market concentration and structure, the CCS focuses on market shares and concentration ratios. The Substantive Assessment Guidelines state that competition concerns are unlikely to arise in a merger situation unless:

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

[82] The thresholds set out above are simply indicators of potential competition concerns and they do not give rise to a presumption that such a merger *will* lessen competition substantially. The Substantive Assessment Guidelines state that further investigation is required to determine whether a merger will result in an SLC. Similarly, an SLC could potentially be established at thresholds below that set out above if other relevant factors provide strong evidence of any SLC.

[83] The focus of the CCS merger control analysis relates to the effects of the merger on competition. 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 for merger purposes, the relevant price level is the current price rather than the competitive price.

[84] The CCS will consider among others the following relevant factors:

- market power;
- market concentration and structure;
- actual and potential competition in the market;
- barriers to entry;

- countervailing buyer power;
- substitutability;
- efficiencies; and
- the failing firm defence.

[85] The Competition Act allows the CCS to take efficiency gains into account at two separate points in the analytical framework. First, efficiencies may be taken into account where they increase rivalry in the market so that no SLC would result from a merger. Secondly, efficiencies may be taken into account where they do not avert an SLC but will nevertheless result in net economic efficiencies in markets in Singapore. Such efficiencies should bring about lower costs, greater innovation, greater choice or quality and be sufficient to outweigh the detriments to competition in Singapore caused by the merger. Consequently mergers with net economic efficiencies are deemed to be excluded from the ambit of Singapore's merger control regime.

[86] The Section 54 prohibition does not apply to any merger specified in the Fourth Schedule of the Act, namely where the merger is:

- approved by any Minister or regulatory authority (other than CCS) pursuant to any requirement imposed by written law;
- approved by the MAS pursuant to any requirement imposed under any written law; or
- under the jurisdiction of another regulatory authority (other than CCS) under any written law or code of practice relating to competition.

[87] Furthermore the section 54 prohibition does not apply to any merger involving an undertaking in relation to certain specified activities under the Act. The specified activities tend to relate to the supply of services for the public such as postal, wastewater management and transportation.

Merger Authorization

[88] Since the merger control regime is voluntary, there is no mandatory requirement under the Competition Act for merger parties to notify their merger situation to the CCS. Merger parties may nevertheless notify their merger situations to the CCS and apply for a decision as to whether the merger has infringed or the anticipated merger, if carried into effect, will infringe the section 54 prohibition ('Application'). Fees are applicable when making a merger notification.

[89] The Merger Procedures Guidelines state that merger parties are strongly encouraged to conduct a self-assessment of the acquisition in question to ascertain if an Application to the CCS is necessary. Failure to do so before consummation of a merger may be construed by the CCS as 'intentionally or negligently' infringing the section 54 prohibition. If the CCS subsequently decides (acting on its own or on a third party complaint) that the merger in question results or would result in an SLC, the CCS has the power to impose financial penalties on the merger parties

and/or require the merger to be unwound, where an infringement has been committed 'intentionally or negligently'.

[90] A decision whether or not to file an Application must therefore be made on the basis of a self-assessment conducted in accordance with the methodologies in the Substantive Assessment Guidelines read with the CCS Guidelines on Market Definition. Following self-assessment, where the decision is taken to make an Application, the merger parties should include such an obligation as a conditions precedent.

[91] The CCS gives merger parties the opportunity to request a Pre-Notification Discussion ('PND'). PNDs allow merger parties the opportunity to carry out informal discussions with the CCS in order to identify the information to be submitted with the notification.

[92] The CCS adopts a two-phased approach when evaluating notified anticipated mergers and mergers:

- Phase 1 Review: The CCS commences a Phase 1 Review ('Phase 1 Review') after it accepts a Form M1 Application which fulfils all the applicable filing requirements and receives the relevant fee. The Phase 1 Review is expected to be completed within 30 working days. Anticipated mergers and mergers that clearly do not raise any competition concerns will be cleared under the Phase 1 Review.
- Phase 2 Review: If the CCS is unable, based on the information submitted during the Phase 1 Review, to conclude that the anticipated merger or merger does not raise any competition concerns, it will proceed to a Phase 2 Review ('Phase 2 Review'). A Phase 2 Review entails a more detailed assessment and is expected to be completed within 120 working days from when the applicable Phase 2 filing requirements have been met (involving the submission of a complete Form M2).

[93] After the applicant has submitted completed Forms M1 and/or M2 with the relevant fee, the CCS may require the applicant to provide additional information within a certain deadline. If the applicant is unable to revert with the additional information within the deadline, the CCS may 'stop the clock' for the period between the date on which the original deadline and the subsequent point where the applicant reverts with the additional information. If the applicant fails to revert with the additional information within the deadline (and any extensions which may have been granted), the CCS may determine the Application by not giving a decision.

[94] The CCS may, at any time before making a decision as to whether the section 54 prohibition has been or will be infringed, accept commitments from the merger parties that remedy, mitigate or prevent the SLC arising from the merger. This may also result in an extension of the applicable deadline where the CCS 'stops the clock' to consider such commitments.

[95] Where the CCS has issued a decision that a merger has not infringed or that an anticipated merger will not, if carried into effect, infringe the section 54

prohibition, immunity is conferred in that the CCS will not take further action in relation to the section 54 prohibition, unless:

- the CCS has reasonable grounds for suspecting that the information on which it based its decision (including any information on the basis for which it accepted a commitment) was incomplete, false or misleading; or
- the CCS has reasonable grounds for suspecting that a party who provided a commitment failed to adhere to one or more of the commitment terms.

[**96**] The CCS requires to give notice in writing to the notifying party before removing immunity. A decision that an anticipated merger will not, if carried into effect, infringe the section 54 prohibition may also be subject to a validity period, in which such immunity will apply only where the anticipated merger is carried into effect within the validity period.

[**97**] Where the CCS proposes to issue a decision that a merger has infringed or an anticipated merger will, if carried into effect, infringe the section 54 prohibition, it will give notice to the party who applied for the decision, or where that party no longer exists, the merged entity. That party may, within 14 days of the notice, apply to the Minister for Trade and Industry for the anticipated merger or merger to be exempted from the section 54 prohibition on the ground of any public interest consideration.

[**98**] The CCS prefers structural and (to a lesser degree) behavioural remedies over financial penalties, for restoring the competitive conditions in the market. The CCS may give such directions as it considers appropriate to remedy, mitigate or prevent the adverse effects to competition caused by the merger situation. Such directions may include:

- prohibiting an anticipated merger from being carried into effect or requiring a completed merger to be dissolved or modified in such manner as the CCS may direct;
- requiring the merger parties to enter into such legally-enforceable agreements as may be specified by the CCS to prevent or lessen the anti-competitive effects which have arisen;
- requiring the merger parties to dispose of such operations, assets or shares of such undertaking in such manner as may be specified by the CCS; and
- providing a performance bond, guarantee or other form of security on such terms and conditions as the CCS may determine.

[**99**] In exceptional circumstances, financial penalties may also be imposed to reflect the seriousness of the infringement and to deter future infringements if a merger has infringed the section 54 prohibition and the infringement was committed intentionally or negligently. A financial penalty may be in the sum of up to 10 per cent of the turnover of each relevant merger party in Singapore for each year of infringement for a maximum period of three years.

[**100**] Parties suffering loss or damage directly arising from a merger that has infringed the section 54 prohibition are entitled to commence a civil action seeking relief against the relevant undertakings. Such rights of private action only arise

after the CCS has made a decision that a merger has infringed the section 54 prohibition and the appeal period has expired or, where an appeal has been brought, upon determination of the appeal.

TAXATION ASPECTS

Taxation Issues on Acquisitions Generally

[**101**] Tax issues may arise in relation to the sale and purchase of business assets or shares in a company. Under the Income Tax Act, any income accruing in or derived from Singapore ('sourced in Singapore') or accruing or derived from outside Singapore ('sourced outside Singapore') and received in Singapore, is subject to income tax in Singapore. Singapore currently does not have capital gains tax.

[**102**] Insofar as tax on realized gains is concerned, there is no imposition of capital gains tax in Singapore. Therefore, when the shareholders of a target company dispose of their target shares, the question is whether the gain realized, if any, constitutes capital gains or trading income, the latter of which is subject to income tax. Whether the gain is treated as capital gains or trading income depends on whether the relevant shareholders of the target company are regarded by the Inland Revenue Authority of Singapore (the 'IRAS') to be share traders. Where the gain is treated as trading income, the next question that arises would be whether the gain is sourced in Singapore or sourced outside Singapore and received in Singapore.

[**103**] In addition, where a share sale is involved, there may be issues of whether unutilized accrued tax losses of the target company would remain available to the target company after the share sale if there was a substantial change in shareholders (as defined in the Income Tax Act) arising from the share sale. In contrast, where a business sale is involved, there may be issues of clawback of capital allowances (or tax depreciation) which have been claimed by the vendor as tax deductions in relation to the assets being sold. If the business sale involves the sale of inventory or stock-in-trade, there may also be issues relating to a deemed trading gain being imputed on the vendor.

[**104**] The tax treatment of tax resident ('Resident') and non-tax resident ('Non-Resident') vehicles does not differ materially under the Income Tax Act. However, Non-Residents cannot claim treaty benefits under Avoidance of Double Taxation Agreements or 'DTAs' signed between Singapore and other jurisdictions. Tax residence does not necessarily follow the jurisdiction of incorporation of the vehicle, but under domestic law, residence is generally dependent on whether the control and management of the business of the vehicle is exercised in Singapore (subject to specific provisions in applicable DTAs).

[**105**] Therefore, an offshore vehicle could possibly be regarded as a Resident and an onshore vehicle could possibly be regarded as a Non-Resident depending on

where the 'control and management' of its business is exercised. Some of the factors that might assist in establishing the Singapore tax residency of a company are as follows:

- the majority of the directors are Singapore residents;
- all directors' meetings are held in Singapore;
- the corporate documents of the company are kept in Singapore;
- the directors each act in an independent manner, that is, they exercise their functions as directors in a bona fide manner and they do not act at the dictation of, or acquiesce to the decisions of, or suggestions made by, any other person or entity outside Singapore without proper consideration of their own;
- all tasks in relation to the running of the company and the execution of its business are the responsibility of the directors. The directors only delegate tasks for which they are responsible to:
  - employees, if any, of the company that are resident in Singapore; or
  - professional service providers in Singapore under independent service contracts;
- no person outside Singapore has the general authority to negotiate and conclude any contracts on behalf of the company except in specific contractually-delegated circumstances; and
- the company is incorporated in Singapore.

[**106**] The list of factors above is of course non-exhaustive and merely indicative. The determination of tax residency remains a question of fact (and can be quite formulistic in nature).

[**107**] The corporate tax rate of 18 per cent applies to both Resident and Non-Resident vehicles and both Resident and Non-Resident vehicles should submit income tax return to the IRAS on income taxable in Singapore.

[**108**] All companies can enjoy partial tax exemptions on their income, in that 75 per cent of the first SD10,000 of income is tax exempt and 50 per cent of the next SD290,000 is tax exempt.

Stamp Duties

[**109**] Stamp duty in Singapore may be relevant to business and share acquisitions. In Singapore, stamp duty is generally levied on documents relating to the transfer or assignment of interest in stocks, shares or immovable property. Stamp duty is payable within 14 days from the date of execution if the document is executed in Singapore or 30 days of its receipt in Singapore if the document is executed overseas. There is relief from stamp duty that may be available under the Stamp Duties Act for transfers pursuant to reconstruction or amalgamation of companies or transfers between associated companies (as defined in the regulations) provided that the stipulated conditions are met.

Goods and Services Tax

[**110**] The goods and services tax (the 'GST') was first introduced in Singapore on 1 April 1994 as an ad valorem tax. Currently, GST is levied at the rate of 7 per cent.

[**111**] Generally, GST is chargeable on taxable supplies made by taxable persons in the course of furtherance of any business carried on by that person. A disposition of business assets or liabilities (whether or not in connection with its re-organization) is deemed a supply made in the course or furtherance of that business under the Goods and Services Tax Act (the 'GSTA'). Broadly speaking, a taxable person is a person who is liable to register or is registered under the GSTA. This in turn generally refers to a person who makes taxable supplies exceeding SD1 million in four successive quarters.

[**112**] A taxable supply is generally a supply of goods or services in Singapore other than an exempt supply under the GSTA. Sale of residential property for example, is an exempt supply and is therefore not subject to GST. The transfer of ownership of shares in a company is also an exempt supply.

[**113**] Accordingly, if a transaction involves the disposition of business assets by a taxable person, there may be GST payable when the acquiror acquires the assets, which the acquiror may be able to recover as input tax provided that it is GST-registered and that certain stipulated conditions are met (for example, the input tax in incurred for the making of taxable supplies, subject to certain exceptions), and there may again be GST payable if the acquiror is to sell the assets subsequently.

[**114**] However, the transfer of business as a whole or part thereof as a going concern is treated as an excluded transaction, that is to say, it is neither a supply of goods or services. As a result, such a transfer is not subject to GST. All the following conditions must be satisfied before the transfer can be treated as a transfer of business as a going concern and therefore an excluded transaction:

- The supply of assets is made with connection to the transfer of a business or part thereof to the transferee.
- The transferred assets must be intended for use by the transferee to carry on the same business of the transferor.
- If only a part of the business is transferred, this portion must be capable of independent operation.
- After the transfer is completed, there must be continuity of the business. There must be no cessation of the business unless the cessation is temporary as may be necessary to allow the business to be operationally ready under the new ownership.
- Transferee must be a GST-registered person at the time of the transfer and must remain GST registered after the transfer. In this respect, where the transferee is not GST registered, the transferee is to notify the Comptroller of Income Tax of the need to register for purposes of this rule at least 30 days before the date of transfer.
- Both transferor and transferee must keep proper records of the values and descriptions of the assets or class of assets transferred so as to allow both the

transferor and transferee to reconcile the difference of the values of the assets before and immediately after the transfer with the value of the transferred assets.

[**115**] In the event that GST is payable, the parties can contractually decide who is to bear the GST, but the vendor is responsible for accounting for the GST to be charged to the Inland Revenue Authority of Singapore.

Financing Rules and Restrictions

[**116**] Section 76 of the Companies Act sets out the general prohibition against the giving of financial assistance by a company incorporated in Singapore (the 'Singapore company'). Section 76 prohibits a Singapore company from giving financial assistance to any person for the purpose of the acquisition or proposed acquisition of shares or units of shares in the Singapore company or its holding company. A contract or transaction entered into in contravention of section 76 will be void or voidable at the option of the Singapore company depending on the circumstances. Financial assistance is, however, permitted to be given by the Singapore company if the provided whitewash procedure is adopted. There are some exemptions from the prohibition against financial assistance, and a Singapore company may give financial assistance in two special situations, subject to other conditions being met: (a) if the amount of financial assistance does not exceed 10 per cent of the aggregate of the total paid-up capital and reserves of the Singapore company, and (b) a resolution that authorises the Singapore company to give the financial assistance is passed by all the members of the Singapore Company present and voting either in person or by proxy at the relevant meeting, or by all the members of the Singapore company if it is a resolution that is proposed to be passed by written means.

[**117**] There are four methods by which a Singapore company may acquire or purchase its own shares, namely (a) off-market purchase on an equal access scheme, (b) selective off-market purchase, (c) contingent purchase, and (d) market purchase. A share buyback may be funded out of profits as well as capital so long as the company is solvent. A payment by a company for the acquisition or purchase of its own shares may be made out of the company's capital or profits so long as the company is solvent.

[**118**] Since 30 January 2006, it has been possible for companies seeking to reduce their share capital to do so without court sanction.

Withholding Taxes

[**119**] There is no requirement to withhold tax on dividend payments. Singapore currently does not have withholding tax on dividends even though withholding tax rates on dividends are provided under some of the tax treaties to which Singapore is a party.

[**120**] Aside from dividends, the Income Tax Act provides for withholding of tax in respect of certain payments made to persons not known to be resident in Singapore. The withholding tax rate for such payments made to non-residents is normally either:

- the specified rate as stipulated in the Income Tax Act, which ranges from 15 per cent to 20 per cent of the gross amount (assuming the payment is derived by the recipient otherwise than from a trade, business, profession or vocation carried on or exercised by such person in Singapore and is not effectively connected with any permanent establishment in Singapore of that person); or
- the reduced tax rate as provided under a tax treaty (where applicable).

[**121**] The payments subject to withholding under the Income Tax Act include:

- interest, commission, and fee in connection with any loan or indebtedness;
- royalty or other payments for the use of or the right to use any movable property;
- payment for the use of or the right to use scientific, technical, industrial or commercial knowledge or information or for the rendering of assistance or service in connection with the application or use of such knowledge or information;
- management fees;
- rent or other payments for the use of any movable property;
- payment of remuneration to a non-resident director;
- consideration paid for real property to a non-resident seller who is a property trader; and
- certain professional service fees.

[**122**] Depending on the circumstances, there may be applicable exemptions/exclusions from the withholding tax obligation as discussed above.

EMPLOYMENT CONSIDERATIONS

Employee Rights

[**123**] Singapore's employment or labour law and practice is a combination of the common law and statute law. The common law or case law governing the employment contract and the relationship of master and servant is generally the same as in England. The common law position has been modified to some extent by statute in Singapore.

[**124**] The primary statute governing employment in Singapore is the Employment Act. The Employment Act covers all employees with the exception of seamen, domestic servants, government employees or any person employed in a managerial, executive or confidential position. The Act also applies to employees who are foreigners as long as they fall within the definition of 'employee' under the Act.

[**125**] The Act addresses several aspects of the employer-employee relationship and stipulates certain minimum terms and conditions of employment. Part IV of

the Act governing, inter alia, rest days, hours of work, holidays, annual leave, sick leave, and wages supplements and increases applies only to workmen and employees (who are not excluded under the general definition of 'employee') whose wage or salary is not more than SD1 600 per month (excluding overtime payments, bonus payments, annual wage supplements, productivity incentive payments and any allowance however described).

[**126**] Employer-employee relationships or aspects thereof not governed by the Employment Act are generally governed by the common law.

[**127**] Aside from the Employment Act, the other Acts and Regulations relevant to employment include the Central Provident Fund Act, Employment of Foreign Manpower Act, Industrial Relations Act, Retirement Age Act, Trade Unions Act, Work Injury Compensation Act, and Workplace Safety and Health Act.

[**128**] The Industrial Relations Act allows for the registration of collective agreements which embody agreements reached between trade unions and employers on matters pertaining to the terms and conditions of service and which have been certified by the Industrial Arbitration Court. Once registered, a collective agreement is deemed to become an award, which is binding on the employer (or its successor) and on the relevant trade union and its members.

Compulsory Transfer of Employees

[**129**] When a merger or acquisition takes place, issues may arise as to the status of the employees within the new entity or the acquired company.

[**130**] Where the transaction involves an acquisition of shares in a company, the transaction will not affect the terms of the employment contract between the employee and the company. The company in question continues as the same legal entity in spite of the change in shareholding or change in control. There is no automatic termination or variation by operation of law of the terms of the employee's employment contracts as a result of the transaction, and the employees would carry on as employees of the same company after the completion of the share acquisition.

[**131**] Where the transaction involves an acquisition of a business as a going concern in Singapore, the t business would be transferred by the transferor/employer company (the 'Transferor') to the acquiror or transferee company (the 'Transferee').

[**132**] The common law position is that the employment contracts between the Transferor and the employees would generally have to be terminated once the business is taken over by the Transferee. However, under Singapore law, the impact such a transaction may have on the status of the employees would depend on the type of employee in question.

[**133**] In Singapore, employees are divided into two broad categories: (1) those who fall within the scope of the Employment Act, i.e. employees who are not employed in a confidential, executive or managerial position, and (2) those who do not fall under the provisions of the Employment Act.

Employees under the provisions of the EA

[**134**] In respect of employees who fall under the provisions of the Employment Act (the 'Employment Act Employees'), section 18A(1) of the Employment Act has the effect of transferring such employee's contract to the Transferee as if it was originally entered into with the Transferee, and the period of employment of such employee with the Transferor at the time of the transfer will count as a period of employment with the Transferee, i.e. the transfer does not break the continuity of the period of employment.

[**135**] In addition:

- all of the transferor's rights, powers, duties and liabilities under or in connection with any such contract of service shall be transferred to the transferee;
- any act or omission performed prior to the transfer by the transferor in respect of the contract of service shall be deemed to have been performed by the transferee; and
- any act or omission performed prior to the transfer by an employee employed in the undertaking or the part transferred in relation to the transferor shall likewise be deemed to have been done in relation to the transferee.

[**136**] The effect of the provisions of section 18A is that there is a statutory transfer of the employment contracts of the Employment Act Employees together with the Transferor's business so that the Transferee is recognized in law as the new employer. The Transferee takes on all the rights and liabilities in respect of the employment contracts of the Employment Act Employees concerned.

[**137**] Section 18A(5) requires the Transferor to notify its Employment Act Employees and the trade unions of such employees (if any) of the proposed transfer as soon as it is reasonable and before such a transfer takes place. This is to enable consultations between the Transferor and its Employment Act Employees of the Transferee and between the Transferor and the trade unions of such employees (if any) to take place.

Employees who fall outside the provisions of the Employment Act

[**138**] In respect of employees who do not fall under the provisions of the Employment Act (the 'Non-Employment Act Employees'), the transfer of such employees is a matter of contract between the Transferee and the employee, and is not automatic. The employment of such Non-Employment Act Employees with the Transferor will be terminated upon the completion of the acquisition by the Transferee.

EMERGING ISSUES AND FUTURE DEVELOPMENTS

[**139**] On 8 June 2007, the SIC announced the extension of the Take-over Code to Real Estate Investment Trusts ('REITs'). This development will allow for the

safeguards in the Take-over Code to apply to REITs and will provide a framework for the fair and equal treatment of all unitholders in a take-over and merger situation. The Take-over Code and the SFA will be amended to give effect to the extension of the Take-over Code to REITs. In the meantime, the SIC prescribed that parties intending to acquire 30 per cent or more of the total units of a REIT or, when holding not less than 30 per cent but not more than 50 per cent of the total units of a REIT, acquire more than 1 per cent of the total units of the REIT in any six-month period, should make a general offer for the REIT. The SIC should be consulted in cases of doubt.

[**140**] The SIC is also studying whether changes should be made to the Take-over Code to adopt the recent changes in the United Kingdom regime which has considerably tightened the aggregation and disclosure rules in respect of dealings in options and derivatives. In the meantime, a person who wishes to acquire options or derivatives should consult the SIC beforehand, if the aggregation of the shares underlying such options or derivatives with those already owned causes such person to exceed the mandatory offer threshold.