

Corporate Restructuring

International Information for International Businesses

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This article has been published in the October 2007 issue of
BNA International's *Corporate Restructuring*



www.bnai.com

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The Competition Act, Chapter 50B of Singapore (the “Act”) was introduced as the Competition Bill 2004 (B44/2004) in Parliament on September 21, 2004 and passed on October 19, 2004. The Act is the principal statute governing the competition law regime in Singapore. It is modelled on the competition legislation of the European Community and the United Kingdom Competition Act 1998.

The focus of the Act is on prohibitions relating to anti-competitive agreements, abuses of dominant positions and mergers which substantially lessen competition.

The Competition Commission of Singapore (the “CCS”), a statutory board of the Ministry of Trade and Industry, administers the competition law regime in Singapore. The 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”.

Phased implementation of the Act

The Act was implemented in three phases:

- *Phase One:* The provisions establishing the CCS came into force on January 1, 2005;
- *Phase Two:* The provisions on anti-competitive agreements, decisions and practices, abuse of dominance, enforcement, appeal processes, and other miscellaneous areas came into force on January 1, 2006; and
- *Phase Three:* The remaining provisions pertaining to mergers and acquisitions (“Merger Control Regime”) came into force on July 1, 2007.

This phased approach was adopted to allow both the CCS and businesses time to prepare for the implementation of the new laws.

Scope of the Merger Control Regime

The scope of the Merger Control Regime is provided under:

- a. the Act, as amended by the Competition (Amendment) Bill 2007, which was passed in Parliament on July 1, 2007 following its first reading on April 9, 2007 and second reading on May 21, 2007; and
- b. the CCS Guidelines on the Substantive Assessment of Mergers (the “Substantive Assessment Guidelines”) and the CCS Guidelines on Merger Procedures (the “Merger Procedures Guidelines”), which were gazetted and published on the CCS’ website in June 2007.

The Section 54 prohibition

The operative provision under the Act governing the Merger Control Regime is Section 54(1), which 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, unless the merger falls within an exclusion in the Fourth Schedule, or is exempted by the Minister on the ground of any public interest consideration (the “Section 54 Prohibition”).

The Section 54 Prohibition may apply even where the merger takes place outside of Singapore, or where any merger party is outside Singapore, provided that the substantial lessening of competition is within any market in Singapore.

When a merger occurs

A merger occurs when:

- a. two or more previously independent undertakings merge;
- b. one or more persons or other undertakings acquire direct or indirect control of the whole or part of one or more other undertakings; or
- c. 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.

Control over an undertaking exists if decisive influence may be exercised over the activities of that undertaking by reason of any rights, contracts or other means. The existence of control is determined by whether decisive influence is capable of being exercised, rather than the actual exercise of such influence.

A joint venture may also fall within the definition of a “merger” under the Act if it is one that performs on a lasting basis, all the functions of an autonomous economic entity. Joint ventures which satisfy these requirements would constitute a merger defined in b above above.

Exceptions

Section 54(7) of the Act sets out four exceptional situations which are deemed not to constitute a merger within the meaning of the Section 54 Prohibition. These are:

- a. acquisition of control by a person acting in his capacity as a receiver, liquidator or underwriter;
- b. merger between undertakings which are directly or indirectly controlled by the same undertaking;
- c. acquisition of control resulting from a testamentary disposition, intestacy or the right of survivorship in a joint tenancy; and
- d. acquisition of control by parties whose normal activities include carrying out of transactions and dealing in securities for their own account or for the account of others.

- e. The last category only applies where the securities in the acquired undertaking are held on a temporary basis and any exercise of the voting rights in respect of the securities is for the purpose of arranging the disposal of the acquired undertaking or its assets or securities, and not for determining the strategic commercial behaviour of the acquired undertaking.

Notification thresholds

The Merger Procedures Guidelines provide that if a merger results in the indicative notification thresholds being crossed, the CCS is likely to give further consideration to the merger before being satisfied that it will not result in a substantial lessening of competition. The indicative thresholds (“Notification Thresholds”) are:

- a. a post-merger combined market share of the three largest firms of at least 70 percent and the merged undertaking has a market share of at least 20 percent; or
- b. a merged undertaking with a market share of at least 40 percent.

The CCS has expressly stated that any test as to the existence of substantial lessening of competition is qualitative, rather than quantitative, and that a substantial lessening of competition could potentially be established even if the indicative figures fall below the Notification Thresholds. Qualitative factors that the CCS would take into consideration include the ease and speed of supply-side substitution, countervailing buyer power, loss of maverick competitors and enterability of new competitors among others.

Assessment of substantial lessening of competition

In the case of horizontal mergers, i.e., mergers between undertakings that are active or potentially active in the same economic market and at the same level of business, the CCS will assess if the merger enhances the risk of non-co-ordinated or co-ordinated effects.

Non-co-ordinated effects arise if the merged entity finds it profitable to raise prices (or reduce output or quality) post-merger, due to a reduction in competition between the merged entities. If customers regard the product of one merger party as a close substitute for the product of the other merger party, any price increase in one product is likely to result in customers switching to the other product. The sales which are lost as a result of a price increase in the first product are then more likely to be recaptured by increased sales in the other product, thereby enhancing the merged entity’s incentive to raise prices. Other firms in the market may also find it profitable to raise prices because the higher prices of the merged entity’s products will cause some customers to switch to rival products, thereby increasing demand for the rivals’ products. In this regard, the term “non-co-ordinated effects” is used because it refers to price increases by the merged entity, without the need for co-ordination from other competitors in the market.

On the other hand, co-ordinated effects arise if the reduction in the number of market players post-merger increases the possibility that the firms may co-ordinate their behaviour to raise prices, or reduce quality or output. Co-ordinated effects may also arise where a merger reduces competitive constraints in a market, thus increasing the probability that competitors will collude or strengthening a tendency to do so. Certain market conditions may enhance co-ordinated effects, for example, transparency that enable firms to observe their competitors’

conduct, or the potential for credible retaliatory measures in the event that a firm deviates from any co-ordinated course of action.

Apart from horizontal mergers, there are also vertical or conglomerate mergers. Vertical mergers are mergers between undertakings operating at complementary levels of the production or distribution chain (e.g., a merger between a retailer and its wholesaler). Conglomerate mergers are mergers between undertakings in different markets where no vertical relationship exists between the merging parties. While non-horizontal mergers generally do not lead to a substantial lessening of competition, they may raise competition concerns under certain circumstances if the merged entity has market power in at least one of the markets concerned.

The competition concerns which may arise from a vertical merger can be illustrated by a merger between a wholesaler and a retailer. The wholesaler may, post-merger, sell only to the retailer with which it has merged and refuse to sell to the retailer’s competitors (or sell to them only at uncompetitive prices). If the wholesaler has market power, such a course of action could mean that the other retailers are effectively foreclosed from a substantial part of the wholesale market. Correspondingly, a retailer with market power can foreclose a substantial part of the retail market by buying only from the wholesaler with which it has merged.

Similarly, the competition concerns which may arise from a conglomerate merger can be illustrated by a merger which creates a merged entity with a portfolio of brands under its control. Where the brands relate to products that share sufficient characteristics to be considered a discrete group, customers may have an incentive to purchase the portfolio of brands from a single supplier to reduce their transaction costs. If the merged entity plans to sell the portfolio of brands as a bundle and it has market power in at least one of the brands, competition concerns may arise if the merged entity’s competitors are unable to supply the same full range of brands and are consequently foreclosed from the market as a result of their inability to come up with a competing bundle.

Assessment of countervailing factors

Any competition concerns that a merger (whether horizontal or non-horizontal) might otherwise raise may be offset by certain countervailing factors that constrain any exercise of post-merger market power. One such factor would be the prospect of entry by new rivals or the expansion of existing rivals. However, for the threat of new entry (actual or threatened) to be a sufficient competitive constraint, the entry must be:

- a. likely to occur in the event that the merged entity attempts to exercise its market power;
- b. sufficient in scope to constrain any attempt to exploit increased post-merger market power; and
- c. sufficiently timely and sustainable to provide effective and lasting post-merger competition. Entry within less than two years will generally be timely, but this must be assessed on a case-by-case basis.

Another countervailing factor would be the existence of buying power, for example, where the customer is able to discipline supplier pricing by credibly threatening to switch to the supplier’s competitors or by other measures (e.g., delaying purchases or positioning the supplier’s products in less attractive locations within the retail outlet).

A merger may also be regarded as not substantially lessening competition if the failing firm/division defence applies. For the

defence to apply, the failing merger party must be in such a dire situation that without the merger, the failing merger party and its assets would exit the market in the near future. Furthermore, the failing merger party must be unable to meet its financial obligations in the near future, with no serious prospect or re-organising the business. Finally, there should be no less anti-competitive alternative to the merger. The defence will not apply if there are other realistic buyers willing to purchase the failing merger party or its assets at a commercially reasonable price (this includes situations where the price is lower than what the acquiring party is prepared to pay), whose acquisition would produce a more competitive outcome.

Another possible countervailing factor would be if the merger creates efficiencies that increase post-merger rivalry, for example, where a merger between two smaller competitors generates efficiencies that enable the merged entity to charge a lower price and compete more effectively with a larger player, such that the conclusion is that there is no substantial lessening of competition. Any claimed efficiencies must be demonstrable, in that:

- a. the claimed efficiencies are clear and supported by detailed and verifiable evidence;
- b. the claimed benefits are likely to arise with the merger; and
- c. these benefits will materialise within a reasonable period of time.

The claimed efficiencies must also be merger-specific, i.e., arising as a direct consequence of the merger.

Even if the merger is found to substantially lessen competition, it may still fall within the net economic efficiencies exclusion in paragraph three of the Fourth Schedule to the Act. This exclusion applies if the merger generates efficiencies which outweigh the adverse effects due to any substantially lessening of competition which may result from the merger. Examples of efficiencies which may satisfy the exclusion include those which bring about lower costs, greater innovation, greater choice or higher quality. For the exclusion to apply, these efficiencies must arise in markets within Singapore and must be sufficient to outweigh the detriments to competition in Singapore caused by the merger. Furthermore, the efficiencies must also satisfy the requirements of being demonstrable and merger-specific, as explained in the preceding paragraph.

Exclusions

The Section 54 Prohibition does not apply to any merger:

- a. approved by any Minister or regulatory authority pursuant to any requirement imposed by written law;
- b. approved by the Monetary Authority of Singapore pursuant to any requirement imposed under any written law; or
- c. under the jurisdiction of another regulatory authority under any written law or code of practice relating to competition.

The Section 54 Prohibition also does not apply to any merger involving any undertaking relating to activities which have been specified as being excluded from the Section 34 and Section 47 prohibitions, namely:

- d. the supply of ordinary letter and postcard services by a person licensed and regulated under the Postal Services Act (Cap. 237A);
- e. the supply of piped potable water;

- f. the supply of wastewater management services, including the collection, treatment and disposal of wastewater;
- g. the supply of scheduled bus services by any person licensed and regulated under the Public Transport Council Act (Cap. 259B);
- h. the supply of rail services by any person licensed and regulated under the Rapid Transit Systems Act (Cap. 263A); and
- i. cargo terminal operations carried out by a person licensed and regulated under the Maritime and Port Authority of Singapore Act (Cap. 170A).

Market definition

Market definition and the measurement of market shares are important in the process of determining whether agreements have as their object or effect an appreciable prevention, restriction or distortion of competition in a market under the Section 34 prohibition, or whether an undertaking with substantial market power amounting to a dominant position in a market has abused its market power under the Section 47 prohibition, or whether a merger has resulted or may be expected to result in a substantial lessening of competition in any market in Singapore under the Section 54 Prohibition. Market definition is the first step in a full competition analysis and the key step in providing the framework for analysis through identifying the competitive constraints acting on a seller of a given product.

Market, not turnover

Unlike the European and U.K merger control rules which rely on turnover figures (which are by their nature readily identifiable), the Notification Thresholds rely on market shares. The CCS has stated in the Merger Procedures Guidelines that it will not necessarily accept parties' identification of a relevant market. The relevant markets must be defined in accordance with the rules set out in the CCS Guidelines on Market Definition ("Market Definition Guidelines").

Defining the relevant market

The essential task in market definition is to define all the products on the demand side that buyers regard as reasonable substitutes for the product under investigation ("focal product") and then to identify all the sellers who supply the focal and substitute products or who could potentially supply them. This exercise of defining the relevant market includes defining its geographical reach which may extend beyond the area under investigation and in which the focal product is sold ("focal area").

The hypothetical monopolist test

The CCS Guidelines on Market Definition sets out the hypothetical monopolist test ("the test") as a conceptual approach used to define markets. In essence, the test seeks to establish the relevant market as the smallest product group and geographical area such that a hypothetical monopolist controlling that product group in that area could profitably sustain prices that are at least a small but significant amount above competitive levels. That product group (and area) is usually the relevant market for competition law purposes.

The test starts with a narrow definition of the product and geographic market, usually the focal product or focal area. The following question is then asked: whether a significant number

of buyers will switch to other products or areas that are the next best substitutes if the price of the focal product is raised by a small but significant and non-transitory amount above competitive levels. An increase of 10 percent above the competitive price will generally be used for the test but the actual percentage used may vary depending on the particular facts of each case. If the answer to the question is in the affirmative, these other products or areas and their sellers are included in the definition of the market because they potentially constrain the exercise of market power. The same question is asked again with this widened group of products or areas. The question is repeated and the market widened until the point is reached when a significant number of buyers do not respond to the small but significant increase in price by switching to other products or areas. The relevant market containing the principal constraints on the exercise of market power is then used to assess the impact of that agreement or conduct under investigation, or to assess whether an undertaking is dominant in that market.

In cases under the Section 54 Prohibition, the test for market definition is the same as that for cases under the Section 34 and Section 47 prohibitions cases, with the exception that the test focuses on postulating what happens if the price of the focal product is raised by a small but significant and non-transitory amount above current (as opposed to competitive) levels. The reason for this difference is that one of the primary concerns in merger control is whether the merger will result in an increase in prices above prevailing levels.

Practical issues

In practice, it is rarely possible to define a market in strict accordance with the test's assumptions. Even if the test could be conducted precisely, the relevant market is no more than an appropriate frame of reference for competition analysis. Where there is strong evidence that the relevant market is one of a few plausible market definitions and the assessment on competitive impact is shown to be largely unaffected whichever market definition is adopted, it may not be necessary to define the market uniquely.

Notifying anticipated mergers

Applications and self-assessment

There is no mandatory requirement for merger parties to notify their merger situations to the CCS. However, it is advisable to make a merger control notification to the CCS if a merger that is not excluded or exempted under Singapore law has resulted (or may be expected to result) in a substantial lessening of competition in a relevant market. Merger parties are allowed under Sections 56 to 58 of the Act to notify their merger situations to the CCS and apply for a decision as to whether the Section 54 Prohibition has been or will be infringed by the merger situation ("Application").

In considering whether to make an Application, merger parties are strongly encouraged to conduct a self-assessment to ascertain if an Application is necessary. They should refer to the relevant CCS guidelines (in particular Part 6 of the Merger Procedures Guidelines to determine if the merger situation is excluded under the Fourth Schedule of the Act and the Substantive Assessment Guidelines) as well as to the relevant regulations. They may also wish to seek legal advice if necessary. Merger parties should make an Application only if they have serious concerns as to whether the merger situation

has resulted, or may be expected to result in a substantial lessening of competition.

General Steps and Questionnaire

The general steps for deciding whether a merger control notification should be filed are as follows:

- a. Is it a merger?
- b. Is it excluded or exempted?
- c. If not, what is the relevant market (applying the Market Definition Guidelines)?
- e. Are the Notification Thresholds exceeded? If so, notification is recommended.
- f. Even if the Notification Thresholds are not exceeded, do factors which indicate a substantial lessening of competition exist (examine co-ordinated and non-co-ordinated effects) and do net economic benefits exist?
- g. If unclear, consider whether to engage CCS in an informal Pre-Notification Discussion ("PND").

Pre-notification discussion

Merger parties intending to make an Application may approach the CCS for a pre-notification discussion ("PND") to facilitate their preparation for the Application and expedite the review process. The PND helps merger parties to identify the information needed to provide a complete submission, as well as any additional useful information that might expedite the CCS' review of a merger situation. The CCS is prepared to enter into PNDs for anticipated mergers that may not as yet be made known to the public, but it will not entertain discussions on speculative or hypothetical transactions.

Merger parties seeking a PND should submit a request to the CCS in writing. The information provided should include details of the merger situation, such as a brief background of the merger situation, a brief description of the relevant market(s) and sector(s) involved, and the likely impact of the merger situation on competition in those markets and sectors in general terms. In the case of anticipated mergers, the request should provide sufficient information to show the good faith intention of the merger parties to carry the anticipated merger into effect. For merger situations that are already in the public domain, the request should also provide relevant documentation of the public announcement or public knowledge about the merger. If the CCS agrees to the discussion, a draft Application should be provided prior to the discussion.

Where possible, the CCS will endeavour to indicate any potential competition concerns that are apparent from the information provided by the merger parties. However, any such indications are not legally binding on the CCS and are subject to change after receipt of the formal Application. The CCS will not be able to provide any indications on whether a merger situation is likely to be allowed to proceed. In general, any discussion will be useful to the extent that relevant information is made available to the CCS.

Phase 1 and Phase 2 reviews

Undertakings having serious concerns as to whether their anticipated merger will, if carried into effect, infringe or that their merger has infringed the Section 54 Prohibition, may apply to the CCS for a decision. The CCS adopts a two-phased approach when evaluating notified anticipated mergers and mergers. Upon receiving the notification, the CCS will carry out

a Phase 1 review, which is expected to be completed within 30 working days from when the applicable Phase 1 filing requirements have been met. Anticipated mergers and mergers that clearly do not raise any competition concerns under the Section 54 Prohibition will be cleared under the Phase 1 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 the 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. The timeframes of 30 and 120 working days are administrative in nature and may be stopped if parties fail to comply with the CCS' requests for further information or if commitments are being negotiated.

Where the CCS has made a decision upon a notification that an anticipated merger will not, if carried into effect, infringe or that a merger has not infringed the Section 54 Prohibition, immunity is conferred in that no further action may be taken with respect to the notified anticipated merger or merger, in relation to the Section 54 Prohibition. The immunity cannot be removed unless:

- a. 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
- b. 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.

The CCS will have 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 be subject to a validity period, in which the immunity will apply only if the anticipated merger is carried into effect within the validity period.

Where the CCS proposes upon a notification to make a decision that the notified anticipated merger will, if carried into effect, infringe or that the notified merger has infringed 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 the anticipated merger or merger to be exempted from the Section 54 Prohibition on the ground of any public interest consideration.

The CCS may issue interim directions prior to completing its consideration of an anticipated merger or merger which has been notified to the CCS for a decision if the CCS has reasonable grounds for suspecting that the Section 54 Prohibition will be infringed by the anticipated merger if carried into effect, or has been infringed by the merger, and it considers that it is necessary to act:

- a. as a matter of urgency, for the purpose of preventing serious, irreparable damage or of protecting the public interest; or
- b. for the purpose of preventing any action that may prejudice the CCS' consideration of the anticipated merger or merger, or prejudice the giving of any direction under Section 69 of the Act.

Commitments

The CCS may accept commitments at any time before making a decision as to whether an anticipated merger will, if carried into effect, infringe or as to whether a merger has infringed the Section 54 Prohibition. Commitments offered to the CCS must

remedy, mitigate or prevent the adverse effects of the anticipated merger or merger. Upon accepting the commitment, the CCS has to issue a decision that the Section 54 Prohibition (in the case of an anticipated merger) will not be, or (in the case of a merger) has not been infringed. Such a decision may nevertheless be revoked if the CCS has reasonable grounds for suspecting that any information on the basis of which it accepted the commitment was incomplete, false or misleading or that any party who provided the commitment failed to adhere to one or more of the commitment terms.

The CCS may review the effectiveness of commitments which it has accepted and may at any time accept a variation, substitute or release of the commitment.

Consequences for infringement

When the CCS has made a decision that an anticipated merger will, if carried into effect, infringe or that a merger has infringed the Section 54 Prohibition, it may impose the appropriate directions. In the case of anticipated mergers, the direction may, for example, include provisions prohibiting an anticipated merger from being carried into effect. In the case of mergers, the directions may either be structural (e.g., divestment) or behavioural in nature, with a view to remedy, mitigate or eliminate the adverse effects arising from the merger.

Where there has been an intentional or negligent infringement of the Section 54 Prohibition by a merger, a financial penalty not exceeding 10 percent of the turnover of the business of the undertaking in Singapore for each year of infringement, up to a maximum of three years, may be imposed. A party who has suffered loss or damage directly as a result of an infringement of the Section 54 Prohibition has a right of action in civil proceedings, but that right can only be exercised after the CCS has made a decision of infringement and the appeal process has been exhausted.

- 1 Section 54(2) of the Act
- 2 Section 2(1) of the Act defines an undertaking 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.
- 3 Section 54(5) of the Act
- 4 Other than the CCS.
- 5 Third Schedule to the Act
- 6 Please refer to Annex A of the Substantive Assessment Guidelines for the Flowchart: General Framework for Substantive Assessment of Mergers.
- 7 The primary purpose of a PND is to help merger parties intending to submit a notification for decision to the CCS to identify the information needed for a complete submission, as well as any additional useful information that the CCS may require in assessing the notification. Parties can refer to the CCS website at www.ccs.gov.sg/NGD/PNDs.htm for more information on PNDs and the procedures found in the Merger Procedures Guidelines.
- 8 Paragraph 3.7 of the Merger Procedures Guidelines
- 9 Paragraph 3.8 of the Merger Procedures Guidelines
- 10 Paragraph 3.9 of the Merger Procedures Guidelines
- 11 Section 69 of the Act provides for the enforcement of decision of the Commission.

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