GUIDELINES ON MERGER PROCEDURES
RESPONSE TO CONSULTATION

INTRODUCTION

1. The Competition Commission of Singapore (CCS) launched a public consultation on proposed revisions to its Guidelines on Merger Procedures (the Guidelines). The consultation period was from 20 February 2012 to 20 March 2012. The Consultation Document and the Guidelines were posted on CCS' website as well as the Government online consultation portal, REACH. At the close of the public consultation period, CCS received five submissions.

2. CCS thanks all the respondents for their feedback and comments. This paper outlines the main issues raised by the respondents and sets out CCS' considered response and proposed changes.

3. The revised Guidelines are published in the Government *Gazette* on 19 June 2012 and become effective on 1 July 2012. The revised Guidelines may be cited as the CCS Guidelines on Merger Procedures 2012.

SUBMISSIONS ON THE DRAFT REVISED GUIDELINES

Notification Guidelines - the share of supply test

4. CCS' current Guidelines indicate that CCS is unlikely to intervene in a merger situation unless the merged entity has a market share of 40% or more; or the market share of the merged entity is between 20% to 40% and the post merger combined market share of the three largest firms is 70% or more (the latter is commonly known as "CR3").

5. Prior to the consultation, CCS had received feedback that the notification guideline based on market share may deter notification because defining the relevant market is a relatively complex exercise requiring specific expertise and detailed factual information. In addition, the market share threshold does not in itself indicate a merger that may have a substantial lessening of competition in Singapore. The inherent ambiguity may result in firms taking the risk of not notifying potentially problematic mergers.

6. CCS consulted on replacing the notification guideline based on market share with a notification guideline similar to the UK's 'share of supply' threshold. Determination of share of supply is relatively straight forward compared to

defining a relevant market, and the connection with Singapore is clear. However, the responses CCS received on the proposed change were mixed.

7. One respondent expressed a preference for the market share threshold as it would likely be easier to use for a majority of companies given the fact that the market share is broadly used worldwide; another expressed a preference for the share of supply threshold but noted that further information should be given on what is meant by share of supply. Two respondents suggested that the share of supply threshold should also apply to vertical and conglomerate mergers if it applied to horizontal mergers. In addition, CCS received feedback from four respondents that the interplay between share of supply and the market shares that are a factor in the analysis of whether or not a merger gives rise to a substantial lessening of competition (SLC) is unclear.

8. The responses CCS received highlighted possible confusion between a notification guideline based on share of supply and the SLC test that CCS applies in assessing mergers. There was also confusion about the share of supply guideline and the circumstances in which CCS may use its powers to investigate mergers which arise when there is a reasonable suspicion of an SLC.

9. After due consideration, CCS has decided not to introduce a share of supply test, and to continue with the market share test, for self-assessment for merger notification. CCS will address the concern surrounding non-notification of problematic mergers by way of more active surveillance and enforcement.

10. The objective of merger surveillance is to prevent economic harm that results from mergers that give rise to an SLC. Merger parties are urged to exercise due diligence and conduct a rigorous self-assessment to ensure that their mergers would not be problematic and violate the Competition Act. If in doubt, they should apply to CCS for a notification for decision. A clearance decision from CCS provides business certainty for parties to the merger.

Notification guidelines - turnover

11. The draft revised Guidelines on which CCS consulted introduced a proposal for small mergers, defined as where the turnover in Singapore in the financial year preceding the transaction of each of the parties is below S$5 million and the worldwide turnover of each of the parties is below S$10 million.

12. All of the respondents welcomed the proposed change, but some noted that, in their opinion, it was too narrow and did not provide sufficient certainty. It was also

suggested that the worldwide turnover was set too low at S$10 million. CCS has reviewed the worldwide turnover threshold. It will replace this with a combined worldwide turnover of the merger parties set at below S$50 million. The local turnover figure of each of the parties will be set at below S$5 million, as originally proposed.

13. The revised Guidelines will state that CCS is unlikely to investigate a merger situation that only involves small companies, namely where the turnover in Singapore in the financial year preceding the transaction of each of the parties is below S$5 million and the combined worldwide turnover in the financial year preceding the transaction of all of the parties is below S$50 million.

14. In relation to the point that the draft revised Guidelines do not provide sufficient certainty that small mergers will not be investigated, CCS notes that the notification guideline is intended to provide a degree of comfort to small businesses that are merging. It is not intended to be a guarantee that CCS will never investigate these mergers, and in fact it may do so if there is a reasonable suspicion that a merger gives rise to a substantial lessening of competition. This is clarified in the revised Guidelines.

Confidential Advice

15. The draft revised Guidelines on which CCS consulted included a new process for CCS to provide confidential advice to merger parties when they wish to keep their transaction confidential, but would like some indication from CCS on whether they need to notify their transaction. Respondents generally welcomed this.

16. Two respondents indicated that, in their view, confidential advice should be generally available (instead of being limited to anticipated mergers not in the public domain which give rise to a genuine competition issue). CCS' reasons for limiting the provision of confidential advice in this way are as follows: first, the purpose of the provision of confidential advice is to assist with planning and consideration of future mergers, in particular at the stage when the merger parties are concerned to preserve the confidentiality of the transaction. Secondly, the public notification process should remain the primary process for firms to notify CCS of potentially problematic mergers. It is not the intention for the confidential advice process to replace the public notification process, as there are important advantages to the latter. While confidential advice is provided without having taken into account third party views and is therefore not binding on CCS, a decision issued by CCS pursuant to the public notification process would have taken into account third party views and may be fully relied on by the merging parties. A separate but equally important consideration is that there is a need to

build a body of decisions to enable merger parties and their advisors to self-assess their transactions. This is a critical aspect of a voluntary notification regime. CCS will limit the provision of confidential advice to anticipated mergers not in the public domain as originally proposed.

17. Respondents indicated that reasonable fees, for example along the lines of the fees for notification for guidance under sections 34 and 47 of the Competition Act, would be acceptable. CCS has decided not to charge fees for the provision of confidential advice at the initial stage and will review the fee charging policy in due course.

18. It was suggested that merger parties should be able to obtain confidential advice on the basis of a short five page submission setting out the main relevant facts, instead of providing information equivalent to that required in Form M1. CCS considers that confidential advice will be more useful to the parties if it is based on information that is reasonably complete in terms of competitive impact of the transaction, and the revised Form M1 will meet the aim of providing this. As such, CCS will proceed as per its consultation.

19. Respondents also suggested minor clarifications to the process; CCS will implement some of these. For example, the revised Guidelines clarify that commercially sensitive information will be returned to the applicant if CCS declines to provide confidential advice. In addition, the revised Guidelines clarify that information provided in the context of confidential advice will not be shared with other agencies or competition authorities in other jurisdictions. The distinction between pre-notification discussions and confidential advice will also be clarified.

Form M1

20. CCS consulted on increasing the information requirements in Form M1. In light of the increased information requirements, there was one suggestion to introduce a short form M1 or to give parties discretion about which parts of the form to fill in. CCS considers that short form notifications are less appropriate in the context of a voluntary regime where notification is encouraged only for mergers that raise competition concerns. Respondents also suggested the inclusion of a question on efficiencies. This will be implemented in the revised Guidelines.