# PUBLIC CONSULTATION ON MERGER REGIME

## Introduction

1. On 1 January 2006, the prohibitions in the Competition Act ('the Act') on anti-competitive agreements (section 34) and abuse of a dominant position (section 47) came into effect.

2. Minister of State for Trade and Industry, Mr S Iswaran, announced on 27 September 2006 that the merger regime will come into force on 1 July 2007. In preparing for the implementation of the merger provisions, the CCS has studied best practices in various jurisdictions, including the United States, United Kingdom ('UK'), European Union ('EU'), Australia and Ireland.

3. The study showed that changes to our merger regime, as currently proposed for under the Act, are needed to better align it with current international best practices. Some of the proposed changes will require amendment to the Act. To ensure that the views of interested parties are considered before the merger framework and amendments to the Act are finalised, the CCS is holding a 3-week public consultation exercise, starting on 20 October 2006, to gather feedback on:

i) the proposed changes to the merger framework in the Draft Amendment Bill;
ii) the Draft CCS Guideline on the Substantive Assessment of Mergers; and
iii) the Draft CCS Guideline on Merger Procedures.

4. The CCS invites comments from the public on the proposed merger regime as set out in these three documents. We have consulted with the Securities Industry Council and are awaiting their inputs.

## Policy considerations

5. The CCS recognises that some degree of market rationalisation, especially given Singapore's small and open economy, is necessary to enable businesses to reap efficiencies of scale and scope. The CCS expects that only a minority of mergers will raise competition concerns, and will focus its efforts on these.

6. In implementing the merger regime, the CCS is mindful that the procedures do not impose excessive regulatory and business compliance costs, which may unduly constrain merger activities. This paper summarises and outlines the rationale for the key features of the proposed merger regime.

## Key features

Test for substantial lessening of competition

7. Section 54 of the Act prohibits mergers that have or are expected to substantially lessen competition in any market in Singapore (the 'section 54 prohibition'). This test, which is elaborated upon in the Draft CCS Guideline on the Substantive Assessment of Mergers, is also adopted by the majority of competition regimes studied.

8. Mergers that substantially lessen competition could have net offsetting efficiencies. The CCS recognizes that such mergers are, on balance, beneficial to the economy, and hence should be allowed to proceed. The UK and Australia exclude mergers with net offsetting benefits. It is therefore proposed that the Act be amended to allow a merger that is found to substantially lessen competition in a market in Singapore, to proceed if the economic efficiencies it brings about can be shown to outweigh the anti-competitive detriment.

Voluntary notification

9. The merger notification regime presently provided for in the Act allows merger parties to voluntarily notify their merger to the CCS for guidance or decision. It is up to businesses to decide if they want to seek the CCS' clearance of their mergers. The CCS believes that a voluntary system is appropriate for Singapore. As most mergers in Singapore are unlikely to raise competition concerns, a mandatory system could impose undue business costs.

Notifying anticipated mergers and mergers

10. Anticipated mergers are arrangements that are in progress or contemplated that, if carried into effect, will result in the occurrence of a merger. In general, a merger occurs where there is the acquisition or establishment by one or more persons of (direct or indirect) control over the entire or part of a business.

11. The Act currently provides only for the voluntary notification of mergers by the merger parties for the CCS' views on whether the merger is anti-competitive. Feedback received from industry and the legal fraternity is that the notification system should be extended to anticipated mergers. It is proposed that the Act be amended to allow for the voluntary notification of anticipated mergers. CCS' views on the competitive effects of anticipated mergers will provide merger parties with certainty before they invest significant resources in implementing the merger and obviate possible significant costs in unravelling a merger. Such an approach would also align Singapore's merger regime with practices in other major jurisdictions.

12. It is proposed that the CCS accept notifications of anticipated mergers that have been made public. This will allow for public consultations to be held and facilitate a full consideration of the case. This is the approach in the UK. If parties prefer to keep the anticipated merger confidential or need more time to make a public announcement, they can choose to notify the CCS after the anticipated merger has been brought into effect.

Removal of statutory guidance for mergers

13. The Act presently allows merger parties to notify their merger to the CCS for a decision or confidential guidance. The experience of competition authorities in Australia and the UK indicates that confidential guidance provides minimal added-value to businesses, as third party views cannot be sought due to the confidential nature of guidance. Such guidance is unlikely to meet the needs of businesses for certainty, as the merger can be re-assessed if there is a third-party complaint. The benefits of guidance are limited when weighed against the considerable resources expended in a notification for guidance. It is therefore proposed to remove the provision for statutory guidance for mergers.

14. The CCS will instead provide for non-statutory confidential pre-notification discussions to help merger parties prepare for a statutory notification for decision. Where possible, the CCS will endeavour to provide an indication of possible competition concerns that are apparent at this stage from the information provided by the parties.

Accepting commitments

15. Commitments are undertakings given by the merger parties and accepted by a competition authority, binding the former to a course of action which then allows an otherwise anti-competitive merger to proceed. For example, the merging parties might commit to selling some assets in a particular market to a new competitor. The ability of the competition authority to accept commitments reduces costs on all sides, and allows for speedy clearance of anticipated mergers/mergers. The competition authorities in all the jurisdictions surveyed have statutory powers to accept and enforce commitments. It is proposed that the Act be amended to provide for the acceptance, variation, substitution, release and enforcement of commitments.

Ancillary restrictions

16. A merger may also involve arrangements that are anti-competitive in nature, but which are directly related and necessary to the implementation of the merger. These are known as ancillary restrictions. Examples of such agreements include non-compete obligations, licensing arrangements, and purchase and supply obligations.

17. The Act does not currently exclude such ancillary restrictions from being subject to the sections 34 and 47 prohibitions. This means that such agreements may be caught by these prohibitions. To provide certainty to businesses, it is proposed that ancillary restrictions be excluded from the sections 34 and 47 prohibitions. This is similar to the practice in the UK and Ireland.

Post-merger review and validity of non-infringement decisions

18. The Act provides that the CCS may, after making a non-infringement decision for an anticipated merger/merger, re-open the decision if, amongst other things, there are reasonable grounds for believing that there has been a material change of circumstances since its decision. This creates uncertainty for merger parties. It is proposed that the Act be amended to remove this ground for review. Anticipated mergers/mergers which are allowed to proceed will not be subsequently re-examined on the ground of a material change of circumstance. This will also apply to ancillary restrictions. This approach will align our practice with international best practice.

19. Market conditions will change over time. Mergers that would not pose competition concerns, may, at a different time with different circumstances, raise competition issues. It is proposed that the CCS be able, at the time of issuing a non-infringement/favourable decision, to specify the validity period of the decision. The CCS considers that one year will be generally sufficient for parties to act on the decision, but will take into account the circumstances of each merger when specifying the validity period, if any. The CCS will consider requests for extension of time on a case-by-case basis.

Joint ventures

20. The Act presently provides that the creation of a joint venture to perform on an indefinite basis, all the functions of an autonomous economic entity will fall within the merger regime. This may mean that joint ventures of a sufficiently long but definite duration are excluded from the merger regime. It makes more sense, from an economics perspective, for joint ventures that are of a sufficiently long duration and bring about a lasting change in the structure of the undertakings concerned to fall within the merger regime, even if a definite duration is specified. European Commission guidelines use the wording ‘a lasting basis’. It is proposed that the criterion of ‘a lasting basis’ be used instead of ‘an indefinite basis’.

Mergers excluded from the Act

21. Paragraph 1(a) of the Fourth Schedule of the Act currently provides for the exclusion of mergers approved under “any written law”. The intent is to

exclude only mergers that are subject to approval by another regulatory agency, for two reasons: first, to prevent a situation where a merger is subject to approval from two regulatory agencies; and second, a sector-specific regulatory agency, in assessing the merger, will be better-placed to consider the policy and competition considerations relevant to that sector. The current phrasing, however, is broad enough to exclude mergers approved by the court or by the shareholders of a company, without any regulatory oversight. It is proposed that this paragraph be amended to more accurately reflect the policy intent.

Notification procedure

22. The proposed merger notification procedure will have the following key features:

a. Indicative notification thresholds. Mergers that do not raise any potential competition concerns should not be notified. To provide guidance, the CCS has proposed indicative notification thresholds as stated in Paragraph 3.3 of the Draft CCS Guideline on Merger Procedures. Parties are encouraged to consider notifying their anticipated mergers/mergers if they meet or exceed the notification thresholds;

b. 2-phase review process. The CCS will adopt a two-stage process for evaluating anticipated mergers/mergers. The purpose is to quickly allow anticipated mergers/mergers that clearly do not pose competition concerns to proceed within the Phase 1 review period, which is expected to last no more than 30 working days. Only anticipated mergers/mergers that could potentially pose competition concerns will proceed to a Phase 2 investigation, where a more thorough assessment will be conducted. Due to the expected complexity of the assessment in this Phase, the review period is expected to last no more than 120 working days; and

c. Suspensive powers. In line with the approach of voluntary notifications, merger parties will be allowed to complete an anticipated merger or to undertake further integration of a merger at their own commercial risk, when an anticipated merger/merger is being reviewed as part of a notification or during an investigation. However, it is proposed to amend the Act to give the CCS powers to prevent merger parties from taking actions that would prejudice the CCS' ability to consider the anticipated merger/merger and/or to impose appropriate remedies, where the CCS has reasonable grounds to suspect that the anticipated merger, if carried into effect, or the merger, will infringe the section 54 prohibition. These powers will be invoked only when necessary.

Other amendments to the Act

23. It is also proposed to amend the Act to enhance the CCS' ability to discharge its functions effectively.

a. Powers to require compliance. The CCS has the powers to require relevant third parties to furnish returns and information as may be necessary for discharging its functions and duties under the Act, for example, in the making of sector inquiries or studies. However, the CCS does not have a corresponding power to require parties to comply. The CCS is of the view that it is necessary to be able to require parties to furnish such returns and information when exercising its functions in carrying out sector inquiries/studies and when dealing with notifications; and

b. Authorising temporarily-employed staff to enter premises under section 64 of the Act. There will be times when the CCS will need to deploy additional manpower engaged from external agencies to meet its temporary manpower needs in carrying out investigations by entering premises without a warrant. Such entry will be managed, led and directed by CCS staff, with these additional staff playing a supporting role. There is already a similar provision in section 65 relating to entry of premises with a warrant. It is proposed that section 64 be amended to allow for the deployment of such persons.

**Mode of consultation**

24. The Commission seeks feedback on the proposed merger regime and the three consultation documents. The Commission will review the submissions and make changes, where appropriate.

25. Written submissions are to be sent to the Commission via email and by post/courier/fax:

Email: ccs_consultation@ccs.gov.sg

AND

Post/Courier: Competition Commission of Singapore
5 Maxwell Road
#13-01, Tower Block
MND Complex
Singapore 069110
Attn: Director (Economics)

Fax: (65) 62246929

26. Parties that submit comments should organise their submissions as follows:

i. Cover page;
ii. Table of contents;
iii. Summary of major points;
iv. Statement of interest;
v. Comments; and
vi. Conclusion.

27. Supporting material may be placed in an annex. All written submissions should be clear and concise, and should provide a reasoned explanation for any proposed revision to the proposed merger regime and/or consultation documents. Where feasible, parties should identify the specific clause of the Draft Bill or specific paragraph of the consultation paper on which they are commenting. Where parties choose to suggest revisions to the text of the Draft Bill or consultation documents, they should state clearly the specific changes to the text that they propose.

28. All submissions are to be made at or before **noon, 10 November 2006**. Submissions must be submitted in both hard and soft copies (in Microsoft Word format). Parties submitting comments should include their personal/company particulars as well as their correspondence address, contact numbers and email addresses on the cover page of their submissions.

29. The Commission reserves the right to make public all or parts of any written submission and to disclose the identity of the author. Commenting parties may request that any part of the submission that they believe to be proprietary, confidential or commercially sensitive be kept confidential. Any such information should be clearly marked and placed in a separate annex. Where the Commission agrees with the request, it will consider the information but will not publicly disclose it. If the Commission rejects the request, it will not consider the information and will return the information to the submitting party. As far as possible, parties should limit any request for confidential treatment of information submitted. The Commission will not accept any submission that requests confidential treatment of all, or a substantial part, of the submission.

Briefings cum dialogue sessions

30. The Commission will be conducting briefings cum dialogue sessions on **27 October 2006** and **30 October 2006** for industry stakeholders. Parties interested in attending the briefings can obtain more information on the CCS website at http://www.ccs.gov.sg.

Fax: (65) 62246929 or
Email: ccs_feedback@ccs.gov.sg

Please sign up on or before the closing date on **noon, 25 October 2006**.