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PUBLIC INTEREST CONSIDERATIONS IN MERGER CONTROL

-- Note by Singapore --

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This document reproduces a written contribution from Singapore submitted for Item 3 of the 123rd meeting of the OECD Working Party No. 3 on Co-operation and Enforcement on 14-15 June 2016.

More documents related to this discussion can be found at www.oecd.org/daf/competition/public-interest-considerations-in-merger-control.htm

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SINGAPORE

1. Introduction

1. The Competition Commission of Singapore ("CCS") welcomes the opportunity to share its experience with the OECD Competition Committee at its roundtable on "*Public Interest Considerations in Merger Control*" at the WP3 Meeting.

2. Singapore's Merger Regime

2. Section 54 of the Competition Act (Cap. 50B) ("the Act") prohibits mergers that may have resulted or may be expected to result in a substantial lessening of competition ("SLC"), unless they are excluded or exempted (the "Section 54 prohibition"). The Fourth Schedule of the Act provides for exclusions from the Section 54 prohibition.

3. Under Singapore's voluntary merger notification regime, there is no obligation, or mandatory requirement, for merger parties to notify their merger situations to CCS, either before or after implementation of the merger. However, under sections 56 to 58 of the Act, merger parties have the option of notifying their merger situation to CCS and to apply for a decision as to whether the merger situation infringes, or will infringe, the Section 54 prohibition.[1]

4. The Section 54 prohibition came into force on 1 July 2007. As of 10 May 2016, CCS had received 52 merger notifications. 43 notifications were cleared without commitments, 4 were cleared with commitments[2], 4 were withdrawn, and 1 is still undergoing assessment. Half of these merger notifications were also filed in other jurisdictions.

2.1 Public Interest Considerations

5. Under Section 2(1) of the Act, public interest considerations refer to:

> *"national or public security, defence and such other considerations as the Minister may, by order published in the gazette prescribe".*

6. The Minister referred to in the Act is the Minister of Trade and Industry (Trade).[3] Though provided for in the Act, there have been no other public interest considerations gazetted to date.

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1 Paragraph 2.3, CCS Guidelines on Merger Procedures 2012.

2 2 merger notifications were cleared following commitments offered to the CCS. They are: Proposed Acquisition by ADB BVBA of Safegate International AB and Proposed Acquisition by Seek Asia Investments Pte Ltd. of the Jobstreet Business. 2 merger notifications were cleared following CCS's assessment of the potential impact of competition in Singapore pursuant to commitments offered by the merging parties to overseas competition authorities. They are: Proposed Merger between Thomson Corporation and Reuters Group PLC; and Proposed Merger between Manitowoc Company, Inc, (through its wholly-owned subsidiary, MTW County Ltd) & Enodis Plc.

3 The Schedule, Constitution of the Republic of Singapore (Responsibility of the Minister for Trade and Industry (Trade)) Notification 2015.

7. Singapore's institutional design to enforce public interest considerations follows the dual responsibilities external intervention model described in the OECD Secretariat Background Paper on "Public Interest Considerations in Merger Control" ("OECD Background Paper").[4] Public interest factors do not play a role in CCS's competition assessment of a merger which focuses on the SLC test, clearing the merger where there is no SLC, or considering whether the merger may be exempted because it results in net economic efficiencies.

8. Where there is an SLC, section 58 of the Act provides that a decision by CCS that a merger has infringed, or that an anticipated merger will, if carried into effect, infringe the Section 54 prohibition may be made by CCS either upon an application by merger parties for a decision, or upon the conclusion of investigations commenced by CCS. [5] Where CCS proposes to make such a decision, the applicants who notified the merger to CCS for decision or, in the case of an investigation, the merger parties, may apply to the Minister for the merger to be exempted from the merger provisions on the ground of any public interest consideration.[6]

9. The Act does not provide avenues for judicial review of decisions relating to public interest factors. To this end, the Minister's decision is final as provided for in Section 58(4) of the Act.

2.2 Net Economic Efficiencies

10. The OECD Background Paper also discussed that in some cases, efficiencies are considered to counterbalance anti-competitive outcomes in a two stage process: first, there is a finding that a merger is anti-competitive, and secondly it is examined whether the merger can be justified on efficiency grounds.[7]

11. CCS takes efficiency gains into account at two separate points in its analytical framework. First efficiencies may be taken into account where they increase rivalry in the market so that no SLC would result from the merger. Second, efficiencies may also be taken into account where they do not avert a finding of SLC, but will nevertheless result in net economic efficiencies in markets in Singapore.[8] The net economic efficiency defence does not appear to afford an element of public interest to be read into it, unless that aspect of public interest can be translated into an economic efficiency argument.

12. These efficiencies should bring about lower costs, greater innovation, greater choice or higher quality, and be sufficient to outweigh the detriments to competition in Singapore caused by the merger.[9]

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4 Paragraph 29, Public Interest Considerations in Merger Control, OECD Background Paper.

5 Section 58 of the Competition Act (Chapter 50B). Section 4 of the Third Schedule of the Act provides that the Minister may exempt the agreements and conduct from the Section 34 Prohibition (anti-competitive agreements) and the Section 47 Prohibition (abuse of dominance) of the Act if there are exceptional and compelling reasons of public policy.

6 Paragraph 10.6, CCS Guidelines on the Substantive Assessment of Mergers.

7 Paragraph 59, Public Interest Considerations in Merger Control, OECD Background Paper.

8 This is provided for in the Fourth Schedule of the Competition Act (Chapter 50B). "*The section 54 prohibition shall not apply to any merger if the economic efficiencies arising or that may arise from the merger outweigh the adverse effects due to the substantial lessening of competition in the relevant market in Singapore.*"

9 Paragraphs 7.17, CCS Guidelines on the Substantive Assessment of Mergers.

13. These claimed efficiencies must be:

- Demonstrable, in that:
  - They are clear and, in the case of cost savings, quantifiable. The [merging] parties should be able to produce detailed and verifiable evidence of any anticipated price reductions or other benefits;
  - the claimed benefits are likely to arise with the merger; and
  - these benefits will materialise within a reasonable period of time; and
- Merger specific, in that the efficiency gains must be a direct consequence of the merger. The key issue is that the efficiencies are judged relative to what would have happened without the merger.[10]

14. CCS may verify claimed efficiencies with third parties because of information asymmetries. Such third party information may be obtained via public consultation or by contacting them directly.[11] However, the onus is ultimately on the merging parties to demonstrate the claimed efficiencies on the basis of the information available to them.

15. To date, no mergers have been exempted on grounds of net economic efficiencies.

3. Singapore's Experience on the Public Interest Consideration

3.1 Merger between Greif International Holding B.V. & GEP Asia Holding Pte Ltd[12]

16. There has only been one instance where merging parties appealed to the Minister for a merger to be exempted on the ground of public interest considerations.

17. That merger notification was made jointly by Greif International Holding B.V. ("Greif") and GEP Asia Holdings Pte Ltd ("GEP") (jointly referred to as "Parties") in relation to the creation of a joint venture company, Greif Eastern Packaging Pte Ltd ("Greif Eastern") on 20 July 2009. In summary, Greif and GEP were to contribute their respective Singapore business in the manufacturing and selling of steel drums, bitumen drums and steel pails of various capacities and lithographic printing to Greif Eastern, in consideration for equity interests in Greif Eastern. Greif Eastern will be involved in the production, distribution and sale of steel and rigid plastic drums and containers of any size, and the provision of services to such drums and containers.

18. CCS issued a Statement of Decision (Provisional) ("SDP"), proposing to prohibit the joint venture from being carried into effect by means of a direction pursuant to section 69 of the Act. In reviewing the joint venture, CCS's main concern was that the joint venture may substantially lessen competition in the supply of new large steel drums to Singapore, due to horizontal concentration between the two closest rivals in the market. CCS also considered whether the joint venture may substantially lessen competition in the supply of bitumen drums in Singapore, due to the loss of GEP as the only other potential supplier of bitumen drums. As GEP had existing bitumen drum equipment and know-how to promptly re-commence production quickly should the opportunity arise, the transfer of GEP's bitumen drum equipment to Greif, or the elimination of this equipment from the market would cement Greif's current position as the monopoly supplier.[13]

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10 Paragraph 7.18, Ibid.

11 Paragraph 4.45, CCS Guidelines on Merger Procedures 2012.

12 The Statement of Decision can be found on the CCS public register.

13 Paragraphs 6.1 and 6.2, Statement of Decision.

19. **Public Interest Exemption.** The Parties filed an application to the Minister, seeking to exempt the joint venture from the Section 54 prohibition on the grounds of public interest. The Parties submitted that an appropriate and persuasive interpretation of "public interest" would be the "wider economic progress and public benefits" that the joint venture would generate for the Singapore economy and society at large and that there were exceptional and compelling public interest grounds for an exemption to be granted in respect of the joint venture.[14]

20. However, the Minister declined the Parties' application for exemption on the basis that the grounds relied upon by the Parties did not fall within the existing definition of "public interest considerations", which refers to matters of national or public security and defence.[15]

21. **Statement of Decision.** Independent of the Parties' said application to the Minister to exempt the merger on public interest grounds, CCS eventually issued a decision that the joint venture will not lead to an SLC. This was, *inter alia*, pursuant to the Parties' representations that:

- With regard to the supply of bitumen drums, ExxonMobil informed Greif that it intended to cease the use of bitumen drums in 2011, while the only other customer, Shell Eastern Petroleum was not concerned about the joint venture because it will be able to bargain on a global basis.[16]

- With regard to the supply of steel drums, CCS found that the expansion of Mauser, an existing competitor to the Parties, in Singapore, was sufficient in likelihood, scope and time to deter or constrain any attempt by the Parties or their competitors to exploit the reduction in rivalry.[17]

22. The above concludes CCS's contribution to the OECD Competition Committee's Roundtable on *"Public Interest Considerations in Merger Control"* for the WP3 Meeting.

14 Paragraph 3.4, Ibid.

15 Paragraph 3.6, Ibid.

16 Paragraph 6.2, Ibid.

17 Paragraph 9.1, Ibid.