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## Working Party No. 3 on Co-operation and Enforcement

# Roundtable on the Extraterritorial Reach of Competition Remedies - Note by Singapore

**4-5 December 2017**

This document reproduces a written contribution from Singapore submitted for Item 5 at the 126th Meeting of the Working Party No 3 on Co-operation and Enforcement on 4-5 December 2017.

More documentation related to this discussion can be found at

www.oecd.org/daf/competition/extraterritorial-reach-of-competition-remedies.htm

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# *Singapore*

1. The Competition Commission of Singapore ("**CCS**") is a statutory body that was established under the Competition Act (Cap. 50B) ("**the Act**") on 1 January 2005. One of the key functions of CCS is to eliminate or control practices having adverse effect on competition in Singapore.[1] In this regard, it is pertinent to note that the Act has extraterritorial effect and the scope of its application extends to all markets in Singapore unless they are excluded under the Third and Fourth Schedules to the Act. The three key anti-competitive prohibitions under the Act are:

1. **Section 34 prohibition** – section 34 of the Act prohibits agreements, decisions and concerted practices which have as their object or effect the prevention, restriction or distortion of competition within Singapore.
2. **Section 47 prohibition** – section 47 of the Act prohibits any conduct which amounts to the abuse of a dominant position in any market in Singapore.
3. **Section 54 prohibition** – section 54 of the Act prohibits mergers and acquisitions that substantially lessen competition within any market in Singapore.

2. The prohibitions are anchored in preventing an anti-competitive impact in Singapore. In other words, conduct which takes place outside of the geographical boundaries of Singapore but which affects competition within Singapore will fall within the ambit of the Act. This is clearly set out within section 33 of the Act[2], as well as CCS's various guidelines[3]. For instance, the CCS Guidelines on the Section 34 Prohibition 2016 ("**Section 34 Guidelines**") states that an agreement made outside Singapore, an agreement where any party to the agreement is outside Singapore or any other matter, practice or action arising out of such agreement outside of Singapore is prohibited, provided the agreement has as its object or effect the prevention, restriction or distortion of competition within Singapore[4]. Similarly, it is set out in the CCS Guidelines on the Section 47 Prohibition 2016 ("**Section 47 Guidelines**") that the prohibition applies to an

[1] Section 6(1)(b) of the Competition Act (Cap. 50B)

[2] Section 33 of the Competition Act provides that "notwithstanding that (a) an agreement referred to in section 34 has been entered into outside Singapore; (b) any party to such agreement is outside Singapore; (c) any undertaking abusing the dominant position referred to in section 47 is outside Singapore; (d) an anticipated merger will be carried into effect outside Singapore; (e) a merger referred to in section 54 has taken place outside Singapore; (f) any party to an anticipated merger or any party involved in a merger is outside Singapore; or (g) any other matter, practice or action arising out of such agreement, such dominant position, an anticipated merger or a merger is outside Singapore, this Part shall apply to such party, agreement, abuse of dominant position, anticipated merger or merger if - (i) such agreement infringes or has infringed the section 34 prohibition; (ii) such abuse infringes or has infringed the section 47 prohibition; (iii) such anticipated merger, if carried into effect, will infringe the section 54 prohibition; or (iv) such merger infringes or has infringed the section 54 prohibition, as the case may be.

[3] The CCS Guidelines outline how CCS will administer and enforce the provisions under the Competition Act. They are available on CCS's website.

[4] Paragraph 2.2 of the Section 34 Guidelines.

undertaking in a dominant position outside of Singapore, and which abuses that dominant position in a market in Singapore.[5]

## 1. CCS's Power to Accept Competition Remedies

3. Singapore has a voluntary merger notification regime, and merger parties are not mandated to seek approval or to notify their merger situations to CCS. 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.[6] CCS will then conduct a comparison of the extent of competition with and without the merger situation to assess the degree by which the merger situation might lessen competition. If the lessening of competition is likely to be substantial and there are no offsetting efficiencies, the merger situation may infringe the section 54 prohibition.

4. In the event that CCS decides that a merger situation has or will infringe the section 54 prohibition, it has the power to accept remedies which would mitigate or prevent the substantial lessening of competition which might arise from the merger situation.

5. Section 69 of the Act states that where CCS makes a decision that a merger has infringed or that an anticipated merger, if carried into effect, will infringe the section 54 prohibition, it may give appropriate directions to effect the appropriate remedy.[7] The direction may include provisions prohibiting an anticipated merger from being carried into effect or requiring a merger to be dissolved or modified in such manner as CCS may direct. The direction may also include provisions requiring any merger party to:

1. enter such legally enforceable agreements as may be specified by CCS and designed to prevent or lessen the anti-competitive effects which have arisen;
2. dispose of such operations, assets or shares of such undertaking in such manner as may be specified by CCS; and
3. provide a performance bond, guarantee or other form of security on such terms and conditions as CCS may determine.

6. In the case of a merger, CCS may, if the infringement was committed intentionally or negligently, require any party involved in the merger to pay such financial penalty as CCS may determine.

7. Further, pursuant to section 60 of the Act[8], CCS may accept appropriate commitments proposed by the merger parties, to address competition concerns which

[5] Paragraph 2.2 of the Section 47 Guidelines.

[6] Sections 56 – 58 of the Act provides for an application for an anticipated merger or merger to be considered by CCS for a decision.

[7] Section 69 of the Act provides for the directions which CCS may make in the event of an infringement of the section 34, 47 and 54 prohibitions.

[8] Section 60A(1) of the Act states that "the Commission may, at any time before making a decision pursuant to an application under section 57 or 58 or an investigation under section 62(1)(c) or (d) as to whether (a) the section 54 prohibition will be infringed by an anticipated merger, if carried into effect; or (b) the section 54 prohibition has been infringed by a merger, accept from such person as it thinks appropriate, a commitment to take or refrain from taking such action as it considers appropriate for the purpose of remedying, mitigating or preventing the substantial

may be raised by the merger situation. These may include both structural and behavioural remedies. When considering whether the proposed commitments are appropriate, CCS will consider whether the commitments are reasonable and practicable to address the identified adverse effects to competition. As a starting point, CCS will choose the remedial action which will restore competition that has been, or is expected to be substantially lessened as a result of the merger situation. Given that the effect of the merger is to change the structure of the market, remedies that aim to restore all or part of the pre-merger market structure are likely to be a more direct way of addressing the adverse effects. However, CCS will also have regard to the principle of proportionality and take into account other considerations such as the effectiveness of the remedy, the costs associated with the remedy, whether the remedy will require substantial monitoring by the merging parties and CCS.[9]

8. In addition, CCS has accepted voluntary commitments from parties who were investigated for practices potentially amounting to an abuse of dominance.[10] CCS has also accepted voluntary commitments from parties to an application for decision under section 44 of the Act.[11]

## 2. Competition Remedies with extraterritorial effect

9. Read together with section 33 of the Act, CCS's power to accept remedies includes the power to accept remedies which have an extraterritorial effect. For instance, CCS is seized of jurisdiction to consider a merger which has taken place overseas, by entities which are registered in a foreign jurisdiction, if there is a substantial lessening of competition in Singapore. If these foreign-registered undertakings should offer voluntary commitments which remedy, mitigate or prevent the substantial lessening of competition, CCS is empowered to accept them, even if the commitments pertain to conduct which takes place outside of Singapore.

10. Whilst CCS has not yet had any experience in considering remedies which have an extraterritorial reach, the relevant considerations which are set out in the CCS Guidelines on the Substantive Assessment of Mergers 2016 ("Merger Assessment Guidelines") remain relevant. That said, the monitoring of extraterritorial remedies may present challenges. At present, a number of commitments accepted by CCS involve the appointment of an independent monitoring trustee by the merger parties to ensure

lessening of competition or any adverse effect which (i) may be expected to result from the anticipated merger, if carried into effect; or (ii) has resulted or may be expected to result from the merger."

[9] Section 8 of the CCS Merger Assessment Guidelines sets out the various factors which CCS may take into account when determining the appropriateness of remedial action, and the forms of remedial action which may be taken.

[10] The investigations into Coca Cola Singapore Beverages, Cordlife Group Limited, Asia Pacific Breweries (Singapore) Pte. Ltd., and E M Services Pte. Ltd. were closed following voluntary commitments to address the competition concerns identified by CCS. For more information about these cases, please refer to CCS's website.

[11] An undertaking may apply to the CCS for a decision as to whether an agreement entered into by said undertaking has infringed section 34 of the Act. The undertaking does so under section 44 of the Act.

compliance with the commitments.[12] With regard to the monitoring of extraterritorial remedies restricting the conduct of entities outside of the geographic scope of Singapore, the appointment of an independent monitoring trustee combined with commitment terms obliging the merger parties to disclose relevant information necessary for monitoring of said remedies is particularly useful. The independent monitoring trustee may perform its work outside of Singapore, but would be obliged to prepare audit reports to CCS on a regular reporting cycle. This greatly assists CCS to monitor the merger parties' compliance with the remedies, even if the merger parties conducted their business outside of Singapore.

## 3. Extraterritorial Reach of Remedies

11. To date, CCS has handled two merger notifications in which commitments were offered and accepted by overseas competition authorities. These commitments were not offered to CCS, but nonetheless had an impact in Singapore. Generally, CCS's position is that these commitments do not, in and of themselves, necessarily imply that CCS will similarly accept the commitments and allow the merger parties to proceed with the merger. The key consideration is whether the merger will have an appreciable adverse effect on competition in Singapore. As such, any overseas commitments with extraterritorial impact must be viewed in light of the facts and circumstances of each case, to determine if they will sufficiently address competition concerns arising within Singapore.

12. The first is the acquisition of Enodis plc. ("**Enodis**") by The Manitowoc Company, Inc. ("**Manitowoc**")[13]. The businesses of Manitowoc and Enodis overlap horizontally in the supply of cold-focused food service equipment, with the relevant product market encompassing the wholesale supply of four types of ice machines[14]. The transaction resulted in post-merger market shares which exceeded CCS's indicative threshold of 40% and third party feedback indicated that the merger parties were close rivals, their ice machines were close substitutes and the transaction would consolidate the position of the parties in the relevant market, bringing several well-known brands of ice machines under the control of a single merged entity. Given the substantial market share of the merged entity for ice machines, and the corresponding increases in concentration arising from the transaction, CCS was of the view that competition concerns could potentially arise from the transaction.

13. However, CCS took into account the divestment commitments which were offered by the merger parties to the European Commission ("**EC**"), which were accepted

[12] For instance, the voluntary commitments offered and accepted by CCS in respect of CCS 400/004/14: *Notification for Decision: Proposed Acquisition by Seek Asia Investments Pte. Ltd. of the JobStreet Business in Singapore* (13 November 2014) and CCS 400/001/17: *Notification for Decision: Proposed Acquisition by Times Publishing Limited of Penguin Random House Pte. Ltd. and Penguin Books Malaysia Sdn. Bhd.* (25 September 2017), included clauses on the appointment of an independent monitoring trustee which would monitor the merger parties' compliance with the commitments and provide regular audit reports to CCS.

[13] CCS 400/002/008: *Notification for Decision: Anticipated Merger between The Manitowoc Company, Inc. and Enodis plc.* (29 September 2008).

[14] Self-contained cubers, modular cubers, flake machines and scale ice machines.

on 19 September 2008.[15] Under the divestment commitments agreed between the merger parties and the EC, the merger parties had undertaken, *inter alia*, to sell all of Enodis' global ice machine business[16], global commercial refrigeration business and other non-ice business[17]. CCS noted that the divestment commitments had worldwide effect, as all of Enodis' global ice machine businesses were to be divested. As a result, CCS considered that any competition concerns arising in Singapore would have been sufficiently addressed by the merger parties' divestment commitments to the EC. The transaction, if carried out together with the divestment commitments, would not infringe the section 54 prohibition in Singapore.

14. The second is the merger between The Thomson Corporation ("**Thomson**") and Reuters Group PLC ("**Reuters**").[18] Thomson was a global provider of value-added information that is integrated with software tools and applications, to professionals in legal, tax, accounting, financial services, scientific research and healthcare markets. Reuters was a global information company providing financial information, trading capabilities, software and news to professionals in financial services, media and corporate markets. CCS found that there were three separate content sets where there was significant overlap between the merger parties – (1) aftermarket broker research reports; (2) earnings estimates; and (3) fundamentals. With regard to the supply of these three content sets, third party feedback indicated that there were very limited alternatives which were of comparable quality. There were concerns that the merger parties would be able to unilaterally raise prices post-merger, given the lack of competitive pressure to constrain the parties. Barriers to entry for each of the three markets were high, and potential competition concerns were raised within the market for each content set.

15. At the conclusion of the Phase 1 review, CCS was unable to conclude that the merger does not raise competition concerns and the merger proceeded to Phase 2 review. Thereafter, on 19 February 2008, it was announced that the United States Department of Justice ("**US DOJ**"), the EC and the Canadian Competition Bureau ("**CCB**") had given approval for the merger to proceed, subject to commitments[19] offered by the parties to the DOJ and the EC.

[15] The merger parties filed the present notification for decision with the CCS on 15 August 2008. In filing the notification, the merger parties had given notice of the commitments which they had offered to the EC. On 19 September 2008, it was announced that the EC had given approval for the transaction to proceed, subject to the divestment commitments offered by the merger parties. The details of the approved divestment commitments were furnished on CCS on 23 September 2008.

[16] Operated under the "Scotsman", "Ice-O-Matic", "Simag", "Barline", "Icematic" and "Oref" brand names.

[17] Operated under the "Tecnomac" and "Icematic" brand names.

[18] CCS 400/007/07: *Notification for Decision: Merger between the Thomson Corporation and Reuters Group PLC* (23 May 2008)

[19] The commitments include the following:

a) To sell copies of certain databases to allow the purchaser to rapidly enter the market and compete with the merged entity's offerings;

b) To allow the purchaser of the databases to hire the necessary personnel from the parties;

16. CCS considered that the commitments would essentially create another competitor which could supply its products worldwide. CCS concluded that the commitments would have worldwide effect and sufficiently address any competition concerns which may arise in Singapore. As such, the merger would not infringe the section 54 prohibition.

17. These two cases demonstrate that CCS had and will continue to take into account the impact of commitments with extraterritorial effect, which have been accepted by competition authorities from other jurisdictions. The guiding principle is the impact of these commitments in Singapore – whether they would adequately address competition concerns arising domestically.

## 4. Conclusion

18. The need for extraterritorial jurisdiction over anti-competitive conduct taking place outside of Singapore was a deliberate policy decision by the Government who recognises that Singapore is a small and open economy and therefore, vulnerable to anti-competitive activities from undertakings operating overseas. However, the Government is cognisant that in terms of enforcement actions, Singapore will have to take into consideration the principles of territoriality and sovereignty in order to reduce the scope for conflicts. As such, the Minister[20] moving the Competition Bill at its Second Reading in Parliament said:

> *"… Another implication of a small and open economy is this need for extra-territorial provisions. Our intent cannot be and it will be impossible to regulate the practices of big multi-national companies, big overseas firm who happen to have a small presence in Singapore. But, nevertheless, we do need to send a message … As to the action we can take, obviously, we will have to confine our actions to the presence in Singapore."*

19. Whilst CCS has yet to have any experience in considering remedies which have an extraterritorial reach, it is legislatively empowered to do so. Where the facts warrant the consideration of extraterritorial remedies, the factors set out in the Merger Assessment Guidelines remain relevant. The key consideration will be whether the extraterritorial remedies are reasonable and practicable to address the competition concerns. CCS will also take into account other considerations such as the effectiveness of the remedy, the costs associated with the remedy, and whether the remedy will require substantial monitoring.

c) To license to the purchaser of the databases all intellectual property rights, trade secrets, know-how and technical information for collection, aggregation, normalisation and transmission that will allow the acquirer to operate the database; and

d)To provide the purchaser with transitional technical support services such that the purchaser is able to integrate the purchased databases into its own offerings.

[20] Dr Vivian Balakrishnan (now Minister for Foreign Affairs) in Parliament on 19 October 2004.