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WONGPARTNERSHIP LLP'S RESPONSE TO THE PUBLIC CONSULTATION ON PROPOSED CHANGES TO THE CCS GUIDELINES ON MERGER PROCEDURES

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STATEMENT OF INTEREST

WongPartnership LLP is a leading law firm in Singapore with an active Competition Practice. We have been advising our clients on the merger control provisions of the Competition Act since the inception of the law in Singapore.

WongPartnership LLP welcomes the opportunity to comment on the Competition Commission of Singapore ("**CCS**") proposed changes to its Guidelines on Merger Procedures (the "**Proposed Guidelines**"). We consider it timely and useful to assess how the practical application of the merger control regime has been applied since July 2007, when they first came into effect.

SUMMARY OF MAJOR POINTS

WongPartnership LLP believes that the proposed amendments will benefit from further clarification, in particular in the following areas:

(i) Share of Supply Test

a. Interplay with Market Share Test: We would request clarification whether the Market Share Test (as defined below) found in the current guidance issued by the CCS will continue to be relevant. If the test is no longer applicable, this should be clarified.

(ii) Guidance on Vertical and Conglomerate Mergers

a. Suggested guidance on vertical and conglomerate mergers: We suggest that a Share of Supply test may be useful for vertical and conglomerate mergers.

(iii) Confidential Advice

a. Appropriate Fee: We believe our clients may be willing to pay a reasonable fee, similar to and no greater than the initial fee imposed for notifications for guidance or decision under Section 43 of the Competition Act.

b. Information Required: We are of the view that the CCS should not require the same information as set out in the Form M1, but a short note with a summary of the transaction, and the key issues for which parties are seeking confidential advice from the CCS should suffice.

(iv) Notification of Anticipated Mergers

a. Mergers not yet in the Public Domain: It would be useful to clarify whether anticipated mergers not in the public domain may be notified to the CCS.

(v) Other Suggested Clarifications to Form M1

a. We believe that a section for parties to provide the type of efficiencies that may result from the merger may be usefully included in Form M1.

Our response to the CCS' Questions on the Proposed Guidelines is set out below.

COMMENTS AND RESPONSE

1. **Do you consider that the proposed changes to CCS' guidance on the circumstances in which notification is likely to be appropriate will be useful to ensure that mergers that raise competition concerns in Singapore are notified to CCS? If not, please explain why and outline what might be a better approach.**

1.1 We agree that the proposed changes to CCS' guidance are useful and will assist parties, and counsel, in determining whether notification is likely to be appropriate. We note that the guidance broadly consists of the CCS' general guidance on when it would be appropriate to notify the CCS, and introduces two notable additional guidelines.

1.2 The first amendment concerns mergers involving small companies. The second one introduces a share of supply test.

Mergers involving small companies

1.3 We welcome the clarification that mergers involving small companies would not likely raise competition concerns. Our further comments on mergers involving small companies are set out in our response to question 2 below.

Share of Supply Test

1.4 We note that under the current Guidelines on Merger Procedures (the "**Current Guidelines**"), the CCS has indicated that it is unlikely to intervene in a merger situation unless:

(a) the merged entity will have a market share of 40% or more; or

(b) the merged entity will have a market share of between 20% and 40% and the post merger combined market share of the three largest firms (CR3) is 70% or more[1] (the "**Market Share Test**")

1.5 The Current Guidelines go on to provide that "*since market concentration is but one of the factors considered in assessing the merger situation, it does not mean that a merger situation meeting these thresholds will be presumed to lessen competition substantially. Conversely, merger parties may wish to make an Application in respect of a merger situation that does not cross the thresholds but which, in the merger parties' views, could raise competition concerns*."[2]

1.6 We note the removal in the Proposed Guidelines of the reference to the Market Share Test found in the Current Guidelines. We believe that the new notification guideline, based on the parties' share of the supply of goods or services of the same description in Singapore (the "**Share of Supply Test**"), may be useful as it is easier to apply than the current guideline based on the parties' market shares. We also welcome this as a test that will more clearly indicate the Singapore connection to the transaction. A notification guideline based on the Share of Supply Test may also potentially attract more mergers under the jurisdiction of the CCS as previously and thus reduce the risk that anticompetitive mergers escape the scrutiny of the CCS.

Relationship between Market Share Test and Share of Supply Test

1.7 We note that under the section "*Circumstances when it would be appropriate to notify CCS*", the Proposed Guidelines state that

[1] Paragraph 3.4 of the Current Guidelines.
[2] Paragraph 3.6 of the Current Guidelines.

(a) parties to a merger who satisfy the Share of Supply Test, are "*strongly encouraged to notify their merger situation to CCS*".[3]

(b) the Share of Supply Test should be used "*for the purpose of deciding whether or not to notify a merger*".[4]

1.8 It may therefore appear from these amendments that where parties to a merger do not satisfy the Share of Supply Test, they may decide in good faith not to notify their merger to the CCS. As such, this assertion suggests that the Share of Supply Test is akin to a jurisdictional test (i.e. a test to decide whether or not the merger situation should be notified to the CCS).

1.9 However, we further note that:

(a) the Proposed Guidelines provide that *"[t]here is no proposed change to the Guidelines on the Substantive Assessment of Mergers at this juncture*". This suggests that the Market Share Test as set out in the CCS Guidelines on the Substantive Assessment of Mergers (the "**Substantive Guidelines**") may continue to subsist.

(b) the Proposed Guidelines further provide that merger parties should refer to the Substantive Guidelines to determine the nature and extent of any possible concerns that the CCS may have.

(c) one of the two Market Share Tests is still incidentally referred to at paragraph 3.15 of the Proposed Guidelines, which deals with the risks of not notifying anticompetitive mergers to the CCS.

1.10 This suggests that (i) parties should nonetheless consider other factors as set out in the Substantive Guidelines, even if the Share of Supply Test is not met (similar to the present case, where the Market Share Test is merely a guide and is not conclusive), and (ii) that the Market Share test remains relevant.

1.11 In this respect, maintaining the two sets of tests is likely to create confusion on the necessity to notify certain mergers which fall below the Share of Supply Test, but which may nonetheless meet the Market Share Test or raise other concens as set out in the Substantive Guidelines.

1.12 To avoid any misinterpretation of the Guidelines on Merger Procedures, we are of the view that, the CCS should indicate clearly that:

(a) The Market Share Test is no longer considered relevant guidance, and that the Proposed Guidelines and Substantive Guidelines will be amended to this effect.

(b) As with the current Market Share Test, the Share of Supply Test is not a jurisdictional test, but only a *positive* notification guideline, which, if not met, may still require parties to consider the necessity to notify mergers to the CCS in certain identified circumstances.

[3] Paragraph 3.6 of the Proposed Guidelines.
[4] Paragraph 3.7 of the Proposed Guidelines.

Guidance is for horizontal mergers only

1.13 We note that the Share of Supply Test only concerns horizontal mergers, as they are more likely to raise competition concerns. For vertical and conglomerate mergers however, the Proposed Guidelines states that they require to be notified to the CCS "*if the merger parties think the merger may result in a SLC within any market in Singapore*".[5] The Proposed Guidelines provide that the Share of Supply Test would not apply to vertical or conglomerate mergers as the merger parties do not supply goods or services of the same description.

1.14 We would submit that a share of supply test may be useful for the Guidelines on Merger Procedures to provide a notification guideline for these type of mergers as well. We note that in such mergers, competition concerns are most likely to arise where there is a possibility of competitors being foreclosed, where one of the merger parties has a large market presence. Thus a test which, for example, provides that competition concerns are not likely to arise if any of the parties has less than 40% of the share of supply or purchase of the goods or services in Singapore in any of the markets concerned may help identify problematic vertical or conglomerate mergers.

2. **Do you consider that the proposed turnover thresholds for mergers involving small companies are appropriate, too wide, or too narrow?**

2.1 The introduction of a turnover threshold for small companies is useful as it will simplify the assessment of their transactions. We note that the Proposed Guidelines provides that: "*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, notification is unlikely to be required*".[6]

2.2 We would suggest a minor clarification with respect to this sentence. As the introduction of such a turnover threshold is intended to provide a safe harbour and thus legal certainty to companies, it should not be subject to interpretation. However, the current drafting appears to suggest that the phrase "*in the financial year preceding the transaction*" only qualifies the turnover in Singapore and not the worldwide turnover. Accordingly, in our view, the Guidelines on Merger Procedures should define the concept of *"turnover*" more precisely. We suggest the following drafting: "*where the individual turnover of each of the parties in the financial year preceding the transaction is below S$ 5 million in Singapore and below S$10 million worldwide, notification is unlikely to be required*".

3. **Do you think that confidential advice will be useful and, if so, would you or your clients be willing to pay a reasonable fee for this advice from CCS?**

3.1 Our experience suggests that confidential advice will be useful for parties seeking guidance whether their transaction should be notified to the CCS. In this regard, the fact that it is confidential will encourage parties to approach the CCS. One other advantage is that the indicative timeframe of 14 working days is reasonably short.

3.2 Given these advantages, we believe our clients will be willing to pay a fee for confidential advice. However, we submit that the fee should be considerably lower than that required for notifications for decisions under Section 57 or Section 58 of the Competition Act. As a comparison, we believe the initial fee for the Notification for Guidance procedure under Section 43 of the Competition Act would be a good guide as to what may be reasonable for this short, confidential process.

[5] Paragraph 3.4 of the Proposed Guidelines.
[6] Paragraph 3.5 of the Proposed Guidelines.

4. **Do you think there are any risks or disadvantages associated with the confidential advice process as set out in the draft revised Guidelines and, if so, how could these be mitigated?**

Information required from parties

4.1 We note that while the confidential advice does not bear the same legal certainty as a decision,[7] the parties requesting a confidential advice are required to provide the CCS with the same information as in an application for decision.[8] This requirement may operate as a disincentive for parties to seek a confidential advice, especially given that under the Proposed Guidelines, more information must be submitted in an application for decision than is currently required.

4.2 For the above reasons, we believe that the information required from applicants in this context should be limited to what is necessary for the CCS to advise "*on whether or not a merger is likely to raise competition concerns in Singapore"*.[9]

4.3 We note that the UK merger control regime includes a similar process as the proposed confidential advice (referred to as "**Informal Advice**"). The applicants to an Informal Advice are only required to produce "*in a clear, concise executive format of no more than five pages in length*"[10] a summary of their transaction, the theory of harm and the key issues on which they seek advice from the Office of Fair Trading. We would submit that a similar approach would be beneficial, as the considerations in approaching the CCS for confidential guidance are generally different from that of a party who has already determined that they intend to notify their merger, and the same information as is required in Form M1 will not necessarily be useful nor efficient to produce.

Effect of a confidential advice

4.4 In addition, we believe that the main condition for the confidential advice to be effective and useful for parties is to provide them with predictability and legal certainty as to whether their merger situation should be notified to the CCS. In this regard, we note that in a confidential advice, the CCS gives its view "*on whether or not a merger is likely to raise competition concerns in Singapore*".[11] However, the Proposed Guidelines also indicate that the CCS reserves the right to investigate the merger situation after issuing a confidential advice "*where the statutory test for doing so is met*".[12]

4.5 We are of the view that this possibility has the potential to undermine the efficiency of the confidential advice if the CCS investigates a merger situation after it has indicated that the merger does not raise any competition concerns.

4.6 Accordingly, we suggest below a list of such circumstances where the CCS could investigate a merger situation after issuing a confidential advice. These circumstances should, in our view, be broadly similar to the ones under which the CCS may take action in relation to an agreement which has been the subject of a guidance under Section 43 of the Competition Act, namely where:

[7] Paragraph 3.31 of the Proposed Guidelines provides that "*Confidential Advice does not amount to a decision under section 57 or 58 of the Act*."
[8] Except that, as the process is confidential, third party contact details do not need to be provided. Paragraph 3.29 of the Proposed Guidelines.
[9] Paragraph 3.23 of the Proposed Guidelines.
[10] OFT Mergers - Jurisdictional and procedural guidance (OFT527), at paragraph 4.38.
[11] Paragraph 3.23 of the Proposed Guidelines.
[12] Paragraph 3.31 of the Proposed Guidelines.

a. the CCS has reasonable grounds for believing that there has been a material change of circumstance since it gave its confidential advice,

b. the CCS has reasonable grounds for suspecting that the information on which it based its confidential advice was incomplete, false or misleading in a material particular,

c. the CCS has concluded in its confidential advice that the merger is likely to raise competition concerns in Singapore and the parties to the merger do not proceed to a notification for decision within a reasonable time period after the issue of the confidential advice, or

d. a complaint against the merger has been made to the CCS by a person who is not a party to the merger.

5. **Are the conditions, caveats and the process for obtaining confidential advice clear?**

5.1 The caveat for obtaining confidential advice, namely that the CCS "*reserves the right to investigate the merger situation where the statutory test for doing so is met*",[13] is dealt with in points 4.4 to 4.6 above.

5.2 We understand the circumstances when confidential advice may be requested, as stated in the Proposed Guidelines, to operate as conditions, as they are presented as requirements (especially given the repeated use of "*must*"[14]). Under the Proposed Guidelines, these circumstances are as follows:

"*First, the merger must not be completed (...). Second, the merger must not be in the public domain (...). Third, the merger situation must raise a genuine issue relating to the competitive assessment in Singapore*".[15]

5.3 We believe that the Guidelines on Merger Procedures would benefit from providing further clarity as to the fact that these "*circumstances*" are conditions and from specifying whether the CCS is likely to reject an application for confidential advice where these "*circumstances*" are not met.

5.4 Moreover, under the Proposed Guidelines, the conditions under which undertakings should apply respectively for confidential advice or engage in PNDs may benefit from further clarification.

5.5 The Proposed Guidelines indicate that "*in the context of PNDs, CCS does not give views on whether a merger situation would be likely to require a Phase 2 assessment, or if it would lead to an SLC"*.[16] They go on to provide that merger parties may approach CCS for confidential advice. This may suggest that the two procedures are to be combined.

5.6 We would encourage the CCS to specify that the two procedures have different goals: confidential advice should be sought where parties have a doubt whether they should notify their merger situation to the CCS, while PNDs are used as a preliminary stage for notification, and as such are only used when the parties intend to make an application for decision to CCS.

5.7 Furthermore, we would submit that a positive definition of the PNDs, i.e. a definition of what parties can expect from the CCS in PNDs, would be more useful than a negative one, i.e. a

[13] Paragraph 3.31 of the Proposed Guidelines.
[14] Paragraphs 3.25 to 3.27 of the Proposed Guidelines.
[15] Paragraphs 3.25 to 3.27 of the Proposed Guidelines.
[16] Paragraph 4.11 of the Proposed Guidelines.

definition of what the CCS does not do in the context of PNDs. Accordingly, the Guidelines on Merger Procedures should indicate that PNDs are a first stage of the notification process, where applicants discuss with the CCS their draft Form M1 and the information the CCS is likely to require. As such, PNDs should not be used if the parties do not intend or have not decided yet to notify their merger to the CCS.

6. **What are your views on the information requirements in Form M1? If relevant, please explain why you consider that some information may not be required in Phase 1.**

6.1 We welcome the assertion of the CCS, in the introduction of the Proposed Guidelines, that the refined requirements of form M1 "*will mean fewer subsequent information requests to the parties*". As such, the new information requirements represent an important step towards a more efficient merger control regime in Singapore.

6.2 We have a few comments on the content of the refined information requirements as set out in the Proposed Guidelines. Firstly, we believe that only transactions that can be characterised as mergers within the meaning of the Competition Act should be notified to the CCS. In this regard, point 11.a of Form 1 can be confusing, as it appears to cover transactions that are not mergers. It reads as follows:

"*Please describe the notified transaction by providing information relating to:*

a. the nature of the transaction (for example, anticipated or completed merger; acquisition of sole or joint control; acquisition of full or partial control; full-function or other joint venture; or a contract or other means of conferring direct or indirect control);"

6.3 In this regard, we note that non full function joint ventures are not considered as mergers.[17] Furthermore, we note the phrase "*acquisition of full or partial control*" which expression is not used either in the Competition Act or in the Substantive Guidelines, which explain the concept of control.

6.4 Thus, in our view, points 11.a in Form M1 would benefit from greater clarity if the terminology follows that found in the Competition Act and in the Substantive Guidelines, and by removing the reference to “other” joint ventures, as the current drafting suggests joint ventures which are not “full function” would be considered mergers.

6.5 Secondly, we note that Form M1 requires the parties to indicate whether the merger has given or will give rise to non-coordinated effects, coordinated effects or vertical effects, but not whether the merger has or will produce efficiencies (which are only dealt with in Form M2). In this regard, it is our experience that parties may be reluctant to provide information they may view as self-incriminating without further explaining that any such effects may be outweighed by efficiencies. They may also have difficulties in assessing, for instance, customers’ views or the effect of the merger on potential or actual competitors. We note that the burden of proving that their merger situation has efficiency gains lies on the notifying undertakings.

6.6 We encourage the CCS to put less weight on information requirements relating to non-coordinated effects, coordinated effects or vertical effects in Form M1. We believe it would be useful for the parties and for the CCS’ assessment if the parties were able to substantiate the efficiency gains induced by their merger already in Phase 1 and not only in Phase 2. As a result, we encourage the CCS to introduce a section on efficiency gains in Form M1.

[17] Paragraph 3.20 of the Substantive Guidelines.

7. **Are there any areas where you think CCS should provide further clarification or consider additional changes?**

7.1 The Proposed Guidelines would benefit from further clarity as to under which circumstances the CCS can be informed of contemplated mergers. The Proposed Guidelines specify that:

(a) parties may seek confidential advice only when they have a good faith intention to proceed with the transaction and the merger is not yet in the public domain,[18] and

(b) parties can engage in PNDs when they have a good faith intention to proceed with the transaction, and are encouraged not to wait that the merger is in the public domain to do so.[19]

7.2 However, the Proposed Guidelines give no guidance on when anticipated mergers can be notified to the CCS, whether or not such notification follows PNDs. We note that the Competition Act (Chapter 50B) Competition (Notification) Regulations 2007 provides in its Clause 3 that "*Only such anticipated mergers as may be made known to the public may be notified to the Commission under section 57 of the Act*". This may possibly suggest that anticipated mergers which are not as yet in the public domain may not be notified until such mergers are made known to the public.

7.3 We believe that it would be useful for the Guidelines to make clear that a notification may be made to the CCS if the anticipated merger is not yet in the public domain, but will be the public domain.

CONCLUSION

8. In conclusion, we believe that the proposed amendments are a positive development, and hope that our comments will be of assistance to the CCS.

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[18] Paragraphs 3.25 and 3.26 of the Proposed Guidelines.
[19] Paragraph 4.8 of the Proposed Guidelines.