

Competition (Amendment) Bill

Bill No. 11/2007.

Read the first time on 9th April 2007.

A BILL

intituled

An Act to amend the Competition Act (Chapter 50B of the 2006 Revised Edition).

Be it enacted by the President with the advice and consent of the Parliament of Singapore, as follows:

Short title and commencement

1.—(1) This Act may be cited as the Competition (Amendment) Act 2007 and shall, with the exception of section 23, come into operation on such date as the Minister may, by notification in the *Gazette*, appoint.

5 (2) Section 23 shall be deemed to have come into operation on 1st January 2006.

Amendment of section 2

2. Section 2(1) of the Competition Act is amended —

10 (a) by inserting, immediately before the definition of “block exemption”, the following definition:

““anticipated merger” means an arrangement that is in progress or contemplation and that, if carried into effect, will result in the occurrence of a merger referred to in section 54(2);”;

15 (b) by deleting the definition of “merger”; and

(c) by deleting the definition of “party involved in a merger” and substituting the following definitions:

20 ““party involved in a merger” means a person or an undertaking specified in section 54(2) and includes the merged entity;

“party to an anticipated merger” means a person or an undertaking which would be a person or an undertaking specified in section 54(2) if the anticipated merger were carried into effect;”.

25 Amendment of section 33

3. Section 33 of the Competition Act is amended by deleting subsection (1) and substituting the following subsection:

“(1) Notwithstanding that —

30 (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;
- 5 (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
- 10 (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 —

- 15 (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
- 20 (iv) such merger infringes or has infringed the section 54 prohibition,

as the case may be.”.

Amendment of section 45

- 25 **4.** Section 45(2) of the Competition Act is amended by deleting the words “under this Part” and substituting the words “in relation to the section 34 prohibition”.

Amendment of section 46

- 30 **5.** Section 46(2) of the Competition Act is amended by deleting the words “under this Part” and substituting the words “in relation to the section 34 prohibition”.

Amendment of section 52

6. Section 52(2) of the Competition Act is amended by deleting the words “under this Part” and substituting the words “in relation to the section 47 prohibition”.

5 **Amendment of section 53**

7. Section 53(2) of the Competition Act is amended by deleting the words “under this Part” and substituting the words “in relation to the section 47 prohibition”.

Repeal of Division 4 of Part III and new Divisions 4 and 4A of Part III

10 **8.**—(1) Division 4 of Part III of the Competition Act is repealed.

(2) Part III of the Competition Act is amended by inserting, immediately after section 53, the following Divisions:

“Division 4 — Mergers

Mergers

15 **54.**—(1) Subject to section 55, mergers that have resulted, or may be expected to result, in a substantial lessening of competition within any market in Singapore for goods or services are prohibited.

(2) For the purposes of this Part, a merger occurs if —

- 20 (a) 2 or more undertakings, previously independent of one another, merge;
- (b) one or more persons or other undertakings acquire direct or indirect control of the whole or part of one or more other undertakings; or
- 25 (c) the result of an acquisition by one undertaking (the first undertaking) of the assets (including goodwill), or a substantial part of the assets, of another undertaking (the second undertaking) is to place the first undertaking in a position to replace or substantially replace the second undertaking in the business or, as appropriate, the part concerned of the business in which that undertaking was
- 30 engaged immediately before the acquisition.

(3) For the purposes of this Part, control, in relation to an undertaking, shall be regarded as existing if, by reason of rights, contracts or any other means, or any combination of rights, contracts or other means, decisive influence is capable of being exercised with regard to the activities of the undertaking and, in particular, by —

(a) ownership of, or the right to use all or part of, the assets of an undertaking; or

(b) rights or contracts which enable decisive influence to be exercised with regard to the composition, voting or decisions of the organs of an undertaking.

(4) For the purposes of this Part, control is acquired by any person or other undertaking if he or it —

(a) becomes a holder of the rights or contracts, or entitled to use the other means, referred to in subsection (3); or

(b) although not becoming such a holder or entitled to use those other means, acquires the power to exercise the rights derived therefrom.

(5) The creation of a joint venture to perform, on a lasting basis, all the functions of an autonomous economic entity shall constitute a merger falling within subsection (2)(b).

(6) In determining whether influence of the kind referred to in subsection (3) is capable of being exercised, regard shall be had to all the circumstances of the matter and not solely to the legal effect of any instrument, deed, transfer, assignment or other act done or made.

(7) For the purposes of this Part, a merger shall not be deemed to occur if —

(a) the person acquiring control is a receiver or liquidator acting as such or is an underwriter acting as such;

(b) all of the undertakings involved in the merger are, directly or indirectly, under the control of the same undertaking;

(c) control is acquired solely as a result of a testamentary disposition, intestacy or the right of survivorship under a joint tenancy; or

(d) control is acquired by an undertaking referred to in subsection (8) in the circumstances specified in subsection (9).

5 (8) The undertaking referred to in subsection (7)(d) is an undertaking the normal activities of which include the carrying out of transactions and dealings in securities for its own account or for the account of others.

(9) The circumstances referred to in subsection (7)(d) are that —

10 (a) the control concerned is constituted by the undertaking's holding, on a temporary basis, securities acquired in another undertaking; and

(b) any exercise by the undertaking of voting rights in respect of those securities, whilst that control subsists —

15 (i) is for the purpose of arranging for the disposal, within the specified period, of all or part of the other undertaking or its assets or securities; and

20 (ii) is not for the purpose of determining the manner in which any activity of the other undertaking, being an activity that could affect competition in markets for goods or services in Singapore, is carried on.

(10) In subsection (9), “specified period” means —

(a) the period of 12 months from the date on which control of the other undertaking was acquired; or

25 (b) if in a particular case the undertaking shows that it is not reasonably possible to effect the disposal concerned within the period referred to in paragraph (a), within such longer period as the Commission determines and specifies with respect to that case.

Excluded mergers

30 **55.** The section 54 prohibition shall not apply to any merger specified in the Fourth Schedule.

Requests for Commission to consider anticipated mergers and mergers

5 **56.**—(1) Section 57 provides for an anticipated merger to be considered by the Commission on the application of a party to that anticipated merger who thinks the anticipated merger, if carried into effect, may infringe the section 54 prohibition.

(2) Section 58 provides for a merger to be considered by the Commission on the application of a party involved in that merger who thinks the merger may infringe the section 54 prohibition.

10 (3) The Minister may by regulations provide —

(a) that only such anticipated mergers as are prescribed may be notified to the Commission under section 57; and

(b) for the procedure to be followed —

15 (i) by any party making an application under section 57 or 58; and

(ii) by the Commission, in considering such an application.

Notification of anticipated merger

20 **57.**—(1) A party to an anticipated merger of the relevant type which applies for the anticipated merger to be considered under this section shall —

(a) notify the Commission of the anticipated merger; and

(b) apply to it for a decision.

25 (2) Subject to subsections (3) and (5) and sections 60A and 60B, on an application under this section, the Commission may make a decision as to —

(a) whether the section 54 prohibition will be infringed by the anticipated merger, if carried into effect; and

(b) if it will not be infringed, whether it is —

30 (i) because of the effect of an exclusion which will apply if the anticipated merger is carried into effect;

(ii) because the anticipated merger, if carried into effect, is exempted from the application of the prohibition under subsection (3); or

(iii) because a commitment has been accepted pursuant to section 60A.

5 (3) Where the Commission proposes to make a decision that the section 54 prohibition will be infringed by an anticipated merger, if carried into effect, the Commission shall give written notice to the party who applied for a decision on the anticipated merger and the party may, within 14 days of the date of the notice, apply to the Minister for the anticipated merger, if carried into effect, to be exempted from the section 54 prohibition on the ground of any public
10 interest consideration.

(4) The decision of the Minister made under subsection (3) shall be final.

15 (5) Where the Minister exempts an anticipated merger under subsection (3), the Commission may make a decision under subsection (2)(b)(ii).

(6) The Minister may revoke the exemption of an anticipated merger granted under subsection (3) if he has reasonable grounds for suspecting that the information on which he based his decision was incomplete, false or misleading in a material particular.

20 (7) Subject to subsection (8), where the Commission makes a decision that an anticipated merger, if carried into effect, will not infringe the section 54 prohibition, the Commission may, if it thinks fit, state that the decision shall be valid only for the period it specifies therein.

25 (8) Before the expiry of the period referred to in subsection (7), if any, an application may be made by all parties to the anticipated merger who applied to the Commission for a decision on the anticipated merger under this section for that period to be extended.

30 (9) Where an application for an anticipated merger to be considered has been made to the Commission in accordance with subsection (1) and the anticipated merger is carried into effect before the Commission makes a decision under subsection (2) in respect thereof, the application relating to the anticipated merger —

35 (a) may be treated by the Commission as if it were an application for the resulting merger to be considered made in accordance with section 58; and

(b) the Commission may make a decision under section 58 in respect of the resulting merger.

(10) For the purpose of subsection (9), the Commission may make a decision under section 58(2)(b)(ii) (read with section 58(5)) in respect of the merger referred to in subsection (9), notwithstanding the exemption was granted by the Minister under subsection (3) in respect of the anticipated merger.

(11) Notwithstanding subsection (9), the Commission may refuse to make any decision in respect of a merger referred to therein and require any party involved in the merger to apply to the Commission for the merger to be considered under section 58(1).

(12) In this section, “an anticipated merger of the relevant type” means an anticipated merger of the type prescribed by regulations made under section 56(3)(a).

Notification of merger

58.—(1) A party involved in a merger which applies for the merger to be considered under this section shall —

- (a) notify the Commission of the merger; and
- (b) apply to it for a decision.

(2) Subject to subsections (3) and (5) and sections 60A and 60B, on an application under this section, the Commission may make a decision as to —

- (a) whether the section 54 prohibition has been infringed; and
- (b) if it has not been infringed, whether that is —
 - (i) because of the effect of an exclusion;
 - (ii) because the merger is exempted from the prohibition under subsection (3); or
 - (iii) because a commitment has been accepted pursuant to section 60A.

(3) Where the Commission proposes to make a decision that the section 54 prohibition has been infringed, the Commission shall give written notice to —

- (a) the party who applied for a decision on the merger; or

(b) in a case where section 57(9) applies, the party who applied for a decision on the anticipated merger (which was carried into effect) or, where that party no longer exists, the merged entity,

5 and the party or merged entity so notified by the Commission may, within 14 days of the date of the notice, apply to the Minister for the merger to be exempted from the section 54 prohibition on the ground of any public interest consideration.

10 (4) The decision of the Minister made under subsection (3) shall be final.

(5) Where the Minister exempts a merger under subsection (3), the Commission may make a decision under subsection (2)(b)(ii).

15 (6) The Minister may revoke the exemption of a merger granted under subsection (3) if he has reasonable grounds for suspecting that the information on which he based his decision was incomplete, false or misleading in a material particular.

20 (7) A reference in any provision of this Act to an application or a notification under section 58 shall include a reference to an application or a notification under section 57 that the Commission treats as an application or a notification under section 58 pursuant to section 57(9).

Interim measures in relation to notifications of anticipated mergers and mergers

25 **58A.**—(1) If, in respect of an application under section 57 or 58, the Commission has reasonable grounds for suspecting that —

(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,

30 but has not completed its consideration of the matter, and the Commission considers that it is necessary for it to act under this section —

(i) for the purpose of preventing any action that may prejudice —

(A) the consideration of the anticipated merger or merger; or

(B) the giving of any direction under section 69; or

(ii) as a matter of urgency for the purpose —

5 (A) of preventing serious, irreparable damage to a particular person or category of persons; or

(B) of protecting the public interest,

the Commission may give such directions as it considers appropriate for that purpose.

10 (2) Before giving a direction under this section, the Commission shall —

(a) give written notice to the person to whom it proposes to give the direction; and

(b) give that person an opportunity to make representations.

15 (3) A notice under subsection (2) shall indicate the nature of the direction which the Commission is proposing to give and its reasons for wishing to give it.

(4) A direction given under this section shall have effect while subsection (1) applies, but may be replaced if the circumstances permit by a direction under section 69.

20 (5) Sections 69(2)(ba)(i) and (c)(i) and 85 shall also apply to directions given under this section.

Effect of decision that anticipated merger, if carried into effect, will not infringe section 54 prohibition

25 **59.**—(1) This section shall apply to an anticipated merger in respect of which the Commission has determined an application under section 57 by making a decision that the anticipated merger, if carried into effect, will not infringe the section 54 prohibition.

30 (2) The Commission shall take no further action in relation to the section 54 prohibition with respect to the anticipated merger (including where the anticipated merger is carried into effect, or if the Commission's decision is valid for a specified period, where the anticipated merger is carried into effect within that period) unless —

(a) it has reasonable grounds for suspecting that any information on which it based its decision (which may include information on the basis of which it accepted a commitment) was incomplete, false or misleading in a material particular; or

(b) it has reasonable grounds for suspecting that a party who provided a commitment has failed to adhere to one or more of the terms of the commitment.

(3) Action that may be taken in respect of the circumstances referred to in subsection (2) may include the revocation of the decision that the anticipated merger, if carried into effect, will not infringe the section 54 prohibition.

(4) No penalty may be imposed under this Part in respect of any infringement of the section 54 prohibition by the anticipated merger to which this section applies, if carried into effect or, where the Commission's decision is valid for a specified period, if carried into effect within that period.

(5) The Commission may remove the immunity given by subsection (4) if —

(a) it takes action under this Part with respect to one of the circumstances referred to in subsection (2);

(b) it considers that it is likely that the anticipated merger, if carried into effect, or the resulting merger will infringe the section 54 prohibition; and

(c) it gives notice in writing to the party on whose application the decision was made that it is removing the immunity as from the date specified in its notice.

(6) If the Commission has reasonable grounds for suspecting that —

(a) any information on which it based its decision (which may include information on the basis of which it accepted a commitment), and which was provided to it by a party to the anticipated merger, was incomplete, false or misleading in a material particular; or

(b) a party who provided a commitment has failed to adhere to one or more of the terms of the commitment,

the date specified in a notice under subsection (5)(c) may be earlier than the date on which the notice is given.

(7) Where —

(a) the Commission has made a decision that an anticipated merger, if carried into effect, will not infringe the section 54 prohibition; and

(b) the merger resulting from a purported carrying into effect of the anticipated merger is materially different from the anticipated merger,

nothing in this section shall prevent the Commission from taking any action in relation to the section 54 prohibition in respect of the merger.

Effect of decision that merger has not infringed section 54 prohibition

60.—(1) This section shall apply to a merger if the Commission has determined an application under section 58 by making a decision that the merger has not infringed the section 54 prohibition.

(2) The Commission shall take no further action in relation to the section 54 prohibition with respect to the merger unless —

(a) it has reasonable grounds for suspecting that any information on which it based its decision (which may include information on the basis of which it accepted a commitment) was incomplete, false or misleading in a material particular; or

(b) it has reasonable grounds for suspecting that a party who provided a commitment has failed to adhere to one or more of the terms of the commitment.

(3) Action that may be taken in respect of the circumstances referred to in subsection (2) may include the revocation of the decision that the merger has not infringed the section 54 prohibition.

(4) No penalty may be imposed under this Part in respect of any infringement of the section 54 prohibition by a merger to which this section applies.

(5) The Commission may remove the immunity given by subsection (4) if —

(a) it takes action under this Part with respect to the merger in one of the circumstances mentioned in subsection (2);

5 (b) it considers that it is likely that the merger will infringe the section 54 prohibition; and

(c) it gives notice in writing to —

(i) the party on whose application the decision was made; or

10 (ii) in a case where section 57(9) applies, the party who applied for a decision on the anticipated merger (which was carried into effect) or, where that party no longer exists, the merged entity,

15 that it is removing the immunity as from the date specified in its notice.

(6) If the Commission has reasonable grounds for suspecting that —

20 (a) any information on which it based its decision (which may include information on the basis of which it accepted a commitment), and which was provided to it by a party involved in the merger, was incomplete, false or misleading in a material particular; or

(b) a party who provided a commitment has failed to adhere to one or more of the terms of the commitment,

25 the date specified in a notice under subsection (5)(c) may be earlier than the date on which the notice is given.

Division 4A — Commitments

Commitments

30 **60A.**—(1) 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 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.

(2) A commitment shall come into force on the date specified by the Commission when it is accepted.

(3) The Commission may, at any time when a commitment is in force, accept —

(a) a variation of the commitment; or

(b) another commitment in substitution,

for the purpose referred to in subsection (1).

(4) A commitment may be released by the Commission where it has reasonable grounds for believing that the commitment is no longer necessary or appropriate for the purpose referred to in subsection (1).

(5) Before accepting, varying, substituting or releasing a commitment, the Commission shall, except in exceptional circumstances, consult with such person as it thinks appropriate.

Effect of commitments

60B.—(1) Where the Commission has accepted a commitment under section 60A, and subject to subsection (2), the Commission shall make a decision that —

(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, as the case may be.

(2) Nothing in subsection (1) shall prevent the Commission from revoking the decision already made, commencing or continuing any investigation, or making a decision or giving a direction, where —

(a) it has reasonable grounds for suspecting that any information on the basis of which it accepted a commitment was incomplete, false or misleading in a material particular; or

5 (b) it has reasonable grounds for suspecting that a party who provided a commitment has failed to adhere to one or more of the terms of the commitment.

10 (3) If the Commission revokes a decision referred to in subsection (1), the commitment shall be treated, unless otherwise stated, as released from the date of that revocation.

(4) The Commission may review the effectiveness of commitments it has accepted under section 60A in such circumstances as it considers appropriate.”.

New section 61A

15 **9.** The Competition Act is amended by inserting, immediately after section 61, the following section:

“Power to require documents or information

61A.—(1) Where the Commission —

20 (a) has reasonable grounds for suspecting that any feature, or combination of features, of a market in Singapore for goods or services prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in Singapore; or

25 (b) in considering an application for decision filed pursuant to section 44, 51, 57 or 58, has reasonable grounds for suspecting that —

(i) the section 34 prohibition has been infringed by any agreement;

30 (ii) the section 47 prohibition has been infringed by any conduct;

(iii) the section 54 prohibition will be infringed by any anticipated merger, if carried into effect; or

(iv) the section 54 prohibition has been infringed by any merger,

the Commission may, by notice in writing to any person, require the person to produce to the Commission a specified document, or to provide the Commission with specified information, which the Commission considers relates to any matter relevant to such purposes.

(2) A notice under subsection (1) shall indicate —

- (a) the purpose for which the specified document or specified information is required by the Commission; and
- (b) the nature of the offences created by sections 75 to 78.

(3) The Commission may specify in the notice —

- (a) the time and place at which any document is to be produced or any information is to be provided; and
- (b) the manner and form in which it is to be produced or provided.

(4) The power under this section to require a person to produce a document includes the power —

(a) if the document is produced —

- (i) to take copies of it or extracts from it; and
- (ii) to require such person, or any person who is a present or past officer of his, or is or was at any time employed by him, to provide an explanation of the document; or

(b) if the document is not produced, to require such person to state, to the best of his knowledge and belief, where it is.

(5) For the purposes of subsection (1)(a), any reference to a feature of a market in Singapore for goods or services shall be construed as a reference to —

- (a) the structure of the market concerned or any aspect of that structure;
- (b) any conduct (whether or not in the market concerned) of one or more than one person who supplies or acquires goods or services in the market concerned; or
- (c) any conduct relating to the market concerned of customers of any person who supplies or acquires goods or services,

and, in this subsection, “conduct” includes any failure to act (whether or not intentional) and any other unintentional conduct.

(6) In subsections (1) and (2), “specified” means —

(a) specified or described in the notice; or

5 (b) falling within a category which is specified or described in the notice.”.

Amendment of section 62

10. Section 62 of the Competition Act is amended by deleting subsection (1) and substituting the following subsection:

10 “(1) The Commission may conduct an investigation if there are reasonable grounds for suspecting that —

(a) the section 34 prohibition has been infringed by any agreement;

15 (b) the section 47 prohibition has been infringed by any conduct;

(c) the section 54 prohibition will be infringed by any anticipated merger, if carried into effect; or

(d) the section 54 prohibition has been infringed by any merger.”.

20 Amendment of section 64

11. Section 64 of the Competition Act is amended —

(a) by deleting subsection (1) and substituting the following subsection:

“(1) In connection with an investigation under section 62 —

25 (a) any officer of the Commission who is authorised by the Commission to do so (an investigating officer) and such other officers or persons as the Commission has authorised in writing to accompany the investigating officer (authorised person); and

30 (b) any inspector and such other person as the inspector may require,

may enter any premises.”;

- (b) by deleting the words “No investigating officer or inspector shall enter any premises in the exercise of his powers under this section unless he” in subsection (2) and substituting the words “No investigating officer or inspector, and no authorised person or person required by the inspector respectively, shall enter any premises in the exercise of the powers under this section unless the investigating officer or the inspector, as the case may be,”;
- (c) by inserting, immediately before the words “a merger” in subsection (3)(a)(iii), the words “an anticipated merger, or”;
- (d) by inserting, immediately after the words “an investigating officer” in subsection (4)(a), the words “and any authorised person”;
- (e) by deleting sub-paragraph (i) of subsection (4)(a) and substituting the following sub-paragraph:
- “(i) evidence of the investigating officer’s authorisation and the authorisation of every authorised person accompanying him; and”;
- (f) by inserting, immediately after the words “an inspector” in subsection (4)(b), the words “and any person required by him”;
- (g) by deleting sub-paragraph (i) of subsection (4)(b) and substituting the following sub-paragraph:
- “(i) evidence of the inspector’s appointment; and”;
- (h) by deleting the words “An investigating officer or inspector” in subsection (5) and substituting the words “An investigating officer, an authorised person, an inspector or a person required by the inspector”; and
- (i) by deleting the words “the investigating officer or inspector” in subsection (5)(e) and substituting the word “he”.

Amendment of section 65

- 30 **12.** Section 65 of the Competition Act is amended —
- (a) by deleting the words “an investigating officer or inspector” in subsection (1)(c) and substituting the words “an investigating officer, an authorised person, an inspector or a person required by the inspector”;

- (b) by deleting the words “the named officer” in subsection (2)(vii) and substituting the word “he”; and
- (c) by deleting subsection (5) and substituting the following subsection:

5 “(5) A named officer may allow any equipment or article which has a bearing on an investigation and which may be removed from any premises for examination under subsection (2)(viii) to be retained on those premises subject to such conditions as the named officer may require.”.

10 **Amendment of section 66**

13. Section 66 of the Competition Act is amended by deleting the words “an inspector or investigating officer” in subsections (1) and (2) and substituting in each case the words “an investigating officer, such officer or person as the Commission has authorised in writing to accompany the
15 investigating officer, an inspector or a person required by the inspector”.

Amendment of section 67

14. Section 67 of the Competition Act is amended —

- (a) by deleting paragraph (a) of subsection (1) and substituting the following paragraph:

20 “(a) has reasonable grounds for suspecting that the section 34 prohibition or the section 47 prohibition has been infringed but has not completed its investigations into the matter; and”;

- (b) by inserting, immediately after subsection (1), the following
25 subsection:

 “(1A) If the Commission has reasonable grounds for suspecting that the section 54 prohibition —

- (a) will be infringed by an anticipated merger, if carried into effect; or

- (b) has been infringed by a merger,

but has not completed its investigations into the matter, and considers that it is necessary for it to act under this section —

(i) for the purpose of preventing any action that may prejudice —

(A) the investigations; or

(B) the giving of any direction under section 69;
or

(ii) as a matter of urgency for the purpose —

(A) of preventing serious, irreparable damage to a particular person or category of persons; or

(B) of protecting the public interest,

the Commission may give such directions as it considers appropriate for that purpose.”;

(c) by inserting, immediately after the words “subsection (1)” in subsection (4), the words “or (1A), as the case may be,”; and

(d) by deleting subsection (7) and substituting the following subsection:

“(7) In the case of a suspected infringement of the section 54 prohibition by an anticipated merger, if carried into effect, or a merger, sections 69(2)(ba)(i) and (c)(i) and 85 shall also apply to directions given under this section.”.

Amendment of section 68

15. Section 68 of the Competition Act is amended —

(a) by deleting the words “the section 34 prohibition, the section 47 prohibition or the section 54 prohibition has been infringed” in the 7th, 8th and 9th lines of subsection (1) and substituting the words “the section 34 prohibition has been infringed by any agreement, the section 47 prohibition has been infringed by any conduct, the section 54 prohibition will be infringed by any anticipated merger, if carried into effect, or the section 54 prohibition has been infringed by any merger”;

(b) by deleting subsections (2) and (3) and substituting the following subsections:

“(2) Subject to subsections (3) and (5), upon considering any representation made to the Commission under

subsection (1)(ii), the Commission may, as it thinks fit, make a decision that —

- (a) the section 34 prohibition has been infringed by any agreement;
- 5 (b) the section 47 prohibition has been infringed by any conduct;
- (c) the section 54 prohibition will be infringed by any anticipated merger, if carried into effect; or
- 10 (d) the section 54 prohibition has been infringed by any merger.

(3) Where —

- (a) in relation to an anticipated merger, the Commission proposes to make a decision that the section 54 prohibition will be infringed by the anticipated merger, if carried into effect; or
- 15 (b) in relation to a merger, the Commission proposes to make a decision that the section 54 prohibition has been infringed by the merger,

and the Commission has given written notice under subsection (1)(i) to the parties to the anticipated merger or the parties involved in the merger, as the case may be, any such party may, within 14 days of the date of the notice, apply to the Minister for the anticipated merger, if carried into effect, or the merger to be exempted from the section 54 prohibition on the ground of any public interest consideration.”;

(c) by deleting subsection (5) and substituting the following subsection:

“(5) Where the Minister exempts an anticipated merger or a merger under subsection (3), the Commission may make a decision that —

- (a) the section 54 prohibition will not be infringed by the anticipated merger, if carried into effect; or
- 30 (b) the section 54 prohibition has not been infringed by the merger.”; and

- (d) by inserting, immediately after the words “the exemption of” in subsection (6), the words “an anticipated merger or”.

Amendment of section 69

16. Section 69 of the Competition Act is amended —

- 5 (a) by deleting subsection (1) and substituting the following subsection:

“(1) Where the Commission has made a decision that —

- (a) any agreement has infringed the section 34 prohibition;
- 10 (b) any conduct has infringed the section 47 prohibition;
- (c) any anticipated merger, if carried into effect, will infringe the section 54 prohibition; or
- (d) any merger has infringed the section 54 prohibition,

15 the Commission may give to such person as it thinks appropriate such directions as it considers appropriate to bring the infringement or the circumstances referred to in paragraph (c) to an end and, where necessary, requiring that person to take such action as is specified in the direction to remedy, mitigate or eliminate any adverse effects of such infringement or circumstances and to prevent the recurrence of such

20 infringement or circumstances.”;

- (b) by deleting the word “infringes” in subsection (2)(a) and (b) and substituting in each case the words “has infringed”;

- 25 (c) by inserting, immediately after paragraph (b) of subsection (2), the following paragraph:

“(ba) where the decision is that any anticipated merger, if carried into effect, will infringe the section 54 prohibition —

- 30 (i) prohibiting the anticipated merger from being carried into effect;
- (ii) requiring any parties to any agreement that is directly related and necessary to the implementation of the merger (which would result from the anticipated merger being carried

into effect) to modify or terminate the agreement, notwithstanding the agreement is excluded under paragraph 10 of the Third Schedule or the Commission has given guidance or a decision under section 45 or 46, as the case may be, that the agreement is unlikely to infringe, or has not infringed, the section 34 prohibition; and

(iii) requiring any person concerned with any conduct that is directly related and necessary to the implementation of the merger (which would result from the anticipated merger being carried into effect) to modify or cease that conduct, notwithstanding the conduct is excluded under paragraph 10 of the Third Schedule or the Commission has given guidance or a decision under section 52 or 53, as the case may be, that the conduct is unlikely to infringe, or has not infringed, the section 47 prohibition;”;

(d) by deleting paragraphs (c) and (d) of subsection (2) and substituting the following paragraphs:

“(c) where the decision is that any merger has infringed the section 54 prohibition —

(i) requiring the merger to be dissolved or modified in such manner as the Commission may direct;

(ii) requiring any parties to any agreement that is directly related and necessary to the implementation of the merger to modify or terminate the agreement, notwithstanding that the agreement is excluded under paragraph 10 of the Third Schedule or the Commission has given guidance or a decision under section 45 or 46, as the case may be, that the agreement is unlikely to infringe, or has not infringed, the section 34 prohibition; and

(iii) requiring any person concerned with any conduct that is directly related and necessary to the implementation of the merger to modify or cease

that conduct, notwithstanding that the conduct is excluded under paragraph 10 of the Third Schedule or the Commission has given guidance or a decision under section 52 or 53, as the case may be, that the conduct is unlikely to infringe, or has not infringed, the section 47 prohibition;

(d) where the decision is that any agreement has infringed the section 34 prohibition, any conduct has infringed the section 47 prohibition or any merger has infringed the section 54 prohibition, to pay to the Commission such financial penalty in respect of the infringement as the Commission may determine; and

(e) in any case, requiring any party to an agreement that has infringed the section 34 prohibition, any person whose conduct has infringed the section 47 prohibition, any party to an anticipated merger which, if carried into effect, will infringe the section 54 prohibition or any party involved in a merger that has infringed the section 54 prohibition —

(i) to enter such legally enforceable agreements as may be specified by the Commission and designed to prevent or lessen the anti-competitive effects which have arisen;

(ii) to dispose of such operations, assets or shares of such undertaking in such manner as may be specified by the Commission; and

(iii) to provide a performance bond, guarantee or other form of security on such terms and conditions as the Commission may determine.”; and

(e) by deleting the words “subsection (2)(d)(iii)” in subsection (3) and substituting the words “subsection (2)(d)”.

Amendment of section 71

17. Section 71 of the Competition Act is amended —

(a) by inserting, immediately before the words “or any party involved in a merger” in subsection (1), the words “any party to

an anticipated merger in respect of which the Commission has made a decision”;

(b) by inserting, immediately after the word “section” in subsection (1A), “58A,”; and

5 (c) by deleting subsection (3) and substituting the following subsection:

“(3) In subsection (1), “decision” means a decision of the Commission as to —

10 (a) whether the section 34 prohibition has been infringed by any agreement;

(b) whether the section 47 prohibition has been infringed by any conduct;

(c) whether the section 54 prohibition will be infringed by any anticipated merger, if carried into effect; or

15 (d) whether the section 54 prohibition has been infringed by any merger,

and includes a direction given under section 58A, 67 or 69 (including the imposition of any financial penalty under section 69 or as to the amount of any such financial penalty) and such
20 other decision as the Minister may by regulations prescribe.”.

Amendment of section 75

18. Section 75 of the Competition Act is amended by inserting, immediately after the word “section” in subsections (1) and (4), “61A,”.

Amendment of section 76

25 **19.** Section 76 of the Competition Act is amended by inserting, immediately after the word “section”, “61A,”.

Repeal and re-enactment of section 85

20. Section 85 of the Competition Act is repealed and the following section substituted therefor:

“Enforcement of directions of Commission and commitments in District Court

5 **85.**—(1) For the purposes of enforcement of any direction made by the Commission under section 58A, 67 or 69, or any commitment accepted by the Commission under section 60A and which it has not released, the Commission may apply for the direction or commitment to be registered in a District Court in accordance with the Rules of Court and the District Court shall register the direction or commitment in accordance with the Rules of Court.

10 (2) From the date of registration of any direction or commitment under subsection (1), the direction or commitment shall be of the same force and effect, and all proceedings may be taken on the direction or commitment, for the purposes of enforcement as if it had been an order originally obtained in the District Court which shall
15 have power to enforce it accordingly.

(3) A District Court shall have jurisdiction to enforce any direction or commitment in accordance with subsection (2) regardless of the monetary amount involved and may, for the purpose of enforcing such direction or commitment, make any order —

20 (a) to secure compliance with the direction or commitment; or

(b) to require any person to do any thing to remedy, mitigate or eliminate any effects arising from —

(i) any thing done which ought not, under the direction or commitment, to have been done; or

25 (ii) any thing not done which ought, under the direction or commitment, to have been done,

which would not have occurred had the direction or commitment been complied with.

30 (4) Nothing in this section shall be interpreted as conferring upon the District Court any power to order the winding up of a company.”.

Amendment of section 93

21. Section 93(2) of the Competition Act is amended —

(a) by deleting paragraph (d) and substituting the following paragraphs:

“(d) the form and manner in which complaints that the section 34 prohibition has been infringed by any agreement, the section 47 prohibition has been infringed by any conduct, the section 54 prohibition will be infringed by any anticipated merger, if carried into effect, or the section 54 prohibition has been infringed by any merger, are to be submitted to the Commission;

(da) the acceptance of commitments, and the variation, substitution or release of commitments, including the parties that may apply for the variation, substitution or release of commitments and the form and manner in which applications for the variation, substitution or release of any commitment are to be submitted to the Commission;” and

(b) by deleting the word “and” at the end of sub-paragraph (ii) of paragraph (f), and by inserting immediately thereafter the following sub-paragraph:

“(iia) the turnover of all or any party to an anticipated merger (determined in such manner as may be prescribed); and”.

Amendment of Second Schedule

22. Paragraph 5 of the Second Schedule to the Competition Act is amended by inserting, immediately after the words “research and”, the words “studies and to”.

Amendment of Third Schedule

23. The Third Schedule to the Competition Act is amended by inserting, immediately after paragraph 9, the following paragraphs:

“Provisions directly related and necessary to implementation of mergers

10. The section 34 prohibition and the section 47 prohibition shall not apply to any agreement or conduct that is directly related and necessary to the implementation of a merger.

Mergers

11.—(1) The section 34 prohibition shall not apply to any agreement (either on its own or when taken together with another agreement) to the extent that it results, or if carried out would result, in a merger.

5 (2) The section 47 prohibition shall not apply to any conduct (either on its own or when taken together with other conduct) to the extent that it results in a merger.”.

Repeal of Fourth Schedule and new Fourth Schedule

24.—(1) The Fourth Schedule to the Competition Act is repealed.

10 (2) The Competition Act is amended by inserting, immediately after the Third Schedule, the following Schedule:

“FOURTH SCHEDULE

Sections 55 and 92

EXCLUSIONS FROM SECTION 54 PROHIBITION

- 15 1. The section 54 prohibition shall not apply to any merger —
- (a) approved by any Minister or regulatory authority (other than the Commission) pursuant to any requirement for such approval imposed by any written law;
 - 20 (b) approved by the Monetary Authority of Singapore established under section 3 of the Monetary Authority of Singapore Act (Cap. 186) pursuant to any requirement for such approval imposed under any written law; or
 - (c) under the jurisdiction of any regulatory authority (other than the Commission) under any written law relating to competition, or code of practice relating to competition issued under any written law.
- 25 2. The section 54 prohibition shall not apply to any merger involving any undertaking relating to any specified activity as defined in paragraph 6(2) of the Third Schedule.
3. 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.”.
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EXPLANATORY STATEMENT

This Bill seeks to amend the Competition Act (Cap. 50B) for the following purposes:

- (a) to extend Part III of the Act to an anticipated merger which, if carried into effect, will result in the occurrence of a merger, as defined in the Act. The Act presently applies only to mergers, where control has passed to an acquiring party. The amendments will permit voluntary statutory notifications of certain anticipated mergers to be made to the Competition Commission of Singapore (the Commission) for decision;
- (b) to remove notifications for guidance in respect of the section 54 prohibition and to remove the provision that allows the Commission to re-open a non-infringement decision on a merger due to a material change in circumstances;
- (c) to clarify when a merger occurs, the test for control for the purposes of determining when a merger has occurred, and who is a party involved in a merger for the purposes of notification, decision and appeal;
- (d) to replace the criterion for a joint venture to be considered as a merger, namely, that such a joint venture must perform on “an indefinite basis” all the functions of an autonomous economic entity, with the criterion that the functions be performed on “a lasting basis”;
- (e) to permit the Commission, where it has not completed its consideration of a matter, to make interim directions in respect of applications under section 57 or 58 and investigations of anticipated mergers and mergers to prevent any action that may prejudice further consideration or investigations, or the giving of any final directions under section 69, or, as a matter of urgency, to act to prevent serious, irreparable damage to a particular person or category of persons, or to protect the public interest. The power may be exercised where the Commission has reasonable grounds for suspecting that an anticipated merger, if carried into effect, will infringe, or a merger has infringed, the section 54 prohibition;
- (f) to permit the Commission to accept, vary, substitute or release commitments in respect of anticipated mergers or mergers. A non-infringement decision made because of the acceptance of a commitment may be revoked if any term of the commitment is not adhered to. The Commission will, except in exceptional circumstances, consult with any relevant third party before accepting, varying, substituting or releasing any commitment;
- (g) to clarify, in respect of the 3 prohibitions in the Act, that when the Commission gives guidance or makes a decision that one prohibition is unlikely to have been, or has not been, infringed, this will not preclude an investigation by the Commission into a possible infringement of the other 2 prohibitions;

- (h) to expand the Commission's powers to compel the furnishing of information or documents relevant to the conduct of market studies and the consideration of applications for decision;
- (i) to permit a person authorised by the Commission to accompany an investigating officer (authorised person) and a person required by an inspector to enter premises for investigation under section 64;
- (j) to exclude from the section 34 prohibition and the section 47 prohibition, mergers and ancillary restrictions (ancillary restrictions being additional arrangements that may not be integral to a merger, but which are directly related and necessary to its implementation); and
- (k) to exclude from the section 54 prohibition, mergers where the resultant economic efficiencies outweigh any adverse effect from the substantial lessening of competition arising from the mergers, and to clarify the ambit of the exclusion in respect of mergers approved under any written law.

Clause 1 relates to the short title and commencement.

Clause 2 amends section 2(1) to define an "anticipated merger" and a "party to an anticipated merger", to amend the definition of a "party involved in a merger", and to delete the definition of a "merger".

Clause 3 amends section 33(1) to include references to anticipated mergers.

Clause 4 amends section 45(2) to provide that guidance that any agreement is unlikely to infringe the section 34 prohibition does not preclude an investigation by the Commission into a suspected infringement of the section 47 prohibition or the section 54 prohibition.

Clause 5 amends section 46(2) to provide that a decision that any agreement has not infringed the section 34 prohibition does not preclude an investigation by the Commission into a suspected infringement of the section 47 prohibition or the section 54 prohibition.

Clause 6 amends section 52(2) to provide that guidance that any conduct is unlikely to infringe the section 47 prohibition does not preclude an investigation by the Commission into a suspected infringement of the section 34 prohibition or the section 54 prohibition.

Clause 7 amends section 53(2) to provide that a decision that any conduct has not infringed the section 47 prohibition does not preclude an investigation by the Commission into a suspected infringement of the section 34 prohibition or the section 54 prohibition.

Clause 8 repeals and re-enacts Division 4 of Part III as Division 4 has not been brought into operation and amendments are required to be made to various provisions therein before it can be brought into operation. The new Division 4 comprises sections 54 to 60 with a new section 58A inserted after section 58. The clause further inserts a new Division 4A to Part III.

The new section 54 has the following amendments:

- (a) the original paragraph (b) of section 54(2) has been deleted as the original paragraph (c) of section 54(2) (now paragraph (b) in the new section 54(2)) included the original paragraph (b);
- (b) references to “securities” in subsection (3) have been deleted and substituted with “rights”; and
- (c) the reference to “indefinite basis” as a test for determining when a joint venture constitutes a merger for purposes of the Act in subsection (5) has been replaced with the test of a “lasting basis”.

No changes have been made to section 55.

The new sections 56, 57 and 58 —

- (a) allow for the consideration by the Commission of certain anticipated mergers as to whether they will, if carried into effect, infringe the section 54 prohibition, and of mergers as to whether they infringe the section 57 prohibition;
- (b) allow the Commission to specify a validity period in its non-infringement decisions within which anticipated mergers referred to in paragraph (a) should be effected;
- (c) include references to the acceptance of commitments by the Commission; and
- (d) provide for instances in which an anticipated merger referred to in paragraph (a) is carried into effect before the Commission makes a decision in respect of the anticipated merger under section 57, by allowing the Commission to make a decision in respect of the resulting merger under section 58 instead.

The new section 58A permits the Commission to make interim directions in respect of anticipated mergers and mergers referred to in sections 57 and 58.

The new section 59 caters for situations where a non-infringement decision is made upon acceptance of a commitment and limits the power of the Commission to take further action in respect of an anticipated merger where it has made a decision under section 57 that the anticipated merger, if carried into effect, will not infringe the section 54 prohibition.

The new section 60 caters for situations where a non-infringement decision is made upon the acceptance of a commitment and limits the power of the Commission to take further action in respect of a merger where it has made a decision under section 58 that the merger has not infringed the section 54 prohibition.

The new Division 4A to Part III (comprising new sections 60A and 60B) provides for the Commission’s acceptance of commitments from such person as the Commission thinks appropriate, as well as the variation, substitution and release of accepted commitments. The new Division also provides that the Commission will make a non-infringement decision upon acceptance of a commitment.

Clause 9 inserts a new section 61A to empower the Commission to require any person to produce documents or provide information to the Commission for the purposes of market inquiries or applications for decision under certain circumstances. Failure by the person to do so will be an offence (see clause 18). Where the person so required to produce any document destroys, disposes, falsifies or conceals such document, or causes or permits the destruction, disposal, falsification or concealment of such document, he may, in certain circumstances, also be guilty of an offence (see clause 19).

Clause 10 amends section 62(1) to provide for the investigation of anticipated mergers which, if carried into effect, will infringe the section 54 prohibition.

Clause 11 amends section 64 to permit an authorised person and a person required by an inspector to enter premises for the purposes of an investigation and to require, *inter alia*, the production of documents and information, and for the explanations of documents produced to be given.

Clauses 12 and 13 amend sections 65(1) and 66(1) and (2), respectively, to make consequential amendments to those sections in light of the amendments to section 64 under clause 11. Clause 12 further makes technical amendments to section 65(2)(vii) and (5).

Clause 14 amends section 67 to provide that the Commission may impose interim measures during investigations into anticipated mergers and mergers which it considers necessary for the purpose of preventing any action that may prejudice the investigations or the giving of any directions under section 69 or, as a matter of urgency, to prevent serious, irreparable damage to a particular person or category of persons or to protect the public interest.

Clause 15 amends section 68 to empower the Commission to make decisions in respect of anticipated mergers upon completion of investigations in connection therewith.

Clause 16 amends section 69 to empower the Commission to make certain directions in respect of anticipated mergers where it has made a decision that the anticipated merger, if carried into effect, will infringe the section 54 prohibition.

Clause 17 amends section 71 to provide for the bringing of appeals against decisions and directions made by the Commission in relation to anticipated mergers and against directions made by the Commission under the new section 58A (see clause 8). The clause further provides that the Minister may prescribe those decisions of the Commission that may be appealed against.

Clause 18 makes consequential amendments to section 75(1) and (4) arising from the insertion of new section 61A by clause 9.

Clause 19 makes a consequential amendment to section 76 arising from the insertion of new section 61A by clause 9.

Clause 20 repeals and re-enacts section 85. The new section 85 allows, in addition to directions made by the Commission under sections 67 and 69, directions made under the new section 58A and commitments that have been accepted by the Commission to

be registered in the District Court in accordance with the Rules of Court and enforced as if they were orders of court. The new section 85 further empowers the District Court to make appropriate orders to secure compliance with the directions and commitments registered with it or to remedy, mitigate or eliminate effects arising from the non-compliance with such directions and commitments.

Clause 21 amends section 93(2) to include references to the anticipated mergers in connection with the regulation-making power of the Commission, and to include a reference to the making of regulations relating to commitments.

Clause 22 amends the Second Schedule to clarify the Commission's powers with respect to the conduct of research and studies.

Clause 23 amends the Third Schedule to insert new paragraphs 10 and 11 to respectively exclude ancillary restrictions and mergers, from the section 34 prohibition and the section 47 prohibition. The exclusions will apply with effect from 1st January 2006, when the section 34 prohibition and the section 47 prohibition came into force.

Clause 24 repeals and re-enacts the Fourth Schedule as the Fourth Schedule has not been brought into operation and amendments are required to be made thereto before it can be brought into operation.

Paragraph 1 of the Fourth Schedule provides that the mergers that are subject to —

- (a) the approval of any Minister or regulatory authority (other than the Commission) pursuant to any requirement for such approval imposed by any written law;
- (b) the approval of the Monetary Authority of Singapore pursuant to any requirement for such approval imposed under any written law; or
- (c) the jurisdiction of any regulatory authority (other than the Commission) in certain instances,

are excluded from the section 54 prohibition.

No changes have been made to paragraph 2 of the Fourth Schedule.

A new paragraph 3 has been inserted in the Fourth Schedule to provide that mergers with economic efficiencies that outweigh any adverse effect from the substantial lessening of competition arising therefrom are excluded from the section 54 prohibition.

EXPENDITURE OF PUBLIC MONEY

This Bill will not involve the Government in any extra financial expenditure.
