Competition & Antitrust and Trade

Merger Control Regime in Singapore – Voluntary, But Really?

Introduction

It is often stated that Singapore has a voluntary merger notification regime and thus, parties are not obliged to notify their mergers to the Competition and Consumer Commission of Singapore ("**CCCS**"). However, it has become increasingly apparent over the years, and perhaps reinforced by the developments since the seminal *Infringement Decision in relation to the Sale of Uber's Southeast Asian business to Grab in consideration of a 27.5% stake in Grab* (CCCS 500/001/18) ("**Grab-Uber case**"), that CCCS does in fact expect merging parties to notify CCCS as long as the merger could result in a substantial lessening of competition ("**SLC**") and thus be prohibited under Section 54 of the Competition Act (Cap. 50B) ("**Section 54 Prohibition**").

In this Update, we look at (a) when merging parties should consider notifying their merger to CCCS; (b) explain the importance of notification and the possible consequences of failing to notify; and (c) provide suggestions on undertaking a proper merger analysis and managing the Singapore leg of the transaction potentially with the regulator.

Alongside this, we remind our readers that merger control compliance is now in at least four other countries in Southeast Asia, namely, Indonesia, Thailand, Vietnam, and the Philippines. These are countries where notification is mandatory when the prescribed thresholds are crossed (with each country applying different thresholds). Any multi-jurisdictional analysis will need to bear these countries in mind.

When to Notify a Merger

Singapore is a voluntary merger regime. Thus, there is no strict legal obligation in Singapore for merging parties to notify their merger to CCCS. It should be noted that it is not the lack of a notification, but rather the implementation of a merger which contravenes the Section 54 Prohibition, that CCCS is concerned with. On this, a contravention occurs if the merger leads to an SLC. An SLC is indicated when indicative thresholds are crossed.

The indicative thresholds are: (a) if 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% to 40% and the post-merger combined market share of the three largest firms ("**CR3**") is 70% or more.

Where these thresholds are crossed, without more, there is a high risk that the merger will result in an SLC. In such circumstances, CCCS can seize jurisdiction to review the merger to assess if there may be competition concerns.

With that being said, as these are only indicative thresholds, transactions that do not meet the thresholds could still lead to an SLC and hence be investigated by CCCS. Conversely, transactions that meet or exceed the thresholds may not necessarily give rise to competition issues, depending on other factors such as ease of market entry or expansion, countervailing buyer power and net economic efficiencies.

Importance of Notification

A failure to notify a merger which is eventually found to result in an SLC will result in certain consequences.

Investigative powers of CCCS

As a preliminary note, CCCS monitors the market closely for mergers taking place that may require notification through their market intelligence function and third party complaints made to them. If CCCS believes that there would be an SLC in the relevant market, it has the power to initiate an investigation on its own initiative, and has done this on a number of occasions in the past.

During an investigation, CCCS will be able to require parties to produce any documents or information it deems relevant and conduct "dawn raids" if it believes all the relevant information has not been provided. In practice, where the merger has not been implemented as yet, CCCS will request for the merger parties to put in a notification to CCCS so that they are able to better assess the merger.

Penalties imposed by CCCS

After investigating, if CCCS finds that the merger would lead (or has led) to an SLC, it can impose financial penalties of up to 10% of the parties' turnover (up to three years) and further give directions to remedy the SLC. This includes the unwinding of the merger which, of course, presumes the commencement of the implementation of the merger, even if it has only just started.

Thus, while merging parties will not be penalised for their failure to notify since Singapore's merger regime is voluntary, notification is nonetheless highly recommended, since CCCS can impose wide-ranging penalties on merger parties if it concludes that their merger results in an SLC in Singapore (or in a market that encompasses Singapore).

CCCS' willingness to impose penalties was illustrated in the Grab-Uber case, where it imposed a record-high penalty of S$13 million on both parties collectively for infringing the Section 54 Prohibition as the transaction had led to an SLC in the provision of ride-hailing platform services in Singapore. The Grab-Uber case also marks the first and only time thus far that CCCS has imposed a financial penalty on merger parties since Singapore's merger control regime was introduced in 2007. This is a stark reminder that even though Singapore's merger control regime is technically voluntary, notification is nonetheless important as CCCS can still investigate mergers even after they have been closed.

Aside from financial penalties, CCCS is able to impose behavioural and structural remedies as well. In the Grab-Uber case, CCCS had given directions to (a) ensure that Grab's drivers were not required to use the Grab platform exclusively; (b) remove Grab's exclusivity arrangements with any taxi fleet in Singapore; and (c) make Grab maintain its pre-merger pricing algorithm and driver commission rates. CCCS had also imposed a structural remedy that required Uber to sell the vehicles of Lion City Rentals to another competitior, thereby preventing Uber from selling the vehicles to Grab.

In many cases, it would be costly for the parties to implement these remedies after the transaction has been completed, especially where they had not been contemplated by the parties earlier when discussing and structuring the transaction. The need to implement these remedies subsequently could significantly erode the value of the transaction and therefore have both a commercial and administrative impact to the parties.

Suggested Approach

Given CCCS' proactive approach in investigating mergers, parties should conduct a self-assessment within their organisations to determine whether the indicative notification thresholds are crossed. If they are, the parties should undertake a careful legal and economic analysis on whether an SLC will result from the merger.

If there is a risk of an SLC, the parties should then seriously consider filing a notification with CCCS before the transaction has been closed, so that CCCS can review and clear their merger (with or without commitments that would alleviate competition concerns). On this, it should be noted that commitments may be offered by the parties and accepted by CCCS as long as CCCS has not reached a final decision on whether a merger infringes the Section 54 Prohibition.

If parties have a genuine uncertainty whether the transaction would lead to an SLC because the merger does not meet the indicative thresholds or otherwise, parties also have the route of seeking confidential advice from CCCS before putting in a notification. The advantage of this is that the parties will be able to preserve the confidentiality of the transaction. However, parties are only eligible for the process if, amongst other things, the merger is not in the public domain and the merger is not completed but there is a good faith intention to proceed with it.

Concluding Words

While Singapore's merger notification regime is technically voluntary, the regime mirrors the UK Competition and Markets Authority's proactive approach and thus, where the thresholds in Singapore are crossed, notification is highly recommended. Parties choosing not to notify the merger do so at their own risk and peril. Non-notification could result in a wide range of sanctions being imposed.

The imposition by CCCS of financial penalties or directions to comply with remedies could significantly affect the value of the transaction. Parties are therefore well-advised to conduct a competition analysis

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on their proposed transaction at an early stage of their negotiations and deal structuring, and to cater for the need for CCCS review or guidance in their transaction timeline.

If you have any questions in relation to whether you should notify a merger in Singapore, please do not hesitate to contact our team below.

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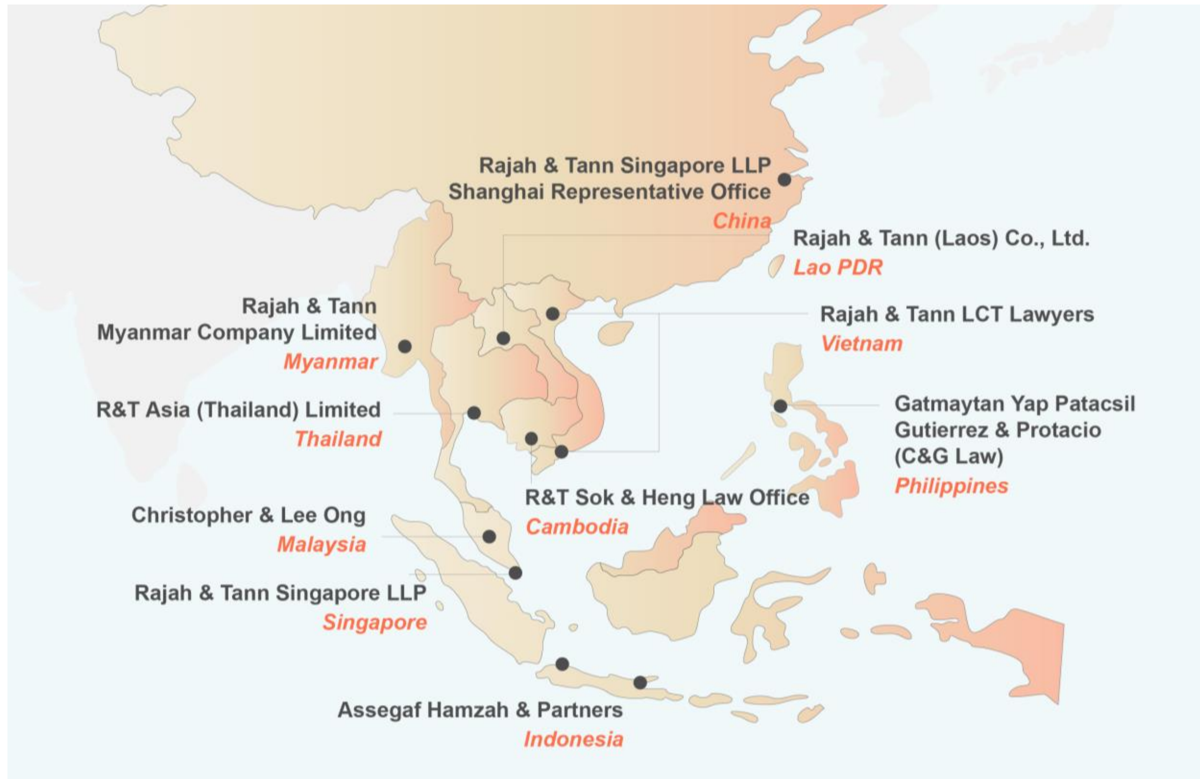

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