Published on 20 October 2023

ANCILLARY RESTRAINTS IN MERGERS AND ACQUISITIONS: A COMPETITION LAW PERSPECTIVE

[2023] SAL Prac 20

Non-compete, non-solicitation and confidentiality clauses implemented in mergers and acquisitions can restrict competition. Yet, competition law recognises the commercial justifications underpinning such clauses and permits them if they are reasonably scoped and directly related to the transaction. This article examines the legality and enforceability of such clauses under Singapore competition law and provides guidance on how such clauses can be scoped in mergers and acquisitions.

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I. Introduction

1 Non-compete, non-solicitation and confidentiality clauses are commonly implemented in corporate merger and acquisition transactions. However, such clauses have been increasingly scrutinised by regulators globally, especially where they restrict employees' freedoms. In the US, the Federal Trade Commission has proposed a new rule that would ban employers from imposing non-compete clauses on their employees, stating that such clauses would impede healthy competition. The UK government has similarly followed suit, proposing to limit the

1 All views expressed in this article are the authors' own.

duration of non-compete clauses in employment contracts to three months.

2 In Singapore, while the legality of such clauses has been extensively examined under the doctrine of restraint of trade,[2] competition law also plays an important role in regulating such clauses in the context of merger situations.[3] In particular, where such clauses are directly related and necessary to the implementation of a merger (otherwise known as "ancillary restraints"), they will not be considered an anti-competitive infringement under Singapore's Competition Act 2004[4] ("Ancillary Restraints Exclusion").[5]

3 This article reviews the scope of the Ancillary Restraints Exclusion in relation to non-compete, non-solicitation and confidentiality clauses and considers how they have been applied by the Competition and Consumer Commission of Singapore ("CCCS"). It also draws observations from the European Commission ("EC")'s treatment of these restraints as CCCS often references EC competition law and practice.

II. General principles on ancillary restraints

4 Parties to a merger commonly enter agreements which restrict the freedom of action of the parties in the market. These include non-compete, non-solicitation and confidentiality clauses. These clauses could constitute anti-competitive agreements that are prohibited under s 34 of the Competition Act 2004 or amount to an abuse of dominance which is prohibited under s 47 of the Competition Act 2004.

5 Yet, such clauses can still be implemented if they are ancillary restraints that are "directly related and necessary to

2 See, *eg*, Nicholas Seng, "Restraint of Trade Covenants in Commercial Agreements" [2019] SAL Prac 21.
3 Section 54(2) of the Competition Act 2004 (2020 Rev Ed) sets out when a merger situation occurs.
4 2020 Rev Ed.
5 Competition Act 2004 (2020 Rev Ed), Third Schedule, para 10.

the implementation of a merger"[6] (*ie*, the Ancillary Restraints Exclusion). The CCCS Guidelines on the Substantive Assessment of Mergers ("CCCS Merger Guidelines") provides guidance on the scope of the Ancillary Restraints Exclusion. For a restraint to be directly related, the restraint "must be economically connected with the merger, intended to allow a smooth transition to the changed structure after the merger, but ancillary or subordinate to its main object".[7] Thus, for instance, a non-compete clause should relate only to the specific goods and services of the acquired business, in order to qualify as being "directly related" to the merger.[8] Importantly, a restraint is not automatically deemed to be directly related to the merger simply because it was agreed at the same time as the merger or is expressed to be directly related to the merger.[9]

6 For the restraint to be necessary to implement the merger, CCCS considers whether the duration, subject matter and geographical field of application of the restraint are proportionate to the overall requirements of the merger.[10] Generally, a restraint is necessary to implement the merger where, in the absence of the restraint, the merger would either be terminated, or proceed at substantially higher costs, over an appreciably longer period or with considerably greater difficulty.[11]

7 Having set out the general principles, we move to consider how they apply specifically to non-compete, non-solicitation and confidentiality clauses.

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6 Competition Act 2004 (2020 Rev Ed), Third Schedule, para 10.
7 CCCS Guidelines on the Substantive Assessment of Mergers (1 February 2022) at para 11.7.
8 CCCS Guidelines on the Substantive Assessment of Mergers (1 February 2022) at para 11.12.
9 CCCS Guidelines on the Substantive Assessment of Mergers (1 February 2022) at para 11.9.
10 CCCS Guidelines on the Substantive Assessment of Mergers (1 February 2022) at para 11.10.
11 CCCS Guidelines on the Substantive Assessment of Mergers (1 February 2022) at para 11.10.

III. Non-compete clauses

8 Non-compete clauses in merger situations typically prohibit the seller of an undertaking from conducting business of a similar nature to that of the acquirer for a specified duration and within a particular geographical field. If non-compete clauses are properly limited, CCCS generally accepts these clauses as essential to the implementation of the merger as it allows the purchaser to reap the full benefit of any goodwill and/or know-how acquired with any tangible assets.[12] Notably, CCCS generally rejects non-compete clauses which benefit the seller of the undertaking rather than the acquirer.[13]

A. Duration of non-compete clauses

9 The duration of non-compete clauses is a key factor that determines whether the restraint is considered sufficiently necessary to fall within the Ancillary Restraints Exclusion.

10 Generally, CCCS will "consider accepting non-compete clauses for a longer period if it involves not only the transfer of goodwill but also know-how".[14] This is similar to the approach adopted by the EC in the Commission Notice on Restrictions Directly Related and Necessary to Concentrations ("EC Ancillary Restraints Guidelines"), where non-compete clauses are justified for periods of up to three years when the concentration involves the transfer of customer loyalty in the form of both goodwill and know-how, and up to two years when only goodwill is included.[15]

11 However, unlike the EC Ancillary Restraints Guidelines, the CCCS Merger Guidelines does not expressly specify a maximum

12 CCCS Guidelines on the Substantive Assessment of Mergers (1 February 2022) at para 11.12.

13 *Grounds of Decision Issued by the Competition Commission of Singapore – In Relation to the Notification for Decision of the Proposed Acquisition by Heineken International B.V. of Asia Pacific Breweries Limited Pursuant to Section 57 of the Competition Act* Case No CCS 400/005/12 (5 November 2012) at para 83.

14 CCCS Guidelines on the Substantive Assessment of Mergers (1 February 2022) at para 11.12.

15 Commission Notice on Restrictions Directly Related and Necessary to Concentrations, (2005/C 56/03) at para 20.

accepted duration for non-compete clauses, although it observes that previous merger cases accepted non-compete clauses for periods ranging from two to five years.

12 Yet, in the proposed acquisition by SK Hynix Inc ("SK Hynix") involving the sale of Intel Corporation ("Intel")'s NAND[16] and Solid State Drive ("SSD")[17] business to SK Hynix[18] ("*SK Hynix / Intel*"), CCCS indicated that it *generally* limits the duration of non-compete clauses in mergers involving the transfer of both goodwill and know-how to three years:[19]

> CCCS considers that *a three-year duration for a non-compete restriction is generally sufficient to ensure that an acquirer obtains the full benefit from the goodwill and know-how acquired as part of a transaction*. … [emphasis added]

13 Notwithstanding the general position, CCCS appears to have accepted a non-compete duration of more than three years in *SK Hynix / Intel*. Although the duration of the non-compete clause was redacted by CCCS, the publicly available master purchase agreement filed with the US Securities and Exchange Commission reveals that the duration of the non-compete clause between SK Hynix and Intel was five years, and it can be reasonably assumed that the same applied to the transaction reviewed by CCCS. The *SK Hynix / Intel* merger involved the transfer of a significant amount of intellectual property ("IP"), including SSD patents, trademarks, copyrights and trade secrets, amongst others, and it appears that CCCS may permit non-compete clauses beyond three years in circumstances where extensive IP is involved and where non-compete clauses will serve pro-competitive ends. This aligns with the CCCS Guidelines on the Treatment of Intellectual

16 "NAND" refers to a type of flash memory used for data storage in various devices.

17 Solid State Drive ("SSD") refers to a type of storage solution used in various devices and relies on flash memory.

18 *Grounds of Decision Issued by the Competition and Consumer Commission of Singapore – In relation to the Joint Notification for Decision on the Proposed Acquisition by SK Hynix Inc of Intel Corporation's NAND and Solid State Drive Business* Case No 400-140-2021-002 (21 July 2021).

19 *Grounds of Decision Issued by the Competition and Consumer Commission of Singapore – In relation to the Joint Notification for Decision on the Proposed Acquisition by SK Hynix Inc of Intel Corporation's NAND and Solid State Drive Business* Case No 400-140-2021-002 (21 July 2021) at para 35.

Property Rights which recognises that non-compete clauses can promote licensing by reducing the risk of misappropriation of the licensed technology and helps ensure that licensees have an incentive to invest in and exploit the licensed technology.[20]

14 Out of all the decisions where the duration of the non-competition provisions has been publicly disclosed, apart from *SK Hynix / Intel*, CCCS has only accepted non-compete clauses with a duration of five years in two other decisions. In *Heraeus / K&S*,[21] which involved the sale of Kulicke and Soffa Industries Inc ("K&S")'s semiconductor assembly materials business to Heraeus Materials Singapore Pte Ltd ("Heraeus"), CCCS permitted the non-compete clause as "a reasonable amount of time for [Heraeus] to establish a reputation for reliability with K&S's customers … in the highly technical semiconductor industry".[22] Similarly, in *Intel / STMicroelectronics*,[23] which involved the creation of a joint venture in the research and development, manufacture, marketing and sale of flash memory, CCCS permitted a five-year non-compete clause, although further reasons were not provided.[24]

15 Notably, out of the three cases[25] in which CCCS accepted non-compete clauses with durations of five years, two cases related to the flash memory market (*SK Hynix / Intel* and *Intel / STMicroelectronics*), while the other case related to the

20 CCCS Guidelines on the Treatment of Intellectual Property Rights (1 February 2022) at para 3.33

21 *Grounds of Decision Issued by the Competition Commission of Singapore – Proposed Acquisition by W.C. Heraeus GmbH (through Heraeus Materials Singapore Pte. Ltd.) of the Bonding Wire Business of Kulicke and Soffa Industries, Inc* Case No CCS 400/003/08 (2 September 2008).

22 *Grounds of Decision Issued by the Competition Commission of Singapore – Proposed Acquisition by W.C. Heraeus GmbH (through Heraeus Materials Singapore Pte. Ltd.) of the Bonding Wire Business of Kulicke and Soffa Industries, Inc* Case No CCS 400/003/08 (2 September 2008) at para 53.

23 *Grounds of Decision Issued by the Competition Commission of Singapore – Notification for Decision: Anticipated Joint Venture Between Intel Corporation and STMicroelectronics N.V.* Case No CCS 400/004/07 (2 October 2007).

24 *Grounds of Decision Issued by the Competition Commission of Singapore – Notification for Decision: Anticipated Joint Venture Between Intel Corporation and STMicroelectronics N.V.* Case No CCS 400/004/07 (2 October 2007) at para 34.

25 These are: *SK Hynix / Intel* (2018), *Heraeus / K&S* (2008) and *Intel / STMicroelectronics* (2007).

semiconductor market (*Heraeus / K&S*). As such, it appears that CCCS is more likely to accept non-compete clauses with durations of five years where the relevant markets are highly technical and specialised and involve a significant amount of IP.

16 CCCS's approach is similar to the approach adopted by the EC. While the EC Ancillary Restraints Guidelines stipulates a maximum duration of three years for non-compete clauses, it likewise recognises that longer periods may be justified under exceptional circumstances.[26] Previous EC decisions where non-compete clauses for five years were accepted include *Volvo / Renault V I*, where the duration was justified given the "relatively high degree of customer loyalty in the truck markets and the long life-cycles of heavy trucks"[27] and *Kodak / Imation*, where the duration was justified given the "economic life cycle of the products concerned" and the "special technology" involved.[28]

B. Geographical scope of non-compete clauses

17 CCCS also considers the geographical field of application of non-compete clauses to determine whether they are necessary to the implementation of a merger. In particular, the geographical scope of non-compete clauses cannot be too wide, and the restriction must "apply only to the area in which the relevant goods and services were established under the previous/current owner".[29]

18 The EC Ancillary Restraints Guidelines appears to go further by extending the acceptable geographical scope to potential markets and jurisdictions which the seller had invested in:[30]

26 Commission Notice on Restrictions Directly Related and Necessary to Concentrations, (2005/C 56/03) at fn 5.
27 Case No COMP/M.1980 – *Volvo / Renault V I* (1 September 2000) at para 56.
28 Case No IV/M.1298 – *Kodak / Imation* (23 October 1998) at para 73.
29 CCCS Guidelines on the Substantive Assessment of Mergers (1 February 2022) at para 11.12.
30 Commission Notice on Restrictions Directly Related and Necessary to Concentrations, (2005/C 56/03) at para 22.

> The geographical scope of a non-competition clause must be *limited to the area in which the vendor has offered the relevant products or services before the transfer*, since the purchaser does not need to be protected against competition from the vendor in territories not previously penetrated by the vendor. That *geographical scope can be extended to territories which the vendor was planning to enter at the time of the transaction, provided that he had already invested in preparing this move*. [emphasis added; references omitted]

19 In the context of Singapore, a non-compete clause would clearly be considered too wide by CCCS if it covered Singapore when the seller of the undertaking did not previously conduct business in Singapore or invested resources in anticipation of entering the Singapore market. However, in situations where non-compete clauses cover other jurisdictions, regardless of whether the seller had previously conducted business in those jurisdictions, CCCS has not commented on the enforceability of these clauses.

20 For instance, in *London Stock Exchange Group / Refinitiv*,[31] which concerned the provision of trading and post-trade clearing services and financial information products globally, the sale and purchase agreement contained a non-compete clause that prohibited Refinitiv Holdings Ltd ("Refinitiv") from offering or selling any products or services that could serve as reasonable substitutes for the products and services sold to the London Stock Exchange Group plc ("LSEG").[32] While the geographical scope of the non-compete clause was not specified, it may be reasonably assumed that the non-compete clause had a global reach, given that LSEG and Refinitiv provided these products and services globally. CCCS only considered the non-compete clause "to the extent that it related to Singapore", and ultimately allowed the

31 *Grounds of Decision Issued by the Competition and Consumer Commission of Singapore – In Relation to the Notification for the Decision of the Proposed Acquisition by London Stock Exchange Group Plc of Certain Subsidiaries and Assets of Refinitiv Holdings Limited* Case No CCCS 400/140/2020/002 (24 May 2021).

32 *Grounds of Decision Issued by the Competition and Consumer Commission of Singapore – In Relation to the Notification for the Decision of the Proposed Acquisition by London Stock Exchange Group Plc of Certain Subsidiaries and Assets of Refinitiv Holdings Limited* Case No CCCS 400/140/2020/002 (24 May 2021) at para 214.

clause to benefit from the Ancillary Restraints Exclusion without considering whether it restricted competition in jurisdictions where the seller had no business activity.[33]

21 *Sembcorp / Keppel*[34] concerned the supply of commercial vessels globally. Sembcorp Marine Ltd ("Sembcorp") and Keppel Offshore & Marine Ltd ("Keppel") entered into a framework agreement, which contained a non-compete clause that prohibited Keppel from conducting businesses in related and overlapping markets with Sembcorp.[35] CCCS likewise accepted the non-compete clause between Sembcorp and Keppel as falling within the Ancillary Restraints Exclusion, "insofar as they apply to Singapore".[36]

22 Both *London Stock Exchange Group / Refinitiv* and *Sembcorp / Keppel* involved the provision of goods or services globally.[37] Yet, even though the geographical scopes of these non-compete clauses potentially cover jurisdictions where the seller of the undertaking did not previously conduct business, CCCS has refrained from commenting on them as they do not

33 *Grounds of Decision Issued by the Competition and Consumer Commission of Singapore – In Relation to the Notification for the Decision of the Proposed Acquisition by London Stock Exchange Group Plc of Certain Subsidiaries and Assets of Refinitiv Holdings Limited* Case No CCCS 400/140/2020/002 (24 May 2021) at para 221.

34 *Grounds of Decision Issued by the Competition and Consumer Commission of Singapore – In Relation to the Notification for Decision on the Proposed Acquisition by Sembcorp Marine Limited of Keppel Offshore & Marine Limited* Case No CCCS 400-140-2022-004 (2 November 2022).

35 Sembcorp Marine Ltd, "Proposed Combination of Sembcorp Marine Ltd and Keppel Offshore & Marine Ltd – Revision of Transaction Structure and Terms" <https://www.sembmarine.com/scm2016/wp-content/uploads/2022/10/20221027.SCM_.Direct-Acquisition.Revised-Structure-and-Terms.pdf> (accessed 15 May 2023) at para 7.5.

36 *Grounds of Decision Issued by the Competition and Consumer Commission of Singapore – In Relation to the Notification for Decision on the Proposed Acquisition by Sembcorp Marine Limited of Keppel Offshore & Marine Limited* Case No CCCS 400-140-2022-004 (2 November 2022) at para 66.

37 For instance, in *London Stock Exchange Group / Refinitiv*, CCCS stated that the geographic scope of the market was "global-to-global": *Grounds of Decision Issued by the Competition and Consumer Commission of Singapore – In Relation to the Notification for the Decision of the Proposed Acquisition by London Stock Exchange Group Plc of Certain Subsidiaries and Assets of Refinitiv Holdings Limited* Case No CCCS 400/140/2020/002 (24 May 2021) at para 40. In *Sembcorp / Keppel*, both Sembcorp and Keppel operated shipyards and provided shipbuilding services in Brazil and the US, amongst others.

relate to Singapore and presumably do not have an impact on competition in Singapore.

23 In contrast, the EC has struck out parts of non-compete clauses that extended beyond the European Union ("EU") for being too wide. In *Norsk Hydro / Enichem Agricoltura – Terni*,[38] which concerned the supply of nitrogen fertilisers in the European Economic Area, Norsk Hydro ASA ("Norsk Hydro") had acquired Enichem Agricoltura ("ENICHEM")'s fertiliser business, Terni Industrie Chimiche ("TIC"). Norsk Hydro had entered a non-compete agreement with ENICHEM and TIC, which imposed a "global non-competition obligation for any activity of manufacturing and trading of fertilizers and ammonia".[39] The EC instead limited the geographical scope of the non-compete clause, stating that "[i]ts geographic scope … must be limited to the area where ENICHEM and TIC were active before the sale".[40]

24 The EC's willingness to strike out parts of non-compete clauses where the geographical scope is too wide, even if the non-compete clauses cover jurisdictions that are not under the EC's purview, suggests that it remains open for CCCS to do the same. As such, even though the CCCS's existing practice is to examine the geographical scope of non-compete clauses only when they relate to Singapore, CCCS has the discretion to limit an overly broad non-compete clause that seeks to restrict competition outside of Singapore. In particular, if restrictions outside Singapore lead to anti-competitive effects in Singapore (*eg*, in the form of higher import prices), CCCS could take a further interest in scrutinising such non-compete clauses.

IV. Non-solicitation clauses

25 A non-solicitation clause restricts one party from actively seeking or soliciting certain relationships (*eg*, employees,

38 Case No IV/M.832 – *Norsk Hydro / Enichem Agricoltura – Terni (II)* (25 October 1996).

39 Case No IV/M.832 – *Norsk Hydro / Enichem Agricoltura – Terni (II)* (25 October 1996) at para 36.

40 Case No IV/M.832 – *Norsk Hydro / Enichem Agricoltura – Terni (II)* (25 October 1996) at para 37.

customers, suppliers) or business opportunities from another party. The CCCS Merger Guidelines does not expressly refer to non-solicitation clauses. However, in *London Stock Exchange Group / Refinitiv*, CCCS cited the EC Ancillary Restraints Guidelines and affirmed that it evaluates non-solicitation clauses in a similar way to non-compete clauses.[41] As such, non-solicitation clauses will only fall within the Ancillary Restraints Exclusion if they are directly related and necessary to implement the merger, and the observations in Part III of this article in relation to limitations on duration and geography of non-compete clauses will equally apply here.

26 CCCS has previously rejected non-solicitation clauses on the basis that they were not ancillary restraints as there was insufficient justification to show why they were necessary. In *Advent Topco / GfK*,[42] the non-solicitation clause was rejected as the parties "failed to provide sufficient justification as to how, in the absence of the broad Non-Solicitation Restrictions, the Parties will be unable to obtain the full value of the combined business following the implementation of the merger".[43]

27 Conversely, CCCS has accepted non-solicitation clauses when they are properly scoped and are required to allow the acquirer to obtain the full benefit of the goodwill and know-how acquired from the seller. In *ContiTech / Trelleborg*,[44] which involved the global supply of printing blankets, the acquirer ContiTech

41 *Grounds of Decision Issued by the Competition and Consumer Commission of Singapore – In Relation to the Notification for the Decision of the Proposed Acquisition by London Stock Exchange Group Plc of Certain Subsidiaries and Assets of Refinitiv Holdings Limited* Case No CCCS 400/140/2020/002 (24 May 2021) at para 218.

42 *Grounds of Decision Issued by the Competition and Consumer Commission of Singapore – In Relation to the Notification for Decision on the Proposed Acquisition by AI PAVE Dutchco I B.V. of GfK SE* Case No 400-140-2022-006 (22 February 2023).

43 *Grounds of Decision Issued by the Competition and Consumer Commission of Singapore – In Relation to the Notification for Decision on the Proposed Acquisition by AI PAVE Dutchco I B.V. of GfK SE* Case No 400-140-2022-006 (22 February 2023) at para 32.

44 *Grounds of Decision Issued by the Competition and Consumer Commission of Singapore – In Relation to the Notification for Decision on the Proposed Acquisition by ContiTech Global Holding Netherlands B.V. of Printing Solutions Sweden Holding AB* Case No 400-140-2022-003 (27 October 2022).

Global Holdings Netherlands B V ("ContiTech") submitted that it would "require a stable workforce that is sufficiently knowledgeable and trained in Trelleborg's printing solution business operations".[45] CCCS accepted the non-solicitation clause, stating that it was "properly scoped" in relation to Trelleborg AB ("Trelleborg")'s employees and was not "overly restrictive of competition", which would allow ContiTech to obtain the full value of the merger.[46] Similarly, in *Fresenius Medical / RenalTeam*,[47] which involved the supply of haemodialysis services in Singapore, CCCS accepted the non-solicitation clause, stating that it would allow Fresenius to "obtain the full value of the assets acquired" from the merger and "serves to preserve and protect the value of the human resource assets" acquired by Fresenius Medical Care Singapore Pte Ltd ("Fresenius").[48] In *City Energy / Tan Sooh Huah*,[49] which involved the supply of liquefied petroleum gas to residential, commercial and industrial customers in Singapore, CCCS accepted the non-solicitation clause imposed by the acquirer, City Energy Pte Ltd as it was "limited to key personnel who are integral to ensuring that the acquired business can be run and is sustainable".[50]

45 *Grounds of Decision Issued by the Competition and Consumer Commission of Singapore – In Relation to the Notification for Decision on the Proposed Acquisition by ContiTech Global Holding Netherlands B.V. of Printing Solutions Sweden Holding AB* Case No 400-140-2022-003 (27 October 2022) at para 29.

46 *Grounds of Decision Issued by the Competition and Consumer Commission of Singapore – In Relation to the Notification for Decision on the Proposed Acquisition by ContiTech Global Holding Netherlands B.V. of Printing Solutions Sweden Holding AB* Case No 400-140-2022-003 (27 October 2022) at para 30.

47 *Grounds of Decision Issued by the Competition and Consumer Commission of Singapore – In Relation to the Proposed Acquisition by Fresenius Medical Care Singapore Pte.Ltd. of 100 per cent. of the Issued Share Capital in RenalTeam Pte.Ltd*. Case No CCCS 400-140-2020-003 (29 May 2020).

48 *Grounds of Decision Issued by the Competition and Consumer Commission of Singapore – In Relation to the Proposed Acquisition by Fresenius Medical Care Singapore Pte.Ltd. of 100 per cent. of the Issued Share Capital in RenalTeam Pte.Ltd*. Case No CCCS 400-140-2020-003 (29 May 2020) at para 106.

49 Grounds of Decision Issued by the Competition and Consumer Commission of Singapore – In Relation to the Proposed Acquisition by City Energy Pte Ltd of Tan Soon Huah Gas Supply Pte Ltd's Liquefied Petroleum Gas Business Case No 400-140-2023-002 (2 August 2023).

50 *Grounds of Decision Issued by the Competition and Consumer Commission of Singapore – In Relation to the Proposed Acquisition by City Energy Pte Ltd of Tan Soon Huah Gas Supply Pte Ltd's Liquefied Petroleum Gas Business* Case No 400-140-2023-002 (2 August 2023) at para 24.

28 The foregoing suggests that non-solicitation clauses are more likely to be accepted by CCCS when they relate to more specialised markets and employees with specialised skillsets. This is similar to how non-solicitation clauses are assessed under the doctrine of restraint of trade. Merger parties must also furnish sufficient justification as to how the non-solicitation clause will allow the acquirer to reap the full benefits of the merger.

29 A further observation is that the justifications for non-solicitation clauses are assessed independently from non-compete clauses. In *Momentive / CoorsTek*,[51] while CCCS accepted a non-compete clause as falling within the Ancillary Restraints Exclusion, it rejected the non-solicitation clause as the parties were unable to explain whether and how the clause was important for the implementation of the merger.[52] As such, transaction parties wishing to include both non-compete clauses and non-solicit clauses have to ensure that each restraint can be independently justified.

V. Confidentiality clauses

30 A confidentiality clause restricts a party from disclosing sensitive information, which ranges from general commercial information to trade secrets and know-how. Similar to non-solicitation clauses, the CCCS Merger Guidelines does not expressly refer to confidentiality clauses. CCCS has also not considered the validity of confidentiality clauses in any decisions to date.

31 However, the EC Ancillary Restraints Guidelines states that confidentiality clauses "have a comparable effect and are therefore

51 *Grounds of Decision Issued by the Competition and Consumer Commission of Singapore – In Relation to the Proposed Acquisition by MOMQ Holding Company of CoorsTek KK.'s Crucibles Business* Case No CCCS 400/140/2022/005 (18 October 2022).

52 *Grounds of Decision Issued by the Competition and Consumer Commission of Singapore – In Relation to the Proposed Acquisition by MOMQ Holding Company of CoorsTek KK.'s Crucibles Business* Case No CCCS 400/140/2022/005 (18 October 2022) at para 23. Note that the scope of the non-solicitation clause was redacted, hence "presumably" is used.

evaluated in a similar way to non-competition clauses".[53] As CCCS takes reference from the EC Ancillary Restraints Guidelines, there is a risk that the CCCS may scrutinise confidentiality clauses in the same way as they do for non-compete clauses. If so, confidentiality clauses will only fall within the Ancillary Restraints Exclusion if they are directly related and necessary to implement the merger, and the observations in Part III of this article in relation to limitations on duration and geography of non-compete clauses will equally apply here.

32 Importantly, the acceptable duration for a confidentiality clause can vary depending on the type of confidential information involved. For example, confidentiality clauses that seek to protect general commercial information (such as customer details, price and quantity information) would constitute ancillary restraints if they are generally limited to the duration of the non-compete clauses that are concurrently implemented in the merger agreement. In *ICI / Williams*,[54] the confidentiality clause imposed an obligation on Williams plc not to disclose or use confidential business information which could be detrimental to the acquired business, for as long as the information remained confidential. The EC objected, and only allowed the confidentiality clause protecting general commercial information to last for the duration of the non-compete clause.[55]

33 In comparison, longer durations appear to be acceptable when the information being protected involves technical know-how. In *Solvay / Laporte*,[56] the EC accepted that the indefinite duration of the confidentiality clause was acceptable in relation to the technical know-how transferred to Solvay SA.[57] It should be noted, however, that the EC Ancillary Restraints Guidelines emphasises that "confidentiality clauses concerning technical know-how may *exceptionally* be justified for longer periods"

53 Commission Notice on Restrictions Directly Related and Necessary to Concentrations, (2005/C 56/03) at para 26.
54 Case No IV/M.1167 – *ICI / Williams* (29 April 1998).
55 Case No IV/M.1167 – *ICI / Williams* (29 April 1998) at para 22.
56 Case No IV/M.197 – *Solvay / Laporte* (30 April 1992).
57 Case No IV/M.197 – *Solvay / Laporte* (30 April 1992) at para 50.

[emphasis added].[58] As such, merger parties should not assume that confidentiality clauses with an indefinite duration in relation to technical know-how would automatically be accepted by competition authorities.

34 It is helpful for transaction parties to understand the EC's approach to confidentiality clauses as this will serve as an important reference to CCCS in the event that it starts to scrutinise confidentiality clauses in merger situations.

VI. Conclusion

35 Non-compete, non-solicitation and confidentiality clauses are often necessary to implement a merger, and for the acquirer to obtain the full benefit of the merger. In Singapore's context, CCCS generally accepts ancillary restraints if they do not exceed three years where the transfer of know-how is involved, are not too wide in relation to Singapore and are properly scoped. Merger parties also bear the burden of justifying the implementation of a non-compete or non-solicitation clause and should therefore be aware of the reasonable and enforceable limits of such clauses.

58 Commission Notice on Restrictions Directly Related and Necessary to Concentrations, (2005/C 56/03) at fn 3.