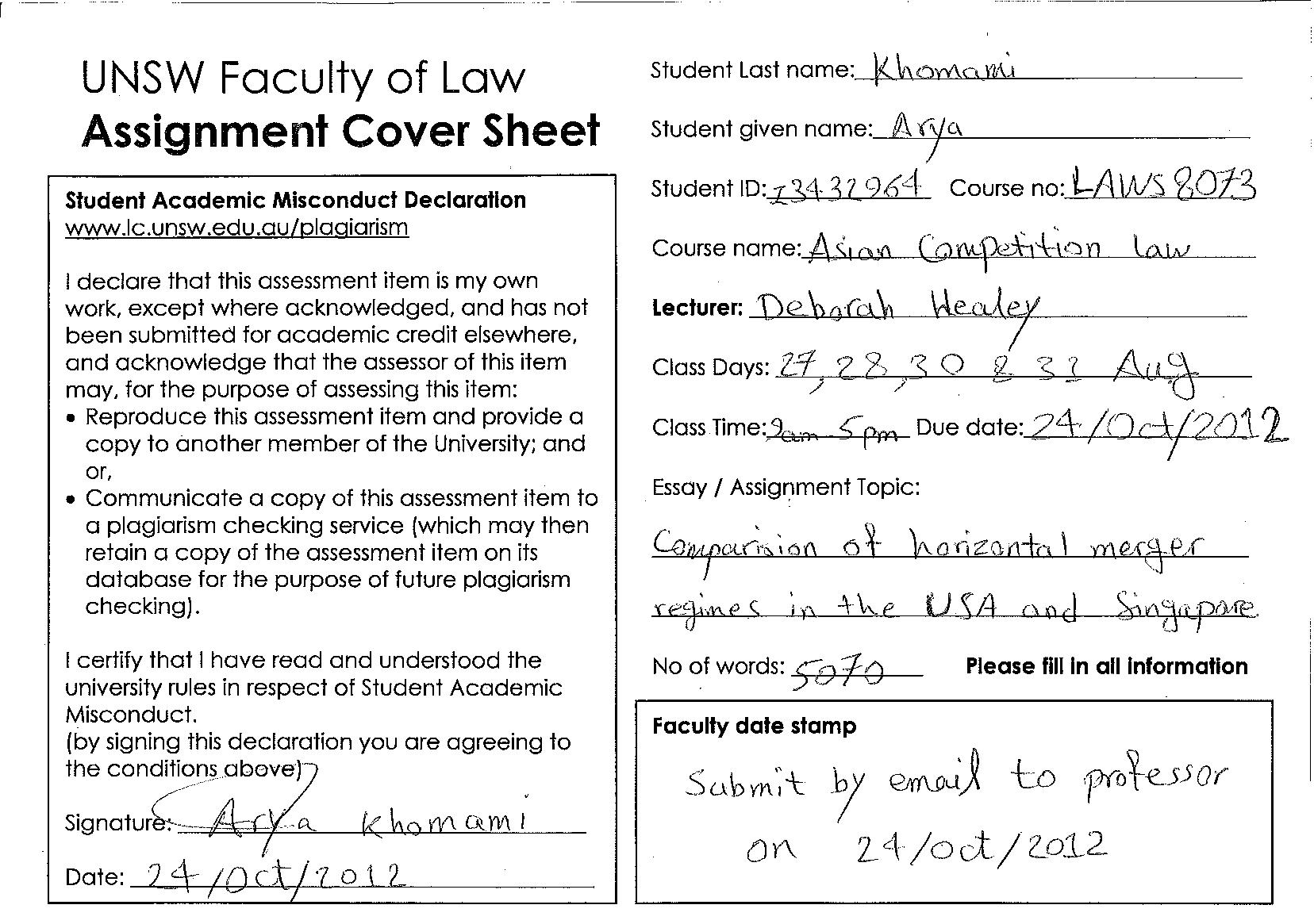
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**Arya Khomami,Asian competition law**

**Subject:Comparision of horizontal merger regimes in the USA and Singapore**

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# I.comparison of laws

There are different laws about merger in the United States. But it can not be denied that the section 7 of Clayton act is the most important one. It states that :” No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly.”Sherman act also in the sections 1, 2 and 5 has some laws that are used in U.S merger case law.[[1]](#footnote-1)

There is one important main law that consider to the merger regime in Singapore. It is Singapore competition law. Art. 27.4.1 Of Singapore competition act states that:” Section 54 prohibits 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, unless the merger falls within exclusion in the Fourth Schedule, or is exempted by the Minister on the ground of any public interest consideration.”

At first glance it is clear that the US act is absolute without exclusions ,but Singapore act has 2 important exclusions.First,fourth schedule that states that:”Mergers and acquisitions(M&As) approved under any written law;or any code of practice under any written law relating to competition, M&As involving any undertaking relating to any specified activity as defined in paragraph 6(2) of the third schedule.”.Schedule 3 mainy is including industries like gas,electricity,public transport and etc.Exemptions in Singapore competition law mainly show the reality about the Sinapore economic structure.There are some govermental companies that they are included in exclusions.[[2]](#footnote-2)

# II.Comparision of guidelines

## A.Market power

The U.S horizontal merger guideline started by mentioning to market power. Mergers which “enhances market power if it is likely to encourage one or more firms to raise price, reduce output, diminish innovation, or otherwise harm customers as a result of diminished competitive constraints or incentives.”[[3]](#footnote-3)Sometimes mergers influence on other rivals behavior, sometimes they do not .Unilateral effect means the merger solely has anti-competitive influences on the market .There are some factors that show the unilateral effect :price factor(increasing price),non-price factors like: quantity,varaiety,services and innovation.As horizontal merger guideline mention,” Agencies normally evaluate mergers based on their impact on customers.”[[4]](#footnote-4)

Then the guideline addresses important subject as adverse competitive effect and try to show the evidences for it. First the Agency do not only consider to the current situation, but also consider to probable effects that likely arise in the future. Second the agency will not only consider to the current merger, but also will consider to the recent mergers on that special market. Third the Agency will consider to the market shares and concentration in the relevant market and will try to find out if it will enhance the market power or not.Fourth,Agency will consider that wether the merging parties are substantial competitors or not(it is one of the important element of adverse effect.)Fifth,Agency try to find out if one of the mergered companies is percieved as a maverick firm,a firm with disruptive role in the market that in addition benefit to the customers too.(mainly by decreasing the prices)[[5]](#footnote-5)

Singapore merger guideline concentrates on substantial lessening of competition (“SLC”) as important criteria to evaluate market power. In contrast with US guideline that mainly concentrate on current and predicted actions of merge red firm and their anti-competitive influences, Singapore guideline try to make it clear that in which situations there is a control from one company over the other that in fact they convert to one economic entity.Therfore the market power of the entity will increase and have substantial lessening of competition influences. It is clear that in the Singapore merger guideline, the SLC test is connected to the decisive control.Therefore CSS must consider that”whether decisive influence is capable of being exercised, rather than the actual exercise of such influence. “[[6]](#footnote-6)

The CCS considers that decisive influence is “generally deemed to exist if there is ownership of more than 50% of the voting rights. Where the ownership is between 30% and 50% of the voting rights of the undertaking, there is a rebuttable presumption that decisive influence exists. ”Voting rights” refers to all the voting rights attributable to the share capital of an undertaking which are currently exercisable at a general meeting. “[[7]](#footnote-7)CSS guideline also consider to the de facto control in details.

There are 2 terms that joint ventures can be perceived as a merger according to the section 3.20 of Singapore guideline, when there is an independent economic entity which permanently control the other.

There are two important differences between merger regime in Singapore and the US. The merger regime in the US consider to the capacity of industry. Therefore the agencies have to consider to the capacity of the merge red company and try to predict that if it enhance the market power or not. The Singapore merger regime tries to make it clear in which situations there is a decisive control. Singapore merger guideline try to make it clear that in which terms the joint venture will convert to joint control or merge red company. The other important difference is the “U.S merger control system does not distinguish between cooperative and concentrative joint ventures.”[[8]](#footnote-8)

## B.Price Test and Market definition

It is mentioned in US guideline that the resource of information are Merging Parties, Customers, Other Industry Participants and Observers.It is true to say that all of these resources are considered in price test.Price test is described as price discrimination in US merger guideline.Price discrimination means price increase in the post-merger situation that there is not any substitute for the product.[[9]](#footnote-9)There are 2 terms :different price and impossibility of defeat the price increase.[[10]](#footnote-10)

The prices will increase in the relavant market.It is important to clear two matter ,as guideline mentiones, in market definition:line of commerce and market participant[[11]](#footnote-11).

There are 2 criterias to define the market:1. The Hypothetical Monopolist Test:It emphasise on the subsititute products would be broad enough[[12]](#footnote-12),increase in price must be significant and non-transitory increase in price (“SSNIP”).2. Benchmark Prices and SSNIP Size:In this approach, the agency will try to find the milestone for prices pre-merger,if the prices would not change pre-merger,it can be chosen as milestone,but in the case of pre-merger price change ,if it increase, the benchmark price must be predicted,but in the case of decrease ,the decreased price will be percieved as criteria.

*It is important to evaluate market shares* and Market Concentration in order to assess market power. They arementioned in the section 5 of US guideline.Section 5.1 mention that all firms that have revenure from the market are market participants.Firms that have this ability to sell the same products to the target customers are market participants too.The agency has to consider to the the historical evidences in order to calculate the market share of mergered company .[[13]](#footnote-13) In fact it is possible to predict the future probable market share of mergered company. “The Agencies measure market shares based on the best available indicator of firms future competitive significance in the relevant market.”[[14]](#footnote-14)Market share will calculate by current and future revenue.[[15]](#footnote-15)

Agency mostly consider to market concentration pre and post merger according to the section 5.3.

The Agencies often calculate the Herfindahl-Hirschman Index (“HHI”) of market concentration.[[16]](#footnote-16)

It is possible to distinguish the kind of market after applying HHI test:

”-Unconcentrated Markets: HHI below 1500

-Moderately Concentrated Markets: HHI between 1500 and 2500

-Highly Concentrated Markets: HHI above 2500”[[17]](#footnote-17)

The Singapore guideline uses the SLC test in order to evaluate lessening of competition. It starts with market definition. In market definition, the products and geographical scope would be considered. Then it describes market power as ability to increase prices. The guideline chooses the European style of measuring the market concentration (CR3: measuring the market shares of 3 big firms).[[18]](#footnote-18)

SSNIP is a clear method in US guideline to analyze the price increase. The Singapore guideline consider to the Hypothetical monopolist test that is similar with US one but it does not mention to the SSNIP that is perceived as a criteria for the price increase. There are two different method used in U.S and Singapore merger regime to evaluate the market concentration.HHI method and CR4 are very similar ,but US one is more reliable and predictable .Because unlike the CR4 ,the HHI reflects both the distribution of market shares of top four firms and the composition of the market outside of the top four.[[19]](#footnote-19) It is true to say that the predictability is one of the important strength of the legal systems.

## C.Unilateral effect

The U.S guideline in section 6 mentioned to the unilateral effect that means the mere merger in some cases can lead to decrease the competition. For example, merger between firms with different products with less or strong substitution can lead to decrease of competition.[[20]](#footnote-20): Because the firm can unilaterally increase the price of one or both products. Sometimes in these cases may be agency consider to the diversion ratio, the rate of increase in the substitution products, when the price of other product increase.

As mentioned before HHI test is an economic criterion that shows the market concentration. It is true to say that merger in high concentrated market may have unilateral effect. But “The Agencies rely much more on the value of diverted sales than on the level of the HHI for diagnosing unilateral price effects in markets with differentiated products. If the value of diverted sales is proportionately small, significant unilateral price effects are unlikely.”[[21]](#footnote-21)

The other important factor of unilateral effects is capacity of the firm, it must be considered that wither the it is profitable for the firm to decrease its capacity in order to increase the prices.(it happen when there is high market share and the margin on suppressed product is low and the market elasticity of demand is low.)Or it is possible for the firm to divert its production to other market and increase prices on that market. This matter is mentioned in section 6.3.

The coordination effects considered in section 7 of US guideline. Coordinated effect is a behavior of firms in the market that are parallel and will lead to price increase. The agency can challenge to the mergers that maybe dangerous for competition because of coordinated effects according to Clayton act. The agency can challenge the merger in the market that is concentrated and vulnerable to coordinated behaviors. Collusion in the relevant or even in the other geographical market according to section 7.2 is the evidence of existence of vulnerable to coordinated conducts. The market is vulnerable to coordination behavior, if rivals only response to each other and their behavior is not based on competition.

CSS guideline in section 6 consider to anti-competitive behaviours:non-coordinated and coordinated effects.non-coordinated effects is where the mergerd firm consider as profitable to increase the price and because then some customers will switch to other products so it is profitable for them to increase the prices too.

U.S merger regime considers to the non-coordinated effects as unilateral effects. While Singapore merger guideline only consider to main kinds of non-coordinated effect, the U.S merger regime considers to different kinds of non-coordinated effect. Therefore there are more criteria’s for non-coordinated effects in US merger regime.

## D.Innovation and Product varaiety

It is possible that innovation and product variety decrease after merger. This matter is mentioned in section 6.4 of US guideline. Maybe the merger works as an incentive to not perform the innovation that one of the firms wanted to do pre-merger. Because the merging firm has substitute revenue from the merging. Therefore the agency will consider that wither the merging firm will direct to high innovation or not, if at least one of the merging parties is capable for innovation. Agency also will consider that wither the merger can be the incentive for decrease of the variety of products in a way that would be harmful for customers.

The decreasing of innovation and varaiety of products is not mentioned in CSS guideline.In contrast It can be the sign of market power of merging firm in US guideline.

Powerful buyers is the term that mentioned in section 8 of US guideline.They are buyers that able to negotiate with suppliers.They will lose their negotiation power after merger ,if merger firm has market power.Decreasing the negotiation power of powerful buyers percieved as a criteria for market power.The powerful buyers is considered in CSS guideline as Countervailing Buyer Power with the same attributes.

## E.Entry

In section 9 of US guideline the agency has to consider to the situation of entry into the market.There are some factors that make clear that entry into the market is easy or not.These factors are:Timeliness(the time that takes for entry into the market),Likelihood(theentry is likely if entrance is profitable),Sufficiency(mergerd firm probably has huge productive potential,it has to be evaluated that that the new firm how much must have potential)

Section 7.5 of Singapore guideline states that the CSS will review 2 elements to evaluate entry into the market:First,barriers of entry including cost,vaiable scale,second,the experience of other entries or withdrawal

It is clear that the US guideline has more criterias for entry,while the singapore one is emphasise mostly on sufficiency and does not consider to timeliness and likelihood for entry into the market.Therefore approving the non-entry barriers is more difficult in US courts.

## F.Efficiency:

Efficiency is considered in section 10 of U.S guideline.In describing the efficiency,the guideline concentrates on quality and low price. In addition the guideline refers to the important word(reasonable means) that use in US courts a lot and make it difficult to approve the efficiency:”Efficiency claims will not be considered if they are vague, speculative, or otherwise cannot be verified by reasonable means.”[[22]](#footnote-22) Also the guideline emphasise thet the efficiency can not justify the monopoly.

Singapore guideline specify some terms for efficiency in section 7.18 including evidences for price reduction,likely claimed benefits,period of time for achievement to benefits.It also states that efficiency will conpare with the situation of without merger.

It is clear that the both regimes use the same approach thorogh the efficiency.But there is an important point in US merger regime that it is emphasised that the efficiency has to be approved by reseanoble means.In fact in U.S case law reasonable means reffered to the special economic methods.Therefore opinions of experts do not have major role in approving the efficiency in U.S.Therefore it seems that approving efficiency in U.S is more difficult than Singapore.

## G.Failing assets

Section 11 of US guideline consider to failing assets.Merging can be a solution for failing assets but there are some terms :” 1) the allegedly failing firm would be unable to meet its financial obligations in the near future; (2) it would not be able to reorganize successfully under Chapter 11 of the Bankruptcy Act; and (3) it has made unsuccessful good-faith efforts to elicit reasonable alternative offers that would keep its tangible and intangible assets in the relevant market and pose a less severe danger to competition than does the proposed merger.”[[23]](#footnote-23)

Section 7.24 of CSS consider to failing party.There are 3 terms for merger with the failing party:dire situation,unable to meet financial obligations,There must not be any other choice except merger.

It is clear that the U.S and Singapore merger regime take the same approach thorough failing party.

# III.Jurisdictions:

I will consider to 3 jurisdictions, one from US and two from Singapore.All of them are merger firms in the same industry(IT:Information Technology).Therefore it will be clear the different approach of US and Singapore merger regimes.

## A.US jurisdiction:

There are a lot of businesses to help taxpayers for preparation of tax request.The merger took place between 2 of these companies:H&R Block and TAXACT.The 3 big companies have 90% of the market including:HRB,Intuit and TAXACT.

The DOJ alleges that because the proposed acquisition would reduce competition in DDIY industry by eliminating head-to-head competition between the merging parties and by making anticompetetive coordination between two major remaining market participants substantially more likely ,the proposed acquisition violates section 7 of the clayton Act.[[24]](#footnote-24)

As U.S guideline started by unilateral effect, the court follows the same way.At first the court consider to the role of the TAXACT in market as a maverik company and its infuence on decreasing the price.Because after merger the there will not be any head to head competition ,therefore it may be influenced on the price increase.This kind of reasoning that is different with CSS jurisdiction (that I will mention further) is based on U.S guideline.US court following the US guideline, concentrated on the influence of ommiting head to head competition as a unilateral effect on current and future market.

The court continued by describing the history of market.Then it defined the market.The government argues that the “relevant market in this case consists of DDIY products,but does not include assisted tax preparation .Under this view of the market ,the aqusition in this case would result in a DDIY market that is dominated by two large players-H&R Block and Intuit-that together control 90 percent of the market share,with remaining 10 percent of the market divided among smaller companies.”[[25]](#footnote-25)

The supreme court approved the opinin of DOJ in market definition and declared that:”The outer boundaries of a product market are determined by the reasonable interchangeability of use by customers or the cross-elasticity of demand between the product itself and substitutes for it.”

The court applied the new approach in market definition.The word “reasonable interchangeability” that used in the jurisdiction is based on non-transitory increase in price(SSNIP) in the future market.Therefore it is important to find at least a small but significant and non-transitory increase in price(SSNIP).This kind of reasoning based on real world evidences and not expert testimony.Therefore the U.S approach thorough market definition is based on relavant market that is influenced by non-transitory increase in price(SSNIP).It is clear that this approach is different with traditional way of market definition that use in Singapore merger cases.

It is important to find out how the court evaluate likely effect on competition.At first the court started by measuring the market concentration,the market concentration in this case is 4291 by HHI.[[26]](#footnote-26)

The court did not accept the segmentation of market to state and federal. Court” finds that there is a little reason to conclude that the market share propositions within the state DDIY segment would be significantly different from federal DDIY”[[27]](#footnote-27)

upon consideration to all of the evidences relating to barriers to entry or expansion,the court cannot find that expansion is likely to avert anticompetetive effects from the transaction.[[28]](#footnote-28)

“In considering to coordination factor,finally,the court notes that the merger would result in the elimination of a particularly aggressive competitor in a highly concentrated market,a factor which is certainly an important consideration when analyzing possible anti-competetive effects”.[[29]](#footnote-29)

In fact the court consider to the elimination of maverik company in the high concentrated market.It is clear that the risk of price-increase in such a market is high.

“The court finds that TaxAct play a special role in this market that constrains prices.Not only did TaxAct back prevailing pricing norms by introducing the free-for-all offer,which others later matched,it has remained the only competitor with significant market share to embrace a business strategy that relies primarily on offering high-quality,full-featured products for free withassociated products at low prices.”[[30]](#footnote-30)

The government argues that unilateral effects are likely because the merger will eliminate head-to-head competition[[31]](#footnote-31).It is one of the difference of U.S merger guideline with Singapore one.U.S guideline as I mentioned before in unilateral effects conider to the elimination of head to head competition that in some special markets can be the only reason for market domination.The US government claims that in the high concentrated market that one of the companies has maverik role,elimination of head to head competition can lead to the market domination.

## B.CSS jurisdiction

The first jurisdiction,

This jurisdiction is between The Thomson Corporation (“Thomson”) and Reuters Group PLC (“Reuters”).

Thomason is software tools and applications, to professionals in legal, tax,Accounting. Reuters was a global information company providing financial information. Post-merger, Reuters would be 100% owned by Thomson Reuters PLC.

It is correct that these 2 companies remained two legal entity ,but in fact , they act like a one economic unit.[[32]](#footnote-32) As I mentioned before,according the Singapore guideline, control of one company by other is the first step.The CSS follows the guideline and try to evaluate the decisive control at first step.

The second step ,as guideline mentioned is definig the market.The CSS use the traditional way of market definition based on scope and product.

“ The parties thus claimed that there are six relevant product markets,comprising the two on-trading and four off-trading floor activities,with the financial information products supplied to each of these six user segments constituting a separate product market”.[[33]](#footnote-33)

The third step is substituability.the Commission found that users of products do not think that they are substitutable.[[34]](#footnote-34)

The commission use hypothetical monopolist test (HMT) in order to test the prices and find the relavant market.It is similar with the US approach.The result show that each content set constitute aseparate product market.Therefore there is no need to consider to bigger group,if the products substitute to each other.[[35]](#footnote-35)

Then,the parties argue that the future performance of a company can be predicted by key metrics as annual or quarterly earnings per share.

In assessing the product markets constituted by the three content sets, the Commission agreed with the parties that the geographic scope of these markets is worldwide. Deliverysystems and product infrastructures allow suppliers to offer the product to customers globally.[[36]](#footnote-36)

The parties argue that the entry is easy for the supply of broker research.But the commission found out for entry there are some requirements like secure contracts with a large number of brokers [[37]](#footnote-37)

It is true to say that in contrast with the U.S one the court mainly emphasise on the sufficiency for evaluating the entry barriers (As singapore guideline mentioned) and did not consider to the likelihood and timeliness as well.I mentioned before that the singapore merger regime in entry is not as broad as U.S one.

The second jurisdiction,Acquisition of Singapore Computer Systems Ltd by Computer Systems Holdings Pte Ltd

This jurisdiction is one of the interesting one in Singapore mergers.CSS company consider to this merger,because they claim that IT market will be high concentrated after merger,they believe that the IT market is not divideable and it is unique.In order to approving this matter, The CSS examined the coordinated and non-coordinated effects.

CSS found out that it was not correct to consider to the market as segmented ,because IT market has special framework.Therfore the customers of IT market are normally customers of a group of market products.

In evaluationg the the non-coordination effect ,the CSS only emphasise on current market and did not consider to the capabilities of mergered company and their influence in the future market.It is in contrast with the U.S one that consider to the non-coordinated effect as a unilateral effect on future market.

In market definition the CSS used the traditional way of market definitionand started by geographical assessment:

CCS’ investigations found support for a worldwide geographic market for IT services, as evinced by the ease of entry of global players, both offshore as well as those who have been able to establish some local presence here (e.g. Tata Consultancy Services Limited, Wipro Technologies)[[38]](#footnote-38)

“The feedback from respondents indicates that entry and expansion barriers for various IT service subcategories are low, as companies are only limited by theavailability of skilled labour. Competitors opined that there were no issues withrespect to the recruitment of skilled labour and that while a good track record was considered important, it is not insurmountable.”[[39]](#footnote-39)

It is clear that like the previos jurisdiction CSS mainly emphasise on the sufficiency for evaluating the entry barriers (in contrast with U.S one) and did not consider to the likelihood and timeliness as well.Because the Singapore guideline emphasise on cost and scale on assessing the entry into market and the jurisdiction follow the same way.

# IV.conclusion:

As U.S guideline and the jurisdiction example illustrate, the U.S horizontal merger regime is trying to give a major role to the unilateral effect and elimination of head to head competition in its market definition,while the singapore one concentrates on the traditional way of market definition(based on scope and product).Also the U.S merger regime consider to the role of maverick companies in market definition in special markets.Therefore it is true to say that the U.S guideline on horizontal mergers adds a new items to the traditional market definition.This new approach in the case law is described as ” real world analysis”.

Overall, the US merger regime is based on influence of merger companies. The US court must try to predict the influences of merger.The Singapore one is mainly based on the market share of the mergered firm. Therefore it is true to say that the US merger regime is not only quantitive.But also there are some qualitive criterias that mentioned in US horizontal merger guideline.In contrast,the singapore merger regime mainly based on quantitive criterias for market domination.Therefore it is usual for CSS jurisdictions to evaluate market domination by considering to the market definition in traditional way ,market share,market concentration and entry.In US jurisdiction there are the same quantitive criterias.But there are also qualitive criterias too, like: unilateral effect,ommission of head to head competition,role of maverik companies in high concentrated markets and etc.

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28. Case 1:11-cv-00948-BAH(U.S district court for the district of columbia):U.S(Plaintiff) V H&R Block(Defandant) P.59,pa.3 [↑](#footnote-ref-28)
29. Case 1:11-cv-00948-BAH(U.S district court for the district of columbia):U.S(Plaintiff) V H&R Block(Defandant) P.63,pa.3 [↑](#footnote-ref-29)
30. Case 1:11-cv-00948-BAH(U.S district court for the district of columbia):U.S(Plaintiff) V H&R Block(Defandant) P.63,pa.3 [↑](#footnote-ref-30)
31. Case 1:11-cv-00948-BAH(U.S district court for the district of columbia):U.S(Plaintiff) V H&R Block(Defandant) P.68,pa.3 [↑](#footnote-ref-31)
32. Case:CSS400/007/07 Notification for Decision:Merger between The Thompson corporation and Reuters group PLC,23 May 2008,p.2,pa.8 [↑](#footnote-ref-32)
33. Case:CSS400/007/07 Notification for Decision:Merger between The Thompson corporation and Reuters group PLC,23 May 2008,pa.10 [↑](#footnote-ref-33)
34. Case:CSS400/007/07 Notification for Decision:Merger between The Thompson corporation and Reuters group PLC,23 May 2008,pa.13 [↑](#footnote-ref-34)
35. Case:CSS400/007/07 Notification for Decision:Merger between The Thompson corporation and Reuters group PLC,23 May 2008,pa.14 [↑](#footnote-ref-35)
36. Case:CSS400/007/07 Notification for Decision:Merger between The Thompson corporation and Reuters group PLC,23 May 2008,pa.28 [↑](#footnote-ref-36)
37. Case:CSS400/007/07 Notification for Decision:Merger between The Thompson corporation and Reuters group PLC,23 May 2008,pa.36 [↑](#footnote-ref-37)
38. Case:CSS400/004/08 Notification for Decision:Acquisition of Singapore Computer Systems Ltd by Computer Systems Holdings Pte Ltd,30 Sep 2008,pa.13 [↑](#footnote-ref-38)
39. Case:CSS400/004/08 Notification for Decision:Acquisition of Singapore Computer Systems Ltd by Computer Systems Holdings Pte Ltd,30 Sep 2008,pa.38 [↑](#footnote-ref-39)