Competition Law

Competition Law Consultation Paper
Feedback by
The Association Of Banks In Singapore

The Association of Banks in Singapore
10 Shenton Way #12-08
MAS Building Singapore 079117

Tel: 62244300 Fax: 62241785
Email: banks@abs.org.sg

Contents

Competition Law Consultation Paper

– Feedback by The Association of Banks In Singapore

The Association of Banks in Singapore ("ABS") welcomes this opportunity to write in representations to the Ministry of Trade and Industry ("MTI") on the Consultation Paper and draft Competition Law Bill ("Draft Law"), which was issued on 12 April 2004.

ABS is pleased to set out below, on behalf of our member banks, comments on the Competition Bill Consultation Paper and would be happy to discuss any of the comments made here further.

SUMMARY OF MAJOR POINTS

The key points discussed in these representations are as follows:

- Express set of guidelines be introduced on how the competition laws will apply to banks.
- The word "undertaking" should be defined to include Group Companies.
- Clarification be provided on the scope of the object and effect test in section 34(1) of the Draft Law, and on the fact that examples listed in section 34(2) are not per se anti-competitive.
- The scope of the phrase "dissimilar conditions" that appears in section 34(2)(d) and section 47(2)(c) of the Draft law be explained clearly to allow banks to function more efficiently.
- Guidance be provided on how horizontal arrangements should be treated.
- Banks be exclude from the merger provision of section 54 of the Draft Law given that this is regulated under the Banking Act.

STATEMENT OF INTEREST

As the representative body of all banks operating businesses in Singapore, the ABS is obligated to ensure that the competition laws eventually introduced are fair and reasonable in its application to the banking industry.

1 SHOULD COMPETITION LAWS AS PROPOSED APPLY TO BANKS

ABS supports the introduction of competition laws. However, ABS proposes that there be an express set of guidelines detailing how competition law is to apply to banks. For instance, for transactions involving money transmissions (excluding cheques clearance), UK has agreed to introduce a set of competition-oriented guidelines to govern the banks participating.

In particular, any guidelines as to how competition law should apply in relation to banks should take into account the necessity for prudential risk management (particularly credit risk management) by banks in the interests of a sound and stable banking system.

Additionally, it is important that in introducing competition laws and guidance on application, the MTI must bear in mind the fact that clarity in the law is essential. Law that is difficult to understand or implement will easily be eroded.

2 UNDERTAKING SHOULD INCLUDE GROUP COMPANIES

ABS notes that there is no exclusion from the Draft Law for agreements or arrangements between companies in the same group. ABS members feel that such agreements or arrangements should not be subject to the provisions of the Draft Law. The commercial reality is that companies in the same group do tend to enter into agreements or arrangements with each other on conditions which may be more favourable than those entered into with third parties.

Competition Commissions, particularly in the EU, have recognised this economic reality and have interpreted/defined "undertaking" to recognise companies within the same group as being a single economic entity. We would like to propose that the definition of "undertaking" in the Draft Law be amended in this manner.

3 MEANING OF CONCERTED PRACTICES

ABS would like to request that a definition be provided for "concerted practices" as used in section 34 of the Draft Law. Alternatively, MTI should provide illustrations as to what constitutes "concerted practices".

4 ARE SECTION 34(2) TRANSACTIONS PER SE ANTI-COMPETITIVE

Section 34(1) of the Draft Law states that agreements between undertakings, decisions by associations of undertakings or concerted practices which have as their object or effect the prevention, restriction or distortion of competition within Singapore are prohibited unless they are exempted in accordance with the provisions of this Part.

Section 34(2) of the Draft Law states that subsection (1) applies in particular to certain types of agreements, decisions or practices.

This raise the question of which of the following interpretation is accurate:

- Whether the agreements, decisions or practices mentioned in subsection (2) are deemed *inherently* anti-competitive or

- Whether it is necessary to go further to prove that the agreements, decisions or practices mentioned in subsection (2) do *in fact* have as their object or effect the prevention, restriction or distortion of competition within Singapore.

As presently drafted, subsection (2) is not very clear. ABS is of the view that it is the latter approach that is intended, as that is the position in the EU and the UK. However, ABS would appreciate some clarification on which approach is intended.

ABS also notes that the Consultation Paper at page 2 states that focus will be placed on anti-competitive agreements or conduct that will have an appreciable adverse effect on markets in Singapore. If this is the intention, then it should be made clear that the agreements in subsection (2) must in fact have a material anti-competitive effect and not be per se anti-competitive.

5 SCOPE OF OBJECT AND EFFECT TEST IN SECTION 34(1) DRAFT LAW

Section 34(1) of the Draft Law provides that agreements which have as their object or effect of anti-competition will be prohibited. There is no guidance on whether the test to be applied in determining whether an agreement has anti-competitive objects or effects is objective or subjective. ABS proposes that the test be clarified. In providing clarification, ABS also seeks clarity on whether the intention of the parties is an important criteria in applying the effects test; in other words, would an agreement fall foul of the effects test where the parties did not intent the agreement to have anti-competitive effects, but as a consequence of a number of factors outside the control of the party, the agreement has anti-competitive effects.

Additionally, ABS proposes that it should be made clear that it is only agreements that have as their primary objective and anti-competitive object that should be struck down.

6 WHETHER PARALLEL BEHAVIOUR WILL BE CAUGHT AS TACIT COLLUSION

Given the wide scope of section 34 of the Draft Law, it would seem that all forms of parallel behaviour could be caught as collusive activity and so fall foul of the law. The EU has, for instance, in one case stated that there is strong evidence of concerted practice "if it leads to conditions of competition which do not correspond to the normal conditions of the market, having regard to the nature of the products, the size and number of undertakings, and the volume of the said market."

ABS would thus be grateful if guidance can be provided as to when actions by parties will be viewed as collusive, particularly when such activity was undertaken pursuant to knowledge gained in hindsight. Such activity should not be regarded as anti-competitive.

7 SCOPE OF MEANING OF VOID IN SECTION 34(3) OF DRAFT LAW

Section 34(3) of the Draft Law provides that any agreement or decision which is prohibited by Subsection (1) is void. Does this mean that the entire agreement is void or only the offending provision in the agreement? For example, parties could have entered into a lengthy joint venture agreement, with only one provision that could be deemed anti-competitive. Perhaps Section 34(3) could be amended to state that only the offending provision be struck out, and that the rest of the agreement continues to be valid.

8 APPRECIABLE EFFECT

The Consultation Paper at page 2, paragraph (b)(i) states:

> "Instead of attempting to catch all forms of anti-competitive agreements or conduct in all markets, focus will be placed on anti-competitive agreements or conduct that will have an appreciable adverse effect on markets in Singapore."

The Draft Law, in sections 34 and 47, however, provide more widely that any agreement which could inter alia distort competition or where there is an abuse of dominant position is prohibited.

The intent as encapsulated in the Consultation Paper is not in sync with the provision as it appears in the Draft Law.

If the intent is to narrow the scope of the competition laws, then the words as used in the Consultation Paper should be adopted and the Draft Law modified to reflect that intent. Case law in the European Union and the United Kingdom show that the Courts have not been consistent in whether the stricter test of appreciable effect is to be used to ascertain whether an act is anti-competitive. As such, it may be prudent in the interest of promoting commercial activity and certainty, that the words "appreciable adverse effect" be included into the Draft Law, with an appropriate definition provided.

9 DISSIMILAR CONDITIONS TO EQUIVALENT TRANSACTIONS

Sections 34(2) and 47(2) provide, inter alia, that the following is reflective of anti-competitive behaviour or abuse of dominance respectively:

> "apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage."

This prohibition is too wide, and may prove to be counter-productive, especially given the use of the phrase "equivalent transaction". In banking, there are a number of instances where dissimilar conditions have to be applied to ensure proper risk management. These include the following:

- Different Trading Partners

  The phrase "equivalent transaction" is not defined and will capture all transactions which have the same qualities; eg deposit accounts. It does not contemplate that the transaction could be with differing trading parties with differing qualities. The provision can therefore extend to differing terms of lending being offered to one trading party who has good financial credentials, has never defaulted and has been regular customer vis-à-vis another trading party who has low credit ratings and is a new customer or has a history of defaulting. Surely this could not be the intent of the legislation, but it certainly is a possible impact.

  ABS would like to request that definitions or illustrations of what could be meant by the phrases "equivalent transactions" and "trading parties" be included in the Draft Law. In particular, ABS would like some clarification on whether "trading party" is intended to include a customer of a bank, although on a literal interpretation it would not appear to do so.

- Negative pledges and other restrictive covenants in loan documentation

  It is not uncommon for loan documentation to contain negative pledges and other covenants to ensure that the risk that the bank is taking is adequately protected. To illustrate, the simplest form of negative pledge is an agreement by a borrower trading party not to encumber, or enter into any transaction which has the commercial effect of encumbering, any of its assets (or assets falling within a particular class or description) without the consent of the lender bank.

  Additionally, alternative forms of negative pledges have been developed and may be used from time to time. The first common alternative type of negative pledge permits the borrower to grant security to a subsequent lender provided that at such time the borrower agrees to grant "equivalent" security or a security interest of a specified type to the negative pledge lender. A second alternative form of negative pledge provides that where security is granted to a subsequent lender in breach of the negative pledge an equivalent security interest or a security interest of a specified type is automatically granted by the borrower in favour of the negative pledge lender.

  Generally, whatever the type of negative pledge used it will be subject to a number of agreed exceptions, which may be exhaustively negotiated between the parties.

  Negative pledges are an indispensable tool for credit risk management. While we do not believe that the intent behind the Draft Law is to capture such loan covenants and undertakings, we are concerned that such clauses could unwittingly be caught under the Draft Law, especially if all dissimilar transactions are considered to be inherently anti-competitive in their effect (please see the comments under paragraph 4 above on the proper interpretation of Section 34(2) transactions).

  ABS thus proposes that, given negative pledges and other covenants are common occurrences in banking documentation, an exemption be carved out in the guidelines that ought to be introduced for the banking sector in recognition of the importance of risk management (especially credit risk management) tools in banking.

10 HORIZONTAL AGREEMENTS IN BANKING WHICH SHOULD BE EXEMPTED

Section 34 of the Draft Law is very wide and can potentially prohibit all horizontal arrangements that banks may enter into with their competitors. ABS proposes that perhaps the following should be exempted.

10.1 Combining Products For Sale

Bundling or tying (ie making the purchase of a good dependent upon the purchase of some other good or service) is caught by sections 34(2)(e) and 47(2)(d). Such transactions are a very common feature in banking, where financial products, as well as related products are bundled together and offered to the customer. One example is where a bank offers customers a discount on their banking on the condition that the customers also purchase insurance from another company.

On the face of the provisions stated, such a bundled product would clearly be regarded as anti-competitive. Yet, the ultimate benefit to consumers could be higher than the apparent anti-competitive effect that it has. Also, the customers are not forced to acquire the product and can always opt for alternatives from other competing banks.

Where the benefits of such a practice clearly outweighs any potential distortion or restriction in competition that it might have, then the conduct should be permitted. The problem with the relevant provision however is that it is stated in very wide terms. It leaves much to chance to in determining whether the transaction would be struck down or otherwise. Of course an exemption could be applied for, but it adds unnecessary costs.

ABS therefore proposes that guidance be provided on how the provision on bundling in a horizontal agreement should apply. It should in fact be made clear that where the arrangement has clear pro-competitive and beneficial qualities to customers, it should be allowed, although as a by-consequence it has anti-competitive effect.

10.2 Cheque Clearing

The Third Schedule, paragraph 7 of the Draft Law excludes the clearing and exchanging of articles undertaken by the Automated Clearing House and the Singapore Clearing Houses Association. However, charges imposed by banks on customers for clearing of cheques in the Cheque Truncation System are not specifically exempted. We would like to request that these charges be specifically exempted as well.

10.3 Horizontal Agreements Generally

Horizontal arrangements do, as a general rule, contribute significantly to the economic growth of a country. But given the wide provision of the Draft Law, almost any horizontal agreement between competitors or potential competitors would fall foul of the Draft Law. ABS thus proposes that the Commission should issue Guidelines containing illustrations as to how horizontal agreements should be treated. This is the approach taken in the European Union.

11 MERGERS & ACQUISITIONS

ABS proposes that banks should be exempt from the application of section 54 of the Draft Law on mergers and acquisition. This is because the provisions of the Banking Act regulate mergers and acquisition in the banking arena, albeit the Banking Act's focus is not on competition. That said, there is mechanism within the provisions of the Banking Act that could allow competition to be one consideration as to whether to allow a merger or otherwise. That is reason enough to exempt banks from the application of section 54.

To stress the point, to allow the continued application of section 54 to the banking industry could result in overlapping regulations, which has the potential to increase the costs of regulation.

12 JOINT VENTURES

Section 54 of the Draft Law defines mergers very widely and goes beyond the strict meaning of merger (in the sense of an amalgamation or consolidation) to cover acquisitions or leases of shares or assets and joint ventures.

ABS would like to request that a specific carve-out from Section 54 of the Draft Law be created for any activity by a bank which requires MAS approval under the Banking Act. For example, Section 31 of the Banking Act already prohibits a bank from acquiring or holding any equity investment in a single company, the value of which exceeds in the aggregate 2% of the capital funds of the bank without MAS' approval. Section 32 of the Banking Act also prohibits a bank from acquiring or holding a stake of more than 10% in any company without MAS' approval.

13 INFORMATION SHARING AGREEMENTS

Credit bureaus and credit registers play an important role in communicating credit histories of borrowers to lender banks. This has, literature suggests, promoted greater efficiencies in the credit markets.

To facilitate greater efficiency in the credit market, such information sharing should be permitted. Lack an exemption allowing for it, information sharing through the credit bureau will fall foul of the provisions of the Draft Law. ABS thus propose that a carve out be included in the Draft Law.

Other than information sharing through the credit bureau, ABS would also like clarification on whether discussions and information sharing on the following will be regarded as anti-competitive:

- Prices and pricing policies, quantity and type of production, product development, distribution and marketing strategies;
- Credit terms and conditions;
- Customers, distributors, dealers;
- Supplier's terms and conditions of sale;
- Terms and conditions of sale applied to customers;
- Territories in which the company sells its products
- Profits, margins, cost and market share; and
- Customer and/or suppler selection, retention and quality refusals to deal with a customer or supplier.

14 BLOCK EXEMPTIONS

The section on block exemptions as it is currently drafted only allows the Commission to make recommendations for block exemptions to be granted.

ABS recommends that the section be modified to allow for all undertakings to be able to apply for block exemptions to be granted in the same way as it can for individual exemptions.

15 POWERS OF INVESTIGATION - EXTENT OF CONFISCATION

The Commission's power to take away documents with or without a warrant is couched in very wide terms. The Commission can take away documents that have "a bearing on the investigation", that is "relevant to the investigation", or that is "of the relevant kind".

It is disruptive to the banking business to allow such wide powers. If the MTI intends to retain this provision, then it should allow the banks to make copies or retain such equipments under prescribed conditions to enable the business to carry on its business.

16 MEANING OF "ANY PERSON"

The provisions dealing with the Commission's power to conduct investigations generally provide that the Commission or any inspector can inter alia require "any person" to produce a document. This is very wide. The scope of who can be required to provide documents should be narrowed.

Additionally, given the wide scope of the section, even past officers and employees can be called upon for investigation. If so, who has the onus of ensuring that the officer or employee attends at the investigation? If it is the employer, it will obviously be placed in a difficult position, as it cannot in any practical manner ensure the presence of an ex-officer or ex-employee. The problem is exacerbated as far as banks are concerned as many foreign talents are employed who leave Singapore once their term of employment ends.

17 COMMISSION / BOARD OF APPEAL PROCESS

The Draft Law is silent on the procedures that the Commission and the Board of Appeal will adopt for hearings, and more importantly do not provide any timelines within which they must hear submissions and hand down its decision?

ABS proposes that if this is not to be included in the Draft Law, then it should be included in guidelines. Providing guidance on the timelines is an important requirement that aids certainty as to when key target dates for filings, submissions and final decision are. This will enable businesses to better plan their activities without the concern of pending complaints hanging over them.

Without timelines clearly set out, there is a possibility that a party intending to commence a private action may fall foul of the limitation of actions provisions contained in the Limitation Act. If no Guidelines on timelines are to be introduced, then it is necessary to make clear that the cause of action for any private action will only accrue at the point the decision is handed down.

18 PROTECTION FOR COMPLAINTS AND FRIVOLOUS COMPLAINTS

18.1 Whistleblowing

The Act is silent as to the position of whistleblowers. They are currently neither encouraged nor condoned. There is however merit in introducing provisions to encourage whistleblowers. Anti-competitive behaviour is difficult to detect and the regulators can only do so much. In keeping in step with a more disclosure based regime, provisions should be included to allow directors, officers and other employees of the company purportedly engaging in anti-competitive behaviour to inform the regulators if the company is in breach of any anti-competitive laws.

Once a whistleblower comes out in the open, be it a director of the company or a disgruntled competitor, protection must be afforded to that person in terms of immunity from prosecution or from civil liability.

Under the provisions of the United Kingdom Enterprise Act, a whistle blower is given a notice from the Office of Fair Trading confirming that he will not face prosecution, upon complying with certain terms. There is case that a similar position should be introduced.

18.2 Leniency

With increased whistle-blowing activities, the regulators would have their hands full. It is thus suggested that leniency provisions be introduced to give some measure of flexibility to the regulators to deal with the offenders, where certain conditions are satisfied, for eg:

- that the person makes an admission of guilt,
- that the person is not the lead cartel member,
- that the person makes full disclosure, and
- that the person ceases involvement with the cartel and cooperates fully with the investigation.

18.3 Dealing With Frivolous Complaints

The Bill is also silent with regards to frivolous complaints. Would there be sanctions imposed for frivolous complaints reported?

Frivolous complaints are to be discouraged as they could result in unnecessary increased costs for the company affected by the investigations. It can also result in disruption to work in the event that documents and equipment are removed from the premises.