AUSTRALIAN COMPETITION AND CONSUMER COMMISSION

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Summary of major points

The Australian Competition and Consumer Commission (ACCC) would like to take this opportunity to congratulate Singapore on the steps it has taken to date in developing a competition law, and welcomes the opportunity to comment on the draft Competition Bill (the draft Bill).

Singapore's draft Bill addresses issues which the ACCC considers are essential ingredients of an effective competition regulatory regime. The concepts underlying the draft Bill are generally sound and suitable for application in a changing world.

In general, the ACCC believes that the draft Bill reflects a balanced approach which is aimed at prohibiting anti-competitive conduct where it is likely to have a substantive detrimental effect on competition. In particular, the ACCC notes that the draft Bill has been designed to facilitate competition by prohibiting certain types of anti-competitive agreements, misuse of dominant position and mergers and acquisitions that substantially lessen competition. The ACCC also notes that the draft Bill provides for the establishment of the Competition Commission of Singapore (CCS) to enforce the law. The ACCC considers that the establishment of an effective, well resourced enforcement agency is critical to the development of a robust competition law.

In light of the above, and its own experience in enforcing competition law in Australia, the ACCC would also offer the following comments for consideration which may assist Singapore in further enhancing the effectiveness of the proposed legislative regime.

- The ACCC notes that the draft Bill sets out the functions of the CCS. The ACCC considers that a fundamental objective of competition law is to enhance consumer welfare. Singapore may wish to consider whether it would be useful to refer to the nexus between competition law and consumer welfare in the functions of the CCS.
- While the draft Bill has a wide extra territorial application, the ACCC notes that the scope of conduct excluded from the application of the draft Bill is broad. In the ACCC's view, the application of competition law to all business entities, regardless of ownership, industry or function, is essential in establishing a culture of competition within an economy.
- The ACCC notes that the draft Bill excludes all forms of vertical agreements from the application of the prohibition against anti-competitive agreements. This may not be appropriate in all circumstances, as some vertical agreements may result in substantial competitive detriment. However, the ACCC recognises that it may be prudent for policy makers and the CCS to focus their energies on the more serious types of anti-competitive conduct initially and move to consider vertical agreements when a culture of competition is more established in Singapore.
- The ACCC notes the absence of any *per se* prohibitions, particularly with respect to hard core restrictions on competition including price fixing, output limitations and market sharing. It appears that the effectiveness of the proposed legislation to deal with hard core restrictions on competition will depend on the way in which

the law is interpreted. Introduction of per se offences into the proposed legislation itself may provide a greater degree of certainty, reduce regulatory burden of the enforcement of the draft Bill and encourage greater levels of compliance.

- The competition tests for anti-competitive agreements and mergers differ. In general, it may be preferable for conduct which results in coordination by agreement to be tested on the same basis as conduct which results in coordination by merger, so as to avoid skewing the incentives faced by decision makers when choosing between these alternate approaches.
- The definition of a merger may require further drafting clarification.
- The draft Bill provides an express power to investigate mergers when the merger provision has been infringed. The current wording of the draft Bill could be interpreted to mean that the CCS will only be able to investigate a merger once it has occurred. It would be preferable for the CCS to also have the power to investigate proposed mergers which have the potential to substantially lessen competition prior to completion of the transaction in order to obtain effective injunctive relief.
- The ACCC notes that the draft Bill incorporates specific prohibitions against price discrimination and the imposition of ancillary contract terms (which may relate to product tying). This may not be appropriate in all circumstances as some forms of price discrimination or product tying may be pro-competitive. Prohibiting anti-competitive ancillary contract terms and price discrimination is likely to be adequately covered by the broad section 34 and 47 prohibitions, without the need to specifically identify these activities as a form of anti-competitive agreement or abuse of dominant position.
- European experience suggests that use of block exemptions may raise some difficulties, as firms may tend to follow the precise form of the exemption in order to avoid cost and delay. In some cases, this may mean that if the precise form of a block exemption does not accommodate particular efficient conduct, that conduct may not be entered into. Singapore may wish to consider carefully whether the introduction of a block exemption system will be the most suitable model for its environment.
- The prohibition against abuse of dominant position in a market, establishes a high threshold. It may not cover situations where substantial competitive damage results from conduct by an undertaking with substantial market power that falls short of a dominant position, or joint dominant position.
- Informal clearance, by way of Guidance or Direction, of abuse of dominant position conduct could impose an unacceptable regulatory burden on the CCS.
- The power of the Minister to modify a block exemption order recommended by the regulator, to determine appeals against the regulator's decisions concerning individual exemptions and to exempt a merger has the potential to decrease the transparency and accountability of the exemption process.
- The draft Bill tends to narrowly constrain rights of private action which may result in an increased burden on the regulator and hinder the development of a culture of competition in Singapore.

- The effectiveness of any competition law depends not only on the prohibitions contained in the law, but on achieving compliance with the law. In Singapore, it will be important to ensure that the CCS is provided with adequate funding and skilled resources in order to carry out its functions. It is also important to develop a competition culture within the community. In this regard, the ACCC notes the Ministry of Trade and Industry's initiative to conduct outreach programmes will be highly beneficial in enhancing business and consumer awareness in the draft Bill.

These observations are discussed in detail below.

The ACCC hopes that these points will be of assistance to Singapore in developing its competition regulatory regime.

Statement of interest

The ACCC is the agency responsible for administering Australia's competition law, known as the *Trade Practices Act 1974*. The ACCC promotes competition and fair trade in the market place to benefit consumers, business and the community.

The ACCC recognises the close economic ties between Singapore and Australia. This relationship is acknowledged and formalised in the Singapore-Australia Free Trade Agreement (SAFTA). The SAFTA chapter on competition policy includes commitments regarding addressing anti-competitive business practices and consultation on anti-competitive business practices of particular concern.

The ACCC was involved in negotiating the SAFTA chapter on competition policy and is keen to continue its commitment to working with Singapore to combat anti-competitive business activities. As part of this commitment, the ACCC is pleased to have the opportunity to comment on Singapore's draft Bill.

Comments

Functions and duties of the CCS

The ACCC has noted that the draft Bill sets out the functions of the CCS.

The ACCC considers that a fundamental objective of competition law is to enhance consumer welfare. The benefits of competitive markets flow through to consumers in the form of enhanced economic welfare. Efficient markets are associated with consumer welfare in terms of increasing production and employment opportunities, and providing access to innovative new products over time at the lowest cost. The process of competition is a method that may be used to deliver market efficiency and therefore benefits to consumers.

Accordingly, Singapore may wish to consider whether it would be useful to refer to the nexus between competition law and consumer welfare in the functions of the CCS.

Scope of application

In general, an effective competition regulatory regime will aim for consistent and broad application. The application of competition law to all business entities, regardless of ownership, industry or function, is essential in establishing a culture of competition within an economy.

The ACCC notes that the draft Bill has a wide extra territorial application. The draft Bill applies to any agreement or merger which has taken place outside of Singapore. The proposed legislation also covers abuse of a dominant position by an undertaking outside Singapore. Such broad extra territorial application will be valuable in an environment where consumers and businesses are increasingly entering into transactions as part of the global economy.

At the same time, the ACCC notes that the Third Schedule of the draft Bill sets out a number of exclusions from the section 34 and section 47 prohibitions and the Fourth Schedule of the draft Bill sets out a number of exclusions from the section 54 prohibition. The scope of conduct excluded from the application of the draft Bill appears to be very broad and this may impact on the effectiveness of Singapore's competition policy.

The draft Bill provides for an exemption process for those business entities which should be immune from the application of the draft Bill on the basis of genuine public interest considerations. The exemption process appears to significantly reduce the need for excluding a broad range of businesses from the application of the draft Bill.

Vertical agreements

The ACCC notes that the Third Schedule of the draft Bill sets out that vertical agreements are not subject to the section 34 prohibition.

The exclusion of all forms of vertical agreements from the application of section 34 may reduce the effectiveness of Singapore's competition policy, given the possibility of anti-competitive outcomes from vertical agreements. For example, non-price vertical restrictions may lead to a reduction in competition in either the buyer or seller side of a market, or may be used to facilitate collusion, by limiting the ability of a firm to engage in trading outside a cartel. Such concerns are particularly relevant in a small economy such as Singapore, where the relatively concentrated nature of markets means that the threat of foreclosure and cartelisation is greater.

Having said this, the ACCC also recognises that some vertical agreements may have little, if any, detrimental effect on competition. This suggests that the effect on competition of vertical agreements is appropriately assessed on a case by case basis and further, that a competition test may be appropriate when assessing whether a vertical agreement is likely to raise concerns under the section 34 prohibition. Additionally, given the draft Bill provides an exemption process for anti-competitive agreements which enhance efficiency, there is the possibility that certain types of vertical agreements be exempted from the application of section 34.

The ACCC also recognises that the detection, investigation and prosecution of vertical agreements may not be an area of high priority for Singapore in the early days of its new competition law regime. It may be prudent for policy makers and the CCS to focus their energies on the more serious types of anti-competitive conduct initially and move to consider vertical agreements when a culture of competition is more established in Singapore.

Per se prohibitions

Section 34 does not contain *per se* prohibitions against hard core restrictions on competition including price fixing, output limitations and market sharing. There is some advantage in drafting section 34 in this manner, as it provides enough flexibility for the law to capture the economic reality of a particular situation. However, there are also disadvantages to this approach.

Per se prohibitions apply to those categories of conduct which are considered very likely to cause harm and they are treated as breaches of the law without a full inquiry of the competitive effects of the conduct. In this way, the law gives business more certainty, thus facilitating better overall compliance with the intent of the legislation at a lower cost to business. It also reduces the time and cost involved in an inquiry (for both business and the regulator) by limiting the issue to a factual examination of whether the conduct occurred or was attempted, rather than a full inquiry into the competitive effects of the conduct.

It appears that the effectiveness of the proposed legislation to deal with hard core restrictions on competition will depend on the way in which the law is interpreted. Introduction of per se offences into the proposed legislation itself may provide a greater degree of certainty, reduce regulatory burden of the enforcement of the draft Bill and encourage greater levels of compliance.

The competition tests for anti-competitive agreements and mergers

The ACCC notes that the competition test in section 34 (agreements which have as their objective or effect the prevention, restriction or distortion of competition within Singapore) is different to the competition test applied to mergers under section 54 (mergers that substantially lessen competition within a market in Singapore for goods and services).

Guidelines to be issued by the regulator may clarify this situation and explain how the two tests will be interpreted and applied but in general, it is preferable for conduct which results in coordination by agreement to be tested on the same basis as conduct which results in coordination by merger, so as to avoid skewing the incentives faced by decision makers when choosing between these alternative approaches.

Definition of mergers

Subsection 54(2)(b) of the draft Bill states that a merger occurs if one or more individuals or other undertakings who or which control one or more undertakings acquire direct or indirect control of the whole or part of one or more other undertakings. It appears that this section makes it a prerequisite for an undertaking to

control one or more undertakings before an acquisition of direct or indirect control of another undertaking would be contrary to the subsection. Some drafting clarification of this subsection may be required.

Power to investigate mergers

The ACCC notes that section 62 provides an express power to the CCS to investigate if there are reasonable grounds for suspecting that section 34 (agreements preventing, restricting or distorting competition), section 47 (abuse of dominant position),or section 54(merger that has resulted or is expected to result in a substantial lessening of competition) has been infringed.

The draft Bill provides an express power to investigate mergers when the merger provision has been infringed. The current wording of the draft Bill could be interpreted to mean that the CCS will only be able to investigate a merger once it has occurred. It would be preferable for the CCS to also have the power to investigate proposed mergers which have the potential to substantially lessen competition prior to completion of the transaction in order to obtain effective injunctive relief.

Specific prohibitions against price discrimination and product tying

The ACCC notes that both section 34 and section 47 prohibit:

- the application of dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage (price discrimination); and
- making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts (the imposition of ancillary contract conditions).

Price discrimination occurs when like goods or services are provided to different persons at different prices. Price discrimination may be anti-competitive or pro-competitive. Price discrimination will be anti-competitive when it is used to create a barrier to entry to a market or to force competitors from a market. Conversely, price cutting, even if it is in favour of a large buyer and hence discriminatory, may engender competition from rival suppliers or in the market generally. It is price flexibility which is at the heart of competitive behaviour and a general prohibition against price discrimination would substantially limit price flexibility.

The effect of price discrimination on competition is appropriately assessed on a case by case basis. Anti-competitive price discrimination conduct is likely to be adequately covered by the broad section 47 prohibition, without the need to specifically identify price discrimination as a form of anti-competitive agreement or abuse of dominant position.

The specific prohibition against the imposition of ancillary contract conditions may have the effect of prohibiting product tying arrangements, a form of vertical agreement. As noted above, the ACCC recognises that some vertical agreements may have little, if any, detrimental effect on competition, and product tying is one form of

vertical agreement which in certain circumstances may enhance efficiency rather than harm competition. For example, in some circumstances the bundling of products may be the most efficient way for a firm to do business and may improve the price and product range choices faced by consumers. The ACCC notes that at this time, the application of the draft Bill to vertical agreements may not be an area of high priority for Singapore.

As discussed above, the effect of vertical arrangements, including product tying, is appropriately assessed on a case by case basis. The imposition of anti-competitive ancillary contract terms, including terms concerning anti-competitive product tying, is likely to be adequately covered by the broad section 34 and 47 prohibitions, without the need to specifically identify the imposition of ancillary contract terms as a form of anti-competitive agreement or abuse of dominant position.

Block exemptions

Section 38 of the draft Bill empowers the Minister, acting on a recommendation of the regulator, to exempt, by order, categories of agreement from the section 34 prohibition. Such exemptions are commonly known as block exemptions.

The Commission of the European Communities (EC) has granted block exemptions pursuant to Article 81(3) of the European Community Treaty (EC Treaty) for certain types of conduct including certain types of research and development projects, certain types of vertical arrangements, technology transfer agreements, motor vehicle distribution and servicing agreements and some franchising agreements. European experience highlights the difficulties of block exemptions. European experience suggests that use of block exemptions may raise some difficulties, as firms may tend to follow the precise form of the exemption in order to avoid cost and delay. In some cases, this may mean that if the precise form of a block exemption does not accommodate particular efficient conduct, that conduct may not be entered into.

Singapore may wish to consider carefully whether the introduction of a block exemption system will be the most suitable model for its environment.

Abuse of dominant position

The ACCC notes that section 47 of the draft Bill is similar to Article 82 of the EC Treaty which prohibits any abuse by one or more undertakings of a dominant position in the common market.

Under Australian law, the test for misuse of market power requires a "substantial" degree of market power[1] rather than the higher test of "dominance". While taking into consideration that Singapore law may adopt the concept of "joint dominance" this still leaves open the possibility that the law will not cover situations where substantial competitive damage results from conduct by an undertaking with substantial market power that falls short of a dominant position, or joint dominant position.

[1] Note that the scope of the Australian test for misuse of market power is currently under consideration, see Economics Reference Committee, *Senate Committee Report, The Effectiveness of the Trade Practices Act 1974 in protecting small business*, Canberra, 2004.

This "gap" has been recognised by the EC in the context of its review of its merger test. The EC has adopted a new merger regulation which came into effect on 1 May 2004. It has modified the test for assessing mergers from "mergers are prohibited if they create or strengthen a dominant position" to "a merger will be prohibited if it would significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position".

Informal clearance of abuse of dominant position

Sections 50 and 51 of the draft Bill provide for informal clearance (by way of Guidance and Decision) of conduct that might constitute an abuse of dominant position.

In the ACCC's view, abuse of dominant position is one of the most serious kinds of anti-competitive conduct and there is a question as to whether it should be possible to obtain informal clearance for this type of conduct at all. In Australia, immunity is not available for misuse of market power.

Any clearance of conduct which might constitute an abuse of dominant position should only be granted after a thorough investigation into the conduct. The results of such an investigation should lead to a conclusion, without doubt, that the conduct in question does not constitute an abuse of dominant position. The prospect of investigations of this type by the CCS in response to all applications for informal clearance of conduct which might constitute an abuse of dominant position would appear to impose a significant regulatory burden upon the CCS.

Additionally, the informal clearance of conduct that might constitute an abuse of dominant position raises the possibility of firms seeking informal clearance for conduct which may be a regular activity in a competitive marketplace, in which competitive moves and countermoves are undertaken. This in turn raises the possibility of an unacceptable regulatory burden on the CCS.

Role of the Minister

The ACCC notes that the Minister has the power to modify a block exemption order recommended by the regulator (section 40), to determine appeals against the regulator's decisions concerning individual exemptions (section 71) and to exempt a merger (section 55 read with Schedule 4). Additionally, the draft Bill does not require the Minister to publish reasons for his or her decision or disclose any supporting information. This situation will limit the transparency of the exemption process and reduce the predictability of the exemption process.

Transparency and accountability of the process are essential if the process is to be predictable and if the business community is to increase its understanding of competition law. Only by developing an understanding of competition law will the business community be in a position to assess its own conduct and determine whether the conduct is likely to be at risk of breaching the law.

Private rights of action

Section 75 of the draft Bill provides for rights of private action in circumstances where the regulator has determined that a breach of the competition provisions has occurred and the appeals process has concluded.

Australia's competition law, the *Trade Practices Act 1974* (the TPA), also provides for rights of private action and it is the ACCC's experience that most litigation under the TPA is between private parties resolving their own disputes and leading their own evidence. The ability of private parties to take action reduces the burden on the regulator and contributes to establishing a culture of competition within an economy.

In order to maximise the benefits of the ability of private parties to take action, it is appropriate that such rights of action not be constrained. The ACCC notes that section 75 of the draft Bill tends to narrowly constrain rights of private action which may result in an increased enforcement burden on the regulator and hinder the acceptance, awareness and understanding of the draft Bill in Singapore.

Funding and Resources

The effectiveness of any competition law depends not only on the prohibitions contained in the law, but on achieving compliance with the law. In Singapore, it will be important to ensure that the CCS is provided with adequate funding and skilled resources in order to carry out its functions. It is also important to develop a competition culture within the community. In this regard, the ACCC notes the Ministry of Trade and Industry's initiative to conduct outreach programmes will be highly beneficial in enhancing business and consumer awareness in the draft Bill.

It has been the ACCC's experience that the courts also play a vital role in enforcement processes. The ACCC notes that the draft Bill provides for the right to seek a review of decisions made by the CCS to the Competition Appeal Board, the High Court and the Court of Appeal. Training programs may be a useful tool in raising the awareness amongst the judiciary in Singapore of the role they play in enforcing Singapore's competition law.

Conclusion

The draft Bill is an economic law, based on economic principles that reflect the accepted view of all modern economies that competition generally enhances consumer welfare and market efficiency. The concepts underlying the draft Bill are generally sound and suitable for application in a changing world. It represents a significant step forward in the development of a competition law in Singapore.

The ACCC particularly congratulates Singapore on its efforts to introduce prohibitions on cartel conduct and abuse of dominant position which are especially important in the context of Singapore's small, open economy.

The ACCC hopes that the comments it has provided will be of assistance to Singapore in developing its competition regulatory regime and would be pleased to provide further information about any of the matters discussed above.