COMMENTS ON SINGAPORE DRAFT COMPETITION BILL

A. Cover page (including the information specified in paragraph 31 of this Consultation document

Comments on the draft competition bill of Singapore (draft bill, for brief) herein are of Dr. S. Chakravarthy, Consultant on Competition Policy and Law. He is a civil servant by profession and a Member of the Indian Bar. He was Member, Monopolies and Restrictive Trade Practices Commission and Member, High Level Committee on Competition Policy and Law, Dept. of Company Affairs, Govt. of India and also on the Committee to draft a new Competition Law for India. Till recently, he was Advisor/Consultant to Govt of India on Competition Policy and Law. The views expressed are his own and not those of the Commission, Committee or the Govt. He is presently Consultant on Competition Policy and Law.

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The public consultation of the draft bill over two rounds is a step in the right direction, as the Singapore Government is proposing to have a competition law for the first time. Being a small open economy, Singapore is doing fairly well in managing its economy, both on the domestic and international fronts. One could argue that in such a milieu there may be no need for a competition law for the country. While this argument may have force, it is important to reckon that markets over the world are globalising and borders are getting dismantled for trade (like 10 new countries joining EU) and that therefore there is the possibility of certain business practices within the country or without, trenching competition in the market to the detriment of consumers. For instance, cartels and predatory pricing, two pernicious anti-competitive practices are causing considerable damage and prejudice to consumer interest. It is in this context of globalisation practised by some dishonest players in the market (thus, imparting an ugly face to globalisation) that every Government, not only Singapore, needs to provide a legal frame work to curb, if not eliminate, anti-competitive practices in the market within its soil.

What is important, however, is that before Singapore enacts the competition law, it is necessary to ensure that there is competition policy in place. Competition policy pervades Industrial Policy, Financial Policy, Trade Policy, Labour Policy, Small and Medium Industries Policy etc. In all these policies, competition principles should be the underpin. In other words, the philosophy of competition should inform the competition policy of the country in all its areas of application. It is presumed that Singapore has a competition policy. If not, a pre-requisite for a competition law is the positing of an appropriate competition policy for Singapore.

B. Table of contents

No comments except that in the Preamble, merger regulation may be included by adding the expression "to regulate mergers". As the proposed legislation is intended to protect consumer interest, this aspect may also be included in the Preamble by adding the expression "to protect consumer interest".

C. Summary of major points

1. The draft bill [clause 6(1) (b)] uses the expression "adverse effect on competition in Singapore". Clause 34 (relating to agreements and clause 47 (relating to abuse of dominance) do not refer to appreciable adverse effect on competition. Clause 34 uses the expression "effect". The Consultation Paper in para 6 b (i) uses the expression "appreciable adverse effect on markets in Singapore", but this does not figure in the draft bill. Harmonisation of the expressions is desirable. Furthermore, it may be appropriate to adopt the concept of "relevant market". Relevant market has two dimensions, namely, the "relevant geographical market" and the "relevant product market". This implies that in the various clauses in the draft bill, use of the expression "appreciable adverse effect on competition in the relevant market in Singapore" may be desirable.

2. There is no definition of a dominant position in the draft bill. As abuse of dominance (clause 47) is prohibited, it is necessary to first define dominance or dominant position. Without identifying an undertaking as a dominant one, it would be difficult to bring in action against it for abuse of dominance. A suggested definition of a dominant position is "a position of strength, enjoyed by an undertaking in the relevant market in Singapore which enables it to (a) operate independently of competitive forces prevailing in the relevant market; or (b) affect its competitors or consumers or the relevant market in its favour".

Alternatively, dominance could be defined in terms of market share. In some countries, the threshold of market share for dominance is 25 %, in some 30 % and in some 50 %. But market share in terms of an arithmetic figure may not capture a dominant position in the real world.

3. There is a no definition of "agreement". The draft bill outlaws anti-competitive agreements. If agreements are in writing, it would be easy for the Commission to examine them and adjudicate if they are anti-competitive in nature. But there could be agreements in terms of oral understandings or concerted arrangements, as for example, cartels. It is therefore desirable to define an agreement. A suggested definition is that
" 'agreement' includes any arrangement or understanding or action in concert, -

i) whether or not, such arrangement, understanding or action is formal or in writing; or

ii) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings".

Likewise, cartels may also be defined explicitly as they constitute a very serious collusive trade practice that affects consumer interest. A suggested definition is that a
" 'cartel' includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services".

4. While merger regulation appears rather friendly to merger players in terms of the fact that there is no mandatory requirement to notify and seek prior approval, there does not appear to be any provision that a merger may be annulled, if it is noticed subsequently that it is detrimental to competition in the market. It is not clear or explicit that a merger can be undone or unbundled by the Commission after the event at a future point of time. From a perusal of the draft bill, it appears that if the merged entity at a future point of time, indulges

in an anti-competitive practice or abuse of dominance, it could be taken to task. But, that would not result in a de-merger or unbundling of the merger but only may carry a penalty for the offending merged entity. As the pre-merger notification is voluntary, it would be desirable to clothe the Commission with powers to examine the merger within one year of the event on whether the merger itself was anti-competitive.

5. Reading the definition of "undertaking" in clause 2(1) and para 10 of the Consultation Paper, it would appear that banks and financial institutions are not covered by the law. Explicit mention of these may be desirable. Likewise, statutory bodies performing commercial and economic activities could be included within the ambit of the law. Presently, clause 33 (4) excludes them. There is no justification for such statutory bodies to indulge in any anti-competitive practice.

6. The Third Schedule lists the exclusions from section 34 prohibition (anti-competitive practices) and section 47 prohibition (abuse of dominance). In para 1 of the said Schedule, the language is very wide. For instance, if an undertaking is involved in the operation of the services of general economic interest, neither section 34 nor section 47 will apply. Such an exclusion may not be in consumer interest. Activities relating to sovereign functions have a justification for exclusion but not activities of general economic interest.

Likewise in para 4 of said Schedule, there is a wide discretion for the Minister to exclude an agreement for "exceptional and compelling reasons of public policy". With due respect to the Minister concerned, there is a potential for misuse of this provision in the name of public interest.

The Minister also has discretion to make the section 34 provision apply to vertical agreements as may be specified by him. This is in para 8 of the said Schedule. It is suggested that the Commission may be given the power to examine any vertical agreement on its possible anti-competitive effect in the market.

Public transport is also excluded in Annex-B and para 6 (2)(d) of the Third Schedule. Public transport is an important service for consumers and any anti-competitive practice in that service needs to be frowned upon. This exclusion needs to be reconsidered.

7. The investigative and adjudicatory functions are with the Commission. Combining these two functions may not be conducive to effective justice. It is desirable to separate these two functions and entrust these to different functionaries. For instance, the investigative functions may be with an authority independent of the Commission. Adjudicatory functions will, of course, be with the Commission

There does not appear to be any provision for Benches of the Commission. The Commission may have to perform as a single unit. If the Commission has a Chairman and the maximum of 16 Members, it will be unwieldy for it to function as a single unit.

The term of office for the Members has a cap of three years. This is too short a period. Five years would be a desirable period. Further, section 3 of the First Schedule gives the Minister discretion to appoint a Member of the Commission for a period shorter than three years. This is undesirable. It is suggested that a minimum period of five years may be stipulated as tenure for the Members.

The Minister has the discretion to revoke the appointment of the Chairman, Deputy. Chairman or any Member in public interest (para 5 of First Schedule). This is likely to undermine the independence and autonomy of the Commission.

Para 13 of the First Schedule empowers the Minister to determine the remuneration of the Members of the Commission "from time to time". The expression within quote is likely to make the situation of remuneration uncertain for them. This is also likely to undermine the independence and autonomy of the Commission.

Overall, the Government seems to have considerable control over the functioning of the Commission. For instance, clause 8 of the draft bill empowers the Minister to give directions to the Commission, which would be binding on the latter. This again compromises the independence and the autonomy of the Commission.

D. Statement of interest

Academic

E. Comments

See Section C above

F. Conclusion

The draft bill is generally a good effort. Remarks and suggestions above are for consideration by the Ministry of Trade and Industry.