Draft Competition Bill

Submissions to the Ministry of Trade and Industry

By: Colin Ng & Partners

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1. INTRODUCTION

1.1 Introduction of the Firm

Colin Ng & Partners is a Singapore law firm with regional offices in Beijing and Hong Kong. Its lawyers include foreign counsel from jurisdictions such as China, Australia, India and Malaysia. The firm's client base spans Singapore and foreign corporations over a range of industries.

The firm set up a Competition Law focus group in June 2003. The members of the focus group include lawyers formally trained in competition law as well as economics, accounting and business finance. These lawyers also have practical experience of competition issues in Singapore, Australia and elsewhere.

1.2 Statement of Interest

The firm welcomes the introduction of a comprehensive, generic competition law to Singapore. The firm's interest in making these submissions is to contribute the firm's technical knowledge in this area to review issues for the Ministry to consider. We are interested to see the formulation of a competition law that is clear, fair and effective in achieving its aims.

1.3 Our Contact Details

Should you wish to contact us to clarify any matter raised by these submissions, the lawyers named below would be pleased to assist:

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2. COMMENTS

The comments set out below are arranged under headings which identify the clauses of the draft Competition Bill (the "**Bill**") in relation to which the comments are made.

2.1 Definition of "Undertaking" and Concept of `Single Economic Entity'

Clause 34 of the Bill is concerned with anti-competitive (horizontal) agreements between undertakings. Under the European Union ("EU") competition rules, agreements between undertakings that form a single economic entity (such as an agreement between a parent company and a subsidiary) are outside the scope of application; they are regarded as intra-group's internal arrangements. We understood at a dialogue session held by the Singapore Business Federation with the Ministry's Market Analysis Division that it is the government's intention to introduce the concept of `single economic entity' under which a group of related companies may be regarded as one undertaking.

However, the pertinent part in the definition of "undertaking" under Clause 2(1) of the Bill appears to suggest otherwise: `"undertaking" means any *person*, being *an* individual, *an* association, *a body corporate* or an unincorporated body of persons' (emphasis and italics added). Therefore, an "undertaking" is either a legal person or an unincorporated body, which definition does not extend to a group of related companies.

To allow a single economic entity to be regarded as an undertaking, we suggest to amend the definition as follows:
`"undertaking" means any person, being an individual, an association, a body corporate or an unincorporated body of persons, capable of carrying on commercial or economic activities relating to goods or services, and includes a group of such persons which, by virtue of their control relations or their business contractual relationships, are regarded as a single economic entity.'

2.2 Clause 9(4)

It appears that a word may be missing from this clause. We submit that the clause should read:
"The Commission may continue to exercise a power conferred upon it…."

2.3 Clauses 34-41: Anti-Competitive Agreements

These clauses appear to be modelled after sections 2-9 of the UK Competition Act 1998 (the "**UKC Act**"), which are in turn modelled after Article 81 of the European Union (EU) Treaty.

2.3.1 Anti-competitive threshold

Although the Ministry's Consultation Paper states that the Competition Commission to be set up under the Bill (the "**Commission**") will focus its investigation and enforcement activities on anti-competitive agreements that have "appreciable adverse effect" on Singapore markets, that qualification is not stated in clause 34. This was raised as a concern in the UK parliamentary debates prior to the enactment of the UKC Act, when it was suggested that the word "appreciable" or "significant" should be included in the relevant provision.

This suggestion was not adopted in the UK because, by virtue of section 60 of the UKC Act, EU competition jurisprudence (which applies the test of "appreciable effect" on competition) would apply in the UK. That situation does not apply in Singapore. We note that the "appreciable effect" test is also reflected in the UK implementation guideline on the relevant prohibition.

We submit that for clarity and transparency, Clause 34 of the Bill should be amended to enshrine the "appreciable effect" test as a general principle. The subsequent guideline may set out the specific mechanics on the application of the general test, to allow flexibility over time as to the appropriate factors or criteria to consider.

2.3.2 Is the object of a questionable agreement relevant?

If it is the intention of the law that only anti-competitive agreements that have "appreciable adverse **effect**" on Singapore markets are prohibited, it would be confusing to provide in Clause 34 that agreements which have as their **object or** effect the prevention, restriction or distortion of competition are prohibited. An agreement should not be prohibited (that is, rendered void under Clause 34(3)) simply because it is proved to have an anti-competitive object, unless it is also shown to have anti-competitive effect. Therefore, the words "object or" should be deleted; alternatively the word "or" should be substituted by the word "and" to read "object and effect".

2.3.3 Non-uniform anti-competition tests: Agreements and Mergers

It is not clear if different tests apply under Clause 34 in relation to anti-competitive agreements (i.e. having the object/ effect of preventing, restricting or distorting competition), and under Clause 54 in relation to anti-competitive mergers (i.e. substantial lessening of competition). It appears more likely for an agreement to be held anti-competitive (especially if it need only be shown that its object is anti-competitive) than for a merger to be held anti-competitive. If, indeed, the two tests are different, the unintended policy outcome might be to drive competitors which would otherwise cooperate by agreement to merge instead.

The "substantial lessening of competition" test is the test uniformly adopted in Australia's Trade Practices Act 1974. A uniform test ensures consistent interpretation of what constitutes anti-competitive conduct. Divergence in interpretation of the two tests may cause confusion and uncertainty for businesses, increasing the likelihood of inadvertent infringement.

We submit that a common test could be applied for determining anti-competitive conduct under both Clauses 34 and 54, and that "substantial lessening of competition" is the preferable formulation, as it includes in the wording of the legislation itself the concept that the effect on competition of infringing conduct must be substantial (see our comments in paragraph 2.3.1 above).

2.3.4 Vertical agreements

Excluding vertical agreements from the application of the `section 34 prohibition' (pursuant to Schedule 3 paragraph 8) will mean that resale price maintenance and many forms of exclusive dealing and tying arrangement will not infringe the competition law, even though such conduct could be highly anti-competitive

(unless such is the conduct of a dominant firm and such conduct constitutes an abuse of dominance, falling within the `section 47 prohibition').

Although Schedule 3 paragraph 8(1) permits the Minister to specify vertical agreements to which the `section 34 prohibition' will apply, there is no provision for a mechanism to bring such exceptional vertical agreements to his attention. This could perhaps be dealt with in the guidelines, by specifying that complaints may be made about certain vertical agreements to the Commission, with an obligation on the Commission to consider the effect on competition of such agreements and, if it deems anti-competitive, to make a recommendation to the Minister that he makes an order pursuant to Schedule 3 paragraph 8(1).

The exclusion of vertical agreements appears to be modelled after section 50 of the UKC Act. However, despite the general exclusion in the UK, resale price maintenance is specifically prohibited in the UK under an Order of 2000.

We submit it is not necessary to have a blanket exclusion for vertical agreements when there are provisions for individual and block exemptions for anti-competitive agreements (horizontal and vertical) to be obtained under Clauses 36 and 38. The requirements to be satisfied to obtain such exemption would mean only pro-competitive vertical agreements would be exempted.

Therefore, we propose that, either the blanket exclusion for vertical agreements be removed from the Bill, or resale price maintenance agreement be specifically incorporated into the `section 34 prohibition'.

2.3.5 Possibility of application of the `section 34 prohibition' to mergers?

It appears that the `section 34 prohibition' could apply to mergers, because mergers are preceded by agreements between undertakings and such merger agreements are not specified in the exclusion. We submit that the exclusion to the `section 34 prohibition' should apply to mergers to avoid the risk that an undertaking's transaction could be caught under both the `section 34 prohibition' and the `section 54 prohibition' (note also different tests under these two – see our comments in paragraph 2.3.3 above).

2.3.6 Void agreements

Clause 34(3) provides that any agreement or decision which is prohibited under Clause 34(1) is void, presumably *ab initio* (i.e. from inception). This is likely to create difficulties for undertakings which have entered into long-term agreements in breach of the `section 34 prohibition', and it also introduces an element of retrospectivity to the legislation. Such agreements will become entirely unenforceable, even in respect of matters arising under the agreements before the Bill comes into force.

The same problem will arise in respect of agreements subject to an exemption or one of the exclusions, where the exemption or exclusion is subsequently revoked or removed. There ought to be a reasonable time given for such agreements to be unwound or to run their course.

This problem was dealt with in the UK by way of transitional provisions set out in Schedule 13 to the UKC Act. We submit that similar provisions ought to be included in the Bill (with appropriate modifications) in relation to long term agreements entered into before the Bill is enacted. Guidelines could deal with

the issue of unwinding such agreements in respect of which an exemption/ exclusion has been revoked/ removed.

We submit that the Bill could be amended to make it clear that an infringing agreement post-facto will only be void from the date the law comes into force, or from a certain time after the date an exemption/ exclusion is revoked/ removed, and that all rights already accrued under such an agreement until that point in time shall continue to be enforceable, that is, deemed as if such agreement is terminated on the effective date of the law where such termination is without prejudice to the accrued rights and liabilities of the respective contractual parties.

2.4 Clause 47: Abuse of Dominance

Clause 47 appears to be modelled after section 18 of the UKC Act, which is in turn modelled after Article 82 of the EU Treaty.

2.4.1 Dominant position

The determination of "abuse of a dominant position" in the EU and in the UK involves two distinct stages: firstly, the requirement of a "dominant position" in the relevant market (or "dominance" or "market power") enjoyed by the undertaking(s) concerned; and secondly, the proof of abusive conduct of the undertaking(s). The definition of "dominance" is a complex task subject to divergent views. This is exacerbated by the fact that the tests for "market power" in the US and in Australia are not quite the same as that in the EU/ the UK. The EU Competition Commission has issued Notice on the definition and in the UK there is implementation guideline, we hope to see such guideline issued by the Commission as soon as practicable after the Bill is passed, to enable the businesses to understand the rules better and plan and reorganise their affairs early.

The reference in Clause 47 to "one or more undertakings" (note: an undertaking may comprise a group of related companies constituting a single economic entity) implies the introduction of the concept of joint or collective dominance. This is one area that we think the Ministry might want to engage in further deliberation, as the EU experience demonstrated the practical difficulties involved in the balanced definition, and proof, of joint or collective dominance.

2.4.2 *Predatory behaviour*

Clause 47(2) uses the term "predatory behaviour" which is not used in the EU/ the UK (as compared to "predatory pricing"), and as such it is not clear if case law from other jurisdictions on "predatory pricing" would be of assistance to its interpretation.

We hope the subsequent guideline as to what constitutes abuse of dominance would be particularly specific in relation to this term "predatory behaviour".

2.5 Clauses 54-58: Merger Control

2.5.1 Exclusions to the `section 54 prohibition'

Schedule 4 provides that mergers approved under any written law shall be excluded from the `section 54 prohibition'. (For example, the Ministry has stated that the mergers of financial institutions will be dealt with by the Monetary

Authority of Singapore, and excluded from the application of the Bill.) This may result in a large number of regulated industries being excluded from the merger control under of the Bill.

This has the undesirable result that mergers may be dealt with on different, and possibly inconsistent, bases, depending on the industry involved, and how it is regulated today. We submit that all mergers, other than those excluded under Schedule 4, ought to be governed under the Bill in relation to their competition aspects.

2.5.2 Clause 54: merger control test

Under Clause 58, mergers that have resulted or may result in a substantial lessening of competition within any Singapore market are prohibited.

It used to be the case in the EU that merger control sought to prevent concentration of market power or the "creation or strengthening of a dominant position" in the relevant market. Therefore, the definition of "dominant position" or the test for determining the existence of dominant position used to be relevant and applicable to two areas of competition law: abuse of dominance, and merger.

However, the EU recently amended its Merger Regulation and so the test for intervention is no longer the "creation or strengthening of a dominant position", but whether the merger would "significantly impede effective competition". It is interesting to note the Bill follows suit and uses the "substantial lessening of competition" reference.

However, reading the Consultation Paper, it appears that the Ministry may think that the two tests – "creation or strengthening of a dominant position", and "substantial lessening of competition"/ "significantly impede competition" – are the same and one; they are not. Paragraph 8(c) of the Consultation Paper first says that what are prohibited are "M&As that substantially lessen competition in Singapore". It then goes on to say that "firms may decide to merge to create or reinforce a dominant position". The same cross reference is made again in Paragraph 10 of Annex A to the Explanatory Statement, which reads: "Undertakings may decide to merge so that the newly merged undertaking could exercise market power and abuse its market power. … Such M&As could substantially lessen competition in Singapore…". Clarification in the Bill on the merger control test would be desirable.

2.5.3 Sub-clause 54(7)(b): minor amendment

It appears that the words "or acquisition" in this sub-clause are unnecessary, and should be omitted.

2.6 Clause 61: Guidelines

2.6.1 Binding effect of guidelines

This clause provides that the Commission **may** publish guidelines with a view to enabling any person to order his affairs in compliance with Part III of the Bill, which includes the competition prohibitions. However, the clause also provides that any guidelines published shall not be binding on the Commission.

We submit that the published guidelines shall be binding on the Commission. Otherwise, the implementation of the competition law will be unpredictable, increasing the difficulty to undertakings of making business decisions. The risk that an undertaking following the published guidelines to the letter could still be found to have infringed the law could affect the business environment in Singapore. It is also likely to lead to over-use of the notification for guidance/ decision provisions. It is difficult to understand why a guidance/ decision made pursuant to voluntary notification by an undertaking is binding on the Commission, but not a guideline made after consultation with various undertakings concerned.

We further submit, that whilst the guidelines may be amended from time to time as may be necessary and desirable, such changes to the guidelines should not apply retrospectively. There should be a process for providing adequate transition time for businesses to change their practices appropriately.

2.7 Clauses 62-66: Investigation Powers

2.7.1 Clause 64: electronic information

Section 27 of the UKC Act, on which this clause appears to be based, has been updated to replace references to "information held in a computer" with "information stored in any electronic form", and to add an alternative to the requirement of production of information in a visible and legible form, being a requirement that the information be produced in a form from which it can readily be produced in a visible and legible form.

We submit the same amendments could be incorporated into sub-clause 64(5)(f) of the Bill. The former amendment widens the scope of electronic information which can be required to be produced so that it covers all forms of electronic media storage, such as storage of SMS messages. The latter amendment potentially reduces the burden on undertakings subject to the Commission's powers of investigation.

2.7.2 Clause 66: privileged communication

Whilst this clause provides for exemption from production or disclosure of a communication on the grounds of legal professional privilege, the Bill is silent on the question of privilege against self-incrimination.

In the UK, this issue is dealt with by virtue of section 60 of the UKC Act, dealing with consistency with EU law, as acknowledged in the Office of Fair Trading's Guideline on Powers of Investigation. We submit that this privilege, at least in relation to admission of infringement of the relevant prohibition, should be specifically provided for in the Bill.

2.7.3 Applicability of Criminal Procedure Code?

It is not clear whether or not the relevant provisions in the Criminal Procedure Code pertaining to police investigation shall apply to the exercise of powers of investigation by the Commission inspectors/ officers under Clauses 62 to 66 and the penal provisions under Clauses 80 to 83 and 87; and if so, to what extent. Although Clause 85 provides that the Commission inspectors/ officers shall be deemed to be public servants for the purposes of the Penal Code (and hence the provisions giving protection to public servants or relating to offences committed

by public servants shall apply), it is still not clear whether the Commission and its inspectors/ officers are conferred the powers of police for the purposes of investigation.

2.8 Clauses 62, 68 and 72: Independence of the Bodies in Administration

2.8.1 The Commission – appearance of conflict of interest

The Commission is the body with both power to investigate suspected infringements (see Clause 62) and authority to determine whether such infringement has occurred (see Clause 68). The Commission will also impose sanctions, including financial penalties, which will fund the Commission. For the same body to hold all investigative, prosecutorial and adjudicative powers and authority in relation to the same matter leaves open the possibility of insufficient independence of the various functions and the appearance of a conflict of interest and bias, in that the adjudicator may appear to have an interest in the outcome of the case.

This model originates from the EU law in civil law Europe, where the inquisitorial system operates, and has somehow been adopted in the common law UK for the purpose of harmonisation among EU member states. However, there is no reason for Singapore to abandon common law norms by adopting the continental civil law system.

We submit that the Australian model would be the preferred model. In Australia, the question of whether any infringement has occurred is determined by the courts, and the regulator acts only as investigator and quasi-prosecutor in proceedings before the courts. Alternatively, the Commission could investigate and prosecute cases to be heard before the Board, with all appeals to go to the courts. If neither system is to be adopted in Singapore, then we submit it ought to be made clear, either in the Bill itself, or in regulations made under Clause 93, that the investigative/ prosecutorial and the adjudicative functions of the Commission are to be conducted entirely separately, with `Chinese wall' in place. We also submit that receipts from financial penalties ought to go into the consolidated revenue.

2.8.2 The Appeal Board – composition and the power to remove

The Competition Appeal Board is to be comprised of members appointed by the Minister. This is in line with the UK method of appointment of the competition appeal body. However, in the UK, the Minister may not remove a member from office except on grounds of incapacity or misbehaviour.

Under Clause 72 of the Bill, the Minister not only determines the period during which the member shall hold office, but also has the power to remove any member of the Board without assigning any reason. These mechanisms do not help to enhance the perception of the independence and impartiality of the Board.

2.9 Clause 69: Financial Penalty

2.9.1 Avoidance of double penalty

Under Clause 69(4), the Commission may impose a financial penalty of up to 10% of such business turnover of the undertaking in Singapore for each year of

infringement. There might arise a situation where an undertaking is fined by the competition authority in another jurisdiction in respect of the same conduct/ agreement occurring in different markets. While Clause 69(4) seeks to compute financial penalty based on only business turnover in Singapore, the EU/ UK authorities would compute financial penalty based on 10% of an undertaking's worldwide turnover. The concern is whether the Commission will cooperate with the "foreign competition body" (as defined in Section 77(4)) or procure arrangement through the International Competition Network to avoid double penalty.

Another consideration is whether the fact that an undertaking has paid or is certainly liable to pay financial penalty in another jurisdiction in respect of the conduct/ agreement affecting the Singapore market would be a mitigating factor.

2.10 Clauses 74-75: Third Party Rights and Proceedings

2.10.1 Clause 74: who is the aggrieved person?

Clause 74 provides that "any person" who is aggrieved by any decision of the Board may appeal to the High Court. It is not clear whether this clause contemplates that third parties, such as victims of infringing conduct, may bring appeal proceedings from a decision of the Board.

We submit that, if clause 74 is intended to allow third parties to appeal, that ought to be made clearer. Otherwise, in order to close the loop, the clause could be amended to make it clear that only parties to the proceedings before the Board are entitled to appeal.

2.10.2 Representative claims

Section 19 of the UK Enterprise Act of 2000, which inserted new section 47B into the UKC Act, provides for representative claims for damages to be made on behalf of consumers. Such a provision in the Bill would enable consumers who have suffered loss or damage arising from infringing conduct to seek recovery without individually bearing the significant legal costs which may be involved in bringing their own claim. Otherwise, the legal costs involved may act as a significant deterrent for consumers to bringing proceedings.

In Australia, the competition authority (known in short as the ACCC) can take representative action and seek orders including compensation for third parties for contravention of the competition prohibitions. Such a system could work as an alternative to the UK system, but only if a model is adopted in Singapore where the investigative/ prosecutorial function and the adjudicative function are separate (see our comments above in Paragraph 2.8.1).

We submit that there ought to be provision for representative actions to be brought in the courts on behalf of consumers.

2.10.3 Clause 75: third party rights of action

The people who arguably have the greatest interest in ensuring compliance with the law – the competitors and consumers affected by anti-competitive conduct – have little power to take action to stop the infringing conduct. This was recognised in the UK Government's consultation paper prior to the draft bill, in which the UK Government envisaged third party civil actions as fortifying the

deterrent effect of the prohibitions and as a safeguard for the victims of anti-competitive behaviour.

Under the provisions of the Bill in our case, their only right of recourse at first instance is to make a complaint to the Commission. As there appears to be no obligation on the Commission to investigate any given complaint, they will have control as to whether a complaint will be investigated at all, and if so, whether it is investigated effectively. Also, whilst the Commission may give urgent interim directions under Clause 67 before it has completed its investigations in order to protect third parties from serious, irreparable damage resulting from suspected infringing conduct, whether the Commission does so appears to be in its discretion and there is no mechanism provided for by which persons affected can appeal the Commission for interim measures to be imposed. In addition, the effectiveness of such measures in some cases (where a court might grant an ex parte interlocutory injunction) must be questionable in circumstances where the Commission is required to give notice of the proposed direction and give the person to whom it will be given an opportunity to make representations.

Providing a right for third parties injured by infringing conduct to seek civil remedies is a significant step forward, particularly because the court will be bound by the decision which establishes infringement of the relevant prohibition, relieving a claimant from the burden of proving the infringement.

However, the fact that civil proceedings may only be commenced after the Commission has found an infringement and all avenues of appeal in respect of such decision have been exhausted, may lead to situations where the delay could result in the affected business going under before any remedy can be sought. This will diminish the usefulness of these rights.

The inability of third parties to pursue civil remedies directly in the courts for anti-competitive conduct could also place enormous pressure on the resources of the Commission. In jurisdictions where private actions are permitted without first recourse to the competition authority, the authority is able to concentrate on conduct which has major widespread economic effects, such as serious cartel behaviour (including price fixing and market sharing) and serious abuses affecting large population, and which may be less likely to result in individual civil litigation, and leave commercial disputes to the courts. In addition, injunctions can be obtained by private parties in respect of infringing conduct to prevent ongoing damage to a third party.

Our provisions in the Bill appear to be modelled after the new section 47A of the UKC Act, inserted by section 18 of the UK Enterprise Act of 2000, by which a similarly shaped regime for third party rights to that proposed for Singapore has been enacted. That new section requires exhaustion of all rights of appeal by the infringing firm before the UK Competition Appeal Tribunal (rather than a court) hears claims for damages for infringement of competition law following a decision by the relevant competition authority. However, it is a new right in addition to existing rights to bring civil actions for damages in the courts. The purpose of that new provision appears to be to remove the burden of proof of the infringing conduct from an injured third party and to extend the limitation periods which might otherwise apply to bringing an action for damages in respect of infringing conduct.

We submit that private actions in the courts ought to be permitted in respect of infringements, at any time, with the right for the Commission to seek to intervene in matters of public interest.

2.10.4 Urgent relief

Alternatively, there ought to be provision for leave to be obtained from the court to bring a civil action before all rights of appeal have been exhausted, to cater for the need to obtain urgent relief. Of course, the benefit of the court being bound by a final decision on infringement would not apply, but this would not deter litigants seeking interim relief, where the burden of proof is lower than that required to obtain damages.

Of course, if there are concurrent proceedings both before the Commission and before the court in respect of the same conduct, the risk of inconsistent decisions arises. The ways in which this could be remedied include:

1. once any interim relief has been granted, the civil proceedings are stayed until the Commission's decision has been made and all avenues of appeal have been exhausted; or

2. all actions for infringement are to be heard in the courts, whether brought by the Commission or by a private third party. This would ensure adjudication by a body independent from the Commission as investigator, allow injured third parties to apply for civil remedies immediately and reduce the burden on the Commission.

We submit the second option is the preferable one.

2.11 Clause 82: Degree of Mental Element in Criminal Offence

This clause appears to be based on section 44 of the UKC Act, yet differs from it in a significant respect. Whereas section 44 of the UKC Act only imposes criminal liability for providing information which is false or misleading in a material particular if such information is provided knowingly or recklessly, Clause 82 is silent on the mental element in the provision of such false or misleading information.

Given the penalty for this offence is a fine of up to $10,000 or imprisonment for up to 12 months, or both, we submit the offence of providing false or misleading information ought only to apply to intentional or reckless provision of such information.

3. CLOSING STATEMENT

We would like to thank the Ministry of Trade and Industry for the opportunity to make these submissions.

In submitting our comments on the Bill, our intention is to discuss issues for the Ministry to consider in formulating a competition law that will be clear, fair and effective. We hope our comments are useful, and we will be available to answer any query or clarification required on any of our comments.

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