COMPETITION BILL CONSULTATION PAPER

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SUMMARY OF MAJOR POINTS

1. A suitable qualification should be inserted to make clear that a violation of Sections 34, 47 and 54 would only occur where there has been an "appreciable adverse effect on markets in Singapore".

2. Language should be drafted into Section 34 to exempt dealings between related companies from the provisions of Section 34 so as to enable businesses to select the most efficient form of internal organization without risking liability under Section 34.

3. Clarification is sought as to:

   (a) whether Section 34(2) purports to set out a list of actions which are *per se* illegal; and

   (b) whether the doctrine of severance would apply to agreements that violate Section 34 such that only offending portions of the agreement are removed.

4. The "individual exemptions" approach as set out in Sections 36 and 41 may give rise to practices that are not in line with the Ministry's stated objectives of keeping regulatory costs and administration to a minimum. It is suggested that the EU/UK approach of a "legal exception" regime be adopted instead.

5. Mergers that have taken place prior to the date of enactment of the law should be expressly exempt from the provisions of Section 54.

STATEMENT OF INTEREST

ExxonMobil Asia Pacific Pte Ltd ("EMAPPL") is the largest foreign investor in Singapore, with over USD 6 Billion in local investments. As an affiliate of Exxon Mobil Corporation, EMAPPL strictly observes and complies with all laws (including antitrust and competition laws) of all countries that are applicable to its business.

The proposed Competition Act 2004 is of interest to EMAPPL particularly in the context of the scope and application of competition laws elsewhere.

COMMENTS

This document has been prepared by ExxonMobil Asia Pacific Pte Ltd in response to the invitation of the Ministry of Trade and Industry ("the Ministry") for public feedback in connection with the Competition Bill, Competition Act 2004 ("the Bill").

We have reviewed the contents of the Bill and set out the following comments for consideration by the Ministry.

1. **"Appreciable Adverse Effect in Markets in Singapore"**

(a) In paragraph 6(b)(i) of the Consultation Paper, its is stated that the focus of the Competition Act 2004 would be placed on conduct that will have an "appreciable adverse effect on markets in Singapore".

(b) It is suggested that if this is the intent, then a suitable qualification to that effect should be drafted to qualify the prohibited acts set out in Sections 34, 47 and 54. In other words, it should be made clear in the Bill that a violation of Sections 34, 47 and 54 would only occur where there has been an "appreciable adverse effect on markets in Singapore".

(c) The term "appreciable adverse effect" has not been defined in the Bill. In the European Union, the European Commission's "Notice on Agreements of Minor Importance" sets out, using market share thresholds, what is not an appreciable restriction on competition. This test has been adopted in the United Kingdom by case law. It is not certain to what extent these thresholds would be applied in Singapore, or whether in the first place, such thresholds that have been applied in the context of the EU / UK are suitable in the context of Singapore.

(d) In any event, to minimize uncertainty in this area, it is suggested that Guidelines on suitable thresholds and other qualifications be issued as soon as possible by the Ministry or the Competition Commission of Singapore.

2. **Part 1, Preliminary, Section 2, Definition of Undertaking**

(a) The term "Undertaking" has been defined as follows: "...any person, being an individual, an association, a body corporate or an unincorporated body of persons, capable of carrying on commercial or economical activities relating to goods or services.".

(b) In the context of Section 34, a literal reading of the definition suggests that related corporations may be prohibited from:

(i) entering into any agreement to fix selling prices for same or similar products that they respectively sell; and

(ii) entering into any agreement to fix buying prices for any raw materials or services that they use in common in the course of their respective businesses,

if the object or effect of such agreement is to "...prevent, restrict or distort competition within Singapore.". The ambit of the prohibition would extend to corporations that are incorporated or resident outside of Singapore, so long as the object or effect of the actions have an impact on Singapore. The Third Schedule does not contain any exemption for such agreements made between undertakings that are related corporations.

(c) Section 34 may bring about difficulties in certain activities between Undertakings that are part of a group of companies that are wholly or majority owned by a common shareholder. Specifically, the provisions of Section 34 may unduly restrict the manner in which related corporations standardize their business affairs for cost and other efficiencies. Section 34 may also restrict the manner in which one Undertaking in the group stewards the affairs of another Undertaking in the group. Such activities may run the risk of being considered "agreements" or "concerted practices" resulting in the prohibited activities.

(d) In the United Kingdom and European Union, this position has been clarified using the concept of "a single economic unit". Under this concept, transactions between related corporations are usually not caught as transactions between Undertakings. For purposes of the competition law regime, such transactions are regarded as being carried out by a single party and hence would not be considered "agreements" or "concerted practices".

(e) In the United States, the Supreme Court held in Copperweld Corp. v. Independence Tube Corp that a parent corporation and its wholly owned subsidiary are incapable of conspiring with each other for purposes of US antitrust laws. The reasoning given by the court was that a parent and its wholly owned subsidiary have a "complete unity of interest". Subsequent court decisions have applied and expanded upon the principle established in the Copperweld Case. In general, the accepted position is that a corporation and its wholly or majority owned subsidiaries are treated as a single entity for antitrust purposes. A parent and minority owned subsidiary may also be treated as a single operating entity if it can be shown that the parent exercises effective control over the subsidiary's operations.

(f) The Bill does not state whether similar concepts would be applied in Singapore. It is suggested that an appropriate qualification needs to be drafted into Section 34 to enable businesses to select the most efficient form of internal organization without risking liability under Section 34.

3. **Part 3, Division 2, Section 34 - Agreements, etc., preventing, restricting or distorting competition.**

(a) Section 34(1) prohibits agreements between Undertakings, decisions of associations of Undertakings and concerted actions between Undertakings that have as their object or effect the prevention, restriction or distortion of competition in Singapore.

(b) Section 34(2) sets out specified examples of types of conduct to which Section 34(1) applies.

(c) It is not clear whether Section 34(2) purports to set out a list of actions which are *per se* illegal - that is, the mere act of engaging in Section 34(2) conduct would result in a violation of Section 34(1) regardless of actual effect on competition; or whether Section 34(1) provides a qualifier to the conduct referred to in Section 34(2) - that is, Section 34(2) conduct violates Section 34(1) only if the conduct in question results in the prevention, restriction or distortion of competition in Singapore. We suggest that appropriate wording be included in Section 34(2) to clarify this.

(d) Section 34(3) provides that "any agreement or decision which is prohibited by subsection (1) is void.". Clarification is sought as to:

(i) whether such agreements or decisions would, in addition to being void, also be regarded as illegal at the time of inception. The issue of illegality is significant as the general law of contract provides that monies paid or property transferred under agreements that are void and illegal would be irrecoverable by the paying party. The Bill expressly provides that prohibited agreements are void ab initio without addressing the issue of whether moneys paid and property transferred are irrecoverable, There might therefore be some uncertainty as to whether it is intended that the general law with respect to illegal contracts will apply. Given the serious consequences, it is suggested that this point should be addressed in the legislation for the avoidance of uncertainty.

(ii) whether the doctrine of severance would apply to agreements that violate Section 34 such that only offending portions of the agreement are removed. Other portions of the agreement remain valid and binding between the parties. Section 69(2)(a) of the Bill seems to suggest that there may be scope for the Commission to take such a position. However, it is noted that the powers conferred upon the Commission in Section 69(2)(a), namely the power to require parties to "modify" or "terminate" the agreement do not appear to be consistent with the idea that the agreement is void *ab initio*.

4. **Part 3, Division 2, Sections 36 and 41 - Individual Exemption**

(a) Section 36 of the Bill provides that the Commission may, upon request by a party to an agreement, grant an exemption to such agreement from the Section 34 prohibition if the agreement satisfies certain criteria set out in Section 41.

(b) The effect of Section 36 read with Section 41 is that an agreement that violates Section 34 of the Bill, but which nonetheless satisfies the criteria set out in Section 41, remains in contravention until such time as the Commission grants the agreement an individual exemption.

(c) The position is different in the European Union and United Kingdom where a "legal exception" regime has been adopted. Under the EU/UK approach, an agreement that falls within the EU/UK equivalent of Section 34 but which satisfies the conditions set out in the EU/UK equivalent of Section 41 shall not be prohibited, no prior decision to that effect being required. Such an agreement is valid and enforceable so long as the conditions in the EU/UK equivalent of Section 41 are satisfied. In other words, parties that are accused of entering into agreements in contravention of the EU/UK equivalent of Section 34 can point to the EU/UK equivalent of Section 41 as a defense to the charge without the need for a formal exemption from the relevant authorities.

(d) It is suggested that the approach that has been adopted in the EU/UK may be appropriate as it obviates the need for parties to continually seek exemptions from the Commission and is more in line with the Ministry's stated objectives of keeping regulatory costs and administration to a minimum. If parties are in doubt as to their position, they may opt to obtain formal guidance under Section 42.

5. **Part 3, Division 4, Section 54 - Mergers**

(a) Section 54 prohibits any mergers that "have resulted", or "may be expected to result" in a substantial lessening of competition within any market in Singapore.

(b) Read literally, the ambit of Section 54 appears to be unduly wide. Specifically, the words "have resulted" would mean that the provisions of Section 54 would apply to corporate mergers carried out any number of years prior to the passing of the Bill to law.

(c) It is suggested that mergers that have taken place prior to the date of enactment of the law be expressly exempt from the provisions of Section 54. To do otherwise would give rise to uncertainty for businesses that had relied on prevailing laws and carried out mergers prior to enactment date, especially in view of severe sanctions imposed under Section 69, which may include dissolution of the merger, and disposal of assets of the merged entity.

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