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Subject : **Feedback on draft Bill on Competition Law**

I attach herewith my feedback in softcopy via e-mail, hardcopy and also softcopy in diskette form will be forwarded to you manually.

The contents of my feedback is as follows :

1. Table of Contents
2. Summary of major points
3. Statement of interest
4. Comments
5. Conclusion

Thank you.

Yours truly
Fathelah Majid

Table of Contents

Summary of major points :-

The object of the draft is very economically efficient, however, the regulatory legal framework suggested in the draft is too extensive and too wide for a small nation like Singapore. The draft should be enforced, however, amendments should be made to the draft to fit it into Singapore. I have made some comments and recommendations including scope of application to include public sectors as well, the application be made mandatory and mandatory for company with a specific turnover eg. company with national turnover of S$2 million and/or global turnover of S$20 million as suggested in India's draft competition bill, reporting of any anti-competitive activities be made mandatory, the draft be information in nature and any sanctions imposed should be applied to company's turnover eg. company with turnover of S$10 million nationwide and S$50 million globally, the commission centre not rely on grant-in-aids but on loans from the government, the commission's service be made exclusive, predatory pricing be imposed (a) upon retailing sectors as there is a clear cut calculation on economic efficiency in retailing (b) based upon company's turnover and (c) list of predatory pricing be made exhaustive, the commission be a member of FATF and/or money gains from ACA to be classified as money-laundering proceeds, penalty be imposed based upon company's turnover and the agreements when rendered void be rendered illegal also and party offering assistant in investigation to be given full leniency.

Statement of interest :-

My interest is purely societal and I am commenting from a public point of view.

COMMENTS :-

A. INTRO

OBJECT of the draft bill

The object of the draft bill on Competition Law (draft) is to protect the market against anti-competitive activities (ACA) and at the same time building the economy, however, the extensive regulatory legal framework suggested in the draft bill, maybe oversized for a small nation such as Singapore.

Early this year, there was a broadcast on AMICUS a brokerage company that had acquired million dollars turnover in less than a year (AMICUS). Consequently, a series of confused marketing activities ensued from property agencies and mortgage brokerage companies. This is one of the many good reason why the draft bill on Competition Law (draft) should come into force for such kind of activities is not economically efficient for an economy as per **Richard Posner**, a famous American Jurist in his ***"Economic Analysis of Law" (EAL)*** suggested that ***creation, application and enforcement of the law can be understood and answered in terms of economic efficiency.***

B. COMMENTS/RECOMMENDATIONS

1. "Scope of Application" - s2(1) – to include public sectors as well

The scope should include public sectors. Such activities may actually exist in securitization, initial public offerings, equity investments. No doubt relief under companies act can be sought which may or may not be successful but the draft will ensure "secured relief" for example any side agreement entered into between majority and minority shareholder (minority shareholder promising the other continued purchase of a product at a fixed price in return for a place in directorship) will be rendered void

I recommend that the Scope of Application to include "public sectors" as well.

2. Application for examination of an agreement - application should be made mandatory

No mandatory obligation has been imposed on the application for examination of agreement. Multi-National Corporations (MNCs) and medium to big enterprises engage consultants or lawyers on retainer basis for professional advices. The draft will have the effect of creating another skill and professional advisers will not hesitate to enlighten themselves with this extra skill to provide it as an extra incentive in the retainer package to attract customers. The free advice then will render it unnecessary to have any agreement examined. Moreover, the free examination provided by the commission does not mean a reduction in the usual retainer fee.

Singapore, though is a tiny island, consist of many multi-national corporations, small, medium and large enterprises has many economic activities in Singapore. Many small undertakings in their eagerness to avoid penalties and investigation will be submitting application at will and the Commission Centre (CC) will become a busy process centre. Application will throng in from every corners of Singapore. The CC will be filled with application, notification, directions, research, investigation and enforcement. The usual administrative problems will consequently occur - back-log, insufficient manpower and the need for overtime and the need for expansion will emerge. The CC will turn from a small department into a major operation. Process will change from manual to electronic filing. The filing fee, paperwork, research and analisation will make the service exclusive and expensive and time consuming. These will act as a deterrant factor to applying for an examination on the agreement. As **Hohfield** a well-known Jurist suggested – ***"for every action there is a reaction and an anti-reaction"***. The undertakings will be deterred from making any application and as a result any transactions entered into will not be known unless it is reported and then there is no mandatory reporting.

I recommend that :-

(i) the application be made mandatory
(ii) application be made mandatory for company with a specific turnover eg. company with national turnover of S$2 million and global turnover of S$20 million.

3. **Reporting of any anti-competitive activities - should be made mandatory**

There is no provision for mandatory reporting of anti-competitive agreements. Reporting of anti-competitive activities should be made mandatory considering the adversarial effect such agreements will have on the economy and also considering that some parties would be most unwilling to report for fear of scandal, abuse, possible involvement, threat, etc.

I recommend that reporting of any anti-competitive activities be made mandatory.

4. **Draft backed by sanction – should be informative in nature and penalty to be imposed to culprits based upon company's turnover**

The draft bill is backed by sanctions. **Jeremy Bentham**, a famous Utilitarian Jurist expounded the theory ***that all laws are commands backed by sanction*** but **Hart** a Positivist Jurist expounded that ***laws should have rules.*** The draft bill be made informative in nature. High level participation should be encouraged, attractive measures and ideas should be introduced to encourage participation. Singapore is evolving in an era of modern, high and micro/macro technology.

Singapore has advanced and intellectualized. A nother form of approach in legislating should be applied and that is "the educating approach (EA). The EA will increase and

enhance society confidence in themselves in being able to adhere to a good measure and consequently produce faith and high appreciation for the government. A sense of righteousness, togetherness and obligation for the good of the nation will emerge as **Montesquiue** asserted in ***"The Spirit of Law (1748)" that good laws were those which were in accordance with the spirit of society.***

I recommend that the EA approach be adopted to test the society on the effect of the draft and any sanctions imposed should be based upon company's turnover.

5. **Grant – In – Aids – should not be relied upon**

Judging from the draft, a major operation is anticipated. The CC is expecting to have their initial expenses drawn from grant-in-aids from the Parliament and loans from the government which will mean erosion of state funds and is therefore an incorrect measure. The CC will be generating revenue for the state and should therefore start from loans and not grant-in-aids.

6.. **An added skill – CC's service should be made exclusive**

As explained above the CC will turn into a busy process centre and various educational training/educational programmes will emerge such as program to educate the undertakings; program on guidelines and program on electronic filing of all applications. Modules will be prepared, lecturers will be employed, classes will be allocated.

I recommend that the course/programs be only restricted to the CC's personnels only. In this way it will reduce any chances of undercutting the CC's exclusive services.

7. **List on predatory pricing be made exhaustive**

The definition of "predatory pricing" begs elaboration. 2 examples are quoted here :-

Lawyer A	Lawyer B
Has an established firm; a nice office which was purchased and paid for; experienced; possessed all types of equipments; modern technology; sufficient manpower; good location; good managerial skills; well-stocked precedent library, and as a result could impose very low costs.	New firm; very intelligent and efficient but lack all the other attributes of Lawyer A.

If Lawyer A is prohibited from imposing low cost can it be termed "predatory pricing"? If the CC impose A with a restructural scheme, his retainers and references will be affected. Does that mean Lawyer A has to make some sacrificings to benefit Lawyer B. Will Lawyer A has a restitutional rights over Lawyer B's business - after all he is making way for Lawyer B to make money.

I recommend that predatory pricing be imposed

(i) upon retailing sectors as there is a clear cut calculation on economic efficiency in retailing for example - if retail price less wholesale price gives a profit then there is not predatory pricing practiced but if retail price less wholesale price gives a loss then there is predatory pricing and an investigation should be launched
(ii) based on company's turnover
(iii) list of predatory pricing should be made exhaustive.

8. **Conflict between the draft and s46 & 47 Banking Act?**

s46 & s47 of Banking Act make express provisions for disclosure of information but what happens if the bank involved is an overseas bank. For example A and B entered into an anti-competitive agreement and B credited his gains into an overseas bank transmitted via Singapore. Money-laundering falls under the Corruption, Drug Trafficking and Other Serious Crime is part of the Commercial Affairs Department which is a member of FATF (Financial Action Task Force), an international anti-money laundering organizations. But what about money gains from ACA? Does it fall under money-laundering.

I recommend that the commission be a member of FATF and money gains from ACA to be classified as money-laundering proceeds for if agreement is made void and illegal, money gained will be considered illegal too.

9. **Voidability – longer liability period**

Any ACA that is prohibited will be automatically VOID – cl 34(3). Agreement that turn out to be unenforceable could be a more effective deterrent for undertakings, however, it may not be economically efficient for it to be automatically void for voidability will take effect from date of contract and not date of enforcement of contract. What if the ACA has not been enforced since date of voidability ie. date of contract. If voidability is based on date of ACA, liability period will be longer. Moreover, there is no pro-rata mentioned. According to s69(4) penalty will be 10% of business turnover up to a maximum of 3 years. What if an agreement is entered into on 01-01-04, to be enforced on 01-07-04 and penalised on 01-11-04. Will the penalty be

10% x $100,000 into 1 year = $10,000 or
10% x $100,000 into 11 months = $9167 or
10% x $100,000 into 4 months = $3333
Will only one party to the contract be liable or both?

I recommend that the penalty be imposed based upon company's turnover ie for company's turnover of S$20m nationwide or S$100m globally.

10. **Illegality -**

Will the void agreement be rendered illegal then? Since there is a sanction imposed, will it be considered illegal then? If it is illegal then how can the offeree who may be an induced party seek relief under the normal contract law and if it is not then it should be made illegal to avoid ACA.

I recommend that the void agreements be made illegal so that no remedies can be sought by either party be it the offeree or the offeror and that party providing assistance in investigating the matter should be given leniency where the penalty is concerned such as **in Argos Littlewoods and Hasbro (UK)** where Argos was fined Pounds 22.65 million whilst Hasbro was granted full leniency for assisting the UK Office of Fair Trading in the investigation.

CONCLUSION

Based on the above, I recommend the following :-

i. that the scope of application to include public sectors as well

ii. the application be made mandatory and mandatory for company with a specific turnover eg. company with national turnover of S$2 million and/or global turnover of S$20 million as suggested in India's draft competition bill.

iii. Reporting of any anti-competitive activities be made mandatory

iv. The draft be information in nature and any sanctions imposed should be applied to company's turnover eg. company with turnover of S$10 million nationwide and S$50 million globally

v. the commission centre not rely on grant-in-aids but on loans from the government

vi. the commission's service be made exclusive

vii. predatory pricing be imposed (a) upon retailing sectors as there is a clear cut calculation on economic efficiency in retailing (b) based upon company's turnover and (c) list of predatory pricing be made exhaustive

viii. the commission be a member of FATF and/or money gains from ACA to be classified as money-laundering proceeds

ix. penalty be imposed based upon company's turnover

x. the agreements when rendered void be rendered illegal also and party offering assistant in investigation to be given full leniency.