Feedback on the Singapore Competition Bill 2004

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Statement of Interest

The author has no connection with any government department or commercial undertakings in Singapore or elsewhere and these comments are made in the capacity of an independent academic observer.

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1. Introduction – Summary

1.1 The decision of the Singapore government to legislate a comprehensive competition statute is to be welcomed and accords with international best practice and conforms to the recommendations of the OECD and other international and regional bodies.

1.2 General Comments

The bill appears to be well drafted and based substantially upon the EC model. The tripartite structure dealing with abuse dominance, collusive agreements and overly concentrative mergers, well accord with the accepted international norms. The establishment of a dedicated competition authority is to be welcomed and its powers of competition advocacy, investigating and penalty/remedy provisions appear to be appropriate, save for the structural, appeal and remedy recommendations made below.

The competence, integrity and independence of the Competition Commission and the transparency and fairness of its procedures will be vital if public and international confidence is to be created in the operation of the new pro-competition system in Singapore. The provision of an appeal tribunal and protection of due process during the investigation and adjudication stages are to be welcomed.

However, the bill also appears to have several features that are sub-optimal. In particular the size of the Competition Commission maybe inappropriately large and the lack of specific eligibility qualifications of members, particularly in law and economic, is of concern. This is a highly technical area and it is essential that members of the Commission should have appropriate knowledge and skills to comprehend the often difficult issues of economic theory, fact and law. Questions may also be raised as to the actual independence of the Commission from government, this matter is raised below in more detail. The Commission should enjoy more extensive powers and jurisdiction, dealt with below, and the role of the Minister should be correspondingly reduced, so as to ensure, so far as is possible, that the integrity and independence of the new system should not be impugned with allegations of political partiality. It would appear that the currently envisaged distribution of powers between the Minister and the Commission is too heavily weighted in favour of the Minister and so may undermine domestic and international confidence. Best practice internationally stresses the need for politicians to play the least role possible in operational competition matters and that competition issues should be decided by independent experts in a competent independent authority. The current distribution of powers should be reconsidered as they appear to be against the international trend, which is to depoliticize competition decision making, so far as it possible, so as to bolster business and consumer confidence in the impartially of decision making.

Another area of concern is the apparently excessive reliance on individual exemption and guidance to be given in the individual cases where breach of the prohibitory provision is suspected. Again, this appears to run counter to international developments, particularly in the EU, where the process of the individual exemption and guidance has been abandoned in favour of shifting the compliance burden on to individual undertakings. The Commission should ensure that its focus is on advocacy, and the discovery and punishment of egregious abuses of dominance and pernicious cartel operations, rather than providing a guidance service for business. Further comment will be made below.

In summary, the three major areas that require reconsideration are: -

A. The size composition and power of the Competition Commission require adjustment to ensure that the body is independent and has a high level of expertise and a narrower, more focused, remit.

B. The extensive powers of the Minister in the proposed competition system need to be reconsidered and reallocated to the Commission and to the Appeal Board, so as to depoliticize the system and enhance domestic and international confidence in the soundness enforcement arrangements.

C. The grant of individual exemption and giving of "comfort" by the Commission should be scraped in favour of developing a compliance culture, based on enterprise responsibility, supported by clear statements of guidance on subject areas promulgated and widely advertised by the Commission.

2. Specific Comments

2.1 The Competition Commission

Clause 5 of the bill provides that Commission should have a chairman and not less than two nor more than 16 members. It is suggested that the maximum size is too big for effective administration and decision making, thus the maximum membership of the Commission should be reduced. Qualification for membership should be spelled out and should include competence in law and/or economics, given the complex theoretical economic and legal matters that need to be understood by the members of this body. The Commission will only have credibility if suitably qualified persons are appointed. In a state as small as Singapore, it may be legitimate to question whether there is sufficient domestic expertise in the relevant disciplines and consideration should be given to whether appointees may be non-Singaporean nationals. The dismissal power of the minister in Clause 5 of the First Schedule is too extensive and may lead to the suspicion that, if a politically unpopular decision is made, then offending members could be removed with out good cause. This power might call into question the presumed and actual independence of the Commission from direct or indirect political pressure. The Chief Executive and the Chairman of the commission should persons who have extensive experience in competition advocacy,

economic investigation and the adjudication of competition cases. The Chairman and/or the Chief Executive should be given specific statutory powers, along with a duty, to advise and to advocate pro-competition policies to government departments as appropriate.

2.2 Substantive Prohibitions

2.2.1 Restrictive Agreements

The jurisdiction, articulation with existing regulated sectors and exemption of government functions under Clause 33 appear appropriate. The prohibitions under Clause 34 are sufficient but under Clause 34 (5) is it appropriate to make the prohibition retrospective?

The exclusions dealt with Clauses 35 and Schedule Three appear appropriate, save that the power of the Minister under Schedule Three Clause 4 (1) appears exceptionally and excessively wide, more precise definitions should be provided of the definition of "*exceptional and compelling reasons of public policy*". The exemption under Schedule Three Clause 6 for public security, piped water, sewage collection and disposal, bus and rail services appear reasonable in the special circumstances of Singapore given its geographical size and density of population. However, the exemption of cargo terminal operation from Clause 34 seem unnecessarily wide and given Singapore reliance on maritime transport and given the need for vitality in port operations, the exclusion appears questionable. The exclusion of vertical agreement under Clause 8 of Schedule Three, appears to be in line with much current academic opinion and reservation of power to derogate from the exclusion is appropriate, though perhaps the power to prohibit classes of vertical agreement should exercised by the Minister only on the advice of the Competition Commission, rather by the Minister acting alone.

The individual exemption the powers under Clause 36 and the procedures under Clause 42 and 43 appear to be an anachronistic. The EU Commission has recently modernized its powers in this regard (See Modernization Regulation [Council Regulation 1/2003], effective 1 May 2004) and has abolished these procedures. (See Also, Whish, Ch.4, Competition Law, 5th Edition, Butterworths,, London 2003). It would seem more appropriate that the burden of compliance with Clause 34 should fall upon the shoulder of individual enterprises. It should their duty to determine whether they have infringed the law by taking appropriate advice and in ensuring a compliance culture in their organization. Clearly, this should facilitated by the issuance by the Commission of appropriately detailed guidance on relevant matters. The approach currently adopted appears to be unnecessarily cumbersome and bureaucratic and is not supported by modern developments. Consideration should also be given to *de minis* provisions, so that matter of a trivial nature are not caught by the Clause 34 prohibition.

2.2.2 Abuse of Dominance

It is to be welcomed that Clause 47 includes oligopoly conduct, as is the explicit jurisdiction element in Clause 47 (3). However, of considerable concern is the ability under Clause 48 to exempt abuses of dominance. This power in schedule Three Clause 4 (4) is very unusual and is open to same criticism as made above in respect of Clause 4 (1). Furthermore, there is no equivalent power in EC law to exempt abuses of dominance. This concern is reinforced by the exemption of abuses conducted by any of the undertakings covered by Schedule 3 Clause 6 (2), in particular abuses in the transport sector- busses, trains or at the port, which could have effects in adjacent market, is of to particular concern. Consideration should be given to removing or at least substantially restricting the power of exemption currently envisaged.

The procedure under Clause 49, 50 and 51 again appears unnecessary for the reasons given above.

2.2.3 Mergers

The test of substantial lessening of competition in Clause 54 is to be welcomed as it the coverage of the provision of the Clause 54 (2).

However, the exemption on the ground of public interest, contained in Clause 55 and Schedule 4 appears to be excessively vague. It is imperative that, as a minimum, greater clarity is given to public interest exemption in order to ensure domestic and international confidence in the application of this concept in Singapore. It would be better to remove it so as to enhance transparency and to dissolve the suspicion of political matters having more weight that competition concerns in relation to merger control.

Recently, Professor Richard Whish of King's College, London was asked to comment on a similar issue of the proposed 'public benefit' test in relation to the new proposed merger guidelines in the Hong Kong telecommunications sector. He said:

"*My own view, however, is that wherever possible, merger control should be applied purely with competition policy and the maintenance of competitive market structures in mind, and that a real danger exists of undermining the effectiveness of the law if other considerations are allowed to influence decision making*."

http://www.ofta.gov.hk/frameset/home_index_eng.html

It should be noted that most merger control systems internationally having increasingly sought to isolate merger control decisions from excessive political interference. For example, the final remnants of political control of merger decisions

making in the UK was abandoned in the Enterprise Act 2002. It is suggested that current provisions are ill defined and they need to be revised accordingly or should be deleted entirely allowing the Commission and the Appeal Board exclusive jurisdiction.

2.3 Enforcement Powers

The investigatory power under Clause 62 – 65 appear appropriate though the restriction of power under Clause 64 (3) (a) appears to be too narrow and should be extended to cover "any premises" or else documents or evidence maybe stored in a location beyond the reach of investigators, who may not have the necessary evidence to satisfy the standard of proof required to obtain a warrant under Clause 65.

Under Clause 68, a power should be included to allow non parties who have the legitimate to intervene so as to allow competitors or consumer groups or industrial associations to be heard, especially on matter in case concerning mergers.

Under Clause 69 (2) (b), power should be given to the Commission to impose a structural remedy, in addition to or in substitution for, penalties or injunctive relief. Some monopoly or oligopoly situations require divestiture orders or other structural remedies. This has always been possible under UK law and now is also possible under EC law by virtue of Art.7 of the Modernization Regulation, see above. Also, under Clause 69 (3) the restriction on the Commission to impose a financial penalty only if it can shown that the offender intended or was negligent, appears to be unduly lenient. Ignorance of the law should be no defence and, if the Commission conducts suitable advocacy campaigns, allows a substantial and well publicized grace period before operationalizing the prohibitory provisions, this limitation of penalty cannot be justified. The government needs to send a strong signal to business that cartel operations and abuse of dominance are serious matters and that the government is in earnest in its resolve to promote competition in the Singapore market. At present the signal is weak.

Additionally, there is a noticeable trend internationally to criminalize certain egregious cartel offences. This is certainly a theme of US and UK systems and appears to be the most beneficial way in which to re-emphasize to senior executives that price fixing is a form of theft and that they could face imprisonment for breach of these prohibitions. These powers might be put into effect, say two or 3 years after the law was activated, to ensure that all executives were fully aware of the consequences of breach. Serious consideration should be given to adding criminal powers in this respect, again as a way of demonstrating the government's firmness of purpose in creating a more competitive business culture in Singapore.

2.4 Appeals

Clause 71 (2) in granting the appeal from Commission decisions on exemptions to the Minister, rather than to the Appeal Board is inappropriate. It is important for public and international confidence in the system of adjudication to be maintained and this can only be achieved by ensuring an independent and transparent process. Appeal to the Minister does not satisfy these core requirements. All appeals from Commission decisions should be to the Appeal Board. Also, consideration should be give to allowing all appeals from sectoral regulators' decision to go the Appeal Board too. This has been done in the recent reform of the UK competition adjudication system. This would enhance the experience of the Appeal Board and ensure consistency across the spectrum of Commission and regulator competition decisions.

Under Clause 72, the Ministers' power of appointment and of removal of members of the Appeal Board is too broad. The Appeal Board will exercise judicial functions and so it is inappropriate that the Minister alone should make these appointments or removals. Power of appointment and removal, for good cause only, should be given to Attorney General or the President, so as to ensure the impartiality of the selection of suitably legally qualified and expert persons for these very important positions. Anything less than this level of transparency will not inspire confidence.

3. Conclusion

The basic structure of the Bill is sound. The main concerns revolve around the size and composition of the Commission and Appeal Board, the distribution of powers as between the Commission and the Minister, the over-breadth of the exempting powers, the need to focus the Commission on advocacy, investigation and enforcement and away from individual guidance and advice.

It is suggested that consideration be given to ensuring the maximum competence and independence of the Commission in delivering a focused package of measures designed to inculcate and enhance a competition culture in Singapore. This will be the best prescription to ensure Singapore's continued economic success in a more competitive regional and global environment.

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