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LAW SOCIETY'S COMMENTS ON PUBLIC CONSULTATION ON THE DRAFT COMPETITION BILL

THE LAW SOCIETY
OF SINGAPORE

Contents

Competition Law Consultation Paper & Draft Bill – Feedback by The Law Society Of Singapore

1 INTRODUCTION

The Law Society of Singapore thanks the Ministry of Trade and Industry ("MTI") for this opportunity to provide feedback on the Consultation Paper and draft Competition Law Bill ("Draft Bill"), which was released on 12 April 2004.

The Law Society would be happy to discuss further any of the comments made here.

2 APPLICATION OF COMPETITION LAWS TO THE LEGAL PROFESSION

The Draft Bill does not exempt the legal or any of the other professions from the provisions of the competition laws. This is the same approach adopted in the other key jurisdictions. Indeed, case law in the key jurisdictions confirms that competition laws are equally applicable to the legal profession.

A key issue that has surfaced in some of the jurisdictions is whether rules and guidelines set by the Law Society or the Bar Association of that particular jurisdiction could be found to be anti-competitive. The competition commission and the courts have adopted a rule of reason approach in ascertaining whether any rules or guidelines violate the competition laws. To this end, a rule banning multi disciplinary practices was found to be prima facie anti-competitive, but when balanced against the rationale for the introduction of the rule, to be in the interest of the public and so not anti-competitive.

The point to note is that whilst the approach of the commission and the court has been fair, it may be appropriate to establish a separate set of guidelines for the legal and accounting professions as a whole if not just for the legal profession. These guidelines could deal with issues of practice and provide guidance on when rules set by the relevant coordinating body, such as the Law Society, will be permissible.

To cite a few examples:

- The guidance provided by the Law Society on the fees that should be charged for conveyancing matters could be seen as anti-competitive price fixing. This despite the fact that there is much competition in the pricing offered by law firms to their clients.

- The Legal Profession (Professional Conduct) Rules prevents sharing of premises between a law firm and another business. Such an arrangement may also be viewed as being anti-competitive as it does distort competition and potentially increase prices as well.

In setting out the above rules, The Law Society has as its aim the betterment of the profession and the protection of the public at large. Yet, unless there are express exemptions or clear guidelines on applicability, they could potentially be struck down as anti-competitive. Any guidelines introduced thus could provide clearly whether such an arrangement is or is not permissible.

3 PERSONS CARRYING OUT OR PERFORMING ACTIVITIES FOR AND ON BEHALF OF THE GOVERNMENT

Section 33(4)(c) of the Draft Bill provides that the material provisions on anti-competition behaviour will not apply to any person carrying out or performing any activity undertaken by the Government or any statutory body on behalf of the Government or that statutory body, as the case may be, in relation to the carrying out or performance of that activity. Is this provision intended to exclude all types of contracts entered into and or all types of activity undertaken for and on behalf of the Government? If a law firm acts on behalf of the Government in defending it in a dispute matter, or acts for it in a corporate transactional matter, does this mean that the competition laws do not apply to that law firm?

The wordings of this sub-section must be clarified.

4 DISSIMILAR CONDITIONS TO EQUIVALENT TRANSACTIONS

This provision which serves as an illustration of anti-competitive behaviour in section 34(2) and section 47 of the Draft Bill is worded very widely. As currently worded, it extends application to more than just price differentiation. It is wide enough to catch for instance differing fees being charged by law firms to different clients for exactly the same transaction. For example, law firms charge very low fees or no fees at all for issuance of letters of demands for simple money due and owing debts on behalf of clients who provide them with bulk work, but charge higher rate for clients who give them the ad hoc piece of work.

The section should be redrafted for greater clarity and business efficacy.

5 HORIZONTAL AGREEMENTS

Section 34 of the Draft Bill can potentially prohibit all forms of horizontal arrangements. This has created some problems in the EU. Yet it is appreciated that it is not possible to provide exemptions within the Draft Bill to create carve outs or to explain the exact scope of how the provision is to apply to horizontal arrangements.

Guidelines containing illustrations as to how horizontal agreements should be treated should therefore be issued. This is the approach taken in the European Union. Where Guidelines are drawn up, it should expressly allow for businesses to pool resources for the purposes of, amongst other reasons, negotiating better prices, so long as such pooling does not have an anti-competitive object or effect.

6 WHISTLEBLOWING AND LENIENCY

There are no provisions allowing for whistleblowing. Neither are there provisions which accord protection to whistleblowers, except for section 78(1)(c) of the Draft Bill. Such a provision is particularly important as lawyers could in the course of their briefs come across information which shows anti-competitive behaviour on the part of the client. Although protected by legal

professional privilege, there may be instances where disclosure becomes necessary (although this may not be conceivable at this time).

There is merit in including a whistleblowing provision as it is not easy to regulate anti-competitive behaviour. The provision should make clear who can whistleblow. Whichever route the whistleblowing comes from, there ought to be protection accorded to the whistleblower against claims, whether civil or criminal, and other forms of prosecution.

As a corollary to whistleblowing, leniency provisions should also be introduced for where an alleged anti-competitive company and or officer thereof alerts the Commission of the activity. This will act to encourage greater self-regulation and make the task of the Commission less onerous.

7 GUIDELINES TO ENSURE COMPLIANCE

Section 61(1) of the Draft Bill is welcomed as it indicates that Guidelines will be provided to businesses to order their affairs to ensure compliance with the competition laws. The fact that such Guidelines will be published by way of Gazette Notification means that the Commission will have flexibility to modify and update the guidelines as the circumstances arise.

The Draft Bill, however, provides that the Guidelines are not binding on the Commission. This could lead to anomalous situations. Clarity in the language is required.

8 POWERS TO CONFISCATE RELEVANT MATERIALS

The Commission's power to take away documents with or without a warrant is couched in very wide terms. Specifically, the Commission can take away documents that have 'a bearing on the investigation' or that is 'relevant to the investigation' or that is 'of the relevant kind'. Whilst such broad powers ensure a more efficient investigation process, it can be disruptive for the business. As a counter-balance, the provision should expressly allow the business which is under investigation, to make copies or retain such equipment under prescribed conditions to enable the business to carry on its business.

9 TIMELINES AND PROCEDURES

We note that the Draft Bill does not prescribe timelines within which the Commission and the Board of Appeal must hear submissions and hand down its decision.

Providing guidance on the timelines is an important requirement it provides certainty as to when key target dates for filings, submissions and final decision are. This will enable businesses to better plan their activities without the concern of pending complaints hanging over them.

Without timelines clearly set out, there is a possibility that a party intending to commence a private action may fall foul of the limitation of actions provisions contained in the Limitation Act. If no guidelines on timelines are to be introduced, then it is necessary to make clear that

the cause of action for any private action will only accrue at the point when the decision is handed down.

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